GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

June 4, 2010

Mr. Garrison D. Miller
U.S. EPA Region III (3WP41)
Water Protection Division
Philadelphia, PA 19103-5103

Re: Public Comment on Draft District of Columbia Municipal Separate Storm Sewer System – NPDES Permit No.DC0000221

Dear Mr. ~~Miller~~ Garry,

Enclosed herein, please find draft and interim comments of the Government of the District of Columbia (the "District") on the draft version of the District's Municipal Separate Storm Sewer System ("MS4") permit, published April 20, 2010. As was agreed by EPA Region 3 Water Protection Division Director Jon Capacasa, the District will provide detailed and final comments to EPA by June 21, 2010. Accordingly, these draft and interim comments are intended to provide EPA with the sense of what the District's final comments will contain; however, the District reserves the right to modify, delete, and/or supplement its comments prior to submission in final form.

The District has strong interests in the development of this new permit. As the permit holder, the District is responsible for overall compliance with permit requirements. Specifically, the District Department of Environment ("DDOE") serves as the Stormwater Administrator, and is responsible for coordination with other District agencies and the DC Water and Sewer Authority ("WASA") for meeting their individual responsibilities under the permit. See the District Department of the Environment Establishment Act, Subchapter II (Stormwater Management), set forth as D.C. Official Code §§ 8-152.01, *et seq.*

In this letter I provide you with some background on the District's MS4 Permit since it was first issued in 2000, and a summary of our major issues with the Draft Permit.

I. Background on the District's MS4 Permit

Since the issuance of the MS4 Permit in 2000, the District has achieved several significant milestones towards effectively managing and reducing pollution from stormwater discharges to the District's water bodies. During this period, the District implemented stormwater management measures that have resulted in substantial gains in reducing the amount

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of pollution. In 2004, EPA issued the second-round permit to the District. That permit was challenged by two organizations, Defenders of Wildlife, and Friends of the Earth (collectively "DOW/FOE"), and the District[1]. At issue was whether the District is required to use best management practices ("BMPs") to control municipal stormwater discharges, with "an iterative process requiring reexamination of its storm water management practices and continued improvements to the respective storm water management programs while continuing to adequately protect the water quality of the receiving stream."[2] DOW/FOE argued that EPA has the authority to require the MS4 to comply with water quality standards ("WQS"). The District argued that it is legally obligated to control the discharges of pollutants in the stormwater to the maximum extent practicable ("MEP"). The District has stated and continues to assert that Congress codified the District's position when it amended the Clean Water Act (CWA)[3], confirming that permits for municipal discharges of stormwater must require controls to reduce the discharges of pollutants to the MEP using measures that include management practices and such other provisions as EPA deems appropriate.[4] This language differs markedly from that in Section 402(p)(3)(A), which mandates that industrial storm water discharges meet all applicable provisions of the Clean Water Act.[5]

The District, EPA Region III, and DOW/FOE began settlement discussions to resolve the issues. These settlement discussions were unsuccessful. However, the District and EPA agreed on a series of enhancements to the 2004 MS4 permit that were designed to provide additional support for the determination that the system-wide controls required by the Permit would ensure compliance with WQS. Specifically, the District would employ BMPs in an on-going iterative and adaptive management process that would demonstrate quantifiable progress toward achieving applicable WQS.[6] The District issued a Letter of Enhancement to EPA Region III on November 27, 2007 and agreed that the enhanced BMPs described in that Letter would become enforceable permit obligations. The Letter of Enhancement included implementation of a specific number of activities, including structural and nonstructural BMPs, with identifiable milestones that would be added to the MS4 stormwater pollution prevention plan.

II. Major Issues with the Draft MS4 Permit Released on April 20, 2010

The District welcomes the issuance of a new progressive MS4 permit that will help the District meet its environmental goals. However, the draft Permit released by EPA on April 20th, 2010 contains several provisions that cause concern for the District. The main subject areas of the permit that we wish to address include: compliance with DC WQS and total maximum daily load ("TMDL") waste load allocations ("WLA"); provisions concerning volumetric retention

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[1] -See procedural history in the EPA Draft Fact Sheet, NPDES Permit Number: DC0000221 (Reissuance) ("Draft Fact Sheet"), footnote 1 at page 2.
[2] - See Draft Fact Sheet, Proposed Amendment No 1 to NPDES Permit No. DC0000221 at page 2.
[3] -See 33 USC §§ 1251, *et. seq.*
[4] - See CWA Section 402(p)(3)(B)(iii), 33 U.S.C. 1342(p)(3)(B)(iii).
[5] -See CWA § 301 (33 USC §1311)
[6] -See, Draft Fact Sheet, p. 4, citing "National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges," 55 F.R. 47990 (Nov. 16, 1990).

standards for non-federal facilities; performance standards for the DC Retrofit Program; and development of TMDL implementation plans and reporting requirements.

Compliance with WQS and TMDL WLA (Parts 1.4, 4.1, 8, 9.4)

The District is dismayed that despite its understanding to the contrary, and its good faith efforts of providing a suite of aggressive BMPs with quantifiable milestones in its 2007 Letter of Enhancement, EPA has included the requirement to meet numeric WQS, and TMDL WLA numeric standards in the draft Permit. While the District appreciates that language in the Draft Fact Sheet indicates EPA's awareness that CWA Section 402(p)(2) requirements for municipal dischargers differ from those for industrial dischargers, the District is not aware of any case law that would indicate that the Fact Sheet would trump very clear permit language. The District therefore interprets Part 1.4 of the Draft Permit to mean that even if the District satisfies all permit requirements, it is ONLY demonstrating "progress toward compliance with DC WQS," not actually meeting the WQS or WLA, which it is also required to do in subparts 1. and 2. of Part 1.4.

Ultra-urban, highly developed watersheds possess a variety of characteristics which can make management of stormwater very difficult and complicate attainment of WQS. It is not possible to treat discharges from an MS4 in a similar fashion as those from an industrial facility or wastewater treatment plant. Unlike those facilities, discharge from an MS4 varies due to the nature of the rainfall. Furthermore, the technology for treatment at the end of the each storm sewer is not practicable. The Permit holds the District accountable for unqualified and immediate compliance with WQS, despite EPA's assertion on page 4 of the Draft Fact Sheet (Reissuance) that the District "will be unable to attain all Water Quality Standards within the first several MS4 permit cycles". Therefore, as written, the permit places the District in violation of WQS and the Permit from the date it becomes effective.

The District requests the EPA change language concerning compliance with WQS under the new permit to reflect that the CWA recognizes the difficulties associated with storm water discharges in CWA Sections 402(B)(iii) and 402(p)(3)(B)(iii).[7] These CWA Sections explicitly provide that permit requirements for discharges from the MS4 shall require controls to reduce the discharge of pollutants to the MEP, including BMPs, control techniques and system design and engineering methods, and such other provisions as the Administrator determines appropriate for the control of such pollutants. EPA is required to assess the effectiveness of these controls through "[e]stimated reductions in loadings of pollutants from discharges from MS4s expected as a result of the municipal storm water quality management program."[8]

As is clear from the preceding text, the parties have engaged in at least ten years of discussion and/or litigation as to whether the MS4 permit must require compliance with WQS. While the parties have not hitherto discussed or litigated whether the permit must also

[7] -33 U.S.C. §§1311(b)(1)(C), 1342(p)(3)(B)(iii).

[8] - 40 CFR 122.26(d)(2)(v)

incorporate WLAs as numeric limits, DDOE points out that compliance with WLAs would effectively constitute compliance with WQS, and therefore the permit should not distinguish between WQS and WLA. Rather, the permit should ensure that pollutant discharges for the parameters listed in the TMDL are reduced to the MEP through the use of BMPs. Such treatment would be consistent with case law to date, as well as EPA's approach in the Chesapeake Bay Program's TMDL for nutrients and sediments. Furthermore, in *Tualatin Riverkeeper vs. Oregon Department of Environmental Quality*[9], the court found that failure to meet an approved pollutant load reduction benchmark, whose achievement would reflect adequate progress towards reducing pollutant loads, should not give rise to a permit violation, but rather, would give rise to an obligation on the part of the permittee to follow the adaptive management process to improve the stormwater management plan.

Accordingly, the District objects to all language in the Permit that requires the District to meet numeric standards in order to achieve permit compliance:

> Part 1.4 (1) and (3) of the draft permit requiring the District to "comply with existing District of Columbia Water Quality Standards (DCWQS), and the accompanying language that provides "compliance with all performance standards and provisions in this Permit shall constitute progress toward compliance with DCWQS";
> Part 4.1.1b "discharges do not cause or contribute to an excursion above any (1) applicable TMDL WLAs; or (2) DC WQS, whichever is more stringent";
> Part 8.1 (3)(A) –" a specified ultimate date for compliance with the WLA.
> Part 8.1 (3)(C) – "Numeric benchmarks" (for the TMDLWLA);
> Part 8.1 (3)(D) – "an interim compliance deadline for achieving the *percentage* of pollutant load reductions";
> Part 9.4 "discharges are causing or contributing to a violation of applicable WQS".

The District reserves the right to object to any language requiring compliance with numeric standards included in the Permit but not listed above. With regard to Part 8.1, should EPA persist in including numeric standards over the District's objection, the Permit must specify that the District will be in compliance as long as it is making efforts to the MEP and is taking corrective action through an adaptive management process to attain any numeric standards for which the District does not meet a deadline.

Provisions concerning volumetric retention standards for non-federal facilities (Part 4.1.1)

The District is very concerned with the performance standard requirements for stormwater management for new development and redevelopment activity stipulated in the Draft Permit. It is critical that any performance standards be appropriate and achievable for development activity in the high density, highly-impervious settings characteristic of the District of Columbia.

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[9] - Tualatin Riverkeepers v. Dept of Environ Quality, A136050, 060100752 (OR Ct. App. 2010)

In addition, the District wishes to point out the several local MS4 permits in both Maryland and Virginia do not include a retention standard or include a retention standard that must be met to the MEP. The implementation of a 1.2 inch retention standard could greatly increase the regulatory "gradient" that is evolving across the mid-Atlantic region. Both Maryland and Virginia have weaker stormwater management regulations, with Virginia's stormwater regulatory requirements being weaker than Maryland's. In Maryland, the intent is to use green infrastructure to the "extent reasonably practicable" to meet the redevelopment standard for the amount in excess of 1 inch of retention for their greenfield standard. Ironically, implementation of more stringent stormwater standards in the District than in surrounding jurisdictions creates a perverse incentive for sprawl by creating an unlevel playing field that will likely accelerate development and growth in DC's neighboring suburban jurisdictions, rather than concentrating it in the urban, developed District core. This notion is at odds with fundamental and accepted concepts of smart growth and also puts the District at a competitive disadvantage with other jurisdictions in terms of economic development.

Performance Standards for the DC Retrofit Program (Part 4.1.2)

The District has implemented very progressive retrofit programs for incorporating pervious surface into local infrastructure. However, the most challenging area to retrofit is the public right-of-way ("ROW"), which can be problematic due to constraints in space and varying site conditions. Further, almost all of the District's transportation projects involve reconstruction in existing ROW, where there is practically no ability to mitigate these constraints. Because of these conditions, the District cannot agree to a volumetric standard for retaining runoff from the ROW. The District can commit to implement stormwater management retrofits in ROW to the MEP through road reconstruction projects, redevelopment projects that upgrade public ROW, and stand-alone retrofit projects. The total area where stormwater management retrofits are implemented should apply toward this requirement.

Development of TMDL Implementation Plans and reporting requirements (Part 8.0)

As you are aware the Federal District Court for the District of Columbia recently remanded most of the District's TMDLs[10] and staggered the duration of their vacatures. Accordingly, the District is concerned that it would be inappropriate for the Permit to require the updates to existing TMDL implementation plans, creation of a new TMDL Implementation Plan, and development of interim milestones (and the like) as these existing TMDLs will be modified. As you will recall conversion of the two TMDLs from annual to daily requirements, which were the subject of the previous challenge by DOW/FOE, required approximately eighteen (18) months.

[10] Anacostia Riverkeeper, Inc. and Friends of the Earth, v. Environmental Protection Agency, Civil Action No. 09-0098 (JDB)

III. Conclusions

The District would like to reiterate the fact that we welcome the issuance of a progressive NPDES permit for the city's MS4. The District's rivers and tributaries provide a tremendous resource to our residents and visitors from around the world. As the restoration continues, this value will only grow. Further, our work to successfully manage stormwater sets an important precedent for not only the Chesapeake region, but for the nation.

Nevertheless, the Draft Permit issued by EPA on April 20, 2010 does contain some provisions, that if required in the final Permit will be problematic for the District. Compliance with DC WQS and TMDLs as part of the MS4 permit is an impractical approach towards obtaining optimal water quality. The risk of perpetual violation of the Permit is too great for the District, and could lead to costly, drawn out litigation that will greatly limit the amount of time and resources available to implement a progressive stormwater management program.

The District greatly appreciates the opportunity to provide these general comments on the Draft Permit and look forward to providing more detailed comments by June 21st. We value the working relationship we have with EPA in reducing pollution in the nation's capital. If you require further assistance, or have any questions or comments, please contact the DDOE Stormwater Administrator Jeffrey Seltzer at 202-535-1603, or at Jeffrey.Seltzer@dc.gov.

Sincerely,

Hamid Karimi, Ph.D.
Deputy Director
District Department of Environment
Natural Resources Administration