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A Clear Commitment to America's Waters

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June 4, 2010

Mr. Garrison D. Miller
United States Environmental Protection Agency
Office of NPDES Permits and Enforcement (3WP41)
1650 Arch Street
Philadelphia, PA 19103-2029

Dear Mr. Miller:

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide comments on the draft municipal separate stormwater sewer system (MS4) permit issued to the District of Columbia (District) on April 21, 2010. NACWA is the leading advocacy organization on behalf of the nation's clean water and stormwater utilities. Our members are on the front lines of environmental protection working every day to improve the quality of our nation's waters. NACWA is also very familiar with the history of the Washington, DC MS4 permit, having been involved as in intervenor in the litigation surrounding the 2004 permit. At the time, NACWA intervened in support of our member agency the District of Columbia Water and Sewer Authority (DCWASA), which was then serving as the Stormwater Administrator pursuant to legislation passed by the DC Council. NACWA understands the complexities surrounding the District's stormwater permit and can provide an important municipal perspective. Although DCWASA is no longer the Administrator for the District's MS4 program, NACWA continues to have great interest in the new draft permit due to the impact it could have not only on Washington, DC but also on other municipalities across the nation that may receive similar permits in the future.

NACWA fully recognizes the negative impacts that urban stormwater runoff has on water quality and is supportive of innovative approaches to reduce these water quality concerns. We are particularly supportive of the use of green infrastructure as a way to help control stormwater runoff and prevent it from reaching sewer systems and waterways in the first place. NACWA was an original signatory with EPA to the *Green Infrastructure Statement of Intent* in 2007 and is pleased to see that the draft District permit embraces the use of green infrastructure. However, we are concerned that the overall scope of the permit and the broad reach of many of its requirements will have a significant negative impact on the city and its residents. Many of the permit's requirements, including the new and redevelopment standards and the

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National Association of Clean Water Agencies
1816 Jefferson Place, NW
Washington DC 20036-2505

p 202.833.2672 f 202.833.4657
www.nacwa.org · info@nacwa.org

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retrofit requirements, are set to impose unprecedented regulatory and financial burdens on the District without any clear knowledge of how much environmental benefit will be achieved in return.

NACWA is particularly concerned with daunting financial cost facing the District to comply with the permit's proposed requirements, particularly at a time when the city's ratepayers are already preparing to spend over $2 billion dollars on an EPA mandated Long Term Control Plan to address combined sewer overflow (CSO) issues, much of which is related to excess stormwater runoff. The issue of affordability and financial capability is one of deep concern to NACWA. We believe that imposing significant new stormwater regulations on a city like Washington without regard to the large financial burden the city has already undertaken to address CSO issues, and all without meaningful additional federal funding to help meet these mandates at a time of severe economic depression, is emblematic of EPA's failure to address the affordability and financial capability issue in a holistic manner.

NACWA furthers believes it is inappropriate and hypocritical for EPA to impose new financial costs on the District for stormwater control when the federal government, as the largest land owner in the city, has recently announced that it will likely not pay any fees related to controlling stormwater runoff.[1] The correspondence from federal consumers relating to the stormwater fee have only been to WASA and referred to the Impervious Area charge that WASA uses to pay the costs of the LTCP. Thus, the federal government has not yet directly addressed the Districts stormwater fee. However, to claim as the federal government indicated it will, that charges related to stormwater management constitute a tax and not a fee and thus exempt federal facilities from payment is to shift the payment burden for the portion rightfully owed by the federal government onto the shoulders of the city's ratepayers. For the federal government to impose one of the most stringent stormwater permits ever written on the District of Columbia and then as the city's largest landowner refuse to pay its fair share of the cost significantly undercuts any efforts by EPA to improve water quality in District's waterways. It is NACWA's position that EPA should refrain from issuing any new stormwater permit for the District until such time as the federal government is willing to pay its share of the associated costs.

In addition to these general comments, NACWA has concerns with three specific components of the permit as outlined below.

Urban Retrofits

NACWA's most serious objection to the draft permit is the requirement for a retrofit program for existing discharges as outlined in Section 4.1.2. This requirement mandates a retrofit program that will manage runoff from 18,000,000 square feet of impervious surface during the permit term, including a minimum of 3,600,000 square feet of transportation right-of-way, to achieve a performance standard of 90% on-site retention for a typical 24-hour storm event. By EPA's own estimates, this retrofit requirement amounts to approximately 20% of the District's existing impervious surface. This new mandate will impose a huge financial cost on the District and its ratepayers at a time when the city is already struggling to meet the costs of another unfunded federal mandate to reduce CSOs through a Long Term Control Plan. At the same time, there is no clear

[1] The General Services Administration has recently informed DCWASA that federal facilities will not pay an impervious area charge levied by DCWASA to help cover the costs of reducing water quality impairment from urban stormwater runoff within the District of Columbia.

understanding of exactly what the water quality improvement will be as a result of the retrofit requirement, much less the correlation of the costs of the retrofit program to potential water quality improvements.

NACWA is pleased to see that the retrofit program requirement does allow for a lower performance standard based on site-specific conditions, and also allows for off-site mitigation or payment-in-lieu options to meet the runoff management goal. These are necessary components for flexibility. NACWA also believes there is value in exploring retrofit options as a possible component to urban stormwater management. However, given the overall uncertainty regarding the water quality impacts of the retrofit program and its significant cost, NACWA believes the retrofit program requirement should be removed from the permit. Instead, NACWA recommends a series of pilot programs for impervious area retrofits be substituted in the permit, allowing time to study both the environmental and cost effectiveness of these efforts before requiring a more wide-scale program. Such an approach using pilot programs first would allow for a more gradual phase in of a retrofit program as the technology becomes more common and the District government better understands how to use the technology effectively.

Possible Numeric Effluent Limits

The permit's potential to create numeric effluent limits for stormwater discharges is another area of significant concern for NACWA. As outlined in Section 8.1, the permit requires compliance with all total maximum daily load (TMDL) waste load allocations (WLAs) applicable to the District MS4, and also requires the District to show how it will meet the WLAs through a TMDL Implementation Plan. The draft permit states that if best management practices alone are not sufficient to implement the WLAs, then "additional controls" may be necessary. The permit further states that in reviewing the TMDL Implementation Plan as part of the overall Stormwater Management Plan, EPA reserves the right "to modify this permit for purposes of requiring additional numeric and/or narrative effluent controls on the discharge of pollutants from the MS4." Such statement suggests that numeric effluent limits for MS4 discharges in the District are possible under this proposed permit.

The possible inclusion of numeric effluent limits under the permit runs counter to requirements expressed in Section 402(p) of the Clean Water Act, which clearly states that municipal stormwater permits must include "controls to reduce the discharge of pollutants to the maximum extent practicable" (MEP). A significant line of case law, including the seminal case of *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), has found the MEP standard does not include numeric effluent limits. *Browner* and its progeny have established a clear interpretation of congressional intent that the MEP standard was not meant to include numeric effluent limits in MS4 permits. Accordingly, the potential of including such numeric limits in the proposed MS4 permit for the District is both a violation of the MEP standard and also the Clean Water Act.

NACWA disputes EPA's statement in the fact sheet accompanying the draft permit that the "meaning of the MEP standard has continued to evolve since it was first articulated two decades ago."[2] In fact, with regard to the issue of numeric effluent limits in stormwater permits, the MEP standard has not evolved at all. The case law has overwhelmingly stated that Congress did not intend to include

[2] Fact Sheet, page 6.

numeric limits in the MEP standard. For this reason, NACWA believes that any references in the permit to numeric effluent limits should be removed, and that the permit should further clarify that compliance with TMDL WLAs will be done through best management practices.

New Development & Redevelopment Standards
NACWA is in favor of requirements for new development or redevelopment that would call for a certain percentage of stormwater to be retained on-site, provided that there are alternative options available due to site-specific constraints. Managing stormwater on-site and preventing excess stormwater flows from running off impervious surfaces is a key step towards improving water quality in many of the nation's watersheds, particularly in urbanized areas. NACWA believes the requirement in the permit for performance standards for new development and redevelopment represents a step in the right direction, particularly because the permit includes an off-site mitigation and fee-in-lieu program for those projects where on-site performance standards cannot be met due to site-specific concerns.

However, NACWA has significant concerns with the 90% capture rate performance standards being proposed in the draft District permit. There are still significant questions about the technical feasibility and cost of meeting such an aggressive capture rate in a highly urbanized environment such as Washington, DC. It is also uncertain how such a requirement will impact the viability of future new and redevelopment projects, although it is likely to have a chilling effect. It is imperative that EPA be sensitive to the unique challenges facing redevelopment projects in Washington, particularly in economically depressed sections of the city. Washington, like many large cities, relies on redevelopment projects in industrial or economically depressed areas to revitalize neighborhoods, attract new business and residents, and increase the tax base. Overly restrictive stormwater requirements for redevelopment that ultimately deter investors and developers from pursing urban redevelopment projects will be counterproductive economically, socially, and environmentally.

NACWA believes the 90% capture rate envisioned in the permit is inappropriate and calls on EPA to revise the performance standards to encourage on-site capture based on site-specific considerations without establishing any specific capture rate. NACWA further calls on EPA to partner with the District and the development community on a series of pilot projects during the term of the proposed permit to determine what percentage of on-site capture is feasible within the city that will result in water quality improvements but also not impede much needed urban redevelopment. Such information could then help lead to a revised performance standard in the next iteration of the city's MS4 permit that establishes an appropriate capture percentage for on-site management of stormwater flows.

In conclusion, it is NACWA's position that the proposed MS4 permit for the District will present significant regulatory and financial hardships for the city without a clear understanding of what kinds of water quality improvements may be achieved. Although individual components of the permit taken alone may seem to be reasonable requirements to control stormwater discharge, taken together they represent an unprecedented regulatory and financial burden for stormwater control with the potential for devastating impacts on the city. As EPA itself stated in the factsheet accompanying the proposed

permit, "the attainment of water quality criteria is an incremental process."[3] Recognizing this fundamental fact, NACWA believes EPA must revise the draft permit to allow a more gradual phase in of the retrofit and redevelopment requirements and only implement these requirements after more is known about their environmental and financial impact on the city. EPA must also remove any potential for numeric effluent limits for MS4 discharges from the permit. NACWA shares EPA's goal of reducing stormwater runoff into our nations water's, but attempting to do so through permits such as the one proposed for the District, which set unrealistic and unattainable requirements for municipal governments, is not an effective strategy for meeting that goal.

Thank you for this opportunity to provide comments on this important document. If you have any questions or concerns, please do not hesitate to contact me at 202/533-1803 or *kjones@nacwa.org*.

Sincerely,

Keith J. Jones
General Counsel

[3] Fact Sheet, page 4.