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RE: West Branch and Boyd Corners Septic System Rehabilitation  
Reimbursement Program Plan

Dear Ms. Young:

We are writing in response to your August 22, 2014 letter regarding the West Branch and Boyd Corners Septic System Rehabilitation Reimbursement Program Plan. We appreciate your comments and we have reviewed and responded to all your comments below. Please note that many of the provisions in the West Branch and Boyd Corners Septic System Rehabilitation Reimbursement Program (Program) are modeled on the Kensico Septic System Rehabilitation Reimbursement Program (Kensico Program). The Kensico Program rules have been revised over the past 5 years to address issues that have arisen during implementation. DEP believes that the Kensico Program rules, and by extension the West Branch/Boyd Corners Program rules, provide sufficient flexibility to facilitate rather than restrict participation while also containing sufficient safeguards to stem potential abuse.

Additionally, it is useful to recognize the existing regulatory and programmatic framework that has been established by the communities to address inspections and repairs of septic systems. The existing framework was developed by the municipalities in response to the requirements of the NYSDEC General Permit GP-0-10-002 (May 2010). Since the municipalities are implementing a program for the inspection, maintenance, and where necessary, the rehabilitation of system systems as part of their MS4 compliance, there will be differences between the implementation of the program EOH and the way it is implemented in the WOH communities. While the EOH Septic Reimbursement Program is separate and apart from the municipal MS4 implementation, the program will coordinate with local municipalities where useful (e.g. data sharing) without adding additional requirements.

1. *Section 1.1 Definitions:*

- a. *"Design Flow"- reference to Table 1 in the 1996 NYS Department of Health Design Handbook should be revised to Table 1 of the 2012 NYSDOH manual entitled "Residential Onsite Wastewater Treatment Systems Design Handbook".*

Response: Program Rules will be revised to reflect the proposed change.

- b. *"Eligible Systems" - the term "reasonably likely to fail in the near future," which is used in several locations in the document, should be defined in the Definitions section. We recommend using the same definition as provided in the Catskill Watershed Corporation's Septic System Rehabilitation and Replacement Program Rules.*

Response: Section 3.2 of the Program Rules outlines the criteria that may be considered when determining if a system is reasonably likely to fail and therefore be eligible for participation. The determination of an eligible system will be determined by a Qualified Inspector as defined by the program rules.

- c. *"Eligible Systems" - definition states that "septic systems that have an open NOV that was issued prior to May 7, 2014 are not eligible for reimbursement funds under the Septic Program." It is not clear why such systems are prohibited from participation in the program. A benefit of allowing such systems to participate might be to encourage and accelerate repair of the system.*

Response: It is necessary for the Program Rules to include a specific date before which septic repair costs are not eligible. Without such a date, the Program might reimburse repairs costs that were done years prior to Program implementation. At the time the Program commences in June 2015, NOV's issued prior to May 7, 2014 will already be over one year old. Residents should not have had any expectation of reimbursement prior to May 7, 2014 since that is the date of that the Mid-Term Revisions to the 2007 FAD was issued. Residents issued violations on May 7, 2014 or thereafter would be eligible subject to DEP review and approval.

- d. *"Failure" - we suggest including "contamination of groundwater" in this definition.*

Response: Program Rules will be revised to reflect the proposed change.

- e. *"Period of Eligibility" - program rules limit reimbursement to a period of one year from the date of an NOV or date the property owner enters the program. The WOH Septic Repair Program has found that one year can be insufficient to allow for both design by a professional engineer, design approval*

*by a regulatory agency, bidding by interested contractor(s), and then construction to completion. Under the NYC Watershed Rules and Regulations, DEP design approvals expire after two years. Allowing at least a two year period of eligibility for reimbursement would perhaps be more consistent with limitations set by the Watershed Rules and Regulations.*

Response: The purpose of the eligibility period was to ensure that failing septic systems are repaired in a timely fashion. Doing so will minimize potential impacts to water quality, which is a primary goal of the Program. DEP's experience in implementing the Kensico Program has shown that repairs have all completed well within the one-year timeframe and this provision has not been problematic. DEP does not anticipate this timeframe will cause hardship in the West Branch/Boyd Corners Program.

- f. *"Remediation"- definition should include the concept of "reasonably likely to fail", e.g., replace the first sentence with: "shall mean installation, replacement, or non-routine repair of an existing on-site wastewater treatment system that is failing or reasonably likely to fail in the near future as determined by a Qualified Inspector."*

Response: Program Rules will be revised to reflect the proposed change.

- g. *"Watershed Regulations" - definition for the term "West Branch Watershed" has been included under this definition. These two definitions need to be separated.*

Response: Program Rules will be revised to reflect the proposed change.

- h. *"Qualified Inspector" - does EFC employ septic system inspectors? In addition, we suggest that criteria used to determine whether or not an inspector is "qualified" be included in this definition, e.g., training obtained.*

Response: DEP's contract with EFC allows EFC to hire contractors to perform inspections of septic systems should it be necessary. Currently in the Kensico Program, County Health Department Sanitarians and/or DEP regulatory staff determine if a system is in failure and in need of rehabilitation. DEP intends to follow a similar structure in the West Branch/Boyd Corners Program. To improve clarity, the definition of a Qualified Inspector will be changed to "DEP or its authorized agent".

## *2. Section 1.2 Septic Program Description*

- a. *Towns in the EOH that are regulated under NYSDEC's Municipal Separate Storm Sewer Systems (MS4s) permit are required to implement a septic system inspection and maintenance program and report on their activities periodically to NYSDEC. Through the Towns' programs, it is likely that septic systems in need of rehabilitation will be identified, and owners of these septic systems may*

*participate in DEP's septic system program. We suggest that the DEP's septic system program rules acknowledge this possible nexus, and need for coordination, with the MS4 program, e.g., by noting that MS4's will be notified of systems participating in DEP's program that have been identified by the MS4 program or otherwise identified by a qualified inspector. As such, the MS4's can satisfy their requirement under the MS4 permit to report subsequent repairs to NYSDEC.*

Response: DEP will coordinate the sharing of Program data with municipalities that request such information. DEP will notify appropriate local officials and staff during its initial program outreach and will make clear that data can be made available for MS4 compliance purposes if requested. However, please note that Towns and/or County Health Departments already have the data management infrastructure in place as part of their program to comply with the septic components of MS4 permit. Further, the data collected through DEP's Septic Program will represent only a geographic subset of the Town's MS4 program area and therefore MS4 will need to continue to track septic repair activity after DEP's Septic Program is in place.

### *3. Section 1.2.1 Priority Areas*

- a. We recommend that the first phase of Program implementation include septic systems within 100 feet, rather than 50 feet, of a watercourse since this is the State minimum regulatory setback distance from a watercourse for an absorption field/seepage pit/raised mound.*

Response: Implementation of the Program in 50-foot increments was determined after DEP's review of the GIS data outlining the number of potential participants within incremental distances from a watercourse. Using this data, DEP assessed workflow and determined the methodology to conduct its outreach efforts. The number of potential participants located within the first 50-feet from a watercourse represents the largest number of parcels within any 50-foot increment. During implementation of the Program, DEP will initiate outreach to subsequent phases if workload in a given phase proves to be less than anticipated. A similar structure was used in the Kensico Program with no issues identified.

Please note that this implementation methodology was outlined in our Program Proposal (December 2013) and was approved by DOH (approval letter dated May 23, 2014).

- b. If more than two phases are a possibility, "i.e." should be changed to "e.g." in the fourth sentence of the first paragraph of this section.*

Response: Program Rules will be revised to reflect the proposed change.

- c. *The list of factors identified for prioritizing systems should also include type of system and system size (if known).*

Response: Program Rules will be revised to reflect the proposed change.

- d. *It is unclear whether the factors used to prioritize systems are listed in order of priority. If they are not, the rules should indicate such by stating, for example, "not in any priority order."*

Response: They are not in any priority order. The Program Rules will be revised to clarify.

#### 4. *Section 2.1 Schedule of Values*

- a. *The schedule of values should allow for deviations if warranted (e.g., tree removal next to a house on a steep bank will probably cost more than tree removal for an access road). For example, the WOH program rules provide that: "The CWC Executive Director may approve a payment of an additional 100% over the schedule of values upon submission of appropriate demonstration or documentation that the cost is reasonable and justified."*

Response: It is anticipated that deviations from the schedule of values will be evaluated on a case-by-case basis by DEP and EFC. Approval will be at DEP's discretion. A similar structure has been successfully implemented as part of the Kensico Septic Program.

- b. *DEP may wish to consider the WOH septic program's approach to limiting engineering costs, i.e., to define a schedule of costs rather than specify a maximum of 20% of the total cost of construction. Capping the engineering costs at 20% of the total cost of construction may lead to engineering costs always being 20% or to engineers designing a system that is more expensive than necessary.*

Response: DEP intends to develop a schedule of values for engineering costs. Notwithstanding the schedule of costs, engineering costs will also remain capped at 20% of the total construction cost. It should be noted that the 50% homeowner cost share also provides an incentive to engineers to minimize costs.

#### 5. *Section 2.2 Property Owner Portion of Cost*

- a. *In the first paragraph, "Primary Residents" should be "Primary Residences."*

Response: Program Rules will be revised to reflect the proposed change.

- b. *In the second paragraph of this section, it should be stated clearly that, in order to qualify for financial hardship funding, the assessed value of the residence must be below the median value of residential homes in the municipality, not below the median value of just "properties" in the municipality.*

Response: Program Rules will be revised to reflect the proposed change.

- c. *DEP may want to consider the criteria used by the WOH program to define eligibility for financial hardship, i.e., HUD 80% income limit of the resident's county. In addition, assets held by a property owner should be considered in defining financial hardship.*

Response: DEP evaluated a variety of options for determining financial hardship and has found that the existing criteria minimize paperwork obligations of participants. The values are readily available and can be determined by homeowners that are considering making application for financial hardship. We are concerned that asking homeowners to allow DEP to investigate and quantify all their other assets might act to dampen participation in the Program.

- d. *The third paragraph provides that all property owners must pay 100% of costs and then be reimbursed later by the Program. The WOH septic system repair program has found that most homeowners do not have funds available to pay for a septic system in full and then wait for reimbursement. Property owners may be more likely to use the program if DEP (or its agent) does two-party checks payable to the homeowner and contractor. This would be especially advantageous to a homeowner who falls under the hardship category.*

Response: Issuance of payment directly to contractors would require additional administrative hurdles by DEP and/or EFC that would slow implementation and payment timeframes. DEP has been implementing the Kensico Septic Program with the same structure with no issues. As such, DEP intends to maintain the payment structure as proposed.

- e. *It is not clear why the Septic Program will not reimburse property owners for any Rehabilitation activities where the reimbursable amount is less than \$1,000.*

Response: The program was established for substantive work that would be otherwise unaffordable. Minor or routine repairs that occur on a more regular basis would not justify the considerable administrative steps necessary to provide reimbursement.

## 6. Section 2.3 Eligible Costs

- a. *The third paragraph states that "The determination as to whether a system is in need of a Repair versus a Remediation will be made by the respective County*

*Health Department and/or DEP..." This statement creates the potential for disputes in making a determination. Other aspects of the program may also lead to disputes. If disputes occur, how will they be mediated? Alternatively, DEP may want to consider leaving this determination up to the professional engineer that has been hired by the homeowner.*

Response: The determination as to whether a system is in need of a Repair versus a Remediation is a regulatory issue and is addressed within the existing framework that has been established between DEP regulatory staff and the respective County Health Departments. Generally, no issues arise. There is a mechanism for depute resolutions in the septic Delegation Agreements although it has not been exercised due to a lack of need. The Septic Repair Program will accept the determination that is made from the regulatory framework and so there is no need to establish a separate dispute resolution framework. If there were a case where DEP regulatory staff determined a project was a remediation and the County did not agree, the remediation costs would still be covered under the Program.

- b. DEP may want to consider adopting the WOH septic system program's allowance for reimbursement for the cost and installation of low flow fixtures. Use of low flow fixtures can reduce the size of the septic system required, reducing costs and space requirements.*

Response: DEP will amend the Program Rules to allow reimbursement for low flow fixtures.

#### **7. Section 2.4 Disallowed Costs**

- a. Again, a one-year limit on the Period of Eligibility may be too stringent.*

Response: See 1.e above.

- b. As discussed above, DEP should consider basing the cap on engineering costs on a schedule of values rather than a percentage of total construction costs.*

Response: See 4.b above.

- c. DEP may want to consider not allowing building permit costs as an eligible cost. The WOH program found that providing reimbursement for building permits led in some cases to inflated building permit fees.*

Response: DEP will revise the Program to exclude building permit costs.

#### **8. Section 2.5 Duplication of Payment Prohibited**

- a. *Include under "unique circumstances": "that faulty equipment was installed, or equipment was incorrectly installed or other circumstances that led or contributed to immediate system failure."*

Response: Once the septic system has been repaired or remediated the Professional Engineer of Record is required to certify that the equipment has been installed and working correctly as designed. Any failures resulting from faulty equipment or incorrect installation would be the responsibility engineer, contractor, and/or component manufacturer to remedy.

#### **9. Section 2.9 Prerequisites to Reimbursement**

- a. *In subsections a.iii. and b.ii., we suggest that three quotes be "required", rather than "recommended". This will help ensure that the quotes will be close to the schedule of costs and that program funds are used more efficiently.*

Response: DEP intends to request that all applicants obtain at least three estimates for any rehabilitation regardless of cost or program requirements. During implementation of the Kensico Program, DEP found that some homeowners were having difficulty obtaining three estimates especially in cases where the total repair cost was relatively low. As such, DEP revised its Program Rules to recommend three estimates rather than require. This was done to provide flexibility and not be forced to exclude an otherwise cooperative homeowner. DEP felt it would be best to build similar flexibility into its West Branch/Boyd Corners Program. It should be noted that the 50% cost share provision provides an incentive for a homeowner to seek out multiple quotes. Additionally, please note that the WOH Septic Program only requires multiple quotes for projects exceeding \$30,000.

- b. *In subsection b.iii., the first sentence is incomplete.*

Response: The first sentence will be revised to read "For Repairs not requiring prior regulatory review and approval by the respective County Health Department or DEP pursuant to the respective County Health Department Rules and Regulations or the Watershed Regulations, the Property owner or its construction contractor must submit to DEP or its Authorized Agent a copy of any forms or submittals required by the respective County Health Department".

#### **10. Section 2.10 Application for Reimbursement**

- a. *The second paragraph states that reimbursements can only be made after an open works site inspection has been completed by DEP or the County Health Department. This statement implies that open works site inspections are required by these program rules, which may duplicate requirements that are already in place under County regulations and/or NYC Watershed Rules. Rather than*

*requiring an open works site inspection as part of the septic system program, DEP may want to reference the requirement for such inspection under County regulations and/or NYC Watershed Rules and Regulations, then require documentation of construction approval under the septic system program rules.*

**Response:** The Program requires that an open works site inspection be completed for all participating projects. DEP acknowledges that the NYC Watershed Rules and Regulations and the County Health Departments generally require open works inspections. It is not our intent to duplicate this effort. DEP will fully accept the County's open works inspection report in cases where County inspections occur. Program staff will only conduct open works inspections if they are not otherwise required. DEP will revise the aforementioned paragraph of the Program Rules to better capture this intent.

- b. This section does not provide any time limit after submission of an application for deeming that an application is complete, or for making a determination on an application once the application is deemed complete. This could leave a homeowner without any options to appeal because the application has not been denied at this point. The rules should provide a time limit for deeming that an application is complete and making a determination on an application.*

**Response:** Time limits on assessing applications that might be appropriate under regulatory programs would not fit with a reimbursement program. The DEP's reimbursement program in the Kensico Basin has been successful to date with the same structure. NYSEFC has provided timely review of applications thus far and DEP anticipates that will continue in the future.

#### *11. Section 2.11 Review of Applications*

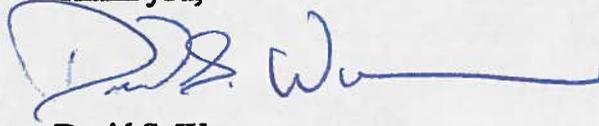
- a. The second paragraph states that: "Approval of request for reimbursement shall be conditioned upon the Property Owner's agreement to have the septic system pumped out and/or inspected if DEP determines that such pump-outs are necessary to protect water quality. Any such pump-outs will be paid for by the Property Owner." Is this requirement above and beyond what is already required by the MS4 permit as it is being implemented EOH? If routine pump-outs are already required by the MS4 towns, it may be better to reference these regulations, rather than give the appearance of DEP imposing new regulations. In addition, if this requirement is already a law at the Town level, it may be easier to enforce as a local law than as a program agreement.*

**Response:** DEP will revise to read "Approval or a request for reimbursement shall be conditioned upon the Property Owner's agreement to have the septic system pumped out and/or inspected if a regulatory agency determines that such pump-outs are necessary to protect water quality". DEP believes that this change captures the intent that any ongoing pump-outs

are not a requirement of the Program but may occur as part of a regulatory requirement.

If you have any questions or comments, please do not hesitate to contact us.

Thank you,



**David S. Warne**  
**Assistant Commissioner**

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