

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In re:)	
)	
Government of the District of Columbia)	
Municipal Separate Storm Sewer System)	NPDES Appeal Nos. 00-14 &
)	01-09
NPDES Permit No. DC 0000221)	
_____)	

ORDER GRANTING MOTION FOR PARTIAL RECONSIDERATION

In April 2000, U.S. EPA Region III (the “Region”) issued a National Pollution Discharge Elimination System (“NPDES”) permit, number DC 0000221 (the “Permit”), to the Government of the District of Columbia. The Permit would authorize storm water discharges from the District of Columbia’s municipal separate storm sewer system (“MS4”). On August 11, 2000, Friends of the Earth and Defenders of Wildlife (“Petitioners”) timely filed a petition requesting that the Environmental Appeals Board review the Permit (the “Petition”). Thereafter, the Region filed a response to the Petition and, on February 20, 2002, we issued our Order Denying Review in Part and Remanding in Part. *In re District of Columbia Municipal Separate Storm Sewer System*, NPDES Appeal Nos. 00-14 & 01-09, slip op. (EAB, Feb. 20, 2002), 10 E.A.D. ____ (hereinafter, “*DC MS4*”).

Before the Board at this time are (1) the Petitioners’ Motion for Partial Reconsideration (“Motion for Reconsideration”), (2) the Region’s Motion for Leave to File a Response to the Motion for Reconsideration and the Region’s Response Opposing Petitioners’ Motion for Reconsideration (“Opposition”), and (3) the Petitioners’ Opposition to Region III’s Motion for

Leave to File a Response, and in the Alternative, Motion for Leave to File a Reply, along with Petitioners' Reply in Support of Motion for Partial Reconsideration ("Petitioners' Reply").¹

The Petitioners request that we reconsider our decision not to grant review of the Permit's condition setting an aggregate numeric effluent limit for four outfalls into Hickey Run, which is a tributary of the Anacostia River. Motion for Reconsideration at 1-5.² In our Order, we rejected the Petitioners' arguments alleging clear error in the Region's decision to set an

¹The Petitioners argue that the Region's Opposition to the Motion for Reconsideration was untimely and "is prejudicial" due to delay in the permitting process. The Region, in contrast, supports its Motion for Leave on the grounds that it believes that the Opposition will aid the Board in deciding Petitioners' Motion for Reconsideration. Upon consideration, we hereby grant the Region's Motion for Leave to File a Response and we grant Petitioners' alternative request for leave to file a reply. The rules governing this proceeding, 40 C.F.R. Part 124, do not establish a fixed deadline for the filing of an opposition to a motion, although such motions should be filed promptly to avoid undue prejudice. Here, where the relief requested by Petitioners in their Motion for Reconsideration necessarily entails further delay in issuance of the Permit, we conclude that Petitioners have not shown prejudice that would warrant denial of the Region's request to submit its Opposition. Both the Region's Opposition and the Petitioners' Reply, which were attached to their respective motions, are hereby deemed filed in this case.

²Petitioners also request that we delete footnote 25 from our Order, which related to one part of the Hickey Run numeric effluent limit analysis, and they request that we clarify our analysis of the requirements of the maximum extent practicable standard under section 402(p)(3)(B) of the Clean Water Act. *Id.* at 5-7. The request to delete footnote 25 is rendered moot by our decision today to grant Petitioners' request that we remand the condition setting an aggregate numeric effluent limit for the four Hickey Run outfalls. With respect to the MEP standard, Petitioners note that in one sentence of our analysis we stated that the key question is "what is practicable." *DC MS4*, slip op. at 36. Petitioners request that we clarify this statement by adding that the "amount" of pollutant reductions "is surely a relevant factor in deciding whether such controls reduce discharges to the maximum extent practicable." Motion for Reconsideration at 6. Such clarification is unnecessary because we stated in our Order that "[t]he Region concluded that the BMPs required by the Permit collectively represent the *maximum* practicable effort to *reduce* pollution from the District's MS4 * * * * and the record does not lead to the clear conclusion that any *additional* BMPs beyond those identified in the Permit are practicable * * *." *DC MS4*, slip op. at 36-37 (emphasis added). Thus, our analysis clearly shows that the amount of reduction is a relevant consideration where the record demonstrates that additional reductions are practicable.

aggregate numeric effluent limit for the four outfalls that form the headwaters of Hickey Run, rather than limits for each individual outfall.

In essence, the Petitioners originally argued in their Petition that each outfall must have its own numeric effluent limit as allegedly required by 40 C.F.R. §122.45(a). We determined that the Petitioners failed to sustain their burden of showing clear error in the Region's decision to set an aggregate limit for the four outfalls in question because we concluded that the interpretation of the regulation offered by Petitioners is not required by the text of the regulation. We observed that the regulatory text refers to "each outfall *or* discharge point" in the disjunctive, and, therefore, we concluded that the regulation contemplated some flexibility in appropriate circumstances to frame effluent limits at a point other than the outfall. *DC MS4*, slip op. at 30. Although we concluded that the Petitioners failed to show clear error in the Region's decision to set an aggregate effluent limit for the Hickey Run outfalls, we nevertheless remanded the Permit's monitoring provision for that aggregate numeric limit. We concluded that the Region's proposed delayed development of the specific monitoring conditions (including subsequent identification, through a report approval process, of the location for such monitoring) failed to comply with the applicable regulations and Agency guidance. *Id.* at 31-33.

Now, the Petitioners, in arguing for reconsideration, suggest that in this case there is a nexus between the condition establishing an aggregate numeric effluent limit and the related monitoring requirements and that we should reserve judgment on the propriety of the aggregate limit until after the monitoring location has been established. The Petitioners, in effect, suggest that we should view the monitoring location as the "discharge point" proximate to the four outfalls, and they state that "when the Region makes that selection and explains why it complies

with the rule, the Board will be in a position to determine whether the Region's construction of the rule is lawful and reasonable." Motion for Reconsideration at 3.

We are persuaded that Petitioners have identified a sufficient nexus between the two conditions (the one specifying the aggregate effluent limit and one requiring monitoring against that limit) for us to defer acceptance of the aggregate limit until the monitoring location has been established. In addition, because, in view of the nexus between the two conditions, the Region may want to reconsider its approach to the aggregate limit in the course of setting the monitoring location, we hereby remand to the Region the condition setting an aggregate numeric effluent limit for the four Hickey Run outfalls. On remand, the Region may re-evaluate whether to set an aggregate limit, or whether to set individual limits, and the Region shall fully explain its reasons for the chosen limit(s) along with its explanation of the related monitoring requirements and monitoring location(s) that it establishes for the four Hickey Run outfalls.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 05/09/02

By: _____ /s/
Scott C. Fulton
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Motion for Partial Reconsideration in the matter of Government of the District of Columbia Municipal Separate Storm Sewer System, NPDES Appeal Nos. 00-14 & 01-09, were sent to the following persons in the manner indicated:

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Dated: 05/10/02

/s/
Annette Duncan