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SURFRIDER FOUNDATION • ANACOSTIA RIVERKEEPER • AUDUBON NATURALIST SOCIETY**

June 4, 2010

*Via electronic mail*

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**Re: Comments on Draft NPDES Permit No. 0000221 for the District of Columbia**

Dear Mr. Miller:

Thank you for this opportunity to comment on Draft NPDES Permit No. DC0000221, Authorization to Discharge under the National Pollutant Discharge Elimination System Municipal Separate Stormwater System ("MS4") Permit (the "Draft Permit").

These comments are submitted on behalf of the Natural Resources Defense Council, Global Green USA, DC Environmental Network, Sierra Club, Friends of Rock Creek's Environment, Anacostia Watershed Society, Casey Trees, Clean Water Action, Potomac Riverkeeper, Surfrider Foundation, Anacostia Riverkeeper, and Audubon Naturalist Society, which are nationwide and local environmental organizations working to protect and restore water quality in the Washington, DC region through advocacy, enforcement, and education. Members of these groups use and enjoy waters adversely affected by MS4 discharges, including the Anacostia River, Potomac River, Rock Creek, and their tributaries.

These comments are supported by a technical review of the Draft Permit prepared by Diane Cameron, a stormwater consultant with a Master's of Science degree in Environmental Engineering and 21 years of experience in the stormwater field; her report is attached hereto.<sup>1</sup> We have also sent a compact disc to the U.S. Environmental Protection Agency ("EPA") containing documents related to and referenced in these comments, and we incorporate them as attachments. Moreover, in addition to our own comments, we hereby incorporate by reference the comments of Earthjustice and the Chesapeake Bay Foundation.

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<sup>1</sup> Diane M. Cameron, *Green Infrastructure in the District of Columbia: Implications for the District's Stormwater Permit* (June 4, 2010) (hereinafter "Cameron Report").

## I. Standards Governing Adoption of the Draft Permit

In issuing an MS4 permit, EPA must not only ensure compliance with substantive legal standards, but it must also ensure that the agency complies with the well-settled standards that govern EPA's administrative decision-making. Under section 706 of the Administrative Procedure Act ("APA"), an agency's issuance of an MS4 permit may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>2</sup> Under this standard, the agency must examine all of the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."<sup>3</sup> An agency decision is arbitrary and capricious when it offers an explanation for its decision that runs counter to the evidence before the agency.<sup>4</sup>

The Draft Permit must therefore be supported by evidence that justifies EPA's decision to include, or not to include, specific requirements. Moreover, EPA would violate these precepts if the Draft Permit ultimately failed to contain findings explaining the reasons why certain control measures and standards were selected while others were omitted. Issuing a permit lacking in record support would risk a remand by a court or by the Environmental Appeals Board ("EAB"), which has repeatedly stated that "the ultimate approach adopted by the permitting agency [must be] rational in light of all the information in the record,"<sup>5</sup> or in other words, that the permitting agency's "rationale for its conclusions...must be adequately explained and supported in the record."<sup>6</sup>

It is crucial that EPA pay close attention to meeting this standard, for it has failed to meet it during previous rounds of DC MS4 permitting. In 2002, the EAB remanded a DC MS4 permit to the agency due to a lack of support in the administrative record for certain decisions regarding control measures.<sup>7</sup> In its decision, the Board stated that "there [was] nothing in the record...that support[ed] the conclusion" that the permit would meet the applicable legal requirements.<sup>8</sup> EPA must avoid that mistake with regards to the current Draft Permit by ensuring that all of the permit's requirements are supported by the record, and by amending or omitting requirements currently in the Draft that lack such support. As discussed below, at this juncture neither the Draft Permit, accompanying fact sheet, nor other documents that have been made available to the public suffice to meet these obligations.

## II. Water Quality in Receiving Waters Does Not Meet Clean Water Act Requirements

In developing the MS4 permitting program, Congress and EPA recognized the serious damage polluted stormwater runoff causes local waterways. According to the National Research Council, "Stormwater runoff from the built environment remains one of the great challenges of modern water pollution

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<sup>2</sup> 5 U.S.C. § 706(2)(A); see also *City of Abilene v. EPA*, 325 F.3d 657, 664 (5th Cir. 2003).

<sup>3</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>4</sup> *Id.*

<sup>5</sup> *The Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, slip op. at 29 (Jan. 14, 2009), 14 E.A.D. \_\_\_ (citing *ConocoPhillips*, slip op. at 26, 13 E.A.D. at \_\_\_ (June 6, 2008)).

<sup>6</sup> *Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (2006).

<sup>7</sup> *Gov't of the Dist. of Columbia, MS4 System*, 10 E.A.D. 323 (2002).

<sup>8</sup> *Id.* at 324.

control, as this source of contamination is a principal contributor to water quality impairment of waterbodies nationwide.”<sup>9</sup> Locally, stormwater from rain or snow melt runs through the District of Columbia’s MS4 and flows untreated into local waterways. Stormwater is the only growing source of pollution to the Chesapeake Bay.<sup>10</sup>

The District has 414 storm sewer outfalls that discharge stormwater, and associated pollution, directly into the Anacostia, Potomac, Rock Creek and their tributaries.<sup>11</sup> The District Department of the Environment (“DDOE”) admits, as it must, that urban runoff and storm sewers have a “major impact” on DC waters.<sup>12</sup> More than five square miles of District estuaries are impaired by discharges from the MS4.<sup>13</sup> Additionally, all District estuaries are impaired for pathogens, which are commonly associated with MS4 discharge.<sup>14</sup> The Anacostia and Potomac Rivers are both impaired for fecal coliform as a result of discharges from the MS4.<sup>15</sup> The rivers and streams of the District are impaired for bacteria, metals, total suspended solids, and oil and grease, along with a host of other pollutants; all of which are associated with discharges from the MS4.<sup>16</sup>

EPA issued the District of Columbia its first MS4 permit in 2000. Though the current Draft Permit represents DC’s third MS4 permit cycle, poor water quality continues to plague the District. In fact, DC’s 2010 draft listing of impaired surface waters showed no improvement over the 2008 listing.<sup>17</sup> Not one pollutant or water body was successfully de-listed. Additionally, not one DC water body could be listed in Category 1 (“all designated uses are attained and no use is threatened”) or even in Category 2 (“some, but not all, of the designated uses are attained and no use is threatened”).<sup>18</sup> Water body impairment persists in the District despite Total Daily Maximum Loads (“TMDLs”) having been developed for each

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<sup>9</sup> National Research Council, *Urban Stormwater Management in the United States* vii (2008), available at [http://www.epa.gov/npdes/pubs/nrc\\_stormwaterreport.pdf](http://www.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf) (hereinafter “*Urban Stormwater*”).

<sup>10</sup> EPA Region 3, “Chesapeake Bay Program Office No-Runoff Challenge,” <http://www.epa.gov/Region3/chesapeake/challenge/> (last visited Jun. 1, 2010).

<sup>11</sup> Gov’t of the Dist. of Columbia, *Upgraded Stormwater Management Plan* 5-6 (Feb. 19, 2009) at 3-1.

<sup>12</sup> Dist. Dep’t of the Env’t, *The District of Columbia Water Quality Assessment: 2008 Integrated Report to the Env’tl. Prot. Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act (P.L. 97-117)* (2008) at 3 (hereinafter “*2008 Integrated Report*”), available at [http://ddoe.dc.gov/ddoe/lib/ddoe/information2/water.reg.leg/DC\\_IR\\_2008\\_Revised\\_9-9-2008.pdf](http://ddoe.dc.gov/ddoe/lib/ddoe/information2/water.reg.leg/DC_IR_2008_Revised_9-9-2008.pdf).

<sup>13</sup> *2008 Integrated Report* at 50.

<sup>14</sup> *Id.*; *Urban Stormwater* at 22 (finding, “A variety of studies have shown that stormwater runoff is a vector of pathogens with potential human health implications in both freshwater (Calderon et al., 1991) and marine waters (Dwight et al., 2004; Colford et al., 2007).”)

<sup>15</sup> *2008 Integrated Report* at Appendix 3.2.

<sup>16</sup> Dist. Dep’t of the Env’t, *Draft - Methodology for the Development of the 2010 Section 303(d) List and the 2010 Section 303(d) List of Impaired District of Columbia Waters* (Mar. 31, 2010) (hereinafter “*Draft 2010 Section 303(d) List*”), available at [http://ddoe.dc.gov/ddoe/lib/ddoe/draft\\_2010\\_section\\_303d.pdf](http://ddoe.dc.gov/ddoe/lib/ddoe/draft_2010_section_303d.pdf); Dist. of Columbia Storm Water Task Force, *MS4 Discharge Monitoring Report for Rock Creek* (Aug. 17, 2007) (hereinafter “*2007 Rock Creek DMR*”), available at [http://ddoe.dc.gov/ddoe/lib/ddoe/stormwaterdiv/2007\\_Rock\\_Creek\\_DMR\\_-\\_FINAL.pdf](http://ddoe.dc.gov/ddoe/lib/ddoe/stormwaterdiv/2007_Rock_Creek_DMR_-_FINAL.pdf); Dist. Dep’t of the Env’t, *Anacostia River Discharge Monitoring Report* (Aug. 19, 2009).

<sup>17</sup> *Draft 2010 Section 303(d) List; 2008 Integrated Report* at Appendix 3.4.

<sup>18</sup> *Id.*

water body on the list in either 1998 or 2002.<sup>19</sup> This marked lack of progress in achieving water quality standards confirms the need for an effective and enforceable MS4 permit that will stem stormwater pollution and achieve improvements in water quality.

### **III. The Draft Permit Fails to Require Control of Stormwater to the Maximum Extent Practicable and Is Inconsistent with Law in Multiple Related Respects**

The Clean Water Act (“CWA”) states that MS4 permits “shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*,” otherwise known as the “MEP” standard.<sup>20</sup> Likewise, CWA regulations mandate that MS4 permits “*will require* at a minimum that [regulated entities] develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [their] MS4[s] to the *maximum extent practicable*.”<sup>21</sup> Courts have held that the phrase “‘to the maximum extent practicable’ does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.”<sup>22</sup>

However, the Draft Permit does not anywhere actually ensure the Permittee will reduce discharges of pollutants to the maximum extent practicable.<sup>23</sup> This shortcoming violates the statutory and regulatory requirements quoted above. The MEP performance standard must be clearly applied to the District’s discharges.

#### *A. The Draft Permit Fails to Ensure that the Permittee Will Meet the MEP Standard and Creates an Impermissible Self-Regulatory Scheme*

The Draft Permit, by containing and omitting various provisions, would essentially allow the Permittee to regulate itself. This result is at odds with federal law. As stated above, the CWA requires that MS4 permits contain controls to reduce the discharge of pollutants to the MEP. It is not enough for a permit to direct a permittee to make a plan, on its own without regulatory and public oversight, to reduce discharges to the MEP; the permitting authority must include provisions in a permit that will ensure that the permittee does *in fact* reduce discharges to the maximum extent practicable.<sup>24</sup> The permitting authority may not merely assume, without providing guidance or verifying compliance, that a permittee’s plans will be adequate to meet the MEP standard. Rather:

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<sup>19</sup> *Id.*

<sup>20</sup> 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).

<sup>21</sup> 40 C.F.R. § 122.34(a) (emphasis added).

<sup>22</sup> *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *see also Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) (“feasible” means “physically possible”).

<sup>23</sup> Notably, the Draft Permit does not even direct the Permittee to do so. Both Section 1 of the Draft Permit, containing general provisions regarding authorized discharges, and Section 4, governing the Permittee’s substantive Stormwater Management Program, fail to explicitly hold the Permittee to the MEP standard.

<sup>24</sup> *See Environmental Defense Center v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003) (hereinafter “EDC”).

[S]torm water management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable.<sup>25</sup>

This legal requirement is thwarted when a permit does not contain the substantive management requirements that are to be imposed by the permit or when some or all of the requirements are left unspecified for future development by the permit applicant without review by EPA or the public. The Draft Permit, in this regard, allows the future development of substantive pollution control programs by the Permittee (§§ 4.1-4.9), fails to provide for public or EPA comment (§ 4.9.4; see section VIII, *infra*), and in many instances does not clearly state when such program development must occur (e.g., §§ 4.3.1-4.3.10). As a result, the Draft Permit has, *de facto*, created an impermissible self-regulatory system by giving the Permittee discretion to develop many critical control requirements with only vague guidance and directives and, in some cases, no deadline for the modification; the Draft Permit does not itself contain the pollution control requirements to be implemented under its auspices. When, as here, these rules are not observed, there is nothing to stop a permittee from “misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.”<sup>26</sup> Without clear directives for what must be included in these plans, there is no assurance that the permittee’s decisions will be reasonable, in good faith, or sufficient to meet the MEP standard, or that if they do fall short of MEP, that the permit is further enforceable.

Permittee self-regulation and lack of direction are well-known and acknowledged problems. As EPA Region 9 has stated, “In our review of MS4 programs...we have found that it is common for permits to rely on the development of plans to achieve certain permit objectives, rather than including prescriptive requirements in the permits.... [T]he plans often result in a reliance on qualitative provisions rather than specific measurable criteria. As a result, we have found that there is often uncertainty among both the MS4 permittees and the permitting agencies as to specific permit expectations.”<sup>27</sup>

The Draft Permit must be modified to prevent this outcome by ensuring that EPA and the public exercise meaningful review authority over the Permittee’s stormwater management programs. Specific permit requirements for these programs, as well as an opportunity for public notice and comment, are both necessary to ensure that the Permittee’s programs meet the MEP standard. (For more discussion of the Draft Permit’s failure to provide adequate opportunities for public participation, please see Section VIII, *infra*.) “Specific measurable criteria” must set expectations for the plans and allow EPA and the public

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<sup>25</sup> *Id.* at 856; see also *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 501-502 (2d Cir. 2005) (discussing importance of review of management plans for concentrated animal feeding operations).

<sup>26</sup> *EDC*, 344 F.3d at 855.

<sup>27</sup> Letter from Douglas E. Eberhardt, EPA, to Dale Bowyer, San Francisco Bay Regional Water Quality Control Board (April 3, 2009), at 2, available at [http://www.swrcb.ca.gov/rwqcb2/water\\_issues/programs/stormwater/muni/mrp/02-11-09/comments/US\\_EPA.pdf](http://www.swrcb.ca.gov/rwqcb2/water_issues/programs/stormwater/muni/mrp/02-11-09/comments/US_EPA.pdf).

to measure the Permittee's progress. Without such oversight, the program amounts to "impermissible self-regulation,"<sup>28</sup> and will not guarantee the MEP standard is met or water quality is protected.

Numerous provisions in the Draft Permit include requirements that are too vague to be enforceable. For example:

- The section governing operation and maintenance of stormwater capture practices on non-District owned or operated property requires only that the Permittee "develop accountability mechanisms to ensure maintenance of stormwater control measures...Those mechanisms *may include* combinations of deed restrictions, ordinances, maintenance agreements, or *other policies deemed appropriate by the District.*" (Draft Permit § 4.2.2.) "Menus" of suggested management practices, like this example, are unlawfully vague because "nothing requires that the combination of items that the [Permittee] selects from this 'menu' will have the combined effect of reducing discharges to the maximum extent practicable."<sup>29</sup>
- The provisions requiring the Permittee to develop a management plan for District Government areas contain various vague provisions, such as the following representative example from the section on streets, alleys, roadways and sidewalks: "The Permittee *shall continue to evaluate and update* the use, application and removal of chemical deicers, salt, sand, and/or sand/deicer mixtures *in an effort to minimize* the impact of these materials on water quality." (Draft Permit § 4.3.6.4.) Not only does this provision provide no guidance as to what criteria should guide the Permittee's evaluation, but it also fails to actually require that the Permittee minimize impact to water quality.
- The requirements for the Permittee's Annual Report and Implementation Plan instruct the Permittee only to "analyze in detail the work to be performed" in each year and to "include an established measurable performance standard for each of the MS4 Program activities." (Draft Permit § 6.2.2.) The Draft Permit contains no guidance as to how such performance standards should be selected, requiring only that the "basis for each of the performance standards...shall be described." (*Id.*)
- Finally, the provisions governing the Permittee's TMDL implementation plans are also impermissibly vague, requiring those plans to contain: "A *set of controls* for achieving the MS4 [wasteload allocation], which *may include* stormwater pollution reduction and elimination laws and regulations, LID implementation..., municipal operations to reduce the discharge of pollutants in stormwater..., and *other management practices.*" (Draft Permit § 8.1, ¶ 3.B.) As previously discussed, such "menus" of possible controls fails to ensure compliance with the MEP standard. Moreover, the Draft Permit requires TMDL implementation plans to include "numeric

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<sup>28</sup> EDC, 344 F.3d at 843.

<sup>29</sup> EDC, 344 F.3d at 855 n.32.

benchmarks which specific annual pollutant load reductions” with no guidance as to how those benchmarks should be set. (Draft Permit § 8.1, ¶ 3.C.; see Section VI, below.)

These provisions provide perfect examples of what EPA’s own *MS4 Permit Improvement Guide* instructs agency officials *not* to do when writing permits. That Guide recognizes that “clear, specific, measurable, and enforceable” provisions are necessary in order for permitting authorities to assess compliance and take enforcement action, if necessary.<sup>30</sup> The *Guide* recommends that permits “include specific deadlines for compliance, incorporate clear performance standards, and include measurable goals or quantifiable targets for implementation,” recognizing that without such provisions, permitting authorities may not be able to adequately assess compliance or enforce violations.<sup>31</sup> The Draft Permit’s inclusion of terms such as “other policies” and “other management practices,” as cited above, directly contradicts not only this generic *Guide* instruction but also its specific prohibition on vague phrases such as “other actions” without specifically describing what those actions are.<sup>32</sup> This contradiction of agency guidance not only indicates a violation of substantive legal requirements but also suggests that the Draft Permit may be considered arbitrary and capricious in violation of APA § 706.<sup>33</sup>

The vagueness pervasive throughout the Draft Permit provisions governing the Permittee’s implementation plans is particularly problematic because the best management practices (“BMPs”) to be contained in those plans are, in effect, the Draft Permit’s effluent limits. Because the Draft Permit contains no requirement for the Permittee to meet numeric effluent limits (see Section VI.A, *infra*), its BMP requirements are its only pollutant limits.<sup>34</sup> However, the Draft Permit does not include the BMP requirements in the permit text itself but rather delegates the task of developing many BMPs to the Permittee in its plans. The lack of specific requirements for the Permittee’s plans, therefore, essentially means that the Draft Permit does not contain effluent limitations as required by the Clean Water Act.

Clean Water Act regulations require that, when an MS4 discharge causes or contributes to a violation of water quality standards for an individual pollutant, the MS4 permit must contain effluent limits for that pollutant.<sup>35</sup> In the District, urban runoff from storm sewers is identified in the 2008 303(d) list as having a major impact on water body impairment.<sup>36</sup> For example, Rock Creek is impaired for bacteria and

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<sup>30</sup> U.S. Environmental Protection Agency, *MS4 Permit Improvement Guide* 5 (2010), available at [http://www.epa.gov/npdes/pubs/ms4permit\\_improvement\\_guide.pdf](http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf).

<sup>31</sup> *Id.* at 5-6.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> See, e.g., *Port Auth. of N.Y. and N.J. v. Dep’t of Transp.*, 479 F.3d 21, 44 (D.C. Cir. 2007) (“An unexplained deviation from the Policy Statement could lead us to set the Final Decision aside”); *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1075-76 (D.C. Cir. 2002) (stating that an agency “acts unreasonably if it departs from established policy without giving a reasoned explanation for the change”). EPA has given no explanation for its deviation from the *MS4 Permit Improvement Guide*.

<sup>34</sup> Clean Water Act regulations anticipate that BMP controls may serve as a permit’s effluent limits by authorizing their use where numeric limits are infeasible, as well as by defining the term “effluent limitations” to include “any restriction” on pollutant discharges. 40 C.F.R. § 122.44(k); 40 C.F.R. § 122.2 (emphasis added).

<sup>35</sup> 40 C.F.R. § 122.44(d)(1)(iii).

<sup>36</sup> *2008 Integrated Report* at 3.

metals, and the District MS4 discharges both.<sup>37</sup> Anacostia River is impaired for metals, total suspended solids, and oil and grease, and the MS4 discharges all three.<sup>38</sup> The Potomac River is impaired for bacteria and metals, and the MS4 discharges both.<sup>39</sup> Overall, 23.5 miles of rivers and streams in the District are impaired by discharges from the MS4.<sup>40</sup> Therefore, the Draft Permit must contain effluent limits to control the impairment-causing discharges. The fact that it does not contain such limits constitutes a violation of the Clean Water Act.

Under the Draft Permit's mandates, the Permittee could come up with a plan that is colorably responsive to the generalities of the Draft Permit and is thus immune from challenge, yet that is insufficient to achieve compliance with the MEP standard. The Draft Permit thus fails to meet the requirements of federal law, and its failure to meet MEP undercuts any benefit that its onsite retention standards provide (see Section VII.B, *infra*).

*B. The 2009 SWMP, Incorporated into the Draft Permit, Has Not Been Shown to Meet MEP*

The Draft Permit anticipates that the Permittee's "Upgraded SWMP" (Stormwater Management Program) of February 19, 2009, will be the baseline for the Permittee's stormwater management program under the Draft Permit. In fact, the Draft Permit directs the Permittee to continue to implement and upgrade the 2009 SWMP's controls and incorporates all of its requirements. (Draft Permit § 4.) Ultimately, the SWMP incorporated by reference in the Draft Permit does not constitute a complete program adequate under the CWA for several overriding reasons. First, the SWMP was not circulated for review along with the Draft Permit, adding to the Draft Permit's violations of public participation requirements. (See Section VIII, *infra*.)

Second, the Draft Permit and the associated Fact Sheet contain no findings or other evidence to support the consistency of the 2009 SWMP with applicable requirements such as the MEP standard. The Draft Permit contains no assertions that the 2009 SWMP meets MEP, nor any explanations of how its contents assure that standard will be met. As discussed above, the CWA requires MS4 permit controls to meet the MEP standard; to the extent EPA is relying on the 2009 SWMP to assure that the Draft Permit meets the MEP standard, it too must be shown to reduce the discharge of pollutants to the maximum extent practicable. In fact, empirical data demonstrates that existing management efforts such as those included in the 2009 SWMP are *not* adequate to meet CWA goals and requirements. Ongoing violations, discussed in Section II, *supra*, show that the 2009 SWMP's controls are not sufficiently reducing pollutant discharges to the District's waters.

Third, even if the SWMP were properly circulated, supported by findings, and had been demonstrably effective, most of the specific commitments in the SWMP that implement CWA regulations were

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<sup>37</sup> *Draft 2010 Section 303(d) List*; 2007 Rock Creek DMR.

<sup>38</sup> *Draft 2010 Section 303(d) List*; Dist. Dep't of the Env't, *Anacostia River Discharge Monitoring Report* (Aug. 19, 2009).

<sup>39</sup> *Draft 2010 Section 303(d) List*; Dist. of Columbia Storm Water Task Force, *MS4 Discharge Monitoring Report* (Aug. 19, 2006), available at <http://ddoe.dc.gov/ddoe/lib/ddoe/stormwaterdiv/2006DMR.pdf>.

<sup>40</sup> Dist. Dep't of the Env't, *2008 Integrated Report* at 45.

accomplished, or should have been, during 2009. For example, the District's specific rain garden implementation program set numeric requirements with a deadline of December 31, 2009.<sup>41</sup> Likewise, deadlines for catch basin retrofitting came and went in 2009.<sup>42</sup> These and other examples evident in the SWMP suggest that the SWMP, while attached to a cover letter application for a new permit, is in significant part already out-of-date. The lack of specifics regarding activities planned in order to comply with the CWA during the next five-year period renders the SWMP legally and substantively inadequate to form the basis of a program that meets the CWA's requirements.

Finally, much like large parts of the Draft Permit itself, in other respects the "measurable outcomes" set forth in the SWMP are too often neither measurable nor reasonably specific enough to determine what outcome is promised and will be used to determine the District's compliance with the Draft Permit. For example, the District's proposed program to address a critical pollution problem, illicit or illegal discharges, is described generally in little more than one page, with non-specific hypothetical examples of how the District may respond to a report of discharge.<sup>43</sup> The measurable outcome in another related program area merely commits the District vaguely to "continue to work with" local law enforcement and to install an unspecified number of cameras at unspecified locations on an unspecified schedule.<sup>44</sup>

There are many more examples of the way in which the SWMP is both significantly out-of-date and too vague and general to meet the requirements of the CWA and its implementing regulations, let alone EPA guidance that emphasizes the critical importance of measurable and specific programmatic and water quality outcomes in MS4 permits. For these reasons, the incorporation of the 2009 SWMP unfortunately does not make the Draft Permit adequate to meet the requirements set by the CWA and EPA regulations for the MS4 program. This significant flaw makes the deferral of program development by the Draft Permit itself even more problematic and underscores why the Draft Permit must contain clear and adequate control measures subject to public and EPA review.

*C. The Draft Permit Must Reflect the Obligations Contained in the 2008 Letter of Agreement Between the Permittee and EPA*

In 2007, EPA and the Permittee reached a two-party agreement on a series of enhancements to the Permittee's 2004 MS4 Permit.<sup>45</sup> These enhancements, which were documented through a Letter of Agreement modified on August 1, 2008, include a series of actions, deliverables, commitments, and

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<sup>41</sup> Gov't of the Dist. of Columbia, *Upgraded Stormwater Management Plan* 5-6 (Feb. 19, 2009).

<sup>42</sup> *Id.* at 5-13; *see also* 5-11 ("Maintenance manual for 'Low Impact Development (LID) Stormwater Control Structures' by April 30, 2009"); 5-23 ("SWPPPs will be developed by DDOT by July 2009").

<sup>43</sup> *Id.* at 5-26—5-27.

<sup>44</sup> *Id.* at 5-28.

<sup>45</sup> U.S. EPA, *Draft Fact Sheet, NPDES Permit No. DC0000221* at 3, available at [http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/DCMS4DraftFactSheet\\_04-19-10.pdf](http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/DCMS4DraftFactSheet_04-19-10.pdf).

deadlines for the Permittee's MS4 program on a range of topics.<sup>46</sup> The commitments in the Letter required significant new activities, with specific objectives and measurable benchmarks.

Because the 2008 Letter of Agreement was agreed to by the Permittee as an "enhancement" to its MS4 permit, the commitments in the Letter should be made requirements of the permit. However, many of the commitments in that Letter are not included in the Draft Permit. For example, the Letter requires documentation of the survival rate of trees planted,<sup>47</sup> whereas the Draft Permit does not require this. (Draft Permit § 4.1.3.) Additionally, the 2008 Letter requires the construction of a green roof on every new building constructed by OPM;<sup>48</sup> the Draft Permit contains no such requirement. As a final example, the 2008 Letter requires installation of cameras to record illegal dumping activities,<sup>49</sup> a provision which does not exist in the Draft Permit.

Because EPA and the Permittee have found the commitments in the 2008 Letter to be practicable, and have provided no explanation as to why they do not continue to be practicable, those requirements are required to be included in the Draft Permit as MEP, using clear, enforceable language.

#### **IV. The Draft Permit Fails to Adequately Control Trash Discharges From the MS4**

Trash is a significant issue and a pollutant of concern for the District's waterways. According to the District's 2008 Water Quality Assessment (305(b) and 303(d)) Integrated Report, the Upper Anacostia River and Lower Anacostia River are impaired by trash.<sup>50</sup> Studies performed by the Anacostia Watershed Society reveal alarming statistics such as: an average of 58 pieces of trash per 100 feet of Anacostia River length, excluding trash that is underwater; an average of 1.6 plastic bags per every 100 square feet of river bottom; and over 14,000 plastic bags counted during a two-month survey.<sup>51</sup> This trash not only creates a nuisance and an eyesore but also endangers birds, fish and other wildlife that ingest or become entangled in the debris.

However, the Draft Permit as currently drafted contains basically no trash reduction provisions beyond a reference to the Anacostia Trash TMDL, which is still being developed. See Draft Permit § 8.1.2 (requiring the Permittee to develop and implement an Anacostia River Trash TMDL Implementation Plan, whose elements will become enforceable conditions of the Permit upon approval of the plan); § 4.3.5 (requiring the Permittee to comply with the Trash TMDL Implementation Plan as part of the

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<sup>46</sup> Letter from George S. Hawkins, Director, Dist. Dep't of the Env't, to Jon M. Capacasa, Director, Water Protection Division, U.S. EPA Region 3 (Aug. 1, 2008) (hereinafter "2008 Letter of Agreement"), available at [http://www.ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/stormwaterdiv/epa\\_letter\\_agreement\\_august\\_2008.pdf](http://www.ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/stormwaterdiv/epa_letter_agreement_august_2008.pdf).

<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.* at 7.

<sup>50</sup> Dist. Dep't of the Env't, *2008 Integrated Report* at Appendix 3.10.

<sup>51</sup> See Md. Dep't Env't & D.C. Dep't Env't, *Total Maximum Daily Loads of Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia* (April 2010) (hereinafter "Draft Anacostia Trash TMDL") at 6, available at [http://www.mde.state.md.us/assets/document/Anacostia\\_Trash\\_TMDL\\_PN.pdf](http://www.mde.state.md.us/assets/document/Anacostia_Trash_TMDL_PN.pdf).

Permittee's Stormwater Management Program obligations). The only other trash provision in the Draft Permit is a vaguely-worded street sweeping requirement. (Draft Permit § 4.3.6.) As the trash TMDL is not yet in place, the Draft Permit lacks any meaningful controls on trash discharges from the MS4.

The Draft Permit's lack of a program to address trash violates the CWA requirement to reduce the discharge of pollutants to the MEP standard. Future plans to implement a trash TMDL – that are, as yet, not duly adopted and integrated regulatory requirements – do not justify or provide a basis for omitting practicable controls from the Draft Permit. EPA must include in the Draft Permit the maximum control requirements that are feasible or possible.

In this case, other MS4 permits in the region have included controls beyond what is contained in the Draft Permit, demonstrating that the Draft Permit is not complying with the MEP standard. For example, even the recently approved Montgomery County, Maryland MS4 Permit – which itself is far from meeting MEP – is stronger than the Draft Permit here. The Montgomery County permit at least contains some trash reduction provisions, and though they represent the kind of “plan to make a plan” that we find unlawfully vague (see Section III.A, *supra*), they do require the permittee to implement the following controls to reduce trash pollution:

- Regional strategies to reduce trash and increase recycling;
- A public outreach and education campaign with specific performance goals and deadlines to increase residential and commercial recycling rates, improve trash management, and reduce littering;
- Establishment of baseline conditions of trash being discharged to and from the storm drain system and development of a trash reduction strategy and work plan detailing control measures and deadlines;
- Implementation of control measures to eliminate the discharge of trash and debris from the county storm drain system; and
- Evaluation and modification of local trash reduction strategies with an emphasis on source reduction and proper disposal.<sup>52</sup>

All of these trash reduction controls have been acknowledged to be feasible and practicable in the Washington, DC metropolitan area; therefore, the Draft Permit's mere reference to a future TMDL, without more, violates the requirement that a permit's controls reduce trash discharges to the *maximum* extent practicable.

In addition, the lack of a trash control program makes the Draft Permit inconsistent with other applicable CWA requirements, including those that require the Permit to be consistent with water quality standards (“WQS”). EPA regulations specify that “each NPDES permit shall include conditions” which, among other things, are necessary to “[a]chieve water quality standards established under

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<sup>52</sup> Md. Dep't of the Env't, *National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Permit for Montgomery County, Maryland*, Permit No. 06-DP-3320 MD0068349 (Feb. 16, 2010) at 5-6, available at [http://www.mde.state.md.us/assets/document/MO%20CO\\_MS4\\_Permit.pdf](http://www.mde.state.md.us/assets/document/MO%20CO_MS4_Permit.pdf).

section 303 of the CWA, including State narrative criteria for water quality.”<sup>53</sup> (For additional discussion of the Draft Permit’s obligation to ensure achievement of WQS, see Section V, *infra*.)

In the District, all waters (except for Hickey Run, Watts Branch, and wetlands) have “A” designated uses, which means they must protect several basic uses, including primary contact recreation and aesthetic enjoyment.<sup>54</sup> In addition, the District has a generally applicable narrative water quality criterion which provides that “[t]he surface waters of the District shall be free from substances in amounts or combinations that do any one of the following: (a) Settle to form objectionable deposits; (b) Float as debris, scum, oil, or other matter to create a nuisance.”<sup>55</sup>

In listing 14.8 miles of rivers and streams as impaired for trash in 2008, DDOE has recognized that these standards are violated throughout the District.<sup>56</sup> Because the District’s MS4 system is a source of trash,<sup>57</sup> CWA regulations require the Draft Permit to contain effluent limitations that will prevent the MS4’s discharges from causing or contributing to water quality standard violations.<sup>58</sup> The Draft Permit contains no such effluent limits for trash or other conditions that will ensure that water quality standards will be met; the reference to the future Anacostia trash TMDL is inadequate as described above. Consequently, the Draft Permit is in violation of CWA requirements that it include conditions to achieve water quality standards.

To remedy this violation, the Draft Permit should require the Permittee to meet numeric trash reduction targets by the end of the permit term, with mandatory demonstrations of reasonable annual progress toward those targets. The Draft Permit should also specify that the Permittee must commit to a series of specified trash reduction measures that can be expected to achieve the discharge targets.

#### **V. The Draft Permit’s Failure to Require That Discharges From the MS4 Not Cause or Contribute to Violations of Water Quality Standards Violates the CWA**

The current Draft Permit errs in not requiring the Permittee to meet applicable water quality standards. The purpose of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>59</sup> The Act’s stated goal is the complete elimination of the discharge of pollutants into navigable waters.<sup>60</sup> In keeping with this goal, the Clean Water Act requires each state and the District of Columbia to adopt and submit for federal approval water quality standards for all waters within its boundaries.<sup>61</sup>

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<sup>53</sup> 40 C.F.R. § 122.44(d)(1).

<sup>54</sup> D.C. Mun. Regs. tit. 11, § 21-1101.

<sup>55</sup> D.C. Mun. Regs. tit. 11, § 21-1104.1.

<sup>56</sup> Dist. Dep’t of the Env’t, *2008 Integrated Report* at 44.

<sup>57</sup> See Draft Anacostia Trash TMDL at § 2.2.1 & Table 12.

<sup>58</sup> 40 C.F.R. § 122.44(d)(1)(iii).

<sup>59</sup> 33 U.S.C. § 1251(a).

<sup>60</sup> *Id.*

<sup>61</sup> 33 U.S.C. §§ 1311(b)(1)(C), 1313.

Despite the importance of water quality standards in improving and preserving water quality, the Draft Permit merely asks the Permittee to make “progress” toward water quality standards and does not require the Permittee to actually attain them. (Draft Permit § 1.4 (stating “[c]ompliance with all performance standards and provisions contained in this Permit shall constitute progress toward compliance with [water quality standards]”).) EPA’s draft fact sheet on the Draft Permit explains this lax provision by stating, “attainment of water quality criteria is an incremental process...so long as permittees reduce the discharge of pollutants to the maximum extent practicable (MEP) within each permit cycle.”<sup>62</sup> This statement wholly misunderstands the MEP standard.

A. *Achievement of Water Quality Standards Is One of the CWA’s Central Objectives*

Water quality standards are maximum permissible pollutant levels, expressed either as numeric limits or in narrative terms, that must be sufficiently stringent to protect public health and enhance water quality, consistent with the uses for which the water bodies have been designated.<sup>63</sup> Water quality standards provide the basis for regulating point sources, “to prevent water quality from falling below acceptable levels.”<sup>64</sup> As announced in the regulations:

[Water quality] standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the [Clean Water] Act.<sup>65</sup>

Achievement of water quality standards is central to the objectives and goals of the CWA.<sup>66</sup> Council on Environmental Quality (“CEQ”) Chairman Train explained the role of water quality standards when Congress enacted the 1972 amendments that created the modern Clean Water Act, stating, “Speaking very generally the whole permit program is tied to the water quality program standards and is a mechanism designed to reach those standards.”<sup>67</sup> For this reason, 40 C.F.R. 122.44(d)(1) plainly requires NPDES permits to “include conditions...necessary to...achieve water quality standards.”<sup>68</sup> As shown by the record, the District discharges impairing pollutants, thereby triggering this provision.<sup>69</sup> (See Section II, *supra*.)

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<sup>62</sup> U.S. EPA, *Draft Fact Sheet*, NPDES Permit No. DC0000221 (2004) at 4.

<sup>63</sup> 33 U.S.C. § 1313(c)(2)(A).

<sup>64</sup> *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 704 (1994) (quotation omitted).

<sup>65</sup> 40 C.F.R. § 131.2.

<sup>66</sup> *See, e.g.*, 33 U.S.C. § 1311 (all permits require compliance with water quality standards); 33 U.S.C. § 1313 (water quality standards via Total Maximum Daily Loads (“TMDLs”)); 33 U.S.C. § 1314 (assessment of attainment of water quality standards); 33 U.S.C. § 1341(a) (permit issuance predicated on water quality standards attainment).

<sup>67</sup> Remarks of CEQ Chairman Train, 92 Cong. S4340 (June 22, 1971).

<sup>68</sup> 40 C.F.R. 122.44(d)(1).

<sup>69</sup> *See, e.g.*, Dist. Dep’t of the Env’t, *Anacostia River Discharge Monitoring Report* (Aug. 19, 2009); Dist. of Columbia Stormwater Task Force, *Discharge Monitoring Report* (Aug. 19, 2006).

*B. The Environmental Appeals Board Ruling That Prior Permits Must Ensure Compliance with Water Quality Standards Applies to the Draft Permit*

The first DC MS4 permit, issued in 2000, was litigated before the Environmental Appeals Board (“EAB”). That EAB decision, which has never been overturned, establishes the correct parameters by which to evaluate DC’s MS4 permit.

1. The Environmental Appeals Board Found that DC Must Ensure Compliance with Water Quality Standards

In a challenge by Defenders of Wildlife and Friends of the Earth (“DOW/FOE”) to the first iteration of DC’s MS4 permit, the EAB held, in 2002, that the permit must ensure compliance with water quality standards.<sup>70</sup> The EAB remanded the permit to EPA to correct its failure to show that the permit’s conditions would be adequate to ensure such compliance. The Board explained the relevant legal standards by stating:

[S]ection 301 of the CWA requires, among other things, that NPDES permits contain ‘any more stringent limitation, including those necessary to meet water quality standards ...established pursuant to any State law or regulation ....’ 33 U.S.C. § 1311(b)(1)(C). This statutory requirement has been implemented, in part, through long-standing regulations that prohibit the issuance of an NPDES permit ‘when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states.’ 40 C.F.R. § 122.4(d)(2001) (emphasis added).<sup>71</sup>

The EAB then remanded the permit to EPA, “to provide and/or develop support for its conclusion that the permit *will* ‘ensure’ compliance with the District’s water quality standards and to make whatever adjustments in the Permit, if any, might be necessary in light of its analysis.”<sup>72</sup>

The EAB decision still stands, though its mandates have been largely ignored by EPA. In 2004, EPA issued a revised permit, which DOW/FOE again challenged based on the permit’s lack of effluent limitations adequate to assure compliance with applicable water quality standards.<sup>73</sup> Though the 2004 permit claimed to resolve these issues and to comply with the EAB decision, ultimately, it fell short. The fact sheet accompanying the 2004 permit stated that:

[T]he Permit establishes narrative effluent limits identified in Parts I.C. and I.D of the reissued Permit which prohibits the permittee from discharging pollutants from the MS4 system to District waterways that could cause or result in an exceedance of applicable water quality standards.<sup>74</sup>

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<sup>70</sup> *Gov’t of the Dist. of Columbia, MS4 System*, 10 E.A.D. 323 (2002).

<sup>71</sup> *Id.* at 335.

<sup>72</sup> *Id.* at 343.

<sup>73</sup> Petition of Earthjustice, *Government of the District of Columbia, MS4*, NPDES permit No. DC 000022 1, Amendment 1 (2006) at 5-6 (hereinafter “Earthjustice Petition”).

<sup>74</sup> U.S. EPA, *Draft Fact Sheet*, NPDES Permit No. DC0000221 (2004) at 9.

Though EPA's intent is clear from the language of the 2004 fact sheet, the permit itself did not unambiguously include such a prohibition, as explained in another petition for review of the 2004 permit filed by DOW/FOE.<sup>75</sup>

In 2005, DOW/FOE reached a settlement with EPA, whereby EPA would modify the permit to, *inter alia*, include the following language: "All discharges of pollutants to or from the MS4 system that cause or contribute to the exceedance of the District of Columbia water quality standards are prohibited."<sup>76</sup> However, EPA reversed course and issued an amendment in 2006 that, instead of prohibiting discharges that would cause or contribute to noncompliance with water quality standards, prohibited discharges that would worsen water quality beyond "current conditions."<sup>77</sup> This language did not ensure compliance with water quality standards since the "current condition" of the District's waters was impaired. DOW/FOE appealed again to the EAB,<sup>78</sup> and EPA withdrew the contested language from the 2006 amendment, promising to address the water quality standards compliance issue in a future permit revision.<sup>79</sup> The Draft Permit is the first set of permit modifications that EPA has proposed since then.

EAB's 2002 decision is dispositive on the issue of water quality compliance in the current permit and EPA is not free to ignore it. As illustrated by the procedural history summarized above, EPA has yet to comply with the EAB's 2002 remand order, and is therefore obliged to do so in the Draft Permit. Despite this record, EPA has not included in the Draft Permit a prohibition on discharges that would cause or contribute to noncompliance with water quality standards, choosing instead to propose language whereby compliance with BMP-based requirements is deemed to be sufficient "progress" towards meeting water quality standards. (Draft Permit § 1.4.) EPA must revise the Draft Permit to include the above-quoted language that was agreed to in the 2005 settlement with DOW/FOE (and to delete any language to the contrary), and must further demonstrate that the permit's conditions, as a whole, will be sufficient to ensure that discharges from the District's MS4 do not cause or contribute to violations of water quality standards.

## 2. EPA Is Further Constrained by Antibacksliding Provisions

The CWA's antibacksliding provision prohibits, except in limited circumstances not applicable here, the renewal or reissuance of a permit that contains "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."<sup>80</sup> By law, DC's current MS4 permit must be at least as rigorous as the current (2004) permit. As noted above, the Fact Sheet for the 2004 permit states that the 2004 permit "establishes narrative effluent limits . . . which prohibits [sic] the permittee from discharging pollutants from the MS4 system to District waterways that could cause or result in an

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<sup>75</sup> Earthjustice Petition at Exhibit 3 "2004 Petition for Review."

<sup>76</sup> *Id.* at Exhibit 2 "Petitioners' Comments on Proposed Amendment 1."

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.*

<sup>79</sup> EPA, *Draft Fact Sheet* at 2.

<sup>80</sup> 33 USC § 1342(o); *see also* 40 C.F.R. § 122.44(l) (prohibiting the relaxation of effluent limitations in reissued permits).

exceedance of applicable water quality standards.”<sup>81</sup> While it is not clear that the 2004 permit actually includes such terms (see Section V.B.1, *supra*), EPA’s intent to do so is clearly stated in the 2004 Fact Sheet and EPA should not backslide by failing to include such a prohibition in the current Draft Permit.

### 3. Failure to Require Compliance with Water Quality Standards Is in Conflict with CWA TMDL Requirements

Additionally, the failure to ensure compliance with water quality standards not only violates the general principles set forth above but also violates the CWA requirement regarding TMDL implementation, as further discussed in Section VI.

#### C. *The Draft Permit Lacks the Required Certifications from The District of Columbia and Affected Neighboring States that the Permitted Discharges Would Comply With All Applicable Water Quality Standards*

Under Section 401(a) of the CWA, any applicant for a federal permit must provide certification from the jurisdiction in which the discharge originates that, *inter alia*, the proposed discharge is consistent with that jurisdiction’s water quality standards.<sup>82</sup> DC’s 2004 MS4 permit was certified by the District Department of Health.<sup>83</sup> However, neither the current Draft Permit nor the Draft Fact Sheet indicates that EPA has sought or obtained a section 401 water quality certification from the District.

The certification is important also because it triggers the rights of neighboring states to be heard on a permit that will affect their water quality.<sup>84</sup> Upon receiving the section 401 certification of the state where the proposed discharge would occur, the Administrator must inform any other state whose water quality may be affected by the Permittee’s discharge.<sup>85</sup> According to the Supreme Court in *Arkansas v. Oklahoma*, “Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State’s water quality requirements can be ensured.”<sup>86</sup> Likewise, EPA regulations provide that the agency may not issue a NPDES permit “when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.”<sup>87</sup> Because of the circumstances of this proposed discharge by a non-state entity into waters proximate to other states, EPA clearly erred in not complying with the certification process. For example, polluted discharge from the DC MS4, either directly or via the Anacostia or Potomac Rivers, flows into the Chesapeake Bay. As referenced above (see Section II, *supra*), DC has over five miles of estuary which are impaired by MS4 discharges. All of DC’s estuaries are

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<sup>81</sup> Earthjustice Petition at Exhibit 2 “Petitioners’ Comments on Proposed Amendment 1.”

<sup>82</sup> 33 U.S.C. § 1341(a)(1).

<sup>83</sup> EPA, *Draft Fact Sheet* at 2-3.

<sup>84</sup> 33 U.S.C. § 1341(a)(2).

<sup>85</sup> *Id.*

<sup>86</sup> *Arkansas v. Oklahoma*, 503 U.S. 91, 104 (1992).

<sup>87</sup> 40 C.F.R. § 122.4.

encompassed by the Chesapeake Bay, which is in turn surrounded by Maryland and Virginia.<sup>88</sup> DC's MS4 discharges necessarily affect water quality in Maryland and Virginia. The District is literally surrounded by other states; the need to comply with Section 401 is manifest.

Furthermore, because of the geographic and hydrologic context, EPA's omission has significant practical consequences. Forty-six states operate approved state NPDES permit programs under the Clean Water Act.<sup>89</sup> Many of these states have stormwater regulations separate from the Clean Water Act that specifically require MS4 permits to comply with water quality standards. Maryland is one such state. Maryland law requires all NPDES permits to be in compliance with water quality standards.<sup>90</sup> The *Arkansas v. Oklahoma* decision supports the proposition that EPA must consider Maryland's water quality standards before issuing the DC permit:

The application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>91</sup>

Maryland, like DC, suffers from degraded water quality.<sup>92</sup> In fact, water quality in the Chesapeake Bay met only 24% of its health goals for 2009.<sup>93</sup> Given that DC has not yet provided any 401 certification, it is unlikely that Maryland has received 401(a)(2) notification that this permit will affect their water quality. However, as an affected state, Maryland is within its rights to object to a permit that violates its own state regulations and harms its water quality. EPA must consider the implications for neighboring states and tighten the Draft Permit's requirements accordingly.

#### *D. EPA's Decision to Not Require Compliance with WQS is Arbitrary and Capricious*

At a minimum, EPA has acted arbitrarily and capriciously by failing to establish a record showing that attaining water quality standards is infeasible. Even if EPA's contention that the language of 33 U.S.C. § 1342(p) invests in it discretion in whether to require compliance with water quality standards is credited, an argument with which we disagree, "the phrase 'to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible."<sup>94</sup> Nowhere in the Draft Permit or accompanying fact sheet does EPA explain its assertion that DC "will be unable to attain all Water Quality Standards within the

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<sup>88</sup> Chesapeake Bay Program, "The Bay Watershed," available at <http://www.chesapeakebay.net/thebaywatershed.aspx?menuitem=13942> (last visited Jun. 3, 2010).

<sup>89</sup> See 33 U.S.C. § 1342(b).

<sup>90</sup> See Md. Code Regs. 26.08.04.

<sup>91</sup> *Arkansas*, 503 U.S. at 105-106.

<sup>92</sup> See generally, Md. Dep't of the Env't, *Draft 2010 Integrated Report of Surface Water Quality in Maryland (2010)* available at

[http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/Pub\\_Notice/draft\\_2010\\_IR\\_for\\_pubnotice.asp](http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/Pub_Notice/draft_2010_IR_for_pubnotice.asp).

<sup>93</sup> Chesapeake Bay Program, "The Bay Water Quality," available at

<http://www.chesapeakebay.net/thebaywatershed.aspx?menuitem=13942> (last visited Jun. 3, 2010).

<sup>94</sup> *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 131 (D.D.C. 2001) (internal citations omitted); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").

first several MS4 permit cycles.”<sup>95</sup> This unsupported statement is not sufficient to comply with the mandates of the Clean Water Act.

To the contrary, courts in other jurisdictions have found that permit requirements, including requiring compliance with water quality standards, are “intended to provide a cost-effective storm water pollution program to the maximum extent practicable,”<sup>96</sup> and that “there is no showing . . . that [] applicable water standards are unattainable.”<sup>97</sup> Indeed, the conclusory assertion that the District cannot attain water quality standards is at odds with the position of multiple other EPA Regions overseeing similar urban storm water permits as well. 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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.

#### *E. EPA Policy Favors a Strong DC Permit*

EPA has stated that it wants DC’s MS4 permit to be a model for the Chesapeake Bay watershed, asserting, “We all need to do our part, and this permit can serve as a model to other municipalities for preventing runoff from washing harmful pollutants into streams and rivers in the [Chesapeake] Bay watershed.”<sup>101</sup> Additionally, Administrator Jackson made “Protecting America’s Waters” one of her seven priorities for the Agency.<sup>102</sup> A centerpiece of that effort is the Urban Waters Initiative, a program designed to help urban communities, like Washington, DC, “reconnect with and revitalize the waters

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<sup>95</sup> EPA, *Draft Fact Sheet* at 4.

<sup>96</sup> *County of Los Angeles v. California State Water Resources Control Board*, 143 Cal.App.4th 985, unpublished portion at 33 (2006).

<sup>97</sup> *Building Industry Ass’n of San Diego County v. State Water Resources Control Board*, 124 Cal.App.4th 866, 874 (2004).

<sup>98</sup> EPA Region 1, Comments on Vermont’s Draft MS4 Permit (Apr. 22, 2010), 2-3, 9.

<sup>99</sup> See e.g., California Regional Water Quality Control Board Los Angeles Region Order 01-182 NPDES Permit No. CAS004001 (Dec. 13, 2001) at 28-19; California Regional Water Quality Control Board San Diego Region Order No. R9-2009-0002, NPDES No. CAS0108740 (Dec. 16, 2009) at 18; California Regional Water Quality Control Board San Francisco Bay Region Municipal Regional Stormwater Order R2-2009-0074 NPDES Permit No. CAS612008 (Oct. 14, 2009) at 8-9.

<sup>100</sup> See *id.*

<sup>101</sup> Statement of Shawn M. Garvin, EPA Mid-Atlantic Regional Administrator, EPA Press Release (Apr. 21, 2010), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/ECF0FC0431AFBF0B8525770C006EA74B>.

<sup>102</sup> Memorandum of Lisa Jackson to All EPA Employees, “Seven Priorities for EPA’s Future,” (Jan. 12, 2010), available at <http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/>.

that are an important part of their health and prosperity.”<sup>103</sup> In contrast to EPA’s stated policy goals and efforts in other arenas, Region 3 has drafted a permit that is not protective of District waterways and is in fact less stringent than requirements in DC’s neighboring Bay state, Maryland. (See Section V.C, *supra*.) If EPA intends for this permit to be used as a successful example of what can be done to stem pollution in urban communities and throughout Chesapeake Bay, it must strengthen the water quality provisions of the Draft Permit to require compliance with water quality standards.

The Clean Water Act must be approached as a cohesive set of requirements designed to work together to eliminate pollution. A permit that does not require compliance with water quality standards fails to utilize an essential Clean Water Act tool for eliminating the discharge of pollution. Enacting water quality standards pursuant to one provision of the Act, but then failing to require the standards be met in the permit (despite the NPDES permitting scheme having been designed as the “mechanism designed to reach those standards”)<sup>104</sup> represents a disjointed and ultimately erroneous approach to the Clean Water Act.

## **VI. The Draft Permit Fails to Require or Assure Actual Compliance with TMDL WLAs**

TMDLs establish wasteload allocations (“WLAs”)—or the maximum amount of a pollutant that each point source discharger may release into a particular waterway—which constitute a form of water quality-based effluent limitation.<sup>105</sup> Once a TMDL has been adopted, NPDES permits are required to contain effluent limitations and conditions consistent with the assumptions and requirements of the approved WLA.<sup>106</sup> Accordingly, EPA has recognized that MS4 permits should include clear and specific requirements related to the identification, evaluation, and implementation of appropriate water quality controls, with attached timeframes and milestones, which are necessary to address any applicable WLA.<sup>107</sup> However, the Draft Permit fails to meet these legal requirements in several ways.

### *A. The Draft Permit Fails to Demonstrate that Its Effluent Limits Will Be Sufficient to Meet Adopted WLAs*

It has been EPA’s position that effluent limitations in MS4 permits should usually be expressed in the form of best management practices (“BMPs”) rather than numeric limits.<sup>108</sup> However, when a permitting authority elects to impose only non-numeric effluent limits (i.e., BMPs), EPA guidance states

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<sup>103</sup> *Id.*

<sup>104</sup> Remarks of Sen. Train, 92 Cong. S4340 (June 22, 1971).

<sup>105</sup> See 33 U.S.C. § 1313(d)(4)(A); 40 C.F.R. § 130.2.

<sup>106</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B); see also U.S. EPA, *TMDLs to Stormwater Permits Handbook (Draft)* at 135 (Nov. 2008), available at [http://www.epa.gov/owow/tmdl/pdf/tmdl-sw\\_permits11172008.pdf](http://www.epa.gov/owow/tmdl/pdf/tmdl-sw_permits11172008.pdf).

<sup>107</sup> See Letter from James D. Giattina, EPA Region 4, to State Water Directors (Apr. 15, 2010), available at <http://www.florida-stormwater.org/pdfs/2009-10%20PDFs/EPA%20Region%20IV%20Guidance%20for%20MS4%20Permits.pdf>.

<sup>108</sup> See U.S. Environmental Protection Agency, *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 4-5 (2002), available at <http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf>.

that the MS4 permit or its administrative record “needs to support that the BMPs are *expected to be sufficient* to implement the WLA in the TMDL.”<sup>109</sup>

The Draft Permit, however, provides no support or factual basis to demonstrate that the Permittee’s BMPs can be expected to adequately implement WLAs. Its requirements for the Permittee’s BMP programs are excessively general: the Draft Permit requires the Permittee’s TMDL implementation plans to contain “a set of controls for achieving the MS4 WLA,” but it provides no specification of what BMP controls are to be implemented. (Draft Permit § 8.1, ¶ 3.B.) Moreover, while the Draft Permit requires the Permittee to demonstrate later down the road, in its TMDL Implementation Plans, how the controls it chooses will achieve WLAs (§ 8.1, ¶ 3.E), there is no demonstration of WLA compliance within the Draft Permit itself. This approach is problematic because there is no specific requirement that TMDL Implementation Plans be made available for public notice and comment, only that the Permittee “engage the public in a meaningful way in the process of developing” the plans. (Draft Permit § 8.1, ¶ 3.F.) As discussed in Section III.A, *supra*, this approach to demonstration of WLA compliance denies the public any meaningful review opportunity.

EPA Region 9 has stated that, “given the uncertainties in the performance of many of the BMPs commonly used for stormwater pollution control, it is often difficult to make such a demonstration.”<sup>110</sup> The practical difficulty inherent in assuring that BMPs alone will implement WLAs indicates that it would be an abuse of discretion not to include numeric effluent limitations in the Draft Permit. After all, EPA itself admits in guidance that BMPs are sometimes “not an appropriate way to express effluent limitations” and that permit writers may “choose to develop numeric effluent limitations as a feasible and appropriate way to incorporate the TMDL provisions into the permit.”<sup>111</sup> An obvious example of a situation where BMPs alone are not appropriate is the case where, as here, BMPs have not been, and cannot be, determined to be sufficient to comply with WLAs.<sup>112</sup>

In sum, EPA should expressly include each WLA applicable to the District as a numeric effluent limitation in the Draft Permit. A failure to do so, given that BMPs alone cannot be demonstrated to sufficiently meet legal obligations, would violate the APA’s arbitrary and capricious standard.

#### *B. The Draft Permit Fails to Actually Require Compliance With WLAs*

The permit lacks clear and enforceable language requiring compliance with WLAs. This is both unlawful, for the reasons described above, and inconsistent with practice in other EPA Regions.

First, the Draft Permit nowhere clearly states that compliance with WLAs is required. The Draft Permit states that it “includes all TMDL WLAs applicable to the District MS4 approved or established as of the

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<sup>109</sup> *Id.* at 2 (emphasis added) (citing 40 C.F.R. §§ 124.8, 124.9 & 124.18).

<sup>110</sup> See Letter from Eberhardt to Bowyer at 6.

<sup>111</sup> EPA, *TMDLs to Stormwater Permits Handbook* at 137.

<sup>112</sup> Notably, the Draft Permit (§ 8.1, ¶ 2.) states, “If [best] management practices alone adequately implement the WLAs, then additional controls will not be necessary.” This implicitly concedes that EPA has not made, and cannot make, a determination that the BMPs in the permit are sufficient to achieve compliance with the WLAs.

effective date of this Permit.” (Draft Permit § 8.1, ¶ 1.) Additionally, it requires the Permittee’s SWMP to “[b]e consistent with applicable waste load allocations (WLAs) for each approved Total Maximum Daily Load (TMDL) for each receiving water body.” (Draft Permit § 1.4.2.) This language – “includes” WLAs, “consistent with” WLAs – is imprecise and engenders uncertainty as to whether the Draft Permit actually requires the Permittee’s discharge to comply with WLAs. The Draft Permit’s language should be amended to explicitly require compliance with all applicable WLAs.

Second, the Draft Permit’s iterative approach to TMDL implementation represents another way in which it fails to actually require compliance with WLAs. According to EPA, “the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and achieving ... total maximum daily load (TMDL) compliance.”<sup>113</sup> Consequently, the Draft Permit provides that if pollutant-specific WLAs are not being met, the Permittee shall develop, through its Annual Reports, “recommendations for correction of the non-compliance problems.” (Draft Permit § 8.1.) Despite failing to meet WLAs, it appears the Permittee will continue to be considered in compliance with the Permit as long as it “document[s] all previous and on-going efforts at achieving the specific pollutant reductions identified in the TMDL WLA and further demonstrat[es] additional controls sufficient to achieve those reductions...”<sup>114</sup>

The Draft Permit’s apparent failure to hold the Permittee accountable for its noncompliance – beyond simply requiring it to revise its strategy – renders the already unclear TMDL and WLA requirements meaningless. By allowing the Permittee to remain in compliance with the permit regardless of whether it actually meets WLAs, the Draft Permit allows the Permittee to avoid its TMDL obligations indefinitely, creating a fiction that its efforts are resulting in water quality improvement. In this manner the Draft Permit never actually requires compliance with WLAs and the Permit violates the fundamental requirement that it be issued only if consistent with adopted WLAs.

Third, the failure to clearly require compliance with WLAs is inconsistent with other EPA Regions’ positions on this issue. For example, EPA Region 9 has recently stated that a permit should “explicitly state that the wasteload allocations (WLAs) established by . . . TMDLs are intended to be enforceable permit effluent limitations and that *compliance is a permit requirement*.”<sup>115</sup> Region 1 has also stated that MS4 permits “should set specific enforceable requirements to meet the applicable WLA.”<sup>116</sup> Next to these other EPA Regions’ permits, the Draft Permit here unexplainably stands out as a much weaker document, at least as far as WLAs are concerned, potentially rendering it arbitrary and capricious.

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<sup>113</sup> EPA, *Draft Fact Sheet* at 4.

<sup>114</sup> *Id.* We note that a requirement to propose corrective action is appropriate (and desirable), so long as permit terms are clear that a failure to meet WLAs is a permit violation and that taking corrective action does not obviate the violation. However, the Draft Permit falls short by not making this point clear and, in fact, by suggesting otherwise.

<sup>115</sup> Letter from Douglas E. Eberhardt, EPA, to Michael Adackapara, Santa Ana Regional Water Quality Control Board (Feb.13, 2009), at 3.

<sup>116</sup> EPA Region 1, *Comments on the Jan. 2010 Draft VT Small MS4 General Permit* at 3 (Apr. 2010).

C. *The Permit Fails to Include Schedules of Compliance for the WLAs, as Required by EAB Precedent*

The permit unlawfully defers to TMDL Implementation Plans, to be developed by the Permittee, for establishment of numeric benchmarks for pollutant load reductions to impaired water bodies and associated timelines for achieving those benchmarks. The EAB recently held, in an appeal concerning the District of Columbia's NPDES permit for the Blue Plains sewage treatment plant, that any EPA-issued NPDES permit in the District of Columbia must include, *within the permit itself*, a schedule for compliance with water quality-based effluent limitations, if compliance is not anticipated immediately upon permit issuance.<sup>117</sup> In that 2008 ruling, the EAB squarely held that EPA is bound by the following requirement in the District's EPA-approved water quality standards:

“When the Director requires a new water quality standard-based effluent limitation in a discharge permit, the permittee shall have no more than three (3) years to achieve compliance with the limitation, unless the permittee can demonstrate that a longer compliance period is warranted. A compliance schedule *shall* be included in the Permit.”<sup>118</sup>

EPA is bound by this EAB ruling and must, therefore, revise the Draft Permit to include compliance schedules for WLAs consistent with the above-cited provision of the District's water quality standards. The specification of compliance schedules cannot be deferred to the TMDL Implementation Plans, which are prepared by the Permittee following permit issuance.

D. *The Inconsistency of the Draft Permit with WLAs and TMDLs Precludes Any New Discharge or Increased Discharge Pursuant to the CWA and the Ninth Circuit's Decision in Pinto Creek*

EPA should note a significant additional consequence of its failure to assure that TMDLs and their associated WLAs are actually implemented by the Draft Permit and to ensure that the Permit is consistent with those WLAs. Under the Ninth Circuit's decision in *Friends of Pinto Creek v. EPA*, no NPDES permit may be issued to a new discharger<sup>119</sup> if the discharge will contribute to the violation of water quality standards, as is the case when new discharges of pollutants are made to waters impaired for those same pollutants.<sup>120</sup> A single exception to this rule exists where a TMDL has been performed, and the “new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards.”<sup>121</sup> In other words, a permit for new discharges may *not* be issued, even when a TMDL for the relevant pollutant exists, unless it can be firmly

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<sup>117</sup> *District of Columbia Water & Sewer Auth.*, slip op. at 25-34 (Mar. 19, 2008), 13 E.A.D. \_\_\_.

<sup>118</sup> *Id.* at slip op 25 (quoting DC Mun. Reg. § 1105.9 (emphasis added by EAB)).

<sup>119</sup> A “new discharger” is defined as “any building, structure, facility, or installation: (a) From which there is or may be a ‘discharge of pollutants;’ . . . (c) Which is not a ‘new source;’ and (d) Which has never received a finally effective NPDES permit for discharges at that ‘site.’” 40 C.F.R. § 122.2. This definition thus applies to buildings or structures, including new subdivisions, industrial facilities, or commercial structures, within the Permittee's jurisdiction.

<sup>120</sup> *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007).

<sup>121</sup> *Id.*

established that “there are sufficient remaining pollutant load allocations under existing circumstances.”<sup>122</sup>

Water quality standards in the District of Columbia are already violated by existing discharges: according to the District’s 2008 Water Quality Assessment (305(b) and 303(d)) Integrated Report, no water body monitored between 2003 and 2007 fully supported all of its designated uses, and the District’s water quality continues to be impaired.<sup>123</sup>

Therefore, any new or additional discharge of pollutants for which impairments already exists would necessarily contribute to a violation. TMDLs have been performed for many of the District’s waters – more than 350 TMDLs in total.<sup>124</sup> However, the Draft Permit does not guarantee that there are sufficient pollutant load allocations remaining, as it does not adequately control discharges (as described above). Specifically, as noted, the Permit does not appear to actually require discharges to be controlled to implement WLAs. Consequently, if the Draft Permit is approved as currently written – providing no basis to find that any available load exists – EPA will not be able to authorize any new or increased discharges in the District, nor will surrounding states be able to do so, to affected waters.

*E. The Draft Permit’s Failure to Require Water Quality Monitoring to Determine TMDL Compliance for All TMDL Pollutants Is Inconsistent with the CWA and Otherwise Arbitrary and Capricious*

Under the CWA, all NPDES permits must require water quality monitoring sufficient to determine compliance with permit requirements.<sup>125</sup> The statute states, “Whenever required to carry out the objective of this chapter, including but not limited to... (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance...(A) the Administrator shall require the owner or operator of any point source to...(iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods)...as he may reasonably require.”<sup>126</sup>

Accordingly, EPA policy also states that NPDES permits must require permittees to undertake the monitoring necessary to assure compliance with permit limitations.<sup>127</sup> This monitoring requirement is central to enforcing the CWA, because it requires permittees to identify and disclose their own permit violations.<sup>128</sup> Moreover, monitoring activities are needed not only to determine whether a permittee

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<sup>122</sup> *Id.*

<sup>123</sup> DDOE, 2008 *Integrated Report* at 1.

<sup>124</sup> Dist. Dep’t of the Env’t, *TMDL Program - An Important Step Toward Restoring the Anacostia and Other Impaired Waters in the District*, <http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,499033.asp>.

<sup>125</sup> 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), 122.48(b).

<sup>126</sup> 33 U.S.C. § 1318(a).

<sup>127</sup> EPA, *Establishing TMDL WLAs for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 5 (citing 40 C.F.R. § 122.44(i)).

<sup>128</sup> *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931, 108 S. Ct. 1102, 99 L. Ed. 2d 264 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988).

has violated its permit conditions, but also to assess the performance of the permittee's management practices and, if applicable, adjust those practices so that any violations will cease.<sup>129</sup>

To that end, Clean Water Act regulations anticipate that monitoring will be required to take a certain form: "All permits shall specify...required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity."<sup>130</sup> This language, referring to monitoring "intervals" and "frequency," clearly contemplates that permittees should undertake periodic monitoring of water quality, such that the performance of the permittee's management practices may be evaluated. Regulations also require MS4 permit applicants to include "a proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled..., why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment."<sup>131</sup> This provision is a straightforward requirement for permittees to perform water quality sampling.

The Draft Permit, however, authorizes a different type of monitoring. It provides that, "[f]or TMDL pollutants not included in Table 3,<sup>132</sup> pollutant load reductions will be estimated using BMP efficiencies in place of monitoring data." (Draft Permit § 8.1, ¶ 3.G.) In other words, instead of actually testing water quality, the Permittee is authorized to estimate its compliance from the degree of BMP implementation it has thus far achieved.

This scheme frustrates the purpose of imposing monitoring requirements in the first place; it provides no feedback on BMP performance, thereby precluding any educated revision or adjustment of BMPs to ensure TMDL compliance. EPA's own policy documents have recommended against taking this approach, urging "that [NPDES] permits require collecting data on the actual performance of the BMPs."<sup>133</sup> Moreover, this scheme violates the Clean Water Act's monitoring requirements because it is clearly not adequate to assure compliance with WLAs. Without testing water quality, it is impossible for the Permittee or EPA to ascertain whether the Permittee's discharges are in compliance with its TMDL obligations.

Finally, even if water quality monitoring sufficient to determine compliance were not a specific CWA requirement, the Draft Permit's implementation-based "monitoring" scheme is a clear abuse of discretion. EPA cannot rationally both rely on estimates of BMP performance as a basis of determining that the *Draft Permit's requirements are consistent with WLAs*, while relying on these very same estimates, unverified by actual sampling, to determine that *permit implementation results in actual compliance with the WLAs*. This approach is arbitrary and capricious and renders the "monitoring"

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<sup>129</sup> See *id.* ("[Monitoring D]ata may provide a basis for revised management measures ... [and] might indicate if it is necessary to adjust the BMPs.").

<sup>130</sup> 40 C.F.R. § 122.48(b); see also 40 C.F.R. § 122.41(j).

<sup>131</sup> 40 C.F.R. § 122.26(d)(2)(iii)(D).

<sup>132</sup> Table 3 of the Draft Permit includes E. coli, nitrogen, phosphorus, suspended solids, cadmium, copper, lead, and zinc; therefore, BMP-based monitoring would apply to all other pollutants.

<sup>133</sup> EPA, *Establishing TMDL WLAs for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* at 5.

scheme illusory and circular. The Draft Permit should be revised to require water quality monitoring for *all* TMDL pollutants.

## **VII. The Draft Permit's Green Infrastructure Provisions Are Important and Well-Justified But Need to Be Strengthened to Address Water Quality Impairment**

We strongly support the Draft Permit's use of measurable low impact development and green infrastructure requirements. These techniques have proven to be cost effective and environmentally beneficial mechanisms for dealing with stormwater pollution. Green infrastructure measures specified in the Permit, such as green roofs and tree planting, not only control stormwater pollution, but have the added benefits of improving air quality, reducing energy costs, and creating green jobs. As the Cameron Report shows, implementing green infrastructure in the District is feasible, cost effective, and on par with stormwater policies in other jurisdictions.<sup>134</sup>

### *A. The Draft Permit's Green Infrastructure Requirements Must Be Increased to Significantly Improve Water Quality*

Impacts to water quality are tied directly to the introduction of impervious surface cover in the landscape; as impervious cover increases in a watershed, runoff and pollutant loads increase, and water quality degrades. Research shows that impervious cover of as little as 5 percent of a watershed results in a significant decline of aquatic insect and freshwater fish diversity, and that, "[m]arked habitat degradation occur[s] at 8 to 10 percent total impervious area."<sup>135</sup> As a result, the most effective means of addressing impacts to water quality is through addressing runoff at its source, i.e., through retaining the runoff onsite. This approach prevents runoff and pollutant loads from increasing in the first instance, and limits the effects of increased impervious surfaces in a watershed.

Green infrastructure techniques like those required in Section 4 of the Draft Permit are demonstrably effective at addressing runoff at the source. While we strongly support the inclusion of retrofit requirements in the Draft Permit, the permit must go farther in order to maximize the benefits that these techniques have to offer. For example, the Permit requires 4,150 tree plantings per year. (Draft Permit § 4.1.3.) In order to meet the 40% tree canopy goal set by Mayor Fenty, the Permit should require a net increase of 8,600 trees annually, more than double the number currently proposed.<sup>136</sup> Likewise, the DC Retrofit Program should be increased to encompass a more significant area of the city. The program is required to manage runoff from 18,000,000 square feet of impervious surfaces over the five year Permit term. (Draft Permit § 4.1.2.) Though this number seems large, it actually translates into 413 acres over five years or approximately 83 acres per year. The District has approximately 6,061

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<sup>134</sup> See generally Cameron Report.

<sup>135</sup> Earl Shaver, et al., North American Lake Management Society, 2007, *Fundamentals of Urban Runoff Management: Technical and Institutional Issues*, at 4-98, 4-95, , available at [http://www.deq.state.ms.us/mdeq.nsf/pdf/NPS\\_FundamentalsofUrbanRunoffManagement/\\$File/Fundamentals\\_full\\_manual\\_lowres.pdf?OpenElement](http://www.deq.state.ms.us/mdeq.nsf/pdf/NPS_FundamentalsofUrbanRunoffManagement/$File/Fundamentals_full_manual_lowres.pdf?OpenElement).

<sup>136</sup> Casey Trees, "Urban Tree Canopy Goal," <http://www.caseytrees.org/geographic/key-findings-data-resources/urban-tree-canopy-goals/index.php> (last visited Jun. 2, 2010).

impervious acres on which stormwater is completely uncontrolled.<sup>137</sup> At that rate, it would be more than 70 years before all uncontrolled impervious area in the District was retrofitted under this program. Though EPA claims to have intended the retrofit requirement to be comparable the standard in Montgomery County, Maryland, which requires treatment for an additional 20% of impervious surface, Cameron estimates that the DC requirement is only 1/3 as comprehensive as that of Montgomery County.<sup>138</sup> The acreage requirement needs to be tripled if not quadrupled before it will represent any serious progress toward controlling stormwater pollution or approach a level that is similar to the Montgomery County permit.

EPA should make two further improvements to the acreage-based retrofit requirements. The permit should require that, when selecting projects for retrofitting within the Anacostia watershed, the DC LID projects within the Anacostia Restoration Plan (ARP), released on April 19, 2010, will be given top priority.<sup>139</sup> Also, the provision of Section 4.1.2.1 stating that “A minimum of 3,600,000 square feet of this objective must be in transportation rights-of-way” should be elaborated in greater detail, to list in the permit the series of steps to be undertaken by D-DOT in order to achieve this requirement.<sup>140</sup>

The inclusion of measurable green infrastructure requirements in the Draft Permit is a step forward in stormwater Permitting policy, and one we strongly endorse. However, the improvements to water quality will depend in part on the scale of the requirements compared to the size of the area from which pollutants will be discharged. Here, that scope requires that the strong green infrastructure policy in the Permit be implemented in an expanded way calculated to more rapidly improve water quality.

*B. The Draft Permit Utilizes the Appropriate Retention Standard, But Related Permit Provisions Should Be Clarified and Strengthened to Ensure the Effective Implementation of that Standard*

Though stronger retention requirements are feasible, the Draft Permit’s on-site retention standards for new and redevelopment are reasonable.<sup>141</sup> The draft Permit requires, “stormwater controls to achieve on-site retention of 1.2” volume of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting.” (Draft Permit § 4.1.1.a.) The Permit alternatively requires the retention of predevelopment runoff volume of stormwater from the same volume storm. (*Id.*) The draft Permit states that these requirements are triggered where development or redevelopment, “disturbs land greater than or equal to 5,000 square feet[.]” (Draft Permit § 4.1.1.)<sup>142</sup>

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<sup>137</sup> Cameron Report at 5.

<sup>138</sup> EPA, *Draft Fact Sheet* at 10; Cameron Report at 5-6.

<sup>139</sup> See Cameron Report at 6.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 6-16.

<sup>142</sup> The vague term “disturb” is not defined in the definition section of the draft Permit. To avoid an unintended loophole whereby developers could claim to have actually “disturbed” less than the threshold 5,000 square feet on a 5,000 square feet or bigger project site, EPA should clarify that all development or redevelopment conducted on a site that is 5,000 square feet or greater triggers these on-site retention standards.

The on-site retention of stormwater, with no discharge, prevents 100% of a specified volume of water from leaving a site, thereby preventing 100% of the pollutants in that runoff from mobilizing and reaching receiving waters. As a result, it is a superior method of stormwater control than conventional best management practices (“BMPs”) or other methods that allow for offsite discharge or only address pollution after it has already mobilized in runoff. This method has proven to be not adequately protective of water quality through several cycles of MS4 permitting. Moreover, standards and practices requiring the on-site retention of stormwater have already been established in permits and ordinances throughout the U.S.<sup>143</sup> Their adoption in all corners of the country demonstrates the practicability of this approach to stormwater management, and thus, that practices resulting in the onsite retention of stormwater are required under the Clean Water Act’s “maximum extent practicable” standard.<sup>144</sup>

### 1. The Retention Standards are Feasible and Cost Effective for Development and Redevelopment

Industry commenters sometimes complain that stormwater controls are infeasible or cost prohibitive, especially on redeveloped sites. Yet these claims are belied by numerous studies showing that green infrastructure can be effectively implemented in developed and redeveloped sites at a low cost while still meeting strict stormwater management standards.

For example, a study of three redeveloped sites in Maryland found that, “For highly urban sites, ESD [environmental site design – another term for green infrastructure] was comparable or less expensive than a traditional stormwater system.”<sup>145</sup> The study showed that all three sites were able to meet Maryland’s 1” retention standard using green infrastructure and to do so at a substantial cost savings – upward of 40% at all three locations.<sup>146</sup> Moreover, EPA’s Energy Independence and Security Act of 2007 (“EISA”) section 438 guidance establishes an obligation for developers of new or redeveloped federal properties to use management methods that keep the precipitation from a 95th percentile storm on-site.<sup>147</sup> The EISA guidance document provided case studies which compared the costs of installing onsite control measures utilizing green infrastructure against the costs to install traditional stormwater

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<sup>143</sup> See e.g., California Regional Water Quality Control Board Los Angeles Region Order 01-182 NPDES Permit No. CAS004001 (Dec. 13, 2001) at 28-19; California Regional Water Quality Control Board San Diego Region Order No. R9-2009-0002, NPDES No. CAS0108740 (Dec. 16, 2009); Maryland Dep’t of Env’t NPDES MS4 Permit, Montgomery County, MD (009-DP-3320) (MD0068349); W. Virginia Dep’t of Env’t Protection Draft General National Pollution Discharge Elimination System Water Pollution Control Permit, NPDES Permit No. WV0116025; Md. Code Regs. 26.08.04; Phila. Water Dep’t Regs. 600.0 *et seq.*

<sup>144</sup> 33 U.S.C. § 1342(p).

<sup>145</sup> Meliora Environmental Design LLC, *Comparison of Environmental Site Design for Stormwater Management for Three Redevelopment Sites in Maryland*, 2008.

<sup>146</sup> *Id.*

<sup>147</sup> See U.S. EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*, Dec. 4, 2009, available at [http://www.epa.gov/owow/NPS/lid/section438/pdf/final\\_sec438\\_eisa.pdf](http://www.epa.gov/owow/NPS/lid/section438/pdf/final_sec438_eisa.pdf).

management controls. In Denver, a 4.5 acre site with 55% impervious cover was able to meet the 95th percentile rainfall event standard at a cost of 17.3% less than a traditional approach. In Atlanta, a 21 acre site with 70% impervious cover was able to meet the standard at a cost of only 9.9% more than traditional stormwater controls.<sup>148</sup> Notably, the EISA guidance applies the same stormwater standards to both new and redeveloped sites. EPA interpreted the phrase “maximum extent technically feasible” in EISA to dictate the same standards be applied regardless of site classification. Significantly, given the large federal presence here, federal sites in Washington, DC, both under the EISA guidance and the terms of the draft MS4 Permit, are held to the 1.7” retention standard but all other development need only meet the less stringent 1.2” standard.<sup>149</sup> (Draft Permit § 4.1.1.a and b.)

Likewise, in a study conducted in the San Francisco Bay area, Richard Horner, a member of the National Academy of Sciences Panel on Reducing Stormwater Discharge Contributions to Water Pollution, demonstrated that even in an urban infill redevelopment site with limited to no infiltration capacity, it is possible to retain 78.9% of the annual stormwater that would otherwise have been discharged to the stormwater drain. For new development sites with adequate infiltration capacity, 100% of stormwater could be retained onsite in nearly all cases.<sup>150</sup>

Consistent with these findings, analysis of the specific requirements in the Draft Permit conducted by LimnoTech, Inc. demonstrates that an on-site retention standard of 1.7 inches is practicable in most areas of Washington, DC using on-site stormwater management techniques alone. It proves even more practicable when coupled with off-site mitigation or fee-in-lieu provisions.<sup>151</sup> Their analysis showed that, in most of the assessed sewersheds, sufficient opportunities are present to install stormwater practices that will provide adequate capacity to achieve 1.7 inches of stormwater retention. In reality, these sewersheds likely have even greater stormwater retention opportunities because the opportunity analysis only evaluated the potential of four stormwater practices; rainwater harvesting, for example, was not considered. In addition, the off-site mitigation and fee-in-lieu provisions provide additional flexibility in meeting the proposed stormwater standards. The opportunity analysis also demonstrates that several of the sewersheds have “excess” stormwater volume retention capacity to allow the off-site provisions to be exercised.<sup>152</sup> Given that the Permit requires retention of significantly less rainfall than Limnotech found could be feasibly retained, the Limnotech study is strong evidence of the practicable nature of the 1.2 inch requirement.

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Richard R. Horner, *Supplementary Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area* (2007) at 4-5; Richard R. Horner, *Initial Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area* (2007) at 16.

<sup>151</sup> See LimnoTech, Inc., *Analysis of the Pollution Reduction Potential of DC Stormwater Standards* (July 24, 2009).

<sup>152</sup> *Id.*

## 2. The Burden to Demonstrate Need for Off-site Waivers Rests with the Applicant

Allowances for off-site mitigation in cases where fully meeting the on-site retention standard is infeasible, like those addressed in section 4.1.1.d of the Draft Permit, should be rare and the burden of proof needs to rest squarely with the applicant, not the government plan reviewer, to show that all green infrastructure on-site opportunities have been exhausted before turning to off-site options. As demonstrated in the Cameron Report, successful urban redevelopment stormwater requirements, such as those applied in Montgomery County, Philadelphia, and elsewhere, combine a strict protocol for maximizing on-site opportunities for retention and a presumption that all sites are able to attain the full volume standard on-site, with flexibility to allow and enable some degree of off-site mitigation for instances where the full on-site retention volume is proven to be infeasible.<sup>153</sup> The Draft Permit should be revised to require the “stepwise” approach outlined in the Cameron report, which ensures that the maximum possible on-site retention will be achieved, and that a greater than 1:1 mitigation ratio will be applied in the limited cases when off-site mitigation is allowed.<sup>154</sup> Further, the Draft Permit should be revised to ensure that off-site mitigation projects are green infrastructure-based and occur in the same watershed as the original project, wherever feasible.<sup>155</sup> EPA should also delete from the Draft Permit the allowance for “adjustments to the retention standards for redevelopment, high density development,” and certain other categories of projects. (Draft Permit § 4.1.1.d.) This provision would create an unnecessary and unworkable exemption from the permit’s strong and achievable on-site retention standards.<sup>156</sup>

### *C. The Draft Permit Must Provide More Specific, Enforceable Requirements Concerning Code Review and Removal of Barriers to Green Infrastructure*

As discussed above, green infrastructure, which has multiple benefits to the environment and to the community writ large, should be encouraged as a method of controlling stormwater. To that end, it is essential that the District review its codes and policy documents to ensure the removal of barriers to green infrastructure techniques, such as vegetated and stormwater reuse and infiltration practices including bioretention, green street facilities, permeable pavements, green roofs, green walls, rain barrels and cisterns. These barriers create unnecessary red tape that not only fails to promote green infrastructure, but also discourages innovation. Any code revisions should, of course, be subject to public comment, but moreover, individual site plans should also be open to public review so that the community can ensure that green infrastructure techniques are being used appropriately and well and to the MEP.<sup>157</sup> Additionally, the Draft Permit’s requirement concerning incentives for “green

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<sup>153</sup> See Cameron Report at 7-8; NPDES MS4 Permit, Montgomery County, MD (009-DP-3320) (MD0068349); Philadelphia Water Dep’t., *Philadelphia Stormwater Management Guidance Manual Version 2.0* (Feb. 1, 2008), available at <http://www.phillyriverinfo.org/Programs/SubprogramMain.aspx?Id=StormwaterManual>.

<sup>154</sup> Cameron Report at 3.

<sup>155</sup> *Id.* at 4.

<sup>156</sup> *Id.*

<sup>157</sup> See *id.* at 3.

landscaping” is laudable, but should be clarified and strengthened to ensure its effectiveness.<sup>158</sup> All of these revisions (and others described above) would help ensure that the permit requires the use of green infrastructure techniques to the maximum extent practicable.

#### **VIII. The Draft Permit’s Public Participation Elements Are Inadequate and Unlawful**

EPA must provide for public review of the Draft Permit and its underlying programs. As discussed above, the permit as currently written is impermissibly vague, requiring the Permittee to compose, at some later date, many essential components of the permit. We believe that the permit must provide concrete requirements which will constitute permit compliance. However, since the current draft of the permit requires DC to essentially write much of the permit itself, it is especially imperative that the public has the opportunity for substantive involvement in all subsequently drafted permit plans, through notice and comment and other processes.

Even if future public participation opportunities are provided for, the serial review of the permit program over an extended period of time discourages and frustrates public participation. This is at odds with the CWA public participation regulations that state that, “EPA... shall provide for, encourage, and assist the participation of the public.”<sup>159</sup> The vague and confusing nature of the Draft Permit controverts the purpose of this provision. Even relatively sophisticated commenters have had difficulty in unraveling the Draft Permit’s provisions. For example, as discussed above, the permit relies heavily on the 2009 SWMP, yet that document has not been made readily available to the public, and the Draft Permit does not address how the public can gain access to that and other integral documents. The permit is not clear on what constitutes compliance or when compliance is due. Public oversight of this permit, as EPA’s own regulations encourage, cannot be accomplished without massive time and resource commitment, a luxury that the average citizen cannot afford. The permit terms must be clarified, compliance deadlines set, and all necessary documentation made available for public review and comment.

Moreover, the Permit is unclear regarding what elements of the 2009 Stormwater Management Plan (SWMP) will continue and which will change. Section 2.3 of the Draft Permit outlines DDOE’s duties in implementing the SWMP, including: “Making available to the public and other interested and affected parties, the opportunity to comment on MS4 stormwater management program.” The 2009 SWMP was prepared by DDOE and submitted as part of its application for permit renewal. The SWMP contains the characterization data used to identify the source of pollutants and predict their impacts on waterways, proposed management plans, an assessment of stormwater controls, as well as a fiscal analysis.<sup>160</sup> EPA must make clear its requirement that the 2009 SWMP be noticed for public comment and for DDOE to substantively respond to all comments and make changes to the SWMP where appropriate. This scheme is considered in section 4.9.4 of the permit, which states, “The Permittee shall continue to implement its process for consideration of public comments on their SWMP.” The phrasing implies that

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<sup>158</sup> *See id.* at 4.

<sup>159</sup> 40 C.F.R. § 25.3.

<sup>160</sup> *See Gov’t of the Dist. of Columbia, Upgraded Stormwater Management Plan.*

DDOE has begun a public comment process on the SWMP, but to our knowledge, it has not. Because the SWMP is such an essential component of the permit, EPA must explicitly require public notice and comment and substantive response from DDOE on the 2009 SWMP and any other SWMP developed during the permit term.

Though the Draft Permit requires ongoing public involvement, the Draft Permit's language falls short of a meaningful commitment to involve the public, stating, "The Permittee shall continue to establish a method of routine communication to groups such as watershed associations...." (Draft Permit § 4.9.4.) Simply establishing communication does not ensure the public a meaningful opportunity to participate in the further development and implementation of the permit. Section 5.1 of the permit offers an example of a concrete commitment to public involvement:

Within one year of the effective date of this permit the permittee shall develop, public notice and submit to EPA Region III for approval a revised monitoring plan to meet the following objectives...

This type of concrete language should be mirrored throughout the permit for each and every "plan", "standard", or "program" the Permittee is required to develop. The public has a critical role in ensuring effective pollution reduction and the permit must support and enforce that role.

As a final point, *Environmental Defense Center, Inc. v. U.S. E.P.A.* highlights the legal necessity of public involvement and meaningful regulatory entity review during the permitting process: "[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity.... Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy."<sup>161</sup> Without such review, the public and EPA have no way to "ensure that each [MS4 permit] program reduces the discharge of pollutants to the maximum extent practicable."<sup>162</sup> The current Draft Permit does not adequately involve the public in the development and review of the permit's many management and implementation plans. To be adequate under the CWA, the Draft Permit must require the Permittee to make available control plans for public comment, and EPA itself must formally provide for public review and comment prior to EPA approval of such plans.

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<sup>161</sup> *EDC*, 344 F.3d at 856.

<sup>162</sup> *Id.*

## IX. Conclusion

As these comments indicate, the Draft Permit requires significant improvements before it is ready to be approved, and, while there are important new requirements in the permit that we support, NRDC is strongly opposed to approval of the Draft Permit in its current form. We would welcome a continuing discussion with EPA staff regarding changes to the Draft Permit that would allow us to fully support it. Please feel free to contact us, via Rebecca Hammer at the Natural Resources Defense Council, at 202-513-6254.

Sincerely,



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