ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	
Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES permit No. DC 0000221, Amendment 1, issued effective March 14, 2006	Docket No: NPDES Appeal No.
Friends of the Earth and Defenders of Wildlife,	
Petitioners,	
U.S. Environmental Protection Agency, Region III,	
Respondent.	

PETITION FOR REVIEW

Pursuant to 40 C.F.R. §124.19, Friends of the Earth (FOE) and Defenders of Wildlife (Defenders) hereby petition the Environmental Appeals Board (the Board) to review the final decision of the Regional Administrator, U.S. Environmental Protection Agency Region III (the Region) to issue NPDES permit No. DC 0000221, Amendment 1 (the permit amendment) for the District of Columbia municipal separate storm sewer system (MS4). Exhibit 1. The permit amendment was signed by the Regional Administrator's delegee on March 13, 2006 with an effective date of March 14, 2006. FOE was mailed notice of the issuance of the permit amendment by letter from the Region dated March 14, 2006.

I. Interests of Petitioners

Friends of the Earth is a nonprofit corporation with its offices at: 1717 Massachusetts Avenue NW #600, Washington, DC 20036-2002, 202-783-7400. FOE is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. FOE is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land.

Defenders of Wildlife is a nonprofit corporation with offices at: 1130 17th Street, NW, Washington, DC 20036, Phone: (202) 682-9400. Defenders is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. Defenders is dedicated to the preservation of wildlife and wildlife ecosystems, and the promotion of public appreciation of wildlife.

Actions by FOE and Defenders to protect and enhance the environment include administrative advocacy and litigation to enforce environmental laws. Both organizations have a long history of involvement in water quality-related activities, and members of both are greatly concerned about water quality. Members of FOE and Defenders use, enjoy, live adjacent to or near, and otherwise benefit from waters and riparian areas that are adversely impacted by the District's MS4 discharges. Members of both organizations use and enjoy such waters and riparian areas for a variety of purposes, including, but not limited to, boating, sightseeing, hiking, wildlife watching, aesthetic enjoyment, and other recreational pursuits.

Discharges from the District's MS4 system cause or contribute to pollution levels in waters used by FOE and Defenders members that are injurious to human health, wildlife, the aesthetic qualities of those waters, and to uses pursued and enjoyed by such members. Such discharges, and EPA's failure to adequately limit them in the permit amendment as further described below, threaten the health and welfare of FOE and Defenders members, impair and threaten their use and enjoyment of the above-mentioned waters, and deny them the level of water quality to which they are entitled under the Clean Water Act.

Earthjustice is a nonprofit, public interest law firm that is representing FOE and Defenders in this matter. Its address is 1625 Massachusetts Avenue, NW, Suite 702, Washington, D.C. 20036, (202) 667-4500. The undersigned are the Earthjustice attorneys who are handling this matter.

Petitioners and 15 other environmental organizations filed timely comments with EPA during the public comment period on the permit amendment. The comments were made by letter dated August 17, 2005 and are a part of the administrative record in this matter. Exhibit 2. The issues presented in this petition were raised in petitioners' comments on the 2004 permit, which are also part of the record. Exhibit 6. Petitioners did not specifically raise all of the arguments raised in this petition in their 2005 comments because, as explained more fully below, those arguments arise out of drastic revisions to the proposed language that petitioners could not reasonably have anticipated.[1]

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[1] See *In Re New England Plating Co.*, 9 E.A.D. 726, 732 n.14 (2001)("An issue not raised during the comment period may nonetheless be raised on appeal if it was not reasonably ascertainable during the comment period.")(citing 40 C.F.R. § 124.13); *In Re Teck Cominco Alaska Incorporated, Red Dog Mine*, 11 E.A.D. 457, 480 (2004)(Board has "consistently recognized that issues pertaining to changes from the draft to final permit decision may be raised for the first time on appeal;" "Because the in-stream 500 mg/l TDS limit from the Mainstem of Red Dog Creek during spawning season is a change in the final Permit

II. Grounds for Review

A. Background

The NPDES permit at issue in this petition governs the discharge of polluted stormwater runoff from the District of Columbia MS4 to the Potomac River, the Anacostia River, Rock Creek and tributaries of the foregoing. These discharges occur from hundreds of storm sewer outfalls during and after rainfall events. As further detailed below, pollution levels in these discharges routinely exceed D.C. water quality standards for bacteria and other contaminants, and have been identified by the District itself as major causes of water quality impairment in D.C. waters.

The Clean Water Act ("CWA" or "the Act") prohibits the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. 42 U.S.C. §§1311(a), 1342(a)(1). Such permits must specify technology-based effluent limitations, plus any more stringent limitations necessary to assure compliance with water quality standards in the receiving waters. 33 U.S.C. §1311(b)(1). In 1987, Congress set a 1990 deadline for operators of large MS4s (like the District of Columbia) to apply for NPDES permits, and a 1991 deadline for issuance or denial of such permits. Id. §1342(p)(4)(A). The CWA required these permits to provide for compliance as expeditiously as practicable, but in no event later than three years after the date of issuance of such permit. Thus, the CWA mandated the MS4 systems be in compliance with applicable CWA requirements no later than 1994.

Modification from the draft, [petitioner] was not required to raise issues regarding that limit during the public comment period on the draft permit modification.")(citing *In Re Rockgen Energy Ctr.*, 8 E.AD. 536, 540 (1999)); 40 C.F.R. § 124.19(a)(a person who has failed to participate in the public hearing on a draft permit may petition for review of that permit "to the extent of the changes from the draft to the final permit decision.").

Neither the District nor the Region followed this legally mandated path. The District did not complete its MS4 permit application until 1998, and the Region did not issue an MS4 permit to the District until 2000 – nearly a decade behind the statutory schedule. The permit directed the District to continue a number of existing management practices that had stormwater related benefits (e.g., street sweeping, catch basin cleaning), but did not contain any water-quality based effluent limits to assure compliance with water quality standards in the receiving waters (except for one small tributary of the Anacostia – Hicky Run). Defenders and FOE timely petitioned this Board for review of that permit, arguing that it was deficient in a number of major respects. On February 20, 2002, the Board granted the petition in part, holding that the permit was deficient because, *inter alia*, the Region failed to show the management practices required by the permit would be adequate to ensure compliance with water quality standards. The Board remanded the permit to the Region for correction of this and other deficiencies. *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 223, NPDES Appeal Nos. 00-14 & 01-09 (2002)(hereinafter *DCMS4 I*), motion for partial reconsideration granted 5-9-02.

On remand, the Region did not propose a revised permit until November 15, 2003. Defenders, FOE and others filed comments on the proposal in December 2003, but the Region did not issue a final permit until August 19, 2003 – a full 2 ½ years after this Board's decision in *DCMS4 I*. The revised permit suffered from several of the same major deficiencies as the initial permit, and from other deficiencies as well. Accordingly, on September 20, 2004 Defenders and FOE petitioned the Board to direct the Region to correct these deficiencies. Exhibit 3. Petitioners argued, *inter alia*, that the permit did

not contain effluent limitations adequate to assure compliance with applicable water quality standards and was thus in violation of the Act, EPA rules, and the Board's decision in *DCMS4 I*. Id. at 7-20.

In October 2004, Earthjustice and the Region began settlement discussions and jointly requested that the Board defer action on the appeal. On May 10, 2005, the parties reached a settlement whereby the Region would amend the permit to, among other things, explicitly prohibit discharges to or from the MS4 system that cause or contribute to the exceedance of water quality standards. See Exhibit 4 (proposed amendment), Part I.C.2. The Region released the agreed upon amendment for public comment in July 2005. See Exhibit 5 (fact sheet accompanying final amendment), at 3. Based on this proposal and pursuant to the parties' settlement, petitioners moved the Board for leave to withdraw their appeal in October 2005. The Board granted petitioners' motion to withdraw on October 28, 2005, specifying that the withdrawal was without prejudice.

On March 14, 2006, the Region issued a final version of the amendment. Unlike the negotiated draft amendment, the final amendment does not prohibit discharges that would cause or contribute to noncompliance with water quality standards. Rather, in contradiction with the draft amendment language, the final amendment merely prohibits discharges that would contribute to worsening water quality compared to "current conditions"—conditions which violate water quality standards. The Region has failed to explain, and indeed cannot explain, how the final amendment complies with the Board's very explicit instructions in *DCMS4 I* "to provide and/or develop support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards." 10 E.A.D. at 343 (emphasis in original). Moreover, the Region's abrupt

reversal in course subsequent to the close of the public comment period has denied petitioners a meaningful opportunity to comment on the amendment. Accordingly, Defenders and FOE ask the Board to direct the Region to correct these deficiencies forthwith.

B. Issues

1. Compliance with water quality standards: An NPDES permit must include effluent limitations adequate to assure compliance with applicable water quality standards in the receiving waters. 33 U.S.C. §§1311(b)(1)(C), 1342; 40 C.F.R. §122.4(d). EPA has stated that this requirement applies to MS4 permits. See, e.g., *DC MS4 I*, 10 E.A.D. at 329, 335-43; EPA, NPDES Storm Water Phase II Fact Sheet 2-4 (1998)(incorporated herein by reference); Memorandum from E. Donald Elliott, General Counsel, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991)(incorporated by reference). Further, 40 C.F.R. §122.44(d) requires each NPDES permit to contain limitations on all pollutants or pollutant parameters that are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an excursion above any water quality standard.

The permit here does not meet these basic requirements. Although the District's MS4 discharges indisputably cause and contribute to violations of water quality standards, the permit does not contain effluent limitations or other requirements adequate to ensure that such violations will be remedied and prevented.

a. MS4 discharges under "current conditions" cause and contribute to violations of DC water quality standards:[2]

The key change made by the Region between the draft permit amendment and the final permit amendment is the establishment of "current conditions," rather than water quality standards, as the benchmark for permit compliance under Part I.C.2.[3] The permit amendment of Part I.C.2 prohibits only those MS4 discharges that contribute to the worsening of water quality below current levels, essentially grandfathering existing discharges. See Ex. 1, Part I.C.2.

District reports and the 2002 SMWP show that existing conditions in the District's water violate water quality standards and that those violations are caused in major part by stormwater discharges.[4] The District's most recent listing of waters pursuant to CWA §303(d) identifies *all* of the District's rivers as "impaired", meaning that they violate the District's water quality standards.

http://www.epa.gov/reg3wapd/tmdl/pdf/dc2004.pdf (Exhibit 12). See also

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[2] The "current conditions" standard described below appeared nowhere in the proposed permit amendment, nor could petitioners have reasonably anticipated that the Region would adopt it at the time they submitted their August 17, 2005 comment letter. Thus, although petitioners did not submit the following evidence in its most recent set of comments, the evidence is appropriate for the Board's review. See supra note 1. In addition, virtually all of the following evidence was set forth in Petitioners' comments on the 2004 proposed permit, and was undisputed by the Region. Ex. 4 (Petitioners' 2004 Comments). See also Ex. 2 (Petitioners 2005 comments) (noting generally that "rivers running through the heart of the nation's capital are not clean enough for their intended uses.").

[3] The definition of "current conditions" (which did not appear in the draft permit amendment, but was added to the final version) states:

> "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

Ex. 1, Part X.

[4] Government of the District of Columbia, Storm Water Management Plan, October 19, 2002.

http://oaspub.epa.gov/waters/state_rept.control?p_state=DC (Exhibit 13). The District's §305(b) Water Quality Reports (2002 and prior years – all incorporated by reference into Petitioners' 2004 comments) specifically identify storm water discharges as major contributors to violations of water quality standards and failure to achieve designated uses in these waters. Exhibit 9. For some waters, the 2002 report lists urban runoff/municipal storm sewers as the **only** known source of impairment. *Id.* Because receiving waters in the District already violate the District's standards for conventional and toxic pollutants, any effluent that exceeds those standards necessarily contributes to in-stream excursions.

Monitoring data submitted with the District's initial Part 2 MS4 application (Exhibit 10) confirms that such discharges repeatedly exceed the District's water quality standards for fecal coliform bacteria, which are 200/100 mL max. 30-day mean for Class A waters, and 1,000/100 mL for Class B waters. 21 DCMR 1104.6. In almost all of the stormwater sampling reported in the Part 2 application, fecal coliform counts exceeded one or both of these standards, often by wide margins. Ex. 10, tables 4.3.4-3, -5, -7, -9, -11. In some samples fecal coliform counts were greater than 16,000/100 mL. The Part 2 Application also showed that MS4 discharges repeatedly exceeded water quality standards for mercury, copper, and oil & grease. Id., tables 4.3.4-3 to -14; 21 DCMR 1104.6. At least one discharge also exceeded arsenic criteria for fisheries. Id., table 4.3.4-10. Data in the record for *DCMS4 I* also suggests potential cyanide violations. *DCMS4 I*, Record Exhibit 14, Run Summary Sheets.[5]

[5] The record contains sampling data indicating total cyanide levels as high as 113 ug/l., and other readings of 111, 67, and 73 ug/l. *DCMS4 I*, Record Exhibit 14, run summaries of 9/2/94, 3/29/95, and 5/3/95. The District's aquatic life standards for cyanide are 5.2 ug/l chronic and 22 ug/l acute, expressed as free cyanide. 21 DCMR 1104.6 Table 2.

The District's 2002 Storm Water Management Plan (SWMP) further demonstrates that MS4 discharges violate water quality standards. Monitoring data reported in Appendix E of the 2002 SWMP shows virtually all fecal coliform counts exceeding one or both of the District's standards, often by wide margins. In some samples fecal coliform counts reached as high as 110,000/100 mL. Exhibit 11. Table 4.4.1-1 of 2002 SWMP further shows event mean concentrations of copper, lead and zinc that exceed D.C. water quality standards by significant margins. Id. For example, the District's acute water quality criteria for copper in fisheries is 13 ug/l and the chronic criteria is 9 ug/l (assuming a water hardness of 100 mg/l). 21 DCMR 1104.7. All of the event mean concentrations for copper reported in Table 4.4.1-1 of the 2002 SWMP exceeded one or both of these criteria, with some mean concentrations as high as 82, 96, and 125 ppb.[6] For zinc, the District's acute and chronic criteria are 120 ug/l. Event mean concentrations exceeded this level at four of the monitoring cites. Ex. 11, SWMP Table 4.4.1-1.

Exceedances of water quality standards in MS4 discharges equate to water quality standards violations because, in the absence of mixing zones for these discharges (and none have been established), compliance with standards is measured at the point of discharge. See *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 75 (1st Cir. 1993); *In re Broward County, Florida, NPDES Permit No. FL0031771*, 6 E.A.D. 535 (August 27, 1996). See also, EPA, Office of Water Regulations and Standards, "Mixing Zones -

[6] The criteria cited in the text are for dissolved metals. Table 4.4.1-1 does not indicate whether the monitored values reported for metals reflect dissolved fraction or total metals. Even assuming the numbers reflect total metals, they would substantially exceed the comparable total metal criteria, derived by using the conversion factor cited in the District's rules, 21 DCMR 1106.11.

Water quality Standards Criteria Summaries: A Compilation of State/Federal Criteria" at 2, EPA 440/5-88/015 (September 1998).

The fact that DC MS4 discharges cause or contribute to water quality standards exceedances is further confirmed by the District's final Total Maximum Daily Loads (TMDLs) for the Anacostia River and its tributaries for Biochemical Oxygen Demand, Suspended Solids, Fecal Coliform, and Organics and Metals. As Appendix A to the Fact Sheet documents for the 2004 permit indicates, these TMDLs all require substantial percentage reductions in pollutant loadings from MS4 discharges. Exhibit 8. The TMDLs and supporting documentation submitted by the District to EPA (incorporated into Petitioners' 2004 comments by reference), as well as EPA's decision documents approving these TMDLs (incorporated into Petitioners' 2004 comments by reference), are all premised on the conclusion that these percentage reductions are necessary to attain and maintain water quality standards in the receiving waters. The reductions plainly have not yet been achieved. Indeed, the TMDLs were only recently adopted and the District has yet to document any actual reductions in MS4 pollutant discharges – let alone the percentages of the magnitudes mandated by the TMDLs.[7]

b. The permit amendment does not contain effluent limits adequate to assure compliance with water quality standards:

The permit amendment provisions do not assure compliance with standards and in fact conflict with the Act's requirements for compliance with standards. First, the permit contains no numeric, parameter-specific limitations for discharges from any MS4 outfall. Not only are such pollutant specific, numeric limits presumptively required by the Act

[7] Petitioners contend that these TMDLs are not sufficiently protective to comply with the CWA. In any event, substantial pollutant reductions are needed to achieve the load reductions necessary to meet even these inadequate TMDLs.

(33 U.S.C. §§1311(b)(1)(C), 40 C.F.R. §§122.4(d), 122.44(d), 122.44(k)(3)), but they must be outfall specific unless infeasible. 40 C.F.R. §§122.44(h)(i)(1), 122.45(a).

Although the permit amendment requires the District to implement the Best Management Practices (BMPs) "necessary to reduce pollutants as set forth in the Upgraded Storm Water Management Plan" (Ex. 1, Part I.D), EPA may rely on BMPs in lieu of numeric effluent limitations only where numeric limits are "infeasible" and where the Region shows that other types of limitations will assure compliance with water quality standards.[8] See 40 C.F.R. §122.44(k)(3). Here, the Region has not satisfied either of these threshold requirements.

The Region did not even attempt to develop numeric, outfall-specific effluent limits, let alone show they are infeasible. Moreover, any claim of infeasibility would be meritless on its face. As noted above, because neither the District nor EPA has established mixing zones for discharges from the D.C. municipal separate storm sewer system, effluent limits must be set to assure compliance with water quality standards at the point of discharge – i.e., the effluents limits must mirror the receiving water quality standards themselves. See *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 75 (1st Cir. 1993); *In re Broward County, Florida, NPDES Permit No. FL0031771*, 6 E.A.D. 535 (August 27, 1996). See also, EPA, Office of Water Regulations and Standards, "Mixing Zones - Water quality Standards Criteria Summaries: A Compilation of State/Federal Criteria" at 2, EPA 440/5-88/015 (September 1998). This is not an exercise requiring

[8] The Board has previously noted that BMPs are also authorized by 40 C.F.R. §122.44(k)(2), which provides for permits to specify BMPs where authorized under section 402(p) of the CWA for the control of storm water discharges. This provision, however, does not authorize the use of BMPs *in lieu of* numeric limits. The other provisions of the CWA and EPA rules cited above require numeric effluent limitations, a requirement that can be overcome only where numeric limits are shown to be infeasible and other types of limitations are shown to assure compliance with water quality standards.

any information beyond the water quality criteria set in D.C.'s published water quality standards. EPA cannot rationally claim that it is infeasible to simply apply the District's numeric water quality criteria as outfall-specific effluent limitations.

Second, even if the Region could show that numeric effluent limits are infeasible, it cannot use BMPs as a surrogate without showing that those BMPs assure compliance with water quality standards. 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §122.4(d); *DC MS4 I* 10 E.A.D. at 341-43. This Board confirmed in *DCMS4 I* that if the Region cannot support a conclusion that the permit "*will* 'ensure' compliance with the District's water quality standards," the permit is legally inadequate. 10 E.A.D. at 343. Here, the Region has not even asserted that the District's storm water management programs are sufficient to ensure compliance with applicable water quality standards. Nor has the Region found or shown that the permit as modified by Amendment 1 will ensure compliance with D.C. water quality standards. Rather, the Region states that the District's programs address only the requirement to reduce pollutants "to the maximum extent practicable." Ex. 1, Part D.1-3; Ex. 7 (Responsiveness Summary) §II.B.ii.[9] As petitioners stated in their comments on the proposed permit amendment: "Statutory mandates to ensure compliance with water quality standards are *separate from, and additional to*, technology-based requirements calling for the reduction of pollutants to the 'maximum extent practicable.'" Ex. 2, at 1 (emphasis added). Thus, the permit amendment's provisions regarding controls to reduce pollutants to the maximum extent practicable do not substitute for a requirement that the District ensure compliance with water quality standards.

[9] EPA states that "the basis for the current MS4 Permit sets forth a framework for a long-term storm water management control program for determining compliance with applicable water quality standards 'to the maximum extent practicable' through the use of best management practices." Ex. 7 §II.B.ii.

Moreover, the Region cannot legitimately claim that the District's measures are sufficient to ensure compliance with standards because there are no facts or analyses in the record to support such a claim. As noted above, the District itself has determined that MS4 discharges cause or contribute to water quality standards violations in D.C. waters, and there is substantial evidence that discharges from MS4 outfalls exceed DC water quality standards by wide margins for a variety of pollutants. The District's approved TMDLs require that – to meet water quality standards – pollution loadings from MS4 discharges to the Anacostia and its tributaries must be cut by percentages ranging from 50% to 98% depending on the pollutant. There is no evidence that the District's SWMP will cut MS4 pollutant discharges *at all*, let alone by percentages of this magnitude. Neither the District nor Region are able to quantify any pollutant reductions that will or may occur as a result of the District's current or planned storm water management programs. Indeed, the 2002 SWMP contains almost nothing in the way of new BMPs beyond those in the pre-existing SWMP.

For all the foregoing reasons, the permit amendment fails to ensure compliance with water quality standards and is contrary to the CWA, EPA rules, and this Board's instructions in *DCMS4 I.*. The Board must again remand the permit amendment to the Region to correct these deficiencies.

c. The narrative prohibitions on discharge of pollutants to and from the MS4 do not assure compliance with water quality standards:

i. Part I.C.2 of the permit amendment is inadequate on its face: The prohibitions on discharges that do appear in the permit do not substitute for outfall specific, numeric effluent limits, and are wholly inadequate to assure compliance with water quality

standards. In fact, the permit sets current conditions that violate water quality standards as the baseline from which permit compliance will be assessed under Part I.C.2. Ex. 1, Parts I.C.2 and VII.P.

As discussed in section II.A above, the proposed permit amendment contained language upon which petitioners and the Region had agreed at the conclusion of their settlement discussions. The proposed amendment stated:

> All discharges of pollutants to or from the MS4 that cause or contribute to the exceedance of the District of Columbia water quality standards are prohibited.

Ex. 4, Part I.C.2. The final permit represents a complete reversal from this approach, setting "current conditions," as opposed to the District's water quality standards, as the benchmark from which to measure compliance with the permit:

> 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.

Ex. 1, Part I.C.2.

As explained in section II.B.1.a above, water quality within the District of Columbia currently violates applicable standards, due in large part to stormwater runoff. Nevertheless, Part I.C.2 does not prohibit existing discharges from the MS4 system that contribute to violations of these standards. Instead, only those discharges that contribute to even greater noncompliance are prohibited. While it is important that the MS4 permit prevent backsliding, this measure obviously fails to "ensure" compliance with water quality standards as required by law. 33 U.S.C. §§1311(b)(1)(C).

ii. The Region has failed to provide a reasoned basis for drastically altering Part I.C.2: The documents accompanying the final permit amendment articulate no rational

basis for the Region's novel approach. Given that the final language in Part I.C.2 represents a major departure from the proposed language, the Region is under an especially strong obligation to explain its actions. See, e.g., *Mountain Communications v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004)(agency action was arbitrary and capricious where agency "changed direction without explanation, indeed without even acknowledging the change"); *Gen. Elec. Co. v. US Dept. of Commerce* 128 F.3d 767, 774-75 (D.C. Cir. 1997)("by not explaining the difference between [a provision of the final rule] and the language of the proposed rule, [the agency] failed to exercise reasoned decisionmaking"). The Region utterly fails to meet this obligation.

The Fact Sheet accompanying the final permit amendment notes that the proposed amendment represented the parties "settlement in principle on the issues," but does not even acknowledge that the final amendment flouts this settlement, let alone explain why the agency followed that course. Ex. 5, at 3. The closest the Region comes to providing a rationale for the change is its statement that it "considered [four comment letters], when issuing the final document, by making modifications to account for existing ambient water quality conditions, placing emphasis on reducing pollutants to the maximum extent practicable and by adding a clarifying definition." Id. at 4. The Region does not explain what it means by "account[ing] for" existing conditions, or why existing conditions are legally relevant. Further, it fails to consider the highly relevant factor that "existing ambient water quality conditions" themselves violate water quality standards. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(agency action is arbitrary and capricious where agency failed to consider a relevant factor).

Finally, the Region ignores this Board's ruling that BMPs alone do not satisfy the requirements of the CWA. *DCMS4 I*, 10 E.A.D. at 343.

The Region's Responsiveness Summary is equally opaque. In responding to comments from a coalition of municipalities, the Region states:

> In the fact sheet accompanying the proposed amendment, EPA points out that the basis for the current MS4 Permit sets forth a framework for a long-term storm water management control program for determining compliance with applicable water quality standards "to the maximum extent practicable" through use of best management practices. EPA is clarifying the language in the final document as it intends Amendment No. 1 to be fully consistent with the basis for issuing the current permit.

Ex. 7 §II.B.ii. This explanation is unintelligible. See *BP West Coast Products v. FERC*, 374 F.3d 1263, 1288 (D.C. Cir. 2004)(rejecting agency rationale: "the 'reasoning' consists of a recitation of separately unassailable statements that do not together constitute a syllogism leading to the conclusion purportedly based on them"); *Howard v. SEC*, 376 F.3d 1136, 1148 (D.C. Cir. 2004)(rejecting agency argument that was "illogical and makes no sense whatsoever"). To the extent the Region is relying on BMPs as a substitute for requiring compliance with applicable water quality standards, the rationale is inconsistent with the CWA and has already been rejected by this Board. *DCMS4 I*, 10 E.A.D. at 343.

Nor does the Region's passing reference to *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), provide a legitimate rationale for the final permit language. Ex. 7 §II(B)(i)-(ii). First, EPA explicitly stated in the Responsiveness Summary accompanying the 2004 permit that it had not to date adopted the finding of certain courts that section 402(p)(3)(B)(iii) of the CWA gives EPA the option of "requiring less than strict compliance with state water quality standards." Ex. 15, at 2 (quoting *Defenders*,

191 F.3d 1159). Second, *Defenders* is not binding precedent outside of the Ninth Circuit. The law in the D.C. Circuit, which controls here, is that section 301 of the Act imposes a "strict requirement" that NPDES permits for point sources "must contain discharge limitations necessary to protect water quality." *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 992. (D.C. Cir. 1997).

Third, petitioners respectfully submit that *Defenders* was wrongly decided. EPA itself argued in that case the Act does in fact require MS4 permits to assure compliance with water quality standards. 191 F.3d at 1164. In ruling to the contrary, the court ignored the plain language of the statute, and failed to give proper deference to EPA's national interpretation of the Act, as required by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Section 301(b)(1)(C) of the Act explicitly requires all NPDES permits to contain whatever limitations are necessary to assure compliance with water quality standards in the receiving river or lake. 33 U.S.C. §1311(b)(1)(C). Nowhere does the statute exempt MS4 permits from this mandate. The *Defenders* Court found that such an exemption was implicit, because a subsection of the Act dealing with industrial storm water permits expressly cross references section 301 of the Act, while the municipal storm water subsection does not. 191 F.3d at 1164-66. Aside from violating the well established rule against implied repeal of statutes, this reasoning ignores the fact that compliance with water quality standards is a "cornerstone" of the Act. *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). Congress does not have to restate it in every subsection of the statute to give it effect. The *Defenders* court also inexplicably ignored the Conference Report for the 1987 Water Quality Act, which stated unequivocally that "all municipal separate storm sewers **are subject to the requirements of sections 301**

and 402" of the Act. H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. at 158 (1986)(emphasis added).

Even if the Region could appropriately rely on *Defenders*, it has not explained how the "current conditions" standard in Part I.C.2 is an appropriate use of discretion under that decision. Setting existing pollution levels as the benchmark for permit compliance, when those levels substantially violate water quality standards due in large measure to MS4 discharges, would represent a profoundly unreasonable and arbitrary exercise of any discretion EPA might have, even under *Defenders*.

In the Responsiveness Summary accompanying the final permit amendment, the Region indicates that the changes to Part I.C.2 address the District of Columbia Department of Health's concerns that the proposed language did "not address the District's impaired waters" and that the its wording was "in effect, excluding allowed discharges." See Ex. 7 §IV(B)(i)-(ii). Again, the Region's explanation is so obtuse as to be unintelligible. See *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996)("In order to ensure that an agency's decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its decision."); *United Transp. Union v. STB*, 363 F.3d 465, 467 (D.C. Cir. 2004)(rejecting rationale articulated by agency, which "was confusing at best, doubletalk at worst."). Moreover, the Region fails to explain why existing discharges should be "allowed" even when they are contributing to the impairment of DC waters that violate standards. The CWA does not contain a "grandfather" clause which allows EPA to condone existing pollution. On the contrary, the poor water quality in the District's waterways heightens the Region's obligation to require a strong stormwater management program. See 33 U.S.C. §§1311(b)(1)(C), 1342; 40 C.F.R. §122.4(d).

The Region's action was further flawed because the Region completely failed to respond the comments filed by Petitioners and 15 other organizations supporting the proposed permit's prohibition on discharges that would cause or contribute to violations of water quality standards. The Region's only response to these comments was to state that "EPA appreciates the comment." Exhibit 7 at 2. Thus, the Region did not even acknowledge that it was rejecting the position supported by the comments, much less explain why it was doing so. The Region's failure to provide a meaningful response to petitioners' comments renders its action arbitrary, capricious, and violative of EPA rules. 40 C.F.R. §124.17(a)(2). See Professional Pilots Ass'n v. FAA, 118 F.3d 758, 763 (D.C. Cir. 1997) (the "agency must have offered a reasoned explanation for its chosen course of action, responded to 'relevant' and 'significant' public comments, and demonstrated that it afforded adequate consideration to every reasonable alternative presented for its consideration")(internal citations omitted).

For the reasons explained above, the narrative prohibition in Part I.C.2 fails to ensure compliance with water quality standards and, in fact, permits continuing violations of those standards. Moreover, the Region has not articulated a reasoned basis for why it reversed course between the proposed and final permit amendment, or how the new language could possibly ensure compliance with water quality standards. Thus, the permit amendment is arbitrary, capricious, and contrary to law. *State Farm*, 463 U.S. at 43 (agency must show rational connection between facts found and choice made).

d. The permit's reopener clause is legally inadequate[10]

The final permit amendment includes changes to the permit's reopener clause (Part VII.P.c) that track the changes made to Part I.C.2 and are unlawful and arbitrary for the same reasons. Whereas the proposed reopener clause provided that the permit could be modified or revoked and reissued in the event that EPA determined that further controls were necessary to "ensure that the effluent limits are sufficient to prevent an exceedance of water quality standards," in the final permit, the clause is triggered when further controls are necessary to "ensure that effluent limits are sufficient to prevent a further lowering of water quality from current conditions."[11] See Ex. 4, Part VII.P.c.; Ex. 1, Part VII.P.c.

As with Part I.C.2, instead of ensuring compliance with water quality standards, the clause now appears to establish a "current conditions" baseline of impaired water quality against which the need for permit reopening will be measured. Again, the Region provides no rationale for making this abrupt change from the proposed permit, and it is arbitrary and unlawful for the reasons stated above with respect to Part I.C.2.

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[10] Petitioners challenge the reopener clause only to the extent that it has been modified from the proposed language in the final permit. Thus, petitioners need not have raised this claim below. See supra note 1.

[11] The clause is also triggered when EPA determines that further controls are necessary "to ensure that the effluent limits are consistent with any applicable TMDL WLA allocated to discharge of pollutants from the MS4." Ex. 1, Part VII.P.c.

2. Reduction of pollutants to the "maximum extent practicable"[12]

Neither the District nor EPA has demonstrated that the District's stormwater program will reduce storm water pollutant discharges to the maximum extent practicable, as required by CWA § 402(p)(3)(iii) ("MEP" requirement). Indeed, the District and EPA have failed to quantify *any* reductions in pollutant discharges that will be achieved under the 2002 SWMP or any subsequent programs. The record is devoid of any evidence that would support such a showing. EPA cannot rationally or lawfully find that the SWMP or the permit will reduce storm water pollutant discharges to the maximum extent practicable when there is no evidence that that the District's BMPs will produce any reductions at all, much less reductions to the maximum extent practicable.[13] Moreover, neither the District's nor EPA's analyses purport to show, or corroborate, that greater reductions are not practicable, and any such claim would be farfetched.

The Region's action in issuing the permit amendment was further arbitrary and capricious, because the Region provided no facts or explanation supporting its statements in the fact sheet and the permit that the District's MS4 program would reduce discharges to the maximum extent practicable. The Region merely asserted that the District's program was sufficient to meet the "maximum extent practicable" standard, with no

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[12] Although petitioners did not raise this specific issue in their comments on the draft amendment, the claim is reviewable because of the drastic changes between the proposed and final permit amendment. See supra note 1. Petitioners comments on the proposed permit amendment rested on the proposed language in Part I.C.2. See, e.g., Ex. 2, at 2 ("By requiring the permittee to comply with quality-based standards under the MS4 permit, EPA has taken an important step toward making the waterways in the nation's capital safe for their intended uses.") Petitioners could not have reasonably anticipated that the Region would so substantially reverse course on this requirement in the final permit. Because the proposed permit on its face mandated that MS4 discharges comply with water quality standards, Petitioners reasonably concluded that it would be sufficient to protect their interests. By deleting the requirement to comply with water quality standards, the Region has reopened the question of whether the permit overall is sufficient to protect water quality in the District's rivers and comply with the Clean Water Act. See *In Re: Teck Cominco Alaska Incorporated, Red Dog Mine*, NPDES 11 E.A.D. 457, 480 (2004).

[13] Petitioners are aware that the Board rejected a similar argument in *DCMS4 I*. They raise the issue again because they respectfully disagree with the Board's prior decision and wish to preserve the issue for possible future judicial review in this matter should the Board decline to reconsider its prior decision.

explanation whatsoever of the Region's basis for that conclusion. Moreover, the record for the permit amendment is utterly devoid of any evidence supporting such a conclusion. An agency acts arbitrarily and capriciously where its action is not supported by a rational explanation and substantial evidence. See *Edison Mission Energy v. FERC*, 394 F.3d 964 (D.C. Cir. 2005)(vacating inadequately explained decision); *Los Angeles v. USDOT* 103 F.3d 1027 (D.C. Cir. 1997)(agency action arbitrary and capricious where supported by no evidence and agency failed to inquire into relevant factors).

4. Notice and opportunity for public comment

In addition to substantive flaws discussed above, the permit also suffers from a procedural flaw: the Region's failure to provide adequate notice and opportunity for public comment. As discussed above, the permit amendment finalized by the Region was drastically different from that proposed. This drastic change deprived petitioners of the opportunity to offer meaningful public comment on the approach taken in the final permit amendment. The CWA and EPA rules explicitly require notice and opportunity for comment on proposed NPDES permits and amendments thereto. 33 U.S.C. §1342(b)(3); 40 C.F.R. §122.62. This right to notice and comment is unlawfully abrogated when the Region so drastically changes the final permit as to make it a totally different amendment than the one proposed. The purpose of the notice and comment requirement in the Clean Water Act and EPA rules is to provide the public with a meaningful opportunity for input on the specific course the agency proposes to take in a permit. That purpose is completely undermined where a central substantive provision of the final permit is completely different from the proposal.

Under the Administrative Procedures Act (APA), "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)(quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546-57 (D.C. Cir. 1983)). The D.C. Circuit has held that "the final rule must be a 'logical outgrowth' of the proposed rule." *Id.* The same concept applies here. See *id.* (noting that "logical outgrowth" doctrine is applicable under statutes that provide for notice and comment other than the APA) (citing *Husquarna AB v. EPA*, 254 F.3d 195, 203 (D.C. Cir. 2001)); *In the Matter of: Old Dominion Electric Coop. Clover, VA*, 3 E.A.D. 779 (1992) (stating that "there may be times when a revised permit differs so greatly from the draft version that additional public comment is required"). As in the context of rulemaking, the public is deprived of notice and a meaningful opportunity to comment on a stormwater permit where key aspects of the final permit bear no resemblance to the proposed language.

In determining whether a final rule is a "logical outgrowth" of a proposed rule, courts consider "whether the party, ex ante, should have anticipated the changes to be made in the course of the rulemaking." *Id.* (internal quotation omitted). Here, petitioners could not have anticipated the changes made to Part I.C.2 or Part VII.P.c of the proposed permit amendment. There was no indication in the proposal that the agency was considering abandoning the prohibition on discharges that contribute to the exceedance of water quality standards in favor of the weaker "current conditions" standard. To the contrary, based on the settlement agreement, petitioners had every reason to believe that the Region fully intended to pursue an approach that would *ensure* compliance with

water quality standards. See Ex. 5 (fact sheet), at 3 (equating proposed amendment with amendment agreed upon by the parties). Indeed, because compliance with water quality standards was petitioners' primary concern in their appeal of the 2004 permit, no settlement would have been reached if EPA had not agreed to this approach. See Ex. 3, at 7-20. As a result, petitioners were in no position to predict the changes made by the Region and thus were denied an opportunity to comment on the entirely novel "current conditions" standard set out in the final permit. See *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997)(final rule was not a "logical outgrowth" of proposed rule where agency abandoned approach in proposed rule although it had not "mention[ed] any problems with" or "express[ed] any interest in changing that aspect of the rule"); *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1186 (remanding NPDES permit where plaintiffs "could not have reasonably anticipated that the final permit would embrace an entirely different standard;" the issue was not "on the table" during the comment period).

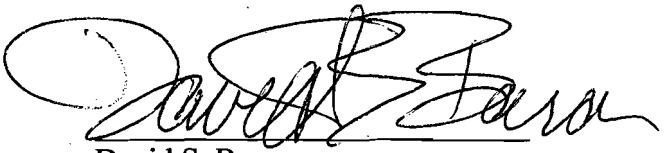
If petitioners had known that the Region was considering abandoning the proposed and agreed upon approach in favor of a radically weaker (and unlawful) one, they would have submitted extensive comments and evidence that may have persuaded the Region of its error. As is evident from the record of this and prior appeals of this permit, the Region has often modified proposed permit language in response to comments from petitioners and others. Yet petitioners here were deprived of any opportunity to do so with respect to language of central substantive importance to the permit.

III. Relief Requested

Petitioners respectfully request that the Region be directed to correct the above-described deficiencies within 120 days. The setting of a deadline is warranted in light of the extraordinary delays by the District and the Region in addressing this matter. As noted above, the District did not complete its MS4 permit application until 1998 (eight years late), and the Region did not issue an MS4 permit to the district until 2000—nearly a *decade* behind the statutory schedule. After this Board found deficiencies in that permit in February 2002, the Region took *another 2 1/2 years* to respond, and—as fully discussed above—still failed to correct key deficiencies identified in the Board's decision. Once again, with the issuance of the final permit amendment that does not ensure compliance with water quality standards, the Region has delayed in implementing the Board's directive. Unless the Region is directed to *correct* (not merely reconsider) these deficiencies by a specific, near term deadline, this process could go on ad infinitum. In the process, the CWA's explicit deadlines for issuance of adequate MS4 permits and for compliance with their terms will be effectively nullified.

The 120-day schedule proposed by Petitioners would allow the Region ample time to draft proposed permit language for the matters at issue, accept public comments, and sign a final permit modification. For example, the Region could take 45 days to draft a proposal, 45 days for public comment, and 45 days to consider public comment and issue the final permit language. The issues raised here have been before the Region for years, and addressing them in a manner consistent with the CWA will hardly require the Region to reinvent the wheel.

DATED this 17th day of April, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review were served by first class mail, postage prepaid, this 17th day of April, 2006 on:

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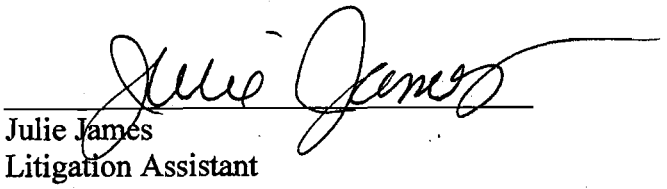

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