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DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY | 5000 OVERLOOK AVENUE, SW | WASHINGTON, DC 20032

August 27, 2012

By First Class and Electronic Mail

Ms. Kaitlyn Bendik
EPA Region 3
Mail Code: 3WP41
1650 Arch Street
Philadelphia, PA 19103
Bendik.Kaitlyn@epa.gov

Re: DC Water Comments on Draft Modification of the District of Columbia Municipal Separate Storm Sewer System Permit No. DC0000221

Dear Ms. Bendik:

Please find attached comments of the District of Columbia Water and Sewer Authority ("DC Water") in response to the July 12, 2012 Public Notice of the Comment Period for the Draft Limited Modification for the District of Columbia Municipal Separate Storm Sewer System Permit No. DC0000221

We appreciate EPA's consideration of our comments. Please contact me (randy.hayman@dcwater.com) or Gregory Hope (gregory.hope@dcwater.com) if you have any questions.

Sincerely,

Randy E. Hayman
General Counsel

Enclosure

DC WATER COMMENTS
REGARDING DRAFT MODIFICATION OF THE DISTRICT OF COLUMBIA MS4 PERMIT AND ACCOMPANYING FACT SHEET

August 27, 2012

I. INTRODUCTION

On September 30, 2011, the Environmental Protection Agency (the "EPA") issued a final National Pollutant Elimination System ("NPDES") permit for the District of Columbia Municipal Separate Storm Sewer System ("MS4") (the "Permit"). Two Petitions for Appeal of the Permit were filed with the Environmental Appeals Board on November 4, 2011. The first petition for review was filed by the District of Columbia Water and Sewer Authority ("DC Water") and the Wet Weather Partnership, and the second was filed by Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (the "Environmental Petitioners"). On May 18, 2012, Environmental Petitioners reached a settlement agreement with EPA, requiring EPA to "publish notice of a draft modification to the DC MS4 Permit and accompanying Fact Sheet" within fifty-five days. EPA published the Draft Modification on July 12, 2012.

DC Water supports several of the changes to the Permit proposed in the draft modification. However, a number of problems persist with the Permit, which DC Water urges EPA to address during this Permit modification process. As discussed in Part II.A. of these comments, DC Water is primarily concerned with the permit's continued direct imposition of broad, unspecified compliance obligations on DC Water, which is legally and financially independent from the District Government. Although these comments note several other shortcomings of the permit, DC Water's objections to impracticable and unauthorized permit provisions arise largely from the concern that DC Water could be required to fulfill such

provisions due to the broad imposition of permit responsibility on DC Water. Therefore, EPA could address DC Water's concerns by clarifying that DC Water has no responsibility for compliance with the requirements of the permit. Alternatively, DC Water is entitled to have its permit obligations clearly distinguished from those of the District Government.

II. COMMENTS

A. The Proposed Amendment to the Definition of "Permittee" Does Not Eliminate Improper Imposition of Direct Permit Responsibility on DC Water

DC Water appreciates the proposed amendment of the definition of "Permittee," which would remove DC Water from the definition. DC Water has no interest in being a permittee with any direct Permit responsibilities under the District of Columbia's MS4 Permit. However, the amendment of the definition of permittee is only a half measure toward addressing the issue of DC Water's status as an unwilling permittee. Although this proposed amendment is a step in the right direction, deleting the reference to DC Water in the definition of "permittee" does not eliminate DC Water's *de facto* status as a permittee, given the direct imposition of Permit responsibilities on DC Water elsewhere in the Permit. For example, Permit Section 2.3.1 makes DC Water broadly (and impermissibly vaguely) "responsible for complying with those elements of the permit within its jurisdictional scope and authorities," and Section 2.2 requires DC Water to "provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit."

While DC Water agrees that the definition of "Permittee" should be limited to "the Government of the District of Columbia," DC Water objects to the continued direct imposition of Permit responsibilities on DC Water. EPA should take the opportunity presented by this proposed Permit modification to fully address the concern by clarifying that the Government of

the District of Columbia is the sole permittee with sole responsibility for compliance with the Permit. In particular, DC Water urges EPA to remove the following language from Permit Section 2.3.1, which directly imposes broad and undefined Permit compliance obligations on DC Water:

> Each named entity [including DC Water] is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.

Without this additional Permit modification, EPA's amendment to the definition of "Permittee" will be ineffective because DC Water will remain a *de facto* permittee by virtue of the direct Permit responsibilities imposed by Permit Section 2.3.1.

The Permit's treatment of DC Water is improper given that DC Water is a legally and financially independent entity from the Government of the District of Columbia. Pursuant to its enabling statute, DC Water is an "independent authority" with a "separate legal existence" from the District Government. D.C. Code § 34-2202.02(a). DC Water's legal independence from the District Government has been confirmed by the District of Columbia Court of Appeals. *See District of Columbia Water and Sewer Authority v. Delon Hampton & Associates*, 851 A.2d 410, 412 (D.C. 2004); *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 977-78 (D.C. 2001), *adopted*, 800 A.2d 686 (D.C. 2002). Because DC Water is legally and financially independent from the District Government, the permit for the District of Columbia Government may not impose broad, undefined and vague compliance responsibilities on DC Water, whether or not DC Water is explicitly listed in the definition of "permittee." If DC Water is to have any responsibility under the permit, that responsibility must be fully and fairly identified so that there will be no finger pointing between the District Government and DC Water as to which legal entity is responsible for the numerous requirements of the permit.

B. Public Notification Requirement for SSOs to the MS4 is Legally Invalid and Contrary to Public Policy

DC Water is unaware of any statutory or regulatory authority that would allow EPA to require public notification for each sanitary sewer overflow ("SSO") that reaches the MS4. We do not believe that there is any such authority in either the Clean Water Act or EPA's regulations (which address the issue, but only require reporting to the District Government and/or EPA). Unless EPA can cite a specific statutory and/or regulatory authorization for this requirement, it must be removed from the permit. We note that Agency guidance does not provide such authority and is irrelevant to the issue at hand.

This requirement is contrary to the laws of a number of states which reject blanket public notification requirements. For example, North Carolina sets volumetric thresholds for public notice of overflows. *See* North Carolina General Statutes § 143-215.1C. DC Water's conclusion that EPA lacks authority to require public notice of all SSOs to the MS4 is bolstered by the absence of any such public notice requirement in EPA's Permit for DC Water's Blue Plains Treatment Plant (NPDES Permit Number DC 0021199). Thus, EPA's permits for the citizens in the MS4 provide different requirements as to sewer overflows than for citizens in the CSO area. This is arbitrary and capricious. DC Water is unaware of any other MS4 permit that requires public notification of all SSOs that reach the MS4. We ask that EPA explain why this requirement has been included in the District of Columbia's MS4 permit but not in the Blue Plains Permit or in MS4 permits for other cities.

We are disappointed that EPA did not take the opportunity of the public notice of this proposed requirement to explain its statutory/regulatory authority for imposing such a requirement as well as EPA's intentions in terms of whether this will become a requirement of

all MS4 permits or if EPA is simply singling out the District Government for this onerous and unwise requirement.

Requiring public notification of all SSOs is contrary to public policy. Public notice of every SSO that reaches the MS4, including low-volume SSOs that will have no public health or environmental impact, discharges during the non-recreation season, and in other circumstances, is counterproductive because it will desensitize the public to notifications regarding significant discharges. Automatically issuing indiscriminate notifications of each and every SSO to the MS4 will confuse the public with marginal or unhelpful information, much of which is irrelevant to the needs of the public, resulting in important notifications of significant SSOs going unnoticed in the midst of the more frequent minor SSOs.

While DC Water supports the requirement to notify appropriate sewer and public health agencies of all sanitary sewer discharges that reach the MS4 system, public notification is another matter entirely. We have no objection to District Government or EPA issuing notices based upon the notices we provide to them. However, we disagree with EPA's authority to force DC Water to do so and believe such broadcast notices are unwise substantively so we decline to be responsible to perform such notices. EPA should clarify its authority for this requirement and which legal entity will be required to fulfill it.

C. DC Water Supports the Proposed Definition of "Benchmark" Loadings to the Permit

DC Water applauds the proposed addition of the definition of "benchmark" in Section 9 of the Permit. The significant clarification that "benchmarks," specifying annual pollutant load reductions, are targets (unenforceable goals) is a positive change and addresses a significant concern of DC Water regarding the practicality of the Consolidated TMDL Plan requirement in

the Permit. Given the extreme variability in MS4 pollutant concentrations and loadings, it is impossible to guarantee annual loading reductions. *See* Memorandum from Robert H. Wayland, III, Director, EPA Office of Wetlands, Oceans and Watersheds, and James A. Hanlon, Director, EPA Office of Wastewater Management, to Water Division Directors, Regions 1-10, Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, at 5 (Nov. 22, 2002), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/final-wwtmdl.pdf ("[S]torm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized" . . . . The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers."). Therefore, treatment of annual pollutant load reduction benchmarks as enforceable permit terms would make it impossible for the permittee to comply with the permit. Accordingly, we support the change to annual goals or targets, mindful of the significant variability in MS4-related pollutant loadings, as part of an iterative process to reduce pollutant loads from the District Government's MS4 system.

D. The Extension of the Deadline to Prepare the Consolidated TMDL Implementation Plan is an Improvement but Still Provides Insufficient Time

Increasing the time for completion of the Consolidated TMDL Implementation Plan from 2 years to 30 months is an improvement, but it still provides insufficient time to complete the highly complicated and time intensive task at hand. We don't see how the District Government can be reasonably expected to develop a consolidated plan for approximately 370 TMDL wasteload allocations, covering more than 200 water quality limited segments in the District of Columbia, impaired by a wide variety of pollutants. DC Water does not believe that 30 months

is enough time to develop a meaningful plan for such an extensive array of pollutants and varied water bodies, especially given the impossibility of assigning fixed end dates for achievement of TMDL wasteload allocations, as discussed in Part II.E. of these comments.

The Permit calls for the Consolidated TMDL Implementation Plan to include a "demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment." DC Water is unaware that the District Department of the Environment (the "DDOE") has the necessary models in place or that such models could be developed and the results assessed in sufficient time to comply with the proposed 30 month deadline. In fact, we are unaware that such modeling has ever been completed on the scale required by the Permit; however, if there have been instances where this has been accomplished, we ask EPA to identify them in its response to this comment. We believe that EPA should identify the precedents with specificity. Moreover, we ask that EPA provide the detailed schedule that it developed to support the 30 month schedule for this permit requirement. Specifically, how long has EPA allocated for data collection and assessment for pollutants of concern, model development, calibration and validation, evaluation of control alternatives, selection of the most cost-effective alternatives, evaluation of pollutant benchmarks, and public notice of same before submittal of the final plan in 30 months. We don't see how the District Government can possibly get there from here.

While we support the additional time, the 30 month timeline remains insufficient to develop, public notice, and submit to EPA a Consolidated TMDL Implementation Plan for all TMDL wasteload allocations assigned to District MS4 discharges. Instead, the 30 month plan deliverable should be targeted to a handful of priority waters and pollutants. Once the plan for

priority impairments has been developed and implemented, then the scope of the plan can be increased over time to address waters with lower priorities. We urge EPA to take an iterative approach rather than requiring a comprehensive plan with detailed modeling and pollutant reduction benchmarks when the information needed (data, models, BMPs, performance of the BMPs, etc) is not available and won't be within 30 months.

E. Despite Positive Proposed Amendments, TMDL Implementation Plan Requirements Including Enforceable End Dates Remain Impracticable

The Permit and proposed modification require the District Government to set a fixed end date for achievement of each of the approximately 370 applicable TMDL wasteload allocations. *See* Permit Section 4.10.3; http://iaspub.epa.gov/tmdl_waters10/attains_impaired_waters.tmdls?p_state=DC. The proposed modification specifies that the Consolidated TMDL Implementation Plan must include "A specified schedule for ~~compliance with each TMDL~~attainment of WLAs that includes final attainment dates and, where applicable, interim milestones and numeric benchmarks," and it stresses that "EPA will incorporate elements of the Consolidated TMDL Implementation Plan as enforceable permit provisions, including milestones and final dates for attainment of applicable WLAs." DC Water objects to this requirement to set enforceable final attainment dates and interim milestones prior to engaging in an iterative, adaptive management process. We fail to see how the District Government can be expected to divine fixed end dates for all these TMDLs when in some cases not even early results are available for the best management practices ("BMPs") which have been implemented to date. DC Water believes that it will be impossible for the District Government to develop an adequate Consolidated TMDL Implementation Plan in compliance with this requirement. This is a set up for failure.

Rather than specifying fixed end dates and interim milestones for compliance with all TMDL wasteload allocations, the Consolidated TMDL Implementation Plan should identify (1) a prioritization of the TMDL wasteload allocations to be implemented, and (2) a process for making reasonable further progress toward compliance with TMDL wasteload allocations to enable the District Government to more accurately identify ultimate attainment dates and interim milestones after evaluating and adapting initial implementation efforts. The permit should allow for any dates by which compliance with WLAs is anticipated to be estimates that will be revisited each permit term for refinement, as warranted, based upon implementation during the prior permit period.

In order to accurately determine the date by which wasteload allocations will be achieved, the District Government will need the benefit of iterative BMP implementation over several permit cycles. Before BMPs have been piloted, evaluated – including through monitoring, implemented, and modified as appropriate, it is impossible to determine a compliance end date that is anything more than an uneducated guess. Such uneducated guesses serve no purpose and do not belong being recast as binding regulatory requirements.

Furthermore, it is likely that many of the TMDL wasteload allocations, such as the unprecedented 90-98% reduction in fecal coliform bacteria discharged to the Anacostia River, are altogether unattainable given the current state of BMP technology. *See* http://www.epa.gov/waters/tmdldocs/dc_tmdl-AnacostiaRiver-AnacostiaBac_DR.pdf. We ask EPA to identify any water similar to the Anacostia (including the source makeup of the bacteria loadings) in the country that have accomplished anything close to this level of reduction. The

Consolidated TMDL Implementation Plan requirements in Section 4.10.3, including fixed end dates and interim milestones for achieving wasteload allocations, are arbitrary and capricious.

Instead of requiring the District Government to set fixed end dates and milestones, which will be incorporated as enforceable Permit terms, EPA should allow the schedules to be adjusted based on implementation experience. Taking an iterative, adaptive management approach to TMDL implementation in the Permit would be consistent with EPA guidance which "affirms the appropriateness of an iterative, adaptive management BMP approach, whereby permits include effluent limits (e.g., a combination of structural and non-structural BMPs) that address storm water discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments (i.e., more stringent controls or specific BMPs) as necessary to protect water quality." Memorandum from Robert H. Wayland, III, Director, EPA Office of Wetlands, Oceans and Watersheds, and James A. Hanlon, Director, EPA Office of Wastewater Management, to Water Division Directors, Regions 1-10, Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs, at 5 (Nov. 22, 2002), *available at* http://water.epa.gov/lawsregs/ lawsguidance/cwa/tmdl/upload/final-wwtmdl.pdf. In that guidance document, EPA cited with approval a National Research Council report that "recommends an approach that includes 'adaptive implementation,' i.e., 'a cyclical process in which TMDL plans are periodically assessed for their achievement of water quality standards' . . . and adjustments made as necessary." *Id*.

One example of a program incorporating adaptive management strategies is the Montgomery County, Maryland MS4, which has been recognized as one of the strongest MS4

programs in the country. Pursuant to its MS4 permit, Montgomery County has prepared a "Coordinated Implementation Strategy," which "requires an iterative approach," and sets forth "target dates" for meeting various "compliance targets," including compliance with wasteload allocations in the MS4 permit area. Montgomery County Department of Environmental Protection, Montgomery County Coordinated Implementation Strategy at 24-25 (Jan. 2012), *available at* http://www6.montgomerycountymd.gov/content/dep/downloads/water/ CCISFinal_Jan2012v2.pdf. The "target dates" for compliance with wasteload allocations are qualified estimates that are subject to adjustment. The Montgomery County Coordinated Implementation Strategy explains, "Sound implementation strategies require assessment and effective adaptation to respond to new information, changing conditions, new technologies, and lessons learned. This will be the basis of the plan that will be used when benchmarks are not met and the projected funding is inadequate." EPA should recognize the wisdom of such reasoning and apply it in the District of Columbia's MS4 Permit instead of unreasonably requiring fixed end dates and interim milestones without the necessary benefit of such an iterative, adaptive management approach.

If EPA insists on retaining the fixed end date requirement, we ask that EPA identify each other instance in an MS4 permit where a consolidated TMDL plan requirement has been imposed with a requirement to specify enforceable fixed end dates for compliance with each applicable TMDL wasteload allocation. We also ask EPA to identify when the consolidated plan was submitted by any such other systems, which waters/pollutants are addressed, what process was used to identify fix end dates for compliance with wasteload allocations (i.e., whether a scientific process was used to identify the fixed end dates or whether they were the product of

guesswork), and whether the fixed end dates are being met. We would like EPA to supply this information in order to better evaluate the attainability of the Consolidated TMDL Implementation Plan requirement in the District of Columbia's Permit with EPA's proposed modifications.

F. Part 1.4 Is Inconsistent with Maximum Extent Practicable Standard

As DC Water indicated in its comments filed June 4, 2010 on the draft MS4 Permit for the District of Columbia published for public review and comment on April 21, 2010, the language included in Part 1.4 that is republished and amended in EPA's Draft Modification is unclear and is inconsistent with the compliance standard for MS4s set forth in the Clean Water Act. Pursuant to Clean Water Act section 402(p)(3)(B)(iii), "[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)(3)(B)(iii) (emphasis added). The "maximum extent practicable" standard should be explicitly referenced in Part 1.4 and the vague and inconsistent requirements listed in that section should be eliminated. In particular, the proposed requirement that "[c]ompliance with . . . milestones and final dates for attainment of applicable WLAs" is necessary for "adequate progress toward compliance with DC WQS and WLAs for this permit term," is inconsistent with the "maximum extent practicable" standard given the impracticability of accurately setting milestones and final end dates for WLAs, as discussed in Part II.E. of these comments.

III. CONCLUSION

DC Water supports several of the changes proposed in EPA's Draft Modifications. We also believe that several of the changes do not go far enough (such as the inadequate extension of

the deadline for the Consolidated TMDL Implementation Plan and change to make the fixed end dates for TMDL compliance enforceable requirements). Finally, we believe that several problems with the Permit remain. DC Water urges EPA to take the opportunity presented by this Draft Modification to further amend the Permit to eliminate the improper imposition of permit responsibilities on DC Water, the unauthorized and unwarranted public notification requirement for SSOs, the unreasonable requirements of setting enforceable final end dates for compliance with TMDL WLAs, and inconsistencies with the applicable "maximum extent practicable standard." DC Water appreciates EPA's consideration of these comments.