Long Creek Residual Designation – Public Comments and EPA's Response

EPA New England provided opportunities for public comment on EPA's December 3, 2008 preliminary residual designation decision by issuing a press release to local newspapers, posting the decision document and supporting materials on the regional website, publishing a notice and request for public comment in the Federal Register, and posting the materials for public viewing on the www.regulations.gov website. Following the initial solicitation of comments, EPA New England, through Maine DEP's correspondence to affected parties regarding the permitting of the designated discharges, again invited public comment on EPA's preliminary residual designation determination during the comment period for Maine's *Proposed General Permit for Post-Construction Discharge of Storm water in the Long Creek Watershed.*

Several commenters addressed both EPA's residual designation and ME DEP's permitting in the same comment letter. EPA is responding only to the comments related to the residual designation, as Maine is authorized to issue the NPDES permit and is thus responsible for responding to comments related to the permit.

Comments related to residual designation from both solicitations are addressed below.

A. Comments Received in response to the EPA ***Notice of Availability of Preliminary Residual Designation of Certain Storm Water Discharges in the State of Maine Under the National Pollutant Discharge Elimination System of the Clean Water Act*** (dated December 3, 2008 and issued in the Federal Register / Vol. 73, No. 251 / Wednesday, December 31, 2008)

1. John C. Charters for General Growth Properties – Maine Mall, LLC
2. Steve Hinchman for Conservation Law Foundation

These two sets of comments were entered into the federal document management system docket for Long Creek on 2/18/09.

General Growth Properties Comments

February 17, 2009

Ms. Jennie Bridge
U.S. Environmental Protection Agency
New England Region
One Congress Street, Suite 1000
Mail Code CWQ
Boston, MA 02114-2023

Subject: Docket ID No. EPA-RO1-OW-2008-0910
Long Creek Watershed – Preliminary Residual Designation
Preliminary Comments

Dear Ms Bridge;

This letter is being submitted to the EPA in response to the Notice of Availability published in the December 31, 2008 Federal Register in which preliminary comments were requested on the above referenced document. We recognize that the comment period on the preliminary Residual Designation will remain open until the close of the public comment period on any draft NPDES Permit (general or individual) that is expected to be issued by the Maine Department of Environmental Protection (MDEP). We anticipate that additional comments may be submitted after we have had the opportunity to review the draft NPDES permits.

Page 1 of 5 (cont.):

GGP-Maine Mall Land, LLC and GGP-Maine Mall, LLC have ownership interests in the following properties within the Long Creek Watershed:

Map	Lot	Approximate Parcel Area	Approximate Impervious Area
74	9	5.7 acres	5.2 acres
74B	3	54.7 acres	49.6 acres
68	5C	1.3 acres	1.0 acres

Collectively, these parcels are a portion of the property more commonly known as The Maine Mall.

Page 2 of 5:

As a property owner, we have been an active participant in the Long Creek Watershed Study by encouraging our staff and consultants to serve on both the Steering Committee, as well as the Technical Advisory Committee. Our properties were one of the first in the Maine Mall area to receive a Site Location of Development Act Permit from the MDEP, and the properties have always been developed in accordance with the requirements of the MDEP at the time of construction. In addition, as we have considered redevelopment of our properties, we have pro-actively reached out to the City of South Portland, the MDEP and the Conservation Law Foundation to discuss alternative measures which could be reasonably incorporated into the redevelopment plans to improve stormwater quality. In fact, the redevelopment plans for our property located at Tax Map 74, Lot 9, which were approved by both the City and MDEP in 2008 included BMP's such as bio-retention cells, subsurface storage, mechanical treatment devices and rainwater harvesting. Our projects have benefitted from the collaborative efforts of these various stakeholders and regulators.

It is obvious in reviewing the Residual Designation that Long Creek is a distressed waterbody and long term improvements are necessary to maintain a healthy environment and protect the quality of life for future generations. It is equally obvious that the stress in the watershed is a result of a number of different factors that are a result of the urbanization that has occurred over the last forty years, including as noted on Page 7 of the Residual Designation "associated commercial and retail developments, I-95 and I-295 and associated interchanges, industrial facilities, office parks, hotels and a golf course". We applaud the EPA in their decision to have the Residual Designation apply to any property that exceeds 1 acre of impervious cover in that the overall impacts to the watershed are a result of the aggregate area within the watershed, and not simply a result of a few developments.

To be effective in having the greatest benefit on the watershed, the proposed NPDES program must treat all of the causes of the stress equally, and not result in one sector or type of Owner in having to bear an inordinate amount of the responsibility or cost in the long term improvements. Whether the impervious cover is related to a shopping center, a public or private roadway, or a municipal complex, all of the responsible parties must bear a proportional share of the costs associated with the long term improvements.

Page 3 of 5:

As a draft NPDES permit has yet to be issued for review, it is difficult to comment on any particular aspect of the process as it moves forward, but the following concerns are noted based on our understanding of the situation:

- How will the various types of impervious cover be treated in the draft NPDES permit and will it be equitable?
- How long will a property owner have to implement improvements if they elect to proceed with an Individual Permit?

These concerns are discussed in greater detail below.

How will the various types of impervious cover be treated in the draft NPDES permit and will it be equitable?

In reviewing the Draft NPDES permit, we would encourage the EPA to consider the relative impacts of the various types of impervious cover, and insure that all parties are treated equitably. Figure 3b (Impervious Cover by Subwatershed) of the Draft Long Creek Watershed Management Plan indicates that there are approximately 2,242 total acres within the watershed, and 630 acres of impervious cover, or approximately 28% impervious cover. Figure 3a, Relationship of Impervious Cover to Stream Habitat Quality would appear to indicate that if a stream has greater than 10% impervious cover, the receiving waterbody becomes impacted, and water quality degrades. As the quoted % impervious cover in Long Creek is 28%, a significant reduction of non-treated impervious cover will be necessary to attain the long term goals.

Page 3 of 5 (cont.):

Presently, the MDEP Chapter 500, the Stormwater Management Law, includes the following criteria under the "General Standards" (water quality treatment) section of the Law:

> (e) Stormwater Management Law project including redevelopment. For a project requiring a Stormwater Management Law permit that includes redevelopment of impervious area that was in existence as of November 16, 2005 (the effective date of Chapter 500 revisions), the redevelopment of that impervious area is not required to meet General standards provided the department determines that the new use of the existing impervious area is not likely to increase stormwater impacts resulting from the proposed project's stormwater runoff beyond the level of impact already caused by the runoff from the existing impervious area. The requirements of Appendix D must still be met, if applicable.

Page 4 of 5:

> (f) Site Location of Development Law project including redevelopment. For a project requiring a Site Location of Development Law permit that includes redevelopment of existing impervious area that was in existence as of November 16, 2005 (the effective date of Chapter 500 revisions), redevelopment of that impervious area is required to meet the general standards to the extent practicable as determined by the department. If the department determines that it is not practicable to make significant progress towards meeting the general standards for the redeveloped impervious area, the department may require off-site mitigation within the same watershed as an alternative for stormwater treatment. The requirements of Appendix D must still be met, if applicable.

The application of these sections as the process moves forward could result in a requirement that property owners that don't require a Site Location of Development Act Permit (less than 3 acres of impervious cover) are not required to upgrade the stormwater system on their property in the event of a "redevelopment" project while a landowner with greater than 3 acres of impervious cover would need to upgrade the stormwater system. This could result in an unfair shift of the burden to the larger property owners. Based upon information contained within the Draft Watershed Plan, it appears that approximately 50% of the total impervious cover is located on parcels with less than 3 acres of impervious surface, and approximately 50% is located on parcels that exceed 3 acres. It would appear that equity is needed to insure that all properties undergoing "redevelopment" in the future are treated consistently.

Chapter 500 includes a pro-active approach to permitting in watersheds that have an approved watershed study as follows:

> **9. Municipal stormwater management programs.** The department may allow a municipality or a quasi-municipal organization, such as a watershed management district, to substitute a management system for stormwater for the stormwater permit requirement pursuant to 38 M.R.S.A. § 420-D(2). The management system may apply to an entire watershed, or a subcatchment, of receiving water, and may include multiple watersheds within the jurisdiction of the municipality or quasi-municipal organization. A project located within the area served by a management system approved by the department is exempt from the stormwater permit requirements contained in this chapter.

Page 5 of 5:

In reviewing the Draft Long Creek Watershed Management Plan, we were unable to determine how a "redevelopment project" may be treated in the future relative to the standards that would be required, and whether there would be any differentiation in the treatment standards based on acreage. It would appear that this should be addressed as the process moves forward.

How long will a property owner have to implement improvements if they elect to proceed with an Individual Permit?

Given the current economic conditions, we are concerned with the potential timeframe that may apply for a property owner to make improvements under an Individual Permit. In reviewing the Draft Watershed Plan, no apparent schedule was provided for the implementation of the various improvements that would be funded under the Cooperative Restoration Program. However, it would appear that the improvements would be constructed over a 10 year timeframe based on the various projects included in the Watershed Plan. If the improvements contemplated under the General Permit aspects of the NPDES program would take up to 10 years to be completed, then it would appear reasonable for a similar timeframe to complete improvements under an Individual Permit.

Page 5 of 5 (cont.):

In summary, we appreciate the opportunity to submit these preliminary comments on the Residual Designation, and look forward to the release of the Draft NPDES permits so that we can finalize our comments to both the MDEP and the EPA.

Please contact us with any questions that you may have.

Sincerely,

GGP-Maine Mall L.L.C.

By: _____
John C. Charters
Authorized Officer

GGP-Maine Mall Land L.L.C.

By: _____
John C. Charters
Authorized Officer

cc: Andy Fisk, Maine Department of Environmental Protection
Tex Haeuser, City of South Portland
Steve Hinchman, Conservation Law Foundation

EPA Response to GGP

We note your comment on page 2 of 5 (end of paragraph 2) on EPA's preliminary residual designation decision applying to any property that [sic] exceeds one acre of impervious cover. Based on information contained or referenced in the Residual Designation decision document, EPA designated discharges for NPDES permitting on the basis of the number of acres of impervious area in the watershed. As documented in its decision, discharges from these surfaces are causing and contributing to water quality standards violations. EPA reserved the option to designate other stormwater discharges in the Long Creek watershed in the future if appropriate.

Conservation Law Foundation Comments

February 17, 2009

Ira Leighton
Action Regional Administrator
EPA New England, Region 1
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Via Email to
Bridge.jennie@epa.gov

Re: Comments on Preliminary Residual Designation for Long Creek, South Portland, Maine. Docket No. EPA-R01-OW-2008-0910

Dear Acting Regional Administrator Leighton:

The Conservation Law Foundation ("CLF") is pleased to offer the following comments regarding the December, 2008 Record of Decision documenting the determination of the U.S. Environmental Protection Agency ("EPA") Region 1 Administrator pursuant to Section 402(p)(2)(E) of the federal Clean Water Act, 33 U.S.C. § 1342(p)(2)(E), and corresponding

regulations, that stormwater controls and NPDES permits are needed for existing development in the Long Creek watershed in South Portland, Maine.

CLF is a membership based nonprofit organization that works to restore the health of our waterways, many of which are failing to meet basic water quality standards for public health and recreation. CLF's Clean Water/ Healthy Forests Program is a leader in advocating for advanced stormwater regulation under the Clean Water Act to remedy severe water pollution and flooding problems throughout New England. CLF has petitioned EPA under its Section 402(p)(2)(E) Residual Designation Authority ("RDA") to require cleanup of stormwater discharges from numerous existing industrial and commercial properties in the Charles River watershed in Massachusetts[1], and has litigated successfully in the Vermont Supreme Court and agency tribunals to require that state's Agency of Natural Resources extend its Clean Water Act

[1] *See* CLF and Charles River Watershed Association's comments on EPA's Charles River Residual Designation
Pursuant to the Clean Water Act, February 9, 2009.

permitting authority to existing, unregulated stormwater pollution discharges in five badly polluted watersheds surrounding Burlington, Vermont.[2]

As you know, CLF also filed the petition that led to this determination. We hereby incorporate by reference into this comment letter CLF's original March 7, 2008 petition, as well as supplemental comments provided to EPA by letter or email on May 22, 2008 and June 19, 2208.

Across New England, stormwater pollution has emerged as the major threat to the health of our rivers, lakes and streams. Some of our most treasured waters – used by millions for recreation, fishing and other tourism – are suffering from toxic algae blooms, heavy metals contamination, and poor water quality due to pollution-laden stormwater runoff flowing from parking lots, rooftops and other impervious surfaces. Long Creek dramatically exemplifies this pollution problem: as EPA points out in its Record of Decision, there are no other sources of pollution into Long Creek. Rather the entire pollution load – metals, nutrients, sediment and other stressors – comes from stormwater runoff from existing and largely unregulated development. And the problem is growing.

The continuing deterioration of Long Creek demonstrates the urgent need for EPA leadership in RDA implementation to remedy water quality impairments caused in whole or in part by existing poorly controlled and uncontrolled stormwater discharges. EPA, in this Record of Decision, has provided convincing and overwhelming documentation of the need for this program in relation to the applicable legal standards. The new permitting program anticipated in this Record of Decision is well within the authority of EPA and, as an approved state, the Maine Department of Environmental Protection (DEP). Further, the existing case law shows that this RDA determination is *not optional*. See In re Stormwater NPDES Petition, 2006 VT 91, ¶ 28. Rather, as noted in our petition, based on the agencies' scientific and factual findings that stormwater-associated pollutants from existing properties are contributing to water quality impairments in Long Creek and its tributaries, the RDA determination is required under Section 402(p)(2)(E) of the Clean Water Act and its implementing regulations. CLF endorses EPA's proposal to include within this initial RDA determination all properties with one acre or more of impervious surface. As we have noted in our prior comments, enlarging the class definition above one acre would be contrary to the legal requirements under RDA. Indeed, as the EPA's analysis demonstrates, even

at full implementation (defined as 67% effective treatment) of the one-acre designation, attainment of class will likely also require streambed and wetlands rehabilitation and perhaps even additional designation on a case-by-case basis of smaller properties. Thus, we see this designation as the bare minimum necessary to comply with legal standards. We also condition our support of the one-acre designation on the understanding that EPA is not making any finding or determination that smaller properties are not contributing to the impairment, but rather is leaving the status of these smaller properties open for further consideration.

[2] See In re Stormwater NPDES Petition, 2006 VT 91; Judgment Order Docket No. 14-1-07 Vermont Environmental Court (Aug. 28, 2008).

We request that EPA finalize this preliminary determination process as soon as possible. As EPA has explained, and consistent with the legislative history of the 1987 Amendments, "designation is appropriate as soon as the adverse impacts from storm water are recognized."[3]

Quick action is also critical because, absent an RDA designation, the burden for meeting water quality standards will fall solely upon a small group of stormwater dischargers (MS4s, industrial activities, and construction projects) that currently are subject to CWA jurisdiction.[4] Cash strapped municipalities have expended staff time and resources to comply with the MS4 permit requirements. Yet to date, existing commercial and retail development, institutions, and high-density residential properties, have largely not been required to do their fair share to address the pollution problems that imperil Long Creek.

This is not only unfair, but also – as indicated by the long history of water quality violations in Long Creek – without participation of existing unregulated stormwater dischargers, Long Creek will be incapable of achieving attainment of state water quality standards. This study, combined with the prior analyses by DEP and EPA, has reaffirmed that unless existing unregulated developments reduce their inputs of metals, nutrients, sediments, and other pollutants, water quality targets simply cannot be met in the creek.

Again, we applaud and concur with the EPA's preliminary determination that stormwater pollution controls and NPDES permits are required for existing unregulated properties that are contributing to non-attainment of water quality standards in Long Creek. Thank you for this opportunity to comment and please contact me if I can be of further assistance.

Sincerely,

Steve Hinchman, for
Conservation Law Foundation

[3] *See* Letter from Tracy Mehan, III, EPA Assistant Administrator to Ms. Elizabeth McLain, Secretary, Vermont Agency of Natural Resources re: guidance on issues related to permits for discharges to impaired waters, Sept. 16, 2003 (citing James R. Elder, Director EPA Office of Water Enforcement and Permits, Designation of Stormwater Discharges for Immediate Permitting at 2 (Aug. 8, 1990) ("Mehan Letter").

[4] See, e.g., 33 U.S.C. § 1342(p)(3)(A) (permits for stormwater discharges associated with industrial activity, including construction activities, must meet the CWA § 301(b)(1)(C) mandate to include any more stringent limitation necessary to meet water quality standards).

EPA Response to CLF

We note your comments on page 2 of 3 (beginning of last paragraph) and on page 3 of 3 (last paragraph) on EPA's preliminary residual designation decision applying to all properties with one or more acre of impervious cover, and that storm water pollution controls and NPDES permits are required for existing unregulated properties that are contributing to non-attainment of water quality standards in Long Creek. See response to GGP comments above. Your understanding that EPA is not making any finding or determination that smaller properties are not contributing to the impairment, and is leaving the status of these smaller properties open for further consideration, is a proper interpretation of the decision document.

We note your comment on top of page 3 of 3 requesting that EPA finalize this preliminary determination process as soon as possible. EPA is timing the finalization of its preliminary determination to allow the affected parties an opportunity to review both the proposed permit and the designation document. Given the relationship between the designation and the permit, EPA believes this approach allows affected parties a meaningful opportunity to comment on EPA's decision in the broader context of Maine's permitting decision.

B. Copies of Comments Received from the Maine DEP ***Notice & Invitation to Comment on the DEP's Proposed General Permit for Post-Construction Discharge of Storm water in the Long Creek Watershed*** (issued July 2, 2009, which included an invitation to comment on EPA's preliminary residual designation decision)

The following respondents sent to EPA on August 14, 2009 copies of their comment letters addressed to the Maine DEP, and requested that the correspondence be reviewed and entered into the record of comment:

1. Vincent Maietta for V. & E. Enterprises
2. William E. Taylor of Pierce Atwood for Dead River Company, Transport leasing Corporation, Fairchild Semiconductor Corporation, Running Hill SP, LLC, and MWB, LLC.
3. Paul S. Cincotta for Running Hill Shopping Plaza, LLC
4. John Charters for General Growth Properties, Inc.

These four sets of comments were entered into the federal document management system docket for Long Creek on 8/19/09. Excerpts of the comments relating to EPA's preliminary residual designation decision are provided below. These four comment documents may be viewed in their entirety at the following site: http://www.regulations.gov (Type in the key words "residual designation" and then search for the docket ID No. EPA-R01-OW-2008-0910.). Maine DEP is preparing the response to all comments related to Maine's draft general permit, and a copy of the document (Maine's *Long Creek Post-Construction Response to Comments*) will be included in the EPA record when available.

Comments from V. &. E. Enterprises
None related to EPA's preliminary residual designation decision; no EPA response required.

Comments from Pierce Atwood
None related to EPA's preliminary residual designation decision; no EPA response required.

Comments from Running Hill Shopping Plaza (excerpt from page 1)

August 14, 2009

Mr. Jeff Dennis
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

Subject: Long Creek Watershed – Draft General Permit
Comments and Questions

Dear Mr. Dennis;

This letter is being submitted to the MDEP in response to the Notice & Invitation to Comment on the DEP's Proposed General Permit for Post-Construction Discharge of Stormwater in the Long Creek Watershed. In addition, a copy of this letter is being forwarded to the EPA in response to the Notice of Availability published in the December 31, 2008 Federal Register regarding the Residual Designation Authority.

Running Hill Shopping Plaza, LLC owns the property at 200 Running Hill Road, which consists of approximately 10.9 acres of impervious cover. In addition, we share a boundary, with the adjacent Target property, which includes an additional 9.9 acres of impervious cover. The two properties have shared infrastructure improvements, including stormwater facilities.

It is obvious in reviewing the Watershed Plan, the Draft General Permit and the Residual Designation that Long Creek is a distressed waterbody and long term improvements are necessary to maintain a healthy environment and protect the quality of life for future generations. It is equally obvious that the stress in the watershed is a result of a number of different factors that are a result of the urbanization that has occurred over the last forty years, including as noted on Page 7 of the Residual Designation "associated commercial and retail developments, I-95 and I-295 and associated interchanges, industrial facilities, office parks, hotels and a golf course". We applaud the EPA in their decision to have the Residual Designation apply to any property that exceeds 1 acre of impervious cover in that the overall impacts to the watershed are a result of the aggregate area within the watershed, and not simply a result of a few developments.

EPA Response to RHSP

We note your comment on page 1 of 7 (end of paragraph 2) on EPA's preliminary residual designation decision applying to any property that [sic] exceeds one acre of impervious cover (and not simply to a few developments). See response to GGP comments above.

Comments from General Growth Properties

August 14, 2009

Mr. Jeff Dennis
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

Subject: Long Creek Watershed – Draft General Permit
Comments and Questions

Dear Mr. Dennis;

This letter is being submitted to the MDEP in response to the Notice & Invitation to Comment on the DEP's Proposed General Permit for Post-Construction Discharge of Stormwater in the Long Creek Watershed. In addition, a copy of this letter is being forwarded to the EPA in response to the Notice of Availability published in the December 31, 2008 Federal Register regarding the Residual Designation Authority. We have previously provided comments on the Preliminary Residual Designation, and would like this letter to be added to the record at the EPA as additional comments on the Residual Designation.

GGP-Maine Mall Land, L.L.C. and GGP-Maine Mall, L.L.C. have ownership interests in the following properties within the Long Creek Watershed:

Map	Lot	Approximate Parcel Area	Approximate Impervious Area
74	9	5.7 acres	5.2 acres
74B	3	54.7 acres	49.6 acres
68	5C	1.3 acres	1.0 acres

Collectively, these parcels are a portion of the property more commonly known as The Maine Mall.

As a property owner, we have been an active participant in the Long Creek Watershed Study by encouraging our staff and consultants to serve on both the Steering Committee as well as the Technical Advisory Committee. Our properties were one of the first in the Maine Mall area to receive a Site Location of Development Act Permit from the MDEP, and the properties have always been developed in accordance with the requirements of the MDEP at the time of construction. In addition, as we have considered redevelopment of our properties, we have pro-actively reached out to the City of South Portland, the MDEP and the Conservation Law Foundation to discuss alternative measures which could be reasonably incorporated into the redevelopment plans to improve stormwater quality. In fact, the redevelopment plans for our property located at Tax Map 74, Lot 9, which were approved by both the City and MDEP in 2008 included BMP's such as bio-retention cells, subsurface storage, mechanical

treatment devices and rainwater harvesting. Our projects have benefitted from the collaborative efforts of these various stakeholders and regulators.

It is obvious in reviewing the Watershed Plan, the Draft General Permit and the Residual Designation that Long Creek is a distressed waterbody and long term improvements are necessary to maintain a healthy environment and protect the quality of life for future generations. It is equally obvious that the stress in the watershed is a result of a number of different factors that are a result of the urbanization that has occurred over the last forty years, including as noted on Page 7 of the Residual Designation "associated commercial and retail developments, I-95 and I-295 and associated interchanges, industrial facilities, office parks, hotels and a golf course". We applaud the EPA in their decision to have the Residual Designation apply to any property that exceeds 1 acre of impervious cover in that the overall impacts to the watershed are a result of the aggregate area within the watershed, and not simply a result of a few developments.

EPA Response to GGP

We note your comment on page 2 of 9 (end of paragraph 2) on EPA's preliminary residual designation decision applying to any property that [equals or] exceeds one acre of impervious cover (and not simply to a few developments). See response to GGP comments above.