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

In Re:	)	
	)	NPDES Appeal No. 11-05
Government of the District of Columbia Municipal Separate Storm Sewer System	)	
NPDES Permit No. DC 0000221	)	

ENVIRONMENTAL PROTECTION AGENCY REGION III'S RESPONSE TO PETITION NO. 11-05

The U.S. Environmental Protection Agency Region III ("EPA"), by and through the undersigned counsel, hereby submits to the Environmental Appeals Board ("EAB" or "Board") the following response to the joint petition number 11-05 ("the Petition") filed by the District of Columbia Water and Sewer Authority ("DC Water") and the Wet Weather Partnership ("WWP") (collectively, "Petitioners").

BACKGROUND

On September 30, 2011, EPA issued a final Phase I Municipal Separate Storm Sewer System ("MS4") NPDES permit (Permit No. DC0000221) to the Government of the District of Columbia ("DC Government" or "the Permittee"), which had an effective date of October 7, 2011 ("the Permit"). The DC Government is the sole permittee. *See, e.g.,* Permit at 1 (cover sheet) and Section 2.3.1. The District of Columbia Comprehensive Stormwater Management Enhancement Amendment Act of 2008 (D.C. Law 17-371; D.C. Official Code §§ 8-152.01 and 8-152.03) assigns various responsibilities to entities within the DC Government – for example, it creates within the District Department of the Environment ("DDOE") a "Stormwater

Administration" that is "responsible for monitoring and coordinating the activities of all District agencies, including the activities of the District of Columbia Water and Sewer Authority ('DC WASA'), which are required to maintain compliance with the Stormwater Permit." D.C. Official Code § 8-152.01(a) (2012). Prior to finalizing the Permit, EPA published a draft permit for public review and comment on April 21, 2010 and accepted comments through June 4, 2010. *See* Fact Sheet at 2.

EPA fully addressed public comments received on the draft Permit, including those submitted by Petitioner DC Water (no comments were submitted by Petitioner WWP). The final Permit issued on September 30, 2011 includes provisions necessary for implementing Total Maximum Daily Loads ("TMDLs") established for many area waters, including the Potomac River, Anacostia River, and the Chesapeake Bay. Where TMDLs have been established or approved, the Permit requires the Permittee to develop a plan for meeting the relevant limits in those TMDLs. *See* Permit Section 4.10.3.

On November 4, 2011, Petitioners filed a joint petition requesting that the EAB review various portions of the Permit.[1] On November 17, 2011, DDOE requested leave to intervene and to respond to the petitions. The Board granted DDOE's request in its February 2, 2012 Order. By way of Orders dated February 14, 2012 and April 11, 2012, the Board temporarily stayed proceedings on the Petition to allow for participation in the Board's Alternative Dispute Resolution pilot process. On May 8, 2012, the Board lifted that stay.

[1] Four environmental groups – Friends of the Earth, the Natural Resources Defense Council, the Anacostia Riverkeeper, and the Potomac Riverkeeper – also jointly filed a petition for review on November 4, 2011; that petition has been resolved via a settlement agreement dated May 18, 2012 (*see* Order Continuing Stay of Proceedings (May 22, 2012)).

ARGUMENT

EPA respectfully requests that the Board deny review of the Petition because, as shown below, Petitioners have not met their threshold burden to demonstrate a basis for review of any of the claims in the Petition.

I. DC WATER MAY NOT HAVE STANDING TO FILE A PETITION

First, DC Water may not have standing to file a petition. The requirements for standing set out in EPA's regulations are straightforward: if any "person" filed comments or participated in a public hearing on the draft permit, it may challenge the permit; if it did not, it "may petition for administrative review only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a) (2011).

As discussed in numerous briefs filed with the Board, there is some question regarding the legal status of DC Water under the statutes of the District of Columbia and whether DC Water may be considered a separate "person" from the Government of the District of Columbia, here represented by the DC Attorney General, under 40 C.F.R. § 124.19(a). As EPA stated in its Response to District Department of the Environment's Response to Order Requiring Additional Briefing (filed January 26, 2012), EPA defers to the District of Columbia's interpretation of DC law on this issue.

II. PETITIONERS FAILED TO MEET THE THRESHOLD REQUIREMENTS FOR REVIEW OF ANY PART OF THE PERMIT.

Even if Petitioners have standing to file the Petition, they have failed to meet any of the threshold requirements for review. This inquiry is separate and apart from the issue of standing, and includes: (1) the Petitioners' burden to show that any issues raised in the petition were raised during the public comment period if reasonably ascertainable; and (2) the Petitioners' burden to demonstrate, with specificity, either that the challenged permit provision is based on a

clearly erroneous finding of fact or conclusion of law or that the Board should exercise its discretion to review the provision. *See, e.g., In re: Peabody Western Coal Co.*, NPDES Appeal Nos. 10-15 & 10-16, slip. Op. at 22-23 (aug. 31, 2011); EAB Practice Manual (Sept. 2010) at 41-42 (collecting cases).

First, the Petitioners bear the burden of demonstrating whether the challenged permit condition is a change from the draft permit or, if not, that "any issues being raised were raised during the public comment period" if reasonably ascertainable. 40 C.F.R. § 124.19(a) (2011). If, like DC Water, a petitioner bases its claim for standing on its having participated in the public comments or public hearing on a draft permit, it must show that the issue in question was raised during the public comment period, either by the petitioner or another commenter, with "a reasonable degree of clarity and specificity" in order for the Board to consider the issue on appeal. *LeBlanc v. EPA*, 310 Fed. Appx. 770, 775, 2009 WL 331557 (6th Cir. 2009), *citing In re New England Plating*, 9 E.A.D. 726, 732, 2001 WL 328213 (EAB 2001). *See also* EAB Practice Manual (Sept. 2010) at 43.

Second, the Petitioners bear "the burden of demonstrating that the Region based the permit decision on a clearly erroneous finding of fact or conclusion of law or that the Board should exercise its discretion to review an important policy matter or an exercise of discretion by the permit issuer." EAB Practice Manual (Sept. 2010) at 41 (citing 40 C.F.R. § 124.19(a); *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (Sept. 15, 2009)).

To meet that burden, a potential petitioner "must meet a minimum standard of specificity" by "'demonstrat[ing] ***with specificity*** in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review'" and "support[ing] its allegations with solid evidence that the permit issuer clearly erred in its decision, as 'the Board

will not entertain vague or unsubstantiated claims.'" EAB Practice Manual (Sept. 2010) at 42 (emphasis added), quoting *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) and *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 61 (Sept. 15, 2009).

Furthermore, a petitioner must substantiate those specific allegations by providing legal authority for the assertion. *City of Pittsfield*, 614 F.3d at 11. *See also In re DC WASA*, 13 E.A.D. 714 at III.C.2.b, 2008 WL 782611 (EAB 2008). A petitioner "may not simply restate its original comments in order to be granted review without demonstrating why the Region's response was clearly erroneous or otherwise warranted review." *LeBlanc,* 310 Fed. Appx. at 775, *citing In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 472 (EAB 2005). *See also City of Pittsfield, Mass. v. EPA,* 614 F.3d 7, 11 (1st Cir. 2010) (collecting EAB cases). Similarly, simply disagreeing with the Region's response to a comment does not meet a petitioner's burden of showing clear error or reviewable exercise of discretion. *In re DC WASA*, 13 E.A.D. at III.C.2.b.

For the reasons discussed below, Petitioners have failed to meet any of the above-described threshold requirements for review.[2]

A. Petitioners Have Not Met Their Burden to Challenge Section 4.3.1.3 of the Permit.

As Petitioners have failed to meet their threshold burden with respect to their argument challenging Section 4.3.1.3 of the Permit, the Board should decline to review this portion of the Permit.

Petitioners allege that EPA impermissibly added the words "and the public" to Section 4.3.1.3 of the final Permit – adding the public as another group to be notified of a sanitary sewer

[2] The Board previously ruled that the WWP has standing only to challenge Section 4.3.1.3 of the Permit. *See* EAB Order Granting District of Columbia Motion to Intervene and Limiting Participation of Wet Weather Partnership, dated February 2, 2012. As a result, WWP is included only in Section II.A, below.

overflow ("SSO") into the MS4 within 24 hours of the event – without public notice and comment. *See* Petition at 12-13. Petitioners allege that, if they could have commented on this language in section 4.3.1.3 of the Permit, they would have argued that it is inconsistent with the permit for the Blue Plains wastewater treatment plant (NPDES Permit No. DC0021199), that notifying the public of "every SSO that reaches the MS4 will . . . desensitize[e] the public to the notifications that matter", and that Petitioners are "unaware of any legal authority" to require public notification of each SSO so there must not be any.[3] Petition at 12. Petitioners then make a blanket statement that "the requirement in 4.3.1.3 is beyond EPA's legal authority, arbitrary and capricious, and contrary to public policy." *Id.*

These allegations do not provide the requisite specificity and substantiation for Petitioners to meet their burden of proof, however. As the Board has stated, a "petitioner must support its allegations with solid evidence that the permit issuer clearly erred in its decision". EAB Practice Manual (Sept. 2010) at 42. Here, Petitioners have made no attempt to argue, much less provide "solid evidence," that the language in Section 4.3.1.3 is based on a clearly erroneous finding of fact or conclusion of law or that the Board should exercise its discretion to review an important policy matter or exercise of discretion by the permit issuer. Instead, Petitioners provide only their own opinion that informing the public of untreated sewage entering public waters would be "counterproductive", which is based on the underlying assumption that not every SSO "matter[s] to public health." Petition at 12.

Such conclusory, vague, and unsubstantiated claims fail to meet Petitioners' burden and, as a result, are inappropriate for consideration by the Board. *See* EAB Practice Manual (Sept.

[3] The substance of these allegations is addressed in section III.A, below.

2012) at 42 (quoting *In re Attleboro,* NPDES Appeal No. 08-08, slip op. at 61 (Sept. 15, 2009)). Accordingly, EPA requests that the Board decline to review Section 4.3.1.3 of the Permit.

B. DC Water Has Not Met Its Burden to Challenge Section 4.10.3 of the Permit.

DC Water has not met its burden with respect to its argument that the requirement in Section 4.10.3 of the Permit to develop a consolidated TMDL implementation plan within two years is unreasonable.

First, although DC Water submitted various public comments regarding the TMDL implementation plan section of the draft Permit, it did not argue in those comments that the timing or requirements for such a plan were in any way impracticable or unreasonable. *See* Petition, Exhibit B. While DDOE (the agency of the DC government responsible for developing the consolidated TMDL implementation plan) did comment on the adequacy of time to develop the plan, DC Water does not refer to the comment at all, and provides no explanation, much less one with the requisite specificity and substantiation, as to why EPA's response to any such comment was clearly erroneous or otherwise merits review. On this failure alone, DC Water fails to meet its threshold burden.

DDOE submitted a public comment requesting more time for plan development, which had been twelve (12) months. *See* Responsiveness Summary at 57. EPA responded to that comment (*id.*), in part consolidating the plans required and extending the timeframe for plan development to twenty-four (24) months. *Id.* DDOE did not file a petition challenging this, or any other aspect of, the Permit.

Instead of fulfilling these threshold requirements clearly set out by the Board, DC Water essentially argues that the Permit condition is impossible to meet, making arguments that it could have made, but did not make, on the draft permit (which contained a shorter time period than the

final permit). As noted, however, DDOE, the agency responsible for meeting this condition of the Permit, did not consider the final permit's requirement to develop a consolidated plan within twenty-four months to be impossible.

As a result of DC Water's failure to meet the threshold requirements for a petition under 40 C.F.R. 124.19(a), EPA requests that the Board decline to review section 4.10.3 of the Permit.

C. DC Water Has Not Met Its Burden to Challenge Section 2.3.1 of the Permit.

DC Water fails to meet its threshold burden to challenge Section 2.3.1 of the Permit because DC Water does nothing to substantiate its argument other than disagree with EPA's response to its public comment, and provides no legal authority to substantiate its argument.

DC Water argues that the Permit inadequately defines DC Water's responsibilities, and notes that DC Water submitted comments on this issue during the public comment period. Petition at 7-8. DC Water never attempts to make any demonstration of how or why EPA's response to its comments was clearly erroneous or otherwise merits review.[4] *Id.* In fact, DC Water does not even acknowledge in its Petition that EPA responded to its comments. *Id.*

As the Board has repeatedly held, merely disagreeing with EPA's response to a comment does not show clear error. *LeBlanc v. EPA*, 310 Fed. Appx. 770, 775, 2009 WL 331557 (6th Cir. 2009), *citing In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 472 (EAB 2005). *See also City of Pittsfield, Mass. v. EPA,* 614 F.3d 7, 11 (1st Cir. 2010) (collecting EAB cases). In its Petition, DC Water has not even explicitly disagreed with EPA's response to its comment, much less met its threshold burden on this issue. As such, the Board should decline to review Section 2.3.1 of the Permit.

[4] EPA's response to DC Water's comments on this issue can be found on page 66 of the Responsiveness Summary.

D. DC Water Has Not Met Its Burden to Challenge Section 4.11 of the Permit.

As with the other portions of its Petition, DC Water does not provide the threshold demonstration to warrant review of Section 4.11 of the final Permit regarding additional pollutant sources, because DC Water simply restates its public comments on this issue.[5] DC Water makes no statement whatsoever regarding the Region's response to its comments on this issue, much less any argument that the final Permit provision is clearly erroneous in any way or otherwise merits review. *See* Petition at 11-12. As already discussed, merely restating public comments does not meet the threshold requirements for a petition. Accordingly, the Board should decline to review Section 4.11 of the Permit.

III. Even If Petitioners Had Met Their Threshold Burden to Challenge the Permit, Their Claims Fail As a Matter of Law.

As discussed above, Petitioners have not met their threshold burden to show with sufficient specificity that review of the Permit is warranted. Even if the Petition is deemed adequate, however, Petitioners' claims fail as a matter of law.

A. The Change to Permit Section 4.3.1.3 Is Not Based on a Clearly Erroneous Finding of Fact or Conclusion of Law.

EPA's addition of the requirement to notify the public of an SSO into the MS4 within 24 hours of an event was not based on a clearly erroneous finding of fact or conclusion of law because it merely added "the public" to an already existing notification requirement, and notifying the public of SSOs is consistent with EPA policy and guidance with respect to SSOs. This addition is not a significant change and does not place any significant additional burden on the Permittee.

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[5] As noted in the Petition, Section 4.11 of the final Permit combines portions of sections 3.1 and 3.3 of the draft Permit. *See* Petition at 11-12.

Section 4.3.1.3 of the draft Permit required "[n]otifying appropriate sewer and public health agencies when the sanitary sewer overflows to the MS4 within 24 hours." Permit Section 4.3.1.3. The same section of the final Permit requires "[n]otifying appropriate sewer, public health agencies **and the public** when the sanitary sewer overflows to the MS4 within 24 hours." *Id.* (emphasis added). Thus, the final Permit merely added "the public" as one additional group to notify while notifying others. As EPA did not believe this to be a significant change, the Agency did not re-public notice the Permit, instead noting the change in the Fact Sheet for the final Permit. *See* Fact Sheet at 26-27. EPA also summarized the few comments that were received on this section of the draft Permit and explained the changes that were made as a result of those comments. *Id.* This change from the draft to the final Permit was a logical outgrowth of the draft permit provision to notify the relevant public agencies, which provision had been in place in prior versions of the Permit since 2004 (*id.*), and emerged from discussions with DDOE on behalf of the DC Government. Furthermore, agency policy and guidance recognizes that wet weather discharges containing untreated sewage can pose significant health threats to the public and, as a result, public notification of SSOs is now common procedure across the country.[6]

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[6] *See, e.g.,* U.S. EPA, National Pollutant Discharge Elimination System Permit Requirements for Peak Wet Weather Discharges from Publicly Owned Treatment Works Treatment Plants Serving Separate Sanitary Sewer Collection Systems, December 2005 (http://www.epa.gov/npdes/pubs/proposed_peak_wet_weather_policy.pdf); U.S. EPA, Guide for Evaluating Capacity, Management, Operation and Maintenance (CMOM) Programs at Sanitary Sewer Collection Systems, January 2005 (http://www.epa.gov/npdes/pubs/cmom_guide_for_collection_systems.pdf); U.S. EPA, Sanitary Sewer Capacity, Management, Operation and Maintenance Self-Assessment Check-list, (http://www.epa.gov/npdes/pubs/cmomselfreview.pdf) (see Overflow Emergency Response Plan, page 22); U.S. EPA, Report to Congress: Impacts and Control of CSOs and SSOs, August 2004, EPA 833-R-04-001. (http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm).

Petitioners argue that if they had been able to comment on EPA's addition of the phrase "and the public", they would have argued, among other things, that this language was inconsistent with the Blue Plains permit for wastewater treatment in the DC area, that notifying the public of all SSOs to the MS4 would "desensitize" them, and that this notification requirement is beyond EPA's legal authority. *See* Petition at 12-13.

First, Petitioners' claim that this requirement is inconsistent with the Blue Plains permit is unfounded and irrelevant. Federal regulations require that an NPDES MS4 permit "require[s] controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. 1342(p)(3)(B)(iii). Not only is there no requirement in the Clean Water Act or federal regulations that an MS4 permit and a wastewater treatment plant permit contain the same provisions but, as explained in relevant EPA policy and guidance, the determination of what constitutes the "maximum extent practicable" (which applies to MS4 permits but not wastewater treatment plant permits) is made on a permit-by-permit basis, and may change from source to source or permit cycle to permit cycle. *See, e.g., MS4 Permit Improvement Guide*, April 2010, EPA-833-R-10-001. What matters here is that the requirement was appropriate for this permit.

Furthermore, Petitioners argue that the inconsistency with the Blue Plains permit would be caused by an overlap of pollutant reduction controls – that as part of the Blue Plains permit DC Water has committed to a massive long-term control plan for its *combined sewer area*, that these CSO controls will yield an extremely high level of wet weather runoff capture and treatment, and that this level of control is far beyond the traditional MS4 requirements in non-CSO communities. *See* Petition at 12-13. This substantive argument has nothing to do with the change to Section 4.3.1.3 requiring notification of the public of an SSO event that overflows to

the MS4, which, by definition occurs when the sanitary sewer overflows before the sewer reaches the wastewater treatment plant and is therefore outside of the combined sewer area.

Second, Petitioners provide absolutely no explanation for why they believe that notifying the public of discharges of untreated sewage to area waters will "desensitize" them. *See generally* Petition at 12-13. It would seem that Petitioners think the reason for their statement is obvious. The Region disagrees, however, with Petitioners' conclusion. To the contrary, the Region believes that potential threats to public health from discharges of untreated sewage is important information to be shared with the public and has issued policy and guidance documents accordingly. *See supra,* footnote 6. *See also* Responsiveness Summary at 26-27 (as part of response, agreeing with comments requesting that the relevant portions of the draft permit be strengthened in various ways).

Finally, as SSOs are a matter of both public health and environmental health, EPA does have the legal authority to require the permittee to notify the public of each SSO into the MS4. It is therefore consistent with the Clean Water Act and EPA policy and guidance to include a requirement for public notification of SSOs to the MS4 in an MS4 permit such as the DC MS4 Permit. *See supra,* footnote 6.

B. EPA's Decision to Not Include Language in the Final Permit Specifying DC Water's Responsibilities Was Not Clearly Erroneous.

DC Water's second argument, that the Permit fails to adequately define DC Water's responsibilities, fails because DC Water is neither the permittee nor a co-permittee and, as a result, the Permit does not need to specify what, if any, responsibilities DC Water might have. It therefore was not clearly erroneous for EPA to decline to include such language in the Permit.

DC Water claims that EPA's failure to clarify DC Water's responsibilities was arbitrary and capricious, violated the NPDES permitting procedures,[7] and resulted in EPA action beyond its legal authority because when EPA chooses to issue an NPDES permit to more than one independent entity, it has a legal obligation to do so in a way that assigns to each entity its legal obligations. *See* Petition at 7-8.

EPA disagrees – putting aside whether DC Water is an independent agency, EPA did not issue a permit to more than one independent entity as there is only one permittee – a point that DC Water seems to acknowledge.[8] Although Section 2.3.1 of the Permit identifies some DC agencies and departments as responsible for complying with those elements of the Permit within their respective jurisdictional scope and authority, EPA included this language only to refer to relevant DC law and to recognize the DC structure of stormwater management. EPA did not intend for the Permit to detail the responsibilities of sub-agencies of DC Government; indeed, to do so would not only add unnecessary length and potential confusion to the Permit, but would render the Permit inflexible to changes in DC law. EPA also explicitly intended for the Permit to be as self-contained as possible, noting in the Fact Sheet that "EPA made significant effort to avoid appending or incorporating by reference other documents containing permit requirements into the Final Permit. In the interest of clarity and transparency EPA, to the extent possible, has included all requirements directly in the permit." Fact Sheet at 4-5.

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[7] DC Water does not cite to any procedures that allegedly were violated or explain why EPA's response to its comments was insufficient.

[8] DC Water agrees that the Permit is issued to the DC Government, that the DC Government owns and operates the MS4, that the DC Government has overall responsibility for compliance with the Permit, and that DDOE is responsible for managing the District's MS4 Stormwater Management Program and all activities necessary to comply with the Permit. *See* Petition at 3.

C. EPA's Inclusion of the TMDL Implementation Plan Requirement in the Final Permit Was Not Clearly Erroneous.

There is no basis for DC Water's claim that the TMDL Implementation Plan requirement is impracticable. As discussed above, EPA notes that the Permittee did not appeal this provision or any other portion of the final Permit. In fact, DDOE submitted comments on this provision of the draft permit requesting additional time for plan development. *See* Administrative Record item 13; Responsiveness Summary at 57. As a result of those comments on the draft Permit, EPA met with DDOE in October 2010 to discuss TMDL implementation planning and to coordinate that planning with the revised monitoring program. *See* Administrative Record item 41 (*Summaries of Meetings Held with Commenters After the Close of the Public Comment Period*). Because DDOE indicated during those meetings that two years would be adequate for both activities, EPA incorporated that timeframe into the final Permit. *Id.*; *see also* Responsiveness Summary at 57.

Furthermore, EPA expects the permittee to develop a reasonable plan that leaves room for improvements and modifications. *See* Fact Sheet at 32-33; Responsiveness Summary at 58 (noting, among other things, that the permit does "not preclude the use of any plans, data, information, etc. that the District may want to include in the development of its Consolidated TMDL implementation plan"). EPA agrees that there can be significant variability in MS4 pollutant concentrations and loadings, but disagrees that this makes it is impossible to guarantee any reductions. There are numerous studies, models, calculators, and other tools for estimating reductions from stormwater BMPs, including the Chesapeake Bay models that have been calibrated to the District and that already have been used to make pollutant reduction estimates for some of the requirements in the Permit. *See, e.g.,* Administrative Record items 36, 39, 43.

EPA understands that TMDL implementation will be an iterative process and has allowed for that process to occur. *See* Fact Sheet at 5-6.

D. Section 4.11 of the Final Permit is Not Based on a Clearly Erroneous Finding of Fact or Conclusion of Law.

DC Water fails to meet its burden of proving that the requirements regarding additional pollutant sources in Section 4.11 of the final Permit are vague and overbroad.

Section 4.11 in the final Permit consolidates Sections 3.1 and 3.3 from the draft Permit (*see* Fact Sheet at 4, 33), both of which DC Water commented on. DC Water fails to demonstrate, however, how or why EPA's response to their comments is unreasonable or invalid. *See* Responsiveness Summary at 67. As repeatedly discussed herein, merely disagreeing with how EPA responded to Petitioners' comments is not grounds for a petition.

III. Of The Two "Clerical Issues" Raised By Petitioners, One Is A Substantive Claim for which Petitioners Have Not Met Their Threshold Burden, And The Other Is Truly Clerical, Which Is Inappropriate For Inclusion In A Petition Filed Under Section 124.19.

Petitioners raise two "clerical" issues, neither of which is appropriately raised in their Petition. One issue seems to be truly clerical, and such truly clerical issues are not appropriate for inclusion in a petition before the Board. The other issue is not clerical at all, but instead is a substantive claim for which Petitioners have not met their threshold burden.

A. Definition of TMDL Implementation Plan Is A Clerical Issue.

First, Petitioners claim that the definition of "TMDL Implementation Plan" in Section 9 of the Permit should reference Section 4.10 instead of Section 8.1.4. *See* Petition at 13. EPA agrees that this is a clerical issue, and agrees that the change should be made. As noted above, however, a petition before the Board is not the appropriate avenue for raising such truly clerical issues.

B. Definition of "Illicit Discharge" Is A Substantive Issue.

Petitioners' second "clerical" issue is that the definition of "illicit discharge" is inconsistent with Section 1.2 of the Permit and should be revised to be consistent. *See* Petition at 13. EPA does not believe this to be a clerical issue, however, because there is no inconsistency and, therefore, Petitioners' claim is based on a substantive misunderstanding of these sections of the Permit.

The definition of "illicit discharge" in the Permit is taken verbatim from the federal regulations (40 C.F.R. § 122.26(b)(2)), and 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)." Permit at p. 50. Section 1.2 of the Permit clarifies that such discharges in fact may not be illicit discharges under certain circumstances as outlined, despite whether they at first appear so. Permit at Section 1.2. Therefore, the definition of an illicit discharge and the text of Section 1.2 are not substantively inconsistent; EPA is simply clarifying which discharges are illicit.

IV. CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Board decline to review the Petition.

Respectfully submitted this 11th day of June, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Response to Petition No. 11-05 were served on the following persons by U.S. Mail and electronic mail.

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