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ENVIR. APPEALS BOARD

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FROM: Lori Kier

PHONE #: (215) 814-\_\_\_\_\_

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From:  
**Lori G. Kier**  
**Senior Assistant Regional Counsel**  
U.S. States Environmental Protection Agency, Region 3  
1650 Arch Street (Mail Code 3RC20)  
Philadelphia, PA 19103  
Voice: (215) 814-2656  
Fax: (215) 814-2603  
E-mail: [kier.lori@epamail.epa.gov](mailto:kier.lori@epamail.epa.gov)

ENVIRONMENTAL APPEALS BOARD

To:	<u>Ms. Eureka Durr</u>	Fax No. :	<u>(202) 233-0121</u>
	<u>Jennifer Chavez, Esq./David S. Baron, Esq.</u>	Fax No. :	<u>(202) 667-2356</u>
	<u>David E. Evans, Esq./Darin K. Waylett, Esq.</u>	Fax No.:	<u>(804) 698-2049</u>

Date: October 29, 2007 Number of pages (including cover): 8

Re: DC MS4/Notice of Withdrawal of Permit Amendment,  
Motion for Dismissal with Prejudice and Memorandum in Support Thereof

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

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ENVIR. APPEALS BOARD

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In Re: )  
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 )  
 Government of the District of Columbia, )  
 Municipal Separate Storm Sewer )  
 System )  
 )  
 NPDES Permit No. DC 0000221 )  
 )  
 Government of the District of Columbia )  
 )  
 Friends of the Earth and Defenders of Wildlife, )  
 )  
 Petitioners, )  
 )  
 U.S. Environmental Protection Agency, Region III, )  
 )  
 Respondent. )

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Appeal Number: NPDES No. 06-07  
Appeal Number: NPDES No. 06-08

Notice of Withdrawal of Permit Amendment,  
Motion for Dismissal with Prejudice and Memorandum in Support Thereof

The United States Environmental Protection Agency, Region III ("Respondent", "EPA" or "the Agency"), hereby notifies the Environmental Appeals Board that, pursuant to 40 C.F.R. § 124.19(d), the Agency is withdrawing portions of Amendment No. 1 ("the Amendment") to the above-captioned Permit, NPDES Permit No. DC0000221 ("the Permit"), and avers that it intends to prepare a draft permit modification under 40 C.F.R. § 124.5 addressing all portions so withdrawn. EPA hereby moves to dismiss with prejudice for the following reasons:

1. On April 19, 2000, EPA issued the District of Columbia ("the District") its first municipal separate storm sewer system ("MS4") permit for discharges of storm water from the

MS4 portion of the District. The Agency then issued Amendment No. 1 to that permit on January 12, 2001, and Amendment No. 2 issued on March 19, 2003. On August 19, 2004, the Agency issued the final second-round permit to the District, with an expiration date of August 18, 2009. On March 14, 2006, following appeals of the August 19, 2004 permit by Defenders of Wildlife and Friends of the Earth (DOW/FOE), EPA issued Amendment No. 1 to the August 19, 2004 permit.

2. The March 14, 2006 Amendment was appealed by both the permittee and DOW/FOE.

3. All three parties to the appeals – EPA, the District and DOW/FOE – have negotiated extensively, but have thus far been unable to reach a negotiated settlement. Despite this withdrawal, negotiations among the parties continue as the Agency prepares a draft permit modification to be public-noticed in the near future.

4. Therefore, EPA is hereby withdrawing the contested permit terms of the March 14, 2006 Amendment No. 1 pursuant to 40 C.F.R. § 124.19(d). The withdrawn permit terms are identified in Attachment "A" hereto, and include the following sections or portions thereof: I.C.2; I.D.2; I.D.3 (indicated language); VII.P.c; IX.B ("Demonstration of Compliance" paragraph); and X, "Current Conditions".

5. Pursuant to 40 C.F.R. § 124.19(d), EPA will prepare a new draft permit modification addressing the withdrawn permit conditions identified in Attachment "A" hereto, and will submit the revised draft permit amendment terms for public comment.

6. Also pursuant to 40 C.F.R. § 124.19(d), all portions of the permit amendment which are not withdrawn by this notice continue to apply.

7. EPA submits that as a result of this withdrawal, the petitions for review of the permit amendment are moot.

WHEREFORE, the Region therefore requests dismissal of the petitions; an appropriate proposed Order dismissing the petitions is enclosed herewith.

Date: 10/29/07

Lori G. Kier  
Lori G. Kier  
Senior Assistant Regional Counsel  
Mail Code 3RC20  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103  
(215) 814-2656

District of Columbia Municipal Separate Storm Sewer System Permit  
Amendment No. 1

Those sections or portions of sections identified below are withdrawn from the permit modification.

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PART I. DISCHARGES AUTHORIZED UNDER THIS PERMIT

C. Limitations to Coverage (Prohibitions)

2. All discharges of pollutants to or from the MS4 system, not regulated by a general or an individual NPDES permit, that cause or contribute to the lowering of water quality from current conditions within the District of Columbia are prohibited.

D. Effluent Limits

2. WOBEL Limit - The permittee shall implement the controls, Best Management Practices (BMPs), and other activities necessary to reduce pollutants to the Maximum Extent Practicable as set forth in the Upgraded Storm Water Management Plan dated October 19, 2002, and all other requirements of this Permit (including but not limited to the narrative prohibitions on discharge of pollutants from the MS4 set forth in I.C. of this Permit). EPA reserves the authority to modify this effluent limit as described below in Part VII.P (Reopener Clause for Permits) of this Permit.

3. Effluent Limits Consistent with TMDL WLA -- delete the portion of the first sentence that contains the following language: "as set forth in the Upgraded Storm Water Management Plan dated October 19, 2002 ." The remainder of the paragraph is uncontested.

PART VII. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

P. Reopener Clause for Permits

c. The Permit may be modified in accordance with 40 C.F.R. Part 124.5, or revoked and reissued to incorporate additional controls in the event that EPA determines that further controls, under the iterative approach, are necessary to (1) ensure that the effluent limits are sufficient to prevent a further lowering of water quality from current conditions and/or (2) to ensure that the effluent limits are consistent with any applicable TMDL WLA allocated to discharge of pollutants from the MS4.

## PART IX. OTHER APPLICABLE PROVISIONS

### B. TMDL WLA Implementation Plans and Compliance Monitoring

Demonstration of compliance (as specified in Parts IV and VIII of the Permit ) will be calculated using the procedures (i.e., Simple Method) identified in the Upgraded SWMP dated October 19, 2002 (or other procedures approved by EPA via permit modification and shown to be scientifically sound and reliable in estimating actual load reductions), and will be reported by comparing the calculated load for each pollutant to the approved pollutant specific WLAs and its associated storm water load reductions for the receiving waterbody as specified in the Fact Sheet.

## PART X. PERMIT DEFINITIONS

"Current conditions"- refers to a trend analysis which compares existing or baseline data to future data collected through the MS4 monitoring program as described in part iv (monitoring and reporting requirements) of the permit to assess the overall performance (i.e., selection of bmps/lid projects, setting of narrative/numeric effluent limits to mep and/or water quality based standards) of the storm water management program within the District of Columbia.

## CERTIFICATE OF SERVICE

I hereby certify that I have mailed the original and one copy of the foregoing Notice of Withdrawal of Permit Amendment and Motion for Dismissal with Prejudice to the Clerk of the Environmental Appeals Board at the following address:

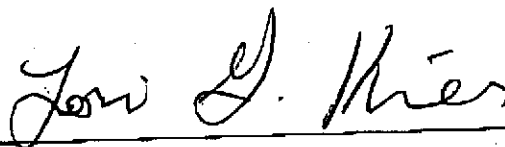
Ms. Eurika Durr  
Clerk of the Board  
Environmental Appeals Board (MC 1103B)  
U.S. Environmental Protection Agency  
1341 G Street, N.W., Sixth Floor  
Washington, D.C. 20005

I also certify that I have mailed a copy to each of the addresses below:

David S. Baron, Esq.  
Jennifer Chavez, Esq.  
Earthjustice Legal Defense Fund  
1625 Massachusetts Ave., N.W. #702  
Washington, D.C. 20036

David E. Evans, Esq.  
Darin K. Waylett, Esq.  
McGuire Woods, LLP  
One James Center  
Richmond, VA 23219

Date:

10/29/07Lori G. Kier



