

EXHIBIT D

FACT SHEET

National Pollutant Discharge Elimination System (NPDES)
Municipal Separate Storm Sewer System (MS4)
Permit No. DC0000221 (Government of the District of Columbia)
Draft Modification #1

NPDES PERMIT NUMBER: DC0000221, Modification #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

MS4 ADMINISTRATOR NAME AND MAILING ADDRESS:

Director, District Department of the Environment
1200 First Street, N.E., 6th Floor
Washington, D.C. 20002

FACILITY LOCATION:

District of Columbia's Municipal Separate Storm Sewer System (MS4)

RECEIVING WATERS:

Potomac River, Anacostia River, Rock Creek, and Stream Segments Tributary
To Each Such Water Body

INTRODUCTION:

Today's action proposes a limited modification of the District of Columbia Municipal Separate Storm Sewer System (MS4) Permit. On September 30, 2011, the U.S. Environmental Protection Agency (EPA) issued the Phase I National Pollutant Discharge Elimination System (NPDES) permit for the District of Columbia Municipal Separate Storm Sewer System, Permit No. DC0000221. The permit became effective October 7, 2011.

On November 4, 2011, the Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (collectively, the Environmental Petitioners) filed a petition requesting the Environmental Appeals Board (EAB) to review the permit (appeal 11-06). On the same day, the District of Columbia Water and Sewer Authority (DC Water) and the Wet Weather Partnership (WWP) also jointly filed a petition requesting the EAB to review the permit (appeal 11-05).

On November 17, 2011, the District Department of the Environment (DDOE) filed a motion with the EAB requesting permission to intervene and file a response to both petitions for review. On February 2, 2012 the EAB granted DDOE's motion.

On December 20, 2011, the EPA provided notification to DDOE of its determination of which permit elements would be stayed pending resolution of the appeals. The stay was limited only to certain provisions. The remainder of the permit remained in effect, and continues to remain in effect.

All parties agreed to attempt to resolve the appeals through Alternative Dispute Resolution (ADR) and on March 8-9, 2012 convened with an EAB judge and a representative of the EAB to agree upon the issues that would be discussed in negotiations. The parties conducted subsequent discussions over the following two months to attempt to reach agreement on relevant issues.

On May 18, 2012, the EPA and the Environmental Petitioners (appeal 11-06) signed a settlement agreement in which the EPA agreed to propose modifications to language in several sections of the permit and to provide certain clarifications in the draft fact sheet for those proposed modifications. The petition for review filed by DC Water and the Wet Weather Partnership (appeal 11-05) was not resolved via ADR; that petition is pending before the EAB.

For additional information on the appeal proceedings the EAB docket is available at: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/f22b4b245fab46c6852570e6004df1bd/a4dedd0575d39c4f852579420055a56a!OpenDocument

ACTION TO BE TAKEN:

The EPA is today proposing specific and limited modifications, consistent with the settlement agreement and ADR discussions described above, to the District of Columbia NPDES MS4 Permit No. DC0000221, issued on September 30, 2011. Pursuant to 40 C.F.R. § 122.62 and 40 C.F.R. § 124.19, the EPA is taking comments *only* on the proposed language changes identified in draft Modification #1. The remaining portions of the permit are not open for comment or modification.

The following conventions are used to show proposed changes to the existing permit language: deleted language is indicated in ~~strikethrough~~ font and added language is indicated in underline font.

I. MINOR MODIFICATIONS

References to two section numbers were erroneously cited in the final permit. Pursuant to 40 C.F.R. 122.63(a), those section numbers are being corrected as follows:

1. On page 9, Table 1, the part number for the Retrofit Program will be corrected to 4.1.5.
2. On page 53, within the definition for "TMDL Implementation Plan", the erroneous reference to section 8.1.4 will be replaced with the correct reference to section 4.10.3.

II. PROPOSED MODIFICATIONS

Pursuant to 40 C.F.R. §§ 122.62 and 124.19, the EPA is proposing several modifications to the permit. In general the proposed modifications are intended to serve several purposes:

1) To provide additional public notice and input on the District's development of its Consolidated TMDL Implementation Plan. The proposed modifications specifically provide for public participation in the development of the Consolidated Total Maximum Daily Load (TMDL) Implementation Plan (*see* II.E), and also add six (6) months to the schedule for submitting the Plan to the EPA for approval, in order to facilitate public participation and an adequate public notice period for the draft Plan.

The EPA is also taking comment on a provision to require public notification of sanitary sewer overflows to the MS4 (*see* II.C) in section 4.3.1.3 of the permit.

2) To provide additional clarity and accountability for specific water quality-related outcomes. The proposed modifications to discharge limitations (*see* II.B), content requirements for the Consolidated TMDL Implementation Plan (*see* II.E), and the specific addition of definitions for the terms "benchmarks" and "milestones" used for TMDL planning (*see* II.G) are to clarify what are to be enforceable permit requirements. The EPA clarifies that final dates for attainment of wasteload allocations (WLAs) must be specified in the Plan and that the EPA will incorporate interim and final milestones for attainment as enforceable permit provisions.

The EPA also clarifies that *all* provisions of this permit are enforceable. The permittee must comply with all conditions of this permit. The EPA intends each provision of the permit to be enforceable. Compliance with any provision of this permit does not relieve the permittee from compliance with any other provision of the permit.

3) To provide clarity that the Government of the District of Columbia is the sole permittee. To eliminate any possible confusion about who the "permittee" is, the EPA is proposing modifications of the definition of "permittee" and standardization of language throughout the permit. Specifically, the EPA is proposing to remove a reference to DC Water (*see* II.C), to simplify the definition of permittee (*see* II. G), and to replace the term "District" with "permittee" in many places throughout the permit (*see* II.A).

The EPA recognizes that the Government of the District of Columbia has the institutional policies, regulations and agreements to make internal determinations about which District entities shall implement the various provisions of the permit. The EPA realizes that a number of departments, agencies and authorities of the Government of the District of Columbia will be engaged in carrying out particular responsibilities under the permit. However, the permit does not purport to identify which of these entities are responsible for any particular requirement, as this does not fall within the EPA's purview as the permitting authority. The EPA will continue to work directly with DDOE, the current stormwater administrator.

The following describe the specific proposed modifications:

A. PERMITTEE

To simplify and clarify the definition of "permittee", the EPA is proposing to replace the term "District" with "permittee" in all places in the permit where the term "District" has been used in the context of a mandate to the permittee to carry out a provision. The term "District" or "District of Columbia" continues to be used when the reference is to the specific geographical area.

Consistent with simplification of the definition of "permittee" (*see* II.G) these changes are intended to clarify that there is a single permittee, *i.e.*, the Government of the District of Columbia. As stated in Part 2.3 of the permit, the specific duties and obligations under the permit may ultimately be carried out by particular agencies, departments or authorities with the Government of the District of Columbia. DC law recognizes that implementing the MS4 permit involves a number of agencies, as outlined in the *Comprehensive Stormwater Management Enhancement Amendment Act of 2008*.¹ Section 151(a), which was enacted as part of the 2008 law, established a Stormwater Administration within DDOE, and provides that the Stormwater Administration "shall be responsible for monitoring and coordinating the activities of all District agencies, including the activities of the District of Columbia Water and Sewer Authority . . . which are required to maintain compliance with the Stormwater Permit" (referring to the MS4 permit). Section 151(c) further requires various agencies "and any other District agency identified by the Director" of DDOE to comply "with all requests made by the Director relating to stormwater related requests . . .". Therefore, while the permit stipulates the requirements to be fulfilled, determination of which agency or entity will be charged with bringing those tasks to fruition is governed by the DC statute and not a determination made by the permitting authority.

B. DISCHARGE LIMITATIONS

In Part 1.4 of the permit the EPA proposes to modify the final sentence to read:

"Compliance with the ~~performance standards and~~ provisions contained in Parts 2 through 8 of this permit, including milestones and final dates for attainment of applicable WLAs, shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term."

The purpose of the proposed modification is to emphasize the importance of robust and timely progress towards implementation of the applicable wasteload allocations and attainment of water quality standards within defined timeframes.

C. SANITARY SEWAGE SYSTEM MAINTENANCE OVERFLOW AND SPILL PREVENTION RESPONSE

1. Modification to Part 4.3.1

¹ Draft Modification #1 Administrative Record, Document #18 (District of Columbia, *Comprehensive Stormwater Management Enhancement Amendment Act of 2008*, DC Law 16-51; DC Official Code §8.151.01 *et seq.*)

In Part 4.3.1 of the permit the EPA proposes the following modification:

"The permittee shall ~~coordinate with DC Water to~~ implement an effective response protocol for overflows of the sanitary sewer system into the MS4."

The EPA had not originally included the phrase "coordinate with DC Water to" in the draft permit proposed in April 2010, but added it to the final permit per the request of DC Water in their comments on the proposed permit². The EPA has subsequently concluded that this provided more confusion than clarity, and is now proposing to delete the phrase consistent with the modifications described above (*see* II.A) emphasizing that the Government of the District of Columbia is the permittee, and that the permittee will coordinate implementation of the permit according to its policies and regulations.

2. Public Comment on Part 4.3.1.3

In addition the EPA solicits public comment on the provision in the final permit that the permittee shall provide public notification of sanitary sewer overflows to the MS4. The final permit provided that the permittee would have procedures for:

"Notifying appropriate sewer, public health agencies and the public within 24 hours when the sanitary sewer overflows to the MS4."

In the draft permit provision, the EPA did not originally include the phrase "and the public." However, in response to comments for more public notification and review generally^{3,4,5,6}, the EPA included it in the final permit as a logical outgrowth of the draft permit provision. The draft permit included requiring notice to appropriate public health agencies, and the rationale for notifying the public directly is the same: to ensure that people know to stay out of waterways in which untreated domestic sewage has been discharged. Notification of the public directly is also consistent with agency policy and guidance^{7,8,9,10,11,12,13,14} on sanitary sewer overflow (SSO)

² Final Permit Administrative Record Document #14 (District of Columbia Water & Sewer Authority, George Hawkins, Comment Letter (June 4, 2010)).

³ Final Permit Administrative Record Document #3 (Alice Ferguson Foundation, Inc., Tracy Bowen, Comment Letter (June 4, 2010)).

⁴ Final Permit Administrative Record Document #5 (Anacostia Watershed Society (50 form letters) (May – June 2010)).

⁵ Final Permit Administrative Record Document #8 (Chesapeake Bay Foundation, Lee Epstein, Comment Letter (June 4, 2010)).

⁶ Final Permit Administrative Record Document #16 (Friends of Rock Creek's Environment, Beth Mullin, Comment Letter (June 4, 2010)).

⁷ Draft Modification #1 Administrative Record, Document #1 (U.S. EPA, *Report to Congress: Impacts and Control of CSOs and SSOs*, August 2004, EPA 833-R-04-001).

⁸ Draft Modification #1 Administrative Record, Document #2 (U.S. EPA, *Why Control Sanitary Sewer Overflows?*, fact sheet).

⁹ Draft Modification #1 Administrative Record, Document #3 (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).

¹⁰ Draft Modification #1 Administrative Record, Document #4 (U.S. EPA, *Guide for Evaluating Capacity, Management, Operation and Maintenance (CMOM) Programs at Sanitary Sewer Collection Systems*, January 2005).

notification. Nonetheless, in order to be sure that the public has an opportunity to comment on this provision, the EPA seeks public comment on the requirement to include notice to the public when sanitary sewers overflow to the MS4. Upon receipt of those public comments, the EPA will decide whether to retain the requirement for public notification of SSOs to the MS4, remove it, or include a variation on this provision in the permit. The EPA emphasizes that, because this is an MS4 permit, this provision includes *only* those SSOs that reach the MS4.

D. PUBLIC INVOLVEMENT AND PARTICIPATION

In Part 4.9.4.1 of the permit the EPA proposes to add the following:

"The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation of the permittee's SWMP. In particular the permittee shall provide meaningful opportunity for the public to participate in the development of the permittee's Consolidated TMDL Implementation Plan. The permittee shall continue to implement its process for consideration of public comments on their SWMP."

The purpose of this modification is to ensure that all parties with an interest in TMDL implementation have ample opportunity to participate in the planning process. Other modifications are also being proposed to Part 4.10.4 of the permit (*see* II.E) to achieve that purpose.

E. TOTAL MAXIMUM DAILY LOAD (TMDL) WASTELOAD ALLOCATION (WLA) PLANNING AND IMPLEMENTATION

A number of changes to Parts 4.10.3 and 4.10.4 are being proposed, which are summarized here. For the specific modifications to the permit language being proposed, please refer to the proposed modifications document.

1. The EPA is proposing to extend the compliance schedule for development of the Consolidated TMDL Implementation Plan (the Plan) from 24-months to 30-months to allow for adequate public involvement and public notification. The permit requirement to develop the Plan has been stayed due to permit appeal. Under 40 CFR § 124.19(d) the EPA is proposing to withdraw the original permit requirement and replace it with the modified provision. Therefore, the 30-month period would begin with the effective date of the permit modification. (Part 4.10.3)

¹¹ Draft Modification #1 Administrative Record, Document #5 (U.S. EPA, *Sanitary Sewer Capacity, Management, Operation and Maintenance Self-Assessment Check-list*, (see Overflow Emergency Response Plan, page 22)).

¹² Draft Modification #1 Administrative Record, Document #6 (American Society of Civil Engineers, *Sanitary Sewer Overflow Solutions, Guidance Manual*, April 2004).

¹³ Draft Modification #1 Administrative Record, Document #7 (U.S. EPA, Model NPDES Permit Language for Sanitary Sewer Overflows, August 2007 Draft).

¹⁴ Draft Modification #1 Administrative Record, Document #8 (U.S. EPA, NPDES Permit Requirements for Municipal Sanitary Sewer Collection Systems and SSOs, August 2007 Draft).

2. The EPA is proposing to remove the reference to the 2002 TMDL for Total Suspended Solids in the Upper and Lower Anacostia River from the permit because that TMDL has been superseded by the 2007 TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin. (Part 4.10.3)
3. The EPA is proposing modifications that provide additional clarification that the EPA will take action to incorporate milestones and final WLA attainment dates into the permit as enforceable requirements of the program. (Part 4.10.3)
4. The EPA is proposing modifications that clarify when and how modifications to the Plan must be submitted to the EPA. (Part 4.10.3)
5. The EPA is proposing modifications that clarify what the interim and final elements of the Plan must be, including benchmarks, milestones and final attainment objectives (*also see*, II.G). (Part 4.10.3)
6. The EPA is proposing to add a requirement that the Plan include adequate narrative to ensure that there is clear understanding of the rationale for TMDL implementation schedules and controls. (Part 4.10.3)
7. The EPA is proposing modifications that clarify that all TMDLs with WLAs assigned to the MS4 that are in effect, e.g., haven't been withdrawn, reissued, or the water delisted, must be included in the Plan. (Part 4.10.3)
8. The EPA is proposing modifications that clarify that the most current version of the Plan must be posted on the permittee's website. (Part 4.10.3)
9. The EPA is proposing modifications to the language describing actions the permittee must take should the permittee make insufficient progress toward attaining any WLA. (Part 4.10.4)

In the event the permittee does not submit a Consolidated TMDL Implementation Plan, submits a plan that fails to address one or more applicable TMDLs, or submits a plan that the EPA disapproves, the EPA will initiate action to set the relevant milestones and final dates for attainment by which the permittee will meet applicable WLAs, pursuant to section 4.10.3 of the permit, within 6 months of the failure and finalize those requirements within 2 years of the failure. The EPA will incorporate those elements as enforceable permit provisions.

The EPA believes these modifications would improve the transparency of the process with respect to implementing the various, and to some extent overlapping, TMDLs that apply to the receiving waters in question. Moreover, the clarifications should make it easier for both the permittee and the public to identify the enforceable elements of the permit.

F. DESIGN OF THE REVISED MONITORING PROGRAM

The final permit aligned the schedules for development of the Consolidated TMDL Implementation Plan and the Revised Monitoring Program (Part 5.1.1) because of the importance of tailoring monitoring to support TMDL implementation. Since the EPA is proposing to extend the compliance date for submittal of the Consolidated TMDL Plan to 30 months, the EPA also proposes to extend the compliance date for submittal of the Revised Monitoring Strategy to 30 months to maintain the alignment between the two schedules. Both 30 month schedules would start with the effective date of this permit modification.

G. DEFINITIONS

In conjunction with the changes to 4.10.3 and 4.10.4, the EPA proposes two new definitions to support and clarify the expectations for TMDL planning and implementation:

"Benchmark' as used in this permit is a quantifiable goal or target to be used to assess progress toward "milestones" (see separate definition) and WLAs, such as a numeric goal for BMP implementation. If a benchmark is not met, the permittee should take appropriate corrective action to improve progress toward meeting milestones or other objectives. Benchmarks are intended as an adaptive management aid and generally are not considered to be enforceable."

"Milestone' as used in this permit is an interim step toward attainment of a WLA that upon incorporation into the permit will become an enforceable limit or requirement to be achieved by a stated date. A milestone should be expressed in numeric terms, i.e. as a volume reduction, pollutant load, specified implementation action or set of actions or other objective metric, when possible and appropriate."

In addition, the EPA proposes to simplify the definition of "permittee" as follows:

~~"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."~~

As explained above (*see*, II.A), under District of Columbia law, it is the responsibility of DDOE to coordinate implementation of the MS4 permit.

WHERE TO SEND COMMENTS:

Comments on the proposed modifications may be sent via electronic mail or regular mail to:

Ms. Kaitlyn Bendik
U.S. Environmental Protection Agency
Region 3
NPDES Permits Branch, Mailcode 3WP41
1650 Arch Street
Philadelphia, PA 19103-2029
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Comments must be postmarked (if regular mail) or sent (if electronic mail) on or before August 27, 2012.