

Exhibit A

NPDES Permit No. DC0000221

Issuance Date: August 19, 2004

Effective Date: August 19, 2004

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MUNICIPAL SEPARATE STORM WATER SEWER SYSTEM PERMIT NO. DC0000221

AMENDMENT NO. 1

In compliance with the provisions of the Clean Water Act, 33 U.S.C. 1251 et seq.

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

is authorized to discharge from all portions of the municipal separate storm sewer system owned and operated by the District of Columbia to receiving waters named

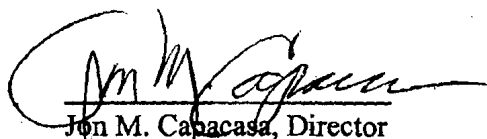
Potomac River, Anacostia River, Rock Creek,
And Tributaries

in accordance with the approved Storm Water Management(s), effluent limitations, monitoring requirements, and other conditions set forth in this Amendment No. 1 herein to Parts I, III, VII, IX, and X of Parts I through X of the previously issued Permit.

The effective issuance date of this Amendment No. 1 is *March 14, 2006*

This Amendment No. 1 to the Permit and the authorization to discharge shall expire at midnight, on August 18, 2009.

Signed this *13th* day of *March, 2006*.



Jon M. Capacasa, Director
Water Protection Division
United States Environmental Protection Agency
Region III

PART I. DISCHARGES AUTHORIZED UNDER THIS PERMIT

C. Limitations to Coverage (Prohibitions) [Replace existing language of C including Title with this]

Section 402(p)(3)(B)(ii) of the Clean Water Act specifically prohibits non-storm water entering the MS-4. The Permit does not authorize the Permittee to discharge pollutants from the MS4 as described herein:

1. Non-Storm Water and Phase I and Phase II Storm Water

Discharges of non-storm water (other than those listed in Part I.B. of this permit) are prohibited except where such discharges comply with all other terms and conditions of this permit and are:

- a. Regulated with a General NPDES permit for Phase I or Phase II storm water discharges, or
- b. Regulated with a individual NPDES permit.

2. All discharges of pollutants to or from the MS4 system, not regulated by a general or an individual NPDES permit, that cause or contribute to the lowering of water quality from current conditions within the District of Columbia are prohibited.

D. Effluent Limits

[replace existing Subpart D with the following]

1. MEP Effluent Limit - The permittee shall implement the controls, Best Management Practices (BMPs), and other activities necessary to reduce pollutants as set forth in the Upgraded Storm Water Management Plan dated October 19, 2002. Unless and until modified consistent with Part VII.P (Reopener Clause for Permits) of this Permit, the Upgraded Storm Water Management Plan requirements expressed in the form of BMPs, represent the controls necessary to reduce the discharge of pollutants to the Maximum Extent Practicable (MEP) in accordance with 40 CFR Part 122.44(k)(2).

2. WQBEL Limit - The permittee shall implement the controls, Best Management Practices (BMPs), and other activities necessary to reduce pollutants to the Maximum Extent Practicable as set forth in the Upgraded Storm Water Management Plan dated October 19, 2002, and all other requirements of this Permit (including but not limited to the narrative prohibitions on discharge of pollutants from the MS4 set forth in I.C. of this Permit). EPA reserves the authority to modify this effluent limit as described below in Part VII.P (Reopener Clause for Permits) of this Permit.

3. Effluent Limits Consistent with TMDL WLA - The permittee shall implement controls, Best Management Practices (BMPs), and other activities necessary to reduce pollutants to the Maximum Extent Practicable as set forth in the Upgraded Storm Water Management Plan dated

October 19, 2002, and to comply with all other requirements of this Permit (including but not limited to the narrative prohibitions on discharge of pollutants from the MS4 set forth in I.C. of this Permit). As further described in Part IX.B. of this Permit, in addition to complying with the effluent limits I.C. and I.D. of this Permit, the Permittee is required to submit and, unless instructed otherwise by EPA, implement the recommendations of implementation plans specific to the Anacostia River Total Maximum Daily Load (TMDL) wasteload allocations (WLAs) and Rock Creek TMDL WLAs in accordance with the schedule set forth in Part III.A. Table 1 of this Permit.

PART III. STORM WATER MANAGEMENT PLAN (SWMP)

C. Annual SWMP Reporting

The [Annual] Report shall include the following separate sections:

6. [keep existing part and add the following - remember this is cross referenced to Part III.D first paragraph] this identification shall include but not be limited to the permittee's calculation of pollutant loads and reductions from the MS4 system in those watershed(s) for which there are applicable TMDL WLAs using the methods described in Part IX.B.

PART VII. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

P. Reopener Clause for Permits

c. [replace first sentence of existing language with the following; concluding sentence of VII.P unchanged] The Permit may be modified in accordance with 40 C.F.R. Part 124.5, or revoked and reissued to incorporate additional controls in the event that EPA determines that further controls, under the iterative approach, are necessary to (1) ensure that the effluent limits are sufficient to prevent a further lowering of water quality from current conditions and/or (2) to ensure that the effluent limits are consistent with any applicable TMDL WLA allocated to discharge of pollutants from the MS4.

PART IX OTHER APPLICABLE PROVISIONS

A. Waivers and Exemptions

[unchanged, but add additional sentence] As part of its Annual Report to EPA under Part III.C. of this Permit, the permittee shall describe each and every instance in which the District authorized such an exemption and/or granted such a waiver, the nature and location of the activity for which each exemption or waiver was granted, the justification for each exemption or waiver, and the District's basis for finding that the exemption or waiver was consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations.

B. TMDL WLA Implementation Plans and Compliance Monitoring

[replace first paragraph of 2004 Permit with the following]

In addition to the duty to comply with the narrative effluent limits in Part I of this Permit, the permittee shall demonstrate compliance as described in this Part and in Part IV (Monitoring and Reporting Requirements). In accordance with the schedule identified in Part III.A. (Compliance Schedule) and Table 1 and below, Permittee shall further submit implementation plans to reduce discharges consistent with any applicable EPA-approved waste load allocation (WLA) component of any established Total Maximum Daily Loadings (TMDL). An applicable TMDL WLA for this Permit means any MS4 WLA established on or before the effective date of this Permit for a receiving stream, segment of a stream, or other waterbody within the District of Columbia as described below.

[next 2 paragraphs, identifying applicable WLAs and associated reductions left unchanged]
[the following paragraph to replace the third paragraph of Part IX.B in 2004 permit]

Demonstration of compliance (as specified in Parts IV and VIII of the Permit) will be calculated using the procedures (i.e., Simple Method) identified in the Upgraded SWMP dated October 19, 2002 (or other procedures approved by EPA via permit modification and shown to be scientifically sound and reliable in estimating actual load reductions), and will be reported by comparing the calculated load for each pollutant to the approved pollutant specific WLAs and its associated storm water load reductions for the receiving waterbody as specified in the Fact Sheet.

[the following two paragraphs to replace the last paragraph of Part IX.B. in 2004 permit]

The TMDL Implementation Plans shall consist of documenting all previous and on-going efforts at achieving the specific pollutant reductions identified in the TMDL WLA and further demonstrating additional controls sufficient to achieve those reductions through an established performance based benchmark. This benchmark shall be applied against annual projected performance standards for purposes of achievement of adequate reductions.

The Permittee shall submit to EPA the applicable TMDL Implementation Plans for the Anacostia River TMDLs within six months of the effective date of this permit and shall implement such Plan. The Permittee shall submit to EPA the applicable TMDL Implementation Plan for the Rock Creek TMDLs within twelve months after the effective issuance date of this Permit and shall implement such Plan.

PART X. PERMIT DEFINITIONS

[Add new definitions]

“Benchmark” or “measurable performance standard”- The term when used in Parts III.C.6. (Annual SWMP Reporting), III.D. (Annual SWMP Implementation Plan) and IX.B (TMDL WLA Implementation Plans and Compliance Monitoring) of the Permit refers to a criteria-based management evaluation tool described in Part IX.B (including but not limited to the Simple Method) for the purpose of making the determination each year as required in Part III.C.6 and

Part III.D. during the term of the Permit.

“Current Conditions”- Refers to a trend analysis which compares existing or baseline data to future data collected through the MS4 monitoring program as described in Part IV (Monitoring and Reporting Requirements) of the Permit to assess the overall performance (i.e., selection of BMPs/LID projects, setting of narrative/numeric effluent limits to MEP and/or water quality based standards) of the Storm Water Management Program within the District of Columbia.

Exhibit A

EPA Responsiveness Summary

Re: Responsiveness Summary
National Pollution Discharge Elimination System (NPDES)
Municipal Separate Storm Sewer System (MS4) Permit
Draft Amendment No. 1

NPDES PERMIT NUMBER: DC0000221

FACILITY NAME AND MAILING ADDRESS:

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

FACILITY LOCATION:

District of Columbia's
Municipal Separate Storm Sewer System

RECEIVING WATERS:

Potomac River, Anacostia River,
Rock Creek, and Tributaries

PUBLIC COMMENT PERIOD:

July 21, 2005 to August 22, 2005

EPA Region III received four comment letters during the public review period from interested parties regarding the Government of the District of Columbia (Permittee) draft Amendment No. 1 to the current Municipal Separate Storm Sewer System (MS4) NPDES Permit which was issued August 19, 2004. A summary of the comments and EPA Region's III responses to those comments are provided below. In reaching its decision regarding the issuance of the final Amendment, hereafter known as Amendment No.1, the Region considered these comments and certain modifications in response to those comments in Amendment No. 1 and the Fact Sheet.

I. Comment Letter Number 1.

A. Commentors:

Various environmental organizations from throughout the District of Columbia concerned with storm water issues signed the letter: Correspondence dated August 17, 2005, was received from

these parties (including, in part Natural Resources Defense Council, Earthjustice, and Friends of the Earth) during the public comment period. EPA Region III provides the following response to the issue raised by these interested environmental organizations.

B. General Comment:

Commentors represented by the organizations commend EPA for drafting an Amendment that will bring the Permit more in line with Clean Water Act water quality-based standard requirements.

C. EPA Response:

EPA appreciates the comment.

II. Comment Letter Number 2.

A. Commentors:

The commentors are a municipal coalition represented by Mr. David W. Burchmore, Esq. of Squire, Sanders, and Dempsey L.L.P. from Cleveland, Ohio. EPA received correspondence dated August 18, 2005, from Mr. Burchmore on behalf of the National League of Cities, the National Association of Flood and Stormwater Management Agencies, the National Association of Clean Water Agencies, the CSO Partnership, the West Virginia Municipal League, and the Virginia Municipal League during the public comment period.

B. Comment No. 1/Specific Comments on Draft Amendment No. 1-Part I.C. Limitations to Coverage:

i. Comment:

The commentors recommend that Part I.C.2 of the draft Amendment be changed back to the language in the current Permit or the proposed language be qualified by stating that such discharges are prohibited "to the maximum extent practicable" based on the Ninth Circuit Court of Appeals' decision in *Defenders of Wildlife v. Browner*, 191 F.3d 1167 (9th Cir. 1999).

ii. EPA Response:

The draft language in Part I.C.2 was intended to be consistent with the *Defenders of Wildlife* decision, as well as its progeny (both judicial and administrative). In the fact sheet accompanying the proposed amendment, EPA points out that the basis for the current MS4 Permit sets forth a framework for a long-term storm water management control program for determining compliance with applicable water quality standards "to the maximum extent practicable" through the use of best management practices. EPA is clarifying the language in the final document as it intends Amendment No.1 to be fully consistent with the basis for issuing the current MS4 Permit.

C. Comment No. 2a/Permit Part I.D.-Effluent Limits:

i. Comment:

Depending on the modification made to Part I.C.2 as discussed and for the reasons stated above for making such changes, Part I.D.2 should be qualified by the "maximum extent practicable" limitation.

ii. EPA Response:

The basis for issuing the MS4 Permit in August of 2004 was the District's Upgraded Storm Water Management Plan (SWMP) dated October 19, 2002. The fact sheet accompanying the August, 2004 MS4 Permit provides that EPA has determined that the Upgraded SWMP represents the technology-based level of pollution reduction. The fact sheet further indicates that pollution reduction should be achieved through the combination of best management practices (BMPs) controlling the quantity as well as the quality of pollutants in the MS4 to the maximum extent practicable (MEP). EPA believes that making reference to the Upgraded SWMP in Part I.D.2 accomplishes the same objective and eliminates the redundancy issue.

D. Comment No. 2b/Permit I.D.-Effluent Limits:

i. Comment:

Part I.D.3 of the draft Amendment should be revised so that the permittee is expected to implement controls for managing waste load allocations associated with the Total Maximum Daily Loadings (TMDL) Implementation Plans under development within the Anacostia River and Rock Creek subwatersheds to the maximum extent practicable.

ii. EPA Response:

The Upgraded SWMP dated October 19, 2002, provides the framework for identifying a long-term approach for managing storm water which is both practicable and reasonable. The intent of the TMDL Implementation Plan is to develop specific storm water controls and methodologies designed for that particular subwatershed to better enhance and support the framework that was identified through the Upgraded SWMP. Since the same principles of "practicable and reasonable" controls for managing storm water are the basis on which these documents have been developed, EPA believes the reference to the Upgraded SWMP in Part I.D.3 addresses this issue and any revision would be redundant.

E. Comment No. 3/Permit Part IX.B-OtherApplicable Provisions:

i. Comment:

Similar to above comment number 2b, the required submission of implemenation plans and

additional controls for addressing TMDL waste load allocations must be qualified by using the phrase, "to the maximum extent practicable".

ii. EPA Response:

See comment number 2b above for response.

III. Comment Letter 3.

A. Commentor(s):

The Government of the District of Columbia (as Permittee) and the District of Columbia Water and Sewer Authority (WASA) (as the District's Storm Water Administrator) were represented by David E. Evans, Esq. of McGuireWoods LLP from Richmond, Virginia in their August 19, 2005, comment letter.

B. General Comment II.A:

i. Comment:

The District of Columbia and WASA believe that with the exception of its failure to include the Maximum Extent Practicable (MEP) qualifier in the water quality-based requirements, the current MS4 Permit complies with the law and does not need to be modified. The parties are disappointed that they were not able to consult prior to the issuance of the draft document.

ii. EPA Response:

The intent of the draft Amendment was to resolve Earthjustice's appeal of the final permit issued in August, 2004, in such a way that the iterative process established through the MS4 Permit was supportive and not compromised. The document was shared prior to issuance and EPA's views that the draft Amendment was consistent with the iterative process were discussed, as well as expressed in the draft fact sheet.

C. Specific Comment II.B.1/Permit Part I.C-Limitations to Coverage:

i. Comment:

The District and WASA object to the words "or from" in Part I.C.2 of the draft Amendment and ask that they either be deleted or qualified by the MEP standard.

ii. EPA Response:

See comment number 1 under comment letter number 2 from the Municipal Coalition for response.

D. Specific Comment II.B.2/Permit I.D-Effluent Limits:

i. Comment:

The District and WASA are concerned that EPA's decision to remove the standards compliance language currently in the MS4 Permit in Part I.D.2 and Part I.D.3, although not as serious, suggests that the District has an ultimate unqualified obligation to meet water quality standards. The commentors thus recommend either keeping the language in the existing Permit or using an MEP standard qualifier.

ii. EPA Response:

See EPA response to comment letter number 2, comment #2a, from the Municipal Coalition for response.

E. Specific Comment II.B.3/Permit Part III.C-Annual Reporting:

i. Comment

The District and WASA have no objection to this additional annual reporting obligation.

ii. EPA Response:

EPA appreciates the comment.

F. Specific Comment II.B.4/ Permit Part VII.P-Reopener Clause for Permits:

i. Comment:

The new reopener language in Part VII.P of the draft Amendment should be qualified by the MEP standard because it suggests that the District has an unqualified obligation to meet water quality standards.

ii. EPA Response:

EPA is exercising its options to change direction through the permitting process based on the District's Upgraded SWMP should current Program controls need to be adjusted under the "iterative" approach.

G. Specific Comment II.B.5/Permit Part IX.A-Waivers and Exemptions:

i. Comment:

The District does not plan to grant any waivers and exemptions, and therefore, has no objection to the additional reporting requirement.

ii. EPA Response:

EPA appreciates the comment.

H. Specific Comment II.b.6/Permit Part IX.b-TMDL WLA Implementation Plans and Compliance Monitoring:

i. Comment:

The District and WASA are concerned that by using the permit modification vehicle for changing from procedures other than those identified in the Upgraded SWMP for demonstrating compliance unnecessarily complicates and burdens the process.

ii. EPA Response:

A permit modification, which is governed by federal regulations at 40 C.F.R. Part 124.5, formalizes the procedure in the permit and is not done arbitrarily. Prior to EPA taking such action, a scientifically defensible argument would have to be made for deviating from the procedures and method presently in place to demonstrate compliance.

I. Specific Comment II.B.7/Permit Part X-Permit Definitions:

ii. Comment:

The District and WASA have no objection to the addition of the "Benchmark" or "measurable performance standard" definition.

ii. EPA Response:

EPA appreciates the comment.

IV. Comment Letter Number 4.

A. Commentor:

The District of Columbia Department of Health (DOH) certified the draft Amendment under Section 401 of the Clean Water Act, 33 U.S.C. Part 1341, provided three modifications are included in the document. EPA received correspondence from the certifying District agency dated August 19, 2005, during the public comment period. EPA Region III provides the following responses to the issues raised by DOH.

B. Modification #1: [Amend the Draft Amendment No. 1, Part I(C)(2) Provision to Reflect Authorized Discharges].

i. Comment:

DOH recommends that EPA delete this provision and replace it with the existing language of the current MS4 Permit since Part I(C)(2) does not address the District's impaired waters and the current wording is, in effect, excluding allowed discharges.

ii. EPA Response:

EPA will be substituting replacement language in the final issued Amendment to address the points raised by DOH in its Section 401 certification letter.

C. Modification #2: [Amend Draft Amendment No. 1, Part I(D)(3) to Clarify that the Controls in the MS4 Permit are Appropriate Effluent Limits Consistent with TMDL WLAs]:

i. Comment:

DOH recommends that EPA replace this provision with the language currently in the MS4 Permit since Part I(D)(3) removes EPA's determination that the controls in the MS4 Permit "are appropriate effluent limits consistent with the assumptions and requirements of the approved waste load allocations(WLAs)" established in the District's TMDLs. Also, DOH takes issue with the requirement that EPA conduct an assessment whether further controls are necessary which "in effect" imposes more stringent compliance with effluent limits.

ii. EPA Response:

EPA is adding additional language to the provision in the final issued Amendment to address the points raised by DOH in its Section 401 certification letter.

D. Modification #3 [Delete Draft Amendment No. 1, Part VII(P)(c) Reopener Clause for Permit Provision which states that "to ensure that the effluent limits are sufficient to prevent an exceedance of water quality standards"]:

i. Comment:

DOH recommends that this phrase be deleted from this provision for reasons stated above in Modification #1 and Modification #2.

ii. EPA Response:

EPA is modifying some of the wording in the provision when the final Amendment is issued to address the concerns raised by DOH in its Section 401 certification letter.

Re: Fact Sheet (To be Supplemented with Final Fact Sheet from DCMS4 NPDES Permit
No. DC0000221 Dated August 19, 2004)
National Pollutant Discharge Elimination System (NPDES)
Proposed Amendment No. 1 to NPDES Permit No. DC0000221

NPDES PERMIT NUMBER: DC0000221, AMENDMENT NO. 1

FACILITY NAME AND MAILING ADDRESS:

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

FACILITY LOCATION:

District of Columbia's
Municipal Separate Storm Sewer System (MS4)

RECEIVING WATERS:

Potomac River, Anacostia River,
Rock Creek, and Tributaries

FACILITY BACKGROUND AND DESCRIPTION:

The Government of the District of Columbia (the District) owns and operates a Municipal Separate Storm Sewer System (MS4) which discharges storm water during wet weather events from various outfall locations throughout the District into its waterways. On April 19, 2000, the United States Environmental Protection Agency Region III (EPA) issued the District its first Storm Water Phase I National Pollutant Discharge Elimination System (NPDES) Permit for the control and management of storm water discharges originating from these outfalls. (The collective permit for these various outfalls is known as an "MS4" permit). The Permit was issued for a three-year period and administratively extended from April 19, 2003, until August 19, 2004. (The Permit is hereafter referred to as the 2000 MS4 Permit). On August 19, 2004, EPA issued the District its second Storm Water Phase I NPDES Permit, which is valid for a five-year period and covers all discharges within the corporate boundaries of the District. This service area includes discharges served by, or otherwise contributing to, discharges from the MS4 system. The MS4 Permit does not cover the District's combined or sanitary sewer systems.

Since EPA first issued the Phase I MS4 Permit to the District in 2000, the District has made a number of accomplishments, including: (1) establishment of an infrastructure for addressing storm water activities, (2) development of a watershed-based rotating monitoring program to evaluate the chemical parameters and physical characteristics of the municipal storm water being discharged from representative outfalls in the MS4 system, (3) performance of assessments of

existing MS4 activities which contribute to the runoff being discharged into the MS4 system, (4) development of implementation measures for managing and enforcing MS4 activities within the District, and (5) upgrading its previous Storm Water Management Program (SWMP) based on these findings. The District's upgraded SWMP (which EPA approved in October 2003, and which was used as the basis for the MS4 Permit issued in August 2004) sets forth a framework for a long-term storm water management control program for determining compliance with applicable water quality standards to the maximum extent practicable through the use of best management practices (BMPs).

The current MS4 Permit requires a combination of narrative and BMP controls for addressing storm water at its sources. These mechanisms are also used to characterize storm water because of its indiscriminate nature. In general, EPA views the MS4 NPDES permit program as an iterative process requiring reexamination of ongoing controls and continued improvements to the respective storm water management programs while continuing to adequately protect the water quality of the receiving stream. The MS4 Permit builds on existing MS4 inventories, databases, baseline monitoring data, partnerships, pilot projects, and increased MS4 activity implementation as the upgraded SWMP approach for managing the quantity and enhancing the quality of storm water throughout the District. Moreover, the Permit requires measurable performance standards to be developed and assessed, and implementation plans for reducing the storm water components of waste load allocations of Total Maximum Daily Loads to be implemented, all of which are intended to evaluate the effectiveness of the District's programs.

PROPOSED ACTION TO BE TAKEN:

On July 21, 2005, EPA proposed to issue an amendment, hereafter referred to as Amendment No. 1, to the District's MS4 Permit which became effective on August 19, 2004. This action is being taken in part in response to issues raised by a permit appeal filed by petitioners Earthjustice on behalf of the Friends of the Earth and Defenders of Wildlife with the Environmental Appeals Board (EAB) on September 20, 2004. In that appeal, the petitioners argued that the District of Columbia Water and Sewer Authority (WASA or the Authority), which has been given responsibility for storm water management under the MS4 system, should be identified as a co-permittee along with the Government of the District of Columbia in the Permit. The petitioners' argument for making WASA a co-permittee was based on the fact that the WASA Board is not "directly accountable and responsible to the City Council and Mayor" and to ensure that the Authority is held legally accountable for its actions under the Permit. The petitioners also argued that the "maximum extent practicable" standard, the water quality-based effluent limits, and the total maximum daily waste load allocation narrative effluent limits specified in the MS4 Permit were not sufficient to adequately assure compliance with applicable water quality standards, let alone demonstrate that MS4 activities under the District's storm water management program will account for and reduce pollutant loadings from the MS4 system.

Furthermore, the petitioners went on to explain in the petition that the waiver, exemption, and variance provisions in the District's water quality standards and storm water regulations conflicted with the Clean Water Act and EPA rules, and that the provisions could undermine the integrity of the MS4 Permit and the District's storm water management program. Finally, the petitioners raised concerns that the monitoring program in the MS4 Permit violates EPA rules in that the program does not explicitly require monitoring from each MS4 outfall and does not require that the monitoring be representative of the monitored MS4 activity.

In October 2004, Earthjustice and EPA, Region III, began to discuss between themselves the issues on appeal, many of which had been raised during the petitioners' previous appeal of the 2000 MS4 Permit (which resulted in a decision by the EPA Environmental Appeals Board (EAB)); see Order Denying Review in Part and Remanding in Part at <http://www.epa.gov/eab/disk11/dcms4.pdf> (Feb. 20, 2002) and Order Granting Motion for Partial Reconsideration at <http://www.epa.gov/eab/orders/dcms4recon.pdf> (May 10, 2002). The parties' discussions immediately began to prove beneficial and they therefore jointly requested that the EAB defer action on the appeal to give them time to work through their differences on the issues. After several additional extensions of time, the parties reached settlement in principle on the issues on May 10, 2005, whereby the Region would propose and public notice Amendment No.1 to the current MS4 Permit and consider any comments received during the public review period before making the document final. That Permit Amendment was therefore public noticed in July 2005.

Concurrent with the review and comment period of draft Amendment No. 1 to the MS4 Permit, EPA Region III will be requesting that the District of Columbia's Department of Health certify the amendment under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. EPA also has requested that the offices of the Fish and Wildlife Service (part of the Department of Interior) and the National Marine Fisheries Service (part of the National Ocean and Atmospheric Administration) review the document for compliance with the Federal Endangered Species Act, 42 U.S.C. §§ 460 *et seq.*

The proposed modifications to the August 19, 2004 MS4 Permit is summarized in the Table below:

Table 1. (Modifications to August 19, 2004, DC MS4 Permit)

Permit Part and Title	Effect of Amendment No.1
Part I.C (Limitations to Coverage)	Emphasizes that the limitations to coverage are actually prohibitions and expands on the types of discharges that are permitted to occur from the MS4 system;

Part I.D (Effluent Limits)	Clarifies the types of effluent limits to be addressed through the MS4 Permit, how these limits will be implemented through the upgraded SWMP, and the authority on which EPA will rely in implementing potential permit modifications to ensure that these limits result in an effective program as well as linking the appropriate parts of the MS4 Permit back to these limits;
Part III.C (Annual SWMP Reporting)	Describes annual reporting requirements for calculating pollutant loads and reductions from the MS4 system in those watersheds with approved total maximum daily loadings;
Part VII.P (Reopener Clause for Permits)	Describes additional requirements for opening the MS4 Permit through modifications;
Part IX.A (Waivers and Exemptions)	Requires accountability and reporting of waivers and exemptions;
Part IX.B (TMDL WLA Implementation Plans and Compliance Monitoring)	Describes how the total maximum daily loadings methodologies for complying with the effluent limits of the MS4 Permit and demonstration of compliance to ensure successful achievement of waste load reductions will be addressed;
Part X (Permit Definitions)	Adds a "measurable performance standard" definition for evaluating the effectiveness of the District's MS4 activities under their storm water management program.

During the public review period, EPA Region III received four comment letters regarding proposed Amendment No.1. The Region considered these comments, when issuing the final document, by making modifications to account for existing ambient water quality conditions, placing emphasis on reducing pollutants to the maximum extent practicable, and by adding a clarifying definition. A summary of the comments along with the EPA response is contained in the responsive summary which supplements this fact sheet. The Region received comments from the District of Columbia Department of Health through its Section 401 certification letter which is addressed in the responsiveness summary. The United States Fish and Wildlife Service and the National Ocean and Atmospheric Administration's National Marine Fisheries Service both concurred with the Region's Biological Evaluation which concluded that Amendment No.1 would not adversely affect endangered or threatened species that reside within the District of Columbia by letters dated August 18, 2005, and October 6, 2005. The draft documents along with the final documents now complete the administrative record for the project and are available to the public for review at the Martin Luther King, Jr. Public Library which is located at 901 G Street, N.W. in Washington, D.C..

For additional information, contact Mr. Garrison D. Miller, Mail Code 3WP13, District of Columbia/Maryland/Virginia Branch, Office of Watersheds, EPA Region III, United States Environmental Protection Agency, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.

Exhibit B

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McGUIREWOODS

Exhibit B

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Direct Fax: 1.804.698.2049

August 19, 2005

By Email and Federal Express Delivery

Mr. Garrison D. Miller
Mail Code 3WP13
MD/DC/VA Branch
Office of Watersheds
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Re: District of Columbia Municipal Separate Storm Sewer
System - NPDES Permit No. DC0000221 – Amendment No. 1

Dear Mr. Miller:

The Government of the District of Columbia (the "District") and the District of Columbia Water and Sewer Authority ("WASA") appreciate and thank you for the opportunity to submit these joint comments on draft Amendment No. 1 to the District's Municipal Separate Storm Sewer System ("MS4") permit (the "Amendment").

Both the District and WASA have important interests in the Amendment. As the permit holder, the District is responsible for overall compliance with any new requirements in the Amendment. WASA, as the Storm Water Administrator, is charged with coordinating the District's MS4 permit compliance activities among the District agencies with storm water management responsibilities.

Before turning to the District's and WASA's comments on the Amendment, some background is in order.

I. BACKGROUND

As noted in the draft fact sheet accompanying the Amendment, since the MS4 permit was first issued in 2000, the District has achieved a number of significant milestones in the ongoing development and implementation of its MS4 program, including establishment of an MS4 management and enforcement infrastructure, development and implementation of a watershed-based MS4 monitoring program, MS4 source assessments, and substantial upgrades to the Storm Water Management Program ("SWMP"), which were approved by EPA and used as the basis for the MS4 permit when it was re-issued in August, 2004. These accomplishments reflect the District's and WASA's commitment not only to the MS4 program,

but also, together with their other initiatives¹, to restore and protect the District's rivers, particularly the Anacostia, so that their full economic, recreational, and environmental benefits are realized.

These commitments notwithstanding, storm water management to achieve compliance with water quality standards is an inherently inexact and uncertain undertaking, particularly in an urban setting as large and diverse as the District's. As EPA has noted:

*The water quality impacts of discharges from [MS4s] depend on a wide range of factors including: The magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of storm water discharge to receiving water flow.*²

Moreover, the best management practices ("BMPs") used to control municipal storm water can vary greatly in their effectiveness and efficiencies depending on many of the same wide ranging factors that affect the water quality impacts of MS4 discharges. In sum, discharges from MS4s and their associated water quality impacts and controls are vastly different than discharges from municipal and industrial wastewater treatment plants. Unlike treatment plants where technologies can be designed and constructed to achieve specified pollutant concentrations and loadings, the effectiveness and control efficiencies of MS4 BMPs can only be estimated. The resulting pollutant concentrations and loadings will vary greatly depending on not only on BMP efficiencies, but also rainfall intensity, duration, volume, and frequency. It is for these reasons that the District's current permit employs, and the District and WASA support, "an iterative process requiring reexamination of ongoing controls and continued improvements to the respective storm water management programs while continuing to adequately protect the water quality of the receiving stream."³

The District and WASA and EPA agree on the above-described iterative approach as an effective way to account for the inherently uncertain nature of storm water management; however, they disagree on the ultimate obligation. EPA asserts that it has the authority to require MS4s to comply with water quality standards as it deems appropriate. The District and WASA, on the other hand, believe that the District's obligation, both legally and for the benefit of its rivers, is to do all that it reasonably can do to control the discharges from its MS4: in legal terms, to control its discharges to the "maximum extent practicable" ("MEP"). In the District's and WASA's view, this is an ongoing obligation, which means that progress never ends. Using an iterative process, the District is committed to build upon its experiences, testing, monitoring, and new information and technologies to continually improve the effectiveness of its MS4 program.

The District has every hope and expectation that this process will lead to load reductions sufficient to prevent its MS4 from causing or contributing to exceedances of water quality

¹ The most significant examples include WASA's \$1.3 billion combined sewer overflow control program; the District's Anacostia waterfront redevelopment project; and over \$1 billion in upgrades to the Blue Plains advanced wastewater treatment plant.

² National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,038 (Nov. 16, 1990)

³ Draft Fact Sheet, Proposed Amendment No 1 to NPDES Permit No. DC0000221 at page 2.

standards. However, the District's and WASA's best efforts notwithstanding, compliance with water quality standards can not be assured because, as described above, municipal storm water management is an inherently uncertain undertaking. Municipalities should be expected to undertake every reasonable measure to control the discharges from their MS4s, but no useful purpose is served by holding them to standards that can not possibly be achieved no matter how great the effort. The District and WASA believe that Congress shared this view when it amended the Clean Water Act ("CWA") in 1987 to establish the storm water management program in Section 402(p) (33 USC §1342(p)). In sum, the District and WASA maintain that Section 402(p) prohibits EPA from requiring strict compliance with water quality standards in MS4 permits to the extent compliance with water quality standards can not be achieved with the implementation of controls to the maximum extent practicable.

These opposing views were evident during development of the current permit in early 2004. Consistent with the iterative process discussed above, the District and WASA readily accepted the need to add to and enhance the requirements in the permit in existence at that time to reflect improvements to the MS4 program since the permit was first issued in 2000; but they asked that these requirements be expressly qualified by the MEP standard set forth in Section 402(p). EPA, on the other hand, proposed to include several conditions in the permit that either required or could be construed to require immediate compliance with water quality standards without any MEP qualification. The District and WASA eventually agreed not to object if water quality-based requirements were included in the permit without any MEP qualification provided the requirements were not expressed as unqualified and immediate water quality standards compliance obligations. When issued in August, 2004, the permit contained a number of water quality-based requirements without any MEP qualification, but all were expressed in ways that were achievable and avoided exposing the District to enforcement for alleged water quality standards violations even if the District was in compliance with the MEP standard.

It is against this background that the District and WASA have reviewed and here comment on the Amendment.

II. Comments

A. General Comment

The District and WASA are very disappointed that without offering them any opportunity for prior consultation, EPA now proposes to modify a permit which reflects the significant MS4 program progress and accomplishments outlined above, the iterative process embraced by EPA, and all that the District can reasonably be expected to do at this stage in the continuing development and implementation of its MS4 program. In short, the District and WASA believe that with the exception of its failure to include the MEP qualifier in the water quality-based requirements, the current permit complies with the law and does not need to be modified.

B. Specific Comments

1. Part I.C (Limitations to Coverage)

The District and WASA object to the addition of the words "or from" in Part I.C.2 and ask that they either be deleted or qualified by the MEP standard. Although consisting of only two words, this proposed change has great legal significance because it would effectively

incorporate the District's water quality standards into the permit as immediate and unconditional compliance obligations, thereby exposing the District to potential enforcement based on alleged violations of the standards.

In addition to unfairly subjecting the District to potential non-compliance and enforcement for storm water discharges presently beyond its ability to control to meet water quality standards, the proposed change would exceed EPA's authority and would be arbitrary and capricious.

As noted above, when Congress amended the CWA in 1987⁴, it added Section 402(p), which established a program specifically for municipal and industrial storm water systems. Among the most significant elements of the program established in Section 402(p) are clearly-stated standards governing municipal and industrial storm water discharges. Section 402(p)(3) states that industrial storm water discharges must comply with all applicable provisions of CWA §301 (33 USC §1311). Section 301 includes the CWA's water quality standards compliance provisions, thereby expressing Congress' clear intent that industrial storm water discharges must meet water quality standards. Section 402(p) contains no such requirement for municipal storm water discharges. Rather, Section 402(p)(3) provides that permits issued for MS4s must (1) include a requirement to prohibit non-storm water discharges into the MS4, and (2) require controls to reduce the discharge of pollutants to the maximum extent practicable. Accordingly, Congress drew a clear distinction between industrial and municipal storm water discharges, and plainly chose not to require MS4s to comply with water quality standards to the extent it would require controls more stringent than MEP.⁵

EPA has not stated or otherwise suggested that this proposed addition and resulting water quality standards compliance obligation, is MEP for the District's MS4. To the contrary, the District can not comply with this obligation at this stage of its MS4 program. Therefore, since the MEP standard obviously reflects an achievable requirement, the proposed change to Part I.C.2 to prohibit discharges that would cause or contribute to exceedances of water quality standards would exceed EPA's authority under CWA §402(p) without the addition of an MEP qualifier.

The District and WASA are well aware that EPA believes it can require strict compliance with water quality standards under its discretionary authority in Section 402(p)(3)(iii), which, in addition to the MEP standard, provides that permits for MS4's shall require "such other provisions as the Administrator ... determines appropriate for the control of such pollutants." We respectfully disagree. First, such an interpretation would render the MEP standard virtually meaningless. Surely, Congress did not intend to establish the MEP standard simply to have it ignored because EPA determined that some other standard was appropriate. Established rules of construction require that statutes be construed to give effect to all their provisions.⁶ EPA's interpretation is inconsistent with this rule. The better interpretation is that EPA can require

⁴ Pub. L. No. 100-4, 101 Stat. 7 (1987).

⁵ See, *Defenders of Wildlife v. Browner*, 191 F.3d 1167 (9th Cir. 1999), which held that the MEP standard governs MS4 discharges and that they are not required to comply with water quality standards.

⁶ See, *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment") (internal quotations omitted).

compliance with water quality standards provided compliance with the standards does not require controls more stringent than MEP.

Further, assuming for the sake of argument that the above provision does give EPA the discretionary authority to require compliance with water quality standards without the MEP qualifier, it does not give EPA the authority to act at will. Aside from EPA's obligation under the law to provide a reasoned basis for the exercise of its discretionary authority,⁷ Section 402(p)(3)(iii) expressly states that to the extent EPA seeks to include "other provisions" in an MS4 permit, those provisions must be "appropriate for the control of such pollutants". EPA has offered no basis for proposing to add the water quality standards compliance obligation other than its desire to settle the pending appeal. Moreover, we do not see nor has EPA explained how there is any rational relationship between an immediate and unqualified prohibition on discharges that cause or contribute to a violation of water quality standards and EPA's authority to include conditions in the permit "appropriate for the control of pollutants". This might be the case if the prohibition would contribute to the control of pollutants to a greater extent than already required by the permit, but there is absolutely no evidence that it will. In fact, the only certain result of this change will be to expose the District to potential non-compliance with the permit and enforcement action. Surely, this is not what EPA intends by the added language. Most certainly, it is not what Congress intended; therefore, the addition of the water quality standards compliance obligation in Part I.C.2 based on EPA's discretionary authority under Section 402(p)(3) would be in excess of EPA's authority and arbitrary and capricious.

Finally, the added water quality standards compliance obligation in Part I.C.2 is so vague and undefined that it fails to give the District fair notice of its legal obligations, and, therefore, violates fundamental principles of due process, and is unconstitutional.

[A] regulation [] which allow[s] monetary penalties against those who violate [it], ... must give ... fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.⁸

The added water quality standards compliance obligation fails this standard by any measure. While it prohibits discharges which cause or contribute to exceedances of water quality standards, it does not tell the District what it must do to comply with the prohibition or provide any standard of culpability.

2. Part I.D (Effluent Limits)

The District and WASA are concerned that EPA's proposal to remove the standards compliance language in Part I.D.2 indicates that EPA has changed its determination that the controls required by the permit are sufficient to achieve compliance with applicable water quality

⁷ See, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (vacating a lower court decision with instructions to remand a rule to the agency for further consideration as the rule did not provide the requisite 'reasoned analysis').

⁸ See, *First American Bank v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985) *quoting* *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)). See also, *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998).

standards. The District and WASA are not aware of any new information since the permit was issued last year that would justify a change in the determination. Absent new information, the language should remain in the permit.

Although the proposed change to Part I.D.3 would not have the same immediate legal consequences for the District as the proposed change to Part I.C.2 and resulting standards compliance obligations, it would insert language in the permit which would strongly suggest that the District has an ultimate unqualified obligation to meet water quality standards. As discussed above, the District's water quality standards compliance obligations are qualified by the MEP standard. Therefore, for the same reasons discussed above with respect to the proposed addition to Part I.C.2, if EPA finalizes this change, it should be accompanied by express language qualifying the obligation with the MEP standard.

3. Part III.C (Annual SWAMP Reporting)

The District and WASA have no objection to this additional annual reporting obligation.

4. Part VII.P (Reopener Clause for Permits)

The proposed new reopener language in Part VII.P should be qualified by the MEP standard for the same reasons discussed above regarding the proposed changes to Part I.C.2 and Part I.D.3 because it too suggests that the District has an unqualified obligation to meet water quality standards.

5. Part IX.A (Waivers and Exemptions)

The District does not plan to grant any waivers and exemptions, and therefore, has no objection to the proposed change to Part IX.A.

6. Part IX.B (TMDL WLA Implementation Plans and Compliance Monitoring)

The District and WASA are concerned the proposed change to the third paragraph in Part I.B (relating to demonstration of compliance) unnecessarily complicates and burdens the process for modifying the procedure used to calculate compliance by requiring that any procedure other than that in the SWMP be approved by EPA via permit modification. Any such modifications would be highly technical in nature, and EPA should be able to approve them without formal permit modification. Therefore, the District and WASA urge EPA not to finalize this proposed change.

7. Part X (Permit Definitions)

The District and WASA have no objection the proposed added definition.

Mr. Garrison D. Miller
August 19, 2005
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Again, thank you for the opportunity to submit these comments on behalf of the District and WASA, and please do not hesitate to contact Dr. Mohsin Siddique at 202-787-2424, if you have any questions or need additional information.

Sincerely,

A handwritten signature in black ink that reads "David E. Evans". The signature is written in a cursive style with a large, stylized "D" and "E".

David E. Evans

Cc: Avis M. Russell
Bruce Brennan
Mohsin Siddique