NATURAL RESOURCES DEFENSE COUNCIL · EARTHJUSTICE
ANACOSTIA RIVERKEEPER · ANACOSTIA WATERSHED SOCIETY
AUDUBON NATURALIST SOCIETY · CHESAPEAKE BAY FOUNDATION
CLEAN WATER ACTION · FRIENDS OF THE EARTH · POTOMAC RIVERKEEPER

August 27, 2012

Via electronic mail

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

Re: Comments on Draft Limited Modification of the District of Columbia Municipal Separate Storm Sewer System (MS4) Permit No. DC0000221

Dear Ms. Bendik:

Thank you for this opportunity to comment on the draft limited modification to the District of Columbia municipal separate storm sewer system (MS4) permit. These comments are submitted on behalf of the Natural Resources Defense Council, Earthjustice, Anacostia Riverkeeper, Anacostia Watershed Society, Audubon Naturalist Society, Chesapeake Bay Foundation, Clean Water Action, Friends of the Earth, and Potomac Riverkeeper, which are nationwide and local environmental organizations working to protect and restore water quality in the Washington, DC region through advocacy, enforcement, and education. Members of these groups use and enjoy waters adversely affected by MS4 discharges, including the Anacostia River, Potomac River, Rock Creek, and their tributaries.

Together, we urge EPA to finalize the proposed permit modifications in their current form. These modifications will improve the specificity and enforceability of the permit's requirements, making the permittee's duties more explicit and making it easier for EPA and the public to initiate enforcement proceedings should any permit violations occur.

Including enforceable requirements in this permit is critical in order to achieve local and regional water quality goals. No water body in the District of Columbia currently fully supports all of its designated uses.[1] As the District Department of the Environment recently stated, "The water quality of the District's waterbodies continues to be impaired," and urban runoff from the MS4 is one of the pollution sources with "major impacts" on those waters.[2] Urban runoff is also a major source of pollutants that contribute to the Chesapeake Bay "dead zone," for which the EPA adopted total maximum daily loads (TMDLs) in 2010. As EPA stated in the Bay TMDL, Clean Water Act permits like the District's MS4 permit "provide the reasonable assurance that the [wasteload allocations] in the TMDL will be achieved."[3] If urban runoff impacts are to be reduced, this permit must contain provisions that are more than vague directives to make progress. Rather, it must set forth a specific path to attainment through clear requirements with which compliance is mandatory and easily measured.

I. The Proposed Modifications Are Needed to Hold the District Accountable for Meeting Water Quality Goals

EPA should finalize the modifications as proposed because they make clear that the District is responsible for developing an enforceable schedule that will lead to the attainment of all TMDL wasteload allocations by a date certain, as required by the Clean Water Act.

All permits issued under the Clean Water Act National Pollutant Discharge Elimination System (NPDES) must include conditions adequate to "ensure compliance" with applicable water quality standards in receiving waters.[4] In addition, all NPDES permits must contain requirements "consistent with the assumptions and requirements of any available wasteload allocation."[5] As a general matter, NPDES permits must ensure compliance with water quality standards and WLAs immediately upon issuance. In certain cases, however, if such compliance cannot be achieved immediately, "[t]he permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations."[6] Schedules must be designed to achieve compliance "as soon as possible, but not later than the applicable statutory deadline under the CWA."[7] Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement.[8]

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[1] District Department of the Environment, *District of Columbia Water Quality Assessment: 2012 Integrated Report to the U.S. Environmental Protection Agency and Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act (P.L. 77-117) – DRAFT* at 1 (Feb. 2012).
[2] *Id.* at 1, 3.
[3] U.S. EPA, Final Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous, and Sediment, 7-1 (Dec. 29, 2010).
[4] 40 C.F.R. § 122.4(d); *see also* 33 U.S.C. § 1311(b)(1)(C), 1342(a).
[5] 40 C.F.R. § 122.44(d)(1)(vii)(B).
[6] 40 C.F.R. § 122.47(a).
[7] 40 C.F.R. § 122.47(a)(1).
[8] 40 C.F.R. § 122.47(a)(3).

The revised language in Parts 1.4 and 4.10.3 of the permit makes clear that the District must develop and comply with an enforceable schedule that sets out a plan for achieving compliance with wasteload allocations. In particular, the revised language in Part 1.4 is needed to make clear that compliance with this EPA-approved schedule (contained within TMDL Implementation Plans) is the only acceptable substitute for immediate compliance with wasteload allocations and water quality standards. While compliance with other performance standards are important, it is compliance with "milestones and final dates for attainment of applicable WLAs" that is required by the Clean Water Act.

The revisions to Part 4.10.3 are equally critical to ensure that these schedule elements of the District's TMDL Implementation Plans are enforceable as permit provisions, and that they contain "final attainment dates," a point on which the original permit language was unclear. Having ultimate attainment dates incorporated into the permit will make the District's planning process smarter and more efficient. It will also increase accountability, both because the attainment date is enforceable by citizens and EPA, and because it will cause the public to become invested in seeing the District reach that goal. Along those lines, the new requirement for the Implementation Plans to contain an "associated narrative" is necessary for the public and regulators to understand why the District has selected its programs and projects, and how they will achieve the needed pollutant or volume reductions.

In addition to increasing the specificity and enforceability of the permit's water quality requirements, the proposed modifications will also help to ensure that water quality standards and wasteload allocations will be attained if the District does not meet its requirement to submit an adequate plan. The fact sheet language addressing "the event [in which] the permittee does not submit a Consolidated TMDL Implementation Plan, submits a plan that fails to address one or more applicable TMDLs, or submits a plan that the EPA disapproves" is absolutely critical to set a backstop ensuring that a schedule will be set regardless of the District's compliance or noncompliance with the permit. If this situation were to occur, EPA must act quickly to set deadlines so that progress is not delayed. The original permit made no provision for what would occur if the District's plans were inadequate or incomplete; consequently, no compliance schedule would be in place, a legally unacceptable result. The new fact sheet language makes clear that the permittee *will* be subject to a compliance schedule, whether developed by the District or by EPA.

II. The Proposed Modifications Are Needed to Ensure That the Public Will Play a Meaningful Role in the Development of the Permittee's Implementation Plans

Public participation is central to the Clean Water Act NPDES permitting program.[9] The proposed modifications serve this goal by ensuring that the public will be able to play a meaningful role in the development of the District's TMDL Implementation Plans. Because the

[9] 40 C.F.R. § 25.3 ("EPA…shall provide for, encourage, and assist the participation of the public.").

plans, upon EPA approval, set forth the means by which the District will limit its pollution, they contain effluent limitations that must be open for public input.[10] The proposed revisions to Part 4.9.4.1 of the permit are needed to make explicit the requirement that the public be given a "meaningful opportunity" to participate, a phrase which we understand to mean regular and active stakeholder engagement throughout the process of plan development, along with the traditional public notice and comment process.

The revised permit language at the end of Part 4.10.3 is also needed to make clear that the public will always have access to the most current version of the Implementation Plans on the permittee's website. This simple transparency measure will boost the public's confidence in the District's efforts and allow citizens to "watchdog" its progress.

Finally, the proposed modifications are needed to ensure that the permittee's TMDL Implementation Plans will be subject to legal challenge by members of the public should the District fail to demonstrate that the plans will achieve wasteload allocations. The revised language in Part 4.10.3 that specifies that EPA will incorporate elements of the permittee's plans into the permit accomplishes this critical function. When EPA reopens the permit to incorporate interim dates and deadlines and other plan elements, the public will be able to challenge EPA's approval of the plans by commenting on the permit modification and legally challenging that modification if necessary.

III. The Proposed Modifications Are Needed to Resolve Ambiguities in the Original Permit Language

The proposed modifications to the permit are needed to clear up several ambiguities that existed in the original permit text. These clarifications will ensure that the District completely understands its responsibilities.

First, the modifications are needed to define the terms "benchmarks" and "milestones," terms which were not defined in the original permit text. It was previously unclear what the difference was between the two, if any, other than the fact that "benchmarks" were annual and "milestones" were less frequent. Consequently, clear definitions are needed to specify which are enforceable permit terms and which are adaptive management tools. Additionally, "milestones" must be defined to make clear that they must be objective, numeric requirements. It is critical for all enforceable permit terms to be expressed in this way so that it is easily determined whether the permittee is in compliance with them or not. Consequently, we expect "milestones" will be expressed in terms of volume or pollutant reduction to be achieved by each interim or final deadline, so that it is clear how each "milestone" relates to the overall goal of wasteload allocation attainment.

[10] *See Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003).

Second, the modifications are needed to explain the process that the District must follow if new TMDLs are developed during the permit term. The original permit text did not set out a clear path for the District to follow in incorporating new TMDLs into its Implementation Plans. The modified text in Part 4.10.3 minimizes confusion on this point.

Third, the original permit did not clearly require all TMDLs to be addressed in Implementation Plans, but rather could have been interpreted to give the District permission to omit compliance schedules for TMDLs that it believed should be revised or withdrawn. This arrangement would violate the Clean Water Act's requirement for permits either to ensure immediate compliance with water quality schedules or to contain schedules designed to achieve such compliance, as well as the requirement for permits to be consistent with all TMDL wasteload allocations.[11] Furthermore, the permitting context is simply not the appropriate venue for the revision or withdrawal of TMDLs, for which a separate process exists. As a result, the proposed permit modifications in Part 4.10.3 are needed to make clear that *all* TMDLs must be addressed in the permittee's Implementation Plans unless and until they are no longer in effect.

Fourth, the proposed modifications are needed to clarify the process by which the relevant elements of the permittee's Implementation Plans will become enforceable permit terms. The original permit text was unclear on this point. The revised language in Part 4.10.3 makes clear that EPA will incorporate these elements through a formal permit modification process with attendant legal rights for the public.

Finally, the proposed modifications and fact sheet language are needed to resolve ambiguity surrounding the adaptive management process, making clear that compliance with that process does not substitute for compliance with other permit terms or excuse violation of permit deadlines. Too often, the adaptive management process is used as a shield against accountability for failure to meet permit requirements. The new fact sheet language – "Compliance with any provision of this permit does not relieve the permittee from compliance with any other provision of the permit" – reinforces the fact that the permit (Section 1.2) requires compliance with the entire permit and that the separate section on adaptive management (Section 4.10.4) does not relieve the District of that obligation. The result of the proposed language is to make clear that adjusting programs to correct for insufficient progress, while absolutely necessary, does not change the fact that the permittee has violated other permit terms by falling short of requirements, and that the permittee may be subject to enforcement action. The new fact sheet language explains that an endlessly iterative approach, with no consequences for failure, is not acceptable under this permit.

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Together, the proposed modifications strengthen the permit by making it more specific and enforceable. We urge EPA to finalize the modifications in their current form in order to

[11] 40 C.F.R. § 122.4(d), (d)(1)(vii)(B); *see also* 33 U.S.C. § 1311(b)(1)(C), 1342(a).

ensure that the District does its part to clean up the Potomac, Anacostia, Rock Creek, and Chesapeake Bay.

Sincerely,

Rebecca Hammer
Natural Resources Defense Council

Jennifer Chavez
Earthjustice

Mike Bolinder
Anacostia Riverkeeper

Brent Bolin
Anacostia Watershed Society

Diane Cameron
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Lee Epstein
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Kevin Jeffery
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Ed Merrifield
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