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RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

November 13, 2012

Honorable Members of the State Water Resources Control Board
Attn: Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Dear Honorable Board Members and Ms. Townsend:

Re: Comment Letter – Receiving Water Limitations Language Workshop

I am writing on behalf of the Riverside County Flood Control and Water Conservation District ("District") regarding the State Water Resources Control Board's consideration of Receiving Water Limitations ("RWL") language in MS4 permits. This review was triggered by a decision of the Ninth Circuit United States Court of Appeals in *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, *cert granted,* __ U.S. __ (June 25, 2012) ("*NRDC*"). This letter is being submitted in advance of the State Board's November 20, 2012 workshop on reform of the RWL language to be incorporated into MS4 permits as a matter of statewide policy.

The District is the Principal Permittee for three Phase I MS4 permits applicable to municipalities across Riverside County: Order R8-2010-0033, issued by the Santa Ana Regional Water Board to municipalities within the Santa Ana River Region of Riverside County; Order R9-2010-016, issued by the San Diego Regional Water Board to municipalities within the Santa Margarita Region of Riverside County; and Order R7-2008-0001, issued by the Colorado River Regional Water Board to municipalities within the Whitewater River Region of Riverside County. Given our unique perspective as the manager of three Phase 1 MS4 permits, the District and its staff thus, have considerable experience and expertise in developing and administering MS4 permits, and a keen understanding of the issues that the above mentioned court case creates.

The District strongly supports reform of the RWL language to make clear the State Board's often-expressed intention that MS4 Permittees' compliance with RWL be effectuated through an iterative process. However, under the Ninth Circuit's interpretation, any MS4 discharge that causes or contributes to an exceedance of a Water Quality Standard subjects the MS4 Permittee to civil penalty liability, injunctive relief and the payment of attorneys' fees in an action brought by a citizen plaintiff, even where the Permittee is fully implementing the programmatic requirements of their MS4 Permit.

The District supports the California Stormwater Quality Association's ("CASQA") efforts to obtain RWL language that ensures that the iterative process favored by the State Board is honored. The District also supports the comments of the California State Association of Counties, and believes the proposed RWL language attached to those comments is a step in the right direction.

This letter contains additional District comments about the RWL language and the iterative process. We believe that they are best expressed in terms of correcting misperceptions regarding the current RWL language, as interpreted by the Ninth Circuit.

Misperception Number One: Strict compliance with Water Quality Standards is required of MS4 Permittees by the Clean Water Act.

The Clean Water Act provides that MS4 discharges must control pollutants in discharges from the MS4 to the "Maximum Extent Practicable" (33 U.S.C. § 1342(p)(3)(B)(iii)). Unlike the case with other NPDES Permittees, the Clean Water Act does not require that municipalities strictly comply with Water Quality Standards, as determined by the Ninth Circuit in *Browner v. Defenders of Wildlife*. The State Board's own precedential Order WQ 2001-15 recognizes this fact and states that the RWL language was intended to be consistent with the *Browner* case. In that Order, which interpreted RWL language similar to that in *NRDC*, the Board stated:

> *[O]ur language, similar to the U.S. EPA's permit language discussed in the Browner case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the Browner court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards.* [*Order WQ 2001-15 at 7 (emphasis added)].*

Unfortunately, the Ninth Circuit completely disregarded this language, and the Order, in holding that strict compliance was required of MS4 Permittees.

USEPA itself has issued MS4 permits (in non-delegated states) that do not contain RWL language requiring strict compliance with Water Quality Standards. Therefore, it is clear that such compliance is not required by the Clean Water Act nor is such compliance established by USEPA policy. The most prominent example of a recent MS4 permit promulgated by USEPA is that for the District of Columbia ("DC Permit") (relevant portions of which are attached as Exhibit A), which was adopted in 2011.

Part 1.4 of the DC Permit contains the requirements relating to Water Quality Standards and provides, in relevant part: "Compliance with the performance standards and provisions contained in Parts 2 through 8 of the permit shall constitute adequate progress towards compliance with DCWQS [water quality standards] and WLAs [established under TMDLs] for this permit term." The DC Permit Fact Sheet explains the rationale for that language as follows [DC Permit Fact Sheet, Pages 5-6, emphasis added, attached as Exhibit B]:

> *Comments on the language in Part 1.4 varied widely. Some commenters did not believe it was reasonable to require discharges to meet water quality standards. Other commenters believed this to be an unambiguous requirement of the Clean Water Act.*

Today's Final Permit is premised upon **EPA's longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance.** *See generally, "National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges," 55 F.R. 47990 (Nov. 16, 1990).*

EPA is aware that many Permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles. *Rather the attainment of applicable water quality standards* **as an incremental process** *is authorized under section 402(p)(3)(B)(iii) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), which requires an MS4 permit "to reduce the discharge of pollutants to the maximum extent practicable" (MEP) "and such other provisions" deemed appropriate to control pollutants in municipal stormwater discharges.* **To be clear, the goal of EPA's stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal stormwater dischargers would need several permit cycles to achieve that goal.**

Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District's MS4 discharges, requires staged implementation and increasingly more stringent requirements over several permitting cycles. During each cycle, EPA will continue to review deliverables from the District to ensure that its activities constitute sufficient progress toward standards attainment. With each permit reissuance EPA will continue to increase stringency until such time as standards are met in all receiving waters. **Therefore today's Final Permit is clear that attainment of applicable water quality standards and consistency with the assumptions and requirements of any applicable WLA are requirements of the Permit, but, given the iterative nature of this requirement under CWA Section 402(p)(3)(B)(iii), the Final Permit is also clear that "compliance with all performance standards and provisions contained in the Final Permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term" (Section 1.4).**

USEPA is now proposing clarifying changes to this language and to other sections of the DC Permit as the result of a settlement with various parties. However, those changes do not require strict compliance with Water Quality Standards, but rather compliance through the programs developed under the Permit.

The State Board is thus, free to adopt new RWL language that effectuates its previously expressed intent that MS4 permits not require strict compliance with Water Quality Standards with regard to contributions from discharges from MS4s.

Misperception Number Two: The MS4 Permittees are Seeking a "Safe Harbor" that would Insulate them from Responsibility Under the Clean Water Act.

While State Board staff's "Issue Paper" uses the term "safe harbor" in describing the iterative process, the District believes that this is fundamentally misleading. Even a cursory review of the terms of a typical MS4 permit in California reveals that it is full of compliance points. In the three MS4 Permits in which the District serves as Principal Permittee, literally every sentence is a separate point of compliance.

This fact is supported by the language of the Permits themselves. For example, in Order R8-2010-0033 Part XX.G provides: **"The Permittees must comply with all terms, requirements, and conditions of this Order. Any violation of this Order constitutes a violation of the CWA, its regulations and the California Water Code, and is grounds for enforcement action . . . ."** (emphasis added). Similar provisions are contained in the other two Riverside County MS4 Permits. Even without the strict Water Quality Standard language imposed under the Ninth Circuit's opinion, there is no "safe harbor" from liability under the Clean Water Act or, where applicable, the California Water Code, for any Permittee that fails to fully implement each the detailed and prescriptive requirements of its MS4 Permit.

There is a fundamental difference however, between fully complying with activities within the control and responsibility of the Permittees, such as monitoring, implementing BMPs and performing other programmatic requirements of the MS4 Permit; and being forced to guarantee that MS4 discharges will not cause or contribute to exceedances of Water Quality Standards in Receiving Waters, a guarantee that the Permittees' have no ability to make.

What the District and other MS4 Permittees seek is relief from what is essentially "guaranteed non-compliance" where a Permittee can be found in violation of their MS4 Permit even if the exceedance occurs at no fault of or failure by the Permittee, or put another way, even in circumstances where there is nothing a Permittee could have done to prevent that exceedance from occurring. In such a case, the Permittee can be held liable for potentially millions of dollars in legal costs, penalties and other expenses. We note that the City of Malibu, a city of only 13,000 residents, spent more than $2 million in defending against a citizen suit filed with respect to its MS4 Permit and more than $6 million to settle the case, including payment of $750,000 in attorney fees to plaintiffs. Given the tremendous financial challenges faced by every California municipality, including the District, the County of Riverside and the Permittee cities within the County, such a diversion of resources that otherwise would be directed at clean water programs or other vital municipal programs is a poor policy choice. And, as noted, it is not a policy choice that is required by the Clean Water Act, nor is it required by USEPA in their own Permits.

The District recognizes that regulatory enforcement actions and citizen suits are authorized by the Clean Water Act and that such suits may be an appropriate remedy where, for example, a Permittee has failed to comply with the programmatic requirements of its MS4 Permit. Where, however, the Permittees are complying with those requirements in good faith but, due to circumstances beyond

their control, their MS4 discharge causes or contributes to a Water Quality Standard exceedance in Receiving Waters, a citizen suit based on those exceedances potentially throws away the work done by the Permittees and the Water Boards under the MS4 Permit, as discussed below.

Misperception Number Three: MS4 can achieve compliance with strict Water Quality Standards.

MS4 Permittees cannot guarantee that discharges from their MS4s will in fact, not cause or contribute to an exceedance of Water Quality Standards in a Receiving Water. The monitoring conducted under our MS4 Permits reflects exceedances of various Water Quality Standards in Receiving Waters, and we understand that such results are typical for MS4 discharges around the state (please see Pages 2-3 of the CASQA comment letter dated November 2, 2012). The extreme variability of stormwater quality and quantity itself (which, in Southern California, arrives infrequently and from widely varying storm sizes) combined with a multitude of potential pollutant sources beyond a Permittee's ability to truly "control", make it impossible for a municipality to ensure that no discharges from its MS4 will ever cause or contribute to exceedances of Water Quality Standards in Receiving Waters. This was recognized by the Issue Paper released by State Board staff in preparation for the November 20th workshop, which found that as "the storm water management programs of municipalities have matured, **an increasing body of monitoring data indicates that water quality standards are in fact not being met by many MS4s**" (Issue Paper, Page 2 (emphasis supplied)).

Thus, even if municipal Permittees are to be held strictly liable for the ensuring that no discharges from their MS4s cause or contribute to an exceedance of Water Quality Standards, as the Ninth Circuit has interpreted the current RWL language, those Permittees have no ability to attain those standards. The reasons are several-fold and include the following:

1) Unlike an industrial NPDES Permittee, a municipal Permittee is not typically the source of the pollutants in the MS4 discharge (whether wet or dry). The municipality can regulate sources to some degree (through, for example, the operation of structural and non-structural BMPs and implementation of an Illegal Connection/Illicit Discharge program), but the municipality cannot guarantee that pollutants will not enter the MS4 and then be discharged into the Receiving Waters.

2) Municipalities cannot control natural sources of pollutants that are discharged through the MS4. Monitoring has indicated that many pollutants are likely from natural and not anthropogenic sources.

3) While Permittees conduct extensive public education programs as part of their MS4 programs, municipalities cannot "control" human behavior, or "prevent" an individual from taking an action that might cause pollution to enter the MS4. As an example, a resident may, despite all ordinances, regulations, potential penalties or enforcement, public outreach, available BMPs, etc., choose not to pick up after their pets, and

stormwater may, through no fault of the Permittee, pick up animal waste and deposit into the MS4.

4) MS4 Permittees cannot "prevent" flows from entering their MS4. To protect the health and property of their residents, MS4 operators must allow the legitimate flows of water into their drains. This is especially true for the District, which is charged directly by the Legislature [in Water Code App. §48-9] with the task of taking necessary steps to protect the people, properties and watersheds of Riverside County from the negative impacts of flooding. The District cannot, in effect, cause flooding by preventing flows from entering their storm drain, simply because such flows may contain pollutants that cause a violation of the Receiving Waters Limitation provisions of their MS4 Permits. In fact, California law requires downstream property owners (such as MS4 operators) to accept flows from upstream property owners.

5) Further, the authorities granted to flood control districts, such as this District, by the Legislature are narrow and do not include the authority to condition or regulate the quality or nature of stormwater runoff discharged from up gradient properties. This responsibility is appropriately assigned by the Legislature to the Regional Boards.

Similarly, MS4 Permittees cannot guarantee compliance with Water Quality Standards in dry weather. "Alternative 4" in the staff's Issue Paper suggests an alternative RWL approach that would not extend the iterative approach to dry weather discharges. The District submits that this alternative does not reflect the reality of urban runoff. Monitoring conducted under the Riverside County MS4 Permits reflects exceedances of Water Quality Standards during dry weather as well as wet weather. There is no justification for imposition of strict liability for exceedances during such conditions, for the following reasons:

1) During dry weather, other NPDES-permitted discharges continue to flow into the Receiving Waters. For example, much of the flow in the Santa Ana River during dry weather conditions is from non-MS4 sources, such as publicly owned treatment works. Additionally, numerous other separate NPDES-permitted discharges will occur, potentially at concentrations of pollutants that exceed Water Quality Standards. Evidence generated during the *NRDC* case involving the County of Los Angeles, for example, indicated that NPDES permits covering hundreds of these dischargers, including POTWs allowed the discharge of pollutants at concentrations *greater* than Water Quality Standards. Because of these discharges, which are legal and authorized by the Regional Boards, the MS4 Permittees have essentially no more control over compliance with Water Quality Standards in dry weather than they would have during wet weather conditions.

2) Accidental or even intentional illicit discharges by third parties into the MS4 obviously can occur during dry weather as well as wet weather. Such discharges would potentially have an even greater impact on sampling, since they are not diluted by large volumes of stormwater. For example, a vehicular accident recently caused hundreds of gallons of

asphalt tar to enter Sandia Creek, a Receiving Water in Riverside County. While this spill was not discharged through an MS4, if the vehicular accident had occurred in another portion of the watershed, the spill could feasibly have entered into and been discharged from an MS4. Similarly in many places throughout the State, sanitary sewer systems are owned and operated by special districts that have no relation to the MS4 Permittees that own or operate the MS4 systems. Nevertheless, an overflow of such sanitary sewer systems may cause an unavoidable discharge into, and from a Permittee-owned MS4. Such accidental or illicit discharges cannot be "prevented" or "controlled" by the Permittees except to the extent that they can be cleaned up or blocked if promptly reported. However, if the discharge has reached Receiving Waters and caused a measured exceedance of Water Quality Standards, under the Ninth Circuit's interpretation, liability for civil penalties, injunctive relief and attorneys fees will attach to the MS4 Permittee.

3) Enforcing strict Water Quality Standard limits in dry or wet weather is counter-productive to the watershed planning-based MS4 Permits currently being promulgated by many regional water boards. Enforcing such limits will divert Permittee attention and resources from watershed-based, monitoring-heavy compliance programs, as will be discussed in greater detail below.

In essence, under the Ninth Circuit's interpretation of the current RWL language, the District, and potentially every other MS4 Permittee in the state, is in violation of its Permit any time that an exceedance of a Water Quality Standard is recorded and attributed to a discharge from its MS4. This means that the Regional Water Boards have issued, and continue to adopt permits that include RWL language **which cannot be complied with**. The Clean Water Act, however, does not require Permittees to achieve the impossible. *See, e.g., Hughey v. JMS Development Corp.* (11th Cir. 1996) 78 F.3d 1523, 1530 ("In interpreting the liability provisions of the CWA, we realize that Congress is presumed not to have intended absurd (impossible) results.").

Misperception Number Four: The Current RWL Language is more Protective of Receiving Water Quality.

This statement is not only untrue but maintaining the current RWL language actually **impedes** efforts to protect Receiving Water Quality.

We understand that some stakeholders believe that there should be Numeric Effluent Limitations (NELs) contained in the MS4 Permits for purposes of accountability. In response, we note that many MS4 permits now contain numeric Stormwater and Non-stormwater Action Levels ("SALs" and "NALs") or other numeric targets or goals, the exceedance of which trigger specific compliance responses by the Permittees. It is these action levels (which were advocated by the Blue Ribbon Panel established by the State Board to investigate the appropriateness of NELs in MS4 permits) which provide such "numeric" accountability. This is in addition to the numerous other compliance documentation and reporting provisions required of MS4 Permittees that also provide measures of accountability.

More importantly, the current RWL language as interpreted by the Ninth Circuit actually impedes efforts by municipalities to protect water quality. First, by requiring immediate compliance, the language undermines efforts to bring Water Quality Standard-impaired waterbodies into compliance through the Total Maximum Daily Load ("TMDL") program. TMDLs are designed with the recognition that, due to the complexity of the issues causing the waterbody to be impaired in the first place, meeting these requirements cannot be achieved immediately. Therefore, TMDL compliance plans include timelines to achieve such compliance over periods of years and sometimes decades.

Second, most MS4 permits have begun incorporating sophisticated watershed management plans, which prioritize pollutants by waterbody and attempt, through aggressive monitoring and source identification efforts, to identify and address the sources of those prioritized pollutants. Municipalities subject to strict RWL language will have no ability to prioritize pollutants, since they must address any pollutant that exceeds a Water Quality Standard, irrespective of the relative impact that that discharge may have had upon the environment or beneficial uses. Moreover, these watershed management plan approaches employ cooperative monitoring and other watershed-based approaches. Permittees faced with potential liability for any exceedance of Water Quality Standards in Receiving Waters that may be caused or contributed to by discharges of their MS4s, will not likely volunteer to cooperate on any watershed-based approach, if cooperation could subject them to additional unnecessary liability.

Third, in a citizen suit brought under the Clean Water Act, a federal judge is free to impose any appropriate injunctive relief to enforce a permit (33 U.S.C. § 1365(a)). Thus, for example, a court could ignore the provisions of a MS4 permit in ordering municipal defendants to address Water Quality Standard exceedances in Receiving Water. This means that the thousands of people-hours invested in the Permit's development, implementation and oversight by municipalities, the Regional Water Boards and other stakeholders would be wasted. In essence, under the Ninth Circuit's reading of the RWL language, all other language in an MS4 permit appears to be superfluous, since the RWL language would control all compliance efforts. This result, of course, is not required by plain language of the Clean Water Act.

Fourth, if a municipality is in unavoidable and automatic non-compliance with the requirements of its MS4 Permit, it will be unable to justify budgeting for water quality management programs and BMPs otherwise required by the Permit as the municipality will simply receive no benefit from making compliance investments. To gain public support for stormwater programs, a municipality must demonstrate to its residents that such investments will constitute compliance with the Permit.

Discussion of Alternatives

The State Board staff's Issue Paper sets forth five alternatives for consideration. Alternative 1, no change in the current RWL language, is completely unacceptable to the District (and, we believe, to other municipalities across the state) because it fails to address the "guaranteed non-compliance" problem of the current language.

Alternative 2, which proposes to maintain the language that puts the MS4 Permittees in a situation of unavoidable and potentially "guaranteed" non-compliance, but would add greater specification as to how the iterative process might be carried out, is also unacceptable as the MS4 Permittees will still have no viable means to ensure their compliance with the RWL language. While the District does not object in principle to RWL language that spells out clearly, and in achievable terms, what is required of MS4 Permittees when exceedances are recorded, such a change alone does not address the fundamental issues identified in this letter.

Alternative 3, which proposes to provide an iterative process for compliance with the RWL only for pollutants being addressed by dischargers in compliance with an approved TMDL, is better than the first two alternatives, but is still entirely insufficient. By failing to provide a viable means for compliance with the RWL language for non-TMDL pollutants, this alternative language would force Permittees into unavoidable non-compliance, and require them to redirect their efforts and resources away from the TMDL activities, to those other pollutants, due to the strict liability attached to those exceedances. This would be a poor policy choice, as pollutants that are not subject to a TMDL may have significantly less, or even no impact on beneficial uses in the Receiving Waters, as noted in the CASQA comment letter.

Alternative 4, which excludes dry weather discharges from the iterative process to comply with the RWL, is unacceptable for the reasons previously set forth regarding an MS4 Permittees inability to truly "prevent" or "control" accidental or illegal dry weather discharges.

Alternative 5, which provides viable means for compliance with the RWL, for all types of MS4 discharges, is the only viable solution among the alternatives presented by State Board staff. In an era of limited budgets, the only and best way to make progress toward improving the quality our Receiving Waters, is to provide MS4 Permittees the ability to prioritize their efforts, as required in the Watershed Management Plan provisions contained in the most recent MS4 Permits, including the Los Angeles County Permit and the proposed Regional Permit for the San Diego Regional Water Board. As previously discussed, such prioritization cannot occur in the context of strict liability for the exceedance of Water Quality Standards in the Receiving Waters. For all of the reasons set forth in this letter, no other alternative makes policy sense or is congruent with the Maximum Extent Practicable standard in the Clean Water Act.

The District would add that Alternative 5 should additionally incorporate the concept of achieving RWL compliance through watershed management plans, and requests the Board to direct staff to work with stakeholders to ensure that any revised RWL language does not force intermittent or minor exceedances of Water Quality Standards to become de-facto higher priorities than those set by the watershed stakeholders.

In summary, the District supports CASQA, the California State Association of Counties and other municipal stakeholders in advocating for a fully iterative and viable approach to compliance with RWL language in both wet and dry weather conditions. Only when such an approach is in place and endorsed by the State Board will Permittees, including the District, feel confident that they can focus

fully on efforts to address pollutants in discharges into and from their MS4s, and not on preparing for costly and pointless litigation.

The District therefore, respectfully requests the State Board direct its staff to commence development of new language providing for an enforceable, iterative and viable process for MS4 Permittees to comply with the RWL language included in MS4 permits.

We wish to thank you and State Board staff for your consideration of these comments and any further comments, written or oral, that the District may make on these important issues.

Very truly yours,

Steve Thomas

for WARREN D. WILLIAMS
General Manager-Chief Engineer

CP:cw
P8/150189

EXHIBIT A

NPDES Permit No. DC0000221

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

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

is authorized to discharge from all portions of the municipal separate storm sewer system owned and operated by the District of Columbia to receiving waters named:

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

in accordance with the Stormwater Management Program(s) dated February 19, 2009, subsequent updates, and related reports, strategies, effluent limitations, monitoring requirements and other conditions set forth in Parts I through IX herein.

The effective issuance date of this permit is: October 7, 2011.

This permit and the authorization to discharge shall expire at midnight, on: October 7, 2016.

Signed this 30th day of September, 2011.

Jon M. Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency
Region III

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1.1 Permit Area

This permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. This permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded herein from authorization under the District's stormwater program. Hereinafter these areas collectively are referred to as "MS4 Permit Area".

1.2 Authorized Discharges

This permit authorizes all stormwater point source discharges to waters of the United States from the District of Columbia's MS4 that comply with the requirements of this permit. This permit also authorizes the discharge of stormwater commingled with flows contributed by process wastewater, non-process wastewater, or stormwater associated with industrial activity provided such discharges are authorized under separate NPDES permits.

This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not further impaired and that the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and EPA regulations are met.

1.3 Limitations to Coverage

1.3.1 Non-stormwater Discharges

The permittee, as defined herein, shall effectively prohibit non-stormwater discharges into the MS4, except to the extent such discharges are regulated with an NPDES permit.

1.3.2 Waivers and Exemptions

This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any existing waivers and exemptions that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends to any activity that would otherwise be authorized under District law, regulations or

ordinance but which impedes the reduction or control of pollutants through the use of stormwater control measures and/or prevents compliance with the narrative /numeric effluent limits of this permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

1.4 Discharge Limitations

The permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the following requirements:

1.4.1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS);

1.4.2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); and

1.4.3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with the performance standards and provisions contained in Parts 2 through 8 of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

2. LEGAL AUTHORITY, RESOURCES AND STORMWATER PROGRAM ADMINSTRATION

2.1 Legal Authority

2.1.1 The permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards. To the extent deficiencies can be addressed through regulation or other Executive Branch action, the permittee shall remedy such deficiencies within 120 days. Deficiencies that can only be addressed through legislative action shall be remedied within 2 years of the effective date of this permit, except where otherwise stipulated, in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2.1.2 No later than 18 months following the effective date of this permit, the District shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall be consistent with this

EXHIBIT B

FACT SHEET

National Pollutant Discharge Elimination System (NPDES)
Municipal Separate Storm Sewer System (MS4)
Permit No. DC0000221 (Government of the District of Columbia)

NPDES PERMIT NUMBER: DC0000221 (Reissuance)

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

MS4 ADMINISTRATOR NAME AND MAILING ADDRESS:

Director, District Department of the Environment
1200 First Street, N.E., 6th Floor
Washington, D.C. 20002

FACILITY LOCATION:

District of Columbia's Municipal Separate Storm Sewer System (MS4)

RECEIVING WATERS:

Potomac River, Anacostia River, Rock Creek, and Stream Segments Tributary
To Each Such Water Body

INTRODUCTION:

Today's action finalizes reissuance of the District of Columbia Municipal Separate Storm Sewer System (MS4) Permit. In the Final Permit EPA has continued to integrate the adaptive management approach with enhanced control measures to address the complex issues associated with urban stormwater runoff within the corporate boundaries of the District of Columbia, where stormwater discharges via the Municipal Separate Storm Sewer System (MS4).

Since the United States Environmental Protection Agency, Region III (EPA) issued the District of Columbia (the District) its first MS4 Permit in 2000, the Agency has responded to a number of legal challenges involving both that Permit (as well as amendments thereto) and the second-round MS4 Permit issued in 2004. For the better part of ten years, the Agency has worked with various parties in the litigation, including the District and two non-governmental organizations, Defenders of Wildlife and Friends of the Earth, to address the concerns of the various parties. The Agency has engaged in both litigation and negotiation, including formal

mediation.[1] These activities ultimately led to an enhanced stormwater management strategy in the District, consisting of measurable outputs for addressing the issues raised during the litigation and mediation process.

FACILITY BACKGROUND AND DESCRIPTION:

The Government of the District of Columbia owns and operates its own MS4, which discharges stormwater from various outfall locations throughout the District into its waterways.[2]

On April 21, 2010 EPA public noticed the Draft Permit. The Draft Fact Sheet published with that Draft Permit contains more extensive permit background information, and the reader is referred to that document for the history of the District of Columbia MS4 permit.

The public comment period closed on June 4, 2010. EPA received comments from 21 individual commenters and an additional 53 form letters. The Draft Permit, Draft Fact Sheet, and comments received on those documents are all available at: http://www.epa.gov/reg3wapd/npdes/draft_permits.html. The Final Permit reflects many of the comments received. EPA is simultaneously releasing a responsiveness summary responding to these comments.

ACTION TO BE TAKEN:

EPA is today reissuing the District of Columbia NPDES MS4 Permit. The Final Permit replaces the 2004 Permit, which expired on August 18, 2009 and has been administratively extended since that time. The Final Permit incorporates concepts and approaches developed from studies and pilot projects that were planned and implemented by the District under the 2000 and 2004 MS4 permits and modifying Letters of Agreement, and implements Total Maximum Daily Loads (TMDLs) that have been finalized since the prior permit was issued, including the Chesapeake Bay TMDL. A number of applicable measurable performance standards have been incorporated into the Final Permit. These and other changes between the 2004 Permit and today's Final Permit are reflected in a Comparison Document that is part of today's Permit issuance.

WATER QUALITY IN DISTRICT RECEIVING WATERS:

The District's *2008 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act*[3] documents the serious water

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1 A procedural history of Permit appeals can be viewed at the EPA Environmental Appeals Board web: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/b5e5b68e89edabe98525714f00731c6f!OpenDocument&Highlight=2,municipal.

2 Portions of the District are served by a combined sanitary and storm sewer system. The discharges from the combined sewer system are not subject to the MS4 permit, but are covered under NPDES Permit No. xxxx issued to the District of Columbia Water and Sewer Authority.

3 District Department of the Environment, *The District of Columbia Water Quality Assessment, 2008 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act* (hereinafter "2008 Integrated Report").

quality impairments in the surface waters in and around the District. A number of the relevant designated uses are not being met, *e.g.*, aquatic life, fish consumption, and full body contact, and there are a number of specific pollutants of concern that have been identified (for additional discussion on relevant TMDLs *see* Section 4.10 of this Final Fact Sheet).

Commenters on the Draft Permit expressed some frustration over very slow progress or even lack of progress after a decade of implementation of the MS4 program and even longer for other water quality programs. EPA appreciates this concern. Although the District's receiving waters are affected by a range of discharge sources, discharges from the MS4 are a significant contributor of pollutants and cause of stream degradation. EPA also recognizes, however, that stormwater management efforts that achieve a reversal of the ongoing degradation of water quality caused by urban stormwater discharges entail a long term, multi-faceted approach.

Consistent with the federal stormwater regulations for characterizing discharges from the MS4 (40 C.F.R. §122.26(d)(2)(iii)), the first two permit terms for the District's MS4 program required end-of-pipe monitoring to determine the type and severity of pollutants discharging via the system. The monitoring program was not designed to evaluate receiving water quality *per se*, therefore detection of trends or patterns was not reasonably possible. Today's Final Permit includes requirements for a Revised Monitoring Program, and one of the objectives for the program is to use a suite of approaches and indicators to evaluate and track water quality over the long-term (*see* discussion of Section 5.1 in this Final Fact Sheet).
There have been identified improvements in some areas. For example the *2008 Integrated Report* noted improvements in the diversity of submerged aquatic vegetation in the Potomac River, as well as improvements in fish species richness in Rock Creek. Biota metrics are often the best indicators of the integrity of any aquatic system.

EPA also notes that there are a variety of indirect measures indicative of improvement. The federal stormwater regulations foresaw the difficulty, especially in the near-term, of detecting measurable improvement in receiving waters, and relied instead on indirect measures, such as estimates of pollutant load reductions (40 C.F.R. §122.26(d)(2)(v)). The District documents these types of indirect measures in its annual reports, *e.g.*, tons of solids collected from catch basin clean-outs, amount of household hazardous waste collected, number of trees planted, square footage of green roofs installed, and many other measures of success.[4]

EPA believes that documenting trends in water quality, whether improvements, no change, or even further degradation, is an important element of a municipal water quality program. Today's Final Permit recognizes this principle, both in the types of robust measures required as well as the transition to new monitoring paradigms. EPA encourages all interested parties to provide the District with input during the development of these program elements.

THIS FACT SHEET:

(http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/DC_IR_2008_Revised_9-9-2008.pdf

4 District MS4 Annual Reports can be found at: http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495855.asp

This Final Fact Sheet is organized to correspond with the chronological organization and numbering in today's Final Permit. Where descriptions or discussions may be relevant to more than one element of the Final Permit the reader will be referred to the relevant section(s).

To keep today's Final Fact Sheet of readable length, many of the elements included in the fact sheet published with the Draft Permit (Draft Fact Sheet) on April 21, 2010 have not been repeated, but are referenced. Readers are referred to the Draft Fact Sheet published with the Draft Permit for additional discussion on provisions that have been finalized as proposed.[5] The Final Fact Sheet does discuss significant changes since the 2004 Permit (even if discussed in the Draft Fact Sheet). The Final Fact Sheet also contains additional explanation of the Final Permit where commenters requested additional clarification. In addition, this Final Fact Sheet explains modifications to the Final Permit where provisions were changed in response to comments.

In many cases EPA made a number of very simple modifications to the Final Permit, *e.g.*, a word, phrase, or minor reorganization, simply for purposes of clarification. These modifications were not intended to change the substance of the permit provisions, only to clarify them. Most of those types of edits are not discussed in this Final Fact Sheet, but EPA has provided a Comparison Document of the Draft and Final Permits for readers who would like that level of detail.

Many commenters noted that the Draft Permit was not logically organized. EPA agrees. The major reorganization principles include:

1) There is a new Section 3, Stormwater Management Program (SWMP) Plan consolidating the various plans, strategies and other documents developed in fulfillment of permit requirements.
2) All implementation measures, *i.e.*, those stipulating management measures and implementation policies, are included in Section 4 of today's Final Permit. This includes "Source Identification" elements (Section 3 in the Draft Permit) and "Other Applicable Provisions" elements (Section 8 in the Draft Permit), which included TMDL requirements.
3) All monitoring requirements are consolidated in Section 5 of the Final Permit.
4) All reporting requirements are consolidated in Section 6 of the Final Permit.

EPA also refers readers to the Responsiveness Summary released today along with the Final Permit and Final Fact Sheet, for responses to comments and questions received on the Draft Permit. That document contains additional detailed explanations of the rationale for changes made to the Draft Permit in the Final Permit.

Finally, EPA made significant effort to avoid appending or incorporating by reference other documents containing permit requirements into the Final Permit. In the interest of clarity

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5 The Permit and Fact Sheet proposed on April 21, 2010 can be viewed at: http://www.epa.gov/reg3wapd/npdes/draft_permits.html

and transparency EPA, to the extent possible, has included all requirements directly in the permit. Thus, EPA reviewed a variety of documents with relevant implementation measures, *e.g.*, TMDL Implementation Plans and the 2008 Modified Letter of Agreement to the 2004 permit[6], and translated elements of those plans and strategies into specific permit requirements that are now contained in the Final Permit. This Fact Sheet provides an explanation of the sources of provisions that are significant and are a direct result of one of those strategies.

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

(1.2 Authorized Discharges): The Final Permit authorizes certain non-stormwater discharges, including discharges from water line flushing. One commenter noted that many of these discharges, especially from potable water systems, contain concentrations of chlorine that may exceed water quality standards. EPA agrees, and has therefore clarified that dechlorinated water line flushing is authorized to be discharged under the Final Permit.

(1.4 Discharge Limitations): Comments on the language in Part 1.4 varied widely. Some commenters did not believe it was reasonable to require discharges to meet water quality standards. Other commenters believed this to be an unambiguous requirement of the Clean Water Act.

Today's Final Permit is premised upon EPA's longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance. *See generally,* "National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges," 55 F.R. 47990 (Nov. 16, 1990).

EPA is aware that many permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles. Rather the attainment of applicable water quality standards as an incremental process is authorized under section 402(p)(3)(B)(iii) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), which requires an MS4 permit "to reduce the discharge of pollutants to the maximum extent practicable" (MEP) "and such other provisions" deemed appropriate to control pollutants in municipal stormwater discharges. To be clear, the goal of EPA's stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal stormwater dischargers would need several permit cycles to achieve that goal.

Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District's MS4 discharges, requires staged implementation and increasingly more stringent requirements over several permitting cycles. During each cycle, EPA will continue to review deliverables from the District to ensure that its activities constitute sufficient progress toward standards attainment. With each permit reissuance EPA will continue to increase

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6 District Department of the Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

stringency until such time as standards are met in all receiving waters. Therefore today's Final Permit is clear that attainment of applicable water quality standards and consistency with the assumptions and requirements of any applicable WLA are requirements of the Permit, but, given the iterative nature of this requirement under CWA Section 402(p)(3)(B)(iii), the Final Permit is also clear that "compliance with all performance standards and provisions contained in the Final Permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term" (Section 1.4).

EPA believes that permitting authorities have the obligation to write permits with clear and enforceable provisions and thus the determination of what is the "maximum extent practicable" under a permit is one that must be made by the permitting authority and translated into provisions that are understandable and measurable. In this Final Permit EPA has carefully evaluated the maturity of the District stormwater program and the water quality status of the receiving waters, including TMDL wasteload allocations. In determining whether certain measures, actions and performance standards are practicable, EPA has also looked at other programs and measures around the country for feasibility of implementation. Therefore today's Final Permit does not qualify any provision with MEP thus leaving this determination to the discretion of the District. Instead each provision has already been determined to be the maximum extent practicable for this permit term for this discharger.

EPA modified the language in the Final Permit to provide clarity on the expectations consistent with the preceding explanation. Specifically Section 1.4.2 of the Final Permit requires that discharges 'attain' applicable wasteload allocations rather than just 'be consistent' with them, since the latter term is somewhat ambiguous.

In addition, the general discharge limitation 'no increase in pollutant loadings from discharges from the MS4 may occur to receiving waters' was removed because of the difficulty in measuring, demonstrating and enforcing this provision. Instead, consistent with EPA's belief that the Final Permit must include all of the enforceable requirements that would achieve this principle, the following discharge limitation is substituted: "comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit."

In addition, EPA made the following modifications: "Compliance with <u>the</u> performance standards and provisions contained in <u>Parts 2 through 8 of</u> this permit shall constitute adequate progress towards compliance with DCWQS <u>and WLAs for this permit term</u>" (*<u>underlined text added</u>*) (Section 1.4 of the Final Permit). EPA eliminated circularity with the addition of "Parts 2 through 8", clarifying that this requirement does not circle back to include the statements in 1.4.1 and 1.4.2, but rather interprets them. Also, although WLAs are a mechanism for attainment of water quality standards, EPA added the specific language "and WLAs" to make this concept explicit rather than just implicit. In addition this revised language emphasizes that the specific measures contained in the Final Permit, while appropriate for this permit term, will not necessarily constitute full compliance in subsequent permit terms. It is the expectation that with each permit reissuance, additional or enhanced requirements will be included with the objective

of ensuring that MS4 discharges do not cause or contribute to an exceedance of applicable water quality standards, including attainment of relevant WLAs.

2. LEGAL AUTHORITY, RESOURCES, AND STORMWATER PROGRAM ADMINISTRATION

(2.1 Legal Authority): Several commenters pointed out that there were a number of requirements in the Draft Permit without clear compliance schedules or deadlines, or with deadlines that did not correspond well to others in the permit. In the Final Permit, EPA has made several revisions to address these comments. For example, EPA changed a requirement that deficiencies in legal authority must be remedied "as soon as possible" to a 120-day requirement for deficiencies that can be addressed through regulation, and two years for deficiencies that require legislative action (Section 2.1.1). Also, EPA increased the compliance schedule for updating the District's stormwater regulation from twelve months to eighteen months, *id.*, so that this action could be adequately coordinated with the development of the District's new offsite mitigation/payment-in-lieu program (for more discussion see Section 4.1.3 below).

(2.2 Fiscal Resources): One commenter suggested eliminating the reference to the District's Enterprise Fund since funding was likely to come from a number of different budgets within the District. EPA agrees with this comment and has removed this reference.

On the other hand, many commenters noted that the implementation costs of the District's stormwater program will be significant. EPA agrees. The federal stormwater regulations identify the importance of adequate financial resources [40 C.F.R. §122.26(d)(1)(vi) and (d)(2)(vi)]. In addition, after seeing notable differences in the caliber of stormwater programs across the country, EPA recognizes that dedicated funding is critical for implementation of effective MS4 programs.[7,8,9] In 2009 the District established, and in 2010 revised, an impervious-based surface area fee for service to provide core funding to the stormwater program[10] (understanding that stormwater-related financing may still come from other sources as they fulfill multiple purposes, *e.g.*, street and public right-of-way retrofits). In conjunction with the 2010 rule-making to revise the fee the District issued a Frequently Asked Questions document[11] that indicates the intent to restrict this fee to its original purpose, *i.e.*, dedicated funding to implement the stormwater program and comply with MS4 permit requirements. EPA believes this action is essential, and he expects that the District will maintain a dedicated source of funding for the stormwater program.

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7 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

8 National Association of Flood and Stormwater Agencies, Funded by EPA, *Guidance for Municipal Stormwater Funding* (2006) http://www.nafsma.org/Guidance%20Manual%20Version%202X.pdf

9 EPA, *Funding Stormwater Programs* (2008) http://www.epa.gov/npdes/pubs/region3_factsheet_funding.pdf

10 District of Columbia, Rule 21-566 Stormwater Fees, http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleID=474056

11 District of Columbia, FAQ Document *Changes to the District's Stormwater Fee* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/Stormwater_Fee_FAQ_10-5-10_-final.pdf