

**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 and 11-06
Municipal Separate Storm Sewer System)	
)	
NPDES Permit No. DC 0000221)	
_____)	

**ENVIRONMENTAL PROTECTION AGENCY REGION III'S
RESPONSE TO DISTRICT DEPARTMENT OF THE ENVIRONMENT'S RESPONSE
TO ORDER REQUIRING ADDITIONAL BRIEFING**

The U.S. Environmental Protection Agency Region III ("EPA Region III"), by and through the undersigned counsel, hereby submits to the Environmental Appeals Board ("EAB" or "Board") the following Response, as directed by the Board, to the Response filed by the District Department of the Environment ("DDOE") through the Office of the Attorney General for the District of Columbia ("DDOE's Response") to the Board's November 29, 2011 Order.

Although the Board issued an Order to Show Cause on January 19, 2012 related to whether the District of Columbia Water and Sewer Authority ("DC Water") and the Wet Weather Partnership ("WWP") have met the requirements of 40 C.F.R. § 124.19 or otherwise have standing to file a petition, that Order did not authorize a response from EPA Region III on those issues. Accordingly, EPA Region III restricts the scope of this brief to those issues raised in the Board's November 29, 2011 Order but explicitly reserves the right to address the substantive issues of whether each petitioner has met the requirements of 40 C.F.R. § 124.19 or otherwise has standing to file a petition.

BACKGROUND

The Board's November 29, 2011 Order includes a detailed summary of relevant background facts; in the interest of judicial economy, EPA Region III incorporates that detailed summary by reference rather than repeat it here. To provide context for certain additional important facts, however, an abridged version of that summary is included here.

On September 30, 2011, EPA Region III issued a final Phase I Municipal Separate Storm Sewer System ("MS4") NPDES permit (Permit No. DC0000221) to the Government of the District of Columbia ("DC Government" or "the Permittee"), which had an effective date of October 7, 2011 ("the DC MS4 Permit"). The sole permittee of the DC MS4 Permit is the DC Government, although multiple entities within the DC Government have various responsibilities under the DC MS4 Permit. *See, e.g.*, DC MS4 Permit at p.1 (cover sheet), Section 2.3.1.

On November 4, 2011, DC Water and WWP jointly filed a petition requesting that the EAB review the DC MS4 Permit. Four environmental groups – Friends of the Earth, the National Resources Defense Council, the Anacostia Riverkeeper, and the Potomac Riverkeeper – also jointly filed a petition for review on November 4, 2011. On November 17, 2011, DDOE requested leave to intervene as a party respondent and to respond to the petitions for review. Although DDOE did not file its own petition for review of the DC MS4 Permit, it states that it "has a strong interest in these Petitions for Review because of the implications that any revisions to the Permit may have on DDOE's administrative and/or enforcement obligations." DDOE Motion to Intervene, ¶ 2. *See also* DDOE Motion to Intervene, ¶ 13.

On November 29, 2011, the Board issued an Order directing the Attorney General for the District of Columbia ("DC Attorney General") to address the following four questions:

- (1) Who is representing the permittee, i.e., the Government of the District of Columbia, in this matter?
- (2) 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?
- (3) 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, the agency that has been designated lead responsibility to coordinate stormwater issues on behalf of the Government of the District of Columbia?
- (4) 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?

EAB Order (Nov. 29, 2011) at 3. Also in that November 29, 2011 Order, the Board directed EPA Region III to file a response to the District of Columbia's brief. *Id.* at 4. EPA Region III files this brief pursuant to that Order.

On December 22, 2011, the Board issued an Order staying all filing deadlines other than those for the DC Government and EPA Region III to address the above four questions. As a result, EPA Region III has not yet filed a substantive response to either of the petitions. On January 19, 2012, the Board issued an Order to Show Cause to DC Water and WWP.

DISCUSSION

The questions posed by the Board in its November 29, 2011 Order appear to be primarily questions requiring the interpretation of DC law, which may be most appropriately addressed by the DC Attorney General. At the request of the Board, however, EPA Region III provides this response to DDOE's Response, and endeavors to provide whatever assistance it can regarding the questions posed by the Board.

I. The Question of Who May Represent the Government of the District of Columbia in Legal Matters is a Matter of District of Columbia Law, and EPA Region III Defers to the District of Columbia's Interpretation of its Law On that Issue.

The sole permittee of the DC MS4 Permit is the DC Government. *See, e.g.*, DC MS4 Permit at p.1 (cover sheet), Section 2.3.1. EPA Region III intended that identification to be clear, and did not intend for any confusion on that issue. Indeed, the DC Government has been the sole permittee since the issuance of the first Phase I MS4 NPDES permit for the District of Columbia in 2000.

EPA Region III recognizes that a number of entities are responsible for carrying out various stormwater responsibilities under the DC MS4 Permit and that, pursuant to DC Code Section 8-152.01, DDOE is “responsible for monitoring and coordinating the activities of all District agencies, including the activities of [DC Water], which are required to maintain compliance with the [DC MS4 Permit].” DC Code § 8-152.01(a) (2012). *See also* DDOE Response at 3-4. The DC MS4 Permit recognizes and is consistent with this designation under DC law. *See, e.g.*, DC MS4 Permit at Section 2.3.1 (DDOE is “responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of [the DC MS4 Permit] . . . by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to [DC Water].”).

The Region notes, however, that DC Water is not named as a permittee or co-permittee of the DC MS4 Permit, and that the DC MS4 Permit does not explicitly require DC Water to carry out any particular permit requirements. Rather, Section 2.3.1 of the DC MS4 Permit states: “The Government of the District of Columbia is the permittee, and all activities of all agencies,

departments, offices and authorities of the District must comply with the requirements of this permit.”

Pursuant to DC law, the DC Attorney General has the legal authority to represent the Permittee in this matter. DDOE Response at 2, citing D.C. Code § 1-301.87(a) (2012). In its Response brief, the DC Attorney General states that “the responsibility . . . for representing the Government/Permittee in all matters related to the MS4 Permit” is delegated to DDOE, through its Office of the General Counsel, because “DDOE is the designated responsible agency for managing the MS4 Permit.”¹ DDOE Response at 3. EPA Region III considers this to be a matter of DC law and, accordingly, defers to the DC Attorney General’s interpretation of that law.²

II. The Question of Whether DC Water Has Legal Authority to File, As A Permittee, A Petition Challenging the District of Columbia’s MS4 Permit is a Matter of District of Columbia Law and EPA Region III Defers to the District of Columbia’s Interpretation of its Law on That Issue.

The second question posed by the Board is “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?” EAB Order (Nov. 29, 2011) at 3. As the legal authority to challenge a permit pursuant to 40 C.F.R. § 124.19 is not dependent upon whether a petitioner is also a permittee, EPA Region III respectfully submits that this question seemingly involves two distinct issues: (1) whether DC Water can file a petition pursuant to 40 C.F.R. § 124.19; and (2) whether

¹ EPA Region III does not believe this to be a true delegation, given that attorneys in the DDOE Office of the General Counsel are actually Attorneys General who have been assigned to the DDOE Office of General Counsel.

² EPA Region III notes, however, that it understands this delegation to apply only to legal challenges to the DC MS4 Permit and that, pursuant to DC Code Section 8-152.01, DDOE remains the designated representative of DC Government regarding permit issuance and administration processes. Consistent with this understanding, EPA Region III did respond separately to the comments on the draft DC MS4 Permit received from DDOE, DC Water, and the DC Council, respectively, in an effort to respond as clearly and thoroughly as possible to all comments received. *See* Responsiveness Summary at pp. 30-33, 41-64, and 64-79 (available at: <http://www.epa.gov/reg3wapd/npdes/dcpermits.htm>).

DC Water can file a petition on behalf of the permittee (putting aside an analysis of the 40 C.F.R. § 124.19 requirements). EPA Region III understands the Board’s reference to 40 C.F.R. § 124.19 to be included in its question solely because that is the only potential regulatory mechanism by which to file a petition, and that the Board did not intend to seek an analysis of whether DC Water’s petition meets the requirements set forth in 40 C.F.R. § 124.19.³ As a result, EPA Region III interprets the Board’s second question as “Does DC Water have the legal authority to act on behalf of the permittee in its petition for review of the DC MS4 Permit?”⁴

The question of whether DC Water has the authority to file an appeal “as a permittee” turns on an interpretation of DC law to determine whether DC Water may represent the DC Government, the named Permittee. As discussed in Section I above, EPA Region III defers to the DC Attorney General with respect this question.

EPA Region III notes, however, that anyone can file a petition for review pursuant to 40 C.F.R. § 124.19, as long as their petition meets the requirements of that section of the regulations. As mentioned above, although that issue is beyond the scope of this brief, EPA Region III reserves its right to address that issue in its substantive response to the petitions.

³ Also instructive on this issue is the Board’s January 19, 2012 Order to Show Cause, which raises the requirements of 40 C.F.R. § 124.19 only with respect to WWP, not DC Water.

⁴ As noted above, EPA respectfully reserves the right to file a substantive response addressing whether each of the petitions, including that filed by DC Water and the Wet Weather Partnership, meets the requirements of 40 C.F.R. § 124.19.

III. The Question of Whether DC Water May Take a Position That Is Separate From And Possibly Contrary To That of DDOE, Assuming DC Water Had Legal Authority to File A Petition As The Permittee, Is A Matter of DC Law; EPA Region III Defers to the District of Columbia's Interpretation of Its Law on That Issue.

As with the foregoing two questions, the question of whether DC Water is authorized to take a position that is separate from and possibly contrary to that of DDOE turns on an interpretation of DC law. As a result, consistent with its responses in Sections I and II above, EPA Region III defers to the District of Columbia's interpretation of its law on this issue. The only way in which it seems that DC Water could take such a contrary position would be if it were a named co-permittee or if it were not doing so as the Permittee but solely as any other third-party under 40 C.F.R. § 124.19 (or, in other words, in its individual capacity).

EPA Region III's understanding is that, while DC Water is an "independent agency," it is an entity existing within the DC Government.⁵ DDOE Response at 5-6, citing DC Code § 34-2202.02(a). As a result, by issuing the DC MS4 Permit to the DC Government, EPA Region III not only did not need to formally designate DC Water or any other entity within the DC Government as a named co-permittee, but to do so would have been redundant and a likely source of unnecessary confusion.

EPA acknowledges that this understanding may appear at first to be inconsistent with DDOE's statement in its Motion to Intervene that DDOE and DC Water's "interests are not the

⁵ EPA Region III notes, however, that the issue of whether DC Water is an agency of the District of Columbia, or somehow entirely separate from DC Government is not always clear. *See, e.g.*, DDOE website, stating that "DC Water is a semi-autonomous regional entity that is not part of DDOE or the District Government" (<http://www.ddoe.dc.gov/ddoe/cwp/view,a,1209,q,499131.asp>, accessed 12/27/2011, page no longer available); DC Government website, including DC Water in the drop-down list of agencies, but noting that the website for DC Water "is made available as a public service" (<http://app.dc.gov/agencies/detail.asp?id=82>).

same in this case because [their respective] responsibilities [under the DC MS4 Permit] are vastly different.” EPA Region III believes that this potential inconsistency could be reconciled, however, with the assumption that DDOE, as the designated Stormwater Administrator, would resolve competing interests of the various relevant entities within the DC Government prior to its Office of General Counsel filing a petition on behalf of the Permittee. Indeed, employing this assumption would assuage any concern that, if DDOE were allowed to intervene and DC Water’s petition were dismissed solely because DC Water cannot speak for the Permittee (as opposed to failing to meet the requirements of 40 C.F.R. § 124.19), DDOE would not espouse DC Water’s arguments. This assumption would be consistent with EPA Region III’s understanding that, pursuant to DC law, DDOE is responsible for “monitoring *and coordinating* the activities of all District agencies, including [DC Water], which are required to maintain compliance with the Stormwater Permit.” DC Code § 8-152.01 (2012) (emphasis added).

IV. EPA Region III Is Unaware Of Any Change of Law or Circumstance Affecting Any of the Above Issues Since DC Water’s Filing of Its 2007 Motion.

EPA Region III is unaware of any change of law or circumstance affecting any of the above issues since DC Water’s filing of its 2007 motion requesting substitution of DDOE as the representative of the Permittee. Although various events could have occurred that might be relevant to the Permittee’s internal division of responsibilities regarding implementation of the DC MS4 Permit,⁶ that internal division is a matter of DC law that – EPA Region III submits – does not affect the questions posed by the Board in its November 29, 2011 Order. The sole

⁶ Potentially relevant events include enactment of the 2008 Comprehensive Stormwater Management Enhancement Amendment Act (see DC MS4 Permit at Section 2.3.1) and issuance of the January 2008 updated matrix of responsibilities pursuant to the 2000 MS4 Task Force Memorandum of Understanding (see DC MS4 Permit at Section 2.3.2).

Permittee has not changed during that time, nor has the designation of DDOE as the entity within DC Government responsible for monitoring and coordinating the activities necessary to comply with the DC MS4 Permit.

CONCLUSION

EPA Region III does not oppose DDOE's motion to intervene in the pending Board proceeding. EPA Region III also generally defers to the DC Attorney General's interpretation of DC law on the first three questions posed by the Board. However, EPA Region III respectfully reserves the right to address, in its substantive response to the petitions, the issue of whether each petitioner meets the requirements of 40 C.F.R. § 124.19.

Respectfully submitted this 26th day of January, 2012.

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Dated: January 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I filed the original *Environmental Protection Agency Region III's Response to District Department of the Environment's Response to Order Requiring Additional Briefing* with the Clerk of the Environmental Appeals Board electronically through the CDX System. I also hereby certify that, on the same date, I sent a hard copy of the foregoing document to each of the parties below via First Class mail:

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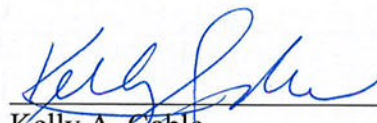
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