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By Electronic Submission and First Class Mail

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

Re: DC Water and Wet Weather Partnership Petition for Review
NPDES Permit No. DC0000221

Dear Ms. Durr:

Enclosed is a copy of the above captioned petition. An additional copy is included to be date stamped and returned to our office in the pre-addressed and stamped envelope enclosed herein.

Thank you for your assistance with this matter.

Sincerely,

F. Paul Calamita

Enclosures

CC: Shawn M. Garvin, US EPA Region III, Administrator
Marcia Mulkey, US EPA Region III, Regional Counsel
Randy Hayman, District of Columbia Water and Sewer Authority, General Counsel
Gregory Hope, DC WASA, Office of the General Counsel, Principal Counsel

responsibilities be enumerated so that there will be full accountability between the District Government and DC Water for the various Permit obligations. While the Permit identifies DC Water's responsibilities for the requirements of the prior permit, it is silent as to the many new responsibilities in the reissued permit. Second, several changes were made to the final permit which were not identified in the draft and, accordingly, these provisions have not had the benefit of public review and comment. Petitioners believe that a couple of these specific provisions need to be refined to more effectively achieve the intended purpose. Finally, several conditions in the final permit, relating to discharge requirements, prohibitions, and demonstrations of compliance, are impracticable and, therefore, cannot be implemented effectively. Accordingly, Petitioners seek to have these conditions revised to ensure that the permit can be fully implemented. The Permit, and associated Fact Sheet and EPA's Responsiveness Summary are attached to and incorporated in this Petition as Exhibit A.

EPA published the draft permit for public review and comment on April 21, 2010 with comments accepted through June 4, 2010. DC Water submitted extensive written comments on the draft permit on June 4, 2010. A copy of DC Water's comments are attached to and incorporated in this Petition as Exhibit B.¹

Established in 1996, DC Water is an independent agency of the District Government and is identified as a "Permittee" under the Permit. See, Permit at 51 (definition of "Permittee").

Established in 1992, the Wet Weather Partnership ("WWP") is a national association of communities which own and operate combined sewer systems and storm sewer systems across the country, just like the District Government. DC Water is a member of the WWP. The WWP seeks environmentally responsible solutions to all urban wet weather issues in a fiscally prudent manner. It is dedicated to ensuring that federal and state water quality regulatory programs are scientifically based,

¹ DC Water's comments are addressed in pages 64-79 of EPA's Responsiveness Summary in Exhibit A.

affordable, and cost-effective. Most of the WWP members hold MS4 stormwater permits like the Permit issued to WWP member DC Water. A number of the WWP members, in addition to DC Water, are located within EPA Region III and, accordingly, may be subject to the EPA's imposition of the same permit conditions which are the subject of this Petition for Review. WWP members outside of EPA Region III may also be subject to those requirements to the extent the Permit is used by EPA Headquarters as a national model for the next generation of MS4 permits.

INTRODUCTION

The Permit states that it is issued to the "Government of the District of Columbia." The District of Columbia owns and operates the MS4, and, as the permit holder, has overall responsibility for compliance with the Permit. The Permit correctly states that the District Department of the Environment ("DDOE") is the agency responsible for managing the District's MS4 Stormwater Management Program and all activities necessary to comply with the Permit. The Permit identifies agencies of the District Government with stormwater management responsibilities, including one independent agency - DC Water, and specifies that "each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities."

EPA's Permit determination was the product of clearly erroneous findings of fact and conclusions of law in that it (1) failed to adequately identify DC Water's responsibilities for storm water management under the Permit and (2) revised several Permit provisions either without notice or in ways that are impracticable for the District Government and/or DC Water to implement. The Petitioners' purpose in filing this Petition for Review is to (1) clarify DC Water's responsibilities under the Permit to avoid any confusion over which entity is responsible for Permit implementation, (2) seek modifications to Permit provisions added after the published draft permit, and (3) seek modifications to other permit provisions in order to allow the permittees to accomplish the intent of those provisions. The issues

which Petitioners raise present important national policy considerations that the EAB should address at this time. Doing so will head off multiple litigation of these same issues in other MS4 permits.

BACKGROUND

The District Government, through its agencies with stormwater management responsibility, and DC Water, have made significant progress in managing stormwater throughout the MS4. During the prior permit term, the District Government developed a nationally leading Storm Water Management Program which was approved by EPA. This program is supported by aggressive stormwater-related legislation and regulations applicable throughout the District. Moreover, the District Government established and has imposed a dedicated stormwater management fee to fund its obligations under both the prior and current Permit.

To ensure further progress the District Government has identified a number of clear, specific, measurable, and enforceable best management practices (“BMPs”) that it will implement pursuant to the Permit. These include stormwater standards for development and redevelopment projects in the MS4, 4,150 annual net tree plantings, a commitment to retrofit 18 million square feet of impervious surface during the permit term, and a commitment to install a minimum of 350,000 square feet of green roofs on District Government properties. We believe the District Government has one of the most aggressive and successful MS4 programs in the country.

In addition to these extensive efforts to comply with its MS4 Permit and improve water quality throughout the MS4, DC Water has committed to a massive long-term control plan for its combined sewer area (approximately one-third of the District land mass). The combined sewer overflow (“CSO”) controls will yield an extremely high level of wet weather runoff capture and treatment. This level of control is far beyond the traditional MS4 requirements in non-CSO communities.

Between its nationally leading MS4 program and its massive CSO Control Program, the District Government and DC Water are making unprecedented investments to control urban wet weather flows.

Despite these aggressive and unprecedented investments MS4 discharges remain highly variable and continue to present an enormous challenge to control in terms of quantity of flow and associated pollutant loadings. Controlling wet weather discharges is still an extremely inexact and uncertain undertaking for most pollutants of concern, particularly in an urban setting as large and diverse as the District of Columbia. EPA has acknowledged the many variables that urban wet weather managers must seek to address:

The water quality impacts of discharges from [MS4s] depend on a wide range of factors including: The magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow.²

Moreover, communities are still trying to identify BMPs that will address the wide range of pollutants that impair urban waters similar to waters in the District of Columbia. Such BMPs can vary greatly in their effectiveness and efficiencies depending on many of the same wide-ranging factors that affect the water quality impacts of MS4 discharges. Further complicating the challenge to control MS4 discharges is that BMPs targeted to one pollutant may actually exacerbate other pollutants of concern. For example, detention ponds to address sediment may have the unintended consequence of increasing bacteria loadings due to wildlife attracted to the pond.

These variables result in highly varying pollutant concentrations and loadings despite the consistent application and implementation of BMPs. Variables identified include the season of the year, length of time between wet weather events, rainfall intensity, duration, volume, ground water levels, coastal flooding, and the uncertainty with the performance of evolving green technologies.

For these reasons, MS4 owners routinely see a very wide range in monitoring results for pollutants of concern from their systems. In the case of the District, this extensive variability in

²National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,038 (Nov. 16, 1990).

monitoring results from (1) ongoing BMP identification efforts, (2) the selection and implementation of BMPs, (3) managing conflicts between BMPs targeted to one pollutant yet which may have the unintended effect of increasing other pollutants, (4) substantial variation in even successful BMP performance, (5) the still embryonic state of green infrastructure/solutions, and (6) the extensive and extremely varied impervious areas within the District. On top of all this uncertainty is the funding challenge and need to ensure that cost-effective BMPs are identified and implemented within MS4 funds available to the District of Columbia.

This extensive variability is what has led the national stormwater program to, by necessity, embrace an approach featuring iterative BMPs rather than making pinpoint water quality improvement and compliance predictions and commitments. Such predictions and commitments are simply impossible at this time.

The District Government has made great and unprecedented strides to address urban wet weather discharges. Petitioners are confident that under the Permit, relentless further progress will be made toward controlling MS4 discharges in the District of Columbia. However, the stark reality is that we still have a long way to go to manage discharges from the MS4, particularly in light of the extreme variability in rainfall volume, intensity, location and the wide variety of pollutants and associated pollutant concentrations and loadings. Our unprecedented progress and determination to relentlessly enhance our program is colored by the sobering uncertainty and the sheer magnitude of the MS4 challenge ahead. It is against this background that EPA issued the Permit.

CHALLENGED PROVISIONS AND GROUNDS FOR REVIEW

Petitioners object to several provisions in the draft permit, including (1) that the Permit fails to adequately define co-permittee DC Water's responsibilities, (2) the requirement to develop a Consolidated TMDL Implementation Plan within two years, which specifies fixed end dates for compliance with Total Maximum Daily Load ("TMDL") wasteload allocations ("WLAs") and annual

pollutant reduction targets for a large number of pollutants, many of which are from unknown sources, (3) the requirements relating to “Additional Pollutant Sources, (4) the requirement to issue a public notice for every sanitary sewer overflow which reaches a storm drain, and (5) several clerical revisions.

A. The Permit Fails to Define Co-Permittee DC Water’s Responsibilities.

Of the seven Stormwater Agencies in addition to DDOE, identified in Section 2.3.1 of the Permit, DC Water is the only one that is an independent agency of the District Government. Because it is an independent agency, it is essential that DC Water’s obligations under the permit be spelled out. Unfortunately, Permit Section 2.3.1 states expansively that “Each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.” In our comments on the draft permit, DC Water attempted to add some specificity to this broad command in Section 2.3.1 by clarifying DC Water’s responsibilities to those enumerated in the 2000 MS4 Memorandum of Understanding (“MOU”) among the District of Columbia stormwater agencies. This simple remedy would have differentiated the responsibilities of DC Water and the District Government itself. However, EPA failed to add this important clarification to its broad imposition of joint responsibility among the DC stormwater agencies.³

The Permit imposes unprecedented MS4 obligations. We believe several key requirements will prove to be too much for even the District Government’s model MS4 program. We raise one particularly significant concern regarding Total Maximum Daily Load requirements below. Regardless, the best hope for compliance is if each District of Columbia stormwater agency understands its role under the permit from the effective date of the Permit. That is not the case. While a task-by-task assignment of responsibility may not be necessary for the other stormwater agencies, because DC Water is an independent agency, DC Water’s specific responsibilities must be enumerated in the Permit.

³While the MOU is referenced in Section 2.3.2 of the Permit, that section merely imposes a requirement on DDOE to coordinate activities pursuant to the MOU. Section 2.3.1 imposes permit compliance responsibility and needs to also have the MOU qualifier DC Water proposed in its comments on the Permit.

EPA's failure to clarify DC Water's responsibilities as being those enumerated in the 2000 MS4 Memorandum of Understanding was arbitrary and capricious and violated the NPDES permitting procedures.

EPA's failure to clarify DC Water's responsibilities also resulted in EPA action beyond its legal authority. 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. The Permit fails to make those assignments between DC Water and the District Government.

The Permit should be remanded to EPA to revise Section 2.3 to clarify DC Water's responsibilities, as an independent agency, under the Permit as being limited to those enumerated in the 2000 MOU. This will preclude any uncertainty between the stormwater agencies and the risk to compliance with the Permit that such uncertainty will bring. DC Water's permit obligations are generally limited to (1) catch basin cleaning, (2) maintaining the MS4 sewer system infrastructure, and (3) the collection of the District Government's stormwater management fee. As a co-permittee and independent agency of the District Government, DC Water is entitled to have its compliance obligations spelled out in the permit. That is the only way for DC Water to be able to ensure it will comply with its obligations and avoid becoming ensnared in any non-compliance by the non-independent stormwater agencies.

B. The Requirement to Develop A Consolidated TMDL Implementation Plan Within Two Years is Impracticable as are the Requirements to Identify Final Compliance Dates and Annual Pollutant Loading Reductions.

Section 4.10.3 of the Permit requires the District Government to develop, publish for public review and comment, and submit to EPA a "Consolidated TMDL Implementation Plan" within two years from permit issuance. The Plan must address "all TMDL wasteload allocations assigned to District MS4 discharges". Permit at Section 4.10.3. There are approximately 370 TMDL wasteload allocations

applicable to District MS4 discharges which have been approved by US EPA. These WLAs cover more than 200 water quality limits stream segments. See, http://iaspub.epa.gov/tmdl_waters10/attains_impaired_waters.tmdls?p_state=DC.

These TMDL WLA's cover a broad range of pollutants listed in Section 4.10.3, including PCBs, bacteria, Biochemical Oxygen Demand, Total Suspended Solids, Organics, Metals, Oil and Grease, Nitrogen and Phosphorous, etc. Note that "Organics" and "Metals" include over a dozen different substances each having individual TMDLs and percent load reduction requirements. Many of these are present in very small concentrations and are often from unknown and uncontrollable sources.

For each TMDL WLA and/or water quality limited segment, the implementation plan "shall include":

1. A fixed end date by which the District of Columbia's MS4 discharges will comply with the applicable Wasteload Allocations ("WLAs").
2. Annual pollutant loading reductions toward achieving the WLAs.
3. Interim numeric milestones where achievement of the WLA will take more than five years.
4. A Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.

This is simply and clearly too much for the vast array of TMDLs, never mind the more than 200 water quality limited segments addressed therein.

We fail to see how the District Government can be expected to develop such a consolidated plan for approximately 370 TMDL WLAs covering more than 200 diverse water quality limited segments across the District of Columbia, which are impaired by such a diverse group of pollutants. Models will have to be developed for each waterbody/impaired segment. Further, the District Government will have to identify now the ultimate set of BMPs that will ensure compliance by the ultimate compliance date, which it must specify for each waterbody/impaired segment. Then the package must be put out

for public review and comment. All of this must happen before the District Government submits the Consolidated Implementation Plan to EPA for approval just 23 months from now.

This is a set up for failure, irrational, and arbitrary and capricious. The District Government will need many permit cycles to identify a suite of iterative BMPs that will allow cost-effective progress toward reducing pollutants in its MS4 discharges. The typical approach is to pilot BMPs, evaluate their cost-effectiveness and opportunities for implementation and then develop a suite of BMPs for each waterbody/water quality limited segment. We are not aware of any shortcuts to this iterative process.

However, the Permit ignores this reality when it commands the District Government to crystal ball ultimate compliance dates for the approximately 370 TMDL WLAs along with annual pollutant loading reductions. Both of which must be validated by modeling and confirmed by monitoring – all before the District Government has had the opportunity to identify the BMPs that it hopes will achieve the WLAs. This Permit requirement has the cart squarely ahead of the horse. Given the extreme variability in MS4 pollutant concentrations and loadings, it is impossible to guarantee reductions in any one year, much less every year.

Section 4.10.3 requires the District to (1) assume, against the significant weight of the evidence, that all of these WLAs are attainable and (2) make uneducated guesses about when those WLAs will be attained along with what the year-by-year pollutant reductions will be. All of this must happen less than two years from now.

This requirement in the Permit is arbitrary and capricious because many of the required TMDL reductions cannot be attained given the current state of BMP technology. For example, TMDL number 3 in the list found in Section 4.10.3 requires a 90-98 percent reduction in fecal coliform bacteria from the District of Columbia's MS4 discharges to the Anacostia River.⁴ On information and belief, this level of

⁴See http://www.epa.gov/waters/tmdl/docs/dc_tmdl-AnacostiaRiver-AnacostiaBac_DR.pdf

reduction has never been achieved in urban stormwater discharges like the District of Columbia's. In fact, we doubt EPA can even document a 50 percent reduction, much less 90-98 percent. The same is true for the annual pollutant reduction requirement for each TMDL pollutant of concern. Such a requirement implicitly assumes a level of stormwater understanding, BMP identification and implementation (forgetting for the moment real world funding constraints) that is simply impracticable.

The Permit should be remanded to EPA to remove the requirements in items 1-5 on page 31 of the Permit. In lieu thereof, the District Government should be required to include in the Consolidated TMDL Implementation Plan an explanation of how the proposed BMPs in the Storm Water Management Plan meet the Maximum Extent Practicable requirement of Section 402(p) of the Clean Water Act. The District Government simply cannot predict when it will ultimately meet the 370 TMDL WLAs and it certainly cannot predict annual pollutant loading reductions for each of the 370 TMDL WLAs.

Further, the Permit should be revised to require the District Government to submit a schedule for the development of the Consolidated TMDL Implementation Plan over a period that will likely span well beyond the proposed two year deadline in the Permit. The plan should expressly allow the District Government to prioritize its implementation efforts among the applicable TMDLs.

C. Permit Section 4.11 is Impermissibly Vague and Overbroad.

Section 4.11 ("Additional Pollutant Sources") of the Permit requires the District Government to compile information on several potential categories of pollutants to the MS4. It then requires the District Government to:

"[I]mplement controls to minimize and prevent discharges of pollutants from additional pollutant sources, including but not limited to Bacteria (E.coli), Total Nitrogen, Total Phosphorous, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters."

It is unclear to Petitioners what EPA intends for the District to do. Until it is clarified, we cannot meaningfully comment on whether this requirement is (1) lawful and (2) appropriate. We note that this

section appears to consolidate two separate sections in the draft permit (Sections 3.1 and 3.3), both of which DC Water commented on. Section 4.11 should be remanded to EPA for either (1) removal from the permit or (2) clarification of its requirements, followed by an opportunity for meaningful public review and comment on the clarified requirements.

D. Permit Section 4.3.1.3 Impermissibly Requires 24 Hour Notice to the Public for Each SSO.

Without notice, EPA added to the final Permit the requirement in Section 4.3.1.3 that the permittee notify “the public within 24 hours when the sanitary sewer overflows to the MS4.” This is legally impermissible in that EPA did not provide public notice of the addition of this significant reporting requirement. Petitioners were deprived of the opportunity to comment on this requirement. Had Petitioners been given the opportunity to comment, they would have objected as this requirement is inconsistent with EPA’s Permit for DC Water’s Blue Plains Treatment Plant (NPDES Permit Number DC 002199) which addresses SSO reporting but does not require public notice of each SSO. It is also inconsistent with the permits issued to the WWP members. Here, this creates a significant inconsistency between the DC Water’s permit for its sewer collection system and stormwater sewer system.

Given the chance, Petitioners would have also objected because requiring public notice of all SSOs which reach the MS4 is counterproductive. Public notice of every SSO that reaches the MS4 will have the unintended consequence of desensitizing the public to the notifications that matter. Petitioners believe that public notice should be carefully limited to SSOs which matter to public health.

Finally, we are unaware of any authority by which EPA can require the permittee to public notice each SSO. Again, it is not a requirement of DC Water’s Blue Plains NPDES permit or any permit for the WWP members of which we are aware. For these reasons, the requirement in 4.3.1.3 is beyond EPA’s legal authority, arbitrary and capricious, and contrary to public policy. Accordingly, Section 4.3.1.3

should be deleted from the permit. Sewer overflow notifications are already addressed through DC Water's Blue Plains NPDES permit.

E. The Following Clerical Corrections Should be Made to Section 9 ("Permit Definitions")

The permit should be remanded to accomplish the following clerical corrections to Section 9 (Permit Definitions):

Illicit Discharge. This definition is inconsistent with Section 1.2 (Authorized Discharges) in that the definition would only authorize firefighting discharges while Section 1.2 has a much broader list of authorized discharges. The definition of "Illicit Discharge" should be revised to be consistent with the authorized discharges in Section 1.2.

TMDL Implementation Plan. This definition incorrectly references Section 8.1.4. The correct reference appears to be to Section 4.10.

Dated: November 4, 2011

Respectfully Submitted,

DC WATER AND THE WET WEATHER PARTNERSHIP



By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review was filed electronically with the Environmental Appeals Board and was served by regular first class U.S. Mail, postage prepaid, this 4th day of November, 2011, upon the following:

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