



July 13, 2017

Via Certified Mail—Return Receipt Requested

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Re: Notice of Intent to File Suit under the Federal Clean Water Act

We, SMPIL Consulting, Ltd., and Barket, Marion, Epstein & Kearon, LLP, are writing on behalf of the Committee for a Sustainable Waterfront regarding violations of the Clean Water Act¹, and the State Pollution Discharge Elimination System (“SPDES”).² The purpose of this letter is to put the owners and/or operators of the “facility” on notice of the ongoing and continuous violations of the Municipal Separate Storm Sewer Systems General Permit No. GP-0-15-003 (“MS4 Permit”), occurring specifically on September 22, 2015,³ June 25, 2015⁴, March 7, 2017⁵ and throughout the last ten calendar years.⁶ For the purposes of this notice letter, the “facility” is defined as the outfalls currently existing, and to be constructed, along the Northern shore and the head of Glen Cove Creek, which discharge into the water directly adjacent to the proposed site of City of Glen Cove Waterfront Project (“Garvies Point Outfalls”).⁷

Please note that under the Clean Water Act it is unlawful to discharge any pollutant into any navigable waters of the United States, without first obtaining a permit to do so.⁸ New York State has been approved to administer its own permitting program, the SPDES program. This program is executed in accordance with the standards set by the EPA, which is administered by the New York State Department

¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*

² N.Y. Environmental Conservation Law §17-08.11.

³ On September 22, 2015, Sean Sallie, Planning Division Supervisor for the County of Nassau sent a letter to Myralee Machol, Executive Director of the Glen Cove Community Development Agency which, as set forth within the body of this notice, was a violation of the Clean Water Act.

⁴ Sean Sallie sent an identical letter to the Glen Cove Community Development Agency.

⁵ On March 7, 2017, the Glen Cove City Planning Board passed a resolution approving a Stormwater Pollution Prevention Plan which, as set forth below, does not comply with the Federal and State Law.

⁶ As set forth below, neither the County of Nassau, nor the City of Glen Cove, have effectively developed and implemented illicit discharge detection and elimination protocols.

⁷ *See generally*, City of Glen Cove, Final Environmental Impact Statement for the RXR Glen Isle Mixed-Use Waterfront Development Project I-4 (2011).

⁸ 33 U.S.C. 1342.



of Environmental Conservation.⁹ Pursuant to the SPDES program, and the MS4 General Permit promulgated thereunder, the City of Glen Cove and the County of Nassau are required to develop and enforce a Stormwater Pollution Management Plan which decreases pollutants of concern to the maximum extent practicable and sets forth certain “Minimum Control Measures”.¹⁰ These Minimum Control Measures must include, *inter alia*, an illicit discharge detection and elimination program, a construction site runoff control process, and post construction runoff control. Unfortunately, as set forth below, the County of Nassau (“County”) and the City of Glen Cove (“City”) have not adequately developed and enforced Best Management Practices and Minimum Control Measures and, therefore, are in violation of the substantive provisions of the MS4 Permit.

Section 505 of the Clean Water Act allows citizens to file suit in Federal Court for facilities in violation of the Clean Water Act provided that the potential respondent in the suit is given a 60-day notice prior to the initiation of the civil action. Accordingly, we hereby place the County and the City on notice, pursuant to 33 U.S.C. §1365 (a-b). We intend to file suit unless the County and the City take all of the necessary steps to remedy the violations of the Clean Water Act outlined in this 60-day notice of violation. If such violations are not remedied within the 60-day notice period, the Committee for a Sustainable Waterfront intends to file suit in the United States District Court seeking injunctive relief and civil penalties for the below-outlined violations and any additional similar violations that we may discover subsequently. If the County or the City has any information suggesting that one or more of the violations outlined in this notice letter did not occur or is stated incorrectly, please immediately provide that information to the undersigned, specifying the violation in question.

Nassau County

Under the MS4 Permit, the County of Nassau is considered a Traditional Non-Land Use Control MS4.¹¹ As such, the County is required to develop “procedures for identifying and locating illicit discharges (track down) of contaminants” and enforce pre- and post-construction stormwater runoff controls. The County has failed to fulfill the substantive requirements of the MS4 Permit for the following reasons:

1. Failure to develop, describe, and implement appropriate controls and measures for the Glen Cove Waterfront Project:
 - A. In a letter from the County to the City of Glen Cove Industrial Development Agency, dated June 25, 2015, the County Planning Supervisor maintained that the County does not have jurisdiction over the Garvies Point Outfalls because “the subject parcels [of the Glen Cove Waterfront Redevelopment] are located entirely within the City of Glen Cove and are not within 300 feet of a municipal boundary”. Such a statement was based on §1610 of the Nassau County Charter which holds that the County jurisdiction extends to all unincorporated areas as well as incorporated areas within 300-feet of an unincorporated area. Notably, as per Appendix 1, the Garvies Point Outfalls are County

⁹ N.Y. Environmental Conservation Law §17-08.11

¹⁰ All municipalities must currently comply with GP-0-15-003. Although this permit expired on April 30, 2017, a State Administrative Procedure Act extension has been put in place extending coverage past this expiration date. MS4s must continue to comply with GP-0-15-003 until the draft permit GP-0-17-002 is finalized and issued. GP-0-17-002 is substantively similar to GP-0-15-003—all claims set forth herein shall apply irrespective of the version of MS4 Permit in force.

¹¹ Notwithstanding their assertion to the contrary in the 2017 MS4 Annual Report, Nassau County is indeed a Traditional Non-Land Use Control MS4. See Shila Shah-Gavnaudias, Nassau County Storm Water Management Program Plan (2009) at 3 (correctly identifying the County’s role under the MS4 permitting scheme).

owned and operated which arguably creates a municipal boundary.¹² Thus, the County has jurisdiction over the subdivision process of the Glen Cove Waterfront Development Project because it is located within 300-feet of an unincorporated area (i.e., the Garvies Point Outfalls).

- B. Furthermore, irrespective of the Nassau County Charter, and the County’s jurisdiction over the land use planning process, the County is required by Federal and State Law to develop and enforce a Stormwater Management Program (“SWMP”) for the Garvies Point Outfalls, and the other outfalls existing in the County.¹³ Accordingly, the County legislature passed Ordinance Number 128-2007 on July 30, 2007, which became law on August 3, 2007. This Ordinance was enacted “to provide for the health, safety and general welfare of the citizens of the County of Nassau through the regulation of connections to the County [MS4] to the maximum extent practicable as required by [F]ederal and [S]tate law”.¹⁴ The law applies “to connections to the County MS4, activities resulting in discharge, seepage, or deposition in the County’s MS4, and all water entering the MS4 generated on any developed and undeveloped lands unless explicitly exempted by an authorized enforcement agency and allowed by a connection permit or other document approved by the [County] Commissioner [of Public Works].”¹⁵
- C. To implement the requirements of the Federal and State Law, and pursuant to the authority granted by Ordinance Number 128-2007, the County, along with other municipalities in the area, including the City, have developed the Nassau County Stormwater Management Program Plan.¹⁶ The Nassau County Stormwater Management Program Plan, in turn, cross-referenced the Nassau County Drainage Requirements (“County Drainage Requirements”). Under the County Drainage Requirements, the Commissioner of Public Works has the authority to set requirements to be met by developers regarding preparation plans submitted for street grading and drainage. The City planning authority is not to approve such a plan until the Commissioner has endorsed the plan with his/her approval.¹⁷ Additionally, the County Water and Waste Water Engineering Unit of Division of Engineering is responsible for the review of the onsite drainage, roadway grading, erosion and sedimentation control plan, and general site-specific conditions proposed as part of the subdivision plans.¹⁸ Despite the clearly delineated responsibility of the County officials set forth in the County Drainage Requirements, the County maintains that it has limited regulatory authority over construction site managers and site developers. Nevertheless, the County is required by the SPDES Permit to ensure that the City, who has the power to issue building permits, and enact zoning ordinances, cooperates in the enforcement efforts.¹⁹

¹² *Id.* at 20.

¹³ Municipal Separate Storm Sewer Systems General Permit No. GP-0-15-003.

¹⁴ Nassau County Ordinance Number 128-2007.

¹⁵ *Id.*

¹⁶ Shila Shah-Gavnaudias, Nassau County Storm Water Management Program Plan (2009).

¹⁷ Nassau County Ordinance No. 157-1953.

¹⁸ Nassau County Department of Public Works, Drainage Requirements (2004).

¹⁹ Municipal Separate Storm Sewer Systems General Permit No. GP-0-15-003 at 24 (“...covered entities [typically non-traditional MS4s and traditional, non-land use control MS4s] are expected to utilize the authority they do possess to create or modify existing regulatory mechanisms, including but not limited to contracts, bid specifications, requests for proposals, etc. to ensure successful implementation.”).

- D. Under the County Drainage Requirements, developers are responsible for providing storage for eight (8) inches of runoff from the subdivision's tributary area, whether contributed from onsite or offsite sources, in conjunction with relevant engineering factors. The engineer representing the developer shall provide the following information to Nassau County for the analysis of the Storage Requirement: 1) Tributary Map including contour information, 2) Tributary Area Calculations, and 3) Runoff Coefficients for property. Per the Nassau County Drainage Requirements, for the County to grant a waiver of the eight-inch requirement, the applicant must submit a letter outlining hardship and detailing the amount of stormwater runoff to be retained at the onsite, the destination of stormwater overflow from the property, the municipality's responsibility for accepting the overflow, and the justification for the failure to meet the county's storage requirement. The County must also be in receipt of a letter from the relevant municipality accepting the additional stormwater, as well as a fee to compensate for the additional maintenance associated with the increased stormwater.
- E. To our knowledge,²⁰ the County has not received a letter of hardship and justification from the developer or any fee to make up for additional maintenance. Yet, in various documents related to the State Environmental Quality Review process, the City continues to falsely represent that the County has affirmatively waived the eight-inch requirement. As such, neither the County nor the City has taken responsibility for approving developer's plan to construct undersized stormwater infrastructure diminished from the eight-inch standard.
- F. By stating that the County does not have jurisdiction over the Garvies Point Outfalls, and not enforcing the County Drainage Requirements, the County has repudiated their duties required by the SPDES Permit. Specifically, the County has failed to comply with the following requirements:
- i. "educat[ing] construction site operators, design engineers, municipal staff and other individuals to whom [the County Drainage Requirements] apply about the construction requirements in the covered entity's jurisdiction, including the procedures for submission of SWPPPs, construction site inspections, and other procedures associated with control of construction stormwater";
 - ii. "develop[ing] (for newly authorized MS4s), record, periodically assess and modify as needed *measurable goals*" (emphasis added);
 - iii. "[s]elect[ing] and implement[ing] appropriate construction stormwater [Best Management Practices] and measurable goals to ensure the reduction of all [pollutants of concern] in stormwater discharges to the [maximum extent practicable]";
 - iv. "address[ing] stormwater runoff from new development and redevelopment projects to the small MS4 from projects that result in a land disturbance of greater than or equal to one acre";

²⁰ The County's response to our FOIL request yielded only the aforementioned letters claiming that they do not have jurisdiction of the Garvies Point Outfalls.

- v. “incorporate[ing] enforceable mechanisms for post□ construction runoff control from new development and re□ development projects to the extent allowable under State or local law that meet the State’s most current technical standards”;
 - vi. “includ[ing] a combination of structural or non□ structural management practices (according to standards defined in the most current version of the NYS Stormwater Management Design Manual) that will reduce the discharge of pollutants to the [maximum extent practicable]. In the development of environmental plans such as watershed plans, open space preservation programs, local laws, and ordinances covered entities must incorporate principles of Low Impact Development (LID), Better Site Design (BSD) and other Green Infrastructure practices to the [maximum extent practicable]”;
 - vii. “...consider[ing] natural resource protection, impervious area reduction, maintaining natural hydrologic condition in developments, buffers or set back distances for protection of environmentally sensitive areas such as streams, wetlands, and erodible soils in the development of environmental plans.”;
 - viii. “ensur[ing] adequate long□ term operation and maintenance of management practices by trained staff, including assessment to ensure that the practices are performing properly”;
 - ix. “develop[ing] (for newly authorized MS4s), implement[ing], and provid[ing] adequate resources for a program to inspect development and re□ development sites by trained staff and to enforce and employ sanctions”;
 - x. “select [ing] and implement [ing] appropriate post□ construction stormwater BMPs and measurable goals to ensure the reduction of all [pollutants of concern] in stormwater discharges to the [maximum extent practicable].²¹
2. Failure to employ proper program assessment, recordkeeping, reporting, and certification requirements:
- A. The MS4 Permit notes that “the covered entity must conduct an annual evaluation of its program compliance, the appropriateness of its identified BMPs, meeting new permit requirements, and progress towards achieving its identified measurable goals, which must include reducing the discharge of pollutants to the [maximum extent practicable].”²² Furthermore, if “the evaluation shows that the SWMP is not reducing discharges to the [maximum extent practicable], the SWMP shall be revised to reduce discharges to the [maximum extent practicable].”²³ In their 2016 and 2017 reporting form, the County candidly admitted that they were not on track to meet the deadline set forth in the Stormwater Management and Pollution Prevention Plan. Thus, the County’s SWMP must be revised accordingly; failing to do so is a violation of the SPDES permit.
3. Failure to develop and implement an adequate illicit discharge detection and elimination program:

²¹ See generally, Municipal Separate Storm Sewer Systems General Permit No. GP-0-15-003.

²² *Id.*

²³ *Id.*

- A. The County has conducted adequate dry weather outfall reconnaissance inventories. Such sampling has revealed significant contamination, including volatile organic compounds, nitrogen, phosphates, and pathogen loading.
- B. The SPDES permit requires that regulated entities track down the sources of contamination through the methods outlined in the EPA manual entitled “Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessment”. According to the manual, track down methods involve starting at the outfall and exploring the “upstream” pipe network to identify illicit discharges into the stormwater system. Such required techniques include visual inspection inside manholes, sandbagging or damming the trunk, dye testing, smoke testing, and video testing.
- C. County records that would retain these efforts as publicly accessible information do not indicate that the county has conducted any exploration of “upstream” pipe networks to identify the origin and spatial extent of the contaminants entering waters through the outfalls. In fact, according to the data obtained from the County, over the last decade the County has only identified 88 illicit discharges. The vast majority of the detection events have resulted from citizen complaints. In contrast to the aforementioned required remediation and investigations by the County, only two of the 88 events appear to have resulted in any corrective action.²⁴ Thus, given the lack of track down efforts, the County has not fulfilled its obligation to track down contaminants and is in violation of the MS4 Permit.

City of Glen Cove

Under the MS4 Permit, the City of Glen Cove is considered a Traditional Land Use Control MS4. As such, the City is also required to develop “procedures for identifying and locating illicit discharges (track down) of contaminants” and enforce pre- and post-construction stormwater runoff controls. The City has also failed to fulfill the substantive requirements of the MS4 Permit for the following reasons:

1. Failure to develop, describe, and implement appropriate controls and measures for the Glen Cove Waterfront Project:
 - A. The MS4 Permit includes a provision regarding SWMP development and implementation that states municipalities must require a “combination of structural or non-structural management practices (according to standards defined in the most current version of the NYS Stormwater Management Design Manual) that will reduce the discharge of pollutants to the [maximum extent practicable].”²⁵ This requirement is most frequently referred to as a Stormwater Pollution Prevention Plan (“SWPPP”). Unfortunately, as set forth below, with respect to the Garvies Point Outfalls, the City approved a SWPPP that did not follow the NYS Stormwater Management Design Manual (“Stormwater Manual”) in an accurate and precise manner.
 - B. Pursuant to the Stormwater Manual, land use planners must decide: 1) what is the spatial extent of the “contributing area”; and 2) what “runoff coefficient” will be assigned to

²⁴ It should be noted that the records we obtained from the County did not contain sufficient details. Should other records of enforcement actions exist, kindly forward them to the undersigned forthwith.

²⁵ Municipal Separate Storm Sewer Systems General Permit No. GP-0-15-003.

each discrete area.²⁶ The SWPPP prepared for the Glen Cove Waterfront Project underrepresented the “contributing area” and inexplicably decreased the “runoff coefficient” assigned to each of the unique geographic features (e.g., pervious surfaces vs. impervious surfaces).²⁷

- C. According to the Stormwater Manual, a “contributing area” or “sub watershed” is defined as “[a]ll land and water area from which runoff may run to a common (design) point”.²⁸ Id. As succinctly explained by the New York State Department of Environmental Conservation (“DEC”), a watershed should be “defined hydrologically instead of politically”.²⁹ The SWPPP arbitrarily and capriciously defined the contributing area using artificially established tax lot boundaries. Thus, the Applicant’s sizing calculations drastically underrepresent the Contributing Area by sources of runoff from the road and the industrial and commercial properties located North and East of the project area which are located within the catchment area.
- D. Land use planners must also define the “amount of runoff” that can be attributed to each particular geographic feature within the contributing area. The conceptual SWPPP originally proffered by the developer identified three categories of “land”: “hardscape/impervious”, “roofs”, and “lawn/pervious”, which were assigned a value of .98, .98, and .50, respectively.³⁰ In a 2016 Amended Subdivision Plan, the Applicant used the value of 0.95, 0.30, and 0.50, for “impervious”, “pervious”, and “pervious roofs.” Thus, the 2016 Amended Subdivision Plan is less protective of the environment because the Applicant arbitrarily and capriciously assigned lower values to both pervious and impervious surfaces. As the runoff coefficients underrepresent the amount of stormwater that will be produced by each design feature, the stormwater infrastructure will necessarily be improperly sized. Accordingly, pollutants of concern could not be reduced to the maximum extent practicable as required by the MS4 permit.
2. Failure to develop and implement an adequate illicit discharge detection and elimination program:
- A. The 2017 City MS4 Annual Report noted that they have conducted an outfall reconnaissance inventory. We cannot verify this assertion, however, as the City was not forthcoming with data related to stormwater, despite requests pursuant to the Freedom of Information Law. Of note, the 2017 County MS4 Annual Report conducted an outfall reconnaissance inventory only on behalf of the County and, therefore, the County efforts cannot be relied upon by the City to fulfill the City’s obligations. As such, we assume that the City did not conduct an outfall reconnaissance inventory, which places it in violation of the MS4 Permit. Should the City have records pertaining to their own independent outfall reconnaissance inventory, kindly forward the same to the undersigned forthwith—as was previously requested.

²⁶ See New York State Department of Environmental Conservation, Stormwater Management and Design Manual 2-22 (2015).

²⁷ Glen Cove City Planning Board, Amended PUD Subdivision Plan (2016).

²⁸ See N.Y. STATE DEP’T OF ENVTL. CONSERVATION, Watershed, *supra* note 26.

²⁹ See generally N.Y. STATE DEP’T OF ENVTL. CONSERVATION, Watershed Management (May 25, 2017, 9:59 P.M.), <http://www.dec.ny.gov/lands/25563.html>.

³⁰ City of Glen Cove, Final Environmental Impact Statement for the RXR Glen Isle Mixed-Use Waterfront Development Project (2011).



- B. Even if the City adequately conducted an outfall reconnaissance inventory, there is no evidence that they have completed any track down of contaminants, notwithstanding contamination identified by the County and the known issues with water quality of Glen Cove Creek.³¹

3. Conclusion

Upon expiration of the 60-day notice period, the Committee for a Sustainable Waterfront intends to file a citizen suit under Section 505(a) of the Clean Water Act. Please note that suits under the Clean Water Act can allege violations of both water quality and “paper quality”, and that an inadequate stormwater pollution prevent plan can be challenged even before the construction of the new outfalls.³²

The Committee for a Sustainable Waterfront would welcome a discussion of effective remedies for the above-outlined violations should the County or the City wish to do so. Furthermore, the 60-day notice period would be appropriate time to inform the Committee for a Sustainable Waterfront of any efforts already taken to remedy the above violations. Should you wish to initiate settlement discussion in the absence of litigation, it is suggested that you initiate those discussions immediately. If good faith negotiations are not occurring, at the close of the 60-day notice period, the Committee for a Sustainable Waterfront will move forward with a citizen suit in an expeditious manner.

Sincerely,

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³¹ Glen Cove Creek is listed as an impaired waterbody under §303 (d) of the Clean Water Act. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, 2016 SECTION 303(D) LIST OF IMPAIRED WATERS REQUIRING A TMDL/OTHER STRATEGY (2016) (listing the southern portion of Hempstead Harbor and its tributaries (e.g., Glen Cove Creek) as an impaired water in need of further restoration and protection).

³² See *City of N.Y. v. Anglebrook Ltd. P'ship*, 891 F. Supp. 900, 903 (S.D.N.Y. 1995) (“[The defendant’s reading of the statute] means that alleged facial inadequacies of a SWPPP are never actionable until there is construction activity, followed by the discharge of a pollutant, followed by a 60-day notice letter and an opportunity to cure. While there is a certain logic to the contention that the Clean Water Act contemplates litigation over water quality as opposed to paper quality, the problem is that the text of the statute precludes this result.”).



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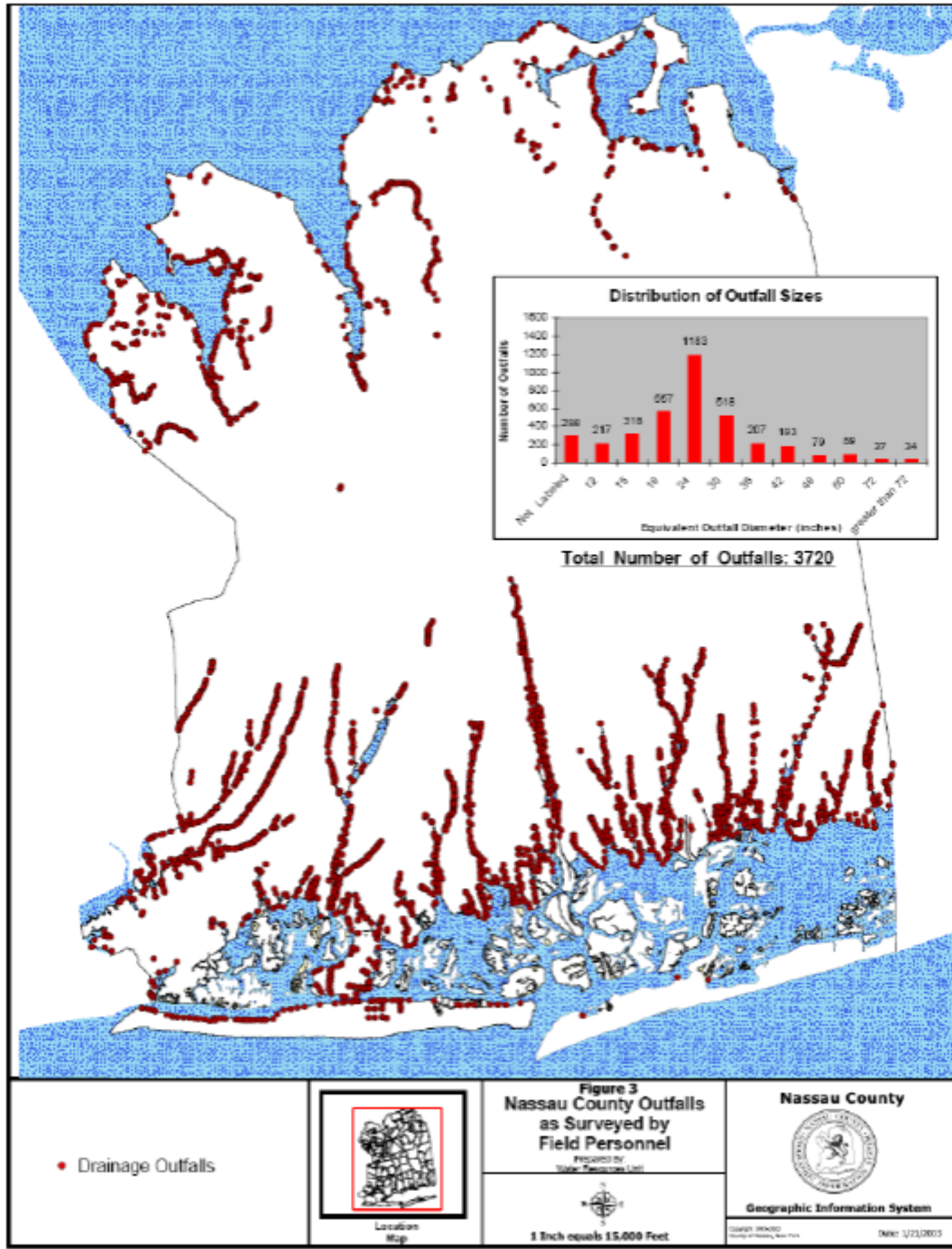
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Appendix 1. Screenshot from the Nassau County Stormwater Plan.