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A Clear Commitment to America's Waters

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August 24, 2012

Ms. Kaitlyn Bendik
U.S. Environmental Protection Agency
Region 3
NPDES Permits Branch, Mailcode 3WP41
1650 Arch Street
Philadelphia, PA 19103-2029

Submitted Via Email to bendik.kaitlyn@epa.gov

Re: Comments on Proposed Modifications to District of Columbia MS4 Permit

Dear Ms. Bendik:

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to provide comments on the proposed modifications announced July 12, 2012 to the municipal separate stormwater sewer system (MS4) permit for the District of Columbia (District). NACWA is the leading national 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 water quality and protect public health. NACWA is very familiar with the long and complicated history of the District MS4 permit, having been involved in litigation over the 2004 permit as well as commenting on the 2011 permit.

NACWA also has significant interest in the District MS4 permit due its possible impact on other municipalities across the nation that may receive similar permits in the future. The District permit has been widely touted as a potential "model" for other permitting authorities. Accordingly, the final disposition of the permit has national implications for NACWA and it stormwater utility members in other parts of the country. NACWA believes the proposed modifications contain both positive changes as well as changes causing significant concern, and can provide an important national perspective on the critical issues involved.

Among the positive permit modifications proposed by EPA is an extension of time to develop the Consolidated TMDL Implementation Plan from 24 month to 30 months. The additional time provided to develop the plan recognizes both the extremely complicated process necessary for appropriate TMDL plan development, while also acknowledging the need for sufficient public input. Additionally, the proposed revision in the definition section clarifying that benchmarks in the permit

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such as annual load reductions are intended as adaptive management aids and are not enforceable is a welcome modification that will provide the District with needed flexibility in permit implementation. NACWA is also supportive of the proposed revision to the definition of "permittee" to remove reference to other independent agencies such as the District of Columbia Water and Sewer Authority.

However, NACWA has significant concerns with two major aspects of the proposed permit modifications. First and foremost is the continued and expanded reference in the permit to numeric limits, goals, and terms, particularly in the context of enforceable permit requirements. This is especially true in the proposed new definitions of "benchmarks" and "milestones" included in the modifications.

As NACWA previously noted in our June 2010 comments on the original version of the District permit, the inclusion of numeric effluent limits potentially conflicts with the requirements of Section 402(p) of the Clean Water Act (CWA), 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 federal case law has found the MEP standard does not require numeric effluent limits, and NACWA believes EPA does not have the legal authority to require compliance with numeric benchmarks or milestones without regard to MEP. Accordingly, the inclusion of such numeric limits in the proposed definitional changes for the District permit presents a potential violation of the MEP standard and also the CWA. NACWA is extremely disappointed to see the continued inclusion of numeric references in the proposed modifications, and believes these references must be removed.

NACWA also strongly disagrees with the proposed changes to part 4.3.1.3 of the permit requiring public notification within 24 hours of a sanitary sewer overflow (SSO) to the MS4. NACWA believes that local public health authorities, not municipal stormwater permittees, are best positioned to make a determination about the need for public notification of an SSO event, and that mandatory public reporting requirements for SSOs reaching MS4s in municipal stormwater permits is inappropriate. Furthermore, EPA has no legal authority to include notification requirements in a federal stormwater permit for SSOs that do not reach jurisdictional waters under the CWA, and overflows to an MS4 certainly would not satisfy federal jurisdictional minimums.[1]

NACWA also notes that while the EPA fact sheet accompanying the proposed modification suggests such public notification requirements are "consistent with agency policy and guidance," none of the documents referenced in the fact sheet footnotes have ever completed final public notice and comment procedures as required under federal law to be considered final agency action and have the force of law. Accordingly, NACWA believes the public notice requirements for SSOs that reach the MS4 must be removed from the permit.

NACWA and its clean water utility members share EPA's goal of reducing stormwater runoff to the nation's waters, and many of NACWA's stormwater agencies are already pursuing innovative strategies to reduce urban stormwater pollution. However, the numeric references and SSO reporting requirements contemplated in the proposed District permit modifications not only exceed EPA's legal authority, but also threaten to make the permit unnecessarily burdensome and costly to implement. Given the significant national attention this permit has received, these inappropriate requirements also could have serious negative implications for other

[1] To the extent EPA's inclusion of public notification requirements for SSOs reaching the MS4 is based on the Agency's belief that the MS4 itself is a jurisdictional water under the CWA, NACWA also strongly objects.

municipal stormwater utilities across the county. NACWA encourages EPA to strongly consider these factors when deciding on final permit modifications.

Thank you again for the opportunity to provide comments. If you have any questions or concerns, please do not hesitate to contact me at 202/833-3692 or *ngardner-andrews@nacwa.org.*

Sincerely,

Nathan Gardner-Andrews
General Counsel