BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

	)
In re:	)
	)
Government of the District of Columbia,	)
Municipal Separate Storm Sewer System,	)
NPDES Permit No. DC 0000221	)
	)

PETITION FOR REVIEW

Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc., respectfully file this petition for review by their counsel:

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Dated: Nov. 4, 2011.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTRODUCTION 5

THRESHOLD PROCEDURAL ISSUES 6

FACTUAL AND STATUTORY BACKGROUND 7

I. The Petitioners 7

II. CWA Requirements for NPDES Permits for Discharges from MS4s 9

III. History of the Permit 9

IV. Standard for Review 13

ISSUES FOR REVIEW 14

I. The Permit Unlawfully Fails to Ensure Compliance with Water Quality Standards and Wasteload Allocations 14

A. MS4 permits must ensure compliance with water quality-based requirements immediately or, in certain cases, pursuant to a specified compliance schedule. 14

B. The Permit fails to ensure compliance with water quality standards and wasteload allocations. 17

1. The Permit does not ensure *immediate* compliance with water quality standards or wasteload allocations 18

2. Even if compliance schedules are appropriate for any new water quality-based limitations in the Permit, the Permit fails to include a lawful schedule designed to achieve compliance. 23

RELIEF REQUESTED 27

LIST OF EXHIBITS 29

TABLE OF AUTHORITIES

Page(s)

CASES

Anacostia Riverkeeper, Inc., et al., v. Jackson,
2011 WL 3019922 (D.D.C. July 25, 2011) 7

Anacostia Riverkeeper, Inc., et al. v. Jackson,
713 F. Supp. 2d 50 (D.D.C. 2010).....7

Friends of the Earth, Inc. v. EPA,
446 F.3d 140 (D.C. Cir. 2006).....15

Taylor v. Sturgell,
553 U.S. 880 (2008).....15

STATUTES

33 U.S.C. § 1311(a) 9

33 U.S.C. § 1311(b)(1) 9

33 U.S.C. § 1311(b)(1)(C) 9, 14

33 U.S.C. § 1313.....15

33 U.S.C. § 1342(a)(1) 9, 14

33 U.S.C. § 1342(p)(3)(B)(ii) 9, 19

33 U.S.C. § 1342(p)(3)(B)(iii) 9

33 U.S.C. §1342(p)(4)(A).....10

33 U.S.C. § 1362(17) 17

OTHER AUTHORITIES

21 DCMR § 1105.9.....16,17, 23, 25

40 C.F.R. § 122.4(d) 9, 14

40 C.F.R. §122.44(d)(1)(i).....14

40 C.F.R. § 122.44(d)(1)(vii)(B) 9, 15

40 C.F.R. § 122.47(a).....16, 23, 24, 25

40 C.F.R. § 122.47(a)(1) 17

40 C.F.R. § 122.47(a)(3) 17

40 C.F.R. § 124.8 16

40 C.F.R. § 124.9 16

40 C.F.R. § 124.16(a)(2)(i) 28

40 C.F.R. § 124.18 16

40 C.F.R. §124.19 5

40 C.F.R. § 124.19(a) 6, 13

40 C.F.R. § 130.2(h) 15

Final Rulemaking, 57 DCR 9129 (Oct. 1, 2010) 23

Notice of Final Rulemaking, 52 DCR 9621 (Oct. 28, 2005) 23

In re District of Columbia Water & Sewer Authority,
13 E.A.D. 714 (2008) 16

In re Government of the District of Columbia Municipal Separate Storm Sewer System,
10 E.A.D. 323 (2002) 11, 12, 13, 14, 20, 26

In re Star-Kist Caribe, Inc.,
3 E.A.D. 172 (Adm'r 1990) 16

In re: Upper Blackstone Water Pollution Abatement District,
NPDES Appeal No. 08-11 (EAB May 28, 2010) 16, 17, 26

Matter of Wego Chemical & Mineral Corp.,
4 E.A.D. 513 (1993) 16

INTRODUCTION

Pursuant to 40 C.F.R. §124.19, Anacostia Riverkeeper, Inc. ("ARK"), Potomac Riverkeeper, Inc. ("PRK"), Friends of the Earth ("FOE"), and Natural Resources Defense Council, Inc. ("NRDC") (collectively "Petitioners") hereby petition the Environmental Appeals Board ("the Board") for review of conditions of National Pollutant Discharge Elimination System ("NPDES") permit No. DC 0000221 ("the Permit") for the District of Columbia municipal separate storm sewer system ("MS4"), issued by the Regional Administrator, U.S. Environmental Protection Agency Region III ("the Region").[1] Ex. 1 (Permit). The Permit was signed on September 30, 2011 with an effective date of October 7, 2011. *Id*. Petitioners received formal public notice of the issuance of the Permit by electronic mail dated October 6, 2011. Ex. 2 (E-mail Notice of Permit Issuance).

The permit at issue in this proceeding authorizes discharges from the municipal separate storm sewer system owned and operated by the District of Columbia to the Potomac River, Anacostia River, Rock Creek, and their tributaries. Ex. 1 (Permit) at 1. Petitioners contend that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically:

1. The following language of § 1.4.3 of the Permit fails to ensure compliance with (a) the District's water quality standards and (b) wasteload allocations set forth in relevant total maximum daily loads: "Compliance with the performance standards and provisions contained in Parts 2 through 9 of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term."

[1] EPA Region 3 is the NPDES permitting authority for the District of Columbia. *See* http://cfpub.epa.gov/npdes/statestats.cfm.

2. The following language of § 4.10.3 of the Permit fails to meet requirements for lawful compliance schedules designed to achieve attainment with wasteload allocations:

> For any new or revised TMDL approved during the permit term with waste load allocations assigned to District MS4 discharges, the District shall update this Plan within six months and include a description of revisions in the next regularly scheduled annual report. The Plan shall include:
>
> 1. A specified schedule for compliance with each TMDL that includes numeric benchmarks that specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
> 2. Interim numeric milestones for TMDLs where final attainment of applicable waste load allocations requires more than one permit cycle. These milestones shall originate with the third year of this permit term and every five years thereafter.
> 3. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
> 4. The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.
> 5. Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs.

THRESHOLD PROCEDURAL ISSUES

Petitioners satisfy the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. In particular:

1. Petitioners have standing to petition for review of the permit decision because they participated in the public comment period on the permit.[2] *See* 40 C.F.R. § 124.19(a).

[2] Although FOE was not a signatory to the Petitioners' comments on the draft Permit, Petitioners respectfully request that FOE be allowed to participate in this proceeding as long as the other Petitioners who did submit comments continue to participate. FOE does not raise any additional arguments beyond those raised by the remaining petitioners. In addition, FOE has a long history of administrative advocacy to strengthen controls on pollution in the District, including participation in DCMS4 I and two subsequent petitions for review of the District's MS4 permit. *See also Anacostia Riverkeeper, Inc., et al., v. Jackson*, 2011 WL 3019922 (D.D.C. July 25, 2011) (successful challenge to legally inadequate TMDLs approved by the Region for the Anacostia River); *Anacostia Riverkeeper, Inc., et al. v. Jackson*, 713

Petitioners and nine other environmental organizations filed timely comments with EPA during the public comment period on the permit amendment. The comments were made by two letters dated June 4, 2011 and are a part of the administrative record in this matter. *See* Ex. 3 (Comments of NRDC et al.) and Ex. 4 (Comments of Earthjustice et al.).

2. The issues raised by Petitioners in this petition were raised during the public comment period and therefore were preserved for review. Citations to the administrative record are included in the relevant sections of the Argument below.

FACTUAL AND STATUTORY BACKGROUND

I. The Petitioners

FOE is a nonprofit corporation with its offices at 1100 15th Street NW, 11th Floor, Washington, D.C. 20005. FOE is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. FOE is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land.

ARK is a nonprofit corporation with its offices at 515 M Street SE, Suite 218, Washington, D.C. 20003. It is dedicated to advocating for a clean and healthy Anacostia River, engaging in efforts to protect and enhance water quality in the river, enforcing existing federal and state laws governing the Anacostia watershed, and educating the public about issues affecting the Anacostia.

PRK is a nonprofit corporation with its offices at 1100 15th Street NW, 11th Floor, Washington, D.C. 20005. It is dedicated to advocating for a clean and healthy Potomac River and its tributaries, enforcing existing federal and state laws governing the Potomac watershed,

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F. Supp. 2d 50 (D.D.C. 2010) (successful challenge to legally inadequate TMDLs approved by the Region for the Anacostia and Potomac Rivers).

protecting the Potomac from pollution and exploitation, and educating the public about issues affecting the Potomac watershed.

NRDC is a nonprofit corporation with its offices at 1152 15th Street NW, Suite 300, Washington, D.C. 20005. It is dedicated to protecting public health and the environment through litigation, lobbying, and public education. NRDC has more than 530,000 members nationwide, including over 1,700 members who live in Washington, D.C.

Earthjustice is a nonprofit, public interest law firm that is representing Friends of the Earth, Anacostia Riverkeeper, and Potomac Riverkeeper in this matter. Its address is 1625 Massachusetts Avenue, NW, Suite 702, Washington, D.C. 20036, (202) 667-4500.

Petitioners act to protect and enhance the environment through administrative advocacy and litigation to enforce environmental laws. These organizations have a long history of involvement in water quality-related activities, and their members are greatly concerned about water quality. Petitioners' members use, enjoy, live adjacent to or near, and otherwise benefit from waters and riparian areas that are adversely impacted by the District's MS4 discharges. Their members use and enjoy such waters and riparian areas for a variety of purposes, including, but not limited to, boating, sightseeing, hiking, wildlife watching, aesthetic enjoyment, and other recreational pursuits.

Discharges from the District's MS4 system cause or contribute to pollution levels in waters used by Petitioners' members that are injurious to human health, wildlife, the aesthetic qualities of those waters, and to uses pursued and enjoyed by such members. Such discharges, and the Region's failure to adequately limit them in the Permit as further described below, threaten the health and welfare of Petitioners' members, impair and threaten their use and enjoyment of the above-

mentioned waters, and deny them the level of water quality to which they are entitled under the Clean Water Act.

II. CWA Requirements for NPDES Permits for Discharges from MS4s

The Clean Water Act ("CWA" or "the Act") prohibits the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized under the law. The NPDES permit program is an exception to that general prohibition. 33 U.S.C. §§1311(a), 1342(a)(1). Such permits must specify technology-based effluent limitations, plus any more stringent limitations necessary to assure compliance with water quality standards in the receiving waters. 33 U.S.C. §1311(b)(1). NPDES permits must include conditions adequate to "ensure compliance" with applicable water quality standards in receiving waters. 33 U.S.C. § 1311(b)(1)(C), 1342(a), 40 C.F.R. § 122.4(d). NPDES permits must also contain requirements "consistent with the assumptions and requirements of any available wasteload allocation." 40 C.F.R. § 122.44(d)(1)(vii)(B). In addition to these requirements for all NPDES permits, MS4 permits are also subject to the requirement that they "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii). MS4 permits must also "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." 33 U.S.C. § 1342(p)(3)(B)(ii).

III. History of the Permit

The Permit at issue in this petition governs the discharge of polluted stormwater runoff from the District of Columbia MS4 to the Potomac River, the Anacostia River, Rock Creek and tributaries of the foregoing waterbodies. These discharges occur from hundreds of storm sewer outfalls during and after rainfall events. Water quality in the MS4's receiving waters does not

currently meet several of the District's water quality standards. The District's biennial report on water quality, submitted to EPA pursuant to Clean Water Act requirements, found that no monitored water body fully supported its designated uses. Ex. 5 (excerpts from District Department of the Environment, 2010 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) of the Clean Water Act (2010)) at 1. Moreover, the report specifically identifies stormwater discharges as one of the most important contributors to surface water impairment. *See id*. at 3, 17.

Neither the District nor the Region followed the legally mandated path for compliance with the legal requirements for MS4 permits. In particular, Congress set a 1990 deadline for operators of large MS4s (like the District of Columbia) to apply for NPDES permits, and a 1991 deadline for permitting authorities to issue or deny such permits. 33 U.S.C. §1342(p)(4)(A). The CWA required these permits to provide for compliance as expeditiously as practicable, but in no event later than three years after the date of issuance of such permit. *Id*. Thus, the CWA mandated the MS4 systems be in compliance with applicable CWA requirements no later than 1994. In contrast, the District did not complete its MS4 permit application until 1998, and the Region did not issue an MS4 permit to the District until 2000 – nearly a decade behind the statutory schedule. The permit directed the District to continue a number of existing management practices that had stormwater-related benefits (*e.g.*, street sweeping, catch basin cleaning), but did not contain any water quality-based effluent limits to assure compliance with water quality standards in the receiving waters (except for one small tributary of the Anacostia – Hickey Run). Friends of the Earth and one other organization timely petitioned this Board for review of that permit, arguing that it was deficient in a number of major respects. On February 20, 2002, the Board granted the petition in part, holding that the permit was deficient because,

inter alia, the Region failed to show the management practices required by the permit would be adequate to ensure compliance with water quality standards. The Board remanded the permit to the Region for correction of this and other deficiencies. *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, NPDES Appeal Nos. 00-14 & 01-09 (2002) (hereinafter "*DC MS4 I*"), motion for partial reconsideration granted May 9, 2002.

On remand, the Region did not propose a revised permit until November 15, 2003, and did not issue a final permit until August 19, 2004. The revised permit suffered from several of the same major deficiencies as the initial permit, and from other deficiencies as well. Accordingly, on September 20, 2004, environmental organizations again petitioned the Board to direct the Region to correct these deficiencies. Ex. 6 (Petition for Review, NPDES Appeal No. 04-10). Petitioners argued, *inter alia*, that the permit did not contain effluent limitations adequate to assure compliance with applicable water quality standards and was thus in violation of the Act, EPA rules, and the Board's decision in *DC MS4 I*. *Id*. at 7-20.

In October 2004, Earthjustice and the Region began settlement discussions and jointly requested that the Board defer action on the appeal. On May 10, 2005, the parties reached a settlement whereby the Region would amend the permit to, among other things, explicitly prohibit discharges to or from the MS4 system that cause or contribute to the exceedance of water quality standards. *See* Ex. 7 § 1.C.2 (Proposed 2004 amendment), Part I.C.2., *see also* Ex. 8 (fact sheet accompanying proposed 2004 amendment), at 3. The Region released the agreed-upon amendment for public comment in July 2005. *Id*. Based on this proposal and pursuant to the parties' settlement, petitioners moved the Board for leave to withdraw their appeal in October

2005. The Board granted petitioners' motion to withdraw on October 28, 2005, specifying that the withdrawal was without prejudice.

On March 14, 2006, the Region issued a final version of the amendment. Ex. 9 (Final 2006 Permit Amendment). Unlike the negotiated draft amendment, the final amendment issued in 2006 did not prohibit discharges that would cause or contribute to noncompliance with water quality standards. Rather, the final amendment merely prohibited discharges that would contribute to worsening water quality compared to "current conditions"—conditions that violate water quality standards. The Region did not explain how the 2006 final amendment complied with the Board's very explicit instructions in *DC MS4 I* "to provide and/or develop support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards." 10 E.A.D. at 343 (emphasis in original). Moreover, the Region's abrupt reversal in course subsequent to the close of the public comment period denied petitioners a meaningful opportunity to comment on the amendment. Accordingly, environmental groups again asked the Board to direct the Region to correct the foregoing deficiencies, in a petition for review filed on April 17, 2006 (NPDES No. 06-08). Thereafter, the parties embarked on an alternative dispute resolution process that ultimately failed to produce agreement on a mutually acceptable set of permit provisions.

On Oct. 29, 2007, EPA withdrew the contested language from the 2006 amendment, and informed the Board that "EPA will prepare a new draft permit modification addressing the withdrawn permit conditions… and will submit the revised draft permit amendment terms for public comment." Ex. 10 (EPA Notice of Withdrawal of 2006 Amendment). However, four years passed following the Region's withdrawal of the 2006 amendment before the Region signed this most recent renewed permit, during which water quality in the Potomac and

Anacostia Rivers and Rock Creek has continued to suffer conditions that violate water quality standards and impair human and wildlife uses. Despite this, the Region continues to flout the EAB's very explicit instructions in *DC MS4 I* "to provide and/or develop support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards." 10 E.A.D. at 343 (emphasis in original).

On September 30, 2011, the Region signed a renewed final Permit with an effective date of October 7, 2011. Among other things, the Permit requires the District to "continue to implement, assess and upgrade all of the controls, procedures and management practices, described in this permit and in the [District's storm water management plan or "SWMP"] dated February 19, 2009." Ex. 1 (Permit) § 3. It sets forth specific elements of the SWMP that EPA must review and approve. *Id*. The Permit includes specific requirements for long-term stormwater management, including an on-site stormwater runoff retention standard for new and redeveloped properties, retrofitting existing pervious surfaces that generate polluted stormwater runoff, planting trees that help limit and control stormwater runoff, street sweeping that removes pollutants from stormwater flow, and other stormwater management controls. Permit § 4. It sets forth monitoring and reporting requirements that the District must implement. Permit §§ 5 and 6. And it requires the District to reapply for permit coverage at least 180 days prior to October 7, 2016, the expiration date of the Permit. Permit § 8.20.

IV. Standard for Review

Pursuant to 40 C.F.R. § 124.19(a), The Board grants review of a petition if it appears from the petition that the permit condition that is at issue is based on (1) a clearly erroneous finding of fact or conclusion of law or (2) involves an important policy consideration which the Board, in its discretion, should review. *DC MS4 I*, 10 E.A.D. at 332-33. The Board determines

"whether the approach ultimately adopted by the Region is rational in light of all information in the record." *Id.* at 342.

ISSUES FOR REVIEW

I. The Permit Unlawfully Fails to Ensure Compliance with Water Quality Standards and Wasteload Allocations

MS4 permits, like all NPDES permits, must ensure compliance with water quality standards and be consistent with applicable wasteload allocations. A failure to ensure such compliance is a violation of the Clean Water Act. If compliance cannot be ensured immediately, a permit may, in certain appropriate cases, include a schedule for compliance with these fundamental requirements. The Permit at issue here neither ensures immediate compliance with these requirements nor includes a lawful schedule designed to achieve compliance. Rather, it impermissibly delegates the task of developing a schedule to the Permittee. This approach is clearly erroneous and violates the mandates of the Clean Water Act.

A. MS4 permits must ensure compliance with water quality-based requirements immediately or, in certain cases, pursuant to a specified compliance schedule.

An NPDES permit must include conditions adequate to "ensure compliance" with applicable water quality standards in receiving waters. 40 C.F.R. § 122.4(d); *see also* 33 U.S.C. § 1311(b)(1)(C), 1342(a). Further, 40 C.F.R. §122.44(d)(1)(i) requires each NPDES permit to contain limitations on all pollutants or pollutant parameters that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." The EAB has stated that this requirement applies equally to MS4 permits. *See, e.g.*, *DC MS4 I*, 10 E.A.D. at 329, 335-43.

In *DC MS4 I*, the EAB found that when issuing an MS4 permit – in fact, the District of Columbia MS4 permit – the Region must "provide and/or develop support for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards." *DC MS4 I* at

342-43 (emphasis original). The *DC MS4 I* decision conclusively decides the question of whether EPA Region 3 must ensure compliance with water quality standards in the D.C. MS4 permit. Under the doctrine of collateral estoppel, EPA may not relitigate an issue of fact or law that has previously been litigated and resolved in a determination essential to a prior judgment, even if the issue recurs in the context of a different claim. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The doctrine of collateral estoppel applies in administrative proceedings such as proceedings before the EAB. *Matter of Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 519 (1993). Because Region 3 was a party to *DC MS4 I*, and because the question of whether water quality standards compliance must be ensured was essential to the EAB's judgment in that proceeding, that question must be treated as settled in the current proceeding.

In addition, all NPDES permits must contain requirements "consistent with the assumptions and requirements of any available wasteload allocation." 40 C.F.R. § 122.44(d)(1)(vii)(B). Wasteload allocations ("WLAs") are developed as part of a total maximum daily load ("TMDL") for an impaired water body. A TMDL represents the maximum amount of a pollutant that a water body can receive each day and meet water quality standards. 33 U.S.C. § 1313. Point sources discharging to a water body with a TMDL are assigned WLAs, which are the maximum amount of pollutant that a source can discharge into an impaired water per day. 40 C.F.R. § 130.2(h). Once a point source such as an MS4 is assigned a WLA, that WLA must be implemented through an NPDES permit. *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) ("Once approved by EPA, TMDLs *must* be incorporated into permits" (emphasis added).). EPA guidance states clearly that the regulatory requirement to be "consistent with" WLAs means that "the permit's administrative record needs to provide an adequate demonstration that, where a BMP [practice]-based approach to permit limitations is

selected, the BMPs [practices] required by the permit will be sufficient to implement applicable WLAs."[3] *See* Ex. 11 (Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, re: Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (Nov. 12, 2010)) at 4 (hereinafter "2010 Hanlon Memorandum"); *see also* 40 C.F.R. §§ 124.8, 124.9 & 124.18.

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." 40 C.F.R. § 122.47(a). A Region may only include a compliance schedule when the applicable state's water quality standards or its implementing regulations authorize such schedules. *See In re: Upper Blackstone Water Pollution Abatement District*, NPDES Appeal No. 08-11 at 102-03 (EAB May 28, 2010) (citing *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (Adm'r 1990), modification denied, 4 E.A.D. 33, 34 (EAB 1992)). The District's regulations implementing its water quality standards provide for the use of compliance schedules, but only for *new* limitations. 21 DCMR § 1105.9 ("When the Director requires a new water quality standard-based effluent limitation in a discharge permit, the permit may, when appropriate, specify a schedule of compliance."). Accordingly, the EAB has ruled that EPA-issued NPDES permits in the District of Columbia must include a schedule for compliance with *new* water quality based effluent limitations if compliance is not anticipated immediately upon permit issuance. *In re District of Columbia Water & Sewer Authority*, 13 E.A.D. 714 (2008).

[3] Petitioners note that EPA's preference is for wasteload allocations to be implemented in NPDES permits as *numeric* effluent limitations rather than BMP practice-based requirements. *See* 2010 Hanlon Memorandum at 2-4.

The Clean Water Act defines a schedule of compliance as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17). Schedules must be designed to achieve compliance "as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3). The District's regulations also state that schedules shall require compliance "as soon as possible," and that the permittee shall have no more than three years to achieve compliance with the limitation, "unless the permittee can demonstrate, and the record reflects, that a longer compliance period is warranted." 21 DCMR § 1105.9.

A schedule of compliance must be contained within the permit itself. *See In re: Upper Blackstone*, NPDES Appeal No. 08-11 at 102 (compliance schedules must be "made part of an EPA-issued NPDES permit"). The permitting authority must include *in the permit record* a sound rationale for determining that any compliance schedule meets the requirement that effluent limitations be met as soon as possible. Ex. 11 at 4 (2010 Hanlon Memorandum) (emphasis added).

B. The Permit fails to ensure compliance with water quality standards and wasteload allocations.

Contrary to these Clean Water Act requirements, this Permit fails to ensure immediate compliance with water quality standards and wasteload allocations. Moreover, even if, for the sake of argument, one assumed that compliance schedules are appropriate for some of the water quality-based limitations in the Permit, the Permit fails to include a lawful schedule designed to achieve compliance. Consequently, the Permit falls short of legal obligations and fails to hold the Permittee accountable for improving water quality in the District.

1. The Permit does not ensure *immediate* compliance with water quality standards or wasteload allocations.

As detailed above, water quality in the MS4's receiving waters does not currently meet several of the District's water quality standards, and both EPA and the District have determined that MS4 discharges presently cause or contribute to violations of standards. Notwithstanding these facts, the Permit fails to include provisions that ensure that the District's MS4 will comply immediately with such standards. Rather, the Permit explicitly states that the District is not expected to meet standards at any time during this five-year permit term. *See* Ex. 1 (Permit) at § 1.4 ("Compliance with the performance standards and provisions contained in Parts 2 through 8 of this permit shall constitute *adequate progress toward* compliance with DCWQS . . . for this permit term" (emphasis added).). Additionally, the Permit's administrative record contains neither a § 401 water quality certification nor any technical analysis purporting to show that compliance with the Permit's conditions will lead to near-term compliance with standards. *See* Ex. 12 (Responsiveness Summary) at 111 (explaining that the § 401 certification was waived). Instead, the Region's response to comments on the draft permit "acknowledges that such standards attainment may not occur in its entirety during this Permit cycle." Ex. 12 (Responsiveness Summary) at 110. This failure to ensure compliance with water quality standards is in violation of the Clean Water Act.

In response to Petitioners' comments criticizing the Permit's failure to ensure WQS compliance, the Region asserts that the Permit actually does require the District to attain standards. *See* Ex. 12 (Responsiveness Summary) at 80, 110. In support of this claim, the Region points to a Permit provision requiring the District to "[e]ffectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality standards (DCWQS)." *Id.* (quoting Ex. 1

(Permit) § 1.4.1); *see also* Ex. 1 (Permit) at § 2.1.1 ("The permittee shall use its existing legal authority to control discharges to and from the [MS4] in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards."). The Region additionally refers to a Permit provision requiring the District to take corrective action if MS4 discharges are causing or contributing to a violation of standards. Ex. 12 (Responsiveness Summary) at 80, 110 (citing Permit § 8.4).

This argument fails for several reasons. First, the primary provision that the Region cites (§ 1.4.1) is apparently based on the Act's prohibition of non-storm water discharges to the MS4, but it has been rendered in a form different from and potentially weaker than required under that "non-storm water" prohibition—which is absolute as set forth in the Clean Water Act. *See* 33 U.S.C. § 1342(p)(3)(B)(ii). It is unclear what the cited language is intended to cover or how it is enforceable as a practical matter, particularly given other elements of the Permit. Second, in this connection, any supposed requirement for the District to comply with standards is illusory given that the Permit also gives the District a "safe harbor" from meeting standards during the permit term if the District takes certain steps defined as "adequate progress toward compliance." *See* Ex. 1 (Permit) at § 1.4. Reading the Permit as a whole, this "safe harbor" provision appears to trump the provisions the Region cites as constituting a requirement to meet standards or, at minimum, renders the Permit in this regard irreparably vague about fundamental control requirements. Third, the Region's claim that the Permit requires compliance with water quality standards is belied by the Permit's supporting documents, which clearly state that the Region views such compliance as an iterative process likely to span multiple permit cycles and that the District need only show incremental progress towards attainment. *See, e.g.*, Ex. 13 (Fact Sheet) at 5-6 ("During each cycle, EPA will continue to review deliverables from the District to ensure

that its activities constitute sufficient progress toward standards attainment. *With each permit reissuance* EPA will continue to increase stringency until such time as standards are met in all receiving waters" (emphasis added).).

Finally, the Permit provisions cited by the Region are not responsive to the EAB's order in *DC MS4 I* requiring the Region to "*provide . . . support* for its conclusion that the permit *will* 'ensure' compliance with the District's water quality standards." *DC MS4 I*, 10 E.A.D. at 343 (emphasis added and original). None of the cited provisions is a legally acceptable substitute for "facts or technical analysis" in the record showing that the Permit *will in fact* achieve water quality standards. *See id.* at 341. Likewise, a requirement for the District to take corrective action if its discharges are causing or contributing to violations of standards does not in any way ensure that those standards will not be violated in the first place. In their comments on the draft permit, Petitioners pointed out that the Permit's failure to ensure compliance with water quality standards violated the Board's ruling in *DC MS4 I*. Ex. 3 (NRDC et al., Comments on Draft NPDES Permit No. 0000221 for the District of Columbia (June 4, 2010)) at 14-15; Ex. 4 (Earthjustice, Re: Proposal to Reissue NPDES Permit for Municipal Separate Storm Sewer System (MS4) to Government of the District of Columbia, Draft Permit No. DC0000221 (June 4, 2010)) at 2-7. However, the Region failed to respond to or even acknowledge this critical point. *See* Ex. 12 (Responsiveness Summary) at 80, 110-12 (addressing Petitioners' water quality standards comments without mentioning the effect of the ruling in *DC MS4 I*). It was clear legal error for the Region to ignore both Petitioners' comments and the Board's order in *DC MS4 I*.

Additionally, the Region's failure to ensure compliance with water quality standards is at odds with the actions of other Regions that oversee States' issuance of MS4 permits. In particular:

> In EPA Region 1's comments on the January 2010 Draft Vermont Small MS4 General Permit, EPA clearly expresses an expectation for compliance with water quality standards and its insistence on clear plans for achieving this. In Region 9, there are no fewer than ten permits in California alone that require compliance with water quality standards as part of permit compliance. It is entirely unclear from the Permit and accompanying documents why standards would not be attainable in the District when they are a required compliance obligation in similar and even larger metropolitan areas, such as Los Angeles or San Francisco. Region 3's divergent and wholly unsupported position in issuing a permit without requiring compliance with water quality standards falls squarely within the parameters of arbitrary and capricious action.

Ex. 3 at 18 (Comments of NRDC *et al.*). In light of the foregoing, it is clear that the Region's failure to ensure water quality standards compliance is arbitrary, capricious, and an abuse of discretion.

Just as it fails to ensure immediate compliance with water quality standards in general, the Permit does not ensure immediate compliance with wasteload allocations adopted to ensure that existing violations of standards are corrected and the quality of polluted waters improved. The Permit expressly states that compliance with its mandated performance standards "shall constitute adequate progress toward compliance with . . . WLAs for this permit term." Ex. 1 (Permit) § 1.4. In other words, the Permit excuses the District from meeting WLAs *in fact* as long as it implements certain practices which the Region apparently views as a substitute for actual, empirical compliance with WLAs, and provides advance notice that the District will not be held accountable if it falls short of meeting them. In no conceivable sense is this provision "consistent with" applicable WLAs. The only exception to this "safe harbor" provision is the WLA for the Anacostia River trash TMDL, which the District is explicitly required to attain by the end of the permit term.[4] Ex. 1 (Permit) § 4.10.1 ("The permittee shall attain removal of

[4] While the sufficiency of the Anacostia trash TMDL itself is not at issue here, Petitioners note that they do not concede that compliance with the Anacostia trash TMDL will necessarily achieve compliance with water quality standards for trash in the Anacostia. *See* Ex. 16 (District Department of the Environment & Maryland Department of the Environment, "Comment Response Document Regarding the Total Maximum Daily Load of Trash for the

103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term."). As this specific provision indicates, the Region understands how to require compliance with wasteload allocations when it chooses to do so. By contrast, the "safe harbor" provision in Section 1.4 of the Permit makes it clear that the Region intends the District to achieve only "progress toward compliance" with all other WLAs, rather than actual attainment.

In addition, nothing in the record demonstrates that the Permit's conditions are actually sufficient to achieve WLAs. The Permit's administrative record is completely devoid of technical analysis on this subject. Rather, the Region has offered only a few bare assertions, such as: "EPA is assured that the Final Permit is consistent with the assumptions and requirements of the WLAs in the [Chesapeake Bay] TMDL." Ex. 13 at 30 (Fact Sheet). Similarly, the responsiveness summary asserts, without citing any supporting analysis, that "EPA has specifically found that the BMPs and other provisions included in the Permit are sufficient to achieve TMDL WLAs." Ex. 12 at 113 (Responsiveness Summary); *see also id.* at 84 ("With the foregoing provisions in the Final Permit, EPA *believes* that the District's stormwater management program will achieve the reductions needed to attain applicable WLAs" (emphasis added).).

Not only are these conclusory assertions lacking any sort of technical substantiation, they are undermined by other statements by the Region acknowledging that the Permit's provisions merely require progress towards compliance with WLAs, but not actual compliance. In the Responsiveness Summary, the Region contends that the Permit's TMDL implementation language "is now sufficiently robust to ensure that the Permittee *continues to progress toward*

Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and The District of Columbia" (Aug. 5, 2010)) at Comments 11-12, 18-22.

meeting WLAs." Ex. 12 at 114 (Responsiveness Summary) (emphasis added). Moreover, the fact sheet states that the Permit's "measures are *necessary to ultimately achieve* the specified reductions [for WLAs]," *see* Ex. 13 at 30 (Fact Sheet) (emphasis added); yet "necessary" does not equate to "adequate" or "sufficient," and the reference to "ultimately achiev[ing]" the specified reductions is a clear acknowledgment that the Permit does not require immediate compliance with WLAs. In short, nothing in the administrative record satisfies the Region's legal obligation to provide an adequate demonstration that the permit's requirements will be sufficient to immediately implement applicable WLAs. *See* Ex. 11 (2010 Hanlon Memorandum). No provision in EPA's TMDL regulations allows a point source not to implement its wasteload allocation once it has been assigned. Consequently, the Region's failure to require compliance with WLAs violates the Clean Water Act.

2. Even if compliance schedules are appropriate for any new water quality-based limitations in the Permit, the Permit fails to include a lawful schedule designed to achieve compliance.

If compliance with water quality standards and wasteload allocations cannot be ensured immediately, a permit may, in certain cases, include a schedule for compliance. In the District, permits may include compliance schedules for new water quality based effluent limitations. 21 DCMR § 1105.9. Clean Water Act regulations state that, when a compliance schedule is appropriate, a permit may include such a schedule if it sets out benchmarks, interim deadlines, and an ultimate date for attainment. 40 C.F.R. § 122.47(a). Even if certain requirements in this Permit are considered "new" such that a compliance schedule would be appropriate,[5] this Permit contains none of the requirements for compliance schedules that are required by CWA

[5] The District's water quality standards have been revised since the issuance of the last D.C. MS4 permit in 2004. *See* Notice of Final Rulemaking, 52 DCR 9621 (Oct. 28, 2005); Final Rulemaking, 57 DCR 9129, 9135-9146 (Oct. 1, 2010). Additionally, certain TMDLs have been approved for District waters since that time. *See* Ex. 1 (Permit) at § 4.10.3 (listing TMDLs applicable to the District by date of approval).

regulations. Instead, the Region treats compliance with water quality standards as an open-ended goal to be attained at some as-yet-undetermined time:

> EPA is aware that many permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards *within one or more MS4 permit cycles*. . . . Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District's MS4 discharges requires staged implementation and increasingly more stringent requirements *over several permitting cycles*.

Ex. 13 (Fact Sheet) at 5 (emphasis added). Likewise, the Region asserts that the Permit will ensure that the District "continues to progress toward meeting WLAs," Ex. 12 (Responsiveness Summary) at 114, and that the Permit's measures are necessary to "ultimately achieve" WLAs, Ex. 13 (Fact Sheet) at 30, yet it fails to indicate when this ultimate achievement is to occur. Instead, it requires the District to develop its own schedule for compliance with TMDLs and to demonstrate through modeling how the District's chosen controls will lead to the eventual attainment of WLAs. Ex. 1 (Permit) § 4.10.3. The Permit states that this schedule will become an enforceable permit term once approved by the Region. *Id.*

This approach is not a legally sufficient compliance schedule. As an initial matter, the Permit's sole focus on developing compliance schedules for TMDLs (albeit inadequate) means that the Permit wholly lacks any provisions relating to a schedule for compliance with water quality standards in situations where TMDLs have not been developed.[6] Moreover, the requirement for the *District* to develop TMDL compliance schedules is, on its face, legally inadequate—even if a compliance schedule here is otherwise appropriate. CWA regulations plainly require that compliance schedules be included *within* NPDES permits. 40 C.F.R. § 122.47(a) ("The permit may, when appropriate, specify a schedule of compliance leading to

[6] Seventeen water bodies in the District are listed as category 5 waters, meaning that they are not meeting water quality standards and no TMDL has yet been developed. *See* Ex. 5 (excerpts from 2010 Integrated Report) at Appendix 3.10.

compliance with CWA and regulations."); *see also* 21 DCMR § 1105.9; *In re: Upper Blackstone*, NPDES Appeal No. 08-11 at 102 (compliance schedules must be "made part of an EPA-issued NPDES permit"). A permit cannot simply defer development of a compliance schedule to a future date.

To allow a permittee to develop its own compliance schedule after a permit is issued would make it impossible for the permitting authority to properly fulfill its own oversight obligations. For example, EPA guidance summarizing CWA regulations and prior EAB decisions concerning compliance schedules makes clear that, upon permit issuance, the permitting authority must make a reasonable finding, *adequately supported by the administrative record*, that (i) the compliance schedule will lead to compliance with limitations and ultimately meet water quality standards; (ii) that the schedule is "appropriate"; and (iii) that ultimate compliance is required "as soon as possible."[7] Ex. 14 (Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, re: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits (May 10, 2007) (hereinafter "2007 Hanlon Memorandum")) at 2 (citing 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A), 122.47(a), 122.47(a)(1)). With regard to the requirement that compliance be achieved "as soon as possible," EPA has separately stated that it expects permitting authorities "to include *in the permit record* a sound rationale for determining that any compliance schedule meets this requirement." Ex. 11 (2010 Hanlon Memorandum) at 4 (emphasis added). The Board's own standard of review additionally

[7] Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the limitations under prior permits; the extent to which the discharger has made good faith efforts to comply with the limitations and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the limitations and if so, how long would it take to implement the modifications; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the limitation as it would have used to meet the limitation in its prior permit. Ex. 14 (2007 Hanlon Memorandum) at 3.

requires the Board to determine "whether the approach ultimately adopted by the Region is rational in light of all information *in the record*." *DC MS4 I*, 10 E.A.D. at 342.

If the District develops its own schedule after the permit has already been finalized and issued, that schedule cannot possibly be supported by information in the administrative record, given that the record is already closed and contains no analysis regarding the appropriate length or contents of such a schedule. Without any analysis showing that compliance schedules for the District are "appropriate" and will achieve WLAs "as soon as possible," the Board cannot perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality. *Id.* at 342-43. Consequently, the Permit's approach to the development of compliance schedules, to the extent that the Permit's provisions can even be so characterized at all, cannot be found to rationally meet the regulatory requirements for such schedules. It was clearly erroneous for the Region to adopt this approach despite contrary instructions in multiple EPA guidance documents.

Because the Region committed a clear error in issuing a Permit that neither ensures immediate compliance with the water quality-based requirements of the Clean Water Act nor includes a lawful schedule designed to achieve such compliance, the Board must remand the sections of the Permit pertaining to compliance with water quality standards and TMDL wasteload allocations. On remand, the Region must either (a) demonstrate based on support in the record that the Permit ensures immediate compliance with water quality standards and wasteload allocations, or (b) make a finding based on the record that such compliance cannot be achieved immediately and include within the Permit, where appropriate, a schedule that ensures the District will achieve compliance as soon as possible.

RELIEF REQUESTED

Petitioners respectfully request that the Region be directed to correct the above-described deficiencies within 120 days. The setting of a deadline is warranted in light of the extraordinary delays by the District and the Region in addressing this matter. As noted above, the District did not complete its MS4 permit application until 1998 (eight years late), and the Region did not issue an MS4 permit to the district until 2000—nearly a *decade* behind the statutory schedule. After this Board found deficiencies in that permit in February 2002, the Region took until 2006 to issue a permit amendment, and still failed to correct key deficiencies identified in the Board's decision. After the Region in 2007 withdrew its 2006 permit amendment, stating to the Board that it would "prepare a new draft permit modification addressing the withdrawn permit conditions… and will submit the revised draft permit amendment terms for public comment," the Region arbitrarily decided that the permit amendment would be "deferred for reconsideration of the issues until the current MS4 Permit renewal process began in 2009." Ex. 15 (draft fact sheet for permit proposed in 2010). The Region did not complete that process until 2011, more than two years after the statutory 5-year term of the permit had come to a close. In short, the Region has engaged in severe and egregious delay, yet has still failed to implement the Board's 2002 directive. Unless the Region is directed to *correct* (not merely reconsider) these deficiencies by a specific, near term deadline, this process could go on indefinitely. Meanwhile, the CWA's explicit deadlines for issuance of adequate MS4 permits and for compliance with their terms will be effectively nullified.

The 120-day schedule proposed by Petitioners would allow the Region ample time to draft proposed permit language for the matters at issue, accept public comments, and sign a final permit modification.

Petitioners also respectfully request that any and all provisions of the Permit not directly challenged by this petition continue to remain in effect, pursuant to 40 C.F.R. § 124.16(a)(2)(i). *See* Ex. 1 (Permit) § 8.11 ("The provisions of this permit are severable, and if any provisions of this permit, or the application of any provision of this permit to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.").

Respectfully submitted this 4th day of November, 2011.

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