Responsiveness Summary
National Pollutant Discharge Elimination System (NPDES) Permit Modification

NPDES PERMIT NUMBER: DC0000221

PERMITTEE NAME and MAILING ADDRESS: Government of the District of Columbia The John A. Wilson Building 1350 Pennsylvania Avenue, N.W. Washington, D.C. 20004

FACILITY LOCATION: Municipal Separate Storm Sewer System (MS4)

RECEIVING STREAM: Potomac River, Anacostia River, Rock Creek, and stream segments tributary to each such water body

PUBLIC REVIEW and COMMENT PERIOD: July 12, 2012 to August 27, 2012

COMMENTERS:

A. Choose Clean Water Coalition, Peter J. Marx, on behalf of the following organizations: American Rivers; Anacostia Watershed Society; Audubon Naturalist Society; Chesapeake Bay Foundation; Citizens for Pennsylvania's Future (PennFuture); Friends of Lower Beaverdam Creek; National Wildlife Federation, Mid-Atlantic Regional Center; Natural Resources Defense Council; and Virginia Conservation Network (August 10, 2012);

B. National Association of Clean Water Agencies, Nathan Gardner-Andrews, Esq. (August 24, 2012);

C. Anacostia Watershed Citizens Advisory Committee, Cary Coppock (August 27, 2012);

D. District of Columbia Water & Sewer Authority (DC WASA) (a/k/a DC Water), Randy E. Hayman, Esq. (August 27, 2012); and

E. 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 (August 27, 2012).

INTRODUCTION:

Today's action involves certain limited modifications to the District of Columbia's (DC or the District) 2004 Municipal Separate Storm Sewer System (MS4) Permit. A procedural history of the Permit, since it was initially issued in 2000, can be found at: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/b5e5b68e89edabe98525714f00731c6f!OpenDocument&Highlight=2,municipal.

The U.S. Environmental Protection Agency (EPA or the Agency) provided public notice of the proposed limited modifications on July 12, 2012 and provided a comment period of forty-five days. The public notice period closed on August 27, 2012.

In response to the public-notification of the draft modification, EPA received comments from five commenters. The comments received were useful and resulted in an improved final permit modification, which is being issued today along with this Responsiveness Summary and an accompanying fact sheet. Each comment letter contained one or more comments that are individually excerpted and responded to below. Each letter is identified by an identifying letter of the alphabet, the organization/agency on behalf of which the comment was submitted, the name of the person submitting the comment, and the date of the comment. Following the initial information, each comment contained in the letter is excerpted and followed by EPA's response.

A. Choose Clean Water Coalition, Peter Marx (August 10, 2012):

Comment A1: "We fully support strengthening the permit in accordance with the public comment draft."

EPA Response: EPA thanks the commenter.

Comment A2: "The proposed changes to the District's permit are helpful because they make clear that the District is responsible, by way of a TMDL implementation plan that becomes an enforceable component of the permit, for reducing pollution from the MS4 in order to meet wasteload allocations (WLAs) for the system."

EPA Response: EPA thanks the commenter, but notes that, as described in the Fact Sheet for the proposed modification, after approval of the Consolidated TMDL Implementation Plan, EPA will incorporate elements of the Plan as enforceable permit requirements.

Comment A3: "Specifically, the proposed amendment to the permit would:

- Make clear that the District's discharges must immediately meet water quality standards and applicable WLAs unless the District develops and complies with an EPA-approved TMDL Implementation Plan that contains an ultimate date for achieving each WLA and enforceable milestones that demand progress and eventual achievement of all TMDLs.
- Require DDOE to 'provide meaningful opportunity for the public to participate in the development of the permittee's Consolidated TMDL Implementation Plan.' Because the plan, upon EPA approval, is the means by which the District will limit its pollution, it is an effluent limitation that must be open for public input.
- Include annual numeric pollution reduction benchmarks that ensure constant assessment of the success of the plan and prompt adaptive management action to improve control programs to correct deficiencies that might delay achievement of WLAs or interim milestones.
- Incorporate numeric milestones, falling due at least every 5 years, that require the District to achieve specific pollutant reductions or other relevant measures of mandatory progress toward meeting WLAs. Failure to satisfy one of these milestones would be a permit violation."

EPA Response: EPA appreciates the commenter's support of the modifications, which speak for themselves. Refer to the Fact Sheet for the proposed modification for additional explanation.

Comment A4: "Although we do not concede that these changes make the permit as strong as the Clean Water Act requires it to be, they—in combination with other permit provisions such as the strong retention standard for new and redeveloped sites—collectively will help ensure that the MS4 participates in the cleanup of numerous pollution-burdened water bodies in the District and in the Bay watershed."

EPA Response: EPA believes the permit as developed meets all the applicable requirements of the Clean Water Act and is sufficiently strong to ensure water quality goals are met.

B. National Association of Clean Water Agencies, Nathan Gardner-Andrews, Esq. (August 24, 2012):

Comment B1: "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 [sic] 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."

EPA Response: The action being taken by EPA is a limited modification to the existing MS4 permit for DC NPDES Permit No. DC0000221. We will address individual points of concern in following responses. .

Comment B2: "Among the positive permit modifications proposed by EPA is an extension of time to develop the Consolidated TMDL Implementation Plan from 24 month [sic] 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."

EPA Response: EPA appreciates the support of this modification, and is finalizing the permit modification with the 30 month schedule.

Comment B3: "Additionally, the proposed revision in the definition section clarifying that benchmarks in the permit 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."

EPA Response: EPA agrees with this comment, and is finalizing the permit modification with the proposed definition of "benchmark."

Comment B4: "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."

EPA Response: EPA appreciates the Commenter's support with this revision, and is finalizing the permit modification with the proposed definition of "permittee." However, EPA notes that the modification to the definition of "permittee" does not change the meaning of the definition from that in the final permit issued September 30, 2011 – the sole permittee is and has been the Government of the District of Columbia. The modification is intended solely to clarify that fact, as some found the wording of the definition in the final permit to be confusing.

Comment B5: "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."

EPA Response: This comment is beyond the scope of the permit modification. The definitions of "milestone" and "benchmark" are for purposes of clarity to assist the permittee in developing it Consolidated TMDL Implementation Plan. As explained in the Fact Sheet accompanying the proposed Permit Modification #1, "the EPA proposes two new definitions to support and clarify the expectations for TMDL planning and implementation." Fact Sheet at 8. The permit modification does not establish any benchmarks or milestones in Part 4.10.3, nor does it establish any numeric effluent limitations.

As the commenter notes, this comment repeats points made its comments on the proposed permit that was issued on September 30, 2011. For the EPA's response to that comment, see Responsiveness Summary, Response to Comment 18.c. , pp. 99-100, available at http://www.epa.gov/reg3wapd/pdf/pdf_npdes/Wastewater/DC/DCMS4FINALResponsivenessSummary093011.pdf.

Comment B6: "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 the 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."

EPA Response: As a result of comments on the proposed modification to part 4.3.1.3 of the permit, EPA is changing the public notice requirement to allow the permittee to determine when, how, and by whom the public shall be notified of sanitary sewer overflows to the MS4 when there may be a risk to public health so long as public health is protected. The final modified permit language is consistent with these principles. Also, see response to comment D6.

Comment B7: "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."

EPA Response: EPA notes that, although the referenced policy and guidance documents are not regulations subject to public notice requirements, they are guidance and as such they inform the implementation of the NPDES program. These documents collectively provide support for requiring public notification of SSOs to the MS4 when there may be a risk to public health, and constitute a body of literature explaining why and how public notification of SSOs is scientifically and logistically supportable. Also, see response to comment D6.

Comment B8: "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."

EPA Response: EPA has modified the proposed SSO reporting approach in response to comments. See responses to comments B5 and B6 above and comments D13 through D20.

Comment B9: "Given the significant national attention this permit has received, these inappropriate requirements also could have serious negative implications for other municipal stormwater utilities across the country."

EPA Response: See responses to comments B1 and D6.

C. Anacostia Watershed Citizens Advisory Committee, Cary Coppock (August 27, 2012):

Comment C1: "The US Environmental Protection Agency (USEPA) has set a clear deadline to eliminate the vast majority of the combined and sanitary sewage overflows from the river. In contrast, the Environmental Protection Agency (EPA) and the Maryland Department of the Environment (MDE) have never set any interim or final deadlines for the Counties and the

District to manage stormwater discharges and meet their TMDL wasteload allocations, despite the tons of trash and other more toxic pollutants discharged. The many green infrastructure improvements to the stormwater management system that are needed to help the Anacostia will be a great boon to our communities, greening and beautifying them, creating jobs and raising property values. This work would be no more expensive or technically difficult than the work currently done by DC Water and WSSC."

EPA Response: This comment is beyond the scope of the DC permit modification. Having said that, the renewal of MD MS4 permits for suburban counties is currently underway and EPA is coordinating extensively with MDE on these permits. EPA is working with the Permitting Agency to ensure that similar restoration plans with deadlines for meeting the TMDL Wasteload allocations are incorporated as key provisions of those permits.

Comment C2: "The Clean Water Act is clear that the EPA (and the states to which it has delegated permitting authority) is to establish compliance schedules with deadlines when the permit applicant cannot meet water quality standards immediately. The current permit proposal instead calls for the District to create TMDL implementation plans. As citizens, we are concerned that EPA delegates its authority to set deadlines, [sic] to the regulated party."

EPA Response: The EPA does not agree that the modifications to the permit result in the permittee being delegated authority to set a compliance schedule for meeting water quality-based effluent limitations (WQBELs). The schedule called for in Part 4.10.3 is an element of the Consolidated TMDL Implementation Plan. The Plan is required to be made available to the public for comment and submitted to EPA for review and approval. The permit as modified specifically states that "EPA *will* incorporate elements of the Consolidated TMDL Implementation Plan as enforceable permit provisions." (Section 4.10.3, emphasis added.) Thus, the EPA, not the permittee, will ultimately determine the enforceable schedule.

Comment C3: "Further, we do not understand the difference between stormwater discharge and sewer overflows, in their need for specific deadlines by EPA. Tons of pollutants, including trash, are now fouling the river that runs through our Nation's capital. We understand that zero trash and other TMDLs are difficult to attain, but given our current distance from attaining zero it is reasonable to set and enforce goals."

EPA Response: With respect to the need for specific deadlines to implement TMDLs, please see response to Comment C2. This remainder of this comment is beyond the scope of the permit modification. EPA notes, however, that this permit only addresses discharges from the District's MS4 and that discharges from other sewer systems are covered by a different permit. In addition, Part 4.10.3 specifically requires a Consolidated TMDL Implementation Plan for the wasteload allocations assigned to the MS4.

Comment C4: "If EPA will not set deadline(s) for the District to meet TMDL wasteload allocations, the proposed changes to the permit will at least insure [sic] that milestones and benchmarks are established for specific dates, and are enforceable."

EPA Response: EPA emphasizes that it has set many enforceable deadlines in the permit for compliance with wasteload allocations, and will continue to do so with each reissuance. The permittee's planning process will help inform schedules in future permits. EPA would like to note, however, that "benchmarks" are not enforceable permit provisions.

Comment C5: "We endorse the comments of NRDC and Earthjustice as to why the proposed changes are the minimum necessary."

EPA Response: EPA appreciates the Commenter's support of Modification Number 1 to the Final Permit. EPA would like to note, however, that EPA could not find the phrase "the proposed changes are the minimum necessary" in NRDC and Earthjustice's comment letter regarding Modification Number 1 to the Final Permit, nor was this phrase used prior in the Commenter's letter.

Comment C6: "We also urge EPA to carefully review the proposed MS4 permit for the City of Baltimore from MDE. The proposed permit contains no deadlines for compliance with wasteload allocations, and no real timeframes for Baltimore waters to be cleaned and restored. Also missing is policy to reduce the volume of stormwater that is necessary to truly restore Baltimore's streams. The critical importance of volume reduction, in tandem with correcting other offenses to our waters is supported by peer reviewed literature as provided by other commenters."

EPA Response: This comment is outside the scope of the DC MS4 permit modification. Having said that, EPA is working in close cooperation with MDE on the renewal of several Phase I MS4 permits in MD and will work to ensure that matters of consistency are addressed to the extent possible.

Comment C7: "The Administrator has declared that the [sic] Anacostia River and Baltimore Harbor are important "urban waters" of great consequence to our Nation. Citizen members of AWCAC believe it is time for the regulatory programs of the EPA and MDE to be consistent with that spirit."

EPA Response: This comment is outside the scope of the DC MS4 Permit Modification. EPA believes the permit provisions are sufficiently protective in the spirit of the Urban Waters program.

D. District of Columbia Water and Sewer Authority, Randy Hayman (August 27, 2012)

Comment D1: "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."

EPA Response: EPA appreciates the commenter's (albeit limited) support of the permit modification. With respect the commenter's general statement regarding the problems they believe remain, EPA understands the remainder of the comment letter to provide those specific

issues, and EPA responds to them in turn below. To the extent that the issues referenced in this comment are not described more specifically elsewhere in the comment letter, EPA is unable to respond to this comment as a result of its lack of specificity, other than to respond that EPA disagrees with the commenter on whether "a number of problems persist" with the permit.

Comment D2: "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 the 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."

EPA Response: EPA is clarifying with this permit modification that the permittee is the Government of the District of Columbia. Nothing in the permit modification assigns any direct requirement on DC Water. This comment is speculative and beyond the scope of the permit modification.

With respect to the allegedly "impracticable and unauthorized permit provisions," EPA is unable to respond to that general allegation because the commenter has not identified which aspects of the permit are so allegedly deficient. This comment is therefore beyond the scope of the permit modification.

Comment D3: "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 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.'"

EPA Response: The modification to the definition of "permittee" does not have any substantive effect– as EPA has stated, the Government of the District of Columbia is the sole permittee and has been since EPA issued the initial MS4 Permit in April 2000. Instead, the modification to the definition of "permittee" is meant to remove any confusion that may previously have existed with respect to who is the permittee.

EPA also disagrees that DC Water is a permittee at all, much less an "unwilling" or "*de facto*" permittee. Any actions that the Government of the District of Columbia requires of DC

Water are a matter of District law and are not imposed directly by the permit. With respect to the specific permit sections identified (2.3.1 and 2.3.2), those sections are not part of this limited permit modification; as a result, the commenter's comments with respect to those sections are outside the scope of this permit modification.

Comment D4: "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."

EPA Response: EPA disagrees that the permit directly imposes any responsibilities on DC Water, and believes that EPA has already fully addressed DC Water's concern and communicated that to DC Water repeatedly. (See also responses to comments D2 and D3). As stated in the response to comment D3, that section is not part of this limited permit modification; as a result, the commenter's suggestion on Section 2.3.1 of the permit is beyond the scope of this modification.

Comment D5: "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. . . . 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."

EPA Response: Although this comment is beyond the scope of the permit modification, EPA refers to the plain language of the District of Columbia Stormwater Management Act and otherwise defers to the District of Columbia Attorney General's interpretation of District law. (see also response to comments D2 and D3). Regardless of whether DC Water is or is not legally and/or financially independent from the District Government, the permit does not impose any compliance responsibility directly on DC Water. Therefore, there is nothing for the permit to identify and the commenter's concern is misplaced. Other comments on related issues are outside the scope of the permit.

Comment D6: "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 this permit. We note that Agency guidance does not provide such authority and is irrelevant to the issue at hand."

EPA Response: The EPA does not agree with this comment. As a general matter, section 101(e) of the Clean Water Act sets forth as Congressional goal and policy that the public be involved in the "development, revision and enforcement of any regulation, standards, effluent limitation, plan, or program established by the Administrator or any State under this chapter . . ." 33 U.S.C. § 1251(e). Regarding NPDES permits generally, section 402(a)(2) of the Clean Water Act provides broad authority to "prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of [§402(a)], including conditions on data and information collection, reporting, *and such other requirements as he deems appropriate*." 33 U.S.C. § 1342(a)(2) (emphasis added). Regarding MS4 permits specifically, section 402(p)(3)(B)(ii) (33 U.S.C. § 1342(p)(3)(B)(ii)) requires MS4 permits to "effectively prohibit non-stormwater discharges into the storm sewers," and section 402(p)(3)(B)(iii) requires "controls to reduce the discharge of pollutants [from the MS4] to the maximum extent practicable . . . and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." A requirement that the public be notified of sanitary sewer overflows to the MS4 in a timely and effective manner is a reasonable requirement to prevent human contact with untreated sanitary sewage and the possible adverse health effects that may result from such contact. EPA believes that a requirement for public notification when SSOs to the MS4 pose a threat to public health is logical and appropriate, and is therefore modifying the DC MS4 permit to require the permittee to develop a response strategy that would determine when, how, and by whom the public shall be notified of sanitary sewer overflows to the MS4. EPA's expectation is that the permittee would make a determination of the overflows that pose a potential health threat to the public, and provide public notification accordingly.

Comment D7: "This requirement [public notification of SSOs that reach the MS4] 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. [citation omitted]"

EPA Response: Other state laws are irrelevant to this permit modification. However, EPA notes that many states have developed criteria, thresholds and plans for when and how public notification of SSOs should be provided.

Comment D8: "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."

EPA Response: The terms and conditions of other NPDES permits are not relevant to the authority for this permit modification. See response to comment D6 for further discussion of authority.

Comment D9: "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."

EPA Response: See Responses to Comments B1, D6, D7, and D10.

Comment D10: "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."

EPA Response: EPA is not aware of any data suggesting that notification of SSOs or other types of discharges desensitizes the public to potential health threats, and the commenter does not support its statement with any data. On the contrary, there is evidence that public notification is an effective method of reducing public exposure to pathogens in raw sewage and that many federal, state and local agencies advocate and implement public notification programs for water-borne public health threats (see footnoted references in the Fact Sheet, especially Part 6.5 of the 2004 *Report to Congress* and *What's in Your Water?*). In fact, until the District eliminates overflows from the sanitary sewer system to the MS4, public notification is one of the only mechanisms to minimize public exposure to the pathogens and other pollutants in these overflows. EPA has revised the permit language to allow the permittee to determine which overflows to the MS4 pose a threat to public health, and to provide sufficient public notification of that subset of SSOs to the MS4.

Comment D11: "While DC Water supports the requirements 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."

EPA Response: The permit as modified does not require DC Water to provide public notification. The permit is issued to the Government of the District of Columbia, which includes a number of agencies, departments and authorities, including public health officials. The permit

specifically allows the permittee to make determinations about which of those entities will carry out the various provisions of the permit, including any public notification procedures. With respect to legal authority, see Response to Comment D6.

Comment D12: "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. . . . 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."

EPA Response: EPA believes the commenter's concerns regarding the practicality of the Consolidated TMDL Implementation Plan are beyond the scope of the limited permit modification. In addition, the commenter's description of the definition as a "change to annual goals or targets" is incorrect; this permit modification simply clarifies what was meant by the term "benchmark" in the final permit. Also see Response to Comments D14 through D17.

Comment D13: "Increasing the time for completion of the Consolidated TMDL Implementation Plan from 2 years to 30 months is an improvement, but 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 . . ."

EPA Response: EPA disagrees that 30 months is insufficient. The increase from 24 months to 30 months was to enable the permittee to provide greater public participation. Given that EPA found 24 months to be adequate for plan development, as included in the final permit, the additional 6 months added by this limited permit modification is intended only to enable greater public participation (*See* Proposed Modification Fact Sheet at Page 3, Item 1). EPA believes that an additional 6 months for that purpose is adequate. EPA also notes that the permittee did not provide any comments to the contrary. See Response to Comment D17.

Comment D14: "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."

EPA Response: This comment is beyond the scope of this modification. EPA did not propose a modification to the language in Part 4.10.3. Also see Response to Comment D13.

Comment D15: "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."

EPA Response: See Response to Comment D13.

Comment D16: "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."

EPA Response: See Response to Comment D13.

Comment D17: "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."

EPA Response: This comment is beyond the scope of the permit modification. EPA did not propose to modify the scope of waters or pollutants to be addressed in the Consolidated TMDL Implementation Plan required by the permit. Also see Response to Comments D13, D14, and D18 through D20.

Comment D18: "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. . . . 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 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."

EPA Response: This comment is outside the scope of the permit modification to the extent that it takes issue with the core requirement that the Consolidated TMDL Implementation Plan include enforceable final wasteload allocation attainment dates and interim milestones. These core elements were included in the final permit. The modifications in Part 4.10.3 are intended only as clarification, including clarification that elements of the Plan will become

enforceable when EPA incorporates them into the permit. However, the proposed modification did not reopen the inclusion of these elements as requirements of the Plan in the first instance. Also see Response to Comment D20.

Comment D19: "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 [sic] that will be revisited each permit term for refinement, as warranted, based upon implementation during the prior permit period."

EPA Response: This comment is outside the scope of the permit modification. See responses to comments D17 and D18.

Comment D20: "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."

EPA Response: This comment is outside the scope of the permit modification. Nonetheless, EPA notes that the permittee already has first-hand experience in BMP implementation going back many years, and has even developed its own manual customized to conditions in the District. Further, there is an extensive body of literature on the topic, which the permittee utilized in development of the manual and is therefore familiar with. There are a number of models available to assist in making decisions regarding optimum BMP placement, estimating long-term reductions, and other elements. Although some degree of uncertainty may be part of modeling and planning processes, it is not justification for failing to develop a plan with specific objectives and schedules.

Comment D21: "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. [citation omitted] We ask EPA to identify any water similar to the Anacostia (including the source makeup of the bacteria loadings) in the country that have [sic] accomplished anything close to this level of reduction."

EPA Response: This comment is beyond the scope of the permit modification. This is not the appropriate forum for taking issue with a wasteload allocation (WLA). The time to raise these types of issues is during the development of the relevant TMDL and the associated public review process.

Comment D22: "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."

EPA Response: As stated in response to Comment D18, interim milestones and fixed end dates were required to be included by the permit, not by the modification and therefore this comment is beyond the scope of the modification.

Comment D23: "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."

EPA Response: EPA appreciates the comment and points out that the permit not only allows, but requires updates to account for new data and information. EPA will revisit the schedule and relevant implementation actions with each permit reissuance.

Comment D24: "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."

EPA Response: Dates for ultimate attainment was a requirement of the final permit, and not proposed for modification. Therefore this comment is beyond the scope of this modification. Further, the terms and conditions of other NPDES permits are not relevant to the authority for this permit modification. Additionally, see Response to Comment D18.

Comment D25: "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 [sic] 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."

EPA Response: The terms and conditions of other NPDES permits and programs are not relevant to the authority for this permit modification. See Response to Comment D24.

Comment D26: "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. . . . 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 impracticality of accurately setting milestones and final end dates for WLAs . . . ."

EPA Response: See Response to Comment B5 and responses to comments D13 through D20.

Comment D28: "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."

EPA Response: The commenter seems to be suggesting that compliance schedules should not be enforceable, i.e., "compliance targets" being a goal rather than a requirement. EPA believes that permits should include clear and enforceable objectives and deadlines, and clarifies that under this modification compliance dates will become enforceable when EPA incorporates them into the permit. Additionally, any comments regarding Montgomery County MS4 are outside of the scope of the permit modification. The permit recognizes that this is a process and there will be plenty of opportunity to comment when the permit is subsequently modified to include such enforceable provisions.

E. Natural Resources Defense Council, Earthjustice, et. al., Rebecca Hammer (August 27, 2012):

Comment E1: "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 the Potomac Riverkeeper . . ."

EPA Response: No response is needed.

Comment E2: "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."

EPA Response: With the exception of the SSO public notification provision (see Final Permit Modification Fact Sheet at pages 2 and 3), a provision this commenter did not specifically comment on, EPA is finalizing the permit modifications as proposed.

Comment E3: "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. [citation omitted] 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. [citation omitted] 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." [citation omitted] 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."

EPA Response: EPA agrees that including enforceable requirements in the permit is critical, and believes that the final permit as modified sets a specific path to ultimate attainment of applicable water quality standards.

Comment E4: "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."

EPA Response: With the exception of the SSO public notification provision (see Final Permit Modification Fact Sheet at pages 2 and 3), a provision this commenter did not specifically comment on, EPA is finalizing the permit modifications as proposed.

Comment E5: "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. [citation omitted] In addition, all NPDES permits must contain requirements 'consistent with the assumptions and requirements of any available wasteload allocation.' [citation omitted] 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.' [citation omitted] Schedules must be designed to achieve compliance 'as soon as possible, but not later than the applicable statutory deadline under the CWA.' [citation omitted] Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. [citation omitted]"

EPA Response: The regulations and statute cited by commenters speak for themselves.

Comment E6: "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."

EPA Response: EPA appreciates the commenter's support of the modifications, which speak for themselves. In addition, although the federal regulations at 40 C.F.R. 122.44(d)(1)(vii)(B) require a NPDES permit's water quality-based effluent limit to be consistent with the assumptions and requirements of any available wasteload allocation(s) approved pursuant to 40 C.F.R. 130.7, the TMDL's wasteload allocations themselves are not enforceable *per se*.

Comment E7: "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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA clarifies, however, that the dates included in the Consolidated TMDL Implementation Plan will not become enforceable permit provisions immediately upon EPA approval.

Comment E8: "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."

EPA Response: EPA appreciates the commenter's support for the permit modifications.

Comment E9: "Public participation is central to the Clean Water Act NPDES permitting program. 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 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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA clarifies, however, that the Consolidated TMDL Implementation Plan will not become an enforceable permit provision immediately upon EPA approval; EPA intends to include specific elements of the Consolidated TMDL Implementation Plan as effluent limitations into the permit.

Comment E10: "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."

EPA Response: EPA agrees, and is finalizing this language as proposed.

Comment E11: "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."

EPA Response: EPA agrees, and is finalizing this language as proposed.

Comment E12: "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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. Although the Consolidated TMDL Implementation Plan itself will not be subject to legal challenge, at least not in federal court, when EPA incorporates plan elements into the permit, the public likely will be able to comment on any permit modification and use any available method(s) to challenge such permit modification(s).

Comment E13: 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.

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA is finalizing this language as proposed.

Comment E14: "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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA is finalizing this language as proposed.

Comment E15: "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. [citation omitted] 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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA is finalizing this language as proposed.

Comment E16: "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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA is finalizing this language as proposed. EPA clarifies, however, that EPA may incorporate

elements of the Consolidated TMDL Implementation Plan via a permit modification OR when it reissues the permit.

Comment E17: "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."

EPA Response: EPA appreciates the commenter's support for the permit modifications. EPA is finalizing this language as proposed.

Comment E18: 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."

EPA Response: EPA agrees.