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	)	NPDES Permit Appeal No. 11-05

BRIEF OF FRIENDS OF THE EARTH, ANACOSTIA RIVERKEEPER, INC., POTOMAC RIVERKEEPER INC., AND NATURAL RESOURCES DEFENSE COUNCIL, INC., IN RESPONSE TO THE PETITION OF DC WATER AND SEWER AUTHORITY AND THE WET WEATHER PARTNERSHIP

Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc., (collectively, "Citizen Petitioners") hereby urge the Board to deny review of certain issues raised in a joint petition for review filed on November 4, 2011, by the District of Columbia Water and Sewer Authority ("DC Water") and the Wet Weather Partnership ("WWP") (Dkt. 1). The petition in this matter (hereafter "DC Water Petition") challenges a national pollutant discharge elimination system ("NPDES") permit issued by the U.S. Environmental Protection Agency ("EPA"), allowing the discharge of pollutants from the District of Columbia municipal separate storm sewer system ("MS4") into waters that the Citizen Petitioners' members use and enjoy. *See* Citizen Petitioners' Petition for Review in NPDES Appeal No. 11-06 (Dkt. 3).

In particular, the Board should deny review of the issues raised in Section B of the DC Water Petition, wherein DC Water and WWP argue that the requirement for the permittee to develop a "Consolidated TMDL Implementation Plan" within two years, including annual pollutant loading reductions and final dates for attainment of EPA-approved total maximum daily loads ("TMDLs"), is "impracticable," DC Water Petition at 8-11, and "impossible to

satisfy." DC Water Reply at 13 (June 14, 2012) (Dkt. 42). DC Water and WWP have not met their burden to demonstrate that the permit provisions requiring the development and implementation of a Consolidated TMDL Implementation Plan are based on "a finding of fact or conclusion of law which is clearly erroneous," as required by 40 C.F.R. § 124.19(a). On the contrary, the challenged provisions are consistent with the requirements and prohibitions applicable to the issuance of NPDES permits under the Clean Water Act ("CWA") and EPA's implementing regulations.

Argument

I. THE REQUIREMENT TO DEVELOP AND IMPLEMENT A CONSOLIDATED TMDL IMPLEMENTATION PLAN IS BOTH PRACTICABLE AND CONSISTENT WITH THE CWA

At bottom, DC Water and WWP contend that the requirement to develop and implement a stormwater pollution control plan with "fixed end dates for compliance" is impossible to satisfy. As a factual matter they have failed to support this claim of impossibility with anything other than bare, self-serving assertions. As a legal matter, they have failed to demonstrate any clear error of law in EPA's conclusion that the requirement is not only achievable but is required by EPA regulations and policy implementing CWA requirements for NPDES permits.

A. Absent Immediate Compliance, an Enforceable Consolidated TMDL Implementation Plan and Schedule is Needed to Ensure Compliance With the District's Water Quality Standards

Far from being based on an erroneous conclusion of law, the permit provision requiring a Consolidated TMDL Implementation Plan is necessary in order to meet legal requirements for NPDES permits. In particular, an NPDES permit must include conditions adequate to "ensure compliance" with applicable water quality standards in receiving waters. 40 C.F.R. § 122.4(d); *see also* 33 U.S.C. § 1311(b)(1)(C), 1342(a). Further, regulations set forth at 40 C.F.R.

§122.44(d)(1)(i) require each NPDES permit to contain limitations on all pollutants or pollutant parameters that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." The EAB has stated that this requirement applies equally to MS4 permits. *In re: Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323 at 329, 335-43, NPDES Appeal Nos. 00-14 & 01-09 (EAB, Feb. 20, 2002).

TMDLs establish the total maximum daily load of pollutants from the District's MS4 that can be discharged without causing or contributing to violations of water quality standards. 33 U.S.C. § 1313(d)(1)(C). *See also* AR 1, EPA Responsiveness Summary at 27-28 (summarizing TMDLs that include pollution wasteload allocations ("WLAs") for the District's MS4) and AR1, Fact Sheet at 6 (noting that "[TMDL wasteload allocations] are a mechanism for attainment of water quality standards…."). EPA's regulations require that effluent limitations in NPDES permits provide for attainment of wasteload allocations in applicable TMDLs. 40 C.F.R. § 122.44(d)(1)(vii) ("When developing water quality-based effluent limits under this paragraph 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 prepared by the State and approved by EPA …"). *See also Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) ("Once approved by EPA, TMDLs must be incorporated into permits.") This is consistent with EPA's clearly stated legal basis for including the Consolidated TMDL Implementation Plan requirements in the permit:

> … EPA Policy provides that "[i]f the state or EPA has established a TMDL for an impaired water that includes WLAs for stormwater discharges, Permits for either industrial stormwater discharges or MS4 discharges must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in

> the TMDL." EPA, *Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on Those WLAs'* (November 12, 2010)…; *see also* 40 C.F.R. § 122.44(d)(1)(vii)(B) (When developing water quality-based effluent limits, the permitting authority shall ensure that, *inter alia*, "[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. . . . ").

EPA Responsiveness Summary at 46-47, 58 (Administrative Record ("AR") 1).[1]

EPA's authority to require the development and implementation of a Consolidated TMDL Implementation Plan is further supported by provisions of the CWA and EPA's regulations pertaining to compliance schedules in NPDES permits. The CWA defines a schedule of compliance as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17). EPA's regulations provide that compliance schedules must be designed to achieve compliance "as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Those regulations also provide that compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. *Id*. § 122.47(a)(3). Thus, the incorporation of enforceable deadlines and interim milestones into the permit is not only authorized but required by the CWA and EPA's regulations.

[1] Citizen Petitioners agree with EPA's above-quoted rationale, but adamantly disagree with EPA's statements implying that EPA has discretion to omit "specific narrative or numeric limits to ensure compliance with state water quality standards or TMDLs." Responsiveness Summary at 101, 113 (AR 1). To the extent EPA's position is based on the decision in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999), Citizen Petitioners respectfully submit that the case was incorrectly decided insofar as it assumed that the adoption of MS4-specific provisions in the CWA set forth at § 402(p) rendered inapplicable the fundamental prohibition on discharges that violate water quality standards, set forth in § 301. *Id*. Not only does this interpretation violate the well-established rule of statutory interpretation barring implied repeal of statutes, it ignores the fact that "§ 301(b)(1)(C) expressly identifies the achievement of state water quality standards as one of the Act's central objectives." *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). Moreover, *Defenders* is not binding precedent outside of the Ninth Circuit.

The Board should also reject DC Water and WWP's request that the Board grant review of the requirement of for a Consolidated TMDL Implementation Plan because it constitutes a "national precedent." DC Water Reply at 13. Even assuming incorrectly that the requirement to develop and comply with a stormwater control plan is in fact a national precedent, this is irrelevant to both the legality of the provision and, as discussed further below, the practical achievability of the requirement. *See BP W. Coast Products, LLC v. F.E.R.C.*, 374 F.3d 1263, 1294 (D.C. Cir. 2004) ("Although the Commission does not cite any precedent for this offset, the apparent novelty of this approach does not render it unreasonable.").

B. DC Water's Claim of Impossibility is Unsupported by Facts

Generally speaking, claims of impossibility require the proponent to meet a high burden of proof. The Board traditionally assigns a heavy burden to persons seeking review of issues that are quintessentially technical, such as the issue of TMDL implementation. *See In re: Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB, Nov. 14, 1997). "[W]e have historically deferred to a permit agency on issues … heavily dependent on that agency's technical expertise." *In re: Steel Dynamics, Inc.*, 9 E.A.D. 165, 201 (EAB, June 22, 2000). Clear error or reviewable exercise of discretion are not established simply because a petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated. *In re: Environmental Disposal Systems, Inc.*, 12 E.A.D. 254 (EAB, Sept. 6, 2005). DC Water and WWP do not meet their burden with regard to the claim that developing a Consolidated TMDL Implementation Plan containing compliance deadlines is impossible. Rather, their claim of impossibility – which was not adequately raised during the public comment period – is based purely on speculation, and on a misunderstanding of what is expected of a permittee's implementation plan.

This Board has frequently emphasized that, to preserve an issue for review, commenters must raise the issue with specificity during the public comment period. *In re: Upper Blackstone Water Pollution Abatement District*, 2010 WL 2363514 (EAB, May 28, 2010). As its Reply notes, DC Water's public comments suggested assorted language modifications for the permit (AR 14.1 at §§ 8.1.1 and 8.1.3.A), which it now characterizes as "suggestions for adding flexibility to the requirements to make them more feasible." DC Water reply at 14. However, nothing in those comments purported to argue that the Consolidated TMDL Implementation Plan requirements in the proposed permit would be infeasible or impossible absent the suggested changes. *Id.* Indeed, many of the arguments DC Water raises now (regarding, for example, the sufficiency of current stormwater management technology, or the "extreme variability in MS4 pollutant concentrations and loadings," DC Water Reply at 16) were not expressed during the public comment period. For that reason alone, this Board should disregard them. *See also McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1188 (D.C. Cir. 2004) (a party challenging the agency's decision is prohibited from advancing a *post hoc* argument not presented to the agency).

Even if these claims were properly preserved for review, neither DC Water's public comments on the proposed permit, nor its arguments presented in this proceeding, factually support a claim that the development of a Consolidated TMDL Implementation Plan is impracticable. DC Water asserts that it would be "impossible" to complete such a plan because of the number of TMDL wasteload allocations and water body segments the plan must address. DC Water Reply at 15-16. However, DC Water provides no factual support for this assertion; its Reply simply states that "DC Water does not believe that either 24 or 30 months is enough time to develop a meaningful plan." DC Water Reply at 16. This "belief" lacks substantiation.

A permittee's ability to develop a TMDL Implementation Plan is a predominantly technical question that falls well within the permitting authority's expertise. When EPA responded to DC Water's comments on the draft permit, the agency stated that "[t]his approach [of requiring the permittee to develop an enforceable implementation plan] is being taken as a result of the increased knowledge and development in stormwater control techniques within the District and will enable better monitoring and tracking toward compliance," and noted that "the Permit continues to allow the Permittee flexibility to decide how it will meet the WLAs." EPA Responsiveness Summary at 78 (AR 1). This response shows that EPA "gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable"; consequently, this Board should defer to the agency's judgment. *In re MCN Oil & Gas Co.*, 2002 WL 31030985, 25-26 n.21 (EAB Sept. 4, 2002).

Not only is DC Water's claim of impossibility unsupported by fact, but it is also based on a complete misunderstanding of the purpose and function of an implementation plan. DC Water and WWP state that "the present level of knowledge and development in stormwater control techniques is not advanced enough to allow a permittee to determine the date of final achievement and interim milestones before an iterative BMP process has even begun." DC Water Reply at 14. They further argue that the permit requires them to "accurately determine the date by which wasteload allocations will be achieved"; that "it is impossible to determine a compliance end date that is anything more than an uneducated guess"; and that such efforts are little more than "a shot in the dark." *Id.* at 17. These statements suggest that DC Water has the implementation plan process backwards. The permit does not ask the permittee, in its plans, to "guess" ultimate attainment dates based on how well its selected storm water management technologies and practices are expected to function. Rather, the purpose of an implementation plan is to select interim and final deadlines along with the appropriate suite of BMPs to meet

those targets, based on modeling. *See* Permit at 31, § 4.10.3 ("The Plan shall include: … Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment."). This process does not involve guesswork, but instead requires modeling based on available scientific information, possibly through several rounds of modeling, feedback, and adjustments to the plan before it is submitted to EPA for approval. It is an eminently reasonable method of setting a compliance schedule, particularly in light of the fact that EPA could have simply imposed deadlines within the permit after giving due consideration to comments received during the permit reissuance process.

With regard to DC Water and WWP's argument that specific TMDL wasteload allocations are "altogether unattainable given the current state of BMP technology," DC Water Reply at 17, this issue is not properly addressed through the MS4 permitting context. *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) ("Once approved by EPA, TMDLs *must* be incorporated into permits.") (Emphasis added). If DC Water disagrees with the wasteload allocations contained in particular TMDLs, its remedy is to petition for revision of those TMDLs. *In re. City of Moscow, Idaho*, 10 E.A.D. 135, 159 (EAB, July 27, 2001) (where allegations in a NPDES permit appeal "are in essence challenges to the underlying determinations of the TMDL… Petitioners' challenge should have earlier been brought… as a challenge to the TMDL itself….").

Finally, the Board should disregard DC Water and WWP's preposterous contention that the settlement agreement between Citizen Petitioners and EPA, which extends the time for completion of the Consolidated TMDL Implementation Plan from two years to thirty months, constitutes "indisputable evidence" that the requirement embodied in the final issued permit would be impossible to achieve. DC Water Reply at 15. Nothing on the face of the agreement

supports such a conclusion, and the Board should not indulge attempts to surmise from the agreement what is not supported on the face of the document. *See* Settlement Agreement, *In re Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221*, EAB NPDES Appeal No. 11-06 (Dkt. 43) at 2 ("This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States"). What is apparent is that the settlement agreement simply provides additional time in consideration of the greater specificity and stringency of the agreed permit language modifications, including more specificity as to the enforceable elements of the Plan, and expanded public input opportunities during the development of the Plan. As to the addition of a definition of "benchmarks" and "milestones" pursuant to the settlement agreement, the agreement does not serve as "an implicit concession by EPA as to the impracticability of the… requirement," but instead only serves to confirm that the final permit lacked a clear definition of either those terms. DC Water Reply at 16.

II. IT IS PREMATURE TO GRANT RELIEF BASED ON DC WATER'S AND WWP'S PURELY SPECULATIVE ARGUMENTS

For the reasons stated above, the Board should decline to grant review because DC Water and WWP have failed to establish that the requirement to develop a Consolidated TMDL Implementation Plan within two years is impracticable or impossible. As to the contention that any individual attainment deadline might be impossible to meet, DC Water's claims are premature. Not only will DC Water have the opportunity to participate in the development of the portions of the plan within DC Water's jurisdiction, the Plan will be subject to public comment in which DC Water can participate if it disagrees with any specific interim or final deadline. Permit at 29, 30 (AR 1, §§ 4.9.4, 4.10.3). Subsequently, the Plan will be submitted to EPA and will be incorporated into the permit, at which point DC Water would have an opportunity to

petition this Board for review of EPA's decision to approve or disapprove portions of the Plan that DC Water contests. Finally, should information gathered during the five-year term of the permit indicate that compliance by the dates in the Plan is not feasible, DC Water will again have the opportunity to advocate for permit modifications in the permit renewal process.

Conclusion

In conclusion, Citizen Petitioners respectfully request that the Board deny DC Water and WWP's petition for review in this appeal.

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