EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

July 24, 2015

Via email: pubcomment-ees.enrd@usdoj.gov

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Re: ***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), D.J. Ref. No. 90-5-1-1-07137**

Earthjustice submits these comments regarding the Proposed Modification[1] in the above-referenced case, on behalf of the American Canoe Association, Anacostia Watershed Society, D.C. Environmental Network, Friends of the Earth, Kingman Park Civic Association, Potomac Riverkeeper Network, and Sierra Club. These groups and their many individual members work to protect the Potomac River, Rock Creek, and their tributaries from pollution and degradation so that residents and visitors of Washington, D.C. can use and enjoy these iconic natural resources without fear of illness or injury.

We have long worked to improve degraded water quality and reduce the public health risks associated with combined sewer overflows (CSOs) discharged from the combined sewer system owned and operated by the District of Columbia Water and Sewer Authority (DC Water). Our groups filed the original litigation in 1999 that helped spur a federal lawsuit in 2002, and eventually led to entry of two pending consent decrees and the Long Term Control Plan (LTCP) that is designed to significantly reduce the discharge of CSOs to waters in the District of Columbia. As part of that work, our groups have long advocated for including a robust green component in the LTCP, including extensive green infrastructure, increased tree canopy, aggressive water conservation and reuse, and other cost-effective inflow controls that would reduce the burden on the entire system. We also urged DC Water to develop a progressively-priced rate structure that would include incentives for conservation and mitigation, and place a proportionate share of the costs of cleanup on those sectors that contribute the most to the problem.

[1] Notice of Lodging of First Amendment to Consent Decree, Anacostia Watershed Soc'y v. Dist. of Columbia Water and Sewer Auth., 00-cv-00183-TFH (D.D.C. May 19, 2015) ("Proposed Modification").

More recently, we filed comments on DC Water's 2014 draft proposed LTCP modification.[2, 3] We appreciate that EPA and DC Water have incorporated some significant changes into the current proposal, including a 1.2" runoff retention design standard and acreage-based green infrastructure installation requirements, and a re-engineered design for the Potomac River tunnel, from a closed storage tunnel and associated pumping station to a gravity-fed conveyance tunnel that connects with the Blue Plains Tunnel that leads to the waste water treatment plant.

However, the Proposed Modified LTCP[4] and Proposed Modification include significant shortcomings, including some that must be addressed in order to ensure that the Proposed Modification will provide equivalent performance as compared with the existing LTCP and decree, as required to satisfy Clean Water Act requirements. The Proposed Modification also incorporates a 5-year delay in the compliance date for placing the Potomac tunnel into operation. We oppose this delay because DC Water has not demonstrated that compliance with the current schedule is impracticable, or that DC Water has seriously explored alternatives to achieve affordability and equitability without incurring additional public health risks and water quality degradation.

I. Legal Requirements

For discharges that are covered by a National Pollution Discharge Elimination System (NPDES) permit, the Clean Water Act's anti-backsliding provision prohibits renewal, reissuance, or modification of permit conditions needed to meet water quality standards if the revised permit conditions contain "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."[5] CSOs in the District of Columbia are governed by the NPDES permit that covers both the CSO system and the waste water treatment facility at Blue Plains.[6] That permit requires DC Water to implement and maintain the CSO

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[2] See attached comments on "Draft Proposed Long Term Control Plan Modification for Green Infrastructure (Jan. 2014)" (April 14, 2014).

[3] We hereby incorporate by reference the attached comments concerning the DC Water's January 2014 draft LTCP modification. To the extent those comments are not superseded by the comments in this letter, our position remains the same.

[4] DC Water, *Long Term Control Plan Modification for Green Infrastructure* (May 2015), *available at* https://www.dcwater.com/education/gi-images/green-infrastructure-ltcp-modificaitons.pdf ("Proposed Modified LTCP").

[5] 33 U.S.C. § 1342(o)(1); *cf. id.* § 1342(o)(2) (discussing narrow exceptions that are not applicable here).

[6] *See* EPA, Permit No. DC0021199 (Sept. 30, 2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_npdes/Wastewater/DC/DC0021199BluePlainsFinalpermit.pdf ("DC NPDES Permit").

controls identified in the existing LTCP. Therefore, any modification of the 2005 Consent Decree[7] and LTCP must ensure that the modified LTCP will achieve equivalent or better CSO-reduction performance, as compared to the existing LTCP, in order to avoid backsliding. In addition, EPA's 1994 CSO Control Policy required that an LTCP, like DC Water's, that uses the "demonstration approach" must be adequate to meet water quality standards and be "designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS or designated uses."[8] Under the Clean Water Act, the consent decree must conform to the 1994 CSO Control Policy. 33 U.S.C. §1342(q)(1). In short, any modified consent decree and LTCP must not only predict but ensure equivalent performance in reducing CSOs as compared to the existing LTCP, and must be adequate to meet water quality standards.

Equivalent performance must be demonstrated both by pre-construction modeling, and by putting into place legal assurances that the green infrastructure program will, in fact, achieve the predicted equivalent performance in terms of CSO reduction. Such legal assurances must include backstop measures that are triggered if post-installation monitoring or modeling indicates that the green infrastructure installations achieve lower CSO-reduction performance than predicted.

Finally, the Proposed Modification is governed by Federal Rule of Civil Procedure 60. That rule and related court decisions require the parties proposing a modification of a consent decree to establish that the modification is warranted by changes in circumstances or law or a risk of detriment to the public interest, and to show that the proposed modification is suitably tailored to address the changed circumstance or the risk to the public interest.[9]

II. Changes Needed to Comply with the Clean Water Act

For the green infrastructure component of the Proposed Modification, the draft decree specifies the number of acres that must be controlled by green infrastructure within the Potomac River and Rock Creek sewersheds, and specifies that green infrastructure projects must be designed to achieve a 1.2" runoff retention standard. We agree that including specific acreage requirements along with an explicit green infrastructure design standard is absolutely crucial for ensuring that the proposed modified control measures will provide equivalent CSO reductions as compared to the existing LTCP. We have also reviewed DC Water's documentation from its green infrastructure modeling effort, which is also crucial for assessing the predicted CSO-reduction performance of the proposed modification.

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[7] 2005 Consent Decree, Anacostia Watershed Soc'y v. Dist. of Columbia Water and Sewer Auth., 00-cv-00183-TFH (D.D.C. Mar. 25, 2005) ("2005 Consent Decree").

[8] Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688, 18,693 (Apr. 19, 1994) ("1994 CSO Control Policy").

[9] *See, e.g.*, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378-79 (1992).

But these measures are not enough to *ensure* that the Proposed Modified LTCP *will* achieve equivalent CSO reductions after implementation of the proposed modification, and will assure compliance with water quality standards. The Proposed Modification cannot be entered by the court until it incorporates changes to address the following problems.

A. The Proposed Modification must require contingency measures, additional interim assessments, and public reporting to ensure that green infrastructure installations are in fact providing equivalent performance compared with the current LTCP.

The Proposed Modification includes an important assessment – including a "determination of practicability" – to be performed after the first round of green infrastructure projects and provided to EPA for approval as part of Project Report No. 1 for the Potomac and Rock Creek sewersheds, respectively, under Appendix F, secs. II.C.5. and II.D.7.[10] This formal assessment provides a safeguard and "off-ramp" in the event that DC Water determines the remainder of the plan is not feasible.

We agree that Project Report No. 1 and the determination of practicability are indispensable, because this process is necessary for EPA to verify that the green infrastructure projects are on track to providing equivalent performance and to do so while time is still available for DC Water to change course and revert to a plan that involves construction of a larger-scale Potomac River tunnel. However, the Proposed Modification is inadequate because it does not provide for an assessment or demonstration of equivalent performance *after* that point – much less does it provide a mechanism for requiring DC Water to do more should it be unable to demonstrate equivalent performance.

To address this, the Proposed Modification needs to include additional formal assessment points, similar to the Project Report 1, after each subsequent round of green infrastructure projects. These additional assessments are needed to ensure that DC Water studies and develops a plan to address challenges that are virtually certain to arise after Project 1, in the midst of Projects 2, 3, 4, or 5. This is especially important because the larger acreage requirements come in the later projects.

As part of the additional assessments for subsequent rounds, the Proposed Modification must also incorporate contingency measures that are triggered in the event it is determined, through post-construction modeling or monitoring or other means, that the green infrastructure installations needed to meet the modified LTCP have not provided equivalent CSO-reduction performance. Such contingency measures must be adequate to compensate for any shortfall in CSO-reductions. This is critical. Without contingency requirements, the Proposed Modification risks prohibited backsliding.

[10] Proposed Modification, App. F, secs. II.C.5, II.D.7.

B. EPA's approval of the "green infrastructure program plan" and "determination of practicability" under Appendix F constitute changes to the LTCP that must be subject to public participation.

The Proposed Modification leaves members of the public out of key decision points that will determine the choice of long-term CSO controls and long-term operation and maintenance activities that will directly affect water quality for many years to come. This lack of public participation is inconsistent with EPA guidance that requires these details to be provided prior to approval of a modification,[11] and EPA's 1994 CSO Control Policy which requires "a public participation process that actively involves the affected public in the decision-making to select the long-term CSO controls."[12] In order to bring the Proposed Modification into line with these requirements, Proposed Modification must be revised to require additional opportunities for formal public participation at key decision points, including: EPA's approval or disapproval of DC Water's Green Infrastructure Program Plan that is required in Appendix F, Part I; EPA's approval or disapproval of DC Water's determination of practicability that is required in Appendix F, sec. II.C.5. and II.D.7; and additional check-in points that we advocate for below.

In addition, to facilitate public participation in the review and approval of these significant assessments, Appendix F should require that the following reports or plans must be made available to the public at the same time they are provided to EPA, on DC Water's website or a dedicated website.

1. The green infrastructure Program Plan – Appendix F, sec. I.
2. Each pre-construction Project Description – Appendix F, sec. II.A.
3. Each Post Construction Report – Appendix F, sec. II.B.
4. Potomac Report No. 1 and Rock Creek Report No. 1 (containing DC Water's determination of practicability) – Appendix F, secs. II.C.5. and II.D.7.
5. Reports connected with the additional assessment points that we advocate for.
6. The report regarding legal and policy impediments to implementation of green infrastructure – Appendix F, sec. III.A.7.
7. The quarterly reports required in Appendix F, sec. V.

C. The Proposed Modification must add clear standards for approval or disapproval decisions.

Public participation in the choice of long-term controls is also undermined by a lack of clear, objective standards for EPA's approval or disapproval decisions. In particular, the 2005 Consent Decree does not ensure that EPA or the public will have the information needed to

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[11] EPA, Consent Decree Language Addressing Green for Grey Substitutions at 3-4, *available at* http://water.epa.gov/infrastructure/greeninfrastructure/upload/EPA-Green-Infrastructure-Supplement-2-061512-PJ.pdf.

[12] 1994 CSO Control Policy, 59 Fed. Reg. at 18,692.

ensure equivalent performance. To address this, the Green Infrastructure Program Plan under Appendix F, part I needs to require DC Water to state its rationale for including specific types of green infrastructure controls in its program for particular sewersheds, including an explanation of why those particular types of controls are appropriate in light of available information regarding the land use in relevant sewersheds, the proportion of public- to private-property ownership, hydrological and soil conditions, and any other factors central to determining the appropriateness of the chosen controls. Under the current proposal, DC Water is not required to provide that crucial explanation until six months prior to the award of contract for each project as part of the individual Project Description required in Appendix F, sec. II.A.

In addition, DC Water's "determination of practicability" contained in Project Report No. 1, Appendix F, sec. II.C.5, requires more specificity. Currently, the Proposed Modification only provides a list of undefined and unconnected factors that DC Water is asked to take into consideration, namely "constructability, operability, efficacy, public acceptability and cost per impervious acre treated of the controls."[13] This list of considerations is simply too general, and renders this critically-important provision in the LTCP susceptible to subjectivity. Instead, the Proposed Modification should ask specific questions, such as: Have specific sites been identified for future rounds of green infrastructure installations? Have prior assumptions regarding the operability or constructability of the chosen controls borne out or were they under- or over-estimated? Were the actual costs in line with projections? Does post-construction monitoring indicate that the installations align with DC Water's estimated volume retention and CSO reductions? The Proposed Modification should also explain how EPA will assess and weigh these considerations to reach an approval or disapproval determination.

Similarly, while section I of Appendix F requires DC Water to submit a long-term maintenance plan as part of its Green Infrastructure Program Plan, it does not require enough specificity, either to assure ongoing achievement of the specified levels of pollution control or to meet water quality standards. The vagueness of this requirement also leaves EPA without a rational basis for approving or disapproving the plan, and leaves the Court without an objective basis for reviewing EPA's action.[14] This section needs to require a description of *how* specific types of controls will be maintained and specific *schedules* or time intervals for proper maintenance.

Finally, consistent with fundamental principles of administrative process and transparency, Appendix F needs to require a written explanation of EPA's approval or disapproval decisions, including a response to relevant public comments.

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[13] Proposed Modification, App. F, sec. II.C.5.

[14] *See id.*, App. F, sec. I.B.

III. Other Important Issues to Address in the Final Proposed Modification

A. DC Water has not justified the proposed 5-year delay.

Although not a pure delay, the Proposed Modification would still involve a 5-year extension of the deadline for putting the Potomac tunnel and the final round of green infrastructure installations into operation. This means that reduction of some of the heaviest CSO flows – from outfalls 020-024 – would be delayed.[15] Nowhere has EPA explained why it believes a five-year extension of the compliance schedule is justified. The CSO Control Policy requires that CSO consent decrees include "compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA." CSO Policy IV.B.2.g. See also *id*. part I.E. There is no basis for finding that the original tunnel schedule is no longer practicable.

DC Water cites affordability as a justification for the 5-year extension, but its response to our comments indicates that it did not undertake even a cursory exploration of alternative approaches for funding the LTCP that distribute costs among customers more equitably.[16] The response states that "[i]ntroduction of the impervious area charge is intended for this purpose. It apportions a higher percentage of the cost to customer with more impervious area because run off from impervious area contributes by far the most storm water to the combined sewer system which causes CSOs to occur." This response ignores the numerous other affordability strategies that have been identified in connection with DC Water's proposal.

We are also concerned that the 5-year delay is inconsistent with and may undermine the District's watershed implementation plan for meeting its obligations under the Chesapeake Bay Total Maximum Daily Loads (Dec. 2010). At a minimum, DC Water should be required to undertake supplemental projects in the Anacostia River watershed to offset the delay. We hereby incorporate by reference the comments submitted by NRDC, *et al.* (July 24, 2015) which

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[15] In fact, the delay could be indefinitely extended even beyond 5 years, because under sec. II.C.7. of Appendix F of the Proposed Modification allows for an indefinite day-for-day extension of the deadline to "[p]lan, design, and construct the Potomac River Storage/Conveyance Tunnel with a total storage volume of not less than 40 million gallons," should DC Water determine after Project No. 1 that the remaining green infrastructure plan is not practicable and should EPA delay in its approval of that decision. As discussed further below, we object to this provision because it allows for indefinite delay.

[16] *See, e.g.* Proposed Modified LTCP at K-15. DC Water also states that the proposed extended schedule is not intended as a stand-alone affordability strategy, and cites as the other reason for the extension the need to complete an environmental impact statement for the tunnel. As we discussed in our April 2014 comments on the January 2014 draft, it is unlikely that DC Water was previously unaware of or unable to properly plan for that obligation while meeting the current LTCP and consent decree schedule.

address the Bay TMDL schedule, affordability, and the need for supplemental projects, in more detail.

B. The public notification plan in the Proposed Modification fails to properly notify the public of the location and occurrence of CSO discharges in a timely manner, and fails to take into account the additional health risks posed by the proposed five year delay in completing the Potomac River tunnel and Green Infrastructure elements of the LTCP.

Providing timely, accurate public notification of CSO discharges is critically important to minimizing the risk posed to public health by this chronic source of water pollution, and is one of the core tenets of EPA's 1994 CSO Control Policy.[17] The public's use of the Potomac River in D.C. for human powered boating, fishing, and swimming is clearly increasing in popularity, as evidenced by the large number of boat rental businesses; canoe, rowing, and kayak clubs; and boathouses situated on the riverfront.[18] As clean water advocates, our groups are focused on promoting public access to the Potomac and Anacostia Rivers in order to build a strong constituency that has a sense of ownership and a vested interest in clean, safe waterways. In order to accomplish this goal, we are making every effort to ensure that the public is fully informed as to water quality in these rivers at all times, so they can make informed decisions as to when and where to recreate. Given the fact that CSO discharges in DC make up the lion's share of bacterial pollution in this stretch of the Potomac, it is essential that DC Water's public notification plan is up to the task of keeping water users apprised of local conditions.

Unfortunately, the Proposed Modification does not meet this standard. In fact, it proposes further delays in implementing the minimal public notification plan first outlined in the 2005 Consent Decree,[19] due to the five year delay for completion of the Potomac Tunnel being contemplated by EPA and DC Water. We strongly urge EPA to require significant improvements in the public notification requirements in the proposed modification, as noted in the comments that follow.

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[17] 1994 CSO Control Policy, 59 Fed. Reg. at 18,694.

[18] The Potomac River in D.C. has always been a destination for recreational and competitive kayakers and canoeists, supported by a number of boathouses and rowing clubs, some of which have been in existence for nearly a century. The recent upsurge in waterfront development, including the Nationals Park and the Wharf in Southwest DC, have increased public interest in recreating on the Potomac. *See* http://www.boatingindc.com/ for information on boat rentals and boathouses in D.C. The Anacostia Watershed Society also sponsors paddling trips on the Anacostia, information at http://www.anacostiaws.org/get-involved/recreation/paddling/paddle-night, last accessed July 24, 2015.

[19] 2005 Consent Decree.

As background, DC Water is required to notify the public of the location and occurrence of CSO discharges, pursuant to the currently in-place 2005 Consent Decree, the 2003 Consent Decree, and the current DC NPDES Permit.[20] In the 2005 Consent Decree currently in force, DC Water must install a "visual notification system" utilizing colored lights to alert the public when CSOs may be discharging at three locations on each receiving water (Potomac and Anacostia Rivers, Rock Creek).[21] However, the deadline for installing and operating these warning light systems is unclear; the 2005 Consent Decree and the Proposed Modification state that they must be installed "as part of the construction of the tunnel storage projects for the Anacostia River, the Potomac River and for Rock Creek," and that the details of the systems will be finalized during Facility Planning for each receiving water.[22] The 2005 Consent Decree also states that the requirements in the decree are "in addition to the obligations imposed regarding public notification in the [2003] Consent Decree."[23] The 2003 Consent Decree contains requirements for posting notification data on a public website and installing adequate signage at CSO outfalls, in addition to the warning light system.[24]

The Proposed Modification contains essentially the same language, except for minor changes regarding the different colored lights to be used. However, we note that the Proposed Modification has also omitted the language in section VI, ¶ 32, cross referencing the additional requirements found in the 2003 Consent Decree.[25] Since the 2003 Consent Decree is still in force, this language needs to be included in the Proposed Modification.

According to DC Water's website, only two visual notification systems have been installed and are in operation, one on the Potomac and one on the Anacostia River.[26] There is no mention of a visual warning system on Rock Creek.[27] The September 2008 Facility Report for the Anacostia River states that it was not "practicable" at that time to finalize details of the public notification system, due to uncertainties surrounding waterfront development and access point, but commited to finalizing the plans by November 2011.[28] The Facility Plan for the Potomac

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[20] *See* 2005 Consent Decree at 22; 2003 Consent Decree at 19-24, Anacostia Watershed Soc'y v. Dist. of Columbia Water and Sewer Auth., 00-cv-00183-TFH (D.D.C. Oct. 10, 2003) ("2003 Consent Decree"); DC NPDES Permit at 39-40.

[21] 2005 Consent Decree at 22.

[22] *Id.*; Proposed Modification at 21.

[23] 2005 Consent Decree at 23.

[24] 2003 Consent Decree at 21-22.

[25] Proposed Consent Decree Modification at 22.

[26] *See* DC Water, Combined Sewer System, https://www.dcwater.com/wastewater_collection/css/#lights (last visited July 21, 2015).

[27] *Id.*

[28] *See* Proposed Modification, App. D at 29.

Storage Tunnel and the Potomac Tunnel Dewatering Pumping Station is not required to be submitted to EPA until December 31, 2018, and construction on the Potomac Tunnel is not required to commence until 2023 at the earliest. Proposed Modification at 18-19. Since the public notification systems are only required to be installed as "part of the construction" of the tunnel storage projects, it is unlikely under this proposed plan that they would be completed until nearly the end of the LTCP twenty year implementation process.

Based on the information available, DC Water's implementation of the visual notification system has fallen years behind schedule, and may be completely stalled. To add insult to injury, DC Water is now proposing to delay completion of the Potomac Tunnel five years, until 2030, thereby potentially delaying completion of the public notification system until construction of the tunnel at least commences. As stated previously, there is no clear deadline or schedule in the Proposed Modification for completing this system, and therefore no way to measure compliance with either the 2005 Consent Decree or the Proposed Modification. DC Water has failed to provide any justification for delaying the completion of public notification systems until the late stages of LTCP implementation, nearly ten years from now. Implementation of a robust public notification system should be a priority for DC Water and EPA, given the fact that the most significant reductions in sewage overflow volume will not occur until the late stages of LTCP implementation, leaving the public poorly informed over the next ten years, while high volumes of CSO discharges continue.

DC Water has also failed to provide justification for its proposal to only install visual notification systems in three locations on each receiving water. While three locations may be sufficient for Rock Creek or possibly the Anacostia River, given their size and access points, we are concerned that this may not be sufficient for the Potomac River waterfront, which has changed significantly since the 2005 Consent Decree was entered. Human powered boating has significantly increased, particularly in the spring and summer months, when rainfall patterns tend to result in regular CSO discharge events.[29] DC Water and EPA should reassess how many visual notification systems may be needed given this change in use, and the likelihood that discharges from existing CSO outfalls upstream of recreational access areas may be affecting recreational users outside the vicinity of the single visual notification location.

In light of the current status of DC Water's visual notification system, we urge EPA to require clear, enforceable deadlines for completing the visual warning light systems on all three receiving waters as quickly as possible, in order to provide the public with much needed information on CSO events. At a minimum, DC Water should be required to complete installation on all three receiving waters within the next 1-2 years, well before construction begins on the Potomac tunnel and green infrastructure projects. DC Water should also take a

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[29] [29] *See* CSO Facilities Quarterly Reports on DC Waters webpage, https://www.dcwater.com/wastewater_collection/css/css_reports.cfm?active_tab=csodivisionquarterlyoperationreports (last visited July 23, 2015). For example, compare reports of wet weather CSO discharges in Table 2-12, 1Q 2015 Report with 3Q 2014.

fresh look at how many warning light systems may be needed, and increase the number if necessary to ensure proper notification at regular intervals along the Potomac riverfront. If DC Water continues to propose three installations, it should describe where the light systems will be located, and why this number is sufficient to meet EPA's notification requirements.

We also have concerns regarding the adequacy of DC Water's CSO signs, the utility of CSO discharge information currently available on DC Water's website,[30] and the lack of e-mail or text message notification of CSO discharges being offered to the public.

While we support DC Water's efforts to install signage at all CSO outfalls, we urge EPA and DC Water to commit to update the content and design of the signs in order to ensure that the CSO warning is being communicated to the broadest possible audience. For example, the current signs simply state that "Pollution may occur during rainfall."[31] We recommend revising this language to say "Discharges of untreated sewage may occur during rainfall." This additional level of detail will alert users to the fact that a public health risk is present when the outfall is flowing. CSO signage would also be greatly improved by including graphical images depicting the warning against swimming or boating during a discharge. New York City's CSO signs are a good example of this.[32] DC Water should also assess the need to post signs in multiple languages, including Spanish, in order to reflect the diverse use of these waterways for recreational fishing, boating, and other uses. Signs should be two sided, so that people on the water and on the shoreline can see them easily.

DC Water's CSO webpage has a good amount of basic background data on CSO systems and discharges, and includes useful links to quarterly combined sewer system reporting required by the 2005 Consent Decree and 2003 Consent Decree. However, the maps showing CSO outfall locations lack necessary detail and do not give the street address or other specific informative for public notification purposes and should be updated. The maps showing sewersheds and outfall locations are not high resolution, and do not give the street address or other specific location information of the outfalls.[33] The user is left with only a general impression of where the outfalls are located. This is in sharp contrast to Philadelphia's public notification webpage, which has an interactive map showing the city's 164 CSO outfall

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[30] *See* https://www.dcwater.com/wastewater_collection/css/ (last visited July 23, 2015).

[31] *Id.*

[32] *See DEP Replaces Sewer Outfall Signs in New York City* (Feb. 25, 2011), http://www.nyc.gov/html/dep/html/press_releases/11-15pr.shtml#.Va7Yx_lVhBc.

[33] *See* https://www.dcwater.com/wastewater_collection/css/ (last visited July 23, 2015).

locations, with popups for each location that contain the street address and information on the last reported discharge from that outfall.[34]

Philadelphia's investment in flow monitoring on many of its outfalls enables it to provide the public with close to real time information on which CSO outfalls are discharging sewage, and the level of detail in the map allows users to obtain detailed information on outfall locations, and frequency of discharges. According to the DC NPDES Permit, DC Water monitors flow on 13 CSO outfalls, including 021, the largest volume outfall on the Potomac.[35] At a minimum, DC Water should develop an interactive online map with updated information on flows from these outfalls, and specific location information on all of its permitted outfalls. New information could be added to the map as additional outfalls are monitored, or other outfalls are consolidated or closed.

Other cities with similarly sized or larger combined sewer systems have implemented, or are in the process of implementing, multi-faceted public notification systems that provide the public with accurate, timely information on CSO discharges via e-mail, text message, or phone hotline options. Examples include Chicago and Cincinnati, where residents have the option of receiving e-mail alerts or calling a CSO hotline.[36]

In sum, DC Water's public notification system is inadequate to meet the regulatory requirement of providing the public with timely notification of untreated sewage discharges that may pose a risk to their health and safety. As such, the system requires significant revision and a commitment to using new technology to reach the broad audience of people who recreate in and on the Potomac and Anacostia Rivers, and Rock Creek. Basic improvements are needed, including a reassessment of the number of visual notification/warning light systems; updated signage; updated outfall maps; and the availability of text, e-mail, or phone hotline alerts to notify the public when discharges of untreated sewage are going into local waterways. Clear, enforceable timelines must be added to the Proposed Modification to ensure that public notification is a priority and implemented in the short term, not deferred until the very end of the LTCP implementation process. Robust public notification is needed now and in the near future, when CSO pollution is greatest, not ten years from now when CSO controls are underway.

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[34] *See* Philadelphia Water Department, CSOcast, http://www.phillywatersheds.org/what_were_doing/documents_and_data/live_data/csocast (last updated July 23, 2015).

[35] DC NPDES Permit at 41-44.

[36] *See* Chicago Metropolitan Water Reclamation District, Combined Sewer Overflow, https://www.mwrd.org/irj/portal/anonymous/overview (last visited July 23, 2015); Metropolitan Sewer District of greater Cincinnati, CSO Public Notification Program, http://www.msdgc.org/consent_decree/cso_public_notification_program/eurl.axd/9488dbd8dca65542a91c0fddbcb06795/ (last updated May 14, 2015).

C. The Proposed Modification lacks sufficient study or strategies for addressing planning-related uncertainties and impediments.

The Proposed Modification still lacks a sufficiently detailed strategy for addressing the planning-related uncertainties and impediments that DC Water may face in working to install green infrastructure in a dense urban environment. We note that much of this analysis is left to be done until well after the Proposed Modification would be approved.

We are particularly concerned that DC Water does not appear to have conducted a detailed assessment of whether adequate publicly-owned land in the relevant sewersheds is available for DC Water to meet its requirements to control specified acreage in each sewershed with green infrastructure, or whether sufficient privately-owned land is available to make up for any shortfall in public land. Nor does the proposed modification address how EPA will enforce the green infrastructure requirements in the decree if DC Water does not identify sufficient available property – either public or private – on which to meet its requirements for acreage to be controlled by green infrastructure.

The full attention of all the consent decree parties must be turned to these critical planning needs immediately. As we noted in our comments on DC Water's January 2014 draft proposed LTCP modification, the lack of advance planning is the greatest source of uncertainty associated with the proposed modification, and needs to be addressed before the parties ask the court to enter a final modified consent decree.

D. The Proposed Modification lacks adequate assurance of preservation and maintenance of privately-installed green infrastructure.

The Proposed Modification would allow DC Water to take credit for certain privately-installed and maintained green infrastructure installations. We note that under the current LTCP, DC Water is not allowed to credit private, or even public, green infrastructure projects against its obligation to install a tunnel of sufficient size to accomplish the specified CSO reductions. For this approach to be appropriate, at a minimum the Consent Decree must provide adequate assurances regarding long-term maintenance of private practices.

As it stands, the standard for maintenance of private green infrastructure installations is so vague that we have little confidence such installations will be held to the same high standard for post-construction maintenance that DC Water-administered projects would be held to. EPA should consider incorporating the requirements set forth in the District's 2013 Rule on Stormwater Management and Soil Erosion and Sediment Control, Chapter 5 of Title 21 of the District of Columbia Municipal Regulations. In addition, as part of the additional assessments that we advocate for above, the Proposed Modification should require DC Water to certify that the private practices it has taken credit for up to the date of that assessment remain in place and are complying with their operation and maintenance requirements.

E. The proposed modification fails to explicitly require DC Water to maintain green infrastructure constructed on public property

As noted previously, we fully support the use of green infrastructure as a key part of a "gray/green" approach to reducing CSO pollution and improving water quality in the Potomac and Anacostia Rivers and Rock Creek, assuming of course that green infrastructure functions as designed, and can be implemented on a large enough scale to achieve at least equivalent CSO reductions as the current LTCP. Properly maintaining green infrastructure installations is critical to ensuring that they meet the retention goals relied upon to meet all water quality and technology based criteria in the LTCP and NPDES permit for D.C.'s CSS system. As EPA notes in a recent review of green infrastructure projects funded through the Clean Water State Revolving Fund, "[w]hile maintenance plans and strategies vary by project and project type, the findings in this report demonstrate that proper maintenance is essential to maximizing the environmental, social, and economic benefits of green infrastructure, as well as ensuring that projects perform as they were designed to."[37]

DC Water has publicly committed to maintaining green infrastructure in the informational materials and plans supporting the proposed modification. Proposed Modified LTCP at ES-13, 3-17. Unfortunately, these commitments are not formally memorialized in the Proposed Modification (i.e. the proposed modified consent decree itself), and thus would not be an enforceable condition of the decree. The Proposed Modification outlines DC Water's commitments to installing green infrastructure in the Potomac and Rock Creek sewersheds, but leaves the details to the referenced Appendix F. Even though Appendix F, the Green Infrastructure Program for the Potomac and Rock Creek Sewersheds, would become an enforceable part of the consent decree, it only contains a requirement to develop a Green Infrastructure Program Plan that must contain "[A] plan to (1) preserve and maintain the GI control measures installed pursuant to the GI Program Plan [.]" Proposed Modification, Appendix F at 1.

While we do not dispute DC Water's intentions regarding the need for maintenance of green infrastructure, it is clear that the only specific requirement regarding maintenance in the Proposed Modification and its Appendices is to develop and submit a plan that contains another plan for preservation and maintenance. Assuming DC Water submits its plans on time to EPA, unanticipated contingencies could result in maintenance of green infrastructure not being assured, because of the lack of a formal provision requiring it. For example, budgetary constraints and interagency disputes among District agencies regarding the responsibility for funding maintenance could result in delays or even complete failure to maintain green

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[37] *The Importance of Operation and Maintenance for the Long-Term Success of Green Infrastructure: A Review of Green Infrastructure O&M Practices in ARRA Clean Water State Revolving Fund Projects,* U.S. Environmental Protection Agency, available at http://water.epa.gov/grants_funding/cwsrf/upload/Green-Infrastructure-OM-Report.pdf, last accessed July 24, 2015.

infrastructure installations, which themselves must function as designed in order to meet the terms of the Proposed Modification and Proposed Modified LTCP. In order to minimize this risk and uncertainty, the Proposed Modification should be revised to include a clear requirement that DC Water is responsible for assuring the maintenance of all green infrastructure installed on public property in the District pursuant to the consent decree and LTCP. If DC Water and EPA prefer to memorialize this requirement in an upcoming renewal and modification of the Blue Plains NPDES Permit, then the proposed CD Modification should explicitly state that upon modification of the consent decree, the Blue Plains NPDES permit will be renewed by a date certain or within a certain amount of time following the completion of the Proposed Modification, and the renewed NPDES permit will contain a specific condition requiring the permittee to ensure maintenance of green infrastructure, as stated above.

F. DC Water must be required to eliminate all foreseeable CSOs in average or wet years.

To comply with the 1994 CSO Control Policy, the performance requirement for any modified LTCP can be nothing less than full compliance with the District's water quality standards – including the prohibition on discharging untreated sewage.[38] Moreover, the CSO Policy requires the decree to "eliminate or relocate overflows that discharge to sensitive areas whenever physically possible and economically achievable…" 59 Fed. Reg. at 18692. The area of the Potomac River impacted by the CSOs at issue here is unquestionably a sensitive area, as it is used for primary contact recreation.

As the proposal stands, EPA and DC Water have failed to comply with the above requirements, and missed an opportunity to re-think the entire approach to the LTCP, to adopt an aggressive program (including green infrastructure, conservation and re-use, other inflow controls across the contributing sewersheds, and grey infrastructure where needed) that would eliminate all predicted CSOs in our nation's capital during average and wet design years, and to finally provide a plan and schedule for meeting *all* of the District's water quality standards.

The Proposed Modified LTCP justifies a new look at the "acceptable" percent reduction to be accomplished by the LTCP, particularly in light of the decision to re-engineer the tunnel design. In the existing LTCP, DC Water's cost projections led it and EPA to agree to a control option that allows millions of gallons of annual projected CSOs to be discharged after full LTCP implementation. Similar to the existing LTCP, the Proposed Modified LTCP (if it performs as DC Water currently predicts) would allow 59 million gallons of combined sewage to be discharged into the Potomac River in an average design year (20 million gallons less than the existing LTCP, due to increased performance associated with the tunnel re-design), and will allow some hundreds of thousands of gallons to be discharged into Piney Branch in an average design-year. Given the addition of a substantial green infrastructure component and the re-

[38] *See* D.C. Mun. Regs. tit. 21 § 1104.3 ("Class A waters shall be free of discharges of untreated sewage….").

engineering of the tunnel, the constraints on performance that were based on the prior cost projections are not the same as they were in 2002. Nonetheless, the Proposed Modification only aims to accomplish reductions that are equivalent to the existing LTCP, rather than eliminating the remaining predicted overflows in wet or even average design years. Other than the conclusory assertion that the performance goal is not being changed in the Proposed Modification, EPA and DC Water provide no explanation or technical basis for carrying forward this arbitrary cap on the performance of the LTCP.

DC Water's response to public comments on this issue states that "[t]he purpose of the LTCP modification was not to re-evaluate the appropriate degree of CSO control. This was established when the LTCP was finalized."[39] But the modification should take into account not only DC Water's goals for the modification, but a re-evaluation of whether the modified Consent Decree meets the requirements and goals of the Clean Water Act and EPA's 1994 CSO Control Policy. When that evaluation was performed in 2002, the determination of "appropriate" level of control for the existing LTCP was not based on what would be needed to meet all of D.C.'s water quality standards, and indeed DC Water implicitly acknowledges that the LTCP does not result in compliance with D.C.'s narrative standard prohibiting discharge of untreated sewage.[40] Rather, the existing LTCP was constrained by the cost considerations in place at that time, including cost considerations that were based on a different tunnel design. The Proposed Modification incorporates an entirely different type of tunnel, and therefore the Proposed Modification justifies a second look at this issue. A re-evaluation of the appropriate level of control is also justified because the proposed modification would introduce an additional five-year delay in the tunnel deadline, and a new layer of uncertainty in the proposed green infrastructure portion of the plan as discussed above. Refusal to at least assess the feasibility and cost of complete elimination of CSOs under average and wet years is arbitrary and capricious.

DC Water has attempted to justify its refusal to explore a plan that eliminates foreseeable CSOs in at least the average year, but noting that only full sewer separation would guarantee against CSOs in all instances. However, our request is not to eliminate every possible CSO under all conditions, but to eliminate those that are foreseeable in at least the average design year. There is no reason to assume that goal could only be accomplished with complete separation of the combined system.

G. The provision for an indefinite day-for-day extension allowed for in connection with Project Report No. 1 is unacceptable.

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[39] Proposed Modified LTCP at K-13.

[40] DC Water, *WASA's Recommended Combined Sewer System Long Term Control Plan: Control Plan Highlights* at 20-22 (July 2002), *available at* https://www.dcwater.com/workzones/projects/pdfs/ltcp/Control_Plan_Highlights.pdf.

Appendix F provides that "If EPA fails to either approve or disapprove the determination within 180-days following receipt of Potomac Report No. 1, any subsequent deadline that is dependent upon such approval or disapproval shall be extended by the number of calendar days beyond the 180-day period that EPA uses to approve or disapprove the determination."[41] This extension provision is unlawfully and arbitrarily open-ended, and violates the CSO policy's mandate that consent decrees include "compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA." 1994 CSO Control Policy IV.B.2.g. See also id. part I.E. The purpose of the CSO Policy is "expedite compliance with the requirements of the clean Water Act," not facilitate delay. 59 Fed. Reg. at 18688. Accordingly, the decree must set a definitive, expeditious deadline for EPA approval/disapproval action, and allow for no extensions of deadlines that run from EPA's approval/disapproval action.

In closing, our groups urge EPA to work with DC Water and the District to address the foregoing concerns before asking the court to enter the Proposed Modification.

Sincerely,

/s/ Jennifer C. Chavez
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Earthjustice
202-667-4500

On behalf of:
American Canoe Association
Anacostia Watershed Society
D.C. Environmental Network
Friends of the Earth
Kingman Park Civic Association
Potomac Riverkeeper Network
Sierra Club

[41] Proposed Modification, Appendix F, sec. II.C.6.