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 No. DC 0000221	)

EXHIBIT 1

NPDES Permit No. DC0000221

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT

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 stream segments tributary to each such water body

in accordance with the Stormwater Management Program(s) dated February 19, 2009, subsequent updates, and related reports, strategies, effluent limitations, monitoring requirements and other conditions set forth in Parts I through IX herein.

The effective issuance date of this permit is: October 7, 2011.

This permit and the authorization to discharge shall expire at midnight, on: October 7, 2016.

Signed this 30th day of September, 2011.

Jon M. Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency
Region III

PERMIT FOR THE DISTRICT OF COLUMBIA
MUNICIPAL SEPARATE STORM SEWER SYSTEM

TABLE OF CONTENTS

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1.1 Permit Area

This permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. This permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded herein from authorization under the District's stormwater program. Hereinafter these areas collectively are referred to as "MS4 Permit Area".

1.2 Authorized Discharges

This permit authorizes all stormwater point source discharges to waters of the United States from the District of Columbia's MS4 that comply with the requirements of this permit. This permit also authorizes the discharge of stormwater commingled with flows contributed by process wastewater, non-process wastewater, or stormwater associated with industrial activity provided such discharges are authorized under separate NPDES permits.

This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not further impaired and that the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and EPA regulations are met.

1.3 Limitations to Coverage

1.3.1 Non-stormwater Discharges

The permittee, as defined herein, shall effectively prohibit non-stormwater discharges into the MS4, except to the extent such discharges are regulated with an NPDES permit.

1.3.2 Waivers and Exemptions

This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any existing waivers and exemptions that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends to any activity that would otherwise be authorized under District law, regulations or

ordinance but which impedes the reduction or control of pollutants through the use of stormwater control measures and/or prevents compliance with the narrative /numeric effluent limits of this permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

1.4 Discharge Limitations

The permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the following requirements:

1.4.1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS);

1.4.2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); and

1.4.3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with the performance standards and provisions contained in Parts 2 through 8 of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

2. LEGAL AUTHORITY, RESOURCES AND STORMWATER PROGRAM ADMINSTRATION

2.1 Legal Authority

2.1.1 The permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards. To the extent deficiencies can be addressed through regulation or other Executive Branch action, the permittee shall remedy such deficiencies within 120 days. Deficiencies that can only be addressed through legislative action shall be remedied within 2 years of the effective date of this permit, except where otherwise stipulated, in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2.1.2 No later than 18 months following the effective date of this permit, the District shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall be consistent with this

permit, and shall be at least as protective of water quality as the federal Clean Water Act and its implementing regulations require.

2.1.3 The permittee shall ensure that the above legal authority in no way restricts its ability to enter into inter-jurisdictional agreements with other District agencies and/or other jurisdictions affected through this permit.

2.1.4 Review and revise, where applicable, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the following standards: (1) standards resulting from issuance of District stormwater regulations required by Section 2.1, paragraph 1 herein; and (2) performance standards required by this permit.

2.2 Fiscal Resources

The permittee, including all agencies and departments of the District as specified in section 2.3 below, shall provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit. For the core program the District shall provide a dedicated funding source. Each annual report under Part 6 of this permit shall include a demonstration of adequate fiscal capacity to meet the requirements of this permit.

2.3 Stormwater Management Program Administration/Permittee Responsibilities

2.3.1 The Government of the District of Columbia is the permittee, and all activities of all agencies, departments, offices and authorities of the District must comply with the requirements of this permit. The permittee has designated the District Department of the Environment (DDOE) as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit and the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to departments designated as "Stormwater Agencies" by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008:

District Department of Transportation (DDOT);
Department of Public Works (DPW);
Office of Planning (OP);
Office of Public Education Facilities Modernization (OPEFM);
Department of Real Estate Services (DRES);
Department of Parks and Recreation; and
DC Water and Sewer Authority (also known as and hereinafter referred to as DC Water).

Each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.

2.3.2 DDOE shall coordinate, and all agencies, offices, departments and authorities shall implement provisions of the existing MS4 Task Force Memorandum of Understanding (MOU) dated 2000, updated matrix of responsibilities (January 2008), any subsequent updates, and other institutional agreements to coordinate compliance activities among agency partners to implement the provisions of this permit. DDOE's major responsibilities under these MOUs and institutional agreements shall include:

1. Convening regular meetings and communication with MS4 Task Force agencies and other committees established to implement this permit to budget, assign and implement projects, and monitor, inspect and enforce all activities required by the MS4 permit.

2. Providing technical and administrative support for the MS4 Task Force and other committees established to implement this permit

3. Evaluating, assessing, and synthesizing results of the monitoring and assessment programs and the effectiveness of the implementation of management practices and coordinating necessary adjustments to the stormwater management program in order to ensure compliance.

4. Coordinating the completion and submission of all deliverables required by the MS4 Permit.

5. Projecting revenue needs to meet MS4 Permit requirements, overseeing the District's stormwater fees to fulfill revenue needs, and coordinating with DC Water to ensure the District's stormwater fee is collected.

6. Making available to the public and other interested and affected parties, the opportunity to comment on the MS4 stormwater management program.

2.3.3 Within 180 days of permit issuance, the permittee shall complete an assessment of additional governmental agencies and departments, non-governmental organizations, watershed groups or other community organizations in the District and adjacent states to partner with to administer required elements of the permit. Intra- and inter-agency agreements between relevant governmental and nongovernmental organizations shall be established to ensure successful coordination and implementation of stormwater management activities in accordance with the requirements of this permit. Additional government and nongovernmental organizations and programs to consider include; land use planning, brownfields redevelopment, fire department, building and safety, public health, parks and recreation, and federal departments and agencies, including but not limited to, the National Park Service, Department of Agriculture, Department of Defense, and General Services Administration, responsible for facilities in the District.

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

The permittee shall continue to implement, assess and upgrade all of the controls, procedures and management practices, described in this permit, and in the SWMP dated

February 19, 2009, and any subsequent updates. This Program has been determined to reduce the discharge of pollutants to the maximum extent practicable. The Stormwater Management Program is comprised of all requirements in this permit. All existing and new strategies, elements, initiatives, schedules or programs required by this permit must be documented in the SWMP Plan, which shall be the consolidated document of all stormwater program elements. Updates to the plan shall be consistent with all compliance deadlines in this permit. A current plan shall be posted on the District's website at an easily accessible location at all times.

New Stormwater Management Program strategies, elements, initiatives and plans required to be submitted to EPA for review and approval are included in Table 1.

TABLE 1
Elements Requiring EPA Review and/or Approval

Element	Submittal Date (from effective date of this permit)
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.6)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

No later than 3 years from the issuance date of this permit the permittee shall public notice a fully updated Plan including all of the elements required in this permit. No later than 4 years from the issuance date of this permit the permittee shall submit to EPA the fully updated plan for review and approval, as part of the application for permit renewal.

The measures required herein are terms of this permit. These permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.

TABLE 2
Legal Authority for Selected Required Program Stormwater Elements

Required Program Application Element	Regulatory References
Adequate Legal Authority	40 C.F.R. § 122.26(d)(2)(I)(C)-(F)

Green technology stormwater management practices, which incorporate technologies and practices across District activities.	Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution)
Existing Structural and Source Controls	40 C.F.R. § 122.26(d)(2)(iv)(A)(1)
Roadways	40 C.F.R. § 122.26(d)(2)(iv)(A)(3)
Pesticides, Herbicides, and Fertilizers Application	40 C.F.R. § 122.26(d)(2)(iv)(A)(6)
Municipal Waste Sites	40 C.F.R. § 122.26(d)(2)(iv)(A)(5)
Spill Prevention and Response	40 C.F.R. § 122.26(d)(2)(iv)(B)(4)
Infiltration of Seepage	40 C.F.R. § 122.26(d)(2)(iv)(B)(7)
Stormwater Management Program for Commercial and Residential Areas	40 C.F.R. § 122.26(d)(2)(iv)(A)
Manage Critical Source Areas	40 C.F.R. § 122.26(d)(iii)(B)(6)
Stormwater Management for Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)
Industrial and High Risk Runoff	40 C.F.R. § 122.26(d)(2)(iv)(C), (iv)(A)(5)
Identify Priority Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)(1)
Illicit Discharges and Improper Disposal	40 C.F.R. § 122.26(d)(2)(iv)(B)(1)-(5), (iv)(B)(7)
Flood Control Projects	40 C.F.R. § 122.26(d)(2)(iv)(A)(4)
Public Education and Participation	40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)

Monitoring and Assessment and Reporting	40 C.F.R. § 122.26(d)(2)(iv)(D)(v)
Monitoring Program	40 C.F.R. § 122.26(d)(2)(iv)(B)(2), (iii), iv(A), (iv)(C)(2)
Characterization Data	40 C.F.R. § 122.26(d)(2)(iii)(B)-(D), 40 C.F.R. § 122.21(g)(7)
Reporting	40 C.F.R. § 122.41(l)

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

4.1 Standard for Long-Term Stormwater Management

The permittee shall continue to develop, implement, and enforce a program in accordance with this permit and the permittee's updated SWMP Plan that integrates stormwater management practices at the site, neighborhood and watershed levels that shall be designed to mimic pre-development site hydrology through the use of on-site stormwater retention measures (e.g., harvest and use, infiltration and evapotranspiration), through policies, regulations, ordinances and incentive programs

4.1.1 Standard for Stormwater Discharges from Development

No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will adopt and implement the following performance standard for all projects undertaking development that disturbs land greater than or equal to 5,000 square feet:

Require the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than or equal to 5,000 square feet.

The District may allow a portion of the 1.2" volume to be compensated for in a program consistent with the terms and requirements of Part 4.1.3.

4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking

By the end of this permit term the District must review and revise, as applicable, stormwater, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the retention performance standard required in

Section 4.1.1. The District must also establish/update and maintain a formal process for site plan reviews and a post-construction verification process (e.g., inspections, submittal of as-builts) to ensure that standards are appropriately implemented. The District must also track the on-site retention performance of each project subject to this regulatory requirement.

4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities

Within 18 months of the effective date of this permit the District shall develop, public notice, and submit to EPA for review and comment an off-site mitigation and/or fee-in-lieu program to be utilized when projects will not meet stormwater management performance standard as defined in Section 4.1.1. The District has the option of implementing an off-site mitigation program, a fee-in-lieu program, or both. Any allowance for adjustments to the retention standard shall be defined in the permittee's regulations. The program shall include at a minimum:

1. Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2. Specific criteria for determining when compliance with the performance standard requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3. For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4. The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

The program may also include incentives for achieving other important environmental objectives such as ongoing measurable carbon sequestration, energy savings, air quality reductions in green house gases, or other environmental benefits for which the program can develop methods for quantifying and documenting those outcomes. Controls implemented to achieve those outcomes are subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls.

District-owned transportation right-of-way projects are subject to a similarly stringent process for determining an alternate performance volume, but for the duration of this permit term need not conduct off-site mitigation or pay into a fee-in-lieu program to compensate for the difference.

4.1.4 Green Landscaping Incentives Program

No later than one year following permit issuance, the permittee shall develop an incentive program to increase the quantity and quality of planted areas in the District while allowing flexibility for developers and designers to meet development standards. The Incentive Program

shall use such methods as a scoring system to encourage green technology practices such as larger plants, permeable paving, green roofs, vegetated walls, preservation of existing trees, and layering of vegetation along streets and other areas visible to the public.

4.1.5 Retrofit Program for Existing Discharges

4.1.5.1 Within two years of the effective date of this permit the District shall develop, public notice, and submit to EPA for review and approval a program that establishes performance metrics for retrofit projects. The District shall fully implement the program upon EPA approval. The starting point for the performance metrics shall be the standard in Section 4.1.1. Performance metrics may be established generally for all retrofit projects, or for categories of projects, e.g., roads, sidewalks, parking lots, campuses. Specific site conditions may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1, and a similar calculator or algorithm process may be used in conjunction with a specific site analysis.

4.1.5.2 The District, with facilitation assistance from EPA Region III, will also work with major Federal landholders, such as the General Services Administration and the Department of Defense, with the objective of identifying retrofit opportunities, documenting federal commitments, and tracking pollutant reductions from relevant federal actions.

4.1.5.3 For each retrofit project estimate the potential pollutant load and volume reductions achieved through the DC Retrofit program by major waterbody (Rock Creek, Potomac, Anacostia) for the following pollutants: Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash. These estimates shall be included in the annual report following implementation of the project.

4.1.5.4 The DC Retrofit Program shall implement retrofits for stormwater discharges from a minimum of 18,000,000 square feet of impervious surfaces during the permit term. A minimum of 1,500,000 square feet of this objective must be in transportation rights-of-way.

4.1.5.5 No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement an enforceable mechanism that will adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. The characteristics of these types of projects may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1.

4.1.5.6 The permittee shall ensure that every major renovation/rehabilitation project for District-owned properties within the inventory of DRES and OPEFM (e.g., schools and school administration buildings) includes on-site stormwater retention measures, including but not

limited to green roofs, stormwater harvest/reuse, and/or other practices that can achieve the retention performance standard.

4.1.6 Tree Canopy

4.1.6.1 No later than one year following issuance of this permit, the District shall develop and public notice a strategy to reduce the discharge of stormwater pollutants by expanding tree canopy throughout the city. The strategy shall identify locations throughout the District where tree plantings and expanded tree boxes are technically feasible and commit to specific schedules for implementation at locations throughout the District, with highest priority given to projects that offer the greatest stormwater retention potential. The strategy shall also include the necessary elements to achieve the requirements of Section 4.1.6.2.

4.1.6.2 The District shall achieve a minimum net annual tree planting rate of 4,150 plantings annually within the District MS4 area, with the objective of a District-wide urban tree canopy coverage of 40% by 2035. The annual total tree planting shall be calculated as a net increase, such that annual mortality is also included in the estimate. The District shall ensure that trees are planted and maintained, including requirements for adequately designed and sized tree boxes, to achieve optimal stormwater retention and tree survival rate. Trees shall be planted in accordance with the Planting Specifications issued by the International Society of Arboriculture as appropriate to the site conditions.

4.1.6.3 The District shall annually document the total trees planted and make an annual estimate of the volume of stormwater that is being removed from the MS4 (and combined system, as relevant) in a typical year of rainfall as a result of the maturing tree canopy over the life of the MS4 permit. Also report annually on the status of achieving 40% canopy District-wide.

4.1.7 Green Roof Projects

4.1.7.1 Complete a structural assessment of all District properties maintained by DRES and slated for redevelopment to determine current roof conditions and the feasibility for green roof installation. These assessments shall be performed on an ongoing basis for all properties as they are considered for redevelopment. Based on the structural assessment and other factors, identify all District-owned properties where green roof projects are technically feasible and commit to specific schedules for implementing these projects. Highest priority shall be given to projects that offer the greatest stormwater capture potential.

4.1.7.2 The permittee shall install at a minimum 350,000 square feet of green roofs on District properties during the term of the permit (including schools and school administration buildings).

4.1.7.3 Document the square footage of green roof coverage in the District, whether publicly or privately owned, report any incentive programs implemented during the permit term, and estimate the volume of stormwater that is being removed from the MS4 (and combined

system, as relevant) in a typical year of rainfall as a result of the combined total green roof facilities in the District.

4.2 Operation and Maintenance of Stormwater Capture Practices

4.2.1 District Owned and Operated Practices.

Within two years of the effective date of this permit, develop and implement operation and maintenance protocols and guidance for District-owned and operated on-site retention practices (development and retrofits) to include maintenance needs, inspection frequencies, estimated maintenance frequencies, and a tracking system to document relevant information. Provide training to all relevant municipal employees and contractors, with regular refreshers, as necessary.

4.2.2 Non-District Owned and Operated Practices.

In conjunction with updating of relevant ordinances and policies, develop accountability mechanisms to ensure maintenance of stormwater control measures on non-District property. Those mechanisms may include combinations of deed restrictions, ordinances, maintenance agreements, or other policies deemed appropriate by the District. The District must also include a long-term verification process of O&M, which may include municipal inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the District, and/or other mechanisms. The District must continue to maintain an electronic inventory of practices on private property to include this information.

4.2.3 Stormwater Management Guidebook and Training

4.2.3.1 No later than 18 months from the permit issuance date, the permittee shall finalize a Stormwater Management Guidebook to be available for wide-spread use by land use planners and developers. The Stormwater Management Guidebook shall provide regular updates, as applicable, in a format that facilitates such regular updates, and shall include objectives and specifications for integration of stormwater management technologies, including on site retention practices, in the areas of:

a. Site Assessment.
b. Site Planning and Layout.
c. Vegetative Protection, Revegetation, and Maintenance.
d. Techniques to Minimize Land Disturbance.
e. Techniques to Implement Measures at Various Scales.
f. Integrated Water Resources Management Practices.
g. Designing to meet the required performance standard(s).
h. Flow Modeling Guidance.
i. Hydrologic Analysis.
j. Construction Considerations.
k. Operation and Maintenance

4.2.3.2 The permittee shall continue to provide key industry, regulatory, and other stakeholders with information regarding objectives and specifications of green infrastructure practices contained in the Stormwater Management Guidebook through a training program. The Stormwater Management training program will include at a minimum the following:

a. Stormwater management/green technology practices targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders.
b. Materials and data from stormwater management/green technology practices pilot projects and demonstration projects including case studies.
c. Design and construction methods for integration of stormwater management/green technology practices measures at various project scales.
d. Guidance on performance and cost of various types of stormwater management/green technology practices measures in the District.

4.3 Management of for District Government Areas

Procedures to reduce the discharge of pollutants in stormwater runoff shall include, but not be limited to:

4.3.1 Sanitary Sewage System Maintenance Overflow and Spill Prevention Response

The permittee shall coordinate with DC Water to implement an effective response protocol for overflows of the sanitary sewer system into the MS4. The response protocol shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:

1. Investigating any complaints received within 24 hours of the incident report.
2. Responding within two hours to overflows for containment.
3. Notifying appropriate sewer, public health agencies and the public within 24 hours when the sanitary sewer overflows to the MS4.

This provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4.

4.3.2 Public Construction Activities Management

The permittee shall implement and comply with the Development and Redevelopment and the Construction requirements in Part 4.6 of this permit at all permittee-owned or operated public construction projects.

The permittee shall obtain discharge authorization under the applicable EPA Construction General permit for construction activities and comply with provisions therein.

4.3.3 Vehicle Maintenance/Material Storage Facilities/ Municipal Operations.

The permittee shall implement stormwater pollution prevention measures at all permittee-owned, leased facilities and job sites including but not limited to vehicle/ equipment maintenance facilities, and material storage facilities.

For vehicle and equipment wash areas and municipal facilities constructed, redeveloped, or replaced, the permittee shall eliminate discharges of wash waters from vehicle and equipment washing into the MS4 by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:

1. Self-contain, and haul off-site for disposal;
2. Equip with a clarifier; or
3. Equip with an alternative pre-treatment device.

4.3.4 Landscape and Recreational Facilities Management, Pesticide, Herbicide, Fertilizer and Landscape Irrigation

4.3.4.1 The permittee shall further reduce pollutants and pollutant discharges associated with the storage and application of pesticides, fertilizers, herbicides, the use of other toxic substances and landscape irrigation according to an integrated pest management program (IPM). The IPM shall be an ecosystem based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, use of resistant varieties, and use of low or no chemical and irrigation input landscapes, in accordance with the provisions of this permit, procedures and practices described in the SWMP and regulations.

The permittee shall further utilize IPM controls to reduce pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied by employees or contractors, to public rights-of-way, parks, and other District property to ensure that:

a. Pesticides are used only if monitoring indicates they are needed according to established guidelines;

b. Fertilizers are used only when soil tests indicate that they are necessary, and only in minimum amounts and for needed purposes (e.g., seed germination).

c. Treatments are made with the purpose of removing only the target organism;

d. Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial, non-target organisms, and the environment;

e. No pesticides or fertilizers are applied to an area immediately prior to an expected rain event, or during or immediately following a rain event, or when water is flowing off the area;

f. No banned or unregistered pesticides are stored or applied;

g. All staff applying pesticides are certified or are under the direct supervision of a pesticide applicator certified in the appropriate category;

h. Procedures are implemented to encourage the retention and planting of native and/or non-invasive, naturalized vegetation to reduce water, pesticide and fertilizer needs;

i. Pesticides and fertilizers are stored indoors or under cover on paved surfaces or enclosed in secondary containment and storage areas inspected regularly to reduce the potential for spills; and

j. Landscapes that maximize on-site retention of stormwater, while minimizing mowing, chemical inputs and irrigation are given preference for all new landscape installation.

4.3.4.2 The District shall coordinate internally among departments for the purpose of ensuring that pesticide and fertilizer use within its jurisdiction does not threaten water quality.

4.3.4.3 The District shall partner with other organizations to ensure that pesticide and fertilizer use within their jurisdiction does not threaten water quality.

4.3.4.4 The District shall continue to conduct education and outreach, as well as provide incentives, to curtail the use of turf-grass fertilizers for the purpose of reducing nitrogen and phosphorous discharges to surface waters. The program shall incentivize the use of vegetative landscapes other than turf grass and other measures to restrict the use of turf grass fertilizers.

4.3.4.5 The District shall use GIS layers of public land and sewersheds, as well as background data, to identify priority areas for a targeted strategy to reduce the sources of pesticides, herbicides, and fertilizers that contaminate the stormwater runoff, and report progress toward completing the screening characterization in the next Updated SWMP.

4.3.4.6 The District shall include in each Annual Report a report on the implementation of the above application procedures, a history of the improvements in the control of these materials, and an explanation on how these procedures will meet the requirements of this permit.

4.3.5 Storm Drain System Operation and Management and Solids and Floatables Reduction

4.3.5.1 Within 18 months of the effective date of this permit, the District shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The District shall fully implement the plan upon EPA approval.

4.3.5.2 Until such time as the catch basin maintenance study has been completed and approved, the permittee shall ensure that each catch basin within the DC MS4 Permit Area is cleaned at least once annually during the life of the permit. The permittee shall continue to use strategies for coordinated catch basin cleaning and street-sweeping that will optimize reduction of stormwater pollutants.

4.3.5.3 Within 18 months of the effective date of this permit, and consistent with the 2006 Outfall Survey, the District shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022. This schedule may be combined with the catch basin maintenance study outlined in 4.3.5.1. The repair schedule shall be fully implemented upon EPA approval.

4.3.5.4 The permittee shall comply with the Anacostia River Trash TMDL implementation provisions in Part 4.10 of this permit and apply the technologies and other activities developed in the Anacostia River Watershed Trash TMDL throughout the entire MS4 Permit Area. The permittee shall continue to report the progress of trash reduction in the Consolidated Annual Report.

4.3.6 Streets, Alleys and Roadways

4.3.6.1 Street sweeping shall be conducted on no less than 641 acres of roadway in the MS4 area annually in accordance with the following schedule:

TABLE 3
Street Sweeping

Area/Street Classification	Frequency
Arterials-heavily developed commercial and central business districts with considerable vehicular and pedestrian traffic	At least nine (9) times per year
Industrial areas	At least six (6) times per year
Residential-residential areas with limited throughway and pedestrian traffic AND neighborhood streets which are used for local purposes only	At least four (4) times per year
Central Business District/Commercial-neighborhood business districts and main streets with moderate vehicular and pedestrian traffic	At least one (1) time every two weeks
Environmental hot spots in the	At least two (2) times per month

Anacostia River Watershed	March through October

4.3.6.2 Standard road repair practices shall include limiting the amount of soil disturbance to the immediate area under repair. Stormwater conveyances which are denuded shall be resodded, reseeded and mulched, or otherwise stabilized for rapid revegetation, and these areas should have effective erosion control until stabilized.

4.3.6.3 The permittee shall continue to evaluate and update the use, application and removal of anti-icers, chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality. The permittee shall investigate and implement techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities. The permittee shall evaluate and implement the use of porous/permeable surfaces that require less use of deicing materials and activities. This evaluation shall be made a part of an overall investigation of ways to meet the requirements of the Clean Water Act and reported in each Annual Report.

4.3.6.4 The permittee shall continue to implement and update a program to ensure that excessive quantities of snow and ice control materials do not enter the District's water bodies. The permittee shall report its progress in implementing the program in each Annual Report. Except during a declared Snow Emergency when the permittee determines that the foremost concern of snow removal activities is public health and safety, it shall avoid snow dumping or storage in areas adjacent to water bodies, wetlands, and areas near public or private drinking water wells which would ultimately reenter the MS4.

4.3.7 Infrastructure Maintenance/Pollution Source Control Maintenance

The permittee shall continue to implement an operation and maintenance program that incorporates good housekeeping components at all municipal facilities located in the DC MS4 Permit Area, including but not limited to; municipal waste water treatment facility, potable drinking water facility, municipal fleet operations, maintenance garages, parks and recreation, street and infrastructure maintenance, and grounds maintenance operations, libraries and schools. The permittee shall document the program in the Annual Report, as required at Section 6.2 herein. The permittee shall, at a minimum:

1. Continue to implement maintenance standards at all municipal facilities that will protect the physical, chemical and biological integrity of receiving waters.

2. Continue to implement an inspection schedule in which to perform inspections to determine if maintenance standards are being met. Inspections shall be performed no less than once per calendar year and shall provide guidance in Stormwater Pollution Prevention Plan development and implementation, where needed.

3. Continue to implement procedures for record keeping and tracking inspections and maintenance at all municipal facilities.

4. Continue to implement an inspection and maintenance program for all permittee-owned management practices, including post-construction measures.

5. Continue to ensure proper operation of all treatment management practices and maintain them as necessary for proper operation, including all post-construction measures.

6. Ensure that any residual water following infrastructure maintenance shall be self-contained and disposed of legally in accordance with the Clean Water Act.

4.3.8 Public Industrial Activities Management/Municipal and Hazardous Facilities

For any municipal activity associated with industrial activity, as defined by 40 C.F.R. § 122.26, which discharges stormwater to, from and through the DC MS4, the permittee shall obtain separate coverage under either: (1) the EPA Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) (As modified May 27, 2009); or (2) an individual permit.

4.3.9 Emergency Procedures

The permittee may conduct repairs of essential public service systems and infrastructure in emergency situations. An emergency includes only those situations included as conditions necessary for demonstration of an upset at 40 C.F.R. 122.41(n). For each claimed emergency, the permittee shall submit to the Permitting Authority a statement of the occurrence of the emergency, an explanation of the circumstances, and the measures that were implemented to reduce the threat to water quality, no later than required by applicable Clean Water Act regulations.

4.3.10 Municipal Official Training

The permittee shall continue to implement an on-going training program for those employees specified below, and any other employees whose job functions may impact stormwater program implementation. The training program shall address the importance of protecting water quality, the requirements of this permit, design, performance, operation and maintenance standards, inspection procedures, selecting appropriate management practices, ways to perform their job activities to prevent or minimize impacts to receiving waters, and procedures for tracking, inspecting and reporting, including potential illicit discharges. The permittee shall provide follow-up and refresher training at a minimum of once every twelve months, and shall include any changes in procedures, techniques or requirements.

The training program shall include, but is not limited to, those employees who work in the following areas:

1. Municipal Planning
2. Site plan review

3. Design
4. Construction
5. Transportation planning and engineering
6. Street/sewer and right-of-way construction and maintenance
7. Water and sewer departments
8. Parks and recreation department
9. Municipal water treatment and waste water treatment
10. Fleet maintenance
11. Fire and police departments
12. Building maintenance and janitorial
13. Garage and mechanic crew
14. Contractors and subcontractors who may be contracted to work in the above described
15. areas
16. Personnel responsible for answering questions about the permittee's stormwater program,
17. including persons who may take phone calls about the program
18. Any other department of the permittee that may impact stormwater runoff

4.4 Management of Commercial and Institutional Areas

The District shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all commercial and institutional (including federal) areas covered by this permit.

The permittee shall ensure maintenance of all stormwater management controls in commercial and institutional land areas in accordance with the following provisions:

1. Tracking all controls;
2. Inspecting all controls on a regular basis, according to an inspection schedule;
3. Ensure compliance with the MS4 permit and municipal ordinances at commercial and institutional facilities.

4.4.1 Inventory of Critical Sources and Source Controls

4.4.1.1 The permittee shall continue to maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of stormwater pollution. Critical sources to be tracked shall include the following:

a. Automotive service facilities, *e.g.*, service, fueling and salvage facilities;
b. Industrial activities, as defined at 40 C.F.R. §§ 122.26(b)(14); and
c. Construction sites exceeding one acre, or sites under one acre that are part of a larger common plan of development.
d. Dry cleaners
e. Any other facility the District has identified as a Critical Source

4.4.1.2 The permittee shall include the following minimum fields of information for each industrial and commercial facility identified as a critical source:

a. Name of facility and name of owner/ operator;
b. Address of facility;
c. Size of facility; and
d. Activities conducted at the facility that could impact stormwater.
e. Practices and/or measures to control pollutants.
f. Inspection and maintenance schedules, dates and findings.

4.4.1.3 The permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available inter and intra-agency informational databases (*e.g.*, business licenses, pretreatment permits, sanitary sewer hook-up permits, and similar information).

4.4.2 Inspection of Critical Sources

The permittee shall continue to inspect all commercial facilities identified in Part 4.4.1. herein and any others found to be critical sources twice during the five-year term of the permit. A minimum interval of six months between the first and the second mandatory compliance inspection is required, unless a follow-up inspection to ensure compliance must occur sooner.

4.4.3 Compliance Assurance.

At each facility identified as a critical source, the permittee's inspector(s) shall verify that the operator is implementing a control strategy necessary to protect water quality. Where the permittee determines that existing measures are not adequate to protect water quality, the permittee shall require additional site-specific controls sufficient to protect water quality.

4.5 Management of Industrial Facilities and Spill Prevention

4.5.1 The District shall continue to implement a program to monitor and control pollutants in stormwater discharged from Industrial Facilities located within the MS4 Permit Area, as defined herein, pursuant to the requirements in 40 C.F.R. § 122.26(d)(2)(iv)(C). These facilities shall include, but are not limited to:

a. Private Solid Waste Transfer Stations
b. Hazardous Waste Treatment, Disposal, and/or Recovery Plants
c. Industrial Facilities subject to SARA or EPCRA Title III
d. Industrial Facilities with NPDES Permits
e. Industrial facilities with a discharge to the MS4

4.5.2 The District shall continue to maintain and update the industrial facilities database.

4.5.3 The District shall continue to perform or provide on-site assistance/inspections and outreach focused on the development of stormwater pollution prevention plans and NPDES permit compliance.

4.5.4 The District shall continue to refine and implement procedures to govern the investigation of facilities suspected of contributing pollutants to the MS4, including at a minimum: (i) a review, if applicable, of monitoring data collected by the facility pursuant to its NPDES permit; and (ii) wet weather screening as required by Part 5.2.1 herein (including collecting data on discharges from industrial sites). These procedures shall be submitted as part of each Annual Report required by Part 6.2 herein.

4.5.5 The District shall continue to implement the prohibition against illicit discharges, control spills, and prohibit dumping. Continue to implement a program to prevent, contain, and respond to spills that may discharge to the MS4, and report on such implementation submitted in each Annual Report. The spill response program may include a combination of spill response actions by the permittee and/or another public or private entity.

4.5.6 The District shall report progress in developing and carrying out industrial-related programs in each Annual Report required by Section 6 herein. Provide an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act.

4.6 Stormwater Management for Construction Sites

4.6.1 Continue implementation of the Program that reduces the discharge of pollutants from construction sites. In each Annual Report, the permittee shall evaluate and report to determine if the existing practices meet the requirements of 40 C.F.R. § 122.26(d)(2)(iv)(A) and (D).

4.6.2 Continue the review and approval process of the sediment and erosion control plans under this program. Also, the permittee shall ensure that all construction projects impacting one acre or greater, or less than one acre when part of a larger common plan of development or sale equal to or larger than one acre, are not authorized until documentation is provided that they have received EPA NPDES Construction General Permit Coverage.

4.6.3 Continue to implement inspection and enforcement procedures, including but not limited to inspection of permitted construction sites that disturb more than 5,000 square feet of soil as follows:

1. First inspection prior to ground disturbing activities to review planned sediment and erosion control measures;
2. Second inspection to verify proper installation and maintenance of sediment and erosion control measures;
3. Third inspection to review planned installation and maintenance of stormwater BMPs;

4. Fourth inspection to verify proper installation of stormwater management practices following final stabilization of the project site; and
5. Other inspections as necessary to ensure compliance with relevant standards and requirements.

4.6.4 When a violation of local erosion and sediment control ordinances occurs, the permittee shall follow existing enforcement procedures and practices using standardized reports as part of the inspection process to provide accurate record keeping of inspections of construction sites. The permittee shall use a listing of all violations and enforcement actions to assess the effectiveness of the Enforcement Program in each Annual Report.

4.6.5 Continue with educational measures for construction site operators (Section 4.9 of this permit) that consist, at a minimum, of providing guidance manuals and technical publications.

4.6.6 Report progress in developing and carrying out the above construction-related programs in each Annual Report required by Parts 6.2 herein, including: (i) an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act; (ii) an explanation as to how the implementation of these procedures, particularly with regard to District "waivers and exemptions", will meet the requirements of the Clean Water Act; and (iii) discussion of progress toward meeting TMDL and the District Watershed Implementation Plan deadlines.

4.7 Illicit Discharges and Improper Disposal.

4.7.1 The District shall continue to implement an ongoing program to detect illicit discharges, pursuant to the SWMP, and Part 4 of this permit, and to prevent improper disposal into the storm sewer system, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Such program shall include, at a minimum the following:

a. An updated schedule of procedures and practices to prevent illicit discharges, as defined at 40 C.F.R. § 122.26(b)(2), and, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), to detect and remove illicit discharges as defined herein;

b. An updated inventory (organized by watershed) of all outfalls that discharge through the MS4 including any changes to the identification and mapping of existing permitted outfalls. Such inventory shall include, but not be limited to, the name and address, and a description (such as SIC code) which best reflects the principal products or services provided by each facility which may discharge to the MS4;

c. Continue to implement an illicit connection detection and enforcement program to perform dry weather flow inspections in target areas;

d. Visual inspections of targeted areas;

e. Issuance of fines, tracking and reporting illicit discharges, and reporting progress on stopping targeted illicit discharges, and in appropriate cases, chemical testing immediately after discovery of an illicit discharge;

f. Enforcement procedures for illicit discharges set forth in Part 4 herein;

g. All necessary inspection, surveillance, and monitoring procedures to remedy and prevent illicit discharges. The permittee shall submit an inspection schedule, inspection criteria, documentation regarding protocols and parameters of field screening, and allocation of resources as a part of each Annual Report.

h. The permittee shall continue to implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The permittee shall provide for the training of appropriate personnel in spill prevention and response procedures.

i. The permittee shall report the accomplishments of this program in each Annual Report.

4.7.2 The District shall continue to ensure the implementation of a program to further reduce the discharge of floatables (e.g. litter and other human-generated solid refuse). The floatables program shall include source controls and, where necessary, structural controls.

4.7.3 The District shall continue to implement the prohibition against the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal waste into separate storm sewers. The permittee shall ensure the implementation of programs to collect used motor vehicle fluids (at a minimum oil and anti-freeze) for recycle, reuse, and proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The permittee shall ensure that such programs are readily available within the District, and that they are publicized and promoted on a regular basis, pursuant to Public Education provisions in this permit at Part 4.9 herein.

4.7.4 The District shall continue to work with members of the Metropolitan Police Department to enhance illegal dumping enforcement.

4.7.5 The District shall implement the District's ban on coal tar pavement products, including conducting outreach and enforcement activities.

4.7.6 The District shall implement the Anacostia Clean Up and Protection Act of 2009, to ban the use of disposable non-recyclable plastic carryout bags and restrict the use on disposable carryout bags in certain food establishments.

4.8 Flood Control Projects

4.8.1 The District shall update the impervious surface analysis of floodplains six months after the approval of the revised Flood Insurance Rate Maps by the Federal Emergency Management Agency.

4.8.2 The District shall assess potential impacts on the water quality and the ability of the receiving water to support beneficial uses for all flood management projects. Evaluate the feasibility of retrofitting existing flood control devices to provide additional pollutant and volume removal from stormwater. Report results of such assessment, mapping program, and feasibility studies in the Annual Report (Part 6.2 herein).

4.8.3 The District shall review all development proposed in flood plain areas to ensure that the impacts on the water quality of receiving water bodies have been properly addressed. Information regarding impervious surface area located in the flood plains shall be used (in conjunction with other environmental indicators) as a planning tool. The permittee shall collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development beginning six months after the effective date of this permit. The permittee shall collect similar data for existing development in flood plain areas, in accordance with the mapping program and other activities designed to improve water quality. Critical unmapped areas shall be prioritized by the permittee with an emphasis on developed and developing acreage. Reports of this work shall be summarized in the Annual Report.

4.9 Public Education and Public Participation

The District shall continue to implement a public education program including but not limited to an education program aimed at residents, businesses, industries, elected officials, policy makers, planning staff and other employees of the permittee. The purpose of education is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts. Education initiatives may be developed locally or regionally.

4.9.1 Education and Outreach.

4.9.1.1 The District shall continue to implement its education and outreach program for the area served by the MS4 that was established during the previous permit cycle. The outreach program shall be designed to achieve measurable improvements in the target audience's understanding of stormwater pollution and steps they can take to reduce their impacts.

4.9.1.2 The permittee shall assess current education and outreach efforts and identify areas where additional outreach and education are needed. Audiences and subject areas to be considered include:

a. General public

1) General impacts of stormwater flows into surface waters
2) Impacts from impervious surfaces
3) Source control practices and environmental stewardship actions and opportunities in the areas of pet waste, vehicle maintenance, landscaping, and rain water reuse.

4) A household hazardous waste educational and outreach program to control illicit discharges to the MS4 as required herein
5) Information and education on proper management and disposal of used oil, other automotive fluids, and household chemicals
6) Businesses, including home-based and mobile businesses
7) Management practices for use and storage of automotive chemicals, hazardous cleaning supplies, carwash soaps and other hazardous materials
8) Impacts of illicit discharges and how to report them including information for industries about stormwater permitting and pollution prevention plans and the requirement that they develop structural and non-structural control systems

b. Homeowners, landscapers and property managers

1) Use of low or no phosphorus fertilizers, alternatives to fertilizers, alternative landscaping requiring no fertilizers
2) Landscape designs to reduce runoff and pollutant loadings
3) Car washing alternatives with the objective of eliminating phosphorus detergent discharges
4) Yard care techniques that protect water quality
5) Management practices for use and storage of pesticides and fertilizers
6) Management practices for carpet cleaning and auto repair and maintenance
7) Runoff Reduction techniques, including site design, on-site retention, pervious paving, retention of forests and mature trees
8) Stormwater pond maintenance

c. Engineers, contractors, developers, review staff and land use planners

1) Technical standards for construction site sediment and erosion control
2) Runoff Reduction techniques, including site design, on-site reduction, pervious pavement, alternative parking lot design, retention of forests and mature trees
3) Stormwater treatment and flow control controls
4) Impacts of increased stormwater flows into receiving water bodies

4.9.2 Measurement of Impacts.

The permittee shall continue to measure the understanding and adoption of selected targeted behaviors among the targeted audiences. The resulting measurements shall be used to direct education and outreach resources most effectively, as well as to evaluate changes in adoption of the targeted behaviors.

4.9.3 Recordkeeping.

The permittee shall track and maintain records of public education and outreach activities.

4.9.4 Public Involvement and Participation.

The permittee shall continue to include ongoing opportunities for public involvement through advisory councils, watershed associations and/or committees, participation in developing updates to the stormwater fee system, stewardship programs, environmental activities or other similar activities. The permittee shall facilitate opportunities for direct action, educational, and volunteer programs such as riparian planting, volunteer monitoring programs, storm drain marking or stream clean up programs.

4.9.4.1 The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation and update of the permittee's SWMP. The permittee shall continue to implement its process for consideration of public comments on their SWMP.

4.9.4.2 The permittee shall continue to establish a method of routine communication to groups such as watershed associations and environmental organizations that are located in the same watershed(s) as the permittee, or organizations that conduct environmental stewardship projects located in the same watershed(s) or in close proximity to the permittee. This is to make these groups aware of opportunities for their direct involvement and assistance in stormwater activities that are in their watershed.

4.9.4.3 The permittee shall make all draft and approved MS4 documents required under this permit available to the public for comment. The current draft and approved SWMP and the MS4 annual reports deliverable documents required under this permit shall be posted on the permittee's website.

4.9.4.4 The permittee shall continue to develop public educational and participation materials in cooperation and coordination with other agencies and organizations in the District with similar responsibilities and objectives. Progress reports on public education shall be included in the Annual Report. An explanation shall be provided as to how this effort will reduce pollution loadings to meet the requirements of this permit.

4.9.4.5 The permittee shall periodically, and at least annually, update its website.

4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation

4.10.1 Anacostia River Watershed Trash TMDL Implementation

The permittee shall attain removal of 103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term.

Reductions must be made through a combination of the following approaches:

1. Direct removal from waterbodies, e.g., stream clean-ups, skimmers
2. Direct removal from the MS4, e.g., catch basin clean-out, trash racks

3. Direct removal prior to entry to the MS4, e.g., street sweeping
4. Prevention through additional disposal alternatives, e.g., public trash/recycling collection
5. Prevention through waste reduction practices, regulations and/or incentives, e.g., bag fees

At the end of the first year the permittee must submit the trash reduction calculation methodology with Annual Report to EPA for review and approval. The methodology should accurately account for trash prevention/removal methods beyond those already established when the TMDL was approved, which may mean crediting a percentage of certain approaches. The calculation methodology must be consistent with assumptions for weights and other characteristics of trash, as described in the 2010 Anacostia River Watershed Trash TMDL.

Annual reports must include the trash prevention/removal approaches utilized, as well as the overall total weight (in pounds) of trash captured for each type of approach.

The requirements of this Section, and related elements as appropriate, shall be included in the Consolidated TMDL Implementation Plan (Section 4.10.3).

4.10.2 Hickey Run TMDL Implementation

The permittee shall implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run as described in the updated Plan to satisfy the requirements of the oil and grease wasteload allocations for Hickey Run. If monitoring or other assessment determine it to be necessary, the permittee shall install or implement appropriate controls to address oil & grease in Hickey Run no later than the end of this permit term. As appropriate, any requirement of this Section not completed prior to finalization of the Consolidated TMDL Implementation Plan (Section 4.10.3) shall be included in that Plan.

4.10.3 Consolidated TMDL Implementation Plan

For all TMDL wasteload allocations assigned to District MS4 discharges, the District shall develop, public notice and submit to EPA for review and approval a consolidated TMDL Implementation Plan within 2 years of the effective date of this permit. This Plan shall include, at a minimum, the following TMDLs and any subsequent updates:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Total Suspended Solids (TSS) in the Upper and Lower Anacostia River (2002)
3. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
4. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
5. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
6. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

7. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
8. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
9. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
10. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
11. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
12. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
13. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
14. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
15. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
16. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

This Plan shall place particular emphasis on the pollutants in Table 4, but shall also evaluate other pollutants of concern for which relevant WLAs exist. The District shall fully implement the Plan upon EPA approval. This Plan shall preempt any existing TMDL implementation plans for the relevant WLAs. For any new or revised TMDL approved during the permit term with wasteload allocations assigned to District MS4 discharges, the District shall update this Plan within six months and include a description of revisions in the next regularly scheduled annual report. The Plan shall include:

1. A specified schedule for compliance with each TMDL that includes numeric benchmarks that specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
2. Interim numeric milestones for TMDLs where final attainment of applicable waste load allocations requires more than one permit cycle. These milestones shall originate with the third year of this permit term and every five years thereafter.
3. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
4. The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.
5. Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs.

4.10.4 Adjustments to TMDL Implementation Strategies

If evaluation data, as outlined in the monitoring strategy being developed per Part 5.1, indicate insufficient progress towards attaining any WLA covered in 4.10.1, 4.10.2 or 4.10.3, the

permittee shall adjust its management programs within 6 months to address the deficiencies, and document the modifications in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the necessary reductions. Annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant, outlined in Part 4.10.

4.11 Additional Pollutant Sources

For any additional pollutant sources not addressed in sections 4.1 through 4.9, the permittee shall continue to compile pertinent information on known or potential pollution sources, including significant changes in:

1. land use activities,
2. population estimates,
3. runoff characteristics,
4. major structural controls,
5. landfills,
6. publicly owned lands, and
7. industries impacting the MS4.

For purposes of this section, "significant changes" are changes that have the potential to revise, enhance, modify or otherwise affect the physical, legal, institutional, or administrative characteristics of the above-listed potential pollution sources. This information shall be submitted in each of the Annual Reports submitted to EPA pursuant to the procedures in Part 6.2 herein. For the Stormwater Model, analysis of data for these pollution sources shall be reported according to Part 7 herein.

The permittee shall implement controls to minimize and prevent discharges of pollutants from additional pollutant sources, including but not limited to Bacteria (*E. coli*), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters. Controls shall be designed to prevent and restrict priority pollutants from coming into contact with stormwater, *e.g.*, restricting the use of lawn fertilizers rather than end-of-pipe treatment. These strategies shall include program priorities and a schedule of activities to address those priorities and an outline of which agencies will be responsible for implementing those strategies. The strategies used to reduce or eliminate these pollutants shall be documented in updates to the Stormwater Management Program Plan.

5. MONITORING AND ASSESSMENT OF CONTROLS

5.1 Revised monitoring program

5.1.1 Design of the Revised Monitoring Program

Within two years of the effective date of this permit the District shall develop, public notice and submit to EPA for review and approval a revised monitoring program. The District shall fully implement the program upon EPA approval. The revised monitoring program shall meet the following objectives:

1. Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of sampling stations must be adequate to ensure data are statistically significant and interpretable.

2. Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).

3. Include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

Table 4
Monitoring Parameters

Parameter
E. coli
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

4. All chemical analyses shall be performed in accordance with analytical methods approved under 40 C.F.R. Part 136. When there is not an approved analytical method, the applicant may use any suitable method as described in Section 5.7 herein, but must provide a description of the method.

5.1.2 Utilization of the Revised Monitoring Program

The permittee must use the information to evaluate the quality of the stormwater program and the health of the receiving waters at a minimum to include:

1. The permittee shall estimate annual cumulative pollutant loadings for pollutants listed in Table 4. Pollutant loadings and, as appropriate, event mean concentrations, will be reported in DMRs and annual reports on TMDL implementation for pollutants listed in Table 4 in discharges from the monitoring stations in Table 5.

2. The permittee shall perform the following activities at least once during the permit term, but no later than the fourth year of this permit:

    a. Identify and prioritize additional efforts needed to address water quality exceedances, and receiving stream impairments and threats;

    b. Identify water quality improvements or degradation

Upon approval of the Revised Monitoring Program by EPA Region III, or 2 years from the effective date of this permit, whichever comes first, the permittee shall begin implementation of the Revised Monitoring Program.

5.2 Interim Monitoring

Until such time as EPA has approved the Revised Monitoring Program, the permittee shall implement the following monitoring program:

5.2.1 Wet Weather Discharge Monitoring

The permittee shall monitor for the parameters identified in Table 4 herein, at the locations listed in Table 5 herein. Monitoring frequency for chemical/physical parameters shall be taken by at least three times per year at a minimum. This does not include a geomorphologic assessment and/or physical habitat assessment. The permittee shall conduct sampling as provided in 40 C.F.R. § 122.21(g)(7).

The permittee shall monitor and provide an annual Discharge Monitoring Report for the period of interim monitoring.

TABLE 5
Monitoring Stations

A. Anacostia River Sub Watershed Monitoring Sites
1. Gallatin Street & 14th Street N.E. across from the intersection of 14th St. and Gallatin St. in

an outfall (MS-2)
2. Anacostia High School/Anacostia Recreation Center – Corner of 17th St and Minnesota Ave SE
B. Rock Creek Subwatershed Monitoring Sites
1. Walter Reed -- Fort Stevens Drive -- 16th Street and Fort Stevens Road, N.W. at an outfall (MS-6)
2. Soapstone Creek -- Connecticut Avenue and Ablemarle Street N.W. at an outfall (MS-5)
C. Potomac River Subwatershed Monitoring Sites
1. Battery Kemble Creek-49th and Hawthorne Streets, N.W. at an outfall (MS-4)
2. Oxon Run-Mississippi Avenue and 15th Street, S.E. into Oxon Run via an outfall (MS-1)

The District may revise this list of sites in accordance with its revised monitoring program in Section 5.1 herein. Otherwise, changes to the above MS4 monitoring stations and/or sites for any reason shall be considered a major modification to the permit subject to the reopener clause.

During the interim monitoring period for the pollutants listed in Table 4, demonstration of compliance will be calculated using the procedures identified in the SWMP, the approved Anacostia River TMDL Implementation Plan, and/or other appropriate modeling tools and data on management practices efficiencies. The annual report will provide all monitoring data, and a brief synthesis of whether the data indicate that relevant wasteload allocations and other relevant targets are being achieved.

5.2.2 Storm Event Data

In addition to the parameters listed above, the permittee shall continue to maintain records of the date and duration (in hours) of the storm events sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and a calculated flow estimate of the total volume (in gallons) and nature of the discharge sampled.

5.2.3 Sample Type, Collection, and Analysis

The following requirements apply only to samples collected for Part 5.2.1, Representative Monitoring.

1. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one sample shall be taken for pollutants listed in Table 4 including temperature, DO, pH and specific conductivity. For all parameters, data shall be reported for the entire event of the discharge pursuant to 40 C.F.R. § 122.26(d)(2)(iii).

2. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge, with each aliquot being separated by a minimum period of fifteen minutes.

3. Analysis and collection of samples shall be done in accordance with the most recent EPA approved laboratory methods and procedures specified at 40 C.F.R. Part 136 and its subsequent amendments.

5.2.4 Sampling Waiver

When a discharger is unable to collect samples due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event.

Adverse climatic conditions which may prohibit the collection of samples includes weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.).

5.3 Dry Weather Monitoring

5.3.1 Dry Weather Screening Program

The permittee shall continue with ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4 pursuant to the District SWMP. The permittee shall perform the following: (1) continue to screen known problem sewersheds within the District based on past screening activities; (2) continue to inventory all MS4 outfalls in the District and inspect all outfalls by the end of the permit term; and (3) ensure that the dry weather screening program has addressed all watersheds within the permit term. The screening shall be sufficient to estimate the frequency and volume of dry weather discharges and their environmental impact.

5.3.2 Screening Procedures

Screening may be developed and/or modified based on experience gained during actual field screening activities. The permittee shall establish a protocol which requires screening to ensure that such procedures are occurring, but such protocol need not conform to the procedures published at 40 C.F.R. § 122.26(d)(1)(iv)(D). The permittee shall describe the protocol actually used in each Annual Report with a justification for its use. The procedures described in the SWMP shall be used as guidance.

5.3.3 Follow-up on Dry Weather Screening Results

The permittee shall continue to implement its enforcement program for locating and ensuring elimination of all suspected sources of illicit connections and improper disposal identified during dry weather screening activities. The permittee shall report the results of such implementation in each Annual Report.

5.4. Area and/or Source Identification Program

The permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein.

5.5 Flow Measurements

The permittee shall continue to select and use appropriate flow measurement devices and methods consistent with accepted scientific practices to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device.

5.6 Monitoring and Analysis Procedures

5.6.1 Monitoring must be conducted according to laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments, unless other test procedures have been specified in the permit.

5.6.2 The permittee is authorized to use a more current or sensitive (i.e., lower) detection method than the one identified in 40 C.F.R. Part 136 exists for a particular parameter, including but not limited to PCBs (Method 1668B) and mercury (Method 1631E). If used, the permittee shall report using the more current and/or more sensitive method for compliance reporting and monitoring purposes.

5.6.3 EPA reserves the right to modify the permit in order to require a more sensitive method for measuring compliance with any pollutant contamination levels, consistent with 40 CFR, Part 136, should it become necessary.

5.7 Reporting of Monitoring Results

The permittee shall continue to report monitoring results annually in a Discharge Monitoring Report. If NetDMR (http://www.epa.gov/netdmr/) is unavailable to any of the following then the original and one copy of the Report are to be submitted at the following addresses:

NPDES Permits Branch

U.S. EPA Region III

(3WP41)

Water Protection Division
1650 Arch Street
Philadelphia, PA 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive

Gloucester, Massachusetts

01930-2276

Monitoring results obtained during the previous year shall be summarized and reported in the Annual Report.

5.8 Additional Monitoring by the Permittee

If the permittee monitors (for the purposes of this permit) any pollutant more frequently than required by this permit, using laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the annual Discharge Monitoring Report. Such frequency shall also be indicated.

5.9 Retention of Monitoring Information

The permittee shall continue to retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation for a period of at least five(5) years from the date of the sample, measurement or report. This period may be extended by request of EPA at any time.

5.10 Record Content

Records of monitoring information shall include:

1. The date, exact location, time and methods of sampling or measurements;
2. The individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses;
5. The analytical techniques or methods used; and

6. The results of such analyses.

6. REPORTING REQUIREMENTS

The permittee shall comply with the reporting requirements identified in this section, including but not limited to the deliverables identified in Table 6 below.

TABLE 6
Reporting Requirements

Submittal	Deadline
Discharge Monitoring Report	Each year on the anniversary of the effective date of the permit (AEDOP)
Annual Report	Each year on the AEDOP.
MS4 Permit Application	Six months prior to the permit expiration date.

6.1 Discharge Monitoring Reports

The permittee shall provide discharge monitoring reports per Part 5.7 of this permit on the quality of stormwater discharges from the MS4 for all analytical chemical monitoring stipulated in Part 5 of this permit.

6.2 Annual Reporting

The permittee shall submit an Annual Report to EPA on or by the effective yearly date of the permit for the duration of the permitting cycle. At the same time the Annual Report it submitted to EPA it shall also be posted on the District's website at an easily accessible location. If the annual report is subsequently modified per EPA approval (part 6.2.3 of this permit) the updated report shall be posted on the District's website.

6.2.1 Annual Report.

The Annual Report shall follow the format of the permit as written, address each permit requirement, and also include the following elements:

a. A review of the status of program implementation and compliance (or non-compliance) with all provisions and schedules of compliance contained in this permit, including documentation as to compliance with performance standards and other provisions and deliverables contained in Section 4 herein;
b. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings, including TMDL WLAs and TMDL implementation activities;

c. An assessment of the effectiveness of controls established by the SWMP;

d. An assessment of the projected cost of SWMP implementation for the upcoming year (or longer) and a description of the permittee's budget for existing stormwater programs, including: (i) an overview of the permittee's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs; and (iv) a demonstration of adequate fiscal capacity to meet the requirements of this permit, subject to the (a) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.), as the foregoing statutes may be amended from time to time;

e. A summary describing the number and nature of enforcement actions, inspections, and public education programs and installation of control systems;

f. Identification of water quality improvements or degradation through application of a measurable performance standard as stated throughout this permit;

g. Results of storm and water quality modeling and its use in planning installation of control systems and maintenance and other activities;

h. An assessment of any SWMP modifications needed to meet the requirements of this permit;

i. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 C.F.R. § 122.26(d)(2)(iv) and (v);

j. Methodology to assess the effects of the Stormwater Management Program (SWMP);

k. Annual expenditures and budget for the year following each annual report;

l. A summary of commitments for the next year and evaluation of the commitments from the previous year;

m. A summary of the monitoring data for stormwater and ambient sampling that is collected in the previous year and the plan, including identification of monitoring locations, to collect additional data for the next year;

n. The amount of impervious cover within the District, and within the three major watersheds in the District (Anacostia, Potomac and Rock Creek);

o. The percentage of effective impervious cover reduced annually, including but not limited to the number and square footage of green roofs installed in the District, including the square footage of drainage managed by practices that meet the performance standard in 4.1.1; and

p. An analysis of the work to be performed in the next successive year, including performance measures for those tasks. In the following year, progress with those performance measures shall be part of the Annual Report. The basis for each of the performance standards, which will be used as tools for evaluating environmental results and determining the success of each MS4 activity, shall be described incorporating an integrated program approach that considers all programs and projects which have a direct as well as an indirect affect on stormwater management quantity and quality within the District. The report shall also provide an update of the fiscal analysis for each year of the permit as required by 40 C.F.R. § 122.26(d)(2)(vi).

6.2.2 Annual Report Meeting

Within 12 months of the effective date of this permit the District shall convene an annual report meeting with EPA to present annual progress and plans for the following year. In conjunction with this meeting the annual written report may consist of presentation materials summarizing all required elements of the annual report rather than a lengthy written report, as long as all required elements are included. Following this first annual reporting meeting EPA and the District shall determine if the meeting and associated presentation materials constitute an effective reporting mechanism. With the agreement of both EPA and the District the annual reporting meeting and the use of summarized presentation materials in lieu of a lengthy written report may be extended for the remainder of the permit term.

6.2.3 Annual Report Revisions

Each Annual Report may be revised with written approval by EPA. The revised Report will become effective after its approval.

6.2.4 Signature and Certification

The permittee shall sign and certify the Annual Report in accordance with 40 C.F.R §122.22(b), and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been appraised of the content of such submissions. The permittee shall provide a description of the procedure used to meet the above requirement.

6.2.5 EPA Approval

In reviewing any submittal identified in Table 1 or 6, EPA may approve or disapprove each submittal. If EPA disapproves any submittal, EPA shall provide comments to the permittee. The permittee shall address such comments in writing within thirty (30) days of receipt of the disapproval from EPA. If EPA determines that the permittee has not adequately addressed the disapproval/comments, EPA may revise that submittal or portions of that submittal. Such revision by EPA is effective thirty (30) days from receipt by the permittee. Once approved by EPA, or in the event of EPA disapproval, as revised by EPA, each submission shall be an enforceable element of this permit.

6.3 MS4 Permit Application

The permittee develop a permit Application based on the findings presented in each of the Annual SWMP Reports submitted during the permitting cycle to be submitted six months prior to the expiration date of the permit. The permit application shall define the next iterative set of objectives for the program and provide an analysis to demonstrate that these objectives will be achieved in the subsequent permit term.

7. STORMWATER MODEL

The permittee shall continue to update and report all progress made in developing a Stormwater Model and Geographical Information System (GIS) to EPA on an annual basis as an attachment to each Annual Report required herein.

On an annual basis, the permittee shall report on pollutant load reductions throughout the area covered by this permit using the statistical model developed by DDOE or other appropriate model. In the annual update, the permittee shall include, at a minimum, other applicable components which are not only limited to those activities identified in Section 6 herein, but which are necessary to demonstrate the effectiveness of the permittee's Stormwater Management Program toward implementing a sustainable strategy for reducing stormwater pollution runoff to the impaired waters of the District of Columbia.

Assess performance of stormwater on-site retention projects through monitoring, modeling and/or estimating storm retention capacity to determine the volume of stormwater removed from the MS4 in a typical year of rainfall as a result of implementing stormwater controls. This provision does not require all practices to be individually monitored, only that a reasonable evaluation strategy must provide estimates of overall volume reductions by sewershed.

8. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

8.1 Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and may result in an enforcement action; permit termination, revocation and reissuance, or modification; and denial of a permit renewal application.

8.2 Inspection and Entry

The permittee shall allow EPA, or an authorized representative, and/or the District's contractor(s)/subcontractor(s), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises at reasonable times where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be maintained under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), processes, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

8.3 Civil and Criminal Penalties for Violations of Permit Conditions

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

The Clean Water Act provides that any person who violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, or any permit condition or limitation implementing such section, or any requirement imposed in an approved pretreatment program and any person who violates any Order issued by EPA under Section 301(a) of the Act, shall be subject to a civil penalty not to exceed $25,000 per day for each violation, Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, EPA has raised the statutory maximum penalty for such violations to $37,500 per day for each such violation. 74 Fed. Reg. 626 (Jan. 7, 2009). The Clean Water Act also provides for an action for appropriate relief including a permanent or temporary injunction.

Any person who negligently violates Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementation any such section, shall be punished by a criminal fine of not less than $5,000 nor more than $50,000 per day of such violation, or by imprisonment for not more than 3 years, or by both. Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000, or by imprisonment of not more than 15 years, or by both.

8.4 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

In the event that the permittee or permitting authority determines that discharges are causing or contributing to a violation of applicable WQS, the permittee shall take corrective action to eliminate the WQS exceedance or correct the issues and/or problems by requiring the party or parties responsible for the alleged violation(s) comply with Part I.C.1 (Limitations to Coverage) of this permit. The methods used to correct the WQS exceedances shall be documented in subsequent annual reports and in revisions to the Stormwater Management Program Plan.

8.5 Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

1. Violation of any terms or conditions of this permit;

2. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

3. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge;

4. Information newly acquired by the Agency, including but not limited to the results of the studies, planning, or monitoring described and/or required by this permit;

5. Material and substantial facility modifications, additions, and/or expansions;

6. Any anticipated change in the facility discharge, including any new significant industrial discharge or changes in the quantity or quality of existing industrial discharges that will result in new or increased discharges of pollutants; or

7. A determination that the permitted activity endangers human health or the environment and that it can only be regulated to acceptable levels by permit modification or termination.

The effluent limitations expressed in this permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act. In the event of a revision of the District of Columbia's water quality standards, this document may be modified by EPA to reflect this revision.

The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition. When a permit is modified, only conditions subject to modification are reopened.

8.6 Retention of Records

The permittee shall continue to retain records of all documents pertinent to this permit not otherwise required herein, including but not limited copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the expiration date of this permit. This period may be extended by request of EPA at any time.

8.7 Signatory Requirements

All Discharge Monitoring Reports, plans, annual reports, certifications or information either submitted to EPA or that this permit requires be maintained by the permittee shall be signed by either a principal executive officer or ranking elected official, or a duly authorized representative of that person. A person is a duly authorized representative only if: (i) the

authorization is made in writing by a person described above and submitted to EPA; and (ii) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for an agency. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new notice satisfying the requirements of this paragraph must be submitted to EPA prior or together with any reports, information, or applications to be signed by an authorized representative.

8.8 Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act, 33 U.S.C. § 1321.

8.9 District Laws, Regulations and Ordinances

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable District law, regulation or ordinance identified in the SWMP. In the case of "exemptions and waivers" under District law, regulation or ordinance, Federal law and regulation shall be controlling.

8.10 Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

8.11 Severability

The provisions of this permit are severable, and if any provisions of this permit, or the application of any provision of this permit to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

8.12 Transfer of Permit

In the event of any change in ownership or control of facilities from which the authorized discharge emanates, the permit may be transferred to another person if:

1. The current permittee notifies the EPA, in writing of the proposed transfer at least 30 days in advance of the proposed transfer date;

2. The notice includes a written agreement between the existing and new permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

3. The EPA does not notify the current permittee and the new permittee of intent to modify, revoke and reissue, or terminate the permit and require that a new application be submitted.

8.13 Construction Authorization

This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8.14 Historic Preservation

During the design stage of any project by the Government of the District of Columbia within the scope of this permit that may include ground disturbance, new and existing or retrofit construction, or demolition of a structure, the Government of the District of Columbia shall notify the Historic Preservation liaison and provide the liaison planning documents for the proposed undertaking. The documents shall include project location; scope of work or conditions; photograph of the area/areas to be impacted and the methods and techniques for accomplishing the undertaking. Depending on the complexity of the undertaking, sketches, plans and specifications shall also be submitted for review. The documentation will enable the liaison to assess the applicability of compliance procedures associated with Section 106 of the National Historic Preservation Act. Among the steps in the process are included:

1. The determination of the presence or absence of significant historic properties (architectural, historic or prehistoric). This can include the evaluation of standing structures and the determination of the need for an archaeological survey of the project area.

2. The evaluation of these properties in terms of their eligibility for nomination to the National Register of Historic Places.

3. The determination of the effect that the proposed undertaking will have on these properties.

4. The development of mitigating measures in conjunction with any anticipated effects.

All such evaluations and determinations will be presented to the Government of the District of Columbia for its concurrence.

If an alternate Historic Preservation procedure is approved by EPA in writing during the term of this permit, the alternate procedure will become effective after its approval.

8.15 Endangered Species

The U.S. Fish and Wildlife Service (FWS) has indicated that Hay's Spring Amphipod, a Federally listed endangered species, occurs at several locations in the District of Columbia. The National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA Fisheries) has indicated that the endangered shortnose sturgeon occurs in the Potomac River drainage and may occur within the District of Columbia. The FWS and NOAA Fisheries indicate that at the present time there is no evidence that the ongoing stormwater discharges covered by this permit are adversely affecting these Federally-listed species. Stormwater discharges, construction, or any other activity that adversely affects a Federally-listed endangered or threatened species are not authorized under the terms and conditions of this permit.

The monitoring required by this permit will allow further evaluation of potential effects on these threatened and endangered species once monitoring data has been collected and analyzed. EPA requires that the permittee submit to NOAA Fisheries, at the same time it submits to EPA, the Annual Outfall Discharge Monitoring Report of the monitoring data which will be used by EPA and NOAA Fisheries to further assess effects on endangered or threatened species. If this data indicates that it is appropriate, requirements of this NPDES permit may be modified to prevent adverse impacts on habitats of endangered and threatened species.

The above-referenced Report of monitoring data is required under this permit to be sent on an annual basis to:

The United States Environmental Protection Agency
Region Ill (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

8.16 Toxic Pollutants

If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of the Act, 33 U.S.C. § 1317(a), for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, the permittee shall comply with such standard or prohibition even if the permit has not yet been modified to comply with the requirement.

8.17 Bypass

8.17.1 Bypass not exceeding limitations. In accordance with 40 C.F.R. § 122.41(m), the permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation.

8.17.2 Notice

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it must submit prior notice at least ten days before the date of the bypass. See 40 C.F.R. § 122.41(m)(3)(i).

2. Unanticipated bypass. The permittee must submit notice of an unanticipated bypass as required by 40 C.F.R. § 122.41(l)6) (24-hour notice). See 40 C.F.R. § 122.41(m)(3)(ii).

8.17.3 Prohibition of bypass. See 40 C.F.R. § 122.41(m)(4).

1. Bypass is prohibited, and EPA may take enforcement action against the permittee for bypass, unless:

    a. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage as defined herein;

    b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

    c. The permittee submitted notices as required herein.

2. EPA may approve an anticipated bypass, after considering its adverse effects, if EPA determines that it will meet the three conditions listed above.

8.18 Upset

Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of 40 C.F.R. § 122.41(n) are met.

8.19 Reopener Clause for Permits

The permit may be modified or revoked and reissued, including but not limited to, any of the following reasons:

1. To incorporate any applicable effluent standard or limitation issued or approved under Sections 301, 304, or 307 of the Clean Water Act, and any other applicable provision, such as provided for in the Chesapeake Bay Agreements based on water quality considerations, and if the effluent standard or limitation so issued or approved:

    a. Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or

    b. Controls any pollutant not limited in the permit. The permit, as modified or reissued under this paragraph, shall also contain any other requirements of the Act then applicable; or

2. To incorporate additional controls that are necessary to ensure that the permit effluent limits are consistent with any applicable TMDL WLA allocated to the discharge of pollutants from the MS4; or

3. As specified in 40 C.F.R. §§ 122.44(c), 122.62, 122.63, 122.64, and 124.5.

8.20 Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, it must apply for and obtain a new permit. The application shall be submitted at least 180 days before the expiration date of this permit. EPA may grant permission to submit an application less than 180 days in advance but no longer than the permit expiration date. In the event that a timely and complete reapplication has been submitted and EPA is unable through no fault of he permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

9. PERMIT DEFINITIONS

Terms that are not defined herein shall have the meaning accorded them under section 502 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or its implementing regulations, 40 C.F.R. Part 122.

"Annual Report" refers to the consolidated Annual Report that the permittee is required to submit annually.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. See 40 C.F.R. § 122.41(m)(1)(i).

"CWA" means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. (6-483 and Pub. L. 97-117, 33 U.S.C. §§ 1251 *et seq.*

"Development" is the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet, including new development projects and redevelopment projects. For purposes of Parts 4.1.1 through 4.1.4 of the permit the requirements apply to discharges from sites for which design or construction commenced after 18 months from the effective date of this permit or as required by District of Columbia law, whichever is sooner. The District may exempt development projects receiving site plan approval prior to this date from these requirements.

"Director" means the Regional Administrator of USEPA Region 3 or an authorized representative.

"Discharge" for the purpose of this permit, unless indicated otherwise, refers to discharges from the Municipal Separate Storm Sewer System (MS4).

"Discharge Monitoring Report", "DMR" or "Outfall Discharge Monitoring Report" includes the monitoring and assessment of controls identified in Section 5 herein.

"EPA" means USEPA Region 3.

"Green Roof" is a low-maintenance roof system that stores rainwater where the water is taken up by plants and/or transpired into the air.

"Green Technology Practices" means stormwater management practices that are used to mimic pre-development site hydrology by using site design techniques that retain stormwater on-site through infiltration, evapotranspiration, harvest and use.

"Guidance" means assistance in achieving a particular outcome or objective.

"Illicit connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities, pursuant to 40 C.F.R. § 122.26(b)(2).

"Impaired Water" (or "Water Quality Impaired Water" or "Water Quality Limited Segment"): A water is impaired for purposes of this permit if it has been identified by the District or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards (these waters are called "water quality limited segments" under 40 C.F.R. 30.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit (i.e., an area where wastes are applied onto or incorporated into the soil surface [excluding manure spreading operations] for treatment or disposal), surface impoundment, injection well, or waste pile.

"Large or Medium municipal separate storm sewer system" means all municipal separate storm sewers that are either: (1) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendices F and G of 40 C.F.R. Part 122); or (2) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties (these counties are listed in Appendices H and I of 40 C.F.R. Part 122); or (3) owned or operated by a municipality other than those described in paragraph (i) or (ii) and that are designated by the Director as part of the large or medium municipal separate storm sewer system.

"MS4" refers to either a Large or Medium Municipal Separate Storm Sewer System.

"Municipal Separate Storm Sewer" means a conveyance, or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (1) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State Law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes; (2) Designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.); (3) not a combined sewer; and (4) not part of a Publicly-Owned Treatment Works as defined at 40 C.F.R. § 122.2.

"Offset" means a unit of measurement, either used as monetary or non-monetary compensation, as a substitute or replacement for mitigation of a stormwater control practice that has been determined to be impracticable to implement.

"Performance measure" means for purposes of this permit, a minimum set of criteria for evaluating progress toward meeting a standard of performance.

"Performance standard" means for purposes of this permit, a cumulative measure or provision for attainment of an outcome or objective.

"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, directly accountable and responsible to the City Council and Mayor as authorized under the Stormwater Permit Compliance Amendment Act of 2000 and any subsequent amendments for administrating, coordinating, implementing, and managing stormwater for MS4 activities within the boundaries of the District of Columbia.

"Point Source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other

floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

"Pollutant of concern" means a pollutant in an MS4 discharge that may cause or contribute to the violation of a water quality criterion for that pollutant downstream from the discharge.

"Pre-Development Condition" means the combination of runoff, infiltration and evapotranspiration rates, volumes, durations and temperatures that typically existed on the site with natural soils and vegetation before human-induced land disturbance occurred. In the context of requirements in this permit the environmental objective is a stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed.

"Retention" means the use of soils, vegetation, water harvesting and other mechanisms and practices to retain a target volume of stormwater on a given site through the functions of: pore space and surface ponding storage; infiltration; reuse, and/or evapotranspiration.

"Retrofit" means improvement in a previously developed area that results in reduced stormwater discharge volumes and pollutant loads and/or improvement in water quality over current conditions.

"Stormwater" means the flow of surface water which results from, and which occurs immediately following, a rainfall event, snow melt runoff, and surface runoff and drainage.

"Stormwater management" means (1) for quantitative control, a system of vegetative or structural measures, or both, which reduces the increased volume and rate of surface runoff caused by man-made changes to the land; and (2) for qualitative control, a system of vegetative, structural, and other measures which reduce or eliminate pollutants which might otherwise be carried by surface runoff.

"SWMP" is an acronym for Stormwater Management Program. For purposes of this permit, the term includes all stormwater activities described in the District's SWMP Plan updated February 19, 2009, or any subsequent update, and all other strategies, plans, documents, reports, studies, agreements and related correspondences developed and used pursuant to the requirements of this permit.

"Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production. See 40 C.F.R. § 122.41(m)(1)(ii).

"Total Maximum Daily Load (TMDL) Units" means for purposes of this permit, the sum of individual waste load allocations (WLAs) and natural background. Unless specifically permitted otherwise in an EPA-approved TMDL report covered under the permit, TMDLs are expressed in

terms of mass per time, toxicity or other appropriate measure such as pollutant pounds of a total average annual load.

"TMDL Implementation Plan" means for purposes of this permit, a plan and subsequent revisions/updates to that plan that are designed to demonstrate how to achieve compliance with applicable waste load allocations as set forth in the permit requirements described in Section 8.1.4.

"Stormwater Management Program (SWMP)" is a modified and improved SWMP based on the existing SWMP and on information in each of the Annual Reports/Discharge Monitoring Reports. The purpose of the SWMP is to describe the list of activities that need to be done to meet the requirements of the Clean Water Act, an explanation as to why these activities will meet the Clean Water Act requirements, and a schedule for those activities.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 C.F.R. § 122.41(n)(1).

"Waste pile" means any non-containerized accumulation of solid, nonflowing waste.

"Water quality standards" refers to the District of Columbia's Surface and Ground Water Quality Standards codified at Code of District of Columbia Regulations §§ 21-1100 *et seq.*, which are effective on the date of issuance of the permit and any subsequent amendments which may be adopted during the life of this permit.

"Waters of the United States" is defined at 40 C.F.R. § 122.2.

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 No. DC 0000221	)

EXHIBIT 2

Jennifer Chavez

From: Bendik.Kaitlyn@epamail.epa.gov
Sent: Thursday, October 06, 2011 8:39 AM
Subject: Final Issuance of DC MS4 Permit Announced

This notice is to inform you of final issuance of the District of Columbia (DC) Municipal Separate Storm Sewer System (MS4) National Pollutant Discharge Elimination System (NPDES) Permit, which discharges into the waters of the District of Columbia. This permit has been issued in accordance with the NPDES permit program established by the Clean Water Act (CWA), as amended, 33 U.S.C. §§ 1251 *et seq.* This is a reissuance of the MS4 permit issued to DC on August 19, 2004 and modifications thereto. The permit is scheduled to become effective on October 7, 2011, unless within thirty days thereafter, a petition for review of the permit conditions is filed with the Environmental Appeals Board (EAB), as provided by 40 C.F.R. §124.19. Additional information about permit appeals can be found on the EAB website at: www.epa.gov/eab/. Unless appealed, the expiration date for the final permit is October 7, 2016. If a petition for review is filed, EPA will post to the website below as to which conditions are stayed and which are enforceable, pursuant to 40 C.F.R. § 124.16. If you require any information or assistance regarding this matter, please contact Ms. Kaitlyn Bendik, 1650 Arch Street Mailcode 3WP41, Philadelphia, PA 19103.

The actual permit and related documents are available at: http://www.epa.gov/reg3wapd/npdes/dcpermits.htm.

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 No. DC 0000221	)

EXHIBIT 3

NATURAL RESOURCES DEFENSE COUNCIL
DC ENVIRONMENTAL NETWORK • GLOBAL GREEN USA • SIERRA CLUB
FRIENDS OF ROCK CREEK'S ENVIRONMENT • ANACOSTIA WATERSHED SOCIETY
CASEY TREES • CLEAN WATER ACTION • POTOMAC RIVERKEEPER
SURFRIDER FOUNDATION • ANACOSTIA RIVERKEEPER • AUDUBON NATURALIST SOCIETY

June 4, 2010

Via electronic mail

Mr. Garrison D. Miller
United States Environmental Protection Agency
Office of NPDES Permits and Enforcement (3WP41)
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029
miller.garrison@epa.gov

Re: Comments on Draft NPDES Permit No. 0000221 for the District of Columbia

Dear Mr. Miller:

Thank you for this opportunity to comment on Draft NPDES Permit No. DC0000221, Authorization to Discharge under the National Pollutant Discharge Elimination System Municipal Separate Stormwater System ("MS4") Permit (the "Draft Permit").

These comments are submitted on behalf of the Natural Resources Defense Council, Global Green USA, DC Environmental Network, Sierra Club, Friends of Rock Creek's Environment, Anacostia Watershed Society, Casey Trees, Clean Water Action, Potomac Riverkeeper, Surfrider Foundation, Anacostia Riverkeeper, and Audubon Naturalist Society, which are nationwide and local environmental organizations working to protect and restore water quality in the Washington, DC region through advocacy, enforcement, and education. Members of these groups use and enjoy waters adversely affected by MS4 discharges, including the Anacostia River, Potomac River, Rock Creek, and their tributaries.

These comments are supported by a technical review of the Draft Permit prepared by Diane Cameron, a stormwater consultant with a Master's of Science degree in Environmental Engineering and 21 years of experience in the stormwater field; her report is attached hereto.[1] We have also sent a compact disc to the U.S. Environmental Protection Agency ("EPA") containing documents related to and referenced in these comments, and we incorporate them as attachments. Moreover, in addition to our own comments, we hereby incorporate by reference the comments of Earthjustice and the Chesapeake Bay Foundation.

[1] Diane M. Cameron, *Green Infrastructure in the District of Columbia: Implications for the District's Stormwater Permit* (June 4, 2010) (hereinafter "Cameron Report").

I. Standards Governing Adoption of the Draft Permit

In issuing an MS4 permit, EPA must not only ensure compliance with substantive legal standards, but it must also ensure that the agency complies with the well-settled standards that govern EPA's administrative decision-making. Under section 706 of the Administrative Procedure Act ("APA"), an agency's issuance of an MS4 permit may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[2] Under this standard, the agency must examine all of the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."[3] An agency decision is arbitrary and capricious when it offers an explanation for its decision that runs counter to the evidence before the agency.[4]

The Draft Permit must therefore be supported by evidence that justifies EPA's decision to include, or not to include, specific requirements. Moreover, EPA would violate these precepts if the Draft Permit ultimately failed to contain findings explaining the reasons why certain control measures and standards were selected while others were omitted. Issuing a permit lacking in record support would risk a remand by a court or by the Environmental Appeals Board ("EAB"), which has repeatedly stated that "the ultimate approach adopted by the permitting agency [must be] rational in light of all the information in the record,"[5] or in other words, that the permitting agency's "rationale for its conclusions…must be adequately explained and supported in the record."[6]

It is crucial that EPA pay close attention to meeting this standard, for it has failed to meet it during previous rounds of DC MS4 permitting. In 2002, the EAB remanded a DC MS4 permit to the agency due to a lack of support in the administrative record for certain decisions regarding control measures.[7] In its decision, the Board stated that "there [was] nothing in the record…that support[ed] the conclusion" that the permit would meet the applicable legal requirements.[8] EPA must avoid that mistake with regards to the current Draft Permit by ensuring that all of the permit's requirements are supported by the record, and by amending or omitting requirements currently in the Draft that lack such support. As discussed below, at this juncture neither the Draft Permit, accompanying fact sheet, nor other documents that have been made available to the public suffice to meet these obligations.

II. Water Quality in Receiving Waters Does Not Meet Clean Water Act Requirements

In developing the MS4 permitting program, Congress and EPA recognized the serious damage polluted stormwater runoff causes local waterways. According to the National Research Council, "Stormwater runoff from the built environment remains one of the great challenges of modern water pollution

---

[2] 5 U.S.C. § 706(2)(A); *see also City of Abilene v. EPA*, 325 F.3d 657, 664 (5th Cir. 2003).
[3] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[4] *Id.*
[5] *The Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, slip op. at 29 (Jan. 14, 2009), 14 E.A.D. __ (citing *ConocoPhillips*, slip op. at 26, 13 E.A.D. at __ (June 6, 2008)).
[6] *Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (2006).
[7] *Gov't of the Dist. of Columbia, MS4 System*, 10 E.A.D. 323 (2002).
[8] *Id.* at 324.

control, as this source of contamination is a principal contributor to water quality impairment of waterbodies nationwide."[9] Locally, stormwater from rain or snow melt runs through the District of Columbia's MS4 and flows untreated into local waterways. Stormwater is the only growing source of pollution to the Chesapeake Bay.[10]

The District has 414 storm sewer outfalls that discharge stormwater, and associated pollution, directly into the Anacostia, Potomac, Rock Creek and their tributaries.[11] The District Department of the Environment ("DDOE") admits, as it must, that urban runoff and storm sewers have a "major impact" on DC waters.[12] More than five square miles of District estuaries are impaired by discharges from the MS4.[13] Additionally, all District estuaries are impaired for pathogens, which are commonly associated with MS4 discharge.[14] The Anacostia and Potomac Rivers are both impaired for fecal coliform as a result of discharges from the MS4.[15] The rivers and streams of the District are impaired for bacteria, metals, total suspended solids, and oil and grease, along with a host of other pollutants; all of which are associated with discharges from the MS4.[16]

EPA issued the District of Columbia its first MS4 permit in 2000. Though the current Draft Permit represents DC's third MS4 permit cycle, poor water quality continues to plague the District. In fact, DC's 2010 draft listing of impaired surface waters showed no improvement over the 2008 listing.[17] Not one pollutant or water body was successfully de-listed. Additionally, not one DC water body could be listed in Category 1 ("all designated uses are attained and no use is threatened") or even in Category 2 ("some, but not all, of the designated uses are attained and no use is threatened").[18] Water body impairment persists in the District despite Total Daily Maximum Loads ("TMDLs") having been developed for each

---

[9] National Research Council, *Urban Stormwater Management in the United States* vii (2008), *available at* http://www.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf (hereinafter "*Urban Stormwater*").
[10] EPA Region 3, "Chesapeake Bay Program Office No-Runoff Challenge," http://www.epa.gov/Region3/chesapeake/challenge/ (last visited Jun. 1, 2010).
[11] Gov't of the Dist. of Columbia, *Upgraded Stormwater Management Plan* 5-6 (Feb. 19, 2009) at 3-1.
[12] Dist. Dep't of the Env't, *The District of Columbia Water Quality Assessment: 2008 Integrated Report to the Envtl. Prot. Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act (P.L. 97-117)* (2008) at 3 (hereinafter "*2008 Integrated Report*"), *available at* http://ddoe.dc.gov/ddoe/lib/ddoe/information2/water.reg.leg/DC_IR_2008_Revised_9-9-2008.pdf.
[13] *2008 Integrated Report* at 50.
[14] *Id.; Urban Stormwater* at 22 (finding, "A variety of studies have shown that stormwater runoff is a vector of pathogens with potential human health implications in both freshwater (Calderon et al., 1991) and marine waters (Dwight et al., 2004; Colford et al., 2007).")
[15] *2008 Integrated Report* at Appendix 3.2.
[16] Dist. Dep't of the Env't, *Draft - Methodology for the Development of the 2010 Section 303(d) List and the 2010 Section 303(d) List of Impaired District of Columbia Waters* (Mar. 31, 2010) (hereinafter "*Draft 2010 Section 303(d) List*"), *available at* http://ddoe.dc.gov/ddoe/lib/ddoe/draft_2010_section_303d.pdf; Dist. of Columbia Storm Water Task Force, *MS4 Discharge Monitoring Report for Rock Creek* (Aug. 17, 2007) (hereinafter "2007 Rock Creek DMR"), *available at* http://ddoe.dc.gov/ddoe/lib/ddoe/stormwaterdiv/2007_Rock_Creek_DMR_-_FINAL.pdf; Dist. Dep't of the Env't, *Anacostia River Discharge Monitoring Report* (Aug. 19, 2009).
[17] *Draft 2010 Section 303(d) List*; *2008 Integrated Report* at Appendix 3.4.
[18] *Id.*

water body on the list in either 1998 or 2002.[19] This marked lack of progress in achieving water quality standards confirms the need for an effective and enforceable MS4 permit that will stem stormwater pollution and achieve improvements in water quality.

III. The Draft Permit Fails to Require Control of Stormwater to the Maximum Extent Practicable and Is Inconsistent with Law in Multiple Related Respects

The Clean Water Act ("CWA") states that MS4 permits "shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*," otherwise known as the "MEP" standard.[20] Likewise, CWA regulations mandate that MS4 permits "*will require* at a minimum that [regulated entities] develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [their] MS4[s] to the *maximum extent practicable*."[21] Courts have held that the phrase "'to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible."[22]

However, the Draft Permit does not anywhere actually ensure the Permittee will reduce discharges of pollutants to the maximum extent practicable.[23] This shortcoming violates the statutory and regulatory requirements quoted above. The MEP performance standard must be clearly applied to the District's discharges.

A. The Draft Permit Fails to Ensure that the Permittee Will Meet the MEP Standard and Creates an Impermissible Self-Regulatory Scheme

The Draft Permit, by containing and omitting various provisions, would essentially allow the Permittee to regulate itself. This result is at odds with federal law. As stated above, the CWA requires that MS4 permits contain controls to reduce the discharge of pollutants to the MEP. It is not enough for a permit to direct a permittee to make a plan, on its own without regulatory and public oversight, to reduce discharges to the MEP; the permitting authority must include provisions in a permit that will ensure that the permittee does *in fact* reduce discharges to the maximum extent practicable.[24] The permitting authority may not merely assume, without providing guidance or verifying compliance, that a permittee's plans will be adequate to meet the MEP standard. Rather:

---

[19] *Id.*
[20] 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).
[21] 40 C.F.R. § 122.34(a) (emphasis added).
[22] *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *see also Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").
[23] Notably, the Draft Permit does not even direct the Permittee to do so. Both Section 1 of the Draft Permit, containing general provisions regarding authorized discharges, and Section 4, governing the Permittee's substantive Stormwater Management Program, fail to explicitly hold the Permittee to the MEP standard.
[24] *See Environmental Defense Center v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003) (hereinafter "*EDC*").

> [S]torm water management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.[25]

This legal requirement is thwarted when a permit does not contain the substantive management requirements that are to be imposed by the permit or when some or all of the requirements are left unspecified for future development by the permit applicant without review by EPA or the public. The Draft Permit, in this regard, allows the future development of substantive pollution control programs by the Permittee (§§ 4.1-4.9), fails to provide for public or EPA comment (§ 4.9.4; see section VIII, *infra*), and in many instances does not clearly state when such program development must occur (e.g., §§ 4.3.1-4.3.10). As a result, the Draft Permit has, *de facto*, created an impermissible self-regulatory system by giving the Permittee discretion to develop many critical control requirements with only vague guidance and directives and, in some cases, no deadline for the modification; the Draft Permit does not itself contain the pollution control requirements to be implemented under its auspices. When, as here, these rules are not observed, there is nothing to stop a permittee from "misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable."[26] Without clear directives for what must be included in these plans, there is no assurance that the permittee's decisions will be reasonable, in good faith, or sufficient to meet the MEP standard, or that if they do fall short of MEP, that the permit is further enforceable.

Permittee self-regulation and lack of direction are well-known and acknowledged problems. As EPA Region 9 has stated, "In our review of MS4 programs…we have found that it is common for permits to rely on the development of plans to achieve certain permit objectives, rather than including prescriptive requirements in the permits…. [T]he plans often result in a reliance on qualitative provisions rather than specific measurable criteria. As a result, we have found that there is often uncertainty among both the MS4 permittees and the permitting agencies as to specific permit expectations."[27]

The Draft Permit must be modified to prevent this outcome by ensuring that EPA and the public exercise meaningful review authority over the Permittee's stormwater management programs. Specific permit requirements for these programs, as well as an opportunity for public notice and comment, are both necessary to ensure that the Permittee's programs meet the MEP standard. (For more discussion of the Draft Permit's failure to provide adequate opportunities for public participation, please see Section VIII, *infra*.) "Specific measurable criteria" must set expectations for the plans and allow EPA and the public

---

[25] *Id.* at 856; *see also Waterkeeper Alliance v. EPA*, 399 F.3d 486, 501-502 (2d Cir. 2005) (discussing importance of review of management plans for concentrated animal feeding operations).

[26] *EDC*, 344 F.3d at 855.

[27] Letter from Douglas E. Eberhardt, EPA, to Dale Bowyer, San Francisco Bay Regional Water Quality Control Board (April 3, 2009), at 2, *available at* http://www.swrcb.ca.gov/rwqcb2/water_issues/programs/stormwater/muni/mrp/02-11-09/comments/US_EPA.pdf.

to measure the Permittee's progress. Without such oversight, the program amounts to "impermissible self-regulation,"[28] and will not guarantee the MEP standard is met or water quality is protected.

Numerous provisions in the Draft Permit include requirements that are too vague to be enforceable. For example:

- The section governing operation and maintenance of stormwater capture practices on non-District owned or operated property requires only that the Permittee "develop accountability mechanisms to ensure maintenance of stormwater control measures…Those mechanisms *may include* combinations of deed restrictions, ordinances, maintenance agreements, or *other policies deemed appropriate by the District*." (Draft Permit § 4.2.2.) "Menus" of suggested management practices, like this example, are unlawfully vague because "nothing requires that the combination of items that the [Permittee] selects from this 'menu' will have the combined effect of reducing discharges to the maximum extent practicable."[29]

- The provisions requiring the Permittee to develop a management plan for District Government areas contain various vague provisions, such as the following representative example from the section on streets, alleys, roadways and sidewalks: "The Permittee *shall continue to evaluate and update* the use, application and removal of chemical deicers, salt, sand, and/or sand/deicer mixtures *in an effort to minimize* the impact of these materials on water quality." (Draft Permit § 4.3.6.4.) Not only does this provision provide no guidance as to what criteria should guide the Permittee's evaluation, but it also fails to actually require that the Permittee minimize impact to water quality.

- The requirements for the Permittee's Annual Report and Implementation Plan instruct the Permittee only to "analyze in detail the work to be performed" in each year and to "include an established measurable performance standard for each of the MS4 Program activities." (Draft Permit § 6.2.2.) The Draft Permit contains no guidance as to how such performance standards should be selected, requiring only that the "basis for each of the performance standards…shall be described." (*Id.*)

- Finally, the provisions governing the Permittee's TMDL implementation plans are also impermissibly vague, requiring those plans to contain: "A *set of controls* for achieving the MS4 [wasteload allocation], which *may include* stormwater pollution reduction and elimination laws and regulations, LID implementation…, municipal operations to reduce the discharge of pollutants in stormwater…, and *other management practices*." (Draft Permit § 8.1, ¶ 3.B.) As previously discussed, such "menus" of possible controls fails to ensure compliance with the MEP standard. Moreover, the Draft Permit requires TMDL implementation plans to include "numeric

[28] *EDC*, 344 F.3d at 843.
[29] *EDC*, 344 F.3d at 855 n.32.

benchmarks which specific annual pollutant load reductions" with no guidance as to how those benchmarks should be set. (Draft Permit § 8.1, ¶ 3.C.; see Section VI, below.)

These provisions provide perfect examples of what EPA's own *MS4 Permit Improvement Guide* instructs agency officials *not* to do when writing permits. That Guide recognizes that "clear, specific, measurable, and enforceable" provisions are necessary in order for permitting authorities to assess compliance and take enforcement action, if necessary.[30] The *Guide* recommends that permits "include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation," recognizing that without such provisions, permitting authorities may not be able to adequately assess compliance or enforce violations.[31] The Draft Permit's inclusion of terms such as "other policies" and "other management practices," as cited above, directly contradicts not only this generic *Guide* instruction but also its specific prohibition on vague phrases such as "other actions" without specifically describing what those actions are.[32] This contradiction of agency guidance not only indicates a violation of substantive legal requirements but also suggests that the Draft Permit may be considered arbitrary and capricious in violation of APA § 706.[33]

The vagueness pervasive throughout the Draft Permit provisions governing the Permittee's implementation plans is particularly problematic because the best management practices ("BMPs") to be contained in those plans are, in effect, the Draft Permit's effluent limits. Because the Draft Permit contains no requirement for the Permittee to meet numeric effluent limits (see Section VI.A, *infra*), its BMP requirements are its only pollutant limits.[34] However, the Draft Permit does not include the BMP requirements in the permit text itself but rather delegates the task of developing many BMPs to the Permittee in its plans. The lack of specific requirements for the Permittee's plans, therefore, essentially means that the Draft Permit does not contain effluent limitations as required by the Clean Water Act.

Clean Water Act regulations require that, when an MS4 discharge causes or contributes to a violation of water quality standards for an individual pollutant, the MS4 permit must contain effluent limits for that pollutant.[35] In the District, urban runoff from storm sewers is identified in the 2008 303(d) list as having a major impact on water body impairment.[36] For example, Rock Creek is impaired for bacteria and

---

[30] U.S. Environmental Protection Agency, *MS4 Permit Improvement Guide* 5 (2010), *available at* http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf.
[31] *Id.* at 5-6.
[32] *Id.* at 6.
[33] *See, e.g.*, *Port Auth. of N.Y. and N.J. v. Dep't of Transp.*, 479 F.3d 21, 44 (D.C. Cir. 2007) ("An unexplained deviation from the Policy Statement could lead us to set the Final Decision aside"); *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1075-76 (D.C. Cir. 2002) (stating that an agency "acts unreasonably if it departs from established policy without giving a reasoned explanation for the change"). EPA has given no explanation for its deviation from the *MS4 Permit Improvement Guide*.
[34] Clean Water Act regulations anticipate that BMP controls may serve as a permit's effluent limits by authorizing their use where numeric limits are infeasible, as well as by defining the term "effluent limitations" to include "*any restriction*" on pollutant discharges. 40 C.F.R. § 122.44(k); 40 C.F.R. § 122.2 (emphasis added).
[35] 40 C.F.R. § 122.44(d)(1)(iii).
[36] *2008 Integrated Report* at 3.

metals, and the District MS4 discharges both.[37] Anacostia River is impaired for metals, total suspended solids, and oil and grease, and the MS4 discharges all three.[38] The Potomac River is impaired for bacteria and metals, and the MS4 discharges both.[39] Overall, 23.5 miles of rivers and streams in the District are impaired by discharges from the MS4.[40] Therefore, the Draft Permit must contain effluent limits to control the impairment-causing discharges. The fact that it does not contain such limits constitutes a violation of the Clean Water Act.

Under the Draft Permit's mandates, the Permittee could come up with a plan that is colorably responsive to the generalities of the Draft Permit and is thus immune from challenge, yet that is insufficient to achieve compliance with the MEP standard. The Draft Permit thus fails to meet the requirements of federal law, and its failure to meet MEP undercuts any benefit that its onsite retention standards provide (see Section VII.B, *infra*).

B. The 2009 SWMP, Incorporated into the Draft Permit, Has Not Been Shown to Meet MEP

The Draft Permit anticipates that the Permittee's "Upgraded SWMP" (Stormwater Management Program) of February 19, 2009, will be the baseline for the Permittee's stormwater management program under the Draft Permit. In fact, the Draft Permit directs the Permittee to continue to implement and upgrade the 2009 SWMP's controls and incorporates all of its requirements. (Draft Permit § 4.) Ultimately, the SWMP incorporated by reference in the Draft Permit does not constitute a complete program adequate under the CWA for several overriding reasons. First, the SWMP was not circulated for review along with the Draft Permit, adding to the Draft Permit's violations of public participation requirements. (See Section VIII, *infra*.)

Second, the Draft Permit and the associated Fact Sheet contain no findings or other evidence to support the consistency of the 2009 SWMP with applicable requirements such as the MEP standard. The Draft Permit contains no assertions that the 2009 SWMP meets MEP, nor any explanations of how its contents assure that standard will be met. As discussed above, the CWA requires MS4 permit controls to meet the MEP standard; to the extent EPA is relying on the 2009 SWMP to assure that the Draft Permit meets the MEP standard, it too must be shown to reduce the discharge of pollutants to the maximum extent practicable. In fact, empirical data demonstrates that existing management efforts such as those included in the 2009 SWMP are *not* adequate to meet CWA goals and requirements. Ongoing violations, discussed in Section II, *supra*, show that the 2009 SWMP's controls are not sufficiently reducing pollutant discharges to the District's waters.

Third, even if the SWMP were properly circulated, supported by findings, and had been demonstrably effective, most of the specific commitments in the SWMP that implement CWA regulations were

---

[37] *Draft 2010 Section 303(d) List*; 2007 Rock Creek DMR.
[38] *Draft 2010 Section 303(d) List*; Dist. Dep't of the Env't, *Anacostia River Discharge Monitoring Report* (Aug. 19, 2009).
[39] *Draft 2010 Section 303(d) List*; Dist. of Columbia Storm Water Task Force, *MS4 Discharge Monitoring Report* (Aug. 19, 2006), *available at* http://ddoe.dc.gov/ddoe/lib/ddoe/stormwaterdiv/2006DMR.pdf.
[40] Dist. Dep't of the Env't, *2008 Integrated Report* at 45.

accomplished, or should have been, during 2009. For example, the District's specific rain garden implementation program set numeric requirements with a deadline of December 31, 2009.[41] Likewise, deadlines for catch basin retrofitting came and went in 2009.[42] These and other examples evident in the SWMP suggest that the SWMP, while attached to a cover letter application for a new permit, is in significant part already out-of-date. The lack of specifics regarding activities planned in order to comply with the CWA during the next five-year period renders the SWMP legally and substantively inadequate to form the basis of a program that meets the CWA's requirements.

Finally, much like large parts of the Draft Permit itself, in other respects the "measurable outcomes" set forth in the SWMP are too often neither measurable nor reasonably specific enough to determine what outcome is promised and will be used to determine the District's compliance with the Draft Permit. For example, the District's proposed program to address a critical pollution problem, illicit or illegal discharges, is described generally in little more than one page, with non-specific hypothetical examples of how the District may respond to a report of discharge.[43] The measurable outcome in another related program area merely commits the District vaguely to "continue to work with" local law enforcement and to install an unspecified number of cameras at unspecified locations on an unspecified schedule.[44]

There are many more examples of the way in which the SWMP is both significantly out-of-date and too vague and general to meet the requirements of the CWA and its implementing regulations, let alone EPA guidance that emphasizes the critical importance of measurable and specific programmatic and water quality outcomes in MS4 permits. For these reasons, the incorporation of the 2009 SWMP unfortunately does not make the Draft Permit adequate to meet the requirements set by the CWA and EPA regulations for the MS4 program. This significant flaw makes the deferral of program development by the Draft Permit itself even more problematic and underscores why the Draft Permit must contain clear and adequate control measures subject to public and EPA review.

C. The Draft Permit Must Reflect the Obligations Contained in the 2008 Letter of Agreement Between the Permittee and EPA

In 2007, EPA and the Permittee reached a two-party agreement on a series of enhancements to the Permittee's 2004 MS4 Permit.[45] These enhancements, which were documented through a Letter of Agreement modified on August 1, 2008, include a series of actions, deliverables, commitments, and

[41] Gov't of the Dist. of Columbia, *Upgraded Stormwater Management Plan* 5-6 (Feb. 19, 2009).
[42] *Id.* at 5-13; *see also* 5-11 ("Maintenance manual for 'Low Impact Development (LID) Stormwater Control Structures' by April 30, 2009"); 5-23 ("SWPPPs will be developed by DDOT by July 2009").
[43] *Id.* at 5-26—5-27.
[44] *Id.* at 5-28.
[45] U.S. EPA, *Draft Fact Sheet, NPDES Permit No. DC0000221* at 3, *available at* http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/DCMS4DraftFactSheet_04-19-10.pdf.

deadlines for the Permittee's MS4 program on a range of topics.[46] The commitments in the Letter required significant new activities, with specific objectives and measurable benchmarks.

Because the 2008 Letter of Agreement was agreed to by the Permittee as an "enhancement" to its MS4 permit, the commitments in the Letter should be made requirements of the permit. However, many of the commitments in that Letter are not included in the Draft Permit. For example, the Letter requires documentation of the survival rate of trees planted,[47] whereas the Draft Permit does not require this. (Draft Permit § 4.1.3.) Additionally, the 2008 Letter requires the construction of a green roof on every new building constructed by OPM;[48] the Draft Permit contains no such requirement. As a final example, the 2008 Letter requires installation of cameras to record illegal dumping activities,[49] a provision which does not exist in the Draft Permit.

Because EPA and the Permittee have found the commitments in the 2008 Letter to be practicable, and have provided no explanation as to why they do not continue to be practicable, those requirements are required to be included in the Draft Permit as MEP, using clear, enforceable language.

IV. The Draft Permit Fails to Adequately Control Trash Discharges From the MS4

Trash is a significant issue and a pollutant of concern for the District's waterways. According to the District's 2008 Water Quality Assessment (305(b) and 303(d)) Integrated Report, the Upper Anacostia River and Lower Anacostia River are impaired by trash.[50] Studies performed by the Anacostia Watershed Society reveal alarming statistics such as: an average of 58 pieces of trash per 100 feet of Anacostia River length, excluding trash that is underwater; an average of 1.6 plastic bags per every 100 square feet of river bottom; and over 14,000 plastic bags counted during a two-month survey.[51] This trash not only creates a nuisance and an eyesore but also endangers birds, fish and other wildlife that ingest or become entangled in the debris.

However, the Draft Permit as currently drafted contains basically no trash reduction provisions beyond a reference to the Anacostia Trash TMDL, which is still being developed. *See* Draft Permit § 8.1.2 (requiring the Permittee to develop and implement an Anacostia River Trash TMDL Implementation Plan, whose elements will become enforceable conditions of the Permit upon approval of the plan); § 4.3.5 (requiring the Permittee to comply with the Trash TMDL Implementation Plan as part of the

[46] Letter from George S. Hawkins, Director, Dist. Dep't of the Env't, to Jon M. Capacasa, Director, Water Protection Division, U.S. EPA Region 3 (Aug. 1, 2008) (hereinafter "2008 Letter of Agreement"), *available at* http://www.ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/stormwaterdiv/epa_letter_agreement_august_2008.pdf.
[47] *Id.* at 1.
[48] *Id.* at 3.
[49] *Id.* at 7.
[50] Dist. Dep't of the Env't, *2008 Integrated Report* at Appendix 3.10.
[51] *See* Md. Dep't Env't & D.C. Dep't Env't, *Total Maximum Daily Loads of Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia* (April 2010) (hereinafter "Draft Anacostia Trash TMDL") at 6, available at http://www.mde.state.md.us/assets/document/Anacostia_Trash_TMDL_PN.pdf.

Permittee's Stormwater Management Program obligations). The only other trash provision in the Draft Permit is a vaguely-worded street sweeping requirement. (Draft Permit § 4.3.6.) As the trash TMDL is not yet in place, the Draft Permit lacks any meaningful controls on trash discharges from the MS4.

The Draft Permit's lack of a program to address trash violates the CWA requirement to reduce the discharge of pollutants to the MEP standard. Future plans to implement a trash TMDL – that are, as yet, not duly adopted and integrated regulatory requirements – do not justify or provide a basis for omitting practicable controls from the Draft Permit. EPA must include in the Draft Permit the maximum control requirements that are feasible or possible.

In this case, other MS4 permits in the region have included controls beyond what is contained in the Draft Permit, demonstrating that the Draft Permit is not complying with the MEP standard. For example, even the recently approved Montgomery County, Maryland MS4 Permit – which itself is far from meeting MEP – is stronger than the Draft Permit here. The Montgomery County permit at least contains some trash reduction provisions, and though they represent the kind of "plan to make a plan" that we find unlawfully vague (see Section III.A, *supra*), they do require the permittee to implement the following controls to reduce trash pollution:

- Regional strategies to reduce trash and increase recycling;
- A public outreach and education campaign with specific performance goals and deadlines to increase residential and commercial recycling rates, improve trash management, and reduce littering;
- Establishment of baseline conditions of trash being discharged to and from the storm drain system and development of a trash reduction strategy and work plan detailing control measures and deadlines;
- Implementation of control measures to eliminate the discharge of trash and debris from the county storm drain system; and
- Evaluation and modification of local trash reduction strategies with an emphasis on source reduction and proper disposal.[52]

All of these trash reduction controls have been acknowledged to be feasible and practicable in the Washington, DC metropolitan area; therefore, the Draft Permit's mere reference to a future TMDL, without more, violates the requirement that a permit's controls reduce trash discharges to the *maximum* extent practicable.

In addition, the lack of a trash control program makes the Draft Permit inconsistent with other applicable CWA requirements, including those that require the Permit to be consistent with water quality standards ("WQS"). EPA regulations specify that "each NPDES permit shall include conditions" which, among other things, are necessary to "[a]chieve water quality standards established under

[52] Md. Dep't of the Env't, *National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Permit for Montgomery County, Maryland*, Permit No. 06-DP-3320 MD0068349 (Feb. 16, 2010) at 5-6, *available at* http://www.mde.state.md.us/assets/document/MO%20CO_MS4_Permit.pdf.

section 303 of the CWA, including State narrative criteria for water quality."[53] (For additional discussion of the Draft Permit's obligation to ensure achievement of WQS, see Section V, *infra*.)

In the District, all waters (except for Hickey Run, Watts Branch, and wetlands) have "A" designated uses, which means they must protect several basic uses, including primary contact recreation and aesthetic enjoyment.[54] In addition, the District has a generally applicable narrative water quality criterion which provides that "[t]he surface waters of the District shall be free from substances in amounts or combinations that do any one of the following: (a) Settle to form objectionable deposits; (b) Float as debris, scum, oil, or other matter to create a nuisance."[55]

In listing 14.8 miles of rivers and streams as impaired for trash in 2008, DDOE has recognized that these standards are violated throughout the District.[56] Because the District's MS4 system is a source of trash,[57] CWA regulations require the Draft Permit to contain effluent limitations that will prevent the MS4's discharges from causing or contributing to water quality standard violations.[58] The Draft Permit contains no such effluent limits for trash or other conditions that will ensure that water quality standards will be met; the reference to the future Anacostia trash TMDL is inadequate as described above. Consequently, the Draft Permit is in violation of CWA requirements that it include conditions to achieve water quality standards.

To remedy this violation, the Draft Permit should require the Permittee to meet numeric trash reduction targets by the end of the permit term, with mandatory demonstrations of reasonable annual progress toward those targets. The Draft Permit should also specify that the Permittee must commit to a series of specified trash reduction measures that can be expected to achieve the discharge targets.

V. The Draft Permit's Failure to Require That Discharges From the MS4 Not Cause or Contribute to Violations of Water Quality Standards Violates the CWA

The current Draft Permit errs in not requiring the Permittee to meet applicable water quality standards. The purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[59] The Act's stated goal is the complete elimination of the discharge of pollutants into navigable waters.[60] In keeping with this goal, the Clean Water Act requires each state and the District of Columbia to adopt and submit for federal approval water quality standards for all waters within its boundaries.[61]

[53] 40 C.F.R. § 122.44(d)(1).
[54] D.C. Mun. Regs. tit. 11, § 21-1101.
[55] D.C. Mun. Regs. tit. 11, § 21-1104.1.
[56] Dist. Dep't of the Env't, *2008 Integrated Report* at 44.
[57] *See* Draft Anacostia Trash TMDL at § 2.2.1 & Table 12.
[58] 40 C.F.R. § 122.44(d)(1)(iii).
[59] 33 U.S.C. § 1251(a).
[60] *Id.*
[61] 33 U.S.C. §§ 1311(b)(1)(C), 1313.

Despite the importance of water quality standards in improving and preserving water quality, the Draft Permit merely asks the Permittee to make "progress" toward water quality standards and does not require the Permittee to actually attain them. (Draft Permit § 1.4 (stating "[c]ompliance with all performance standards and provisions contained in this Permit shall constitute progress toward compliance with [water quality standards]").) EPA's draft fact sheet on the Draft Permit explains this lax provision by stating, "attainment of water quality criteria is an incremental process…so long as permittees reduce the discharge of pollutants to the maximum extent practicable (MEP) within each permit cycle."[62] This statement wholly misunderstands the MEP standard.

A. Achievement of Water Quality Standards Is One of the CWA's Central Objectives

Water quality standards are maximum permissible pollutant levels, expressed either as numeric limits or in narrative terms, that must be sufficiently stringent to protect public health and enhance water quality, consistent with the uses for which the water bodies have been designated.[63] Water quality standards provide the basis for regulating point sources, "to prevent water quality from falling below acceptable levels."[64] As annunciated in the regulations:

> [Water quality] standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the [Clean Water] Act.[65]

Achievement of water quality standards is central to the objectives and goals of the CWA.[66] Council on Environmental Quality ("CEQ") Chairman Train explained the role of water quality standards when Congress enacted the 1972 amendments that created the modern Clean Water Act, stating, "Speaking very generally the whole permit program is tied to the water quality program standards and is a mechanism designed to reach those standards."[67] For this reason, 40 C.F.R. 122.44(d)(1) plainly requires NPDES permits to "include conditions…necessary to…achieve water quality standards."[68] As shown by the record, the District discharges impairing pollutants, thereby triggering this provision.[69] (See Section II, *supra*.)

---

[62] U.S. EPA, *Draft Fact Sheet*, NPDES Permit No. DC0000221 (2004)at 4.
[63] 33 U.S.C. § 1313(c)(2)(A).
[64] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994) (quotation omitted).
[65] 40 C.F.R. § 131.2.
[66] *See*, *e.g.*, 33 U.S.C. § 1311 (all permits require compliance with water quality standards); 33 U.S.C. § 1313 (water quality standards via Total Maximum Daily Loads ("TMDLs")); 33 U.S.C. § 1314 (assessment of attainment of water quality standards); 33 U.S.C. § 1341(a) (permit issuance predicated on water quality standards attainment).
[67] Remarks of CEQ Chairman Train, 92 Cong. S4340 (June 22, 1971).
[68] 40 C.F.R. 122.44(d)(1).
[69] *See, e.g.*, Dist. Dep't of the Env't, *Anacostia River Discharge Monitoring Report* (Aug. 19, 2009); Dist. of Columbia Stormwater Task Force, *Discharge Monitoring Report* (Aug. 19, 2006).

B. The Environmental Appeals Board Ruling That Prior Permits Must Ensure Compliance with Water Quality Standards Applies to the Draft Permit

The first DC MS4 permit, issued in 2000, was litigated before the Environmental Appeals Board ("EAB"). That EAB decision, which has never been overturned, establishes the correct parameters by which to evaluate DC's MS4 permit.

1. The Environmental Appeals Board Found that DC Must Ensure Compliance with Water Quality Standards

In a challenge by Defenders of Wildlife and Friends of the Earth ("DOW/FOE") to the first iteration of DC's MS4 permit, the EAB held, in 2002, that the permit must ensure compliance with water quality standards.[70] The EAB remanded the permit to EPA to correct its failure to show that the permit's conditions would be adequate to ensure such compliance. The Board explained the relevant legal standards by stating:

> [S]ection 301 of the CWA requires, among other things, that NPDES permits contain 'any more stringent limitation, including those necessary to meet water quality standards …established pursuant to any State law or regulation ….' 33 U.S.C. § 1311(b)(1)(C). This statutory requirement has been implemented, in part, through long-standing regulations that prohibit the issuance of an NPDES permit 'when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states.' 40 C.F.R. § 122.4(d)(2001) (emphasis added).[71]

The EAB then remanded the permit to EPA, "to provide and/or develop support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards and to make whatever adjustments in the Permit, if any, might be necessary in light of its analysis."[72]

The EAB decision still stands, though its mandates have been largely ignored by EPA. In 2004, EPA issued a revised permit, which DOW/FOE again challenged based on the permit's lack of effluent limitations adequate to assure compliance with applicable water quality standards.[73] Though the 2004 permit claimed to resolve these issues and to comply with the EAB decision, ultimately, it fell short. The fact sheet accompanying the 2004 permit stated that:

> [T]he Permit establishes narrative effluent limits identified in Parts I.C. and I.D of the reissued Permit which prohibits the permittee from discharging pollutants from the MS4 system to District waterways that could cause or result in an exceedance of applicable water quality standards.[74]

---

[70] *Gov't of the Dist. of Columbia, MS4 System*, 10 E.A.D. 323 (2002).
[71] *Id.* at 335.
[72] *Id.* at 343.
[73] Petition of Earthjustice, *Government of the District of Columbia, MS4*, NPDES permit No. DC 000022 1, Amendment 1 (2006) at 5-6 (hereinafter "Earthjustice Petition").
[74] U.S. EPA, *Draft Fact Sheet*, NPDES Permit No. DC0000221 (2004) at 9.

Though EPA's intent is clear from the language of the 2004 fact sheet, the permit itself did not unambiguously include such a prohibition, as explained in another petition for review of the 2004 permit filed by DOW/FOE.[75]

In 2005, DOW/FOE reached a settlement with EPA, whereby EPA would modify the permit to, *inter alia*, include the following language: "All discharges of pollutants to or from the MS4 system that cause or contribute to the exceedance of the District of Columbia water quality standards are prohibited."[76] However, EPA reversed course and issued an amendment in 2006 that, instead of prohibiting discharges that would cause or contribute to noncompliance with water quality standards, prohibited discharges that would worsen water quality beyond "current conditions."[77] This language did not ensure compliance with water quality standards since the "current condition" of the District's waters was impaired. DOW/FOE appealed again to the EAB,[78] and EPA withdrew the contested language from the 2006 amendment, promising to address the water quality standards compliance issue in a future permit revision.[79] The Draft Permit is the first set of permit modifications that EPA has proposed since then.

EAB's 2002 decision is dispositive on the issue of water quality compliance in the current permit and EPA is not free to ignore it. As illustrated by the procedural history summarized above, EPA has yet to comply with the EAB's 2002 remand order, and is therefore obliged to do so in the Draft Permit. Despite this record, EPA has not included in the Draft Permit a prohibition on discharges that would cause or contribute to noncompliance with water quality standards, choosing instead to propose language whereby compliance with BMP-based requirements is deemed to be sufficient "progress" towards meeting water quality standards. (Draft Permit § 1.4.) EPA must revise the Draft Permit to include the above-quoted language that was agreed to in the 2005 settlement with DOW/FOE (and to delete any language to the contrary), and must further demonstrate that the permit's conditions, as a whole, will be sufficient to ensure that discharges from the District's MS4 do not cause or contribute to violations of water quality standards.

2. EPA Is Further Constrained by Antibacksliding Provisions

The CWA's antibacksliding provision prohibits, except in limited circumstances not applicable here, the renewal or reissuance of a permit that contains "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."[80] By law, DC's current MS4 permit must be at least at rigorous as the current (2004) permit. As noted above, the Fact Sheet for the 2004 permit states that the 2004 permit "establishes narrative effluent limits . . . which prohibits [sic] the permittee from discharging pollutants from the MS4 system to District waterways that could cause or result in an

[75] Earthjustice Petition at Exhibit 3 "2004 Petition for Review."
[76] *Id.* at Exhibit 2 "Petitioners' Comments on Proposed Amendment 1."
[77] *Id.* at 5.
[78] *Id.*
[79] EPA, *Draft Fact Sheet* at 2.
[80] 33 USC § 1342(o); *see also* 40 C.F.R. § 122.44(l) (prohibiting the relaxation of effluent limitations in reissued permits).

exceedance of applicable water quality standards."[81] While it is not clear that the 2004 permit actually includes such terms (*see* Section V.B.1, *supra*), EPA's intent to do so is clearly stated in the 2004 Fact Sheet and EPA should not backslide by failing to include such a prohibition in the current Draft Permit.

3. Failure to Require Compliance with Water Quality Standards Is in Conflict with CWA TMDL Requirements

Additionally, the failure to ensure compliance with water quality standards not only violates the general principles set forth above but also violates the CWA requirement regarding TMDL implementation, as further discussed in Section VI.

C. The Draft Permit Lacks the Required Certifications from The District of Columbia and Affected Neighboring States that the Permitted Discharges Would Comply With All Applicable Water Quality Standards

Under Section 401(a) of the CWA, any applicant for a federal permit must provide certification from the jurisdiction in which the discharge originates that, *inter alia*, the proposed discharge is consistent with that jurisidiction's water quality standards.[82] DC's 2004 MS4 permit was certified by the District Department of Health.[83] However, neither the current Draft Permit nor the Draft Fact Sheet indicates that EPA has sought or obtained a section 401 water quality certification from the District.

The certification is important also because it triggers the rights of neighboring states to be heard on a permit that will affect their water quality.[84] Upon receiving the section 401 certification of the state where the proposed discharge would occur, the Administrator must inform any other state whose water quality may be affected by the Permittee's discharge.[85] According to the Supreme Court in *Arkansas v. Oklahoma*, "Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured."[86] Likewise, EPA regulations provide that the agency may not issue a NPDES permit "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."[87] Because of the circumstances of this proposed discharge by a non-state entity into waters proximate to other states, EPA clearly erred in not complying with the certification process. For example, polluted discharge from the DC MS4, either directly or via the Anacostia or Potomac Rivers, flows into the Chesapeake Bay. As referenced above (see Section II, *supra*), DC has over five miles of estuary which are impaired by MS4 discharges. All of DC's estuaries are

[81] Earthjustice Petition at Exhibit 2 "Petitioners' Comments on Proposed Amendment 1."
[82] 33 U.S.C. § 1341(a)(1).
[83] EPA*, Draft Fact Sheet* at 2-3.
[84] 33 U.S.C. § 1341(a)(2).
[85] *Id.*
[86] *Arkansas v. Oklahoma*, 503 U.S. 91, 104 (1992).
[87] 40 C.F.R § 122.4.

encompassed by the Chesapeake Bay, which is in turn surrounded by Maryland and Virginia.[88] DC's MS4 discharges necessarily affect water quality in Maryland and Virginia. The District is literally surrounded by other states; the need to comply with Section 401 is manifest.

Furthermore, because of the geographic and hydrologic context, EPA's omission has significant practical consequences. Forty-six states operate approved state NPDES permit programs under the Clean Water Act.[89] Many of these states have stormwater regulations separate from the Clean Water Act that specifically require MS4 permits to comply with water quality standards. Maryland is one such state. Maryland law requires all NPDES permits to be in compliance with water quality standards.[90] The *Arkansas v. Oklahoma* decision supports the proposition that EPA must consider Maryland's water quality standards before issuing the DC permit:

> The application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[91]

Maryland, like DC, suffers from degraded water quality.[92] In fact, water quality in the Chesapeake Bay met only 24% of its health goals for 2009.[93] Given that DC has not yet provided any 401 certification, it is unlikely that Maryland has received 401(a)(2) notification that this permit will affect their water quality. However, as an affected state, Maryland is within its rights to object to a permit that violates its own state regulations and harms its water quality. EPA must consider the implications for neighboring states and tighten the Draft Permit's requirements accordingly.

D. EPA's Decision to Not Require Compliance with WQS is Arbitrary and Capricious

At a minimum, EPA has acted arbitrarily and capriciously by failing to establish a record showing that attaining water quality standards is infeasible. Even if EPA's contention that the language of 33 U.S.C. § 1342(p) invests in it discretion in whether to require compliance with water quality standards is credited, an argument with which we disagree, "the phrase 'to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible."[94] Nowhere in the Draft Permit or accompanying fact sheet does EPA explain its assertion that DC "will be unable to attain all Water Quality Standards within the

---

[88] Chesapeake Bay Program, "The Bay Watershed," *available at* http://www.chesapeakebay.net/thebaywatershed.aspx?menuitem=13942 (last visited Jun. 3, 2010).
[89] *See* 33 U.S.C. § 1342(b).
[90] *See* Md. Code Regs. 26.08.04.
[91] *Arkansas*, 503 U.S. at 105-106.
[92] *See generally*, Md. Dep't of the Env't*, Draft 2010 Integrated Report of Surface Water Quality in Maryland (2010) available at* http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/Pub_Notice/draft_2010_IR_for_pubnotice.asp.
[93] Chesapeake Bay Program, "The Bay Water Quality," *available at* http://www.chesapeakebay.net/thebaywatershed.aspx?menuitem=13942 (last visited Jun. 3, 2010).
[94] *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").

first several MS4 permit cycles."[95] This unsupported statement is not sufficient to comply with the mandates of the Clean Water Act.

To the contrary, courts in other jurisdictions have found that permit requirements, including requiring compliance with water quality standards, are "intended to provide a cost-effective storm water pollution program to the maximum extent practicable,"[96] and that "there is no showing . . . that [] applicable water standards are unattainable."[97] Indeed, the conclusory assertion that the District cannot attain water quality standards is at odds with the position of multiple other EPA Regions overseeing similar urban storm water permits as well. In EPA Region 1's comments on the January 2010 Draft Vermont Small MS4 General Permit, EPA clearly expresses an expectation for compliance with water quality standards and its insistence on clear plans for achieving this.[98] In Region 9, there are no fewer than ten permits in California alone that require compliance with water quality standards as part of permit compliance.[99] It is entirely unclear from the Permit and accompanying documents why standards would not be attainable in the District when they are a required compliance obligation in similar and even larger metropolitan areas, such as Los Angeles or San Francisco.[100] Region 3's divergent and wholly unsupported position in issuing a permit without requiring compliance with water quality standards falls squarely within the parameters of arbitrary and capricious action.

E. EPA Policy Favors a Strong DC Permit

EPA has stated that it wants DC's MS4 permit to be a model for the Chesapeake Bay watershed, asserting, "We all need to do our part, and this permit can serve as a model to other municipalities for preventing runoff from washing harmful pollutants into streams and rivers in the [Chesapeake] Bay watershed."[101] Additionally, Administrator Jackson made "Protecting America's Waters" one of her seven priorities for the Agency.[102] A centerpiece of that effort is the Urban Waters Initiative, a program designed to help urban communities, like Washington, DC, "reconnect with and revitalize the waters

---

[95] EPA, *Draft Fact Sheet* at 4.
[96] *County of Los Angeles v. California State Water Resources Control Board,* 143 Cal.App.4th 985, unpublished portion at 33 (2006).
[97] *Building Industry Ass'n of San Diego County v. State Water Resources Control Board*, 124 Cal.App.4th 866, 874 (2004).
[98] EPA Region 1, Comments on Vermont's Draft MS4 Permit (Apr. 22, 2010), 2-3, 9.
[99] *See e.g.,* California Regional Water Quality Control Board Los Angeles Region Order 01-182 NPDES Permit No. CAS004001 (Dec. 13, 2001) at 28-19; California Regional Water Quality Control Board San Diego Region Order No. R9-2009-0002, NPDES No. CAS0108740 (Dec. 16, 2009) at 18; California Regional Water Quality Control Board San Francisco Bay Region Municipal Regional Stormwater Order R2-2009-0074 NPDES Permit No. CAS612008 (Oct. 14, 2009) at 8-9.
[100] *See id.*
[101] Statement of Shawn M. Garvin, EPA Mid-Atlantic Regional Administrator, EPA Press Release (Apr. 21, 2010), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/ECF0FC0431AFBF0B8525770C006EA74B.
[102] Memorandum of Lisa Jackson to All EPA Employees, "Seven Priorities for EPA's Future," (Jan. 12, 2010), *available at* http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/.

that are an important part of their health and prosperity."[103] In contrast to EPA's stated policy goals and efforts in other arenas, Region 3 has drafted a permit that is not protective of District waterways and is in fact less stringent than requirements in DC's neighboring Bay state, Maryland. (See Section V.C, *supra*.) If EPA intends for this permit to be used as a successful example of what can be done to stem pollution in urban communities and throughout Chesapeake Bay, it must strengthen the water quality provisions of the Draft Permit to require compliance with water quality standards.

The Clean Water Act must be approached as a cohesive set of requirements designed to work together to eliminate pollution. A permit that does not require compliance with water quality standards fails to utilize an essential Clean Water Act tool for eliminating the discharge of pollution. Enacting water quality standards pursuant to one provision of the Act, but then failing to require the standards be met in the permit (despite the NPDES permitting scheme having been designed as the "mechanism designed to reach those standards")[104] represents a disjointed and ultimately erroneous approach to the Clean Water Act.

VI. The Draft Permit Fails to Require or Assure Actual Compliance with TMDL WLAs

TMDLs establish wasteload allocations ("WLAs")—or the maximum amount of a pollutant that each point source discharger may release into a particular waterway—which constitute a form of water quality-based effluent limitation.[105] Once a TMDL has been adopted, NPDES permits are required to contain effluent limitations and conditions consistent with the assumptions and requirements of the approved WLA.[106] Accordingly, EPA has recognized that MS4 permits should include clear and specific requirements related to the identification, evaluation, and implementation of appropriate water quality controls, with attached timeframes and milestones, which are necessary to address any applicable WLA.[107] However, the Draft Permit fails to meet these legal requirements in several ways.

A. The Draft Permit Fails to Demonstrate that Its Effluent Limits Will Be Sufficient to Meet Adopted WLAs

It has been EPA's position that effluent limitations in MS4 permits should usually be expressed in the form of best management practices ("BMPs") rather than numeric limits.[108] However, when a permitting authority elects to impose only non-numeric effluent limits (i.e., BMPs), EPA guidance states

---

[103] *Id.*
[104] Remarks of Sen. Train, 92 Cong. S4340 (June 22, 1971).
[105] *See* 33 U.S.C. § 1313(d)(4)(A); 40 C.F.R. § 130.2.
[106] 40 C.F.R. § 122.44(d)(1)(vii)(B); *see also* U.S. EPA, *TMDLs to Stormwater Permits Handbook (Draft)* at 135 (Nov. 2008), *available at* http://www.epa.gov/owow/tmdl/pdf/tmdl-sw_permits11172008.pdf.
[107] *See* Letter from James D. Giattina, EPA Region 4, to State Water Directors (Apr. 15, 2010), *available at* http://www.florida-stormwater.org/pdfs/2009-10%20PDFs/EPA%20Region%20IV%20Guidance%20for%20MS4%20Permits.pdf.
[108] *See* U.S. Environmental Protection Agency, *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 4-5 (2002), *available at* http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf.

that the MS4 permit or its administrative record "needs to support that the BMPs are *expected to be sufficient* to implement the WLA in the TMDL."[109]

The Draft Permit, however, provides no support or factual basis to demonstrate that the Permittee's BMPs can be expected to adequately implement WLAs. Its requirements for the Permittee's BMP programs are excessively general: the Draft Permit requires the Permittee's TMDL implementation plans to contain "a set of controls for achieving the MS4 WLA," but it provides no specification of what BMP controls are to be implemented. (Draft Permit § 8.1, ¶ 3.B.) Moreover, while the Draft Permit requires the Permittee to demonstrate later down the road, in its TMDL Implementation Plans, how the controls it chooses will achieve WLAs (§ 8.1, ¶ 3.E), there is no demonstration of WLA compliance within the Draft Permit itself. This approach is problematic because there is no specific requirement that TMDL Implementation Plans be made available for public notice and comment, only that the Permittee "engage the public in a meaningful way in the process of developing" the plans. (Draft Permit § 8.1, ¶ 3.F.) As discussed in Section III.A, *supra*, this approach to demonstration of WLA compliance denies the public any meaningful review opportunity.

EPA Region 9 has stated that, "given the uncertainties in the performance of many of the BMPs commonly used for stormwater pollution control, it is often difficult to make such a demonstration."[110] The practical difficulty inherent in assuring that BMPs alone will implement WLAs indicates that it would be an abuse of discretion not to include numeric effluent limitations in the Draft Permit. After all, EPA itself admits in guidance that BMPs are sometimes "not an appropriate way to express effluent limitations" and that permit writers may "choose to develop numeric effluent limitations as a feasible and appropriate way to incorporate the TMDL provisions into the permit."[111] An obvious example of a situation where BMPs alone are not appropriate is the case where, as here, BMPs have not been, and cannot be, determined to be sufficient to comply with WLAs.[112]

In sum, EPA should expressly include each WLA applicable to the District as a numeric effluent limitation in the Draft Permit. A failure to do so, given that BMPs alone cannot be demonstrated to sufficiently meet legal obligations, would violate the APA's arbitrary and capricious standard.

B. The Draft Permit Fails to Actually Require Compliance With WLAs

The permit lacks clear and enforceable language requiring compliance with WLAs. This is both unlawful, for the reasons described above, and inconsistent with practice in other EPA Regions.

First, the Draft Permit nowhere clearly states that compliance with WLAs is required. The Draft Permit states that it "includes all TMDL WLAs applicable to the District MS4 approved or established as of the

[109] *Id.* at 2 (emphasis added) (citing 40 C.F.R. §§ 124.8, 124.9 & 124.18).
[110] *See* Letter from Eberhardt to Bowyer at 6.
[111] EPA, *TMDLs to Stormwater Permits Handbook* at 137.
[112] Notably, the Draft Permit (§ 8.1, ¶ 2.) states, "If [best] management practices alone adequately implement the WLAs, then additional controls will not be necessary." This implicitly concedes that EPA has not made, and cannot made, a determination that the BMPs in the permit are sufficient to achieve compliance with the WLAs.

effective date of this Permit." (Draft Permit § 8.1, ¶ 1.) Additionally, it requires the Permittee's SWMP to "[b]e consistent with applicable waste load allocations (WLAs) for each approved Total Maximum Daily Load (TMDL) for each receiving water body." (Draft Permit § 1.4.2.) This language – "includes" WLAs, "consistent with" WLAs – is imprecise and engenders uncertainty as to whether the Draft Permit actually requires the Permittee's discharge to comply with WLAs. The Draft Permit's language should be amended to explicitly require compliance with all applicable WLAs.

Second, the Draft Permit's iterative approach to TMDL implementation represents another way in which it fails to actually require compliance with WLAs. According to EPA, "the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and achieving … total maximum daily load (TMDL) compliance."[113] Consequently, the Draft Permit provides that if pollutant-specific WLAs are not being met, the Permittee shall develop, through its Annual Reports, "recommendations for correction of the non-compliance problems." (Draft Permit § 8.1.) Despite failing to meet WLAs, it appears the Permittee will continue to be considered in compliance with the Permit as long as it "document[s] all previous and on-going efforts at achieving the specific pollutant reductions identified in the TMDL WLA and further demonstrat[es] additional controls sufficient to achieve those reductions…."[114]

The Draft Permit's apparent failure to hold the Permittee accountable for its noncompliance – beyond simply requiring it to revise its strategy – renders the already unclear TMDL and WLA requirements meaningless. By allowing the Permittee to remain in compliance with the permit regardless of whether it actually meets WLAs, the Draft Permit allows the Permittee to avoid its TMDL obligations indefinitely, creating a fiction that its efforts are resulting in water quality improvement. In this manner the Draft Permit never actually requires compliance with WLAs and the Permit violates the fundamental requirement that it be issued only if consistent with adopted WLAs.

Third, the failure to clearly require compliance with WLAs is inconsistent with other EPA Regions' positions on this issue. For example, EPA Region 9 has recently stated that a permit should "explicitly state that the wasteload allocations (WLAs) established by . . . TMDLs are intended to be enforceable permit effluent limitations and that *compliance is a permit requirement*."[115] Region 1 has also stated that MS4 permits "should set specific enforceable requirements to meet the applicable WLA."[116] Next to these other EPA Regions' permits, the Draft Permit here unexplainably stands out as a much weaker document, at least as far as WLAs are concerned, potentially rendering it arbitrary and capricious.

---

[113] EPA, *Draft Fact Sheet* at 4.

[114] *Id.* We note that a requirement to propose corrective action is appropriate (and desirable), so long as permit terms are clear that a failure to meet WLAs is a permit violation and that taking corrective action does not obviate the violation. However, the Draft Permit falls short by not making this point clear and, in fact, by suggesting otherwise.

[115] Letter from Douglas E. Eberhardt, EPA, to Michael Adackapara, Santa Ana Regional Water Quality Control Board (Feb.13, 2009), at 3.

[116] EPA Region 1, *Comments on the Jan. 2010 Draft VT Small MS4 General Permit* at 3 (Apr. 2010).

C. *The Permit Fails to Include Schedules of Compliance for the WLAs, as Required by EAB Precedent*

The permit unlawfully defers to TMDL Implementation Plans, to be developed by the Permittee, for establishment of numeric benchmarks for pollutant load reductions to impaired water bodies and associated timelines for achieving those benchmarks. The EAB recently held, in an appeal concerning the District of Columbia's NPDES permit for the Blue Plains sewage treatment plant, that any EPA-issued NPDES permit in the District of Columbia must include, *within the permit itself*, a schedule for compliance with water quality-based effluent limitations, if compliance is not anticipated immediately upon permit issuance.[117] In that 2008 ruling, the EAB squarely held that EPA is bound by the following requirement in the District's EPA-approved water quality standards:

> "When the Director requires a new water quality standard-based effluent limitation in a discharge permit, the permittee shall have no more than three (3) years to achieve compliance with the limitation, unless the permittee can demonstrate that a longer compliance period is warranted. A compliance schedule *shall* be included in the Permit."[118]

EPA is bound by this EAB ruling and must, therefore, revise the Draft Permit to include compliance schedules for WLAs consistent with the above-cited provision of the District's water quality standards. The specification of compliance schedules cannot be deferred to the TMDL Implementation Plans, which are prepared by the Permittee following permit issuance.

D. *The Inconsistency of the Draft Permit with WLAs and TMDLs Precludes Any New Discharge or Increased Discharge Pursuant to the CWA and the Ninth Circuit's Decision in Pinto Creek*

EPA should note a significant additional consequence of its failure to assure that TMDLs and their associated WLAs are actually implemented by the Draft Permit and to ensure that the Permit is consistent with those WLAs. Under the Ninth Circuit's decision in *Friends of Pinto Creek v. EPA*, no NPDES permit may be issued to a new discharger[119] if the discharge will contribute to the violation of water quality standards, as is the case when new discharges of pollutants are made to waters impaired for those same pollutants.[120] A single exception to this rule exists where a TMDL has been performed, and the "new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards."[121] In other words, a permit for new discharges may *not* be issued, even when a TMDL for the relevant pollutant exists, unless it can be firmly

---

[117] *District of Columbia Water & Sewer Auth.*, slip op. at 25-34 (Mar. 19, 2008), 13 E.A.D. __.
[118] *Id*. at slip op 25 (quoting DC Mun. Reg. § 1105.9 (emphasis added by EAB)).
[119] A "new discharger" is defined as "any building, structure, facility, or installation: (a) From which there is or may be a 'discharge of pollutants;' . . . (c) Which is not a 'new source;' and (d) Which has never received a finally effective NDPES permit for discharges at that 'site.'" 40 C.F.R. § 122.2. This definition thus applies to buildings or structures, including new subdivisions, industrial facilities, or commercial structures, within the Permittee's jurisdiction.
[120] *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007).
[121] *Id.*

established that "there are sufficient remaining pollutant load allocations under existing circumstances."[122]

Water quality standards in the District of Columbia are already violated by existing discharges: according to the District's 2008 Water Quality Assessment (305(b) and 303(d)) Integrated Report, no water body monitored between 2003 and 2007 fully supported all of its designated uses, and the District's water quality continues to be impaired.[123]

Therefore, any new or additional discharge of pollutants for which impairments already exists would necessarily contribute to a violation. TMDLs have been performed for many of the District's waters – more than 350 TMDLs in total.[124] However, the Draft Permit does not guarantee that there are sufficient pollutant load allocations remaining, as it does not adequately control discharges (as described above). Specifically, as noted, the Permit does not appear to actually require discharges to be controlled to implement WLAs. Consequently, if the Draft Permit is approved as currently written – providing no basis to find that any available load exists – EPA will not be able to authorize any new or increased discharges in the District, nor will surrounding states be able to do so, to affected waters.

E. The Draft Permit's Failure to Require Water Quality Monitoring to Determine TMDL Compliance for All TMDL Pollutants Is Inconsistent with the CWA and Otherwise Arbitrary and Capricious

Under the CWA, all NPDES permits must require water quality monitoring sufficient to determine compliance with permit requirements.[125] The statute states, "Whenever required to carry out the objective of this chapter, including but not limited to… (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance…(A) the Administrator shall require the owner or operator of any point source to…(iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods)…as he may reasonably require."[126]

Accordingly, EPA policy also states that NPDES permits must require permittees to undertake the monitoring necessary to assure compliance with permit limitations.[127] This monitoring requirement is central to enforcing the CWA, because it requires permittees to identify and disclose their own permit violations.[128] Moreover, monitoring activities are needed not only to determine whether a permittee

---

[122] *Id.*
[123] DDOE, *2008 Integrated Report* at 1.
[124] Dist. Dep't of the Env't, *TMDL Program - An Important Step Toward Restoring the Anacostia and Other Impaired Waters in the District*, http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,499033.asp.
[125] 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), 122.48(b).
[126] 33 U.S.C. § 1318(a).
[127] EPA, *Establishing TMDL WLAs for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 5 (citing 40 C.F.R. § 122.44(i)).
[128] *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988).

has violated its permit conditions, but also to assess the performance of the permittee's management practices and, if applicable, adjust those practices so that any violations will cease.[129]

To that end, Clean Water Act regulations anticipate that monitoring will be required to take a certain form: "All permits shall specify…required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity."[130] This language, referring to monitoring "intervals" and "frequency," clearly contemplates that permittees should undertake periodic monitoring of water quality, such that the performance of the permittee's management practices may be evaluated. Regulations also require MS4 permit applicants to include "a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled…, why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment."[131] This provision is a straightforward requirement for permittees to perform water quality sampling.

The Draft Permit, however, authorizes a different type of monitoring. It provides that, "[f]or TMDL pollutants not included in Table 3,[132] pollutant load reductions will be estimated using BMP efficiencies in place of monitoring data." (Draft Permit § 8.1, ¶ 3.G.) In other words, instead of actually testing water quality, the Permittee is authorized to estimate its compliance from the degree of BMP implementation it has thus far achieved.

This scheme frustrates the purpose of imposing monitoring requirements in the first place; it provides no feedback on BMP performance, thereby precluding any educated revision or adjustment of BMPs to ensure TMDL compliance. EPA's own policy documents have recommended against taking this approach, urging "that [NPDES] permits require collecting data on the actual performance of the BMPs."[133] Moreover, this scheme violates the Clean Water Act's monitoring requirements because it is clearly not adequate to assure compliance with WLAs. Without testing water quality, it is impossible for the Permittee or EPA to ascertain whether the Permittee's discharges are in compliance with its TMDL obligations.

Finally, even if water quality monitoring sufficient to determine compliance were not a specific CWA requirement, the Draft Permit's implementation-based "monitoring" scheme is a clear abuse of discretion. EPA cannot rationally both rely on estimates of BMP performance as a basis of determining that the *Draft Permit's requirements are consistent with WLAs*, while relying on these very same estimates, unverified by actual sampling, to determine that *permit implementation results in actual compliance with the WLAs*. This approach is arbitrary and capricious and renders the "monitoring"

---

[129] *See id.* ("[Monitoring D]ata may provide a basis for revised management measures … [and] might indicate if it is necessary to adjust the BMPs.").
[130] 40 C.F.R. § 122.48(b); *see also* 40 C.F.R. § 122.41(j).
[131] 40 C.F.R. § 122.26(d)(2)(iii)(D).
[132] Table 3 of the Draft Permit includes E. coli, nitrogen, phosphorus, suspended solids, cadmium, copper, lead, and zinc; therefore, BMP-based monitoring would apply to all other pollutants.
[133] EPA, *Establishing TMDL WLAs for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 5.

scheme illusory and circular. The Draft Permit should be revised to require water quality monitoring for *all* TMDL pollutants.

VII. The Draft Permit's Green Infrastructure Provisions Are Important and Well-Justified But Need to Be Strengthened to Address Water Quality Impairment

We strongly support the Draft Permit's use of measurable low impact development and green infrastructure requirements. These techniques have proven to be cost effective and environmentally beneficial mechanisms for dealing with stormwater pollution. Green infrastructure measures specified in the Permit, such as green roofs and tree planting, not only control stormwater pollution, but have the added benefits of improving air quality, reducing energy costs, and creating green jobs. As the Cameron Report shows, implementing green infrastructure in the District is feasible, cost effective, and on par with stormwater policies in other jurisdictions.[134]

A. The Draft Permit's Green Infrastructure Requirements Must Be Increased to Significantly Improve Water Quality

Impacts to water quality are tied directly to the introduction of impervious surface cover in the landscape; as impervious cover increases in a watershed, runoff and pollutant loads increase, and water quality degrades. Research shows that impervious cover of as little as 5 percent of a watershed results in a significant decline of aquatic insect and freshwater fish diversity, and that, "[m]arked habitat degradation occur[s] at 8 to 10 percent total impervious area."[135] As a result, the most effective means of addressing impacts to water quality is through addressing runoff at its source, i.e., through retaining the runoff onsite. This approach prevents runoff and pollutant loads from increasing in the first instance, and limits the effects of increased impervious surfaces in a watershed.

Green infrastructure techniques like those required in Section 4 of the Draft Permit are demonstrably effective at addressing runoff at the source. While we strongly support the inclusion of retrofit requirements in the Draft Permit, the permit must go farther in order to maximize the benefits that these techniques have to offer. For example, the Permit requires 4,150 tree plantings per year. (Draft Permit § 4.1.3.) In order to meet the 40% tree canopy goal set by Mayor Fenty, the Permit should require a net increase of 8,600 trees annually, more than double the number currently proposed.[136] Likewise, the DC Retrofit Program should be increased to encompass a more significant area of the city. The program is required to manage runoff from 18,000,000 square feet of impervious surfaces over the five year Permit term. (Draft Permit § 4.1.2.) Though this number seems large, it actually translates into 413 acres over five years or approximately 83 acres per year. The District has approximately 6,061

---

[134] *See generally* Cameron Report.

[135] Earl Shaver, et al., North American Lake Management Society, 2007, *Fundamentals of Urban Runoff Management: Technical and Institutional Issues*, at 4-98, 4-95, , *available at* http://www.deq.state.ms.us/mdeq.nsf/pdf/NPS_FundamentalsofUrbanRunoffManagement/$File/Fundamentals_full_manual_lowres.pdf?OpenElement.

[136] Casey Trees, "Urban Tree Canopy Goal," http://www.caseytrees.org/geographic/key-findings-data-resources/urban-tree-canopy-goals/index.php (last visited Jun. 2, 2010).

impervious acres on which stormwater is completely uncontrolled.[137] At that rate, it would be more than 70 years before all uncontrolled impervious area in the District was retrofitted under this program. Though EPA claims to have intended the retrofit requirement to be comparable the standard in Montgomery County, Maryland, which requires treatment for an additional 20% of impervious surface, Cameron estimates that the DC requirement is only 1/3 as comprehensive as that of Montgomery County.[138] The acreage requirement needs to be tripled if not quadrupled before it will represent any serious progress toward controlling stormwater pollution or approach a level that is similar to the Montgomery County permit.

EPA should make two further improvements to the acreage-based retrofit requirements. The permit should require that, when selecting projects for retrofitting within the Anacostia watershed, the DC LID projects within the Anacostia Restoration Plan (ARP), released on April 19, 2010, will be given top priority.[139] Also, the provision of Section 4.1.2.1 stating that "A minimum of 3,600,000 square feet of this objective must be in transportation rights-of-way" should be elaborated in greater detail, to list in the permit the series of steps to be undertaken by D-DOT in order to achieve this requirement.[140]

The inclusion of measurable green infrastructure requirements in the Draft Permit is a step forward in stormwater Permitting policy, and one we strongly endorse. However, the improvements to water quality will depend in part on the scale of the requirements compared to the size of the area from which pollutants will be discharged. Here, that scope requires that the strong green infrastructure policy in the Permit be implemented in an expanded way calculated to more rapidly improve water quality.

B. The Draft Permit Utilizes the Appropriate Retention Standard, But Related Permit Provisions Should Be Clarified and Strengthened to Ensure the Effective Implementation of that Standard

Though stronger retention requirements are feasible, the Draft Permit's on-site retention standards for new and redevelopment are reasonable.[141] The draft Permit requires, "stormwater controls to achieve on-site retention of 1.2" volume of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting." (Draft Permit § 4.1.1.a.) The Permit alternatively requires the retention of predevelopment runoff volume of stormwater from the same volume storm. (*Id.*) The draft Permit states that these requirements are triggered where development or redevelopment, "disturbs land greater than or equal to 5,000 square feet[.]" (Draft Permit § 4.1.1.)[142]

[137] Cameron Report at 5.
[138] EPA, *Draft Fact Sheet* at 10; Cameron Report at 5-6.
[139] *See* Cameron Report at 6.
[140] *Id.*
[141] *Id.* at 6-16.
[142] The vague term "disturb" is not defined in the definition section of the draft Permit. To avoid an unintended loophole whereby developers could claim to have actually "disturbed" less than the threshold 5,000 square feet on a 5,000 square feet or bigger project site, EPA should clarify that all development or redevelopment conducted on a site that is 5,000 square feet or greater triggers these on-site retention standards.

The on-site retention of stormwater, with no discharge, prevents 100% of a specified volume of water from leaving a site, thereby preventing 100% of the pollutants in that runoff from mobilizing and reaching receiving waters. As a result, it is a superior method of stormwater control than conventional best management practices ("BMPs") or other methods that allow for offsite discharge or only address pollution after it has already mobilized in runoff. This method has proven to be not adequately protective of water quality through several cycles of MS4 permitting. Moreover, standards and practices requiring the on-site retention of stormwater have already been established in permits and ordinances throughout the U.S.[143] Their adoption in all corners of the country demonstrates the practicability of this approach to stormwater management, and thus, that practices resulting in the onsite retention of stormwater are required under the Clean Water Act's "maximum extent practicable" standard.[144]

1. The Retention Standards are Feasible and Cost Effective for Development and Redevelopment

Industry commenters sometimes complain that stormwater controls are infeasible or cost prohibitive, especially on redeveloped sites. Yet these claims are belied by numerous studies showing that green infrastructure can be effectively implemented in developed and redeveloped sites at a low cost while still meeting strict stormwater management standards.

For example, a study of three redeveloped sites in Maryland found that, "For highly urban sites, ESD [environmental site design – another term for green infrastructure] was comparable or less expensive than a traditional stormwater system."[145] The study showed that all three sites were able to meet Maryland's 1" retention standard using green infrastructure and to do so at a substantial cost savings – upward of 40% at all three locations.[146] Moreover, EPA's Energy Independence and Security Act of 2007 ("EISA") section 438 guidance establishes an obligation for developers of new or redeveloped federal properties to use management methods that keep the precipitation from a 95th percentile storm on-site.[147] The EISA guidance document provided case studies which compared the costs of installing onsite control measures utilizing green infrastructure against the costs to install traditional stormwater

[143] *See e.g.*, California Regional Water Quality Control Board Los Angeles Region Order 01-182 NPDES Permit No. CAS004001 (Dec. 13, 2001) at 28-19; California Regional Water Quality Control Board San Diego Region Order No. R9-2009-0002, NPDES No. CAS0108740 (Dec. 16, 2009); Maryland Dep't of Env't NPDES MS4 Permit, Montgomery County, MD (009-DP-3320) (MD0068349); W. Virginia Dep't of Env't Protection Draft General National Pollution Discharge Elimination System Water Pollution Control Permit, NPDES Permit No. WV0116025; Md. Code Regs. 26.08.04; Phila. Water Dep't Regs. 600.0 *et seq.*

[144] 33 U.S.C. § 1342(p).

[145] Meliora Environmental Design LLC, *Comparison of Environmental Site Design for Stormwater Management for Three Redevelopment Sites in Maryland*, 2008.

[146] *Id.*

[147] *See* U.S. EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*, Dec. 4, 2009, *available at* http://www.epa.gov/owow/NPS/lid/section438/pdf/final_sec438_eisa.pdf.

management controls. In Denver, a 4.5 acre site with 55% impervious cover was able to meet the 95th percentile rainfall event standard at a cost of 17.3% less than a traditional approach. In Atlanta, a 21 acre site with 70% impervious cover was able to meet the standard at a cost of only 9.9% more than traditional stormwater controls.[148] Notably, the EISA guidance applies the same stormwater standards to both new and redeveloped sites. EPA interpreted the phrase "maximum extent technically feasible" in EISA to dictate the same standards be applied regardless of site classification. Significantly, given the large federal presence here, federal sites in Washington, DC, both under the EISA guidance and the terms of the draft MS4 Permit, are held to the 1.7" retention standard but all other development need only meet the less stringent 1.2" standard.[149] (Draft Permit § 4.1.1.a and b.)

Likewise, in a study conducted in the San Francisco Bay area, Richard Horner, a member of the National Academy of Sciences Panel on Reducing Stormwater Discharge Contributions to Water Pollution, demonstrated that even in an urban infill redevelopment site with limited to no infiltration capacity, it is possible to retain 78.9% of the annual stormwater that would otherwise have been discharged to the stormwater drain. For new development sites with adequate infiltration capacity, 100% of stormwater could be retained onsite in nearly all cases.[150]

Consistent with these findings, analysis of the specific requirements in the Draft Permit conducted by LimnoTech, Inc. demonstrates that an on-site retention standard of 1.7 inches is practicable in most areas of Washington, DC using on-site stormwater management techniques alone. It proves even more practicable when coupled with off-site mitigation or fee-in-lieu provisions.[151] Their analysis showed that, in most of the assessed sewersheds, sufficient opportunities are present to install stormwater practices that will provide adequate capacity to achieve 1.7 inches of stormwater retention. In reality, these sewersheds likely have even greater stormwater retention opportunities because the opportunity analysis only evaluated the potential of four stormwater practices; rainwater harvesting, for example, was not considered. In addition, the off-site mitigation and fee-in-lieu provisions provide additional flexibility in meeting the proposed stormwater standards. The opportunity analysis also demonstrates that several of the sewersheds have "excess" stormwater volume retention capacity to allow the off-site provisions to be exercised.[152] Given that the Permit requires retention of significantly less rainfall than Limnotech found could be feasibly retained, the Limnotech study is strong evidence of the practicable nature of the 1.2 inch requirement.

[148] *Id.*
[149] *Id.*
[150] Richard R. Horner, *Supplementary Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area* (2007) at 4-5; *Richard R. Horner, Initial Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area* (2007) at 16.
[151] *See* LimnoTech, Inc., *Analysis of the Pollution Reduction Potential of DC Stormwater Standards* (July 24, 2009).
[152] *Id.*

2. The Burden to Demonstrate Need for Off-site Waivers Rests with the Applicant

Allowances for off-site mitigation in cases where fully meeting the on-site retention standard is infeasible, like those addressed in section 4.1.1.d of the Draft Permit, should be rare and the burden of proof needs to rest squarely with the applicant, not the government plan reviewer, to show that all green infrastructure on-site opportunities have been exhausted before turning to off-site options. As demonstrated in the Cameron Report, successful urban redevelopment stormwater requirements, such as those applied in Montgomery County, Philadelphia, and elsewhere, combine a strict protocol for maximizing on-site opportunities for retention and a presumption that all sites are able to attain the full volume standard on-site, with flexibility to allow and enable some degree of off-site mitigation for instances where the full on-site retention volume is proven to be infeasible.[153] The Draft Permit should be revised to require the "stepwise" approach outlined in the Cameron report, which ensures that the maximum possible on-site retention will be achieved, and that a greater than 1:1 mitigation ratio will be applied in the limited cases when off-site mitigation is allowed.[154] Further, the Draft Permit should be revised to ensure that off-site mitigation projects are green infrastructure-based and occur in the same watershed as the original project, wherever feasible.[155] EPA should also delete from the Draft Permit the allowance for "adjustments to the retention standards for redevelopment, high density development," and certain other categories of projects. (Draft Permit § 4.1.1.d.) This provision would create an unnecessary and unworkable exemption from the permit's strong and achievable on-site retention standards.[156]

C. The Draft Permit Must Provide More Specific, Enforceable Requirements Concerning Code Review and Removal of Barriers to Green Infrastructure

As discussed above, green infrastructure, which has multiple benefits to the environment and to the community writ large, should be encouraged as a method of controlling stormwater. To that end, it is essential that the District review its codes and policy documents to ensure the removal of barriers to green infrastructure techniques, such as vegetated and stormwater reuse and infiltration practices including bioretention, green street facilities, permeable pavements, green roofs, green walls, rain barrels and cisterns. These barriers create unnecessary red tape that not only fails to promote green infrastructure, but also discourages innovation. Any code revisions should, of course, be subject to public comment, but moreover, individual site plans should also be open to public review so that the community can ensure that green infrastructure techniques are being used appropriately and well and to the MEP.[157] Additionally, the Draft Permit's requirement concerning incentives for "green

[153] *See* Cameron Report at 7-8; NPDES MS4 Permit, Montgomery County, MD (009-DP-3320) (MD0068349); Philadelphia Water Dep't,, *Philadelphia Stormwater Management Guidance Manual Version 2.0* (Feb. 1, 2008), *available at* http://www.phillyriverinfo.org/Programs/SubprogramMain.aspx?Id=StormwaterManual.
[154] Cameron Report at 3.
[155] *Id.* at 4.
[156] *Id.*
[157] *See id.* at 3.

landscaping" is laudable, but should be clarified and strengthened to ensure its effectiveness.[158] All of these revisions (and others described above) would help ensure that the permit requires the use of green infrastructure techniques to the maximum extent practicable.

VIII. The Draft Permit's Public Participation Elements Are Inadequate and Unlawful

EPA must provide for public review of the Draft Permit and its underlying programs. As discussed above, the permit as currently written is impermissibly vague, requiring the Permittee to compose, at some later date, many essential components of the permit. We believe that the permit must provide concrete requirements which will constitute permit compliance. However, since the current draft of the permit requires DC to essentially write much of the permit itself, it is especially imperative that the public has the opportunity for substantive involvement in all subsequently drafted permit plans, through notice and comment and other processes.

Even if future public participation opportunities are provided for, the serial review of the permit program over an extended period of time discourages and frustrates public participation. This is at odds with the CWA public participation regulations that state that, "EPA… shall provide for, encourage, and assist the participation of the public."[159] The vague and confusing nature of the Draft Permit controverts the purpose of this provision. Even relatively sophisticated commenters have had difficulty in unraveling the Draft Permit's provisions. For example, as discussed above, the permit relies heavily on the 2009 SWMP, yet that document has not been made readily available to the public, and the Draft Permit does not address how the public can gain access to that and other integral documents. The permit is not clear on what constitutes compliance or when compliance is due. Public oversight of this permit, as EPA's own regulations encourage, cannot be accomplished without massive time and resource commitment, a luxury that the average citizen cannot afford. The permit terms must be clarified, compliance deadlines set, and all necessary documentation made available for public review and comment.

Moreover, the Permit is unclear regarding what elements of the 2009 Stormwater Management Plan (SWMP) will continue and which will change. Section 2.3 of the Draft Permit outlines DDOE's duties in implementing the SWMP, including: "Making available to the public and other interested and affected parties, the opportunity to comment on MS4 stormwater management program." The 2009 SWMP was prepared by DDOE and submitted as part of its application for permit renewal. The SWMP contains the characterization data used to identify the source of pollutants and predict their impacts on waterways, proposed management plans, an assessment of stormwater controls, as well as a fiscal analysis.[160] EPA must make clear its requirement that the 2009 SWMP be noticed for public comment and for DDOE to substantively respond to all comments and make changes to the SWMP where appropriate. This scheme is considered in section 4.9.4 of the permit, which states, "The Permittee shall continue to implement its process for consideration of public comments on their SWMP." The phrasing implies that

[158] *See id.* at 4.
[159] 40 C.F.R. § 25.3.
[160] *See* Gov't of the Dist. of Columbia, *Upgraded Stormwater Management Plan*.

DDOE has begun a public comment process on the SWMP, but to our knowledge, it has not. Because the SWMP is such an essential component of the permit, EPA must explicitly require public notice and comment and substantive response from DDOE on the 2009 SWMP and any other SWMP developed during the permit term.

Though the Draft Permit requires ongoing public involvement, the Draft Permit's language falls short of a meaningful commitment to involve the public, stating, "The Permittee shall continue to establish a method of routine communication to groups such as watershed associations…." (Draft Permit § 4.9.4.) Simply establishing communication does not ensure the public a meaningful opportunity to participate in the further development and implementation of the permit. Section 5.1 of the permit offers an example of a concrete commitment to public involvement:

> Within one year of the effective date of this permit the permittee shall develop, public notice and submit to EPA Region III for approval a revised monitoring plan to meet the following objectives…

This type of concrete language should be mirrored throughout the permit for each and every "plan", "standard", or "program" the Permittee is required to develop. The public has a critical role in ensuring effective pollution reduction and the permit must support and enforce that role.

As a final point, *Environmental Defense Center, Inc. v. U.S. E.P.A.* highlights the legal necessity of public involvement and meaningful regulatory entity review during the permitting process: "[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity…. Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy."[161] Without such review, the public and EPA have no way to "ensure that each [MS4 permit] program reduces the discharge of pollutants to the maximum extent practicable."[162] The current Draft Permit does not adequately involve the public in the development and review of the permit's many management and implementation plans. To be adequate under the CWA, the Draft Permit must require the Permittee to make available control plans for public comment, and EPA itself must formally provide for public review and comment prior to EPA approval of such plans.

[161] *EDC*, 344 F.3d at 856.
[162] *Id*.

IX. Conclusion

As these comments indicate, the Draft Permit requires significant improvements before it is ready to be approved, and, while there are important new requirements in the permit that we support, NRDC is strongly opposed to approval of the Draft Permit in its current form. We would welcome a continuing discussion with EPA staff regarding changes to the Draft Permit that would allow us to fully support it. Please feel free to contact us, via Rebecca Hammer at the Natural Resources Defense Council, at 202-513-6254.

Sincerely,

David Beckman, Director, Water Program
Noah Garrison, Attorney, Water Program
Lawrence Levine, Sr., Attorney, Water Program
Rebecca Hammer, Legal Fellow, Water Program
Cori Lombard, Legal Fellow, Water Program
Natural Resources Defense Council

Neal Fitzpatrick, Executive Director
Audubon Naturalist Society

Paul F. Walker, Ph.D., Director, Security and Sustainability
Global Green USA

Chris Weiss, Director
DC Environmental Network

Gwyn Jones, Chair
Sierra Club, DC Chapter

Beth Mullin, Executive Director
FORCE – Friends of Rock Creek's Environment

Brent Bolin, Director of Advocacy
Anacostia Watershed Society

Maisie Hughes, Director, Planning and Design
Casey Trees

Andy Fellows, Chesapeake Regional Director
Clean Water Action

Ed Merrifield, President
Potomac Riverkeeper

Julie Lawson, Chair, DC Chapter
Surfrider Foundation

Dottie Yunger, Executive Director
Anacostia Riverkeeper

Irv Sheffey, Associate Field Organizer
DC Environmental Justice & Community Partnerships Program
Sierra Club

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 No. DC 0000221	)

EXHIBIT 4

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 4, 2010

Via email (miller.garrison@epa.gov)
and U.S. Mail
Mr. Garrison D. Miller
United States Environmental Protection Agency
Office of NPDES Permits and Enforcement (3WP41)
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Re: Proposal to Reissue NPDES Permit for Municipal Separate Storm Sewer System (MS4) to Government of the District of Columbia, Draft Permit No. DC0000221

Dear Mr. Miller:

Earthjustice submits the following comments on behalf of Anacostia Riverkeeper, Potomac Riverkeeper, Waterkeeper Alliance, and D.C. Environmental Network,[i] regarding EPA Region 3's proposal to re-issue the NPDES permit for discharges from the District of Columbia Municipal Separate Storm Sewer System (hereafter the "MS4 Permit"). These groups also fully endorse the comments submitted by NRDC on behalf of a coalition of local water quality advocates, and we incorporate those comments by reference as though fully stated herein.

Although the proposed permit contains significant new provisions that mark an improvement over prior versions of the permit, it continues to fall short of legal requirements for issuing NPDES permits. Consequently, the proposed permit virtually guarantees that for many years to come water quality conditions in the Potomac River, Anacostia River, Rock Creek, and their tributaries will continue to be unsuitable for fishing and swimming and aquatic wildlife habitat, especially after the frequent storm events that are common in the region. This is contrary not only to the Clean Water Act ("CWA") and District law, but also to the Region's goal of issuing a permit that would serve as "a model to other municipalities for preventing runoff from washing harmful pollutants into streams and rivers in the [Chesapeake] Bay watershed."[1]

Before issuing the final permit, the Region must substantially revise the permit's conditions and add new conditions that will meet the following requirements for NPDES permits. As proposed, the draft permit provisions do not satisfy these key non-discretionary legal requirements:

- **Water quality standards.** The permit must include conditions that ensure compliance with water quality standards for the District of Columbia and downstream receiving state

[1] EPA press release, "EPA Proposes 'Next Generation' Storm Water Controls in Clean Water Permit for Washington D.C.," quoting Shawn M. Garvin, EPA mid-Atlantic Regional Administrator.

1625 MASSACHUSETTS AVENUE, SUITE 702 WASHINGTON, DC 20036-2212
T: 202.667.4500 F: 202.667.2356 E: dcoffice@earthjustice.org W: www.earthjustice.org

waters. Accordingly, the permit must explicitly prohibit discharges from the MS4 that cause or contribute to violations of water quality standards. In addition, to the extent the Region intends to meet this requirement in part by relying on stormwater management plans and programs that the District will develop and implement, the Region must (1) add to the permit "clear, specific, measurable, and enforceable"[2] minimum conditions for such programs and plans, to ensure that, when implemented, they will achieve water quality standards; and (2) explicitly require compliance with such programs and plans as enforceable conditions of the permit (including the District's stormwater management plan and any individual plans or programs that the District is required to develop and implement for street sweeping, tree canopy, best management practices, and the like). Further, before taking final action on the permit the Region must supply record evidence and a reasoned explanation to support a finding that the permit conditions (including programs and plans that are developed outside the permit) will in fact ensure compliance with water quality standards.

- **Reduction of Pollutants to the Maximum Extent Practicable.** The permit must require the District to implement controls to reduce discharges of pollutants to the maximum extent practicable (the "MEP" requirement). Further, before issuing the final permit the Region must supply record evidence and a reasoned explanation demonstrating that the chosen permit conditions will, in fact, meet the MEP requirement. As with conditions for achieving compliance with water quality standards, to the extent the Region is relying on programs and plans developed and implemented by the District, the permit must add to the permit "clear, specific, measurable, and enforceable" minimum conditions for such programs and plans, and explicitly require compliance with such programs and plans as enforceable conditions of the permit

- **Compliance with TMDL Wasteload Allocations.** The permit must include effluent limitations that ensure compliance with wasteload allocations ("WLA") for the D.C. MS4 in applicable total maximum daily loads ("TMDLs"). Because there is no evidence that numeric limitations are infeasible, such effluent limitations must include quantitative, numeric limitations in addition to qualitative stormwater control measures. Further, to the extent the Region intends to meet this requirement in part by relying on TMDL implementation plans that are developed and implemented by the District, the Region must require implementation of those plans as enforceable conditions of the permit.

I. Permit Background

In 1987, Congress set a 1990 deadline for operators of large MS4s (like the District of Columbia) to apply for NPDES permits, and a 1991 deadline for issuance or denial of such permits. Id. §1342(p)(4)(A). The CWA required these permits to provide for compliance as expeditiously as practicable, but in no event later than three years after the date of issuance of such permit. Thus, the CWA required that MS4 systems be in compliance with applicable CWA requirements no later than 1994.

[2] *See* EPA MS4 Permit Improvement Guide, EPA 833-R-10-001 (April 2010).

Despite these clear mandates, the Region did not issue an MS4 permit to the District until 2000 – nearly a decade behind the statutory schedule. The permit directed the District to continue a number of existing management practices that had stormwater related benefits (e.g., street sweeping, catch basin cleaning), but the permit lacked water-quality based effluent limits to assure compliance with water quality standards in the receiving waters (except for one small tributary of the Anacostia – Hickey Run). Defenders of Wildlife ("Defenders") and Friends of the Earth ("FOE") challenged the permit. On February 20, 2002, EPA's Environmental Appeals Board ("EAB") granted the petition in part, and remanded the permit to the Region "to provide and/or develop support for its conclusion that the permit will 'ensure' compliance with the District's water quality standards and to make whatever adjustments in the Permit, if any, might be necessary in light of its analysis." *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 223, NPDES Appeal Nos. 00-14 & 01-09 (2002)(hereinafter *DCMS4 I*), motion for partial reconsideration granted May 9, 2002.

Although the EAB decision still stands, and governs the current proposed permit, the Region has failed to heed the EAB's mandates. On remand – more than two and one-half years following the EAB's decision in *D.C. MS4 I* – the Region in 2004 proposed a revised permit that, like its predecessor, lacked effluent limitations adequate to assure compliance with applicable water quality standards. FOE and Defenders again challenged the permit on the basis that this omission violated the CWA, EPA rules, and the EAB's decision.

Following negotiations, the parties reached a settlement on May 10, 2005, whereby the Region would amend the permit to explicitly prohibit discharges to or from the MS4 system that cause or contribute to the exceedance of water quality standards, among other things. The Region publicly proposed an amendment containing this language in July 2005. However, on March 14, 2006, the Region adopted a final amendment that, unlike the negotiated language, did not prohibit discharges that would cause or contribute to noncompliance with water quality standards. Instead, the 2006 final amendment merely prohibited discharges that would contribute to worsening water quality compared to "current conditions." Because the current conditions violated water quality standards, and because the final permit language differed markedly from the proposed language, the groups again petitioned the EAB for review.

On Oct. 29, 2007, EPA withdrew the contested language from the 2006 amendment, and informed the EAB that "EPA will prepare a new draft permit modification addressing the withdrawn permit conditions… and will submit the revised draft permit amendment terms for public comment." Now, more than **eight years** have passed following the EAB's order in *D.C. MS4 I*, and more than two and one-half years following the Region's withdrawal of the 2006 amendment—during which water quality in the Potomac and Anacostia Rivers and Rock Creek has continued to suffer conditions that violate water quality standards and impair human and wildlife uses. Despite this, the Region continues to flout the EAB's very explicit instructions in DCMS4 I "to provide and/or develop support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards." 10 E.A.D. at 343 (emphasis in original).

Having failed to propose a revised permit that addressed the EAB's order, the Region entered into a series of "letter agreements" with the District, whereby the District agreed to undertake additional commitments in its stormwater management program (*See* MS4 Letter

Agreement attached to Draft Fact Sheet). The Region characterizes this agreement as "significant new activities, which emphasized the shifting nature of the MS4 program within the District from planning to implementation of the plans with specific objectives and measurable benchmarks." Draft Fact Sheet at 3. However, the District has either failed to comply or has failed to report compliance with a number of those commitments, including the following:

- The agreement required the District to "[p]rovide final detailed plan for achieving the optimal District tree canopy goal in the 2009 Implementation Plan, dated August 19, 2009." The District failed to complete a detailed plan for achieving optimal tree canopy or submit it in the August 19, 2009 Implementation Plan.

- The agreement required the District to "Complete the 'Low Impact Development (LID) Stormwater Control Structures Maintenance Manual' by April 30, 2009." As of the latest Implementation Plan and Annual Report, the District has failed to complete this manual.

- The agreement required the District to "Complete a structural assessment on all District properties maintained by Office of Property Management (OPM) to determine current roof conditions and the feasibility for green roof installation by April 30, 2009." As of the latest Implementation Plan and Annual Report, the District has failed to complete this manual.

Despite these failures, the Region has taken no enforcement action. Instead, the Region states that its proposed permit is based in part on the letter agreement. Draft Fact Sheet at 3.

II. Legal Requirements for NPDES Stormwater Permits

NPDES permits must include effluent limitations adequate to ensure compliance with applicable water quality standards in the receiving waters. In particular, Congress required EPA and the States to achieve "any more stringent limitation" that is "required to implement any applicable water quality standards established pursuant to" the Clean Water Act ("CWA"). 33 U.S.C. § 1311(b)(1)(C). EPA regulations thus prohibit the issuance of NPDES permits "[w]hen the imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d) (emphasis added). The regulations further require each NPDES permit to contain limitations on all pollutants or pollutant parameters that are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an excursion above any water quality standard. 40 C.F.R. §122.44(d)(1)(i). In addition, EPA's CWA regulations require that "the permitting authority shall ensure that… [e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge" in any applicable TMDL. *Id.* § 122.44(d)(1)(vii)(B).

Separate from and in addition to requiring compliance with water quality standards, Congress required that "[p]ermits for discharges from municipal storm sewers… shall require controls to reduce the discharge of pollutants to the maximum extent practicable…." 33 U.S.C. § 1342(p).

The U.S. Court of Appeals for the D.C. Circuit has affirmed that compliance with water quality standards is a strict requirement applicable to all NPDES permits. "[O]nce a water quality standard has been promulgated, section 301 of the CWA requires *all NPDES permits for point sources* to incorporate discharge limitations necessary to satisfy that standard." *American Paper Institute, Inc. v. U.S. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (emphasis added). "Section 301 'imposes this strict requirement as to all standards--*i.e.*, permits must incorporate limitations necessary to meet standards that rely on narrative criteria to protect a designated use as well as standards that contain specific numeric criteria for particular chemicals.'" *American Iron and Steel Inst. v. U.S. EPA*, 115 F.3d 979, 992 (D.C. Cir. 1996). To meet this requirement the Region must demonstrate how the record of facts on which the permit is based "supports the conclusion that the Permit would, in fact, achieve water quality standards" *See D.C. MS4 I*, 10 E.A.D. at 342-43 (2002).[3]

Finally, the Region's final action must comply with fundamental principles of reasoned agency decisionmaking. The Administrative Procedure Act instructs courts to set aside agency action "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In order to ensure that final action on the permit survives this standard, the Region must provide substantial evidence along with a "rational connection between the facts found and the choice made" to approve the permit. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). The Region must supply a reasoned basis for its decision to include the proposed permit conditions, as well as its decision to omit others, in light of the foregoing legal requirements. This is critical because the Region has failed to supply a reasoned basis for concluding that past versions of the permit ensure compliance with water quality standards. *See D.C. MS4 I*, 10 E.A.D. at 341-43 (remanding the permit where the EAB found "nothing in the record, apart from District's section 401 certification, that supports the conclusion that the Permit would, in fact, achieve water quality standards").

III. Current Conditions Violate Water Quality Standards and Exceed Wasteload Allocations for the D.C. MS4

The foregoing requirements apply to this permit because the stormwater discharged by the District of Columbia MS4 causes or contributes to violations of water quality standards in the receiving waters. The District's own 2008 water quality assessment demonstrates that discharges from the MS4 are causing or contributing to current conditions that violate water quality standards in 23.5 miles of rivers and streams, 238.40 acres of lakes, and 5.23 square miles of estuaries in the District.[4] In fact, the District's most recent assessments demonstrate

[3] EAB stated in its review of an earlier version of this permit, "the determination relative to water quality standards that the permit issuer is required to make at the time of issuance is that the permit will achieve compliance within three years." *Id*. n. 22, citing Memorandum by E. Donald Elliot, EPA Assistant Administrator and General Counsel, to Nancy J. Marvel, Regional Counsel Region IX, at 4-5 (Jan. 9, 1991). The proposed permit unlawfully fails to do so.

[4] 2008 Integrated Report to EPA and Congress Pursuant to Sections 305(b) and 303(d) of the CWA, Tables 3.7, 3.11, and 3.15.

that **none** of the District's waters enjoy current conditions where "all designated uses are attained and no use is threatened."[5] Previous versions of the D.C. MS4 permit have done nothing to alleviate these water quality conditions. Therefore, in the final reissued permit the Region must include more robust, enforceable permit conditions. Failure to do so will violate fundamental principles of reasoned agency decisionmaking and leave the permit open to legal challenge.

In addition to violating water quality standards, current conditions in the MS4's receiving waters drastically exceed wasteload allocations for the MS4 system in EPA-approved TMDLs. The MS4 Permit must therefore include effluent limitations that ensure compliance with individual WLAs for the D.C. MS4. For example, such limitations must ensure that the MS4 will meet its individual allocation of the "85% overall reduction of sediment/TSS"[6] and the "90 percent reduction in storm water bacteria,"[7] which EPA has already concluded are needed to achieve compliance with the District and Maryland's water quality standards in the Anacostia River. Because discharges from the MS4 contribute to water quality violations for a number of parameters, 40 C.F.R. §122.44(d)(1)(vii)(B) requires that the final MS4 Permit contain effluent limitations for each pollutant that is subject to an EPA-approved TMDL wasteload allocation.

IV. The Permit Fails to Prohibit Discharges that Cause or Contribute to Violations of Water Quality Standards

Despite the foregoing requirements, the Region has once again failed to prohibit discharges from the MS4 that cause or contribute to violations of water quality standards.

A. The permit must be based on record evidence to support the conclusion that the permit controls will ensure compliance with water quality standards.

The permit has no express requirement for the MS4 to achieve reductions needed to meet standards at all, much less by any specified time. Instead, the Region relies on the District – the permittee – to "manage, implement and enforce a stormwater management program" as the means by which EPA purports to ensure compliance with WQS, TMDL allocations, and other legal requirements for NPDES permits. *See* Draft Permit at 2, 6. This approach would unlawfully delegate the Region's duty to "impos[e] conditions" that will "ensure compliance with the applicable water quality requirements of all affected States," to the permittee. *See* 40 C.F.R. § 122.4(d). Instead, the law requires the Region to impose conditions, prior to permit approval and based on evidence in the record, that the Region itself determines are adequate to ensure compliance with standards.

---

[5] DDOE, Draft Methodology for the Development of the 2010 Section 303(d) List and the 2010 Section 303(d) List of Impaired District of Columbia Waters, unnumbered p. 8 (Mar. 31, 2010).

[6] EPA Decision Rationale, Total Maximum Daily Loads, Anacostia River Basin Watershed, For Sediment/Total Suspended Solids, Montgomery and Prince George's Counties, Maryland and the District of Columbia, p. 25 (July 24, 2009)

[7] EPA Decision Rationale, Total Maximum Daily Loads, Anacostia Watershed, For Fecal Coliform Bacteria, p. 24, 28 (signed Aug. 28, 2003, amended Oct. 16, 2003).

The Region does not offer record evidence to support the conclusion that the permit is sufficient to ensure achievement of water quality standards. Instead it simply recites the applicable legal requirements and deems the permit adequate to meet those requirements. But without supporting evidence, the Region cannot presume that the "effluent limitations expressed in this Permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act." Draft Permit at 44. Nor is it lawful for the Region to presume without supporting evidence that "Discharges controlled in accordance with the standards [for new and redevelopment] shall be considered to be as stringent as necessary to ensure that the discharges do not cause or contribute to an excursion above any (1) applicable TMDL WLAs; or (2) DC WQS." *Id*. at 9. It is also unlawful for the Region to presume, without supporting evidence, that "[c]ompliance with all performance standards and provisions contained in this Permit shall constitute progress toward compliance with DCWQS," *id*. at 2. Moreover, a requirement to achieve "progress" is, on its face, inadequate to "*ensure compliance*" with water quality standards as required by 40 C.F.R. § 122.4(d) (emphasis added). Thus it is insufficient for the Region to imply that the permit requires "progress toward attaining water quality criteria," or that the permit requires compliance with water quality standards through "an incremental process." Draft Fact Sheet at 4. Finally, the Region cannot evade this fundamental requirement of the Clean Water Act by claiming, without a scintilla of supporting evidence, that the District "will be unable to attain all Water Quality Standards within the first several MS4 permit cycles." *Id*. Neither the permit, fact sheet, nor the accompanying materials offer any factual support for this claim; in any case, it is directly contrary to Congress' clear mandate.

In short, the permit must be based on affirmative evidence and a reasoned explanation supporting the claim that compliance with the permit's provisions will, in fact, ensure compliance with water quality standards. The EPA EAB decision in *D.C. MS4 I*, which controls this case, made clear that the Region's bare claim that "the BMPs set forth in the District's SWMP are 'reasonably capable of achieving water quality standards," does not meet legal requirements absent supporting evidence. *D.C. MS4 I*, 10 E.A.D. at 342. The same is true today.

B. If the final permit is not significantly improved it will, like past similar permit provisions, ensure continued violations of water quality standards.

Contrary to any claim that the permit ensures compliance with water quality standards, the available evidence shows that water quality violations have persisted under permit provisions much like the current proposed provisions. There the Region also required the permittee to develop and implement a stormwater management plan purportedly as a means of meeting the applicable legal requirements. *See, e.g.* 2000 MS4 Permit (stating that "[t]he permittee shall develop and implement improvements and modifications in current SWMP practices in order to reduce the pollutant load to the extent necessary to meet the requirements of 40 CFR 122.26 (d)(2)(iv) and the provisions of the Clean Water Act for all areas within the District…."). The Region has overseen the District's implementation of this and similar requirements for a decade, yet the Region offers no evidence that they have produced **any** measureable reduction in the discharge of stormwater pollutants into the District's waters—much less that they have produced reductions of the magnitude and rate needed to achieve compliance with water quality standards.

Given the absence of evidence that similar prior permit provisions have failed to produce results, the Region must take a drastically different approach to the current MS4 Permit. In particular, the Region must impose clear and specific conditions that, when implemented will achieve water quality standards. In doing so the Region must follow the approach set out in EPA's MS4 Permit Improvement Guide at 5-6:

> First, and most importantly, permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation. Doing so will allow permitting authorities to more easily assess compliance, and take enforcement actions as necessary.

As proposed, the permit is plagued by vague and unclear requirements that are certain to produce little to nothing in the way of concrete pollution reductions. For example:

- The permit states that the "measures required [in Table 1] are terms of this Permit." Draft Permit at 6. However, Table 1 is simply a list of program elements such as "Existing Structural and Source Controls," and "Roadways," with no specific, measurable requirements for reducing discharges of pollutants under those program elements. *Id*.

- The permit requires the permittee to implement "controls to minimize and prevent discharges of pollutants," but specifies no minimum conditions for complying with this requirement. *Id*. at 5. Rather, the permit merely requires that "the *strategies used* to reduce or eliminate these pollutants *shall be documented* in subsequent Annual Reports and in revisions to the Stormwater Management Plan." *Id*. at 6. This leaves open the possibility of no actual minimization or prevention of the discharge of pollutants.

- The permit requires the District to "continue to develop, implement, and enforce a green technology program," but specifies no minimum conditions for such program. *Id*. at 7.

- Although the permit requires the District to "*report on* the percentage of decreased impervious cover and increased number and square footage of green roofs and other practices that infiltrate, evapotranspire and harvest stormwater," (emphasis added), the permit does not require the permitting to achieve these actions to any particular degree or by any specified time. *Id*. at 8.

- The permit requires the permittee to "develop accountability mechanisms to ensure maintenance of stormwater control measures…Those mechanisms *may include* combinations of deed restrictions, ordinances, maintenance agreements, *or other policies deemed appropriate by the District*." *Id*. at 12. This language thus establishes no minimum outcome for these critical accountability mechanisms.

- The permit allows TMDL Implementation Plans to be based on the permittee's choice of "[a] set of controls for achieving the MS4 [wasteload allocation], which *may include* stormwater pollution reduction and elimination laws and regulations, LID

To be effective and consistent with EPA's MS4 permit writing guide, these provisions need to be revised significantly to provide clear, enforceable, minimum conditions with which the District must at a minimum comply.

C. The ineffectiveness of the proposed permit language is illustrated in the history of the District-Region 3 letter agreement

The Region has for the last several years failed to propose an up-to-date permit for the D.C. MS4, instead relying on its "letter agreement" with the District. However, the letter agreement has already proven to be largely unsuccessful except where the requirements of the agreement largely replicated actions the District was already taking in the regular course of its stormwater program. The agreement contained numerous provisions that allowed the District to choose its preferred level of compliance; in some cases this left open the possibility that the District would make zero progress while still technically not being in violation of the agreement:

- Tree canopy – The agreement stated that "[t]he District shall *make best efforts* to achieve optimal tree canopy by planting..." (emphasis added).

- Tree canopy – The agreement stated that "[n]o later than August 19, 2008, develop and implement a schedule to achieve an optimal tree canopy goal. The District shall *make best efforts* to implement said schedule no later than..." (emphasis added).

- LID Practices – "*To the extent feasible*, DDOT will comply with all LID options..."

- LID Practices – "The City shall *make best efforts* to devise a LID plan and schedule to be completed no later than December 31, 2014, which shall..."

It is unclear whether the District has a real enforceable obligation to complete any of these requirements, because the language of the agreement itself effectively voids the requirements and eliminates any accountability for failure to achieve the agreed actions. Moreover, most of the provisions of the agreement do not obligate the District to demonstrate that actual pollution reductions have been achieved, and instead only require the District to undertake "best efforts" to write some plan or schedule. This ineffective language, and the District's history of noncompliance with the letter agreement discussed above in section I, speak volumes about the likely effectiveness of the proposed permit. Unless the final permit contains significantly improved provisions in accordance with EPA's MS4 Permit Improvement Guide, adoption of the permit as written will be arbitrary and capricious, and not in accordance with the law requiring the Region to ensure compliance with water quality standards.

V. The Permit Fails to Require Controls to Reduce Pollutant Discharges to the Maximum Extent Practicable.

The Region has not even attempted to incorporate the "maximum extent practicable"

("MEP") standard into the permit. Neither the proposed permit nor the proposed Fact Sheet demonstrate that the permit "requires controls to reduce the discharge of pollutants to the maximum extent practicable." There are no assessments or evidence provided to support a finding that the stormwater management plan will reduce pollutants to the maximum extent practicable, other than bare assertions in the proposed fact sheet. Because the Region's permit action must be supported by record evidence and a reasoned explanation, the failure to demonstrate compliance with the MEP standard is arbitrary and capricious and not in accordance with the CWA §402(p), 33 U.S.C. § 1342(p).

The draft fact sheet attempts to address the MEP requirement, but in doing so turns that requirement on its head. The Region claims that "the attainment of water quality criteria is an incremental process, consistent with section 402(p)(3)(B) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), so long as permittees reduce the discharge of pollutants to the maximum extent practicable (MEP) within each permit cycle." Draft Fact Sheet at 4. This is flatly incorrect. The MEP standard for MS4 permits and the requirement for compliance with water quality standards for all NPDES permit are separate, and both apply independently of one another. The MEP requirement was adopted in 1986 and set forth in CWA Section 402(p), 33 U.S.C. § 1342(p), while the longstanding requirement for all NPDES permits to "ensure compliance" with applicable water quality standards is governed by CWA Section 301, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. § 122.4(d). In adopting the maximum extent practicable standard for MS4s, Congress by no means expressed an intent to repeal the earlier-adopted, fundamental requirements of CWA § 301. Quite to the contrary, the Conference Report for the 1987 Water Quality Act stated unequivocally that "all municipal separate storm sewers *are subject to the requirements of sections 301* and 402 of the Act. H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. at 158 (1986) (emphasis added). Thus, the Region must include conditions both to the MEP standard as well as to ensure compliance with water quality standards.

VI. The Permit Fails to Include Effluent Limits for All Applicable TMDL WLAs for the MS4.

CWA regulations require that "the permitting authority shall ensure that… [e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge" in any applicable TMDL. *Id*. § 122.44(d)(1)(vii)(B). To meet this requirement, the Region should explicitly require the MS4 to **achieve** the pollution reductions necessary to comply with TMDL loads that have been allocated to the D.C. MS4 system. Further, the WLAs must be incorporated as numeric effluent limitations in the permit itself.

The fact that EPA has authority to require compliance with BMPs does not justify failure to include numeric effluent limitations. Numeric effluent limits are not only eminently feasible, they are also readily available in the form of existing WLAs that are dedicated exclusively to the D.C. MS4. The language in the Draft Permit fails to include such numeric limits. The Draft Permit at 38 states that "[t]he Permit includes all TMDL WLAs applicable to the District MS4 approved or established as of the effective date of this Permit.") However, there is no basis for asserting that the permit "includes" all applicable WLAs, when clearly it does not. Unless it is made explicitly clear that applicable WLAs are numeric effluent limits that the MS4 must comply with, this language is ineffective.

It is also not sufficient for the permit to rely on the District to implement a stormwater management plan that is "consistent with applicable waste load allocations (WLAs) for each approved Total Maximum Daily Load (TMDL) for each receiving water body." Draft Permit at 2.[8] The draft permit does not require actual attainment of WLAs in the stormwater management program, and the Region has not supplied a basis for concluding that the District's program will, in fact, achieve reductions needed to meet applicable WLAs. This omission is not excused by the fact that EPA has authority to rely on BMPs in certain circumstances. Instead, EPA's own guidance states that, even when a permit relies on stormwater management practices or BMPs, evidence in the administrative record "needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL."[9] Neither the permit nor the draft fact sheet and attached documents contain such support.

Finally, the permit violates anti-backsliding requirements of the CWA. The Act prohibits renewal or reissuance of a permit that contains "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," except in limited circumstances that are inapplicable here. 33 U.S.C. § 1342(o) and 40 C.F.R. § 122.44(l). Under these provisions the permit must be at least as stringent as prior versions. A previous iteration of the permit contained an "aggregate numeric effluent limit for four outfalls into Hickey Run." *D.C. MS4 I*, 10 E.A.D. at 324. However, the permit now lacks any numeric effluent limits on discharges from any MS4 outfalls, including those that discharge into Hickey Run. Although the EAB remanded the permit to the Region to determine whether to include an aggregate numeric limit or a separate limit for each outfall, it did not suggest that EPA could entirely eliminate the numeric limits for Hickey Run. The final permit must restore numeric effluent limits for Hickey Run that are at least as stringent as the prior version of the permit.

VII. Some Permit Provisions Violate Public Notice and Comment Requirements by Allowing EPA or the Permittee to Alter the Permit Requirements Outside of the Public Permit Process

The permit relies heavily on programs and plans that will be developed by the District, after the permit is issued and outside of the public notice and comment procedures for the MS4 permit. Such programs and plans include but are not limited to TMDL Implementation Plans and a stormwater management program. This violates notice and comment requirements because those plans and programs will not have been submitted to public scrutiny prior to permit

[8] Note that the statutory and regulatory provisions cited in conjunction with TMDL WLAs do not relate to TMDL wasteload allocations. *See* Draft Permit ¶ 1.4.2. 33 U.S.C. § 1342(p)(3)(B)(iii) requires that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable…." 40 C.F.R. § 122.44(k)(2) and (3) relate to EPA's authority to require compliance with BMPs.

[9] U.S. Environmental Protection Agency, Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs at 4-5 (2002), (available at http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf), citing 40 C.F.R. §§ 124.8, 124.9 & 124.18).

approval, even though the Region relies on these programs and plans to meet the legal requirements for issuing MS4 permits. It is not enough that the District government may provide a public process for those individual plans and programs. In order to rely on such programs EPA itself must determine, prior to issuing the permit, that such programs will meet water quality requirements. Moreover, as a practical matter, asking members of the public to keep track of D.C.'s proposals for numerous plans and program changes is unreasonable. Such a piecemeal approach will ensure that very few District residents will give input or even be aware of decisions that are of critical importance to the District's ability to achieve clean water in the Potomac, Anacostia, and Rock Creek.

The following provisions may run afoul of notice and comment requirements because they expressly allow the EPA or the District to modify the District's stormwater program without requiring advance public notice and opportunity to comment:

- "The set of BMPs specified in the Permit *can be adapted* as opportunities change, as long as interim compliance deadlines for WLAs are achieved." Draft Permit at 6 (emphasis added).

- "EPA reserves the right after a review and approval of each plan modification/annual report to *modify this permit* for purposes of requiring additional numeric and/or narrative effluent controls on the discharge of pollutants from the MS4." *Id*. at 40 (emphasis added).

- "EPA reserves the right to *modify the Permit* as needed, when monitoring results set forth in Sections 5 and 8 of the permit show that current practices required by this Permit are not sufficient to minimize pollutants in stormwater discharges or other unauthorized discharges into the MS4 System as necessary to comply with standards contained in section 1.4 herein." *Id*. at 41 (emphasis added).

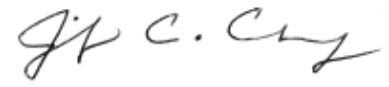
The Region must specify that any such modifications to the permit are subject to public notice and comment procedures. Failure to do so would run counter to EPA EAB's order relating to the 2000 version of this permit. In that permit the Region purported to allow monitoring requirements to be added to the permit after permit approval, through a "minor modification," which process does not include public notice and comment. The EAB concluded that "both 40 C.F.R. § 122.48(b) and 40 C.F.R. § 122.44(i) require that certain monitoring conditions be included in all permits…. Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions — conditions which would thus ordinarily be subjected to public notice and comment — and there does not appear to be anything in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting, the Board concludes that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary. *D.C. MS4 I*, 10 E.A.D. at 324.

VIII. The Permit Contains Some Positive Provisions that the Commenters Support

The permit contains a number of useful provisions, which we urge EPA to retain them in the final permit. In particular, the requirement in Draft Permit ¶ 1.4.3 that "[n]o increase in

pollutant loadings from discharges from the MS4 may occur to receiving waters," is required by law because the District's waters are already severely impaired. In addition, the requirement in Draft Permit ¶ 8.1.3.H., that "TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final WLA achievement dates in this section," is a critical step toward ensuring that WLAs are implemented in a timely and effective manner. Finally, we strongly support the inclusion of numeric retention standards for new and redevelopment and retrofit, and we urge the Region to continue investigating whether the levels of retention required in the permit will reduce pollutants to the maximum extent practicable, or whether stronger standards may be justified upon further information.

Respectfully submitted on June 4, 2010.



Jennifer C. Chavez
Earthjustice
1625 Massachusetts Av. NW, Suite 702
Washington, D.C. 20036
p: 202-667-4500
f: 202-667-2356
e: jchavez@earthjustice.org

[i] **These comments are submitted on behalf of the following groups:**

ANACOSTIA RIVERKEEPER, INC. is dedicated to advocating for a clean and healthy Anacostia River, engaging in efforts to protect and enhance water quality in the river, enforcing existing federal and state laws governing the Anacostia watershed, and educating the public about issues affecting the Anacostia. Members of Anacostia Riverkeeper use and enjoy waters adversely affected by the District of Columbia MS4 discharges, including the Anacostia River and its tributaries in the District of Columbia and Maryland.

POTOMAC RIVERKEEPER, INC. is dedicated to advocating for a clean and healthy Potomac River and its tributaries, enforcing existing federal and state laws governing the Potomac watershed, protecting the Potomac from pollution and exploitation, and educating the public about issues affecting the Potomac watershed. Members of Potomac Riverkeeper use and enjoy waters adversely affected by District of Columbia MS4 discharges, including the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in the District of Columbia, Maryland and Virginia.

WATERKEEPER ALLIANCE, INC. represents the interests of over 182 members, including the Anacostia Riverkeeper and Potomac Riverkeeper. Each of these groups and their members

have an express mission to preserve and protect the water quality in local waterbodies for aesthetic, recreational, health, and other purposes.

DC ENVIRONMENTAL NETWORK is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land with an emphasis on the Metro Washington region. Founded in 1996, the DC Environmental Network has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia. Members of the DC Environmental Network use and enjoy waters adversely affected by MS4 discharges, including the Anacostia River, Sligo Creek, Paint Branch, and other tributaries of the Anacostia River in Maryland and the District of Columbia, as well as the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in Maryland and the District of Columbia.

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 No. DC 0000221	)

EXHIBIT 5

THE DISTRICT OF COLUMBIA
WATER QUALITY ASSESSMENT

2010 INTEGRATED REPORT TO THE ENVIRONMENTAL PROTECTION AGENCY
AND U.S. CONGRESS PURSUANT TO
SECTIONS 305(b) AND 303(d) CLEAN WATER ACT (P.L. 97-117)

District Department of the Environment
Office of Natural Resources
Water Quality Division

TABLE OF CONTENTS

APPENDICES

PART I: EXECUTIVE SUMMARY

The District of Columbia 2010 Integrated Report provides information on the quality of the District's water. The Integrated Report combines the comprehensive biennial reporting requirements of the Clean Water Act's Section 305(b) and the Section 303(d) listing of waters for which total maximum daily loads are required.

District of Columbia Water Quality

Thirty-six waterbody segments were monitored for the goals of the Clean Water Act that apply to the District of Columbia. Each of the waterbodies have been assigned designated uses in the District's water quality standards. The standards also outline numeric and narrative criteria that must be met if a waterbody is to support its uses. Various types of water quality data collected during the period of 2005 to 2009 were evaluated to assess use support of the waterbodies. The evaluation found that the designated uses which directly relate to human use of the District's waters were generally not supported. The uses related to the quality of habitat for aquatic life were not supported. No waterbody monitored by the Water Quality Division fully supported all of its designated uses. The District's water quality continues to be impaired.

Tables 1.1 to 1.3 show the degree to which the waters of the District of Columbia supported their designated uses. Appendices 1.1 to 1.4 are maps showing the degree to which those waters met their uses.

Groundwater is not monitored on the same basis as surface water. This is partly due to the fact that surface water north of the District's boundary, and not groundwater, is the drinking water source for the District. However, groundwater quality is scrutinized via compliance monitoring and on-going studies.

The most significant groundwater updates are the expansion of the groundwater monitoring network, a joint study with the USGS to investigate pesticide impacts on groundwater quality, and a preliminary revision of the conceptual model of groundwater-surface water interactions in the Lower Anacostia River in the vicinity of the Frederick Douglass Memorial Bridge.

TABLE 1.1
DESIGNATED USE SUPPORT BY RIVERS OR STREAMS

Waterbody Type: River, Streams	Degree of Use Support			
	Supporting (mi)	Not Supporting (mi)	Insufficient Information (mi)	Not Assessed (mi)
Overall Use *	-	38.4	-	-
Swimmable Use	-	-	33.5	4.9
Secondary Contact Recreation Use	-	-	-	38.4
Aquatic Life Use	-	34.1	4.3	-
Fish Consumption Use		38.4		-
Navigation Use	9.50	-	-	28.9*

* = not a designated use

TABLE 1.2
DESIGNATED USE SUPPORT BY LAKES

Waterbody Type: Lake, reservoir	Degree of Use Support			
	Supporting (ac)	Not Supporting (ac)	Insufficient Information (ac)	Not Assessed (ac)
Overall Use *	-	238.4	-	-
Swimmable Use	-	238.4	-	-
Secondary Contact Recreation Use	-	-	-	238.4
Aquatic Life Use	-	238.4	-	-
Fish Consumption Use	-	238.4	-	-
Navigation Use	238.4	-	-	-

* = not a designated use

TABLE 1.3
DESIGNATED USE SUPPORT BY ESTUARIES

Waterbody Type: Estuary	Degree of Use Support			
	Supporting (mi^2)	Not Supporting (mi^2)	Insufficient Information (mi^2)	Not Assessed (mi^2)
Overall Use *	-	5.93	-	-
Swimmable Use	-	-	5.93	-
Secondary Contact Recreation Use	-	0.8	-	5.13
Aquatic Life Use	4.15	1.78	-	-
Fish Consumption Use	-	5.93	-	-
Navigation Use	5.93	-	-	-

* = not a designated use

Causes and Sources of Water Quality Impairment

The major causes of impairment to the District's rivers, lakes are estuaries organic enrichment/low DO.

The sources with major impacts on District waters are combined sewer overflows (CSO), and urban runoff/storm sewers. Municipal point sources on the estuaries also have a major impact. Rivers and streams are also impacted by habitat modification and unknown sources.

Programs to Correct Impairment

Several programs within the District Department of the Environment (DDOE), Office of Natural Resources (ONR) are involved in activities to correct water quality impairment. The water pollution control program implements the water quality standards, monitors and inspects permitted facilities in the District, and comprehensively monitors the District's waters to identify and reduce impairment. The water pollution control program is involved in the search for solutions that will provide maximum water quality benefits.

Given the District's urban landscape, nonpoint source pollution has a large impact on its waters. The sediment and stormwater control program regulates land disturbing activities, stormwater management, and flood plain management by providing technical assistance and inspections throughout the city. The nonpoint source program also provides education and outreach to residents and developers on pollution prevention to ensure that their actions do not further impair the city's water quality.

Several activities are coordinated within the groundwater protection program. Those activities include underground storage tank installation and remediation, and groundwater quality standards implementation.

Water Quality Trends

Both of the main waterbodies, the Potomac and Anacostia Rivers support fish and other wildlife populations. But the small stream's aquatic communities are still under stress. The Potomac River continues to benefit from the CSO improvements and implementation of improvements and biological nutrient removal at the Blue Plains wastewater treatment plant. The Anacostia River remains aesthetically and chemically polluted. Much remains to be done.

While submerged aquatic vegetation in the Anacostia and Potomac Rivers continues to struggle, there was a slight improvement from previous years.

Highlights

Low impact development projects to improve the quality and reduce the quantity of stormwater runoff are being implemented throughout the city. Projects such as rain gardens, green roofs, rain barrels, and school yard conservation sites continue to be installed or planned.

Stream survey activities occurred during 2008-2009. Information gathered will help to track trends for the streams. Real-time monitoring stations are on both the Anacostia and Potomac Rivers. This monitoring activity allows web-based viewing of water quality parameters by the general public on an on-going basis.

2009 observations revealed 7 different species of SAV. This is indicative of SAV recovery, as species diversity, and acreage has improved over the past six observation periods.
In 2009, Mayor Andrian M. Fenty, signed the Anacostia River Clean Up and Protection Act, to ban the use of disposable non-recyclable plastic carryout bags and raise money for river clean-up.

Categorization of District of Columbia Waters

Category 1- All designated uses are attained and no use is threatened.

No DC waters fit this category.

Category 2- Some, but not all, of the designated uses are attained and no use is threatened. The attainment status of the remaining designated uses is unknown as insufficient data exists to make an attainment determination.

No DC waters fit this category.

Category 3- Insufficient data exists to determine whether any designated uses are attained.

Category 4- Water is impaired or threatened for one or more designated uses, but a TMDL is not needed.
See subcategories below.

Category 5- Water is impaired or threatened for one or more designated uses and a TMDL is needed.

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 3

Category 3- Insufficient data exists to determine whether any designated uses are attained.

303d Assessment Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
2008	02070010	DCPTF	Potomac Tidal Fresh	DO, Chla		
2008	02070010	DCATF	Anacostia Tidal Fresh	DO, Chla		

[1] The waterbody segments as delineated by the Chesapeake Bay Program.

The District has adopted water quality standards for dissolved oxygen, water clarity and chlorophyll a (Chla) in accordance with the Chesapeake Bay Water Quality Criteria Guidance Document published in 2003 (EPA, 2003). DDOE WQD worked with the Chesapeake Bay Program to assess the tidal waters in the District using the 2003 guidance document and all the addendums published through 2009. For the 2008 listing, the tidal waters were assessed for the 30-day DO attainment and Chla.

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

Category 4A- All TMDLs needed to result in designated use attainment have been approved or established by EPA.

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
1998	02070010	DCTWB00R	Upper Watts Branch-segment 2	Bacteria Organics Total Suspended Solids	High High High	Oct 2003 Oct 2003
1998	02070010	DCTWB00R	Lower Watts Branch-segment 1	Bacteria Organics Total Suspended Solids	High High High	Oct 2003 Oct 2003 Oct 2003
1998	02070010	DCAKL00L	Kingman Lake	Bacteria Organics Metals Oil and Grease	High High High High	Oct 2003 Oct 2003 Oct 2003 Oct 2003
1998	02070010	DCTDU01R	Fort DuPont Creek	Bacteria Metals	High High	Oct 2003 Oct 2003

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
1998	02070010	DCTFD01R	Fort Davis Tributary	Bacteria Metals	Medium Medium	Oct 2003 Oct 2003
1998	02070010	DCTFS01R	Fort Stanton Tributary	Bacteria Organics Metals	Medium Medium Medium	Oct 2003 Oct 2003 Oct 2003
1998	02070010	DCTFC01R	Fort Chaplin Tributary	Bacteria Metals	High High	Oct 2003 Oct 2003
1998	02070010	DCTPB01R	Popes Branch	Bacteria Organics Metals	Medium Medium Medium	Oct 2003 Oct 2003 Oct 2003
1998	02070010	DCTTX27R	Texas Avenue Tributary	Bacteria Organics Metals	Medium Medium Medium	Oct 2003 Oct 2003 Oct 2003
1998	02070010	DCRCR00R	Upper Rock Creek-segment 2	Bacteria Organics Metals	Medium Medium Medium	Feb 2004 Feb 2004 Feb 2004

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
1998	02070010	DCRCR00R	Lower Rock Creek-segment 1	Organics Bacteria Metals	Medium Medium Medium	Feb 2004 Feb 2004 Feb 2004
1998	02070010	DCTOR01R	Oxon Run	Bacteria Organics Metals	Medium Medium Medium	Dec 2004 Dec 2004 Dec 2004
1998	02070010	DCPWC04E	Washington Ship Channel	Bacteria Organics pH	Low Low Low	Dec 2004 Dec 2004 Dec 2004
1998	02070010	DCTBK01R	Battery Kemble Creek	Bacteria Metals	Low Low	Dec 2004 May 2005
1998	02070008	DCTDA01R	Dalecarlia Tributary	Bacteria Organics	Low Low	Dec 2004 May 2005
1998	02070010	DCTCO01L	Chesapeake and Ohio	Bacteria	Low	Dec 2004

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
			Canal			
1998	02070010	DCTNA01R	Nash Run	Bacteria Organics Metals	Medium Medium Medium	Oct 2003 Oct 2003 Oct 2003
1998	02070010	DCPMS00E	Upper Potomac River-segment 3	Bacteria Organics	High High	Dec 2004 Oct 2007
1998	02070010	DCPMS00E	Middle Potomac River-segment 2	Bacteria Organics	High High	Dec 2004 Oct 2007
1998	02070010	DCPMS00E	Lower Potomac River-segment 1	Bacteria Organics	High High	Dec 2004 Oct 2007

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
1998	02070010	DCTFB01R	Foundry Branch	Bacteria Metals	Low Low	Dec 2004 May 2005
1998	02070010	DCTBR01R	Broad Branch	Organics	Low	Feb 2004
1998	02070010	DCTDO01R	Dumbarton Oaks	Organics	Low	Feb 2004
1998	02070010	DCTFE01R	Fenwick Branch	Organics	Low	Feb 2004
1998	02070010	DCTKV01R	Klingle Valley Creek	Organics	Low	Feb 2004
1998	02070010	DCTLU01R	Luzon Branch	Organics	Low	Feb 2004
1998	02070010	DCTMH01R	Melvin Hazen Valley Branch	Organics	Low	Feb 2004

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
1998	02070010	DCTNS01R	Normanstone Creek	Organics	Low	Feb 2004
1998	02070010	DCTPI01R	Pinehurst Branch	Organics	Low	Feb 2004
1998	02070010	DCTPO01R	Portal Branch	Organics	Low	Feb 2004
1998	02070010	DCTPY01R	Piney Branch	Organics Metals	Low Low	Feb 2004 Feb 2004
1998	02070010	DCTSO01R	Soapstone Creek	Organics	Low	Feb 2004
1998	02070010	DCPTN01L	Tidal Basin	Bacteria Organics	Low Low	Dec 2004 Dec 2004
1998	02070010	DCTHR01R	Hickey Run	Bacteria Organics	High High	Oct 2003 Oct 2003
1998	02070010	DCANA00E	Lower	BOD	High	June 2008

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	TMDL Establishment Date
			Anacostia River-segment 1	Bacteria	High	Oct 2003
				Organics	High	Oct 2003
				Metals	High	Oct 2003
				Total Suspended Solids	High	July 2007
				Oil and Grease	High	Oct 2003
				Total PCBs	High	Oct 2007
1998	02070010	DCANA00E	Upper Anacostia River-segment 2	BOD	High	June 2008
				Bacteria	High	Oct 2003
				Organics	High	Oct 2003
				Metals	High	Oct 2003
				Total Suspended Solids	High	July 2007
				Oil and Grease	High	Oct 2003
				Total PCBs	High	Oct 2007

*BOD means biochemical oxygen demand

*The chemicals for which the Organics TMDL for Upper and Lower Watts Branch, Kingman Lake, Fort Stanton Tributary, Nash Run, Pope's Branch, Texas Avenue Tributary, Hickey Run, Upper and Lower Anacostia River have been approved are chlordane, DDD, DDE, DDT, Dieldrin, Heptachlor Epoxide, PAH1, PAH2, PAH3 and Total PCBs.

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4A

*The chemicals for which the Metals TMDL for Kingman Lake, Fort Dupont Creek, Fort Chaplin Tributary, Fort Stanton Tributary, Nash Run, Pope's Branch, Texas Avenue Tributary, Hickey Run, Upper and Lower Anacostia River have been approved are Arsenic, Cooper, Lead, and Zinc.
*The chemicals for which the Organics TMDL for Upper Potomac River, Middle Potomac River and Lower Potomac River have been approved is Total PCBs.
*Bacteria TMDLs have been approved for fecal coliform bacteria.
[1]- last position of alphanumeric code represents the waterbody type. E- estuary, R-river, stream, L- impoundment, lake

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4B

Category 4B- TMDL not required. Other pollution control requirements (such as permits, strategies) are expected to address all waterbody/pollutant combinations and result in attainment of all water quality standards in a reasonable period of time.

No DC waters fit this category.

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES
Category 4C

Category 4C- Impaired or threatened waters for one or more designated uses. TMDL is not required as impairment is not caused by a pollutant.

No DC waters fit this category

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES

Category 5

Category 5- Water is impaired or threatened for one or more designated uses and a TMDL is needed**.**

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	Targeted for TMDL within 2 years	TMDL Establishment Date
1998	02070010	DCPMS00E	Middle Potomac River-segment 2	pH	High	N	May 2011
2002	02070010	DCTFB02R	Foundry Branch	DO	Medium	N	Aug 2013
2002	02070010	DCTBR01R	Broad Branch	Fecal coliform	Medium	N	Aug 2013
2002	02070010	DCTDO01R	Dumbarton Oaks	Fecal coliform	Low	N	Apr 2014
2002	02070010	DCTFE01R	Fenwick Branch	Fecal coliform	Low	N	Apr 2014
2002	02070010	DCTKV01R	Klingle Valley Creek	Fecal coliform	Low	N	Apr 2014
2002	02070010	DCTLU01R	Luzon	Fecal Coliform	Medium	N	Aug 2013

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES

Category 5

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	Targeted for TMDL within 2 years	TMDL Establishment Date
			Branch				
2002	02070010	DCTMH01R	Melvin Hazen Valley Branch	Fecal Coliform	Low	N	Apr 2014
2002	02070010	DCTNS01R	Normanstone Creek	Fecal coliform	Low	N	Apr 2014
2002	02070010	DCTPI01R	Pinehurst Branch	Fecal coliform	Medium	N	Aug 2013
2002	02070010	DCTPO01R	Portal Branch	Fecal coliform	Medium	N	Aug 2013
2002	02070010	DCTPY01R	Piney Branch	Fecal coliform	Low	N	Apr 2014
2002	02070010	DCTSO01R	Soapstone Creek	Fecal Coliform	Medium	N	Aug 2013
2002	02070010	DCPTB01L	Tidal Basin	pH	Medium	N	Aug 2014
2002	02070010	DCTHR01R	Hickey Run	Chlorine(total Residual)	High	N	Dec 2012

DRAFT DISTRICT OF COLUMBIA
LIST OF IMPAIRED WATERBODIES

Category 5

303d Listing Year	Geographic Location	WBID[1]	WB Name	Pollutant(s) or Pollutant Categories Causing Impairment	Priority Ranking for TMDL Development	Targeted for TMDL within 2 years	TMDL Establishment Date
2006	02070010	DCANA00E	Lower Anacostia River-segment 1	Trash	High	N	March 2012
2006	02070010	DCANA00E	Upper Anacostia River-segment 2	Trash	High	N	March 2012

*BOD means biochemical oxygen demand
*The chemicals for which the Organics TMDL for Soapstone Creek, Broad Branch, Dumbarton Oaks, Fenwick Branch, Klingle Valley Creek, Luzon Branch, Melvin Hazen Valley Branch, Normanstone Creek, Pinehurst Branch, Portal Branch, and Piney Brach have been developed are Chlordane, DDD, DDE,DDT, Dieldrin, Heptachlor Epoxide, PAH1, PAH2, PAH3 and TPCBs.
*The chemicals for which the Metals TMDL for Piney Branch has been developed are Arsenic, Copper, Lead, and Zinc.
* Bacteria TMDLs are develop for fecal coliform bacteria.
[1]- last position of alphanumeric code represents the waterbody type. E- estuary, R-river, stream, L- impoundment, lake

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 No. DC 0000221	)

EXHIBIT 6

ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	
Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES permit No. DC 0000221, reissued effective August 19, 2004	Docket No: NPDES Appeal No.
Friends of the Earth and Defenders of Wildlife,	
Petitioners,	
U.S. Environmental Protection Agency, Region III,	
Respondent.	

PETITION FOR REVIEW

Pursuant to 40 C.F.R. §124.19, Friends of the Earth (FOE) and Defenders of Wildlife (Defenders) hereby petition the Environmental Appeals Board to review the final decision of the Regional Administrator, U.S. Environmental Protection Agency Region III (the Region) to reissue NPDES permit No. DC 0000221 (the permit) for the District of Columbia municipal separate storm sewer system (MS4). Exhibit 1. The reissued permit was signed by the Regional Administrator's delegee on August 17th, 2004 with an effective date of August 19, 2004. FOE and Defenders were served with notice of the permit reissuance by letter from the Region dated August 19, 2004.

I. Interests of Petitioners

Friends of the Earth is a nonprofit corporation with its offices at: 1717 Massachusetts Avenue NW, #600, Washington, DC 20036-2002, Phone: (202) 783-7400.

FOE is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. FOE is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land.

Defenders of Wildlife is a nonprofit corporation with offices at: 1130 17th Street, NW, Washington, DC 20036, Phone: (202) 682-9400. Defenders is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. Defenders is dedicated to the preservation of wildlife and wildlife ecosystems, and the promotion of public appreciation of wildlife.

Actions by FOE and Defenders to protect and enhance the environment include administrative advocacy and litigation to enforce environmental laws. Both organizations have a long history of involvement in water quality-related activities, and members of both are greatly concerned about water quality. Members of FOE and Defenders use, enjoy, live adjacent to or near, and otherwise benefit from waters and riparian areas that are adversely impacted by the District's MS4 discharges. Members of both organizations use and enjoy such waters and riparian areas for a variety of purposes, including, but not limited to, boating, sightseeing, hiking, wildlife watching, aesthetic enjoyment, and other recreational pursuits.

Discharges from the District's MS4 system cause or contribute to pollution levels in waters used by FOE and Defenders members that are injurious to human health, wildlife, the aesthetic qualities of those waters, and to uses pursued and enjoyed by such members. Such discharges, and EPA's failure to adequately limit

them in the permit as further described below, threaten the health and welfare of FOE and Defenders members, impair and threaten their use and enjoyment of the above-mentioned waters, and deny them the level of water quality to which they are entitled under the Clean Water Act ("CWA" or "the Act"). The permit also deprives FOE, Defenders, and their members of procedural rights and protections provided under the Clean Water Act as further described below. Defenders and FOE have commented extensively on proposed versions of the permit, and intend to comment on future modifications of the permit as they are put forth for public comment. The failure of the permit to provide for public notice and comment opportunities on changes in permit requirements, as further described below, therefore substantially impairs the public notice and comment rights of Defenders and FOE.

Earthjustice is a nonprofit, public interest law firm that is representing FOE and Defenders in this matter. Its address is 1625 Massachusetts Avenue, NW, Suite 702, Washington, D.C. 20036-2212, Phone: (202) 667-4500. The undersigned is the Earthjustice staff attorney who is handling this matter.

On behalf of FOE and Defenders (hereinafter, collectively referred to as "Petitioners"), Earthjustice filed timely comments with EPA during the public comment period on the permit reissuance. The comments were made by letter dated December 15, 2003 and are a part of the administrative record in this matter. Exhibit 2 . Petitioners incorporate those comments herein by reference, as well as all items referenced in those comments. The issues presented below were raised in Petitioners' December 15, 2003 comments, and other documents referenced therein.

II. Grounds for Review

A. Background

The NPDES permit at issue in this petition governs the discharge of polluted stormwater runoff from the District of Columbia municipal separate storm sewer system to the Potomac River, the Anacostia River, Rock Creek and their tributaries. These discharges occur from hundreds of storm sewer outfalls during and after rainfall events. As further detailed below, pollution levels in these discharges routinely exceed D.C. water quality standards for bacteria and other contaminants, and have been identified by the District itself as major causes of water quality impairment in D.C. waters.

The Clean Water Act (CWA) prohibits the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. 42 U.S.C. §1311(a), 1342(a)(1). Such permits must specify technology-based effluent limitations, plus any more stringent limitations necessary to assure compliance with water quality standards in the receiving waters. 33 U.S.C. §1311(b)(1). In 1987, Congress set a 1990 deadline for operators of large MS4s (such as the District of Columbia) to apply for NPDES permits, and a 1991 deadline for issuance or denial of such permits. Id. §1342(p)(4)(A). The CWA required these permits to provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit. Thus, the CWA mandated that MS4 systems be in compliance with applicable CWA requirements no later than 1994.

Neither the District nor the Region followed this legally mandated path. The District did not complete its MS4 permit application until 1998, and the Region did not issue an MS4 permit to the District until 2000 – nearly a decade behind the statutory

schedule. The permit directed the District to continue a number of existing management practices that had stormwater related benefits (e.g., street sweeping, catch basin cleaning), but did not contain water-quality based effluent limits to assure compliance with water quality standards in the receiving waters (except for one small tributary of the Anacostia – Hickey Run). Defenders and FOE timely petitioned this Board for review of that permit, arguing that it was deficient in a number of major respects. On February 20, 2002, the Board granted the petition in part, holding that the permit was deficient because, *inter alia*: a) the Region failed to show the management practices required by the permit would be adequate to ensure compliance with water quality standards; b) the permit improperly allowed certain modifications without formal permit revision; and c) the District's stormwater program (incorporated by reference into the permit) allowed for waivers and exemptions that appeared inconsistent with federal law. The Board remanded the permit to the Region for further proceedings consistent with its opinion. *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 223, NPDES Appeal Nos. 00-14 & 01-09 (2002)(hereinafter *DCMS4 I*), motion for partial reconsideration granted May 9, 2002.

On remand, the Region did not propose a revised permit until November 15, 2003. Defenders, FOE and others filed comments on the proposal in December 2003, but the Region did not issue a final permit until August 19, 2003 – a full 2 ½ years after this Board's decision in *DCMS4 I*. For reasons further explained below, the revised permit suffers from several of the same major deficiencies as the initial permit, and from other deficiencies as well. Accordingly, Defenders and FOE ask the Board to direct the Region to correct these deficiencies forthwith.

B. Issues

1. Entities covered: The permit names the "Government of the District of Columbia" as the sole permittee. In comments on the proposed permit, Defenders, FOE and others argued that the District of Columbia Water and Sewer Authority (WASA) must be added as a co-permittee. WASA is in fact the operator of the District's system of separate storm sewer lines, pumps, and outfalls that convey the District's stormwater to waters of the United States. See http://www.dcwasa.com/education/ms4/separate_storm_sewer.cfm; http://www.dcwasa.com/about/facilities.cfm#stormwatercollection (cited in Petitioners' comments). Further, WASA has been designated under District of Columbia law as the agency responsible for storm water management, and is in fact an operator of the District's MS4 system. D.C. Code § 34-2202. Pursuant to 40 C.F.R. §122.26(a)(3)(iii), WASA is an "operator" of discharges from the DC MS4 system, and therefore must either be listed as a co-permittee or must obtain its own NPDES stormwater permit.

The Region rejected Petitioners' argument that WASA must be included as a co-permittee. The Region cited a letter from District officials purportedly claiming that under D.C. law the District was the appropriate permittee, and that the District Government holds all District agencies including WASA responsible for implementation of stormwater requirements. Response to Comments (Exhibit 4) at 5. The Region further stated that to further clarify the matter, it was modifying the permit's definition of the "Permittee" to read as follows: "'Permittee' refers to the Government of the District of Columbia and all subordinate District and independent agencies directly accountable and responsible to the City Council and Mayor as authorized under the Storm Water

Permit Compliance Amendment Act of 2000 and any subsequent amendments for administrating, coordinating, implementing, and managing storm water for MS4 activities within the boundaries of the District of Columbia."

The Region's response does not justify its failure to include WASA as a co-permittee. As noted above, WASA is plainly an "operator" that must be listed as a co-permittee under federal rules. It is not merely a part of the D.C. Government, but an independent agency with its own Board of Directors. D.C. Code § 43-1672. Moreover, WASA is not "directly accountable and responsible to the City Council and Mayor," but is run by a General Manager who is accountable to the WASA Board – not the Council or the Mayor. D.C. Code §§43-1661 to –1691. Thus, the definition of "permittee" in the final permit does not ensure that WASA will be accountable under permit, as required by EPA rules.

2. Compliance with water quality standards: An NPDES permit must include effluent limitations adequate to assure compliance with applicable water quality standards in the receiving waters. 33 U.S.C. §§1311(b)(1)(C), 1342; 40 C.F.R. §122.4(d). EPA has stated that this requirement applies to MS4 permits. See, e.g., *DC MS4 I*, 10 E.A.D at 329 335-43; EPA, NPDES Storm Water Phase II Fact Sheet 2-4 (1998)(incorporated herein by reference); Memorandum from E. Donald Elliott, General Counsel, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991). Further, 40 C.F.R. §122.44(d) requires each NPDES permit to contain limitations on all pollutants or pollutant parameters that are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an excursion above any water quality standard. The permit here does not

meet these basic requirements. Although the District's MS4 discharges undeniably cause and contribute to violations of water quality standards, the permit does not contain effluent limitations or other requirements adequate to ensure that such violations will be remedied and prevented.

a. MS4 discharges cause and contribute to violations of DC water quality standards: The fact that the District's MS4 discharges cause and contribute to water quality standards violations is shown by the District's own reports and 2002 Storm Water Management Plan (2002 SWMP).[1] The District's §305(b) Water Quality Reports (2002 and prior years – all incorporated by reference into Petitioners' comments to the Region) specifically identify storm water discharges as known or suspected contributors to violations of water quality standards for specific pollutants in waters throughout the District. For a number of waters, the report lists urban runoff /storm sewers as the **only** source of impairment. Id. Indeed, because receiving waters in the District already violate the District's standards for conventional and toxic pollutants, any effluent that exceeds those standards necessarily contributes to in-stream excursions.

Monitoring data submitted with the D.C.'s initial Part 2 MS4 application confirms that such discharges repeatedly exceed the District's water quality standards for fecal coliform bacteria, which are 200/100 mL max. 30-day mean for Class A waters, and 1,000/100 mL for Class B waters. 21 DCMR 1104.6. In almost all of the storm water sampling reported in the Part 2 application, fecal coliform counts exceeded one or both of these standards, often by wide margins. Part 2 application, Tables 4.3.4-3, -5, -7, -9, -11. In some samples fecal coliform counts were greater than 16,000/100 mL. The Part 2 Application also showed that MS4 discharges repeatedly exceeded water quality

[1] Government of the District of Columbia, Storm Water Management Plan, October 19, 2002.

standards for mercury, copper, and oil & grease. Id., tables 4.3.4-3 to -14; 21 DCMR 1104.6. At least one discharge also exceeded arsenic criteria for fisheries. Id., Part 2 application, table 4.3.4-10. Data in the record also suggests potential cyanide violations. *In re Government of District of Columbia Municipal Separate Storm Sewer System,* NPDES Appeal Nos. 00-14 & 01-09 (EAB) Record Exhibit 14, Run Summary Sheets.[2]

The District's 2002 SWMP further demonstrates that MS4 discharges violate water quality standards. Monitoring data reported in Appendix E of the 2002 SWMP shows virtually all fecal coliform counts exceeding one or both of the District's standards, often by wide margins. In some samples fecal coliform counts reached as high as 110,000/100 mL. Table 4.4.1-1 of 2002 SWMP further shows event mean concentrations of copper, lead and zinc that exceed D.C. water quality standards by significant margins. For example, the District's acute water quality criteria for copper in fisheries is 13 ug/l and the chronic criteria is 9 ug/l (assuming a water hardness of 100 mg/l). 21 DCMR 1104.7. All of the event mean concentrations for copper reported in Table 4.4.1-1 of the 2002 SWMP exceeded one or both of these criteria, with some mean concentrations as high as 82, 96, and 125 ppb.[3] For zinc, the District's acute and chronic criteria are 120 ug/l. Event mean concentrations exceeded this level at four of the monitoring cites. SWMP Table 4.4.1-1.

---

[2] The record contains sampling data indicating total cyanide levels as high as 113 ug/l., and other readings of 111, 67, and 73 ug/l. Record Exhibit 14, run summaries of 9/2/94, 3/29/95, and 5/3/95. The District's aquatic life standards for cyanide are 5.2 ug/l chronic and 22 ug/l acute, expressed as free cyanide. 21 DCMR 1104.6 Table 2.

[3] The criteria cited in the text are for dissolved metals. Table 4.4.1-1 does not indicate whether the monitored values reported for metals reflect dissolved fraction or total metals. Even assuming the numbers reflect total metals, they would substantially exceed the comparable total metal criteria, derived by using the conversion factor cited in the District's rules, 21 DCMR 1106.11.

Exceedances of water quality standards in MS4 discharges equate to water quality standards violations because, in the absence of mixing zones for these discharges (and none have been established), compliance with standards is measured at the point of discharge. See *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 75 (1st Cir. 1993); *In re Broward County, Florida, NPDES Permit No. FL0031771*, 6 E.A.D. 535 (August 27, 1996). See also, EPA, Office of Water Regulations and Standards, "Mixing Zones - Water quality Standards Criteria Summaries: A Compilation of State/Federal Criteria" at 2, EPA 440/5-88/015 (September 1998).

The fact that DC MS4 discharges cause or contribute to water quality standards exceedances is further confirmed by the District's final Total Maximum Daily Loads (TMDLs) for the Anacostia River and its tributaries for Biochemical Oxygen Demand, Suspended Solids, Fecal Coliform, and Organics and Metals. As Appendix A to the Fact Sheet documents, these TMDLs all require substantial percentage reductions in pollutant loadings from MS4 discharges. Exhibit 3, App. A. The TMDLs and supporting documentation submitted by the District to EPA (incorporated into Petitioners' comments by reference), as well as EPA's decision documents approving these TMDLs (incorporated into Petitioners' comments by reference), are all premised on the conclusion that these percentage reductions are necessary to attain and maintain water quality standards in the receiving waters. The reductions plainly have not yet been achieved—indeed, the TMDLs were only recently adopted and the District has yet to document any actual reductions in MS4 pollutant discharges – let alone the percentages of the magnitudes mandated by the TMDLs.

All of the foregoing was set forth in Petitioners' comments on the proposed permit, and was undisputed by the Region.

b. The permit does not contain effluent limits adequate to assure compliance with water quality standards: The permit provisions do not assure compliance with standards and in fact conflict with the Act's requirements for compliance with standards. First of all, the permit contains no numeric, parameter-specific limitations for discharges from any MS4 outfall. Not only are such pollutant specific, numeric limits presumptively required by the Act (33 U.S.C. §§1311(b)(1)(C), 40 C.F.R. §§122.4(d), 122.44(d), 122.44(k)(3)), but they must be outfall specific unless infeasible. 40 C.F.R. 122.44(h)(i)(1), 122.45(a).

The Fact Sheet indicates that EPA is relying on Best Management Practices (BMPs) to achieve the pollutant reductions necessary to meet standards. Pursuant to 40 C.F.R. §122.44(k)(3), however, EPA may rely on BMPs in lieu of numeric effluent limitations only where numeric limits are "infeasible."[4] Here, the Region did not even attempt to develop numeric, outfall-specific effluent limits, let alone show they are infeasible. Moreover, any claim of infeasibility would be meritless on its face. As noted above, because neither the District nor EPA have established mixing zones for discharges from the D.C. municipal separate storm sewer system, effluent limits must be set to assure compliance with water quality standards at the point of discharge – i.e., the effluents limits must mirror the receiving water quality standards themselves. See *Puerto*

[4] The Board has previously noted that BMPs are also authorized by 40 C.F.R. §122.44(k)(2), which provides for permits to specify BMPs where authorized under section 402(p) of the CWA for the control of storm water discharges. This provision, however, does not authorize the use of BMPs *in lieu of* numeric limits. The other provisions of the CWA and EPA rules cited above require numeric effluent limitations, a requirement that can be overcome only where numeric limits are shown to be infeasible and other types of limitations are shown to be sufficient to assure compliance with water quality standards.

Rico Sun Oil Company v. EPA, 8 F.3d 73, 75 (1st Cir. 1993); *In re Broward County, Florida, NPDES Permit No. FL0031771*, 6 E.A.D. 535 (August 27, 1996). See also, EPA, Office of Water Regulations and Standards, "Mixing Zones - Water quality Standards Criteria Summaries: A Compilation of State/Federal Criteria" at 2, EPA 440/5-88/015 (September 1998). This is not an exercise requiring any information beyond the water quality criteria set in D.C.'s published water quality standards. EPA cannot rationally claim that it is infeasible to simply apply the District's numeric water quality criteria as outfall-specific effluent limitations.

Second, regardless of whether numeric effluent limits are expressly required by the CWA and EPA rules, the Region must still demonstrate that whatever effluent limitations it chooses to use in the permit (e.g., BMPs) will be sufficient to assure compliance with water quality standards. 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §122.4(d). This Board explicitly so held in *DC MS4 I*. 10 E.A.D. at 341-43. The Region has failed to do so here. Although the Fact Sheet and the Permit itself contains bare assertions that the District's storm water management programs are sufficient to ensure compliance with applicable water quality standards, there are no facts or analyses in the record to support that claim. To the contrary, the claim is refuted by the record. As noted above, discharges from MS4 outfalls exceed DC water quality standards by wide margins for a variety of pollutants, and the District's own reports identify MS4 discharges as major causes of water quality standards violations in D.C. waters. The District's approved TMDLs require that - to meet water quality standards – pollution loadings form MS4 discharges to the Anacostia and its tributaries must be cut by percentages ranging from 50% to 98% depending on the pollutant. There is no evidence

that the District's SWMP will cut MS4 pollutant discharges *at all*, let alone by percentages of this magnitude. Neither the District nor Region are able to quantify any pollutant reductions that will or may occur as a result of the District's current or planned storm water management programs. Indeed, the 2002 SWMP contains almost nothing in the way of new BMPs beyond those in the pre-existing SWMP.

The Region's finding that the 2002 SWMP was sufficient to assure compliance with water quality standards is therefore arbitrary and capricious because that finding lacks any factual support and conflicts with the facts before the agency, and because the Region has failed to articulate any rational explanation of the facts that would support its conclusion. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(agency must show rational connection between facts found and choice made). Agency action must be based on facts, not mere assertion. Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 866 (D.C. Cir. 2001).

c. Water quality standards language in the permit does not satisfy the requirements of the Act and EPA rules: The water quality standards language that does appear in the permit is not a substitute for outfall specific, numeric limits, and is wholly inadequate to assure compliance with standards as explained below:

i. Part I.C of the permit purports to implement section 402(p)(3)(B)(ii) of the CWA, which requires the permittee to effectively prohibit non-stormwater from entering the MS4. Part I.C.1 states a general prohibition on discharges of non-storm water, with some exceptions. Part I.C.2 states that: "All other discharges of pollutants to the MS4 system that cause or contribute to the exceedance of the District of Columbia water quality standards are prohibited and not authorized by this Permit." This provision does

not assure compliance with water quality standards in the receiving waters because: a) It only governs discharges *to* the MS4 system – not discharges to the District's waters. Under the CWA and EPA rules, the permit must contain water quality based "*effluent* limitations" – a term defined as a restriction on pollutant discharges *to* waters of the United States. 40 C.F.R. §§ 122.2, 122.44(d). b) The provision appears within a part of the permit that is by its terms limited to the prohibition of *non*-storm water discharges to the MS4 system. Yet such discharges are not the sole or even the primary cause of water quality standards violations due to MS4 discharges. Indeed, the District claims to be effectively prohibiting non-storm water discharges to the MS4 system, yet the data cited above shows that storm water discharges are nonetheless causing and contributing to water quality standards violations. Thus, a prohibition on non-storm water or similar discharges to the MS4 system is patently insufficient to assure water quality standards compliance; c) Because the District Government is the only party bound by this permit, the prohibition applies only to the District itself. Yet no where does EPA show that discharges by the District to the MS4 system are the only cause of water quality standards violations that MS4 discharges cause or contribute to in D.C. waters. To the contrary, the record shows that a host of activities by individuals, businesses, federal agencies, and other non-District entities also cause or contribute to elevated pollutant levels in the District's MS4 discharges; d) It is unenforceable as a practical matter, because it would require EPA or a citizen to first prove that a specific discharge to the MS4 system is causing or contributing to an in-stream violation -- yet requires no monitoring or tracking by the permittee (or anyone else) to establish such causation.

ii. Part I.D.2 of the permit, entitled "WQBEL Effluent Limit", provides as follows:

> 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, and all other requirements of this Permit (including but not limited to the narrative prohibition on discharge of pollutants from the MS4 set forth in I.C. of this Permit). Unless and until modified consistent with Part VII.P (Reopener Clause for Permits) of this Permit, EPA has determined that these controls are sufficient to achieve compliance with applicable water quality standards in accordance with existing Federal rules and regulations.

This language does not assure compliance with water quality standards. To the contrary, it states EPA's belief that the District's existing stormwater management activities are sufficient to assure compliance with standards, despite the lack of any factual showing to this effect, and despite the overwhelming record evidence to the contrary.[5] Rather than assuring compliance with standards, this language would doubtless be cited by the District in opposing any enforcement action seeking to require stronger measures to achieve compliance with water quality standards.

The situation would be different if: a) the language in Part I.C.2 was changed to clarify that it applies to more than just non-storm water discharges, and changed to prohibit any discharges <u>from</u> (not "to") the MS4 system that cause or contribute to the exceedance of District of Columbia water quality standards; and b) the second sentence of Part I.D.2 of the permit was deleted. Although not a substitute for numeric water quality based effluent limits, and not a substitute for requiring a showing that the District's SWMP is in fact sufficient to assure compliance with standards, these changes would at least impose an obligation on the District to assure that discharges from its MS4

[5] As noted above, this EPA "finding" is therefore arbitrary and capricious and cannot stand under well settled principles of administrative law.

do not cause or contribute standards violations, and that the permit is not read as some sort of finding that the District's existing SWMP provides such assurance.

iii. Part I.D.3 of the permit, entitled "Effluent Limits Consistent with TMDL WLA," starts with the same first sentence as Part I.D.2 (requiring implementation of the 2002 SWMP and compliance with Part I.C.2), and then states:

> Based on limited information, and until and unless this Permit is modified in accordance with the Reopener Clause of Part VII.P of this Permit, EPA has determined that these controls are appropriate effluent limits consistent with the assumptions and requirements of the approved waste load allocations (WLAs) established in various total maximum daily loads specifically described and discussed in the MS4 Fact Sheet.

The paragraph then goes on to state that EPA will reconsider whether the District's controls are consistent with applicable standards and WLAs after reviewing TMDL implementation plans required under Part IX.B of the Permit. Part I.D.3 is flawed for the same reasons as Part I.D.2. As discussed above, there is absolutely no basis in the record for concluding that the District's existing SWMP will be sufficient to produce the very substantial reductions in stormwater pollutant loadings required to conform with the adopted WLAs. Indeed, there is no evidence in the record that that the District's programs will reduce pollutant loadings from the MS4 system at all. The above-quoted language from Part I.D.3 of the permit is therefore arbitrary and capricious, and warrants reversal by the Board. Further, Part I.D.3's reference to Part I.C.2 of the permit is insufficient to assure protection of water quality standards for all the reasons discussed above with respect to Part I.D.2.

EPA rules explicitly require EPA to assure that the effluent limits in this permit "are consistent with the assumption and requirements of any available wasteload allocation for the discharge." 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA itself acknowledges

that the available WLAs here require significant reductions in existing pollutant loadings from the MS4 system. For example, on the Lower Anacostia river, the WLAs require reductions in MS4 loadings of 90% for fecal coliform, 50% for BOD, 77% in TSS, and 98% in PAHs. Fact Sheet Attachment A. No where in the record does the District explain how it will achieve these reductions. Accordingly, the permit plainly does not assure compliance with water quality standards and is not consistent with the requirements of applicable WLAs as required by the CWA and EPA rules.

Part I.D.3. cross references Part IX of the permit, which directs the District to conduct further monitoring and submit an implementation plan later for complying with the WLAs if the District "concludes" that the MS4 discharge of a specific pollutant is causing or contributing to "an exceedance of the criteria" under the approved WLA. Such a deferral of requirements to comply with the WLAs is contrary to the CWA and EPA rules, and is completely unjustified in this case. The record currently before the Region already shows that substantial reductions in MS4 pollutant loadings are required to comply with the WLAs. Under the above-cited provisions of the CWA and EPA rules, the permit must therefore specify effluent limits to assure compliance with those WLAs. There is no legal justification for allowing the District to put off corrective action: Instead, the corrective action requirements must be specified in this permit. The CWA required the District to obtain this permit more than 10 years ago, and the permit was to require compliance as expeditiously as practicable, but not later than 3 years from the date of permit issuance (i.e., by 1994). 33 U.S.C. 1342(p)(4)(A). EPA cannot lawfully authorize further delays in this statutorily mandated schedule. See also 40 C.F.R.

122.26(d)(2). See also 55 Fed. Reg. at 48044 ("permit conditions should do more than plan for controls during the term of the permit").

Nor is there any justification for interposing a requirement that the District must "conclude" that an MS4 discharge is causing or contributing to an exceedance before being obligated to develop corrective measures.[6] Determination of compliance or noncompliance with TMDLs and WLAs is an objective matter: It is not a matter to be based on the judgment of the permittee. Id. Moreover, the permit as written would allow the District to avoid compliance simply by refusing to "conclude" that a violation has occurred, thereby unlawfully undermining the Act's TMDL requirements. 33 U.S.C. 1313(d); 40 C.F.R§ 122.44(d)(1)(vii)(B). Further, Part IX.B uses legally incorrect terminology in describing what triggers a violation: "If the analysis concludes the MS4 discharge monitored for that specific pollutant is causing or contributing to an exceedance of the criteria under the approved pollutant specific WLAs..." The legal requirement is that permit assure consistency with the WLA *itself*, not some undefined "criteria". Id.; 40 C.F.R. §122.44(d)(vii)(B).

Even if EPA could allow the District to defer adoption and/or implementation of measures to meet the relevant WLAs, the permit would have to require the plan to produce full compliance with the WLAs within 3 years 33 U.S.C. §§ 1311(b)(1)(C), 1342(p)(4)(A), 40 C.F.R. §§122.4(d), 122.44(d). The permit does not meet this

[6] The permit goes on to specifically direct the District to submit TMDL implementation plans for the Anacostia River within six months and for Rock Creek within twelve months after the effective date of the Permit. Part IX.B. Neither the Permit nor the Fact Sheet explains whether this means that the Region or the District has already determined that additional controls are needed to comply with the Anacostia and Rock Creek WLAs, and that implementation plans must therefore specify the additional controls within the six and twelve month time frames. Even if the Board could allow deferral of additional controls, the Region must be directed to clarify that no additional study is needed to determine that the District must adopt additional controls to comply with the Anacostia and Rock Creek WLAs, and that those controls must be adopted forthwith.

requirement, and indeed contains no deadline at all for compliance with the WLAs. Indeed, the permit requires EPA's review and approval of any implementation plan, and sets no deadlines for that action either. Further, to the extent that the permit allows EPA to approve an implementation plan without going through the permit modification process, the permit violates EPA rules which require public notice and comment prior to EPA decisions of that magnitude. 40 C.F.R. §§ 122.62, 122.63.

Finally, Petitioners note that the Permit not only fails to specify numeric effluent limits to assure compliance with water quality standards and the adopted WLAs, but also fails to specify daily loads as mandated by the CWA. The Anacostia and Rock Creek TMDLs are all expressed as annual or seasonal average load limits, rather than daily load limits. Petitioners' comments to the Region incorporated by reference comments filed by Earthjustice on these TMDLs, in which the point was made repeatedly that average annual or seasonal loads do not meet the Act's mandate for daily loads, and do not assure compliance with water quality standards. The Region's response to these comments has been to assert that the permit writer can assure that the loads are properly distributed among the days of the year. However, the final Permit here fails to make any such distributions, and fails to specify any daily loads. As a result, the permit fails to assure protection of water quality standards as required by the CWA and EPA rules. For example, a requirement to cut only the annual loading of fecal coliform by a fixed percentage does not prevent exceedances of fecal coliform numeric criteria on numerous days and months throughout the year. Nor does a fixed percentage cut in annual average loads protect the District's narrative criteria or designated uses on days when high fecal coliform peaks render receiving waters unsafe for swimming, kayaking, canoeing,

wading, and other recreation. E.g. 21 DCMR 1101.1, 1101.2,1102.1, 1104.1, 1104.3, 1104.4, 1104.7,

3. Reductions to the maximum extent practicable: The District has not demonstrated that its SWMP will reduce storm water pollutant discharges to the maximum extent practicable as required by 33 U.S.C. 1341(p) (3)(iii)("MEP" requirement). Indeed, the District is unable to quantify any reductions in pollutant discharges under the 2002 SWMP. The level of control provided under the 2002 SWMP is virtually unchanged from the prior SWMP. According to estimates in the Part 2 application, the prior SWMP was not expected to produce any reductions in cadmium discharges to the Potomac, Anacostia, or Rock Creek watersheds. The program was also not expected to produce reductions in discharges of dissolved phosphorus, copper, and lead to the Rock Creek watershed; or in discharges of dissolved phosphorus to the Potomac watershed. For other pollutants, predicted reductions were negligible. The program was expected to reduce MS4 discharges of total suspended solids in the District by less than one-half of one percent. BOD discharges will be cut by 0.7%, COD by 0.6%, total nitrogen by 0.4%, and total phosphorus by 0.5%. Part 2 application, Table 4.4.5-1. EPA cannot rationally or lawfully find that the SWMP or the draft permit will reduce storm water pollutant discharges to the maximum extent practicable, when the SWMP will in fact produce no reductions at all for some pollutants, and at best negligible reductions for others.[7] Moreover, neither the District's nor EPA's analyses purport to show, or corroborate, that greater reductions are not practicable, and any such claim would be farfetched. Further, the permit does not contain conditions to ensure reduction

[7] Petitioners are aware that the Board rejected a similar argument in *DCMS4 I*. They raise the issue again because they respectfully disagree with the Board's prior decision and wish to preserve the issue for possible future judicial review in this matter should the Board decline to reconsider its prior decision.

of pollutants in discharges to the maximum extent practicable. 40 C.F.R. 122.26(d)(2)(iv).

Indeed, the permit does not even require the level of effort that EPA rules require for small MS4 systems. Such systems must at least establish measurable goals and ensure they are met. No such requirements are included in this permit.

4. **Waivers and exemptions**: The District's water quality and storm water regulations require the granting of a variance from any water quality and storm water requirement upon a finding that compliance "would result in exceptional or undue hardship by reason of excessive structural or mechanical difficulty, or impracticability of bringing the operation into full compliance." 21 DCMR 514.1. The District also exempts from storm water regulation any construction or grading operation covering 5,000 square feet or less, unless part of an approved subdivision plan. Id. 527.1(g). In addition, there are provisions that allow for waivers of storm water management requirements, and for variances where compliance "will result in unnecessary hardship or practical difficulty." Id. 528. These exemption, waiver, and variance provisions conflict with the Act and EPA rules, which require that all storm water discharges be regulated by an NPDES permit. 33 U.S.C. 1311(a), 1342(a)(1), (p)(2)(C), (p)(3)(B), 55 Fed. Reg. at 48009. See also *NRDC v. EPA*, 966 F.2d 1292, 1305-06 (9th Cir. 1992)(EPA does not have authority to create exemptions from stormwater regulatory program). Moreover, these provisions could be used to allow non-stormwater discharges into storm sewers -- discharges that the CWA requires the MS4 permit to prohibit. 33 U.S.C. 1342(p)(B)(ii). Finally, the exemption, waiver and variance provisions conflict with the Act's mandate that SWMPs ensure pollutant reductions to the maximum extent practicable. Id.

§1342(p)(3)(B)(iii). A facility or activity that is exempt does not have to reduce discharges at all, let alone to the maximum extent practicable. Indeed, the Region cannot rationally conclude that the District's SWMP provides for reductions to the maximum extent practicable when it does not know the nature and extent of waivers that the District may grant.

This Board remanded the prior permit in part because of the Region's failure to address this very issue, and the reissued permit does not correct the error. Instead, it repeats the approach of the prior permit of allowing the waiver and exemption provisions to remain in the District's SWMP and allowing the District to decide on an ad hoc basis (without public notice and comment) whether individual exemptions are allowable. This error is not corrected by permit language directing the District not to issue any "exemption, waiver, or variance that would violate the Clean Water Act or EPA regulations," and stating that the permit "does not authorize any discharge based on such exemption, waiver, or variance." Permit Part III.B. This language is virtually identical to the language in the prior permit, and is plainly indefensible. EPA does not satisfy its permit writing duties under the Act by simply directing the permittee in the most general terms not to violate the law. A key purpose of an NPDES permit is to translate general requirements of the Act into source specific requirements. The Region must specify what constitutes compliance or non-compliance in the context of the specific discharge at issue. Here, the Region is obligated by the Act to determine whether the District's wavier and exemption provisions are consistent with the Act (including the MEP standard) and EPA rules. If they are not (as we argue above), the Agency must exclude them from the SWMP that is incorporated into the permit. The Agency cannot allow the District to

make that determination on an ad hoc basis. With no guidance whatsoever from the Region, the District will undoubtedly feel free to grant waivers and exemptions without limitation unless and until the Region objects. And because the permit does not require any notice to the Region or the public of waivers and exemptions, the Agency and the public will have no way of knowing when to object. Further, the waiver and exemption provisions in the District's program effectively authorize amendment of the SWMP, and therefore the permit, without going through the required procedures for permit modification in 40 C.F.R.§§ 122.62 - .63.[8]

These deficiencies are not corrected by language in the reissued permit directing the District to provide an explanation of how procedures for regulating construction sites with regard to waivers and exemptions "will meet the requirements of the Clean Water Act." The waiver and exemption provisions do not meet the requirements of the Act for the reasons set forth above, and EPA cannot brush that illegality under the rug by letting the District merely offer some unknown explanation in the future. This is hardly a situation in the District has not had sufficient time to address the matter – the Board's decision invalidating these waiver provisions was issued more than 2 ½ years ago.

Nor are the above-described deficiencies cured by the following language in the reissued permit:

> This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any of the various existing 'waivers and exemptions' that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends

[8] For all the foregoing reasons, the above-described deficiency is not corrected by language in Part VII.H of the permit providing that "[i]n cases of 'exemptions and waivers' under District law, Federal law and regulation shall be applicable." As with the above-quoted permit language, this provision unlawfully allows the District to make ad hoc waiver determinations without federal oversight and without public notice.

> to any activity that would otherwise be authorized under District law but which impedes the reduction or control of pollutants through the use of BMPs to the maximum extent practicable and/or prevents compliance with the narrative effluent limits of this Permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

Permit Part IX.A. This language is merely a more verbose formulation of the language in Part III.B., and is deficient for all of the same reasons stated above. If anything, the Part IX.A. language weakens the permit even further by indicating that discharges allowed pursuant to waivers and exemptions that are inconsistent with the CWA "may" (not "will") violate the permit.

For all the foregoing reasons, the waiver and exemption provisions incorporated into the draft permit violate the Clean Water Act and applicable EPA regulations. To correct this deficiency, the permit must be amended to state that the District's waiver and exemption provisions are not a part of the approved SWMP and therefore such waivers and exemptions are prohibited by the permit. If the District wants to provide waivers or exemptions, it must either: a) adopt narrowly tailored waiver rules that enable EPA to determine up front that any waivers granted pursuant thereto would not conflict with MEP and other CWA requirements; or b) seek amendment of the permit prior to authorizing any specific waiver or exemption.

5. Monitoring: EPA rules for administering the NPDES program explicitly require monitoring "the volume of effluent discharged from each outfall." 40 C.F.R. §122.24(i)(1)(ii) (emphasis added); see also 40 C.F.R. §122.48. The final permit does not meet this requirement. Instead, it allows the District to monitor only three times a year at only a handful of outfalls in one subwatershed in any given year. It then allows the District to estimate annual cumulative pollutant loadings and event mean concentrations

for the entire subwatershed based on this extremely limited data set. It further allows the District to merely estimate (rather than measure) the volume discharged from the monitored outfalls, in direct contravention of the above cited rules. Permit Part IV.A.2. Further, the permit does not specify the methods for deriving such estimates, or require that whatever estimation methods used be shown to be reliable and based on sound science.

The permit cites 40 C.F.R. §122.26(d)(2)(iii), but that provision specifies monitoring requirements for the permit application. Moreover, even if applicable, that provision requires "representative" monitoring. 40 C.F.R. §§122.26(d)(2)(iii)(D). See also id.122.41(j)(1). The agency's permit writer's manual likewise requires permits to specify monitoring locations "that are representative of the expected wastewater discharge." EPA, NPDES Permit Writers' Manual 118 (1996). Monitoring of discharges to one subwatershed – e.g., Rock Creek -- is not representative of discharges to the Anacostia and the Potomac. The Region has offered no evidence or analysis to suggest discharges to Rock Creek are the same as those to the Anacostia and the Potomac, and any claim to that effect would be indefensible. As shown by the District's SWMP, there are literally hundreds of MS4 outfalls on these rivers. Some discharge runoff from predominantly residential areas, while others discharge runoff from commercial or industrial areas. Runoff from residential, parkland, and limited commercial areas into Rock Creek is hardly representative of runoff from the downtown DC business district or from the Anacostia waterfront at locations such as the Navy Yard and Southeast Federal Center.

In response to Petitioners' comments on this issue, the Region asserted that the permit's monitoring provisions were permissible because they "maximize[d] the limited resources available to provide for increased data," and were consistent with EPA guidance. Exhibit 4 at 15. The Region does not have authority, however, to disregard EPA regulations in order to advance other policy goals. Nor can an EPA guidance document amend or repeal a lawfully adopted regulation. EPA rules explicitly require monitoring of effluent volume from each outfall, and further require that monitoring be representative of the monitored activity. 40 C.F.R. §§ 122.24(i)(1)(ii); 40 C.F.R. §122.48((a). The final permit does not require monitoring of effluent volume from each MS4 outfall, and the Region has not shown (or even claimed) that monitoring of only watershed is representative of all other watersheds. Moreover, the Region's response fails to explain how the very limited monitoring required by the permit will be sufficient to assure compliance with the adopted WLAs for each of the receiving rivers, or with BMP requirements. For example, monitoring of load reductions on Rock Creek does not assure that comparable load reductions are occurring on all of the other waters of the District.

For all the foregoing reasons, the permit monitoring provisions are legally insufficient and not rationally justified.

Relief Requested

Petitioners respectfully request that the Region be directed to correct the above-described deficiencies within 120 days. The setting of a deadline is warranted in the light of the extraordinary delays by the District and the Region in addressing this matter. As noted above, the District did not complete its MS4 permit application until 1998 (eight

years late), and the Region did not issue an MS4 permit to the District until 2000 – nearly a *decade* behind the statutory schedule. After this Board found deficiencies in that permit in February 2002, the Region took *another 2½ years* to respond, and – as fully discussed above – still failed to correct key deficiencies identified in the Board's decision. Unless the Region is directed to *correct* (not merely reconsider) these deficiencies by a specific, near term deadline, this process could go on ad infinitum. In the process, the CWA's explicit deadlines for issuance of adequate MS4 permits and for compliance with their terms will be effectively nullified.

The 120-day schedule proposed by Petitioners would allow the Region ample time to draft proposed permit language for the matters at issue, accept public comments, and sign a final permit modification. For example, the Region could take 45 days to draft a proposal, 30 days for public comment, and 45 days to consider public comment and issue the final permit language. The issues raised here have been before the Region for years, and addressing them in a manner consistent with the CWA will hardly require the Region to reinvent the wheel.

DATED this 20th day of September, 2004.

David S. Baron
Attorney
Earthjustice
1625 Massachusetts Avenue, N.W., Ste. 702
Washington, D.C. 20036
(202) 667-4500

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review were served by first class mail, postage prepaid, this 20th day of September, 2004 on:

Christopher Day
Office of Regional Counsel
EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

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

Julie James

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 No. DC 0000221	)

EXHIBIT 7

NPDES Permit No. DC0000221 DRAFT
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

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

Signed this day of

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 that cause or contribute to the exceedance of the District of Columbia water quality standards 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 in accordance with 40 CFR Part 122.44(k)(2).

2. WQBEL 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, 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 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 implement 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, or revoked and reissued to incorporate additional controls in the event that EPA determines that further controls are necessary to (1) ensure that the effluent limits are sufficient to prevent an exceedance of water quality standards 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 definition]

“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.

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 No. DC 0000221	)

EXHIBIT 8

Re: Draft 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, for evaluating the effectiveness of the District's programs.

PROPOSED ACTION TO BE TAKEN:

EPA is proposing 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), 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 Agency 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 limit, 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; 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 is therefore being public noticed today.

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 are 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.

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.