EARTHJUSTICE

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NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 4, 2010

Via email (miller.garrison@epa.gov)
and U.S. Mail
Mr. Garrison D. Miller
United States Environmental Protection Agency
Office of NPDES Permits and Enforcement (3WP41)
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Re: Proposal to Reissue NPDES Permit for Municipal Separate Storm Sewer System (MS4) to Government of the District of Columbia, Draft Permit No. DC0000221

Dear Mr. Miller:

Earthjustice submits the following comments on behalf of Anacostia Riverkeeper, Potomac Riverkeeper, Waterkeeper Alliance, and D.C. Environmental Network,[i] regarding EPA Region 3's proposal to re-issue the NPDES permit for discharges from the District of Columbia Municipal Separate Storm Sewer System (hereafter the "MS4 Permit"). These groups also fully endorse the comments submitted by NRDC on behalf of a coalition of local water quality advocates, and we incorporate those comments by reference as though fully stated herein.

Although the proposed permit contains significant new provisions that mark an improvement over prior versions of the permit, it continues to fall short of legal requirements for issuing NPDES permits. Consequently, the proposed permit virtually guarantees that for many years to come water quality conditions in the Potomac River, Anacostia River, Rock Creek, and their tributaries will continue to be unsuitable for fishing and swimming and aquatic wildlife habitat, especially after the frequent storm events that are common in the region. This is contrary not only to the Clean Water Act ("CWA") and District law, but also to the Region's goal of issuing a permit that would serve as "a model to other municipalities for preventing runoff from washing harmful pollutants into streams and rivers in the [Chesapeake] Bay watershed."[1]

Before issuing the final permit, the Region must substantially revise the permit's conditions and add new conditions that will meet the following requirements for NPDES permits. As proposed, the draft permit provisions do not satisfy these key non-discretionary legal requirements:

- **Water quality standards.** The permit must include conditions that ensure compliance with water quality standards for the District of Columbia and downstream receiving state

[1] EPA press release, "EPA Proposes 'Next Generation' Storm Water Controls in Clean Water Permit for Washington D.C.," quoting Shawn M. Garvin, EPA mid-Atlantic Regional Administrator.

1625 MASSACHUSETTS AVENUE, SUITE 702 WASHINGTON, DC 20036-2212
T: 202.667.4500 F: 202.667.2356 E: dcoffice@earthjustice.org W: www.earthjustice.org

waters. Accordingly, the permit must explicitly prohibit discharges from the MS4 that cause or contribute to violations of water quality standards. In addition, to the extent the Region intends to meet this requirement in part by relying on stormwater management plans and programs that the District will develop and implement, the Region must (1) add to the permit "clear, specific, measurable, and enforceable"[2] minimum conditions for such programs and plans, to ensure that, when implemented, they will achieve water quality standards; and (2) explicitly require compliance with such programs and plans as enforceable conditions of the permit (including the District's stormwater management plan and any individual plans or programs that the District is required to develop and implement for street sweeping, tree canopy, best management practices, and the like). Further, before taking final action on the permit the Region must supply record evidence and a reasoned explanation to support a finding that the permit conditions (including programs and plans that are developed outside the permit) will in fact ensure compliance with water quality standards.

- **Reduction of Pollutants to the Maximum Extent Practicable.** The permit must require the District to implement controls to reduce discharges of pollutants to the maximum extent practicable (the "MEP" requirement). Further, before issuing the final permit the Region must supply record evidence and a reasoned explanation demonstrating that the chosen permit conditions will, in fact, meet the MEP requirement. As with conditions for achieving compliance with water quality standards, to the extent the Region is relying on programs and plans developed and implemented by the District, the permit must add to the permit "clear, specific, measurable, and enforceable" minimum conditions for such programs and plans, and explicitly require compliance with such programs and plans as enforceable conditions of the permit

- **Compliance with TMDL Wasteload Allocations.** The permit must include effluent limitations that ensure compliance with wasteload allocations ("WLA") for the D.C. MS4 in applicable total maximum daily loads ("TMDLs"). Because there is no evidence that numeric limitations are infeasible, such effluent limitations must include quantitative, numeric limitations in addition to qualitative stormwater control measures. Further, to the extent the Region intends to meet this requirement in part by relying on TMDL implementation plans that are developed and implemented by the District, the Region must require implementation of those plans as enforceable conditions of the permit.

I. Permit Background

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 required that MS4 systems be in compliance with applicable CWA requirements no later than 1994.

[2] *See* EPA MS4 Permit Improvement Guide, EPA 833-R-10-001 (April 2010).

Despite these clear mandates, 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 the permit lacked water-quality based effluent limits to assure compliance with water quality standards in the receiving waters (except for one small tributary of the Anacostia – Hickey Run). Defenders of Wildlife ("Defenders") and Friends of the Earth ("FOE") challenged the permit. On February 20, 2002, EPA's Environmental Appeals Board ("EAB") granted the petition in part, and remanded the permit to the Region "to provide and/or develop support for its conclusion that the permit will 'ensure' compliance with the District's water quality standards and to make whatever adjustments in the Permit, if any, might be necessary in light of its analysis." *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 May 9, 2002.

Although the EAB decision still stands, and governs the current proposed permit, the Region has failed to heed the EAB's mandates. On remand – more than two and one-half years following the EAB's decision in *D.C. MS4 I* – the Region in 2004 proposed a revised permit that, like its predecessor, lacked effluent limitations adequate to assure compliance with applicable water quality standards. FOE and Defenders again challenged the permit on the basis that this omission violated the CWA, EPA rules, and the EAB's decision.

Following negotiations, the parties reached a settlement on May 10, 2005, whereby the Region would amend the permit to explicitly prohibit discharges to or from the MS4 system that cause or contribute to the exceedance of water quality standards, among other things. The Region publicly proposed an amendment containing this language in July 2005. However, on March 14, 2006, the Region adopted a final amendment that, unlike the negotiated language, did not prohibit discharges that would cause or contribute to noncompliance with water quality standards. Instead, the 2006 final amendment merely prohibited discharges that would contribute to worsening water quality compared to "current conditions." Because the current conditions violated water quality standards, and because the final permit language differed markedly from the proposed language, the groups again petitioned the EAB for review.

On Oct. 29, 2007, EPA withdrew the contested language from the 2006 amendment, and informed the EAB that "EPA will prepare a new draft permit modification addressing the withdrawn permit conditions… and will submit the revised draft permit amendment terms for public comment." Now, more than **eight years** have passed following the EAB's order in *D.C. MS4 I*, and more than two and one-half years following the Region's withdrawal of the 2006 amendment—during which water quality in the Potomac and Anacostia Rivers and Rock Creek has continued to suffer conditions that violate water quality standards and impair human and wildlife uses. Despite this, the Region continues to flout the EAB'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).

Having failed to propose a revised permit that addressed the EAB's order, the Region entered into a series of "letter agreements" with the District, whereby the District agreed to undertake additional commitments in its stormwater management program (*See* MS4 Letter

Agreement attached to Draft Fact Sheet). The Region characterizes this agreement as "significant new activities, which emphasized the shifting nature of the MS4 program within the District from planning to implementation of the plans with specific objectives and measurable benchmarks." Draft Fact Sheet at 3. However, the District has either failed to comply or has failed to report compliance with a number of those commitments, including the following:

- The agreement required the District to "[p]rovide final detailed plan for achieving the optimal District tree canopy goal in the 2009 Implementation Plan, dated August 19, 2009." The District failed to complete a detailed plan for achieving optimal tree canopy or submit it in the August 19, 2009 Implementation Plan.

- The agreement required the District to "Complete the 'Low Impact Development (LID) Stormwater Control Structures Maintenance Manual' by April 30, 2009." As of the latest Implementation Plan and Annual Report, the District has failed to complete this manual.

- The agreement required the District to "Complete a structural assessment on all District properties maintained by Office of Property Management (OPM) to determine current roof conditions and the feasibility for green roof installation by April 30, 2009." As of the latest Implementation Plan and Annual Report, the District has failed to complete this manual.

Despite these failures, the Region has taken no enforcement action. Instead, the Region states that its proposed permit is based in part on the letter agreement. Draft Fact Sheet at 3.

II. Legal Requirements for NPDES Stormwater Permits

NPDES permits must include effluent limitations adequate to ensure compliance with applicable water quality standards in the receiving waters. In particular, Congress required EPA and the States to achieve "any more stringent limitation" that is "required to implement any applicable water quality standards established pursuant to" the Clean Water Act ("CWA"). 33 U.S.C. § 1311(b)(1)(C). EPA regulations thus prohibit the issuance of NPDES permits "[w]hen the imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d) (emphasis added). The regulations further require 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. 40 C.F.R. §122.44(d)(1)(i). In addition, EPA's CWA regulations require that "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" in any applicable TMDL. *Id.* § 122.44(d)(1)(vii)(B).

Separate from and in addition to requiring compliance with water quality standards, Congress required that "[p]ermits for discharges from municipal storm sewers… shall require controls to reduce the discharge of pollutants to the maximum extent practicable…." 33 U.S.C. § 1342(p).

The U.S. Court of Appeals for the D.C. Circuit has affirmed that compliance with water quality standards is a strict requirement applicable to all NPDES permits. "[O]nce a water quality standard has been promulgated, section 301 of the CWA requires *all NPDES permits for point sources* to incorporate discharge limitations necessary to satisfy that standard." *American Paper Institute, Inc. v. U.S. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (emphasis added). "Section 301 'imposes this strict requirement as to all standards--*i.e.*, permits must incorporate limitations necessary to meet standards that rely on narrative criteria to protect a designated use as well as standards that contain specific numeric criteria for particular chemicals.'" *American Iron and Steel Inst. v. U.S. EPA*, 115 F.3d 979, 992 (D.C. Cir. 1996). To meet this requirement the Region must demonstrate how the record of facts on which the permit is based "supports the conclusion that the Permit would, in fact, achieve water quality standards" *See D.C. MS4 I*, 10 E.A.D. at 342-43 (2002).[3]

Finally, the Region's final action must comply with fundamental principles of reasoned agency decisionmaking. The Administrative Procedure Act instructs courts to set aside agency action "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In order to ensure that final action on the permit survives this standard, the Region must provide substantial evidence along with a "rational connection between the facts found and the choice made" to approve the permit. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). The Region must supply a reasoned basis for its decision to include the proposed permit conditions, as well as its decision to omit others, in light of the foregoing legal requirements. This is critical because the Region has failed to supply a reasoned basis for concluding that past versions of the permit ensure compliance with water quality standards. *See D.C. MS4 I*, 10 E.A.D. at 341-43 (remanding the permit where the EAB found "nothing in the record, apart from District's section 401 certification, that supports the conclusion that the Permit would, in fact, achieve water quality standards").

III. Current Conditions Violate Water Quality Standards and Exceed Wasteload Allocations for the D.C. MS4

The foregoing requirements apply to this permit because the stormwater discharged by the District of Columbia MS4 causes or contributes to violations of water quality standards in the receiving waters. The District's own 2008 water quality assessment demonstrates that discharges from the MS4 are causing or contributing to current conditions that violate water quality standards in 23.5 miles of rivers and streams, 238.40 acres of lakes, and 5.23 square miles of estuaries in the District.[4] In fact, the District's most recent assessments demonstrate

[3] EAB stated in its review of an earlier version of this permit, "the determination relative to water quality standards that the permit issuer is required to make at the time of issuance is that the permit will achieve compliance within three years." *Id*. n. 22, citing Memorandum by E. Donald Elliot, EPA Assistant Administrator and General Counsel, to Nancy J. Marvel, Regional Counsel Region IX, at 4-5 (Jan. 9, 1991). The proposed permit unlawfully fails to do so.

[4] 2008 Integrated Report to EPA and Congress Pursuant to Sections 305(b) and 303(d) of the CWA, Tables 3.7, 3.11, and 3.15.

that **none** of the District's waters enjoy current conditions where "all designated uses are attained and no use is threatened."[5] Previous versions of the D.C. MS4 permit have done nothing to alleviate these water quality conditions. Therefore, in the final reissued permit the Region must include more robust, enforceable permit conditions. Failure to do so will violate fundamental principles of reasoned agency decisionmaking and leave the permit open to legal challenge.

In addition to violating water quality standards, current conditions in the MS4's receiving waters drastically exceed wasteload allocations for the MS4 system in EPA-approved TMDLs. The MS4 Permit must therefore include effluent limitations that ensure compliance with individual WLAs for the D.C. MS4. For example, such limitations must ensure that the MS4 will meet its individual allocation of the "85% overall reduction of sediment/TSS"[6] and the "90 percent reduction in storm water bacteria,"[7] which EPA has already concluded are needed to achieve compliance with the District and Maryland's water quality standards in the Anacostia River. Because discharges from the MS4 contribute to water quality violations for a number of parameters, 40 C.F.R. §122.44(d)(1)(vii)(B) requires that the final MS4 Permit contain effluent limitations for each pollutant that is subject to an EPA-approved TMDL wasteload allocation.

IV. The Permit Fails to Prohibit Discharges that Cause or Contribute to Violations of Water Quality Standards

Despite the foregoing requirements, the Region has once again failed to prohibit discharges from the MS4 that cause or contribute to violations of water quality standards.

A. The permit must be based on record evidence to support the conclusion that the permit controls will ensure compliance with water quality standards.

The permit has no express requirement for the MS4 to achieve reductions needed to meet standards at all, much less by any specified time. Instead, the Region relies on the District – the permittee – to "manage, implement and enforce a stormwater management program" as the means by which EPA purports to ensure compliance with WQS, TMDL allocations, and other legal requirements for NPDES permits. *See* Draft Permit at 2, 6. This approach would unlawfully delegate the Region's duty to "impos[e] conditions" that will "ensure compliance with the applicable water quality requirements of all affected States," to the permittee. *See* 40 C.F.R. § 122.4(d). Instead, the law requires the Region to impose conditions, prior to permit approval and based on evidence in the record, that the Region itself determines are adequate to ensure compliance with standards.

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[5] DDOE, Draft Methodology for the Development of the 2010 Section 303(d) List and the 2010 Section 303(d) List of Impaired District of Columbia Waters, unnumbered p. 8 (Mar. 31, 2010).

[6] EPA Decision Rationale, Total Maximum Daily Loads, Anacostia River Basin Watershed, For Sediment/Total Suspended Solids, Montgomery and Prince George's Counties, Maryland and the District of Columbia, p. 25 (July 24, 2009)

[7] EPA Decision Rationale, Total Maximum Daily Loads, Anacostia Watershed, For Fecal Coliform Bacteria, p. 24, 28 (signed Aug. 28, 2003, amended Oct. 16, 2003).

The Region does not offer record evidence to support the conclusion that the permit is sufficient to ensure achievement of water quality standards. Instead it simply recites the applicable legal requirements and deems the permit adequate to meet those requirements. But without supporting evidence, the Region cannot presume that the "effluent limitations expressed in this Permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act." Draft Permit at 44. Nor is it lawful for the Region to presume without supporting evidence that "Discharges controlled in accordance with the standards [for new and redevelopment] shall be considered to be as stringent as necessary to ensure that the discharges do not cause or contribute to an excursion above any (1) applicable TMDL WLAs; or (2) DC WQS." *Id*. at 9. It is also unlawful for the Region to presume, without supporting evidence, that "[c]ompliance with all performance standards and provisions contained in this Permit shall constitute progress toward compliance with DCWQS," *id*. at 2. Moreover, a requirement to achieve "progress" is, on its face, inadequate to "*ensure compliance*" with water quality standards as required by 40 C.F.R. § 122.4(d) (emphasis added). Thus it is insufficient for the Region to imply that the permit requires "progress toward attaining water quality criteria," or that the permit requires compliance with water quality standards through "an incremental process." Draft Fact Sheet at 4. Finally, the Region cannot evade this fundamental requirement of the Clean Water Act by claiming, without a scintilla of supporting evidence, that the District "will be unable to attain all Water Quality Standards within the first several MS4 permit cycles." *Id*. Neither the permit, fact sheet, nor the accompanying materials offer any factual support for this claim; in any case, it is directly contrary to Congress' clear mandate.

In short, the permit must be based on affirmative evidence and a reasoned explanation supporting the claim that compliance with the permit's provisions will, in fact, ensure compliance with water quality standards. The EPA EAB decision in *D.C. MS4 I*, which controls this case, made clear that the Region's bare claim that "the BMPs set forth in the District's SWMP are 'reasonably capable of achieving water quality standards," does not meet legal requirements absent supporting evidence. *D.C. MS4 I*, 10 E.A.D. at 342. The same is true today.

B. If the final permit is not significantly improved it will, like past similar permit provisions, ensure continued violations of water quality standards.

Contrary to any claim that the permit ensures compliance with water quality standards, the available evidence shows that water quality violations have persisted under permit provisions much like the current proposed provisions. There the Region also required the permittee to develop and implement a stormwater management plan purportedly as a means of meeting the applicable legal requirements. *See, e.g.* 2000 MS4 Permit (stating that "[t]he permittee shall develop and implement improvements and modifications in current SWMP practices in order to reduce the pollutant load to the extent necessary to meet the requirements of 40 CFR 122.26 (d)(2)(iv) and the provisions of the Clean Water Act for all areas within the District…."). The Region has overseen the District's implementation of this and similar requirements for a decade, yet the Region offers no evidence that they have produced **any** measureable reduction in the discharge of stormwater pollutants into the District's waters—much less that they have produced reductions of the magnitude and rate needed to achieve compliance with water quality standards.

Given the absence of evidence that similar prior permit provisions have failed to produce results, the Region must take a drastically different approach to the current MS4 Permit. In particular, the Region must impose clear and specific conditions that, when implemented will achieve water quality standards. In doing so the Region must follow the approach set out in EPA's MS4 Permit Improvement Guide at 5-6:

> First, and most importantly, permit provisions should be clear, specific, measurable, and enforceable. Permits should include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation. Doing so will allow permitting authorities to more easily assess compliance, and take enforcement actions as necessary.

As proposed, the permit is plagued by vague and unclear requirements that are certain to produce little to nothing in the way of concrete pollution reductions. For example:

- The permit states that the "measures required [in Table 1] are terms of this Permit." Draft Permit at 6. However, Table 1 is simply a list of program elements such as "Existing Structural and Source Controls," and "Roadways," with no specific, measurable requirements for reducing discharges of pollutants under those program elements. *Id*.

- The permit requires the permittee to implement "controls to minimize and prevent discharges of pollutants," but specifies no minimum conditions for complying with this requirement. *Id*. at 5. Rather, the permit merely requires that "the *strategies used* to reduce or eliminate these pollutants *shall be documented* in subsequent Annual Reports and in revisions to the Stormwater Management Plan." *Id*. at 6. This leaves open the possibility of no actual minimization or prevention of the discharge of pollutants.

- The permit requires the District to "continue to develop, implement, and enforce a green technology program," but specifies no minimum conditions for such program. *Id*. at 7.

- Although the permit requires the District to "*report on* the percentage of decreased impervious cover and increased number and square footage of green roofs and other practices that infiltrate, evapotranspire and harvest stormwater," (emphasis added), the permit does not require the permitting to achieve these actions to any particular degree or by any specified time. *Id*. at 8.

- The permit requires the permittee to "develop accountability mechanisms to ensure maintenance of stormwater control measures…Those mechanisms *may include* combinations of deed restrictions, ordinances, maintenance agreements, *or other policies deemed appropriate by the District*." *Id*. at 12. This language thus establishes no minimum outcome for these critical accountability mechanisms.

- The permit allows TMDL Implementation Plans to be based on the permittee's choice of "[a] set of controls for achieving the MS4 [wasteload allocation], which *may include* stormwater pollution reduction and elimination laws and regulations, LID

To be effective and consistent with EPA's MS4 permit writing guide, these provisions need to be revised significantly to provide clear, enforceable, minimum conditions with which the District must at a minimum comply.

C. The ineffectiveness of the proposed permit language is illustrated in the history of the District-Region 3 letter agreement

The Region has for the last several years failed to propose an up-to-date permit for the D.C. MS4, instead relying on its "letter agreement" with the District. However, the letter agreement has already proven to be largely unsuccessful except where the requirements of the agreement largely replicated actions the District was already taking in the regular course of its stormwater program. The agreement contained numerous provisions that allowed the District to choose its preferred level of compliance; in some cases this left open the possibility that the District would make zero progress while still technically not being in violation of the agreement:

- Tree canopy – The agreement stated that "[t]he District shall *make best efforts* to achieve optimal tree canopy by planting..." (emphasis added).

- Tree canopy – The agreement stated that "[n]o later than August 19, 2008, develop and implement a schedule to achieve an optimal tree canopy goal. The District shall *make best efforts* to implement said schedule no later than..." (emphasis added).

- LID Practices – "*To the extent feasible*, DDOT will comply with all LID options..."

- LID Practices – "The City shall *make best efforts* to devise a LID plan and schedule to be completed no later than December 31, 2014, which shall..."

It is unclear whether the District has a real enforceable obligation to complete any of these requirements, because the language of the agreement itself effectively voids the requirements and eliminates any accountability for failure to achieve the agreed actions. Moreover, most of the provisions of the agreement do not obligate the District to demonstrate that actual pollution reductions have been achieved, and instead only require the District to undertake "best efforts" to write some plan or schedule. This ineffective language, and the District's history of noncompliance with the letter agreement discussed above in section I, speak volumes about the likely effectiveness of the proposed permit. Unless the final permit contains significantly improved provisions in accordance with EPA's MS4 Permit Improvement Guide, adoption of the permit as written will be arbitrary and capricious, and not in accordance with the law requiring the Region to ensure compliance with water quality standards.

V. The Permit Fails to Require Controls to Reduce Pollutant Discharges to the Maximum Extent Practicable.

The Region has not even attempted to incorporate the "maximum extent practicable"

("MEP") standard into the permit. Neither the proposed permit nor the proposed Fact Sheet demonstrate that the permit "requires controls to reduce the discharge of pollutants to the maximum extent practicable." There are no assessments or evidence provided to support a finding that the stormwater management plan will reduce pollutants to the maximum extent practicable, other than bare assertions in the proposed fact sheet. Because the Region's permit action must be supported by record evidence and a reasoned explanation, the failure to demonstrate compliance with the MEP standard is arbitrary and capricious and not in accordance with the CWA §402(p), 33 U.S.C. § 1342(p).

The draft fact sheet attempts to address the MEP requirement, but in doing so turns that requirement on its head. The Region claims that "the attainment of water quality criteria is an incremental process, consistent with section 402(p)(3)(B) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), so long as permittees reduce the discharge of pollutants to the maximum extent practicable (MEP) within each permit cycle." Draft Fact Sheet at 4. This is flatly incorrect. The MEP standard for MS4 permits and the requirement for compliance with water quality standards for all NPDES permit are separate, and both apply independently of one another. The MEP requirement was adopted in 1986 and set forth in CWA Section 402(p), 33 U.S.C. § 1342(p), while the longstanding requirement for all NPDES permits to "ensure compliance" with applicable water quality standards is governed by CWA Section 301, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. § 122.4(d). In adopting the maximum extent practicable standard for MS4s, Congress by no means expressed an intent to repeal the earlier-adopted, fundamental requirements of CWA § 301. Quite to the contrary, the Conference Report for the 1987 Water Quality Act 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). Thus, the Region must include conditions both to the MEP standard as well as to ensure compliance with water quality standards.

VI. The Permit Fails to Include Effluent Limits for All Applicable TMDL WLAs for the MS4.

CWA regulations require that "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" in any applicable TMDL. *Id.* § 122.44(d)(1)(vii)(B). To meet this requirement, the Region should explicitly require the MS4 to **achieve** the pollution reductions necessary to comply with TMDL loads that have been allocated to the D.C. MS4 system. Further, the WLAs must be incorporated as numeric effluent limitations in the permit itself.

The fact that EPA has authority to require compliance with BMPs does not justify failure to include numeric effluent limitations. Numeric effluent limits are not only eminently feasible, they are also readily available in the form of existing WLAs that are dedicated exclusively to the D.C. MS4. The language in the Draft Permit fails to include such numeric limits. The Draft Permit at 38 states that "[t]he Permit includes all TMDL WLAs applicable to the District MS4 approved or established as of the effective date of this Permit.") However, there is no basis for asserting that the permit "includes" all applicable WLAs, when clearly it does not. Unless it is made explicitly clear that applicable WLAs are numeric effluent limits that the MS4 must comply with, this language is ineffective.

It is also not sufficient for the permit to rely on the District to implement a stormwater management plan that is "consistent with applicable waste load allocations (WLAs) for each approved Total Maximum Daily Load (TMDL) for each receiving water body." Draft Permit at 2.[8] The draft permit does not require actual attainment of WLAs in the stormwater management program, and the Region has not supplied a basis for concluding that the District's program will, in fact, achieve reductions needed to meet applicable WLAs. This omission is not excused by the fact that EPA has authority to rely on BMPs in certain circumstances. Instead, EPA's own guidance states that, even when a permit relies on stormwater management practices or BMPs, evidence in the administrative record "needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL."[9] Neither the permit nor the draft fact sheet and attached documents contain such support.

Finally, the permit violates anti-backsliding requirements of the CWA. The Act prohibits renewal or reissuance of a permit that contains "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," except in limited circumstances that are inapplicable here. 33 U.S.C. § 1342(o) and 40 C.F.R. § 122.44(l). Under these provisions the permit must be at least as stringent as prior versions. A previous iteration of the permit contained an "aggregate numeric effluent limit for four outfalls into Hickey Run." *D.C. MS4 I*, 10 E.A.D. at 324. However, the permit now lacks any numeric effluent limits on discharges from any MS4 outfalls, including those that discharge into Hickey Run. Although the EAB remanded the permit to the Region to determine whether to include an aggregate numeric limit or a separate limit for each outfall, it did not suggest that EPA could entirely eliminate the numeric limits for Hickey Run. The final permit must restore numeric effluent limits for Hickey Run that are at least as stringent as the prior version of the permit.

VII. Some Permit Provisions Violate Public Notice and Comment Requirements by Allowing EPA or the Permittee to Alter the Permit Requirements Outside of the Public Permit Process

The permit relies heavily on programs and plans that will be developed by the District, after the permit is issued and outside of the public notice and comment procedures for the MS4 permit. Such programs and plans include but are not limited to TMDL Implementation Plans and a stormwater management program. This violates notice and comment requirements because those plans and programs will not have been submitted to public scrutiny prior to permit

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[8] Note that the statutory and regulatory provisions cited in conjunction with TMDL WLAs do not relate to TMDL wasteload allocations. *See* Draft Permit ¶ 1.4.2. 33 U.S.C. § 1342(p)(3)(B)(iii) requires that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable…." 40 C.F.R. § 122.44(k)(2) and (3) relate to EPA's authority to require compliance with BMPs.

[9] U.S. Environmental Protection Agency, Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs at 4-5 (2002), (available at http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf), citing 40 C.F.R. §§ 124.8, 124.9 & 124.18).

approval, even though the Region relies on these programs and plans to meet the legal requirements for issuing MS4 permits. It is not enough that the District government may provide a public process for those individual plans and programs. In order to rely on such programs EPA itself must determine, prior to issuing the permit, that such programs will meet water quality requirements. Moreover, as a practical matter, asking members of the public to keep track of D.C.'s proposals for numerous plans and program changes is unreasonable. Such a piecemeal approach will ensure that very few District residents will give input or even be aware of decisions that are of critical importance to the District's ability to achieve clean water in the Potomac, Anacostia, and Rock Creek.

The following provisions may run afoul of notice and comment requirements because they expressly allow the EPA or the District to modify the District's stormwater program without requiring advance public notice and opportunity to comment:

- "The set of BMPs specified in the Permit *can be adapted* as opportunities change, as long as interim compliance deadlines for WLAs are achieved." Draft Permit at 6 (emphasis added).

- "EPA reserves the right after a review and approval of each plan modification/annual report to *modify this permit* for purposes of requiring additional numeric and/or narrative effluent controls on the discharge of pollutants from the MS4." *Id*. at 40 (emphasis added).

- "EPA reserves the right to *modify the Permit* as needed, when monitoring results set forth in Sections 5 and 8 of the permit show that current practices required by this Permit are not sufficient to minimize pollutants in stormwater discharges or other unauthorized discharges into the MS4 System as necessary to comply with standards contained in section 1.4 herein." *Id*. at 41 (emphasis added).

The Region must specify that any such modifications to the permit are subject to public notice and comment procedures. Failure to do so would run counter to EPA EAB's order relating to the 2000 version of this permit. In that permit the Region purported to allow monitoring requirements to be added to the permit after permit approval, through a "minor modification," which process does not include public notice and comment. The EAB concluded that "both 40 C.F.R. § 122.48(b) and 40 C.F.R. § 122.44(i) require that certain monitoring conditions be included in all permits…. Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions — conditions which would thus ordinarily be subjected to public notice and comment — and there does not appear to be anything in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting, the Board concludes that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary. *D.C. MS4 I*, 10 E.A.D. at 324.

VIII. The Permit Contains Some Positive Provisions that the Commenters Support

The permit contains a number of useful provisions, which we urge EPA to retain them in the final permit. In particular, the requirement in Draft Permit ¶ 1.4.3 that "[n]o increase in

pollutant loadings from discharges from the MS4 may occur to receiving waters," is required by law because the District's waters are already severely impaired. In addition, the requirement in Draft Permit ¶ 8.1.3.H., that "TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final WLA achievement dates in this section," is a critical step toward ensuring that WLAs are implemented in a timely and effective manner. Finally, we strongly support the inclusion of numeric retention standards for new and redevelopment and retrofit, and we urge the Region to continue investigating whether the levels of retention required in the permit will reduce pollutants to the maximum extent practicable, or whether stronger standards may be justified upon further information.

Respectfully submitted on June 4, 2010.

Jennifer C. Chavez
Earthjustice
1625 Massachusetts Av. NW, Suite 702
Washington, D.C. 20036
p: 202-667-4500
f: 202-667-2356
e: jchavez@earthjustice.org

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[i] **These comments are submitted on behalf of the following groups:**

ANACOSTIA RIVERKEEPER, INC. is dedicated to advocating for a clean and healthy Anacostia River, engaging in efforts to protect and enhance water quality in the river, enforcing existing federal and state laws governing the Anacostia watershed, and educating the public about issues affecting the Anacostia. Members of Anacostia Riverkeeper use and enjoy waters adversely affected by the District of Columbia MS4 discharges, including the Anacostia River and its tributaries in the District of Columbia and Maryland.

POTOMAC RIVERKEEPER, INC. is dedicated to advocating for a clean and healthy Potomac River and its tributaries, enforcing existing federal and state laws governing the Potomac watershed, protecting the Potomac from pollution and exploitation, and educating the public about issues affecting the Potomac watershed. Members of Potomac Riverkeeper use and enjoy waters adversely affected by District of Columbia MS4 discharges, including the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in the District of Columbia, Maryland and Virginia.

WATERKEEPER ALLIANCE, INC. represents the interests of over 182 members, including the Anacostia Riverkeeper and Potomac Riverkeeper. Each of these groups and their members

have an express mission to preserve and protect the water quality in local waterbodies for aesthetic, recreational, health, and other purposes.

DC ENVIRONMENTAL NETWORK is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land with an emphasis on the Metro Washington region. Founded in 1996, the DC Environmental Network has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia. Members of the DC Environmental Network use and enjoy waters adversely affected by MS4 discharges, including the Anacostia River, Sligo Creek, Paint Branch, and other tributaries of the Anacostia River in Maryland and the District of Columbia, as well as the Potomac River, Rock Creek, Cabin John Creek, and other tributaries of the Potomac River in Maryland and the District of Columbia.