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 Permit Appeal No. 11-05
	)	
NPDES Permit No. DC0000221	)	

DC WATER'S AND WWP'S REPLY TO EPA'S AND DDOE'S RESPONSES TO PETITION FOR REVIEW

The District of Columbia Water and Sewer Authority ("DC Water") and the Wet Weather Partnership (the "WWP"),[1] (collectively, the "Petitioners"), jointly file this Reply to the responses to their Petition for Review submitted by the United States Environmental Protection Agency Region III ("EPA") and the District Department of the Environment ("DDOE") in the above-captioned matter. Petitioners jointly filed their Petition for Review on November 4, 2011. EPA and DDOE separately filed responses to Petitioners' Petition for Review on June 11, 2012.

Contrary to the arguments raised in EPA's and DDOE's responses, the Board should grant Petitioners' Petition for Review to address the legal shortcomings of the District of Columbia Municipal Separate Storm Sewer Permit (the "Permit") which implicate a number of issues of national significance.

[1] WWP's participation in the reply brief is limited to issues related to condition 4.3.1.3 of the final MS4 Permit, pursuant to the Board's order of February 2, 2012.

ARGUMENT

A. Petitioners Have Standing to File a Petition for Review

1. DC Water Has Standing as a Co-Permittee and Person that Filed Comments

DC Water has standing to file a petition for review as a co-permittee and a person that filed comments on the Draft Permit. The Permit treats DC Water as a co-permittee by expressly referring to DC Water by name and imposing direct legal, regulatory, compliance, and financial obligations on DC Water. "Permittee" is defined to include "independent agencies, such as the District of Columbia Water and Sewer Authority." Permit Section 9 (AR[2] 1). The Permit also indicates that DC Water is "responsible for complying with those elements of the permit within its jurisdictional scope and authorities" and requires it to "provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit." Permit Sections 2.2, 2.3.1 (AR 1).

DDOE mischaracterizes DC Water's position in claiming: "If DC Water wanted to be a permittee or co-permittee it could have filed or signed the permit application but has chosen not to do so. As such DC Water is not a permittee or a co-permittee and lacks standing to challenge this Permit." DDOE Response at 4. DC Water does not wish to be a permittee. DC Water would prefer to have no permit responsibilities whatsoever. Nevertheless, as a separate legal entity from the District of Columbia, DC Water is compelled to assert its *de facto* position as a permittee (albeit an involuntary permittee) in this appeal to clarify what its obligations are under the Permit and to file a protective challenge to several erroneous Permit provisions in case those

[2] References to the Administrative Record are based on the Certified Index to the Administrative Record. Petitioners only received a copy of the Administrative Record on June 14, 2012. Therefore, Petitioners have not had sufficient time to fully review the content of the Administrative Record. Petitioners reserve the right to seek to augment this Reply to address any issues that come to light once Petitioners have reviewed the Administrative Record.

provisions were intended to be implemented by DC Water. Unfortunately, the proceedings to this point in this appeal have confirmed DC Water's fears that EPA and/or DDOE may look to DC Water to comply with several of the contested Permit provisions, such as the requirement to provide public notice of sanitary sewer overflows ("SSOs") to the MS4 system and to implement aspects of the forthcoming consolidated TMDL implementation plan. Despite the Board's Alternative Dispute Resolution process, a mutually agreeable understanding of permit responsibilities between DDOE and DC Water has not been reached more than eight months after the Permit was issued.

Regardless of DC Water's status as an unwilling permittee, it has standing to challenge the Permit under 40 C.F.R. § 124.19(a). Pursuant to federal regulation, "any person who filed comments on [a] draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision." 40 C.F.R. § 124.19(a). DC Water satisfies this standing requirement because it (1) filed comments on the Draft Permit and (2) qualifies as a "person" under EPA's regulations.

DC Water submitted timely written comments on the Draft Permit on June 4, 2010. DC Water, George Hawkins, Comment Letter (June 4, 2010) (AR 14). Those comments were incorporated by reference in DC Water's Petition for Review and were attached as Exhibit B to the Petition.

DC Water is also a "person" independent from the District Government, with standing to file suit separately. "Person" is defined under 40 C.F.R. § 124.2(a) as an individual, association, partnership, corporation, municipality, State, Federal, or Tribal agency, or an agency or employee thereof." DC Water's enabling statute establishes it as "a *corporate body*, created to effectuate certain public purposes, that has a *separate legal existence* within the District

government." Therefore, DC Water meets the definition of "person" as an independent corporation. DC Water also qualifies as a "person" as an independent agency of a municipality. *See* Permit at 51 (AR 1).

DC Water is not, as DDOE claims, "similarly situated with the other District Stormwater Agencies," DDOE Response at 2, 7. Instead, DC Water is uniquely established as an "independent authority" with "a separate legal existence within the District government." D.C. Code § 34-2202.02(a). Critically, DC Water's enabling statute gives it the power "[t]o sue and be sued" on its own behalf, rather than conducting its legal business through the Attorney General of the District of Columbia as DDOE must do. D.C. Code §§ 1-301.81(a)(1), 34-2202.03. DC Water is exercising this express power here in appealing the Permit. The District of Columbia Court of Appeals has specifically ruled that DC Water is a separate, independent legal entity from the District of Columbia government. *See District of Columbia Water and Sewer Authority v. Delon Hampton & Associates*, 851 A.2d 410, 412 (D.C. 2004); *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 977-78 (D.C. 2001), *adopted*, 800 A.2d 686 (D.C. 2002); *New 3145 Deauville, L.L.C. v. First American Title Insurance Company*, 881 A.2d 624 (D.C. 2005).[3] For example, the *Dingwall* court held that DC Water "demonstrably is not the same entity as the District of Columbia," basing this conclusion on the fact that DC Water "is 'sui juris'; i.e., it has the power '[t]o sue or be sued' in its own name," and DC Water has the power to enter into contract with the District, which "is inconsistent with the notion that [DC Water] is indistinguishable from the District" because "an entity does not contract with itself." *Dingwall*, 766 A.2d at 977-78. The holdings of the cases recognizing DC Water's legal independence are not "narrow in scope" as DDOE has alleged, DDOE Response at

[3] See also DC Water's and WWP's Response to DDOE's Additional Briefing and Board's Order to Show Cause, dated January 26, 2012, for a detailed explanation of DC Water's separate legal status and case law confirming that status.

6, but rather are broadly worded and directly hold that DC Water is legally distinct from the District Government and vice-versa. Because DC Water is an independent legal "person" that filed comments on the Draft Permit, it has standing to file the Petition for Review.

2. WWP Has Standing to Challenge Changes to 4.3.1.3 from the Draft to Final Permit

WWP has standing to challenge the public notification requirement added to section 4.3.1.3 after public notice and comment. Pursuant to 40 C.F.R. § 124.19(a) a "person" that did not comment on a draft permit or participate in a public hearing may petition for administrative review "to the extent of the changes from the draft to the final permit decision." The WWP is a trade association of communities owning and operating combined sewer systems and separate storm sewer systems, so it satisfies the definition of "person"—"an individual, *association*, partnership, corporation, municipality, State, Federal, or Tribal agency, or an agency or employee thereof." 40 C.F.R. § 124.2(a) (emphasis added).

The addition, without public notice or comment, of the requirement to notify the public within 24 hours of SSOs to the MS4 is undeniably a substantive change from the draft to the Final Permit, so it meets the standing requirement set forth in 40 C.F.R. § 124.19(a). *See* Permit Section 4.3.1.3 (AR 1). Contrary to DDOE's contention, *see* DDOE's Response to Petition for Review at 8, this is a substantive change, with serious policy and legal implications. Notifying the public is completely different in nature from notifying "appropriate sewer and public health agencies," which was the scope of the SSO notification requirement included in the Draft Permit. Draft Permit Section 4.3.1.3 (AR 2). While public health agencies are equipped to evaluate the severity of each SSO and formulate an appropriate response, the general public does not have the resources required to judge the significance of each SSO. Those agencies of the District Government are free to issue whatever public notification they deem appropriate in response to

their receiving notice of a sewer overflow reaching the MS4 system. There is no need for the Permit to mandate notice for all SSOs.

Automatically issuing indiscriminate notifications of each and every SSO to the MS4 will confuse the public with marginal or unhelpful information, much of which is irrelevant to the needs of the public (e.g., notifications of low volume SSOs with little or no public health or environmental impact), resulting in important notifications of significant SSOs going unnoticed in the midst of the more frequent minor SSOs. This public policy issue is unique to public notifications and was not implicated by the previous notification requirements. The addition of the public notice requirement also creates an inconsistency (not present with the provisions in the Draft Permit) with DC Water's Blue Plains NPDES Permit, which does not require public notice of all overflows from the Combined Sewer Overflow ("CSO") system. Furthermore, the public notification requirement lacks statutory or regulatory authority. Because EPA acted outside of its Clean Water Act authority in adding the public notice requirement, this change from the Draft Permit is legally invalid. Therefore, WWP has standing to challenge the public notice requirement for all SSOs reaching the MS4, which is a substantive change from the Draft to Final Permit.

B. Review Should Be Granted for Each of the Challenged Permit Provisions

Petitioners satisfy the threshold requirements of 40 C.F.R. § 124.19(a), and the Board should grant review of the challenged Permit provisions. The issues raised in the Petition for Review were previously raised during the public comment period for the Draft Permit, with the exception of the public notice requirement added to section 4.3.1.3 of the Final Permit after the public comment period. The comments submitted on the Draft Permit by DC Water on June 4, 2010 (AR 14), which were incorporated by reference and attached as Exhibit B to DC Water's

Petition for Review, adequately presented the issues raised by DC Water in the Petition for Review. However, DC Water notes that uncertainty at the time EPA published the Draft Permit (which, notably, has continued to the present) regarding which Permit tasks were to be fulfilled by DC Water, versus DDOE and the other stormwater agencies, had a chilling effect on DC Water submitting more extensive comments. This uncertainty was exacerbated by the unique relationship between DC Water and DDOE. DC Water expected that EPA would have involved DC Water more in the Permit development process, e.g., by including DC Water in the meetings held with commenters (including DDOE) after the close of the public comment period. *See* EPA Response at 14 (noting that "EPA met with DDOE in October 2010 to discuss TMDL implementation planning and to coordinate that planning with the revised monitoring program" and made changes to the Permit based on those discussions). DC Water was not invited to participate in any such discussions. Nevertheless, the comments submitted by DC Water adequately raised the issues subsequently raised in the Petition for Review.

The Permit provisions challenged in the Petition for Review are "based on clearly erroneous findings of fact or conclusion of law." *See* 40 C.F.R. § 124.19(a). Furthermore, due to the issues of national significance raised in the Petition for Review, the Board should exercise its discretion to grant review of the important policy matters implicated, as well as review of EPA's exercise of its discretion. In their Petition for Review, Petitioners "specifically identify disputed permit conditions and demonstrate why review is warranted." *In re LCP Chemicals-N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993). For the reasons discussed below and in the Petition for Review, the Board should grant review of each of the provisions challenged.

1. DC Water's Status as an Unwilling Co-Permittee

In its comments on the Draft Permit, DC Water clearly raised the issue of the need to specify the responsibilities of co-permittees under the Permit by recommending that the language in section 2.3.1 imposing direct permit responsibility on DC Water be amended to read, "Each named entity [including DC Water] is responsible for complying with those elements of the permit within its jurisdictional scope and authorities <u>as defined in the 2000 MS4 Task Force Memorandum of Understanding (2000 MOU)</u>." The incorporation by reference of the division of permit responsibilities set forth in the 2000 MOU into permit section 2.3.1 would have identified the responsibilities of the various stormwater agencies, including DC Water. EPA's response to this comment is clearly inadequate because it simply restates the provisions in section 2.3.1 and 2.3.2 of the Permit, without providing any justification for refusing to make the significant change requested by DC Water. *See* Responsiveness Summary at 66 (AR 1).

EPA's decision to issue the Permit imposing broad compliance obligations on DC Water without delineating its specific responsibilities was clearly erroneous. DC Water is a separate legal entity from the District of Columbia Government and, as such, a co-permittee under the Permit. DC Water is entitled to have its Permit responsibilities clearly enumerated therein. The Permit refers to DC Water by name and purports to impose significant legal, regulatory, and financial obligations on DC Water. As the Permit is currently written, DC Water is explicitly included in the definition of "permittee." The Permit provides that "'Permittee' refers to the Government of the District of Columbia and all subordinate District and independent agencies, such as the *District of Columbia Water and Sewer Authority* . . . ." Permit Section 9 (AR 1) (emphasis added). Furthermore, the Permit treats DC Water as a permittee by directly imposing Permit responsibilities on DC Water. Permit Section 2.3.1 makes DC Water broadly

"responsible for complying with those elements of the permit within its jurisdictional scope and authorities," and Section 2.2 requires DC Water to "provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit." However, the Permit fails to identify what DC Water's compliance responsibilities actually are. DDOE has taken the position that DC Water's responsibilities are whatever DDOE may want them to be from time-to-time. *See* DDOE's Reply to DC Water's and WWP's Response to DDOE's Additional Briefing and Board's Order to Show Cause at 4 (Jan. 31, 2012).

DC Water is an independent legal entity from the District of Columbia Government, so it is imperative that the Permit specifically define DC Water's Permit obligations. Unlike the other Stormwater Agencies listed in Section 2.3.1 of the Permit, DC Water is an "independent authority" that is a "corporate body, created to effectuate certain public purposes, that has a separate legal existence within the District Government." D.C. Code § 34-2202.02(a). As noted above, DC Water's legal independence from the District Government has been confirmed by the District of Columbia Court of Appeals. *See District of Columbia Water and Sewer Authority v. Delon Hampton & Associates*, 851 A.2d 410, 412 (D.C. 2004); *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 977-78 (D.C. 2001), *adopted*, 800 A.2d 686 (D.C. 2002). The Permit compromises DC Water's legal and financial independence by broadly requiring DC Water to "comply[] with those elements of the permit within its jurisdictional scope and authorities" without identifying DC Water's obligations under the Permit. The Permit impermissibly compromises DC Water's legal and financial independence to the extent it allows DDOE to dictate permit obligations to DC Water with or without funding. This Permit crosses a

clear line of legal and financial independence between DC Water and the District Government. Creating and maintaining that independence is a central reason for DC Water's existence.

The issue of how EPA addresses co-permittees under NPDES permits is of national significance. EPA cannot impose responsibility for permit compliance on multiple legally independent entities without designating which tasks must be completed by each. Otherwise, the permit invites non-compliance and the predictable finger pointing that would follow among co-permittees. The Board should grant review of this issue and rule that when EPA issues an NPDES permit directly imposing compliance responsibilities on more than one legally independent entity, the permit must clearly delineate the obligations of each entity. Specifying each entity's Permit responsibilities will greatly increase the likelihood that all Permit obligations will be fulfilled by eliminating uncertainty regarding which tasks must be carried out by which entity. It is particularly essential in this case, from a legal, practical, and financial standpoint, that the Permit be amended to enumerate DC Water's specific responsibilities. The Board should grant review on this issue because EPA's failure to enumerate DC Water's responsibilities was based on a clearly erroneous finding of fact and/or conclusion of law regarding DC Water's independence and status under the Permit.

2. SSO Public Notice Requirement

Subsequent to the public notice and comment period on the Draft MS4 Permit, EPA impermissibly added a requirement to notify "the public within 24 hours when the sanitary sewer overflows to the MS4" to Permit Section 4.3.1.3. The addition of this significant public reporting provision without following the requisite public notice and comment procedures violated the EPA's regulatory requirements. *See* 40 C.F.R. §130.7(d)(2). As discussed in Part A.2 above, this is a major change from the Draft Permit with serious practical and legal

implications. EPA boldly states that notice and comment was not necessary because "[t]his addition is not a significant change." EPA Response at 9. This weak argument is facially wrong. Moreover, EPA implicitly concedes its error with its recent decision to put the requirement out for public notice and comment as part of its pending May 18, 2012 settlement of Petition for Review No. 11-06. Settlement Agreement, Attachment A at 1, *In re Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221*, EAB NPDES Appeal No. 11-06 (May 18, 2012) (attached hereto as Exhibit 1).[4] This is remarkable because the Petition for Review in Appeal No. 11-06 did not raise this issue. The inclusion of the procedural (but not legal) cure to the procedural error regarding this requirement in the Settlement Agreement is an implicit concession that the change from the Draft to Final Permit was a substantive amendment. EPA's practice of adding substantive requirements to NPDES permits without providing public notice or an opportunity for comment is improper, and, accordingly, the public notice requirements should be removed from Section 4.3.1.3 of the Permit.

Apart from the procedural defect, this provision is clearly erroneous because EPA lacks legal authority to require public notice. Moreover, such notice is contrary to public policy. These are issues of national significance that warrant the Board's review. Petitioners are unaware of any authority that would allow EPA to require public notification for each SSO. There is no such requirement in either the Clean Water Act or EPA's regulations (which address the issue but only require reporting to the District Government and/or EPA). In its Response, EPA was unable to identify any statutory or regulatory authority for the public notice requirement to counter Petitioners' assertion that this provision is unauthorized. EPA was left to

[4] Petitioners are attaching the Settlement Agreement as an exhibit to this reply because it does not appear to be posted on the Environmental Appeals Board's online docket.

generally cite to its own unpromulgated guidance documents. *See* EPA Response at 10 n.6, 12. Numerous courts have rejected EPA attempts to rely on such unpromulgated guidance, issued without the public safeguards of the Administrative Procedure Act's public notice and comment procedures, to impose or amend legal requirements. *See, e.g., National Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37, 45-49 (D.D.C. 2011). Furthermore, the relevance of the guidance documents cited by EPA is limited, and to our reading, none of them state that EPA may require public notification for all SSOs that reach an MS4. The first of the documents cited by EPA is not even final agency guidance, but rather a *draft* policy, and it explicitly "only applies to peak wet weather diversions around secondary treatment units that occur at publicly owned treatment works (POTW) treatment plants serving separate sanitary sewer systems that are recombined with flow from the secondary treatment unit." U.S. EPA, National Pollutant Discharge Elimination System Permit Requirements for Peak Wet Weather Discharges from Publicly Owned Treatment Plants Serving Separate Sanitary Sewer Collection Systems (Dec. 2005), *available at* http://www.epa.gov/npdes/pubs/proposed_peak_wet_weather_policy.pdf.

Additionally, the public notice requirement for SSOs to the MS4 is inconsistent with EPA's Permit for DC Water's Blue Plains Treatment Plant (NPDES Permit Number DC 0021199), which does not require public notice for each SSO (or dry weather CSO) in its provisions for SSO reporting. That EPA does not require such reporting in the Blue Plains permit reinforces the conclusion that EPA lacks authority to impose such a requirement. Not only is the public notice requirement absent from the Blue Plains Permit, but to Petitioners' knowledge, it is nationally unprecedented. EPA has not pointed to a single other NPDES permit in which public notification of all SSOs has been required. *See* EPA Response at 5-7, 9-12.

Requiring public notification of all SSOs is contrary to public policy. As explained in more detail in Part A.2 above, public notice of every SSO that reaches the MS4, including low-volume SSOs that will have no public health or environmental impact, discharges during the non-recreation season, and in other circumstances, is counterproductive because it will desensitize the public to notifications regarding significant discharges. For these reasons, DC Water objects to the requirement of public notice in the MS4 Permit. EPA's backdoor effort to cure its procedural error, of including the requirement after the public comment period, by re-proposing the requirement as part of the settlement of Petition for Review No. 11-06 will not address or cure the lack of authority for this requirement.

Because it is procedurally flawed, beyond EPA's legal authority, arbitrary and capricious, and contrary to public policy, the SSO public notice requirement should be removed from the Permit.

3. Consolidated TMDL Implementation Plan Requirement

The Permit provisions requiring the development within two years and implementation of a Consolidated TMDL Implementation Plan, including fixed end dates for compliance with TMDL wasteload allocations, annual pollutant loading reductions, interim numeric milestones, and a modeling demonstration of how wasteload allocations will be attained, would set a national precedent and would be impossible to satisfy. The permit should be remanded to EPA to remove this clearly erroneous and arbitrary and capricious provision. The Consolidated TMDL Implementation Plan provision is based on important policy considerations which the Board should exercise its discretion to review.

DC Water raised a number of issues with the Implementation Planning provisions in its comments on the Draft Permit. DC Water, George Hawkins, Comment Letter (June 4, 2010) (AR

14). DC Water's comments included suggestions for adding flexibility to the requirements to make them more feasible, such as replacing the requirement for a date for final compliance with the wasteload allocation in Section 8.1.3.A with "an estimated date for achieving compliance with the WLA using an iterative program of BMPs to the MEP." *Id.* DC Water suggested changing the numeric benchmark requirement in Section 8.1.3.C to allow for best management practice ("BMP") implementation benchmarks instead of, or in addition to, annual pollutant load reductions. *Id.* Additionally, DC Water suggested adding a provision to Section 8.1.3.H reading "Compliance with the TMDL-related aspects of each approved SWMP Annual implementation Plan shall constitute compliance with the schedule for achieving applicable TMDL WLAs." *Id.* EPA rejected DC Water's suggestions without providing an adequate explanation as to how the Consolidated TMDL Implementation Plan provisions could possibly be achieved. *See* Responsiveness Summary at 78 (AR 1). EPA claimed that compliance schedules for interim milestones and final attainment are required "as a result of the increased knowledge and development in stormwater control techniques within the District." *Id.* However, EPA ignored the fact that the present level of knowledge and development in stormwater control techniques is not advanced enough to allow a permittee to determine the date of final achievement and interim milestones before an iterative BMP process has even begun. EPA provided no response to DC Water's comment regarding Section 8.1.3.H. *Id.*

EPA argues that the issue of the inadequate time period provided for development of the Consolidated TMDL Implementation Plan was not raised in DC Water's comments on the Draft Permit. EPA Response at 7. This argument is irrelevant because "A petitioner with standing may raise any issues that are eligible for review under the regulations, even if the petitioner did not raise or previously comment on that particular issue." EAB Practice Manual at 43 (Sept.

2010). Here, DC Water has standing to challenge the deadline for development of the Consolidated TMDL Implementation Plan because the issue was raised in the public comment period by DDOE. In its comments on the Draft Permit, DDOE opposed the one-year deadline for development of TMDL Implementation Plans that was included in the Draft Permit, arguing that more time would be required. *See* Responsiveness Summary at 57 (AR 1). Although the time for development of the Consolidated TMDL Implementation Plan was extended to two years in the Final Permit, that time period remains insufficient. DDOE's comments put EPA on notice that the deadline could be challenged, and DC Water is entitled to raise this issue in its Petition for Review.

Although EPA's Response to the Petition for Review maintains that the Consolidated TMDL Implementation Plan requirement is practicable, the May 18, 2012 Settlement Agreement reached with the Environmental Petitioners is indisputable evidence to the contrary. *See* Settlement Agreement, Attachment A at 2-4, *In re Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221*, EAB NPDES Appeal No. 11-06 (May 18, 2012) (attached hereto as Exhibit 1). Petition for Review No. 11-06 did not in any way assert that the 24-month period to develop the Consolidated TMDL Implementation Plan was too short. Nevertheless, EPA is taking the opportunity of the settlement of that appeal to extend the deadline for the TMDL plan from 24 to 30 months. *Id.*, Attachment A at 2. This proposed 25% increase in time to complete the plan, when the Environmental Petitioners' appeal did not even raise this issue, demonstrates that the Consolidated TMDL Implementation Plan requirement is unattainable as it is written. It would be impossible to complete the plan in the two years provided given the complexity of the task of developing a consolidated plan for approximately 370 TMDL wasteload allocations, covering more than 200 water quality limited

segments in the District of Columbia, impaired by a wide variety of pollutants. DC Water does not believe that either 24 or 30 months is enough time to develop a meaningful plan for such an extensive array of pollutants and varied water bodies.

Significantly, while not raised in Petition for Review No. 11-06, the Settlement Agreement also proposes to revise one of the key Permit requirements that DC Water challenged as being impossible. The Settlement Agreement proposes that EPA add a definition of "benchmarks," providing that annual pollutant load reduction benchmarks are unenforceable goals rather than enforceable permit terms. *Id.*, Attachment A at 4. Again, this issue was not raised in the Environmental Petitioners' Petition for Review. Its inclusion in the Settlement Agreement is an implicit concession by EPA as to the impracticability of the Consolidated TMDL Implementation Plan requirement which DC Water has raised in Permit Appeal No. 11-05. Requiring the permittee to guarantee annual pollutant loading reductions would be asking for the impossible due to the extreme variability in MS4 pollutant concentrations and loadings. Despite the very significant change to the TMDL plan requirement which EPA seeks to make through settlement of Permit Appeal No. 11-06, EPA claims in its response to Permit Appeal No. 11-05 that the provision being changed is attainable. EPA's action in the settlement of Permit Appeal No. 11-06 is irreconcilably inconsistent with words in its Response to Petition for Review No. 11-05. Further, EPA has admitted, "there can be significant variability in MS4 pollutant concentrations and loadings." EPA Response at 14. This significant variability makes it impossible for the permittee (whichever one that turns out to be) to guarantee annual loading reductions as mandated in the Consolidated TMDL Implementation Plan section of the Permit. *See* Permit Section 4.10.3 (AR 1). EPA claims that annual loading reductions can be guaranteed because "[t]here are numerous studies, models, calculators, and other tools for estimating

reductions from stormwater BMPs." EPA Response at 14. However, EPA ignores the obvious fact that "pollution reduction estimates" are completely different from guaranteed annual pollutant load reductions. A mere estimation tool cannot be relied upon to ensure annual reductions given the admitted significant variability.

Unfortunately, certain elements of the TMDL Implementation Plan requirement would remain unattainable and arbitrary and capricious even if the proposed Permit amendments in the Settlement Agreement of appeal No. 11-06 are adopted. The Permit requires the District Government to set a fixed end date for achievement of each of the approximately 370 applicable TMDL wasteload allocations as well as enforceable interim numeric milestones. *See* Permit Section 4.10.3; http://iaspub.epa.gov/tmdl_waters10/attains_impaired_waters.tmdls?p_state=DC. DC Water believes that it will be impossible for the District Government to develop an adequate Consolidated TMDL Implementation Plan in compliance with these requirements. In order to accurately determine the date by which wasteload allocations will be achieved, the District Government will need the benefit of iterative BMP implementation over several permit cycles. Before BMPs have been piloted, evaluated, implemented, and modified as appropriate, it is impossible to determine a compliance end date that is anything more than an uneducated guess. It is arbitrary and capricious for EPA to require the District Government to take a shot in the dark in setting a fixed end date and interim milestones for all these WLAs without first having the benefit of the iterative implementation of BMPs over a number of MS4 permit cycles. Furthermore, it is likely that many of the TMDL wasteload allocations, such as the unprecedented 90-98% reduction in fecal coliform bacteria discharged to the Anacostia River, are altogether unattainable given the current state of BMP technology. *See* http://www.epa.gov/waters/tmdldocs/dc_tmdl-AnacostiaRiver-AnacostiaBac_DR.pdf. The

Consolidated TMDL Implementation Plan requirements in Permit Section 4.10.3, including fixed end dates for achieving wasteload allocations and interim milestones, are arbitrary and capricious and should be removed from the Permit. These impossible requirements set up the District Government and DC Water to fail.

DDOE argues that Petitioners' Consolidated TMDL Implementation Plan claim should be dismissed because "DDOE as the designated agency is responsible for developing and drafting the plan," and "should DDOE fail to timely complete the plan it will be the Permittee, through DDOE, that is in violation of the Permit, not DC Water and the other Stormwater Agencies." DDOE Response at 9. DC Water appreciates DDOE's declaration that DC Water is not responsible for developing the Consolidated TMDL Implementation Plan and agrees that DC Water should not be responsible for fulfilling this Permit obligation. However, the Board should note DDOE's silence as to the implementation of the TMDL plan. DDOE does not also confirm that DC Water will not be stuck with the impossible requirement of meeting the annual loading reductions and the compliance end dates which DDOE may specify for all the TMDLs. If DDOE will accept that responsibility and memorialize such a commitment in the Permit, then DC Water will withdraw its challenge to this issue.

DC Water has a right to challenge permit provisions even if it is not ultimately responsible for them, pursuant to 40 C.F.R. § 124.19(a).

4. Additional Pollutant Source Provision

Section 4.11 of the Permit contains the vague and overbroad requirement to "implement controls to minimize and prevent discharges of pollutants from additional pollutant sources, included but not limited to Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash to receiving waters."

DC Water commented on Sections 3.1 and 3.3 of the Draft Permit, which were consolidated into section 4.11. DC Water's comments on the Draft Permit indicated that the requirement to "minimize and prevent" discharges should be replaced with a requirement to "control" discharges because it is impossible to completely eliminate such pollution. In response to DC Water's comment, EPA contended that the requirement to "minimize and prevent" discharges is consistent with the Clean Water Act requirement that MS4 permits "require controls to *reduce* the discharge of pollutants." Responsiveness Summary at 67 (AR 1) (*quoting* 33 U.S.C. § 1342(p)(3)(B)(iii)). This response is irrational because "reducing" discharges, as required by the statute, is clearly a narrower requirement than "preventing" discharges as required in Section 4.11 of the Permit. Additionally, it is unclear what actions the permittee must take to comply with this provision or what is meant by "additional pollutant sources" (this phrase was added to the Final Permit after the comment period).

As with the Consolidated TMDL Implementation Plan requirement, DDOE's response notes that this requirement is DDOE's responsibility and is not DC Water's obligation. DDOE Response at 9-10. However, the failure of the Permit to enumerate DC Water's responsibilities makes this an empty assurance, particularly in light of DDOE's position that they can dictate requirements to DC Water with or without funding as they wish and that such requirements may change. DDOE even indicates that some sort of unspecified assistance may be required of DC Water to complete this vague requirement. DDOE Response at 10. In any case, DC Water is entitled to appeal this vague and overbroad Permit provision in accordance with 40 C.F.R. § 124.19, regardless of which entity is ultimately responsible for fulfilling the obligation under the Permit. However, if DDOE will accept full responsibility for complying with this requirement

and memorialize such allocation of responsibility in the Permit, then DC Water will withdraw its challenge to this requirement.

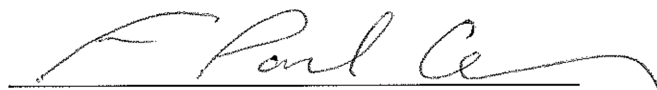
CONCLUSION

The issues raised in Petitioners' Petition for Review, including the treatment of co-permittees in NPDES permits, the unauthorized and nationally unprecedented SSO public notice requirement, the nationally unprecedented and impracticable Consolidated TMDL Implementation Plan requirement, and the vague and overbroad Additional Pollutant Sources requirement, are issues of national significance warranting review by this Board. The District of Columbia MS4 Permit will be a model for MS4 permits nationwide because it covers the nation's capital and because U.S. EPA issues the permit. Petitioners have standing to challenge these provisions and have satisfied the requirements of 40 C.F.R. § 124.19(a) for review by the Board. For all of the foregoing reasons, as well as the reasons set forth in their Petition for Review, Petitioners respectfully request that the Board grant their Petition for Review.

Dated: June 14, 2012

Respectfully submitted,

THE DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY AND THE
WET WEATHER PARTNERSHIP



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to EPA's and DDOE's Responses to Petition for Review was filed electronically with the Environmental Appeals Board and was served by regular first class U.S. Mail, postage prepaid, this 14th day of June, 2012, upon the following:

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