

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)
In re:)
)
Government of the District of Columbia) **NPDES Appeal Nos. 11-05 & 11-06**
Municipal Separate Storm Sewer System)
)
NPDES Permit No. DC0000221)
)
_____)

**DISTRICT DEPARTMENT OF THE ENVIRONMENT'S
RESPONSE TO ORDER REQUIRING ADDITIONAL BRIEFING**

Pursuant to this Board's November 29, 2011 Order, the Attorney General of the District of Columbia through the General Counsel's office of the District Department of the Environment ("DDOE") files its Response to the Order Requiring Additional Briefing. In support of its Response, the Attorney General and DDOE state the following.

BACKGROUND

On September 30, 2011, effective October 7, 2011, the U.S. Environmental Protection Agency ("EPA") issued a final municipal separate storm sewer system ("MS4") NPDES permit ("Permit") to the Government of the District of Columbia. On November 4, 2011, two petitions for review were filed with this Board. One petition was filed by Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (hereafter "Environmental Petitioners"). The other petition for review was filed by the District

of Columbia Water and Sewer Authority (“DC Water”)¹ and the Wet Weather Partnership (hereafter “DC Water Petitioners”).

On November 17, 2011, DDOE filed a Motion for Leave to Intervene as a Party Respondent and Request to Respond to Petitions for Review. Thereafter, this Board requested additional briefing by the Attorney General of the District of Columbia prior to deciding DDOE’s motion to intervene. The Board requested that the Attorney General address four questions, DDOE addresses each in turn.

ARGUMENT

I. The Permittee, Government of the District of Columbia, is Represented by the Attorney General through the General Counsel’s Office of DDOE.

This Board first asked, “Who is representing the permittee, i.e., the Government of the District of Columbia, in this matter?” Pursuant to D.C. Official Code § 1-301.81(a)(1), the Attorney General for the District of Columbia “. . .shall have charge and conduct of all law business of the said District. . . as well as the power to intervene in legal proceedings. . .” The Attorney General has the power to appoint Assistant Attorneys General which serve under the direction and control of the Attorney General and perform duties assigned to them by the Attorney General. D.C. Official Code § 1-301.87(b)(1). Thus, the Attorney General is responsible for representing the Government/permittee in this matter.

The Attorney General has assigned several Assistant Attorneys General to the Office of the General Counsel of DDOE, including the General Counsel and Deputy General Counsel. The Assistant Attorneys General within the DDOE Office of the General Counsel represent DDOE on all legal matters. The MS4 NPDES permit at issue here names the “Government of

¹ Legally DC Water is the District of Columbia Water and Sewer Authority but in 2010, it rebranded and changed its name to DC Water. <http://www.dewater.com/brandnew.cfm>. As such, DC WASA will be referred to as DC Water throughout this brief.

the District of Columbia” as the permittee. DDOE is the agency, designated by the Government/Permittee, with responsibility for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of the permit. Final NPDES Permit DC0000221 at 7. As DDOE is the designated responsible agency for managing the MS4 permit, DDOE through its Office of the General Counsel is delegated the responsibility, by the Attorney General, for representing the Government/Permittee in all matters related to the MS4 permit.

II. DC Water Does Not Have the Legal Authority to File a Petition Challenging the MS4 NPDES Permit.

This Board next asked, “Does DC Water have the legal authority to file, as a permittee, a petition under 40 C.F.R. § 124.19 challenging the District of Columbia’s MS4 NPDES permit?” The short answer is no. However, to answer this question one must first address the issue of whether or not DC Water is a permittee. The MS4 NPDES permit clearly states that “[T]he Government of the District of Columbia is the permittee. . .” Final NPDES Permit DC0000221 at 7. The Final permit states that:

The permittee has designated the District Department of the Environment (DDOE) as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit and the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to departments designated as “Stormwater Agencies” by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008: . . . DC Water and Sewer Authority (also known as and hereinafter referred to as DC Water).

Id.

DDOE was established as an agency within the executive branch of the District of Columbia government to administer and oversee the environmental laws, regulations and programs. D.C. Official Code § 8-151.03(a). In addition, section 8-151.03 directed the Mayor to transfer to DDOE:

. . . those duties and functions of the General Manager of the Water and Sewer Authority related to stormwater administration, including the monitoring and coordinating the activities of all District agencies that are required to maintain compliance with the storm water permit . . .

D.C. Official Code § 8-151.03(b)(2). Once DDOE was established and stormwater administration/management was transferred to DDOE, the Stormwater Administration was established within DDOE. D.C. Official Code § 8-152.01(a). The Stormwater Administration within DDOE is responsible for “monitoring and coordinating the activities of all District agencies, including the activities of the District of Columbia Water and Sewer Authority (“[DC Water]”), which are required to maintain compliance with the Stormwater Permit.” *Id.* Section 8-152.01 further states that,

. . . [DC Water], and any other District agency identified by the Director (“Stormwater Agencies”), shall comply with all requests made by the Director relating to stormwater related requests, compliance measures, and activities, including the adoption of specific standards, and the submission of information, plans, proposed budgets, or supplemental budgets related to stormwater activities.

D.C. Official Code § 8-152.01(c).

Pursuant to the MS4 Permit as well as District law, the permittee is the Government of the District of Columbia and the permittee has designated DDOE as the agency responsible for managing the MS4 Stormwater Management Program. As such, DC Water is not a permittee.

Therefore, DC Water cannot file a petition challenging the District of Columbia's MS4 NPDES permit.

III. DC Water Cannot Take a Position Separate From and Contrary to DDOE.

This Board then asked if DC Water has such legal authority, may DC Water take a position that is separate from, and possibly contrary to, the position of DDOE? While the above argument establishes that DC Water does not have the legal authority, as a permittee, to file a petition, even if it did have that authority it cannot take a position contrary to DDOE.

A little history is instructive. Early in the District, there were three separate sewer, water and sanitation departments.² Over many years, the agencies underwent several name and organizational changes. In 1985, the District Government established the Department of Public Works which included the Water and Sewer Administration.³ In 1996, the District Government created the District of Columbia Water and Sewer Authority pursuant to "The Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996", DC Law 11-111, D.C. Official Code § 34-2202.02.

The District's Home Rule Act, D.C. Official Code §§ 1-201.01 *et seq.*, serves as an enabling act, determining what the District can and cannot do through its three branches of government. Section 204.04 delegates certain legislative powers to the District of Columbia Council ("Council"). It provides, *inter alia*,

The Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality.

D.C. Official Code § 1-204.04(b). Pursuant to this authority, the Council established, "as an independent authority of the District government, the District of Columbia Water and Sewer

² See <http://www.dewater.com/about/history.cfm>

³ *Id.*

Authority. . . that has a separate legal existence within the District Government.” D.C. Official Code § 34-2202.02(a). The goal of establishing DC Water was to improve operational functions and to separate DC Water’s finances from those of the District’s overall budget.

While DC Water is an independent agency, it remains within the District government. As section 34-2202.02 points out, “The Authority shall be a corporate body, created to effectuate certain public purposes, that has a separate legal existence within the District government.” D.C. Official Code § 34-2202.02(a) (emphasis added). Further, with a few exceptions, DC Water is subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District Government. D.C. Official Code § 34-2202.02(b). Even though DC Water is an independent agency, its roles are defined by Council. For instance, Council delegated to DC Water the authority to issue revenue bonds, notes, and other obligations to borrow money to finance or assist in the financing or refinancing of undertakings in the area of utilities facilities, pollution control facilities, and water and sewer facilities. D.C. Official Code § 1-204.90(h)(1).

Thus, while Council clearly delegated to DC Water authority over its finances, budget, and other obligations, many of its functions were left within the jurisdiction of the Mayor and Council. *See* D.C. Official Code § 34-2202.03. For example, the Mayor, with the consent of Council, appoints the DC Water Board members and a Chair of the Board. D.C. Official Code § 2202.04. In addition, DC Water and its Board may not contract to privatize, to purchase or lease the Blue Plains Wastewater Treatment Plant without the approval of the Mayor and the Council. D.C. Official Code §§ 34-2202.05(g)(2) and (3).

Another function, and the one relevant to this matter, is that of Stormwater Administrator. Prior to 2007, DC Water served as the District’s MS4 Stormwater Administrator and coordinated the District’s efforts to comply with the Permit. Once DDOE was created, the function of

Stormwater Administrator was transferred to DDOE pursuant to section 8-151.03(b)(2). D.C. Official Code § 8-151.03(b)(2). As stated above, the Stormwater Administration within DDOE is responsible for “monitoring and coordinating the activities of all District agencies, including the activities of the District of Columbia Water and Sewer Authority (“[DC Water]”), which are required to maintain compliance with the Stormwater Permit.” D.C. Official Code § 8-152.01(a). This section makes clear that DC Water is similarly situated with all other District agencies that are required to maintain compliance with the MS4 permit and just as with all other District agencies with MS4 responsibilities is under the authority of the Mayor. DC Water must participate in all matters regarding the MS4 permit through the Mayor and DDOE, the Stormwater Administrator. Therefore, DC Water does not have the authority to bring an independent action and cannot take a position that is contrary to that of DDOE.

IV. No Change of Law or Circumstance Has Occurred Since the 2007 DC Water Filing.

The final question posed by this Board is, “Has there been a change of law or circumstance affecting any of the above issues since DC Water’s/WASA’s filing of its 2007 motion requesting substitution of DDOE as the representative of the permittee, the District of Columbia?” The answer is simply no. In April 2006, the Government of the District of Columbia and DC Water jointly filed with this Board a Petition for Review challenging a determination by U.S. EPA modifying the DC MS4 NPDES Permit, permit No. DC0000221. *See In re: Government of the District of Columbia Municipal Separate Storm Sewer System*, NPDES Permit No. DC0000221, EAB NPDES Appeal Nos. 06-07 and 06-08. Thereafter, in June 2007, DC Water filed, “The District of Columbia Water and Sewer Authority’s Motion For Leave to Withdraw as Petitioner.”

At that time DC Water argued,

At the time the Petition was filed, [DC Water] served as the MS4's Storm Water Administrator, and thus appropriately coordinated the District's response to the permit, even though it was separately named to reflect its special status as both an independent agency and the then Stormwater Administrator.

DC Water's Motion for Leave to Withdraw as a Petitioner, EAB NPDES Appeal Nos. 06-07 and 06-08, at p. 2. DC Water further argued that pursuant to D. C. Code § 151.03(b)(2), "[E]ffective February 15, 2007, the responsibilities and title of the Storm Water Administrator were transferred from [DC Water] to the newly created Department of the Environment . . ." *Id.* DC Water concluded that because of the transfer of the role to DDOE, it no longer needed to be separately identified in the petition, but "simply can participate with all other affected District agencies through the Mayor and the Stormwater Administrator." *Id.*

To date, there has been no change in either the law or circumstance since the 2007 motion was filed by DC Water. As stated above: (a) the Stormwater Administration remains within DDOE; (b) DDOE is the designated agency under the Permit; and (c) DDOE is responsible for monitoring and coordinating the activities of all District agencies, including those of DC Water. D.C. Official Code § 8-152.01(a). DC Water is designated as a Stormwater Agency under both the Permit and section 8-152.01(c). Therefore, as stated above, DC Water must participate, just as all other affected District agencies, through the Mayor and the Stormwater Administrator (DDOE). DC Water admits this in its 2007 Motion to Withdraw as a Petitioner and nothing has changed that would allow DC Water to bring its own action challenging the Permit now.

CONCLUSION

Both DC law and the MS4 Permit are clear that the Permittee is the Government of the District of Columbia, DDOE is the designated agency responsible for managing the MS4

Stormwater Management Program and all activities necessary to comply with the Permit, and that DC Water is a Stormwater Agency obligated to report to DDOE. DC Water, while an independent agency, is similarly situated to all other District Stormwater Agencies regarding matters related to the MS4 permit. Therefore, DC Water is not a permittee, does not have the legal authority to file a petition with this Board under 40 C.F.R. § 124.19, and even if it could act as a permittee, cannot take a position that is contrary to that of DDOE. As such, DDOE through the Attorney General's Office, respectfully requests that this Board dismiss DC Water as a party in this matter.

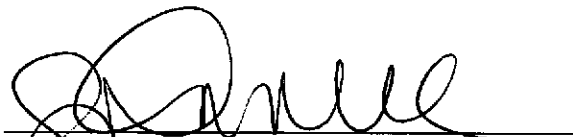
Dated: January 12, 2012

Respectfully submitted,

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Certificate of Service

I certify under penalty of perjury that on this 12th day of January, 2012, a copy of the foregoing District Department of the Environment's Response to Order Requiring Additional Briefing was served as follows:

A copy was electronically filed with the EAB through EPA's Central Data Exchange (CDX) System.

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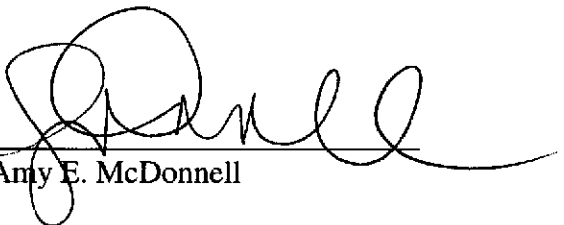
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