

**Re: Responsiveness Summary
National Pollution Discharge Elimination System (NPDES)
Municipal Separate Storm Sewer System (MS4) Permit
Draft Amendment No. 1**

NPDES PERMIT NUMBER: DC0000221

FACILITY NAME AND MAILING ADDRESS:

**Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

FACILITY LOCATION:

**District of Columbia's
Municipal Separate Storm Sewer System**

RECEIVING WATERS:

**Potomac River, Anacostia River,
Rock Creek, and Tributaries**

PUBLIC COMMENT PERIOD:

July 21, 2005 to August 22, 2005

EPA Region III received four comment letters during the public review period from interested parties regarding the Government of the District of Columbia (Permittee) draft Amendment No. 1 to the current Municipal Separate Storm Sewer System (MS4) NPDES Permit which was issued August 19, 2004. A summary of the comments and EPA Region's III responses to those comments are provided below. In reaching its decision regarding the issuance of the final Amendment, hereafter known as Amendment No.1, the Region considered these comments and certain modifications in response to those comments in Amendment No. 1 and the Fact Sheet.

I. Comment Letter Number 1.

A. Commentors:

Various environmental organizations from throughout the District of Columbia concerned with storm water issues signed the letter: Correspondence dated August 17, 2005, was received from

these parties (including, in part Natural Resources Defense Council, Earthjustice, and Friends of the Earth) during the public comment period. EPA Region III provides the following response to the issue raised by these interested environmental organizations.

B. General Comment:

Commentors represented by the organizations commend EPA for drafting an Amendment that will bring the Permit more in line with Clean Water Act water quality-based standard requirements.

C. EPA Response:

EPA appreciates the comment.

II. Comment Letter Number 2.

A. Commentors:

The commentors are a municipal coalition represented by Mr. David W. Burchmore, Esq. of Squire, Sanders, and Dempsey L.L.P. from Cleveland, Ohio. EPA received correspondence dated August 18, 2005, from Mr. Burchmore on behalf of the National League of Cities, the National Association of Flood and Stormwater Management Agencies, the National Association of Clean Water Agencies, the CSO Partnership, the West Virginia Municipal League, and the Virginia Municipal League during the public comment period.

B. Comment No. 1/Specific Comments on Draft Amendment No. 1-Part I.C. Limitations to Coverage:

i. Comment:

The commentors recommend that Part I.C.2 of the draft Amendment be changed back to the language in the current Permit or the proposed language be qualified by stating that such discharges are prohibited "to the maximum extent practicable" based on the Ninth Circuit Court of Appeals' decision in *Defenders of Wildlife v. Browner*, 191 F.3d 1167 (9th Cir. 1999).

ii. EPA Response:

The draft language in Part I.C.2 was intended to be consistent with the *Defenders of Wildlife* decision, as well as its progeny (both judicial and administrative). In the fact sheet accompanying the proposed amendment, EPA points out that the basis for the current MS4 Permit sets forth a framework for a long-term storm water management control program for determining compliance with applicable water quality standards "to the maximum extent practicable" through the use of best management practices. EPA is clarifying the language in the final document as it intends Amendment No.1 to be fully consistent with the basis for issuing the current MS4 Permit.

C. Comment No. 2a/Permit Part I.D.-Effluent Limits:

i. Comment:

Depending on the modification made to Part I.C.2 as discussed and for the reasons stated above for making such changes, Part I.D.2 should be qualified by the "maximum extent practicable" limitation.

ii. EPA Response:

The basis for issuing the MS4 Permit in August of 2004 was the District's Upgraded Storm Water Management Plan (SWMP) dated October 19, 2002. The fact sheet accompanying the August, 2004 MS4 Permit provides that EPA has determined that the Upgraded SWMP represents the technology-based level of pollution reduction. The fact sheet further indicates that pollution reduction should be achieved through the combination of best management practices (BMPs) controlling the quantity as well as the quality of pollutants in the MS4 to the maximum extent practicable (MEP). EPA believes that making reference to the Upgraded SWMP in Part I.D.2 accomplishes the same objective and eliminates the redundancy issue.

D. Comment No. 2b/Permit I.D.-Effluent Limits:

i. Comment:

Part I.D.3 of the draft Amendment should be revised so that the permittee is expected to implement controls for managing waste load allocations associated with the Total Maximum Daily Loadings (TMDL) Implementation Plans under development within the Anacostia River and Rock Creek subwatersheds to the maximum extent practicable.

ii. EPA Response:

The Upgraded SWMP dated October 19, 2002, provides the framework for identifying a long-term approach for managing storm water which is both practicable and reasonable. The intent of the TMDL Implementation Plan is to develop specific storm water controls and methodologies designed for that particular subwatershed to better enhance and support the framework that was identified through the Upgraded SWMP. Since the same principles of "practicable and reasonable" controls for managing storm water are the basis on which these documents have been developed, EPA believes the reference to the Upgraded SWMP in Part I.D.3 addresses this issue and any revision would be redundant.

E. Comment No. 3/Permit Part IX.B-OtherApplicable Provisions:

i. Comment:

Similar to above comment number 2b, the required submission of implementation plans and

additional controls for addressing TMDL waste load allocations must be qualified by using the phrase, "to the maximum extent practicable".

ii. EPA Response:

See comment number 2b above for response.

III. Comment Letter 3.

A. Commentor(s):

The Government of the District of Columbia (as Permittee) and the District of Columbia Water and Sewer Authority (WASA) (as the District's Storm Water Administrator) were represented by David E. Evans, Esq. of McGuireWoods LLP from Richmond, Virginia in their August 19, 2005, comment letter.

B. General Comment II.A:

i. Comment:

The District of Columbia and WASA believe that with the exception of its failure to include the Maximum Extent Practicable (MEP) qualifier in the water quality-based requirements, the current MS4 Permit complies with the law and does not need to be modified. The parties are disappointed that they were not able to consult prior to the issuance of the draft document.

ii. EPA Response:

The intent of the draft Amendment was to resolve Earthjustice's appeal of the final permit issued in August, 2004, in such a way that the iterative process established through the MS4 Permit was supportive and not compromised. The document was shared prior to issuance and EPA's views that the draft Amendment was consistent with the iterative process were discussed, as well as expressed in the draft fact sheet.

C. Specific Comment II.B.1/Permit Part I.C-Limitations to Coverage:

i. Comment:

The District and WASA object to the words "or from" in Part I.C.2 of the draft Amendment and ask that they either be deleted or qualified by the MEP standard.

ii. EPA Response:

See comment number 1 under comment letter number 2 from the Municipal Coalition for response.

D. Specific Comment II.B.2/Permit I.D-Effluent Limits:

i. Comment:

The District and WASA are concerned that EPA's decision to remove the standards compliance language currently in the MS4 Permit in Part I.D.2 and Part I.D.3, although not as serious, suggests that the District has an ultimate unqualified obligation to meet water quality standards. The commentors thus recommend either keeping the language in the existing Permit or using an MEP standard qualifier.

ii. EPA Response:

See EPA response to comment letter number 2, comment #2a, from the Municipal Coalition for response.

E. Specific Comment II.B.3/Permit Part III.C-Annual Reporting:

i. Comment

The District and WASA have no objection to this additional annual reporting obligation.

ii. EPA Response:

EPA appreciates the comment.

F. Specific Comment II.B.4/ Permit Part VII.P-Reopener Clause for Permits:

i. Comment:

The new reopener language in Part VII.P of the draft Amendment should be qualified by the MEP standard because it suggests that the District has an unqualified obligation to meet water quality standards.

ii. EPA Response:

EPA is exercising its options to change direction through the permitting process based on the District's Upgraded SWMP should current Program controls need to be adjusted under the "iterative" approach.

G. Specific Comment II.B.5/Permit Part IX.A-Waivers and Exemptions:

i. Comment:

The District does not plan to grant any waivers and exemptions, and therefore, has no objection to the additional reporting requirement.

ii. EPA Response:

EPA appreciates the comment.

H. Specific Comment II.b.6/Permit Part IX.b-TMDL WLA Implementation Plans and Compliance Monitoring:

i. Comment:

The District and WASA are concerned that by using the permit modification vehicle for changing from procedures other than those identified in the Upgraded SWMP for demonstrating compliance unnecessarily complicates and burdens the process.

ii. EPA Response:

A permit modification, which is governed by federal regulations at 40 C.F.R. Part 124.5, formalizes the procedure in the permit and is not done arbitrarily. Prior to EPA taking such action, a scientifically defensible argument would have to be made for deviating from the procedures and method presently in place to demonstrate compliance.

I. Specific Comment II.B.7/Permit Part X-Permit Definitions:

ii. Comment:

The District and WASA have no objection to the addition of the "Benchmark" or "measurable performance standard" definition.

ii. EPA Response:

EPA appreciates the comment.

IV. Comment Letter Number 4.

A. Commentor:

The District of Columbia Department of Health (DOH) certified the draft Amendment under Section 401 of the Clean Water Act, 33 U.S.C. Part 1341, provided three modifications are included in the document. EPA received correspondence from the certifying District agency dated August 19, 2005, during the public comment period. EPA Region III provides the following responses to the issues raised by DOH.

B. Modification #1: [Amend the Draft Amendment No. 1, Part I(C)(2) Provision to Reflect Authorized Discharges].

i. Comment:

DOH recommends that EPA delete this provision and replace it with the existing language of the current MS4 Permit since Part I(C)(2) does not address the District's impaired waters and the current wording is, in effect, excluding allowed discharges.

ii. EPA Response:

EPA will be substituting replacement language in the final issued Amendment to address the points raised by DOH in its Section 401 certification letter.

C. Modification #2: [Amend Draft Amendment No. 1, Part I(D)(3) to Clarify that the Controls in the MS4 Permit are Appropriate Effluent Limits Consistent with TMDL WLAs]:

i. Comment:

DOH recommends that EPA replace this provision with the language currently in the MS4 Permit since Part I(D)(3) removes EPA's determination that the controls in the MS4 Permit "are appropriate effluent limits consistent with the assumptions and requirements of the approved waste load allocations(WLAs)" established in the District's TMDLs. Also, DOH takes issue with the requirement that EPA conduct an assessment whether further controls are necessary which "in effect" imposes more stringent compliance with effluent limits.

ii. EPA Response:

EPA is adding additional language to the provision in the final issued Amendment to address the points raised by DOH in its Section 401 certification letter.

D. Modification #3 [Delete Draft Amendment No. 1, Part VII(P)(c) Reopener Clause for Permit Provision which states that "to ensure that the effluent limits are sufficient to prevent an exceedance of water quality standards"]:

i. Comment:

DOH recommends that this phrase be deleted from this provision for reasons stated above in Modification #1 and Modification #2.

ii. EPA Response:

EPA is modifying some of the wording in the provision when the final Amendment is issued to address the concerns raised by DOH in its Section 401 certification letter.