

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

_____ )	
<b>In re:</b> )	
)	
<b>Government of the District of Columbia )</b>	<b>NPDES Appeal Nos. 11-05 &amp; 11-06</b>
<b>Municipal Separate Storm Sewer System )</b>	
)	
<b>NPDES Permit No. DC0000221 )</b>	
)	
)	
_____ )	

**DISTRICT DEPARTMENT OF THE ENVIRONMENT'S  
REPLY TO DC WATER'S AND WET WEATHER PARTNERSHIP'S  
RESPONSE TO DDOE'S ADDITIONAL BRIEFING  
AND BOARD'S ORDER TO SHOW CAUSE**

The Attorney General of the District of Columbia through the General Counsel's Office of the District Department of the Environment ("DDOE") files its Reply to DC Water's and Wet Weather Partnership's (hereinafter "DC Water Petitioners") Response to DDOE's Additional Briefing and the Board's Order to Show Cause. DC Water Petitioners filed a Petition for Review of the MS4 Permit. DDOE filed a Motion to Intervene on November 17, 2011. Thereafter, this Board ordered additional briefing by DDOE and a response by U.S. EPA. DDOE filed its brief responding to the order for additional briefing on January 12, 2012. This Board then ordered DC Water Petitioners to Show Cause why they should be permitted to challenge the permit. DC Water Petitioners raised several arguments in their brief that are incorrect and merit correction.

**ARGUMENT**

**A. DC Water Makes Unsupported and Factually Incorrect Statements.**

DC Water makes several statements in its opening paragraphs and summary of the argument that are legally unsupported and factually incorrect. DC Water states that it does not

have an independent source of stormwater revenue, outside of the District government's Enterprise Fund. This is untrue. While the goal of the Enterprise Fund is to cover stormwater expenses to comply with the MS4 permit obligations, it could fall short. If that were to happen, the District government and all stormwater agencies, including DC Water would have to find the funds necessary to comply with the MS4 permit. Just as the DC government would have to raise taxes or fees, DC Water could raise rates to cover its obligations. DC Water does have financial independence and has 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).

DC Water next states that because it is identified by name in the Permit it makes DC Water a co-permittee, with a right to appeal the Permit. The Permit specifically names many of the stormwater agencies, including DC Water. Naming the agencies does not make them co-permittees. In fact the Permit is clear that the Permittee is the Government of the District of Columbia.

Finally, DC Water argues that if the District government believes that it cannot take a position contrary to the District's then the District must pursue that question in D.C. Superior Court. This statement is not supported by any facts, case law or argument. This Board has the authority to decide all of the issues before it in the current petitions for review, motion to intervene, and additional briefing. For DC Water to suggest that the District government needs to take any of these arguments before the DC Superior Court is simply without merit.

B. DC Water Is Not Entitled to File a Petition for Review.

DC Water is not a permittee or co-permittee and therefore cannot seek review of the MS4 permit as such. The MS4 NPDES permit is clear, “[T]he Government of the District of Columbia is the permittee. . .” Final NPDES Permit DC0000221 at 7. The permit does not reference any co-permittees, only a designated agency (DDOE) and stormwater agencies (DC Water and others) that must report to that designated agency. *Id.* Thus, any reference DC Water makes stating it is a co-permittee is incorrect.

DC Water also cannot seek review as a “person” pursuant to 40 C.F.R. § 124.19(a). DC Water argues that pursuant to 40 C.F.R. § 124.19(a) it is a “person” and “independent authority” and can petition for review because it filed comments on the draft permit. DC Water cites to several cases and its enabling statute to bolster its argument that it is an independent authority with a separate legal existence. However, DC Water’s interpretation of its enabling statute and the cited cases is misguided. First, DC Water’s enabling statute is clear that while DC Water has a separate legal existence it remains within the District government. D.C. Official Code § 34-2202.02(a) (emphasis added). And, with 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). For financial and personnel matters, DC Water is an independent agency but for other matters, including the MS4, it is an agency within the District Government just as all other District agencies.

DC Water’s reliance on *Dingwall v. Dist. of Columbia Water and Sewer Authority*, 766 A.2d 974 (D.C. 2001) and *Dist. of Columbia Water and Sewer Authority v. Delon Hampton & Assoc.*, 851 A.2d 410 (D.C. 2004) to support its independent authority argument is misplaced. The holdings in both of the cases are very narrow in scope. The rulings in these cases “do not

stand for the proposition that [DC Water] is not part of the District government for all purposes, but rather that, as a matter of statutory interpretation, the particular sections of District statutes at issue in the cases were not intended to extend certain statutorily-imposed protections of portions of the District government to [DC Water]. *Opinion of the Office of the Attorney General for the District of Columbia, The National Capital Revitalization Corporation ("NCRC") and its Subsidiaries*, 2006 D.C. AG LEXIS 1, 13 (Dec. 8, 2006) (attached as Exhibit A).

DC Water also misapplies the holding in *Zavala v. Dist. Of Columbia Water and Sewer Authority*, No. 06-1864 (D.C. Super. Ct. May 5, 2006). In that case, the Attorney General of the District of Columbia moved for summary judgment seeking the government's dismissal from a case in which a DC Water employee was driving a DC Water owned vehicle and injured a third party. *Id.* The government argued that it could not be held liable for the actions of a DC Water employee because he was not an employee of the District of Columbia. *Id.* As stated earlier, DC Water, while an agency within the District Government, does have independence over its financial and personnel matters. D.C. Official Code § 1-204.96(a). Again, for other matters, DC Water is an independent agency within the District Government. Specifically, for matters involving the MS4 NPDES permit, DC Water is a stormwater agency and must comply with requests of the designated agency, DDOE.

Because DC Water is a stormwater agency, pursuant to the MS4 permit and DC law, it must comply with requests made by the designated agency, DDOE. DC Water is similarly situated with all other stormwater agencies. Therefore, if DC Water, or any other stormwater agency, has issues with its obligations under the MS4 permit, those issues should be brought to the attention of DDOE or the Mayor for resolution.

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

DC Water is incorrect in arguing that because it is an independent corporate body it can take a position separate from and contrary to DDOE. As stated above, for purposes of the MS4 permit DC Water is a stormwater agency similarly situated with all other District agencies designated as stormwater agencies. Therefore, for matters relating to the MS4 permit the Stormwater Administrator, here DDOE, is the final arbiter for disputes. The Stormwater Administrator is responsible for “monitoring and coordinating the activities of all District agencies, including the activities of the [DC Water], which are required to maintain compliance with the Stormwater Permit.” D.C. Official Code § 8-152.01(a). Therefore, any stormwater agency, including DC Water, which has issues with the MS4 permit must seek to resolve those matters through the Stormwater Administrator or the Mayor. Just as the Mayor would now allow two District agencies, *i.e.* DDOT and DPW, to proceed to court with an internal issue, DC Water is held to that same standard for MS4 permit purposes.

D. DC Water’s 2007 Motion is Relevant to its Standing.

DC Water does not have standing to bring this legal challenge. In 2007, DC Water withdrew its Petition for Review of the previous permit stating that it was no longer the Stormwater Administrator and as such did not need to be separately identified in the Petition but “simply can participate with all other affected District agencies through the Mayor and the Stormwater Administrator.” D.C. Water’s Motion for Leave to Withdraw as Petitioners, EAB NPDES Appeal Nos. 06-07 and 06-08, at p. 2.

For DC Water to now argue that its motion in 2007 is not relevant here is disingenuous. First, the same MS4 permit, with a few modifications, is being challenged here. Second, DC Water’s opinion of its legal status is irrelevant. What is relevant is the enabling statute which

states that it is has a “separate legal existence within the District Government.” D.C. Official Code § 34-2202.02(a). DC Water’s legal status was the same at that time as it is now. DC Water is a stormwater agency that must report to the Stormwater Administrator, DDOE. DC Water did not challenge this relationship in 2007 and cannot now argue that that relationship is irrelevant to these proceedings. DC Water’s reliance on the *Dingwall and Hampton* cases to support this argument is misleading. As discussed above, the holdings of these cases are very narrow and do not apply to DC Water’s status as an MS4 stormwater agency.

E. Wet Weather Partnership Does Not Have Standing to Appeal this Permit.

The Wet Weather Partnership (“WWP”) does not have standing to appeal this Permit and should be dismissed as a party. While 40 C.F.R. § 124.19(a) does allow a person to petition for administrative review if they failed to submit comments, that review is limited to changes from the draft to the final permit. WWP did not submit comments on the draft permit and the changes it is challenging are not substantive. WWP first argues that “extensive changes” were made to provisions in the draft Permit regarding DC Water’s financial and legal responsibilities. This is an overstatement. Section 2.3.2.e simply removed a sentence regarding a Memorandum of Understanding and institutional agreements. This sentence dealt with how DDOE as the Stormwater Administrator would interact with the stormwater agencies. The sentence was removed as it was not appropriate to reference this in a permit and the Stormwater Administrator will need to work with the stormwater agencies regardless. By tying this argument to the Enterprise Fund, the WWP is trying to make DC Water’s argument for them and it is irrelevant to this section.

Next, WWP argues that requirements related to the Consolidated TMDL Implementation Plan were changed. Again, no substantive changes were made and in fact that changes that were

made were to streamline the process and making implementation easier. WWP also argues that changes were made regarding the section on “Additional Pollutant Sources.” The Final Permit changed one sentence and took out the words “as soon as practicable.” Again this is not a substantive change. This section relates to the permittee compiling data regarding additional pollutant sources. The additional pollutant sources listed are largely static and have been and will continue to be included in routine reporting.

Finally, WWP argues that section 4.3.1.3 modified the reporting requirements section. Again, this was not a substantive change. The draft permit required notification to all sewer and public health agencies within 24 hours when the sanitary sewer overflows to the MS4. The final permit modified the language to include the words notify “the public.” Notification was always required and this section simply changes who is notified.

Because the only changes that WWP is challenging are minor and not substantive changes and do not change the meaning of any of the permit sections, their petition for review should be denied.

### **CONCLUSION**

For all of the foregoing reasons, DDOE respectfully requests the Board to dismiss DC Water and the Wet Weather Partnership as petitioners, dismiss their petition for review and for all other just and proper relief.

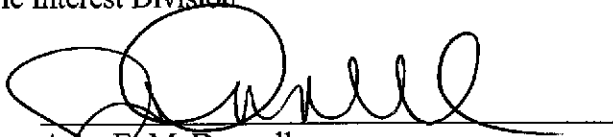
Dated: January 31<sup>st</sup>, 2012

Respectfully submitted,

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## Certificate of Service

I certify under penalty of perjury that on this 31<sup>st</sup> day of January, 2012, a copy of the foregoing District Department of the Environment's Reply to DC Water's and Wet Weather Partnership's Response to DDOE's Additional Briefing and Board's Order to Show Cause was served as follows:

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

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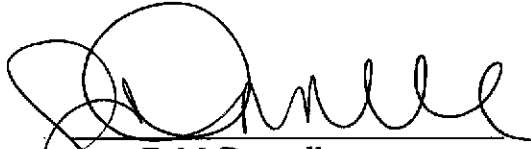
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