

SETTLEMENT AGREEMENT

In re Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221 (EAB NPDES Appeal No. 11-06)

WHEREAS, on September 30, 2011, the U.S. Environmental Protection Agency (“EPA”) issued the Phase I National Pollutant Discharge Elimination System (“NPDES”) permit for the District of Columbia Municipal Separate Storm Sewer System, Permit No. DC0000221 (the “DC MS4 Permit”), which was effective October 7, 2011;

WHEREAS, on November 4, 2011, Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (collectively, “Petitioners”) filed a petition with the EPA Environmental Appeals Board (“EAB”) for review of conditions of the DC MS4 Permit;

WHEREAS, the Petitioners allege that the DC MS4 Permit fails to ensure compliance with EPA-approved water quality standards applicable to the receiving waters in the District of Columbia, and wasteload allocations for the MS4 in EPA-approved total maximum daily loads, in violation of 33 U.S.C. § 1311(b)(1)(C), *id.* § 1342(a), 40 C.F.R. § 122.4(d), and *id.* § 122.44(d)(1)(i);

WHEREAS, Petitioners and EPA have agreed to settle this action without any admission of fact or law, which the parties consider to be a just, fair and equitable resolution of the claims raised in this action;

NOW, THEREFORE, the parties agree as follows:

I. GENERAL TERMS

A. The parties to the Settlement Agreement are Petitioners and EPA. Nothing in this Agreement shall be construed to bind or make any other person or entity not executing this Agreement a third-party beneficiary to this Agreement.

B. This Agreement applies to, is binding upon, and inures to the benefit of the Petitioners and EPA.

C. This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers and agencies, or any person affiliated with it.

II. DEFINITIONS

For purposes of this Settlement Agreement, terms used in the Agreement that are already defined in the Clean Water Act or EPA's implementing regulations (e.g., "wasteload allocation") have the meaning expressed in those definitions. The following terms used in the Agreement are defined as follows:

- a. "Petition" means the petition filed by Petitioners in *In re: Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221*, NPDES Appeal No. 11-06.
- b. "Petitioners" means Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc.
- c. "Region" means United States Environmental Protection Agency, Region 3.

III. SPECIFIC TERMS OF AGREEMENT

A. Within fifty-five (55) days of the Effective Date of this Settlement Agreement, EPA shall publish notice of a draft modification to the DC MS4 Permit and accompanying Fact Sheet, in accordance with the procedures required by federal regulations, and shall begin all necessary consultations under section 7 of the Endangered Species Act ("ESA"). The draft modification to the DC MS4 Permit and accompanying Fact Sheet will include the language contained in Attachment A to this Settlement Agreement.

B. Within 180 days of the Effective Date of this Agreement, EPA shall take final action on that modification, provided that EPA has completed all necessary consultations under section 7 of the ESA prior to that date, and that EPA determined as a result of those consultations that final action on the modification would be consistent with the ESA. In so doing, EPA will take into account any steps that it determines appropriate in light of the results of its ESA consultations. If, after 120 days of the Effective Date of this Agreement, EPA anticipates that those consultations will not be completed within 180 days of the Effective Date, EPA shall notify Petitioners of the need to negotiate in good faith pursuant to the procedure in IV.E below an extension of the 180-day deadline until such time as those consultations are completed.

IV. RELEASES, DISMISSALS, AND REMEDIES

A. This Settlement Agreement shall constitute a complete and final settlement of all claims that were asserted, or could have been asserted, by Petitioners against the Region in the Petition.

B. Petitioners hereby release, discharge, and covenant not to assert (by way of the commencement of an action, the joinder of the Administrator and/or EPA in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity that they may have had, or may now or hereafter have, against the United States based upon matters that were asserted, or could have been asserted, by Petitioners in the Petition, provided, however, that nothing in this Paragraph IV.B shall affect Petitioners' remedies under Paragraphs IV.D through IV.E below.

C. Within seven (7) days of the Effective Date of this Settlement Agreement, Petitioners shall file with the EAB a motion to stay action on their Petition in NPDES Appeal No. 11-06, pending EPA's completion of action pursuant to paragraphs III.A and III.B above.

Petitioners shall be barred from moving to lift the stay of action on their Petition except pursuant to the terms and on the conditions specified in Paragraphs IV.D and IV.E below.

D. Petitioners' Remedies:

(1) Should EPA's final action be identical to the modifications in Attachment A to this Settlement Agreement, Petitioners shall file with the EAB a motion to dismiss their Petition with prejudice within ten (10) days of EPA's final action.

(2) Should EPA's final action not be identical to the modifications in Attachment A to this Settlement Agreement, Petitioners shall, within ten (10) days of EPA's final action, either file a motion to dismiss their Petition with prejudice or file a motion requesting that the Board lift its stay.

(3) Should EPA take no final action with respect to the draft permit modification, or propose no modification at all, Petitioners shall, within ten (10) days of the expiration of the time period in Paragraph III.B above, either file a motion to dismiss their Petition with prejudice or file a motion requesting that the Board lift its stay.

E. Except as provided in Paragraph IV.D above, in the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the disputing Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice. If the Parties are unable to resolve the dispute within 30 days of such meeting, Petitioners' sole remedy is to move the EAB to lift the stay on their Petition.

V. SAVINGS PROVISIONS

A. Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA by the Clean Water Act or by general principles of administrative law, nor shall it in any way be deemed to limit EPA's discretion in taking any final agency action or adopting any rule, policy, or guidance.

B. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise any regulations, guidance, policy, or interpretation EPA may issue in accordance with, or on matters related to, this Settlement Agreement from time to time or to promulgate or issue superseding regulations, guidance, policies, or interpretations, nor shall it be construed to limit any right that Petitioners may have to seek judicial or administrative review in a subsequent case of any such action by EPA.

C. Nothing in this Settlement Agreement shall be construed to limit any defenses EPA may have or to confer on the EAB jurisdiction where such jurisdiction otherwise would be lacking. Similarly, nothing in this Settlement Agreement shall be construed to limit the Petitioners' rights to assert any and all claims that they are entitled to raise, or to confer on the Petitioners the right to raise claims they otherwise would not be able to raise.

D. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the Clean Water Act, or any other law or regulation, either procedural or substantive.

E. In the event of a government shut-down such as occurred in 1995 and 1996, any deadlines herein shall be automatically extended one day for each day of the shut-down, and no notice will be required by EPA to Petitioners or *vice versa* in order to effect such extension. In the event of a *force majeure* or similar occurrence affecting any Party, that Party shall provide the other Parties with notice as soon as is reasonably possible under the circumstances; within seven (7) days of such notice, any Party may invoke the dispute resolution procedure provided in Paragraph IV.E.

VI. NOTICES

A. Any notice required to be given under this Settlement Agreement shall be in writing and shall be deemed effective (1) upon receipt if sent by U.S. Post or (2) upon the date sent if sent by overnight delivery, facsimile, or email. In addition, to be effective, any such notice must be sent to the following:

For the Petitioners:

Jennifer C. Chavez
Earthjustice
1625 Massachusetts Av. NW, Suite 702
Washington, DC 20036
(p) 202.745.5208
(f) 202.667.2356
jchavez@earthjustice.org

-and-

Jon P. Devine, Jr.
Rebecca J. Hammer
Natural Resources Defense Council
1152 15th Street, N.W., Ste. 300
Washington, D.C. 20005
(p) (202) 289-6868
jdevine@nrdc.org / rhammer@nrdc.org

For EPA:

Associate Director, Office of NPDES Permits & Enforcement
Water Permits Division
U.S. Environmental Protection Agency, Region III
1650 Arch Street (3RC20)
Philadelphia, PA 19103

-and-

Kelly A. Gable
U.S. Environmental Protection Agency, Region III
1650 Arch Street (3RC20)
Philadelphia, PA 19103
(p) (215) 814-2200
gable.kelly@epa.gov

B. Any Party may designate a successor contact person for any matter relating to this Settlement Agreement by providing written notice to each of the other contact persons.

VII. MISCELLANEOUS PROVISIONS

A. Each undersigned representative of the Parties to this Settlement Agreement certifies that he or she is fully authorized by the Party to enter into and execute the terms and conditions of this Settlement Agreement and to legally bind such Party to this Settlement Agreement. By signature below, all Parties consent to this Settlement Agreement.

B. This Settlement Agreement is the entire agreement between the Petitioners and EPA in this case. All prior conversations, meetings, discussions, drafts, and writings of any kind are specifically superseded by this Settlement Agreement.

C. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by the Petitioners and EPA. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

D. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

E. The Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any party.

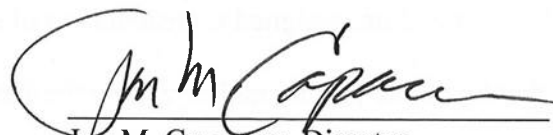
VIII. EFFECTIVE DATE AND MODIFICATION

A. The Effective Date of this Agreement is May 18, 2012.

B. This Agreement may be modified or amended only by written agreement by counsel for the Parties.

FOR EPA

Dated: 5-18-2012




Jon M. Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Counsel:
Kelly A. Gable
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III
1650 Arch Street (3RC20)
Philadelphia, PA 19103

FOR PETITIONERS

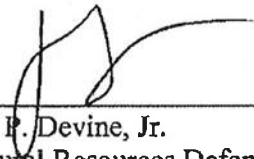
On behalf of petitioners Friends of the Earth, Anacostia Riverkeeper, Inc., and Potomac Riverkeeper, Inc.:

Dated: 5/18/12


Jennifer C. Chavez
Earthjustice
1625 Massachusetts Avenue, N.W., Ste. 702
Washington, D.C. 20036
(202) 745-5208
*Attorney for Friends of the Earth, Anacostia
Riverkeeper, Inc., and Potomac Riverkeeper,
Inc.*

On behalf of petitioner the Natural Resources Defense Council, Inc.:

Dated: 5/18/12


Jon P. Devine, Jr.
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1152 15th Street, N.W., Ste. 300
Washington, D.C. 20005
(202) 289-6868
*Attorney for the Natural Resources Defense
Council, Inc.*

ATTACHMENT A TO SETTLEMENT AGREEMENT

In re Government of the District of Columbia, Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221 (EAB NPDES Appeal No. 11-06)

EPA Region 3 has agreed to propose the following changes to the final permit language to settle the challenge to the DC MS4 permit filed by the environmental petitioners (Anacostia Riverkeeper, Potomac Riverkeeper, NRDC, and Friends of the Earth). The following conventions are used to show changes to the existing permit language: deleted language is indicated in ~~striketrough~~ font and added language is indicated in underline font.

Part 1.4

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, including milestones and final dates for attainment of applicable WLAs, shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

Part 4.3.1:

4.3.1. Sanitary Sewage System Maintenance Overflow and Spill Prevention Response

The permittee shall ~~coordinate with DC Water to~~ implement an effective response protocol for overflows of the sanitary sewer system into the MS4. The response protocol shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:

1. Investigating any complaints received within 24 hours of the incident report.
2. Responding within two hours to overflows for containment.
3. Notifying appropriate sewer, public health agencies and the public within 24 hours when the sanitary sewer overflows to the MS4.

This provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4.

Section 4.9.4.1:

4.9.4.1 The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation and update of the permittee's SWMP. In particular, the permittee shall provide meaningful opportunity for the public to participate in the development of the permittee's Consolidated TMDL Implementation Plan. The permittee shall continue to implement its process for consideration of public comments on their SWMP.

Section 4.10.3:

4.10.3 Consolidated TMDL Implementation Plan

For all TMDL wasteload allocations assigned to District MS4 discharges, the District permittee shall develop, public notice and submit to EPA for review and approval a consolidated TMDL Implementation Plan within 2-years30 months of the effective date of this permit provision. This Plan shall include, at a minimum, the following TMDLs and any subsequent updates:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. ~~TMDL for Total Suspended Solids (TSS) in the Upper and Lower Anacostia River (2002)~~
- 3.2. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
- 4.3. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
- 5.4. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
- 6.5. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)
- 7.6. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
- 8.7. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
- 9.8. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
- 10.9. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
- 11.10. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
- 12.11. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
- 13.12. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
- 14.13. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
- 15.14. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)

16.15. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

This Plan shall place particular emphasis on the pollutants in Table 4, but shall also evaluate other pollutants of concern for which relevant WLAs exist. EPA will incorporate elements of the Consolidated TMDL Implementation Plan as enforceable permit provisions, including milestones and final dates for attainment of applicable WLAs. The ~~District~~ permittee shall fully implement the Plan upon EPA approval. This Plan shall preempt any existing TMDL implementation plans for the relevant WLAs. To account for any new or revised TMDL established or approved by EPA during the permit term with wasteload allocations assigned to District MS4 discharges, the ~~District~~ permittee shall submit an updated this Consolidated TMDL Implementation Plan annually, as necessary. Such updates will account for any actions taken in the 12-month period preceding the date 6 months before the revision is due. If necessary, the first such update will be due 18 months after submittal of the initial Plan, with subsequent updates due on the anniversary of the submittal date, within six months and include a description of revisions in the next regularly scheduled annual report.

The Plan shall include:

1. A specified schedule for ~~compliance with each TMDL~~ attainment of WLAs that includes final attainment dates and, where applicable, interim milestones and numeric benchmarks.
 - a. Numeric benchmarks will ~~that~~ specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
 - b. Interim ~~numeric~~ milestones for TMDLs will be included where final attainment of applicable ~~waste load allocations~~ WLAs requires more than one permit cycle ~~five years~~. Milestone intervals will be as frequent as possible but will in no case be greater than five (5) years. These milestones shall originate with the third year of this permit term and every five years thereafter.
2. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
- 2.3. An associated narrative providing an explanation for the schedules and controls included in the Plan.
3. ~~The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.~~
4. ~~Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs. Unless and until an applicable TMDL is no longer in effect (e.g., withdrawn, reissued or the water delisted), the Plan must include the elements in 1-3 above for each TMDL as approved or established.~~
- 4.5. The current version of the Plan will be posted on the permittee's website.

Section 4.10.4:

4.10.4 Adjustments to TMDL Implementation Strategies

If evaluation data, as outlined in the monitoring strategy being developed per Part 5.1, indicate insufficient progress towards attaining any WLA covered in 4.10.1, 4.10.2 or 4.10.3, the permittee shall make the appropriate adjustments within six (6) months to address the insufficient progress and document those adjustments ~~adjust its management programs within 6 months to address the deficiencies, and document the modifications~~ in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the incorporated milestones necessary reductions. Annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant, outlined in Part 4.10.

Section 5.1.1:

5.1.1 Design of the Revised Monitoring Program

Within two years 30 months of the effective date of Part 4.10.3 of this permit the District shall develop, public notice and submit to EPA for review and approval a revised monitoring program. The District shall fully implement the program upon EPA approval.

Definitions:

"Benchmark" as used in this permit is a quantifiable goal or target to be used to assess progress toward "milestones" (see separate definition) and WLAs, such as a numeric goal for BMP implementation. If a benchmark is not met, the permittee should take appropriate corrective action to improve progress toward meeting milestones or other objectives. Benchmarks are intended as an adaptive management aid and generally are not considered to be enforceable.

"Milestone" as used in this permit is an interim step toward attainment of a WLA that upon incorporation into the permit will become an enforceable limit or requirement to be achieved by a stated date. A milestone should be expressed in numeric terms, i.e. as a volume reduction, pollutant load, specified implementation action or set of actions or other objective metric, when possible and appropriate.

"Permittee" refers to the Government of the District of Columbia and all subordinate District and independent agencies, such as the District of Columbia Water and Sewer Authority, directly accountable and responsible to the City Council and Mayor as authorized under the Stormwater Permit Compliance Amendment Act of 2000 and any subsequent amendments for administrating, coordinating, implementing, and managing stormwater for MS4 activities within the boundaries of the District of Columbia.

References to the Permittee:

In all places in the document where the term 'District' has been used in the context of a mandate to the permittee to carry out a provision, that term has been replaced with the term 'permittee'. The term 'District' or 'District of Columbia' continues to be used when the reference is to the specific geographical area.

Simple Errata:

1. On page 9, Table 1, the part number for the Retrofit Program will be corrected to 4.1.5.
2. On page 53, within the definition for "TMDL Implementation Plan, the reference to section 8.1.4 will be replaced with the correct reference to section 4.10.3.

Fact Sheet:

1. To clarify that EPA intends to ensure the implementation of measures to achieve TMDL WLAs should the permittee fail to develop a Consolidated TMDL Implementation Plan, EPA will add the following explanatory language in the fact sheet:

In the event the permittee does not submit a Consolidated TMDL Implementation Plan, submits a plan that fails to address one or more applicable TMDLs, or submits a plan that EPA disapproves, EPA will initiate action to set the relevant milestones and final dates for attainment by which the permittee will meet applicable WLAs, pursuant to section 4.10.3 of the permit, within 6 months of the failure and finalize those requirements within 2 years of the failure. EPA will incorporate those elements as enforceable permit provisions.

2. To help reinforce enforceability, EPA will add the following language in the fact sheet:

The permittee must comply with all conditions of this permit. EPA intends each provision of the permit to be enforceable. Compliance with any provision of this permit does not relieve the permittee from compliance with any other provision of the permit.

