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July 16, 2015

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Via First-Class Mail and Email

Re: FR Doc. 2015-12588 - Proposed First Amendment to Consent Decree, *United States of America v. District of Columbia Water and Sewer Authority, et al., and the District of Columbia*, Civil Action No. 1:00-cv-00183 (TFH)

The National Association of Clean Water Agencies (NACWA) is pleased to provide its strong support for entry of the First Amendment to Consent Decree in *United States of America v. District of Columbia Water and Sewer Authority, et al., and the District of Columbia*, as proposed (hereinafter, proposed modification). NACWA is a national advocacy organization representing nearly 300 publicly owned clean water utilities throughout the United States, including DC Water. Our members are true environmental stewards working on the front lines every day to provide their communities and ratepayers with clean water, sustainable neighborhoods, and sound economic investments.

NACWA commends all parties to the agreement for their tireless efforts to find a more innovative, cost-effective, and beneficial path forward for both the environment and the community. The federal and local cooperation reflected in the proposed modification demonstrates the U.S. Environmental Protection Agency's (EPA) commitment to its 2014-2018 Strategic Plan goal to "continue to improve the way we do business, engaging closely with our public sector partners at all levels and the regulated community to achieve environmental benefits in the most pragmatic, collaborative, and flexible way possible—for our children and future generations."¹

NACWA has been a strong supporter of green infrastructure (GI), as demonstrated through significant advocacy efforts to increase its regulatory acceptance by EPA. However, NACWA believes each utility must make its own determination about the best way to address wet weather issues, including the extent to which there is an appropriate role for GI. NACWA is proud to count DC Water as one of its leading

¹ [78 FR 69412](#) (11/19/13)

utility members, and applauds DC Water for pursuing an environmentally and financially responsible approach for managing its wet weather and nutrient challenges.

Innovative Approach to Balance Environmental and Economic Responsibilities

NACWA believes the proposed modification appropriately balances DC Water's obligation to prevent the District's combined sewer system from causing or contributing to water quality impairments with its equally important obligation to make sound economic investments with its ratepayers' dollars. The legal and regulatory landscape surrounding the acceptance of GI as a valid approach to address wet weather issues, particularly within the CSO context, has evolved significantly in recent years. NACWA members have played a central role in securing greater recognition of GI by EPA and the Department of Justice (DOJ) as a viable mechanism for wet weather control. We are pleased to see utilities like DC Water actively embracing the use of GI to meet their Clean Water Act (CWA) obligations in new and innovative ways, especially in the context of wet weather consent decrees. We also believe that modifying DC Water's existing Long-Term Control Plan (LTCP) and consent decree is the best way to take advantage of the dual environmental and economic benefits presented by the proposed modification.

NACWA strongly supports the careful analysis DC Water has completed as part of the modification plan to pursue a hybrid green/gray approach in the Potomac River and Rock Creek watersheds. This analysis ensures the proposed modification provides the right combination of green and gray solutions in a LTCP that will best serve the environment, the city, and the public. DC Water is maintaining a significant commitment to gray infrastructure in the proposal by relying on tunnel technology to intercept and store large volumes of water during wet weather events. The modification plan simultaneously makes a substantial and prolonged commitment to GI alongside the gray, which accelerates the environmental benefits of the LTCP as compared to the original "all gray" approach. As an added advantage, the GI component will provide a host of additional environmental, social, and community benefits. In short, the hybrid green/gray solution envisioned by the modification plan will provide for greater overall environmental benefits than the original LTCP, while achieving a comparable level of CSO control. It is a "win-win" in all respects.

DC Water's Proposed Adaptive Management Approach to GI Implementation is Supported by EPA Guidance and Consistent With Other Decrees

The proposed modification to incorporate GI into DC Water's LTCP and consent decree is supported by EPA's recently issued GI guidance.² Specifically, acknowledging the importance of monitoring and evaluating GI projects and practices as work proceeds, the guidance recommends and endorses the type of adaptive management approach to GI implementation proposed by DC Water. This, in turn, means that GI implementation schedules must provide sufficient time to monitor and evaluate completed GI projects before

² Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow (CSO) Control, March 2014 (EPA Publication # 832-R-14-001). In addition, *Managing Wet Weather with Green Infrastructure Action Strategy*, a 2008 publication by NACWA, EPA and others, promotes the benefits of using green infrastructure in mitigating overflows from combined and separate sewers and reducing runoff, and EPA's April 2011 memorandum entitled, *Protecting Water Quality with Green Infrastructure in EPA Water Permitting and Enforcement Programs* affirms EPA's commitment to work with communities to incorporate green infrastructure. Additionally, EPA's Integrated Planning Framework encourages green infrastructure to achieve CWA goals.

proceeding with subsequent projects so that other combined sewer overflow (CSO) communities have the benefit of lessons learned as they proceed with GI implementation.

EPA's guidance describes adaptive management in the GI context as the process by which new information and lessons learned are incorporated into ongoing GI project implementation. NACWA has long supported adaptive management principles as the best way to address wet weather issues in the most cost-effective manner.

In line with the adaptive management concept, the proposed modification's schedule for aggressive installation of GI will provide both environmental and economic benefits. The plan will not only accelerate meaningful reductions of CSO events well before they would have been reduced under the original LTCP, but will result in rate relief for District residents. Most importantly, the proposed modification's adaptive management approach allows for DC Water to adjust its plans for GI if its use ultimately proves to be more difficult than anticipated. This opportunity to course correct, if necessary, significantly strengthens the proposed modification's environmental protections by allowing for the implementation of GI while also ensuring that DC Water can achieve the level of water quality improvement that it has committed to in the consent decree. Given the complexities involved in pursuing GI on the scale proposed in the modification, it is both prudent and appropriate to include provisions allowing alterations on the planned use of GI if necessary. And, as noted above, this flexible and adaptive approach is completely in line with EPA's current guidance and positions on GI.

This adaptive management approach is also entirely consistent with how communities across the country are employing GI techniques. Other major U.S. cities like Cincinnati, Seattle, Cleveland, and Philadelphia are also using adaptive management in addressing their wet weather concerns, many within the context of consent decrees or enforcement orders. The proposed modification will help align Washington, DC and DC Water with many of its peer communities and utilities that are embracing this innovative approach.

Proposed Extension Is Appropriate

The five-year extension to the consent decree included in the proposed modification is reasonable and appropriate given the various considerations involved. In addition to accommodating an adaptive management approach to GI project implementation, DC Water's proposed schedule in the modification provides an optimum combination of accelerated environmental and water quality benefits, aggressive installation of GI while maintaining a robust gray infrastructure construction program, and responsible consideration of the significant rate impacts on DC Water's customers. Many of NACWA's other utility members around the country are struggling with how to complete major wet weather infrastructure improvement projects on a timeline that maximizes environmental benefit while also addressing the substantial financial impact of these projects on their communities. The schedule and adaptive management approach in the proposed modification will serve as a useful model for other utilities.

While stakeholders agree that GI is a powerful tool for managing existing and future problems, challenges exist that can affect the timing of implementation. For example, availability of appropriate land and open space, surveying and appraising potential parcels, and negotiating and closing of property/easement acquisition transactions to meet long-term protection goals can all result in longer implementation times than anticipated. Retrofits on buildings and developed land pose further challenges. In addition, local rules may be lacking,

conflicting, or restrictive (e.g., planning and zoning regulations); water and land-use policies and property rights can create difficulties; and federal rules can be conflicting, overly-prescriptive, inflexible, or silent on key aspects. Population growth, development pressure and a changing climate can also be added to the list. In a highly urbanized area such as Washington, DC, these challenges are compounded.

Considering the breadth of the GI obligations and challenges, the five-year extension is not only reasonable but is in fact very aggressive and on the low side of the spectrum when compared to other recent decree modifications that resulted in additional time, especially those modified to incorporate GI. Moreover, the proposed schedule's economic and environmental advantages more than offset any potential concern over its modest five-year extension of the final completion deadline.

NACWA Supports DC Water's and the District Government's Strong Commitment to GI and Local Jobs

NACWA commends DC Water and the District Government on making a strong commitment to the use of GI, which represents one of the largest financial commitments by any municipal clean water utility in the country. At the same time, DC Water and the District have made an important commitment to employing local residents to help make GI investments a reality. While GI can provide multiple environmental benefits besides improving water quality, such as making communities more livable and resilient, it also provides an excellent opportunity to employ local residents. GI practices are often living, natural systems that, while beautifying the urban landscape, require ongoing maintenance. This means DC Water's commitment to GI will also help create stable, local, green jobs for District residents. DC Water and the District of Columbia are to be commended for their agreement to pursue GI both for its environmental and local employment benefits. Approval of the proposed modification will position DC Water and the District of Columbia as a national GI leader to address wet weather issues.

NACWA urges entry of the First Amendment to Consent Decree as proposed. The agreement reached between the sophisticated parties is fair, adequate, reasonable, and consist with furtherance of the public interest. Furthermore, there is well-established precedent supporting a presumption in favor of approving a settlement such as the proposed modification that is the product of negotiation between EPA and a municipal entity.

NACWA appreciates the opportunity to provide these comments in support of the proposed modification. If you have any questions about these comments, please do not hesitate to contact Nathan Gardner-Andrews at 202/833-3692 or ngardner-andrews@nacwa.org, or Amanda Waters at 202/530-2758 or awaters@nacwa.org.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The signature is stylized with a large "K" and a cursive "Kirk".

Ken Kirk
Executive Director