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April 12, 2006

Via Hand Delivery

Ms. Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: Government of the District of Columbia and
District of Columbia Water and Sewer Authority
Petition for Review

Dear Ms. Durr:

Enclosed are an original and five copies of the captioned petition. An additional copy is included to be date stamped and returned to our office by our representative.

Thank you for your assistance in this matter.

Sincerely,

David E. Evans

Enclosures

cc: Donald S. Welsh, US EPA Region 3 Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

GOVERNMENT OF THE DISTRICT OF COLUMBIA and DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Petitioners. In re: NPDES Permit No. DC0021199	NPDES Permit Appeal No. _____

PETITION FOR REVIEW

Pursuant to 40 C.F.R. § 124.19, the Government of the District of Columbia ("District") and the District of Columbia Water and Sewer Authority ("WASA") (collectively, the "Petitioners") jointly submit this Petition for Review ("Petition") to contest certain conditions in Amendment No. 1 to the above referenced NPDES Permit ("Permit) issued to the District for its Municipal Separate Storm Sewer System ("MS4").

The Petitioners seek review of a final determination by the United States Environmental Protection Agency, Region III ("EPA"), to amend the Permit to incorporate certain conditions related to discharge prohibitions and demonstrations of compliance. Copies of Amendment No. 1, the Fact Sheet, and EPA's Responsiveness Summary accompanying Amendment No. 1 are attached to and incorporated in this Petition as Exhibit A.

EPA issued a draft of Amendment No. 1 for public review and comment on July 21, 2005, and the Petitioners submitted joint written comments on the draft amendment on August 19, 2005. A copy of the Petitioners' comments are attached to and incorporated in this Petition as Exhibit B.

INTRODUCTION

The District owns and operates the MS4, and, as the permit holder, has overall responsibility for compliance with the Permit, including Amendment No. 1. WASA serves as the MS4's Storm Water Administrator, and is charged with coordinating the District's MS4 permit compliance activities among the District agencies with storm water management responsibilities.

Amendment No. 1 originated with an appeal of the Permit by Friends of the Earth and Defenders of Wildlife when the Permit was re-issued on August 19, 2004. Following negotiations among the parties to that appeal, Friends of the Earth and Defenders of Wildlife agreed to withdraw their appeal in return for EPA's agreement to propose certain amendments to the Permit to be incorporated in draft Amendment No. 1. Neither the District nor WASA were parties to the appeal, and, therefore, did not participate in the settlement negotiations. Pursuant to the settlement agreement, EPA issued a draft of Amendment No. 1 for public review and comment on July 21, 2005, and thereafter Friends of the Earth and Defenders of Wildlife submitted a request to the Environmental Appeals Board ("Board") seeking to withdraw their petition without prejudice. The Board granted this request by order dated October 28, 2005. Following public review and comment on the draft of Amendment No. 1, EPA made several modifications to the

proposed amendments and issued Amendment No. 1 on March 13, 2006, with an effective date of March 14, 2006.

BACKGROUND

Since the Permit was first issued in April, 2000, the District has achieved a number of significant milestones in the ongoing development and implementation of its MS4 program. These include the 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 Permit when it was re-issued in August, 2004.[1] These accomplishments reflect the Petitioners' commitment not only to the MS4 program, but also to restoration and protection of the District's rivers, particularly the Anacostia, so that their full economic, recreational, and environmental benefits are realized.[2]

These commitments notwithstanding, storm water management to achieve a specified water quality objective is an inherently inexact and uncertain undertaking, particularly in an urban setting as large and diverse as the District's. In fact, EPA has noted the types of MS4-related variables that can impact water quality, and has concluded that:

> [t]he 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

[1] Petitioners' Comments, at 1 & 2 (Exhibit B).
[2] The most significant examples include WASA's $1.3 billion (2001 dollars) 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. *Id.* at 2.

> to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow.[3]

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. These variables make discharges from MS4s and their associated water quality impacts and controls 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 the season of the year, the length of time between rainfall events, and rainfall intensity, duration, volume, and frequency. It is for these reasons that the Permit has employed "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" since it was first issued in 2000.[4] The Petitioners have, and continue to support this iterative approach because it is the only way to ensure continued water quality improvement while protecting MS4 owners and operators from liability for failing to achieve specified water quality objectives due to factors beyond their control.

It is against this background that EPA proposed Amendment No. 1 on July 21, 2005.

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

[4] Fact Sheet, Proposed Amendment No. 1 to NPDES Permit No. DC0000221, at 2 (Exhibit A).

CHALLENGED AMENDMENTS AND GROUNDS FOR REVIEW

The Petitioners objected to several of the proposed amendments when EPA issued a draft of Amendment No. 1 for public review and comment in July 2005. One was a proposed amendment to Part I.C.2 of the Permit which would have prohibited discharges of pollutants from the MS4 that cause or contribute to the exceedance of District of Columbia water quality standards.[5] The Petitioners also objected to a proposed amendment to Part IX.B which would require a permit modification before the District could use a method other than that specified in the Permit to calculate compliance with the waste load allocations referenced in the Permit.

A. The Amendment to Part I.C.2 Prohibiting Discharges From the MS4 That "Cause or Contribute to the Lowering of Water Quality From Current Conditions Within the District of Columbia" Is Clearly Erroneous.

Following the close of the public comment period and before issuing Amendment No.1, EPA changed the proposed amendment to Part I.C.2 from a prohibition on discharges that "cause or contribute to the exceedance of the District of Columbia water quality standards" to a prohibition on discharges that "cause or contribute to the lowering of water quality from current conditions within the District of Columbia." The Petitioners assert that this final amendment to Part I.C.2 violates Section 402(p) of the Clean Water Act, is arbitrary and capricious, is unconstitutional, and violates the NPDES permitting procedures.

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[5] When the Permit was re-issued in August 2004, Part I.C.2 prohibited discharges "to" the MS4 system that cause or contribute to the exceedance of District of Columbia water quality standards. The proposed amendment added the word "from" to the prohibition in this part. In their August 19, 2005 comments, the Petitioners objected to this proposed amendment, asserting that it violated the Clean Water Act because the prohibition was not qualified by the maximum extent practicable ("MEP") standard established in Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

At the outset, it is important to emphasize that the Petitioners' objection to the amendment to Part I.C.2 does not reflect their expectation that future discharges from the MS4 will cause or contribute to an overall decline in the quality of the District's waters. On the contrary, the Petitioners anticipate that under the iterative approach to the District's MS4 program discussed above, average pollutant concentrations and loads from the MS4 will continue to decline as monitoring and evaluation of existing storm water control measures leads to the installation and operation of additional and more effective measures.

The problem is that the final amendment to Part I.C.2 is so vague that it is subject to an almost endless variety of interpretations, many of which could be used as the basis for asserting that future discharges from the MS4 are "caus[ing] or contribut[ing] to the lowering of water quality from current conditions within the District of Columbia." For example, does "current conditions" mean water quality before, during, or after storm events? If it means water quality before or after storm events, would the District be in violation of the prohibition if sampling during a storm event showed lower water quality than the water quality at other times? Also, does "lowering water quality" mean adding to the concentration of pollutants or to the load of pollutants in the receiving waters?; does it mean lowering water quality at the storm water outfall or does it mean lowering water quality elsewhere in the receiving waters?; and, does it mean lowering water quality on an instantaneous basis or over some period of time? Further, larger storm events are known to contribute larger loads of pollutants than smaller storm events. Does "lowering water quality" mean that the District would be in violation of the discharge prohibition if monitoring of multiple storm events showed lower water quality caused by

larger storms following smaller storms? These are just a few of the compliance-related questions raised by the discharge prohibition added by EPA to Part I.C.2 after the close of the comment period.

1. The Amendment to Part.I.C.2 Violates Section 402(p) of the Clean Water Act

In its Responsiveness Summary for Amendment No. 1, EPA provided the following basis for changing Part I.C.2 to prohibit discharges "that cause or contribute to the lowering of water quality from current conditions within the District of Columbia":

> 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. [6]

Although arguably less stringent than the discharge prohibition proposed in the draft amendment to Part I.C.2, the discharge prohibition in the final amendment is still a water quality-based requirement, and, therefore, exceeds EPA's authority unless qualified by the MEP standard in Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

As noted in the Petitioners' comments on the draft of Amendment No. 1, when Congress amended the Clean Water Act ("CWA") in 1987[7], it added Section 402(p), which established a program specifically for municipal and industrial storm water systems.[8] 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

[6] *See* Responsiveness Summary Accompanying Amendment No.1, at 2 (Exhibit A).
[7] Pub. L. No. 100-4, 101 Stat. 7, 69 (1987)
[8] Petitioners' Comments, at 4 (Exhibit B).

with all applicable provisions of CWA § 301 (33 U.S.C. § 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.[9]

EPA might assert that it can require strict compliance with water quality standards under its discretionary authority in CWA § 402(p)(3)(B)(iii), which, in addition to the MEP standard, provides that permits for MS4s shall require "such other provisions as the Administrator ... determines appropriate for the control of such pollutants." The Petitioners respectfully submit that 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.[10] The only legally sound interpretation is that EPA can require compliance with water quality standards provided compliance with the standards does not require controls more stringent than MEP.

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[9] *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999), which held that the MEP standard governs MS4 discharges and that they are not required to comply with water quality standards.

[10] *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 and citation omitted).

As noted above, EPA's Responsiveness Summary states that the Permit, as it was re-issued in August 2004, was designed around "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."[11] From the Responsiveness Summary, it appears that EPA did not intend Amendment No. 1 to alter this framework.[12] Moreover, in finalizing Amendment No. 1, EPA added MEP-qualifying language to other conditions in the Permit that might otherwise be construed as water quality-based requirements.[13] Therefore, it is apparent that EPA views MEP as the appropriate control standard for the Permit, yet Amendment No. 1 inexplicably includes a water quality-based prohibition in Part I.C.2 that must be complied with even if it would require controls beyond MEP.

The Fact Sheet appears to suggest that EPA does not view the Part I.C.2 prohibition on discharges from the MS4 which cause or contribute to the "lowering of water quality" as inconsistent with the MEP standard because it does not require the District to do any more than is already being done to maintain existing ambient water quality, and, therefore, does not require the District to implement storm water controls beyond the maximum extent practicable.[14] But if that is the case, it is unclear why EPA did not simply include the MEP qualifier in the amendment to Part I.C.2 or at least explain why the qualifier was not added. What is clear, however, is that without the MEP qualifier, the District would be in violation of Part I.C.2 if it could be shown that water

[11] Responsiveness Summary, at 2 (emphasis added) (Exhibit A).
[12] "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." *Id.*
[13] *See* amendments to Part I.D.2 and 3, Amendment No. 1, at 2-3 (Exhibit A).
[14] On page 4 of the Fact Sheet EPA notes that it responded to the comments by "making modifications to account for existing ambient water quality conditions." Fact Sheet, at 4 (Exhibit A).

quality was lowered even if the District was implementing controls to the maximum extent practicable. Therefore, the Petitioners respectfully submit that the amendment to Part I.C.2 violates CWA § 402(p) without the MEP qualifier and is clearly erroneous.

2. The Amendment to Part I.C.2 Is Arbitrary and Capricious

Although, as discussed above, EPA's Responsiveness Summary contains a brief discussion of the basis for its decision to add the prohibition in Part I.C.2, that discussion fails to set forth a reasoned explanation for EPA's action or to offer a "rational connection between the facts found and the choice made."[15] While the Petitioners objected to the discharge prohibition originally proposed in the draft amendment to Part I.C.2, at least the basis for and meaning of that prohibition were apparent. The basis for and meaning of the prohibition in the final amendment to Part I.C.2, on the other hand, are far from apparent, and EPA's Fact Sheet and Responsiveness Summary fail to offer a reasoned explanation for the amendment. Indeed, it is difficult to make any sense of either the explanation for the amendment or the amendment itself.

With respect to EPA's explanation for the amendment, EPA received comments on the proposed amendment from the Petitioners and others requesting either that Part I.C.2 remain unchanged (no discharge prohibition) or that the MEP standard be added to the prohibition. Rather than adopting either of these alternatives, however, EPA changed the amendment to incorporate language which the Responsiveness Summary suggests was intended by EPA to respond to the Petitioners' comments by clarifying that the amendment was intended to be fully consistent with the Permit's "framework for a long-term storm water management control program for determining compliance with

[15] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations and citation omitted). *See also Professional Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997).

applicable water quality standards 'to the maximum extent practicable' through the use of best management practices."[16] EPA could have easily fulfilled its stated intent by doing as the Petitioners and others had requested. Instead, it retained the discharge prohibition, but rather than adding the MEP qualifier, amended Part I.C.2 after the comment period to apply to discharges which caused or contributed to "the lowering of water quality from current conditions." A water quality-based prohibition such as this is fundamentally inconsistent with the technology-based MEP standard because the District can be in compliance with the MEP standard and still violate this prohibition. Therefore, the Petitioners respectfully submit that there is no rational connection between the amendment to Part I.C.2 and EPA's explanation for the amendment.[17]

As explained above, the discharge prohibition in Part I.C.2 is subject to an almost endless variety of interpretations. Consequently, it will be virtually impossible for the District to know whether its MS4 is in compliance with the prohibition from one storm event to the next. Although offering no explanation[18], EPA apparently added the following definition at least in part to define the term "current conditions" in the Part I.C.2 discharge prohibition.

> "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

[16] Responsiveness Summary, at 2 (Exhibit A).
[17] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (finding that when the agency "failed to consider an important aspect of the problem, offered an explanation of its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" that the action is arbitrary and capricious). *See also Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004) (overturning agency action for failure to adequately explain "the specific analysis and evidence upon which the Agency relied").
[18] This in itself is enough to warrant remand of the Permit. *See Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 48 (finding that the agency must "cogently explain why it has exercised its discretion in a given manner").

based standards) of the Storm Water Management Program within the District of Columbia.[19]

Unfortunately, this definition only compounds the uncertainty surrounding the meaning of the requirement imposed by the Part I.C.2 discharge prohibition. Since the prohibition in Part I.C.2 is directed at discharges from the MS4, compliance with the discharge prohibition can only be determined based upon the water quality impacts of discharges from the MS4 from one storm event to the next. Consequently, one would assume that a "lowering of water quality from current conditions" would involve an analysis of the water quality impacts of future individual storm events against ambient water quality conditions existing at the time the Amendment No. 1 was issued. But the definition of "current conditions" refers to a "trend analysis" involving the collection and analysis of data over time. The Petitioners respectfully submit that it is impossible for the District to know whether it is in compliance with the discharge prohibition in Part I.C.2 based upon a trend analysis. Consequently, the permit condition establishes a standard of compliance which is so vague and ambiguous as to be unintelligible. Such agency action is inherently arbitrary and capricious, as there is no way to determine whether it represents the application of agency expertise to lawfully establish standards and criteria to arrive at a reasoned, principled decision.[20]

3. The Amendment to Part I.C.2 Is Unconstitutional

For the reasons discussed above, the discharge prohibition in Part I.C.2 is so confusing that it fails to give the District fair notice of its legal obligations, and, therefore, is unconstitutional because it violates fundamental principles of due process.

[19] *See* Amendment No. 1, Part X (Exhibit A).
[20] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

> [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.[21]

In order to provide due process, the prohibition in Part I.C.2 must satisfy two prongs of inquiry. First, it must provide sufficient notice to the District of what is lawful and what is unlawful conduct, and must do so with "ascertainable certainty."[22] The prohibition is so vague and confusing that the District has no way of knowing what is required of it or whether it is in compliance with the prohibition even if it has met the MEP standard by implementing every BMP required by the Permit; and as the prohibition applies throughout the life of the Permit, the prohibition is "vague in all of its applications."[23] Consequently, the prohibition does not provide the District with fair warning of its obligations, and is unconstitutional.[24]

The second prong of the constitutional inquiry is whether the prohibition impermissibly grants discretionary powers to enforcement officials due to its vagueness. Here, the Permit essentially leaves the determination of whether water quality has been "lower[ed]...from current conditions" up to those enforcing the Permit, who may apply any data, calculations or methods they deem appropriate in determining whether the District is in compliance with the prohibition. As such, compliance may be determined

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[21] *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).
[22] *See Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 29 (1992) (quoting *Diamond Roofing*, 528 F.2d at 649).
[23] *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).
[24] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary application.[25] Therefore, the discharge prohibition in Part I.C.2 is void for vagueness.

4. The Amendment to Part I.C.2 Violates the Permitting Procedures

The NPDES permitting procedures require EPA to give public notice of draft permits and permit amendments.[26] The regulations further provide that the Regional Administrator may reopen the comment period if information or arguments received "appear to raise substantial new questions concerning a permit."[27] While the decision to reopen the comment period is generally discretionary, where a change to the permit "is significant, [and] where the record does not contain sufficient support for the change, and where the insufficiency of the record relating to the significant change has frustrated the public's opportunity to meaningfully comment ... reopening the comment period is appropriate."[28]

Here, the change was significant as the amendment to Part I.C.2 altered not only the basis for the condition, but also substantially altered the manner in which the District must demonstrate permit compliance. As in the rulemaking context, where the final permit condition is not a "logical outgrowth" of the draft permit, and the public could not have anticipated the changes that were made to the permit, a new round of public notice and comment is appropriate.[29] A common method for determining whether final agency action is a "logical outgrowth" of a proposal, is whether a party would have submitted additional or different comments had they had notice of the changes.[30] Here, the

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[25] *See id.* at 109.
[26] 40 CFR § 124.10(a)(1)(ii).
[27] 40 CFR § 124.14(b).
[28] *In re Newburyport Wastewater Treatment Facility*, NPDES Appeal No. 04-06, 2005 EPA App. LEXIS 23, at *23-24 (EAB Dec. 8, 2005).
[29] *See City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003).
[30] *Id.*

Petitioners most certainly would have offered comments which at the very least would have sought clarification of the District's obligations under the discharge prohibition in the amendment to Part I.C.2. Consequently, reopening the comment period would have been appropriate in this case.[31]

B. The Amendment to Part IX.B Retaining the Procedure for Calculating Compliance with the TMDL Waste Load Allocations Specified in Part IX.B and Requiring a Permit Modification To Use a Procedure Other Than That Specified in Part IX.B is Clearly Erroneous.

Part IX.B of the Permit establishes a process for tracking the District's progress in reducing loads from the MS4 for those pollutants for which Total Maximum Daily Load ("TMDL") MS4 waste load allocations ("WLA") have been established. In summary, the process calls for using the data from monitoring of representative MS4 outfalls to calculate pollutant loads, and then comparing the loads to the WLAs for the MS4.

The third paragraph of Part IX.B provides that the District must use the "Simple Method" to calculate the load for each pollutant before that load is then compared to the corresponding WLA. Soon after the Permit was re-issued in August 2004, the District concluded that the Simple Method employed a different approach to calculating pollutant loads than the approach used to arrive at the WLAs for the MS4, and, therefore, comparing the Simple Method load estimates to the WLAs was not a scientifically sound and reliable procedure for tracking progress. Following extended discussions between the District and EPA to resolve this problem, the District submitted to EPA for approval an alternative procedure which involved using the Simple Method for calculating both the baseline and future MS4 pollutant loads, and then comparing these to the percent

[31] *See In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993) (remanding a permit to reopen the comment period following the region's failure to provide adequate opportunity to comment on changes to the permit).

reduction reflected in the WLAs. The District submitted the alternative procedure to EPA in August 2005 as part of the Rock Creek Watershed TMDL WLA Implementation Plan ("Plan") pursuant to the provisions of the third paragraph of Part IX.B of the Permit which authorized EPA to approve an alternative procedure without permit modification.

While Plan approval was pending, EPA proposed to modify the third paragraph in Part IX.B of the Permit as part of Amendment No. 1. However, rather than incorporating the alternative procedure proposed by the District, the amendment proposed to delete the alternative procedure approval process authorized by the Permit and used by the District to submit its proposed alternative procedure, and, instead, require that an alternative procedure be approved only by permit modification. In their comments on Amendment No. 1, the Petitioners objected to this proposed modification because it would affect approval of the pending alternative procedure submitted by the District.

After the close of the comment period for Amendment No 1, but before the amendment was issued, EPA commented on the Plan, but did not make any comments or raise any objections to the alternative procedure thereby effectively approving the alternative procedure. However, EPA did not modify Amendment No. 1 to include the alternative procedure or re-open the public comment period to propose incorporating the alternative procedure in the Permit. Instead, EPA finalized the amendment to the third paragraph of Part IX.B as proposed, and in the process not only retained the procedure in Part IX.B knowing that it was not a scientifically sound and reliable method for calculating pollutant loads, but also requiring that an alternative procedure first be approved by permit modification before it can be used. The Petitioners respectfully submit that it was arbitrary and capricious for EPA to finalize Amendment No.1 as

proposed after it had effectively approved the alternative procedure.[32] Knowing that the procedure specified in Part IX.B was not scientifically sound and reliable and that it had effectively approved an alternative procedure, at the very least EPA should have reopened the comment period and proposed to incorporate the alternative procedure in the third paragraph of Part IX.B.

Dated: April 12, 2006

Respectfully submitted,

GOVERNMENT OF THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY

By Counsel

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[32] The decision clearly "runs counter to the evidence before the agency" and there is no "rational connection between the facts found and the choice made" by the Agency to issue Amendment No. 1 knowing that it was retaining a scientifically unsound procedure and requiring a permit modification to change it. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

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