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By Electronic Submission

Ms. Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: District of Columbia, Municipal Separate Storm Sewer System
Permit Number: DC0000221
Appeal Numbers: NPDES 11-05 and NPDES 11-06

Dear Ms. Durr:

Attached please find the District of Columbia Water and Sewer Authority's and Wet Weather Partnership's Response to District Department of the Environment's Additional Briefing and to the Board's Order to Show Cause.

Sincerely,

F. Paul Calamita

cc: Jennifer C. Chavez, Esq., Earthjustice
Rebecca J. Hammer, Esq., Natural Resources Defense Council
Irvin B. Nathan, Esq., Attorney General for the District of Columbia
Ellen Efros, Esq., Assistant Deputy Attorney General
Amy E. McDonnell, Esq./Alan Barak, Esq., District Department of the Environment
Kelly A. Gable, Esq., Assistant Regional Counsel, EPA Region III
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Gregory Hope, Esq., DC Water, Office of the General Counsel, Principal Counsel

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

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

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S AND WET WEATHER PARTNERSHIP'S RESPONSE TO DISTRICT DEPARTMENT OF THE ENVIRONMENT'S ADDITIONAL BRIEFING AND TO THE BOARD'S ORDER TO SHOW CAUSE

The District of Columbia Water and Sewer Authority ("DC Water") and the Wet Weather Partnership (the "WWP")[1] (collectively, the "Petitioners") file this Response to the additional briefing filed by the District Department of the Environment ("DDOE") on January 12, 2012, pursuant to the Environmental Appeal Board's (the "EAB" or the "Board") November 29, 2011 Order Requiring Additional Briefing, and to the Order to Show Cause issued by the EAB on January 19, 2012. This briefing responds to both aforementioned documents due to the significant overlap in the issues addressed. Petitioners first respond to DDOE's additional briefing, and then to the Board's Order to Show Cause.

The Petitioners appreciate this opportunity to brief these issues. The confusion regarding the unique legal relationship between DC Water and DDOE is the primary reason that DC Water filed its Petition for Review. That confusion is of particular concern to DC Water given the legal and financial liabilities imposed by the National Pollutant Discharge Elimination System Permit

[1] The WWP is only responding to the Show Cause Order, as it has no special knowledge of the legal relationship between DDOE and DC Water discussed in DDOE's Additional Briefing.

No. DC 0000221 for the District of Columbia Municipal Separate Storm Sewer System (the "Permit") and because DC Water does not have an independent source of stormwater revenue, outside of the District government's Enterprise Fund, with which to fund Permit compliance activities. DC Water's legal and financial independence from the District government is of paramount significance.

In support of their Response, the Petitioners state the following:

SUMMARY ARGUMENT

DC Water should not be dismissed as a petitioner in this case because it is a legal entity separate from the District government. While not discussed in DDOE's briefing, this completely separate legal status has been consistently confirmed by the District courts. Accordingly, DC Water satisfies the federal requirements to bring its Petition for Review of the Permit. DC Water is both a co-permittee and an independent legal "person" that commented on the draft Permit, so it is entitled to file a petition for review under 40 C.F.R. § 124.19(a). The WWP is a trade association (of which DC Water is a member) that also qualifies as a "person," so it is entitled under 40 C.F.R. § 124.19(a) to challenge any provisions of the Permit that changed from the draft to the final version, including provisions related to (1) the scope of DC Water's and DDOE's responsibilities under the Permit, (2) the Consolidated TMDL Implementation Plan requirement, (3) the Additional Pollutant Sources requirement, and (4) the 24-hour notice requirement for sewer overflows that reach the municipal separate storm sewer system ("MS4").

As explained in more detail in Part I below, DC Water's enabling legislation expressly states that it is a separate corporate body with an independent legal existence from the District government. The District's courts have consistently construed DC Water's enabling legislation to mean just what it says—that DC Water is not the District government, but rather a separate

legal entity that can sue and be sued and which is expressly authorized to contract with all other separate legal entities, including, expressly, the District government. Obviously, one cannot contract with oneself. In its briefing, DDOE did not even attempt to address the relevant District case law holding that DC Water has legal status separate and apart from the District government.

As a legal entity separate from the District government, DC Water is fully entitled to file a petition for review of the Permit. The Permit was issued by the United States Environmental Protection Agency ("EPA") on September 30, 2011. The Permit identifies DC Water by name in several places and purports to impose expansive legal and financial obligations on DC Water. This makes DC Water a co-permittee, with a right to appeal the Permit.

Even assuming *arguendo* that DC Water is not a co-permittee, it is an independent corporate body with a legal existence separate from the District of Columbia. Accordingly, DC Water is a "person" under 40 C.F.R. § 124.2(a). Because DC Water is a "person" and timely filed comments on the draft Permit, it clearly meets the requirements set forth in 40 C.F.R. § 124.19(a) to file its Petition for Review.

The Petitioners elaborate on these points below, as well as provide DC Water's specific answers to the questions posed by the Board's Order Requiring Additional Briefing, dated November 29, 2011, and respond to the Board's Order to Show Cause of January 19, 2012. DC Water's separate legal existence establishes its right to appeal the Permit under federal law and to take any position in that appeal which DC Water's Board of Directors deem appropriate.

To the extent the District government believes that, as a matter of District law, DC Water cannot take a position contrary to the District's, the District must pursue that question in the Superior Court of the District of Columbia by suit for injunction or declaratory judgment. The likelihood of the District government succeeding on this issue is remote, given District judicial

precedent (discussed in Part I.A below) finding that DC Water is demonstrably legally and financially independent from the District government.

Of course, the District government cannot do indirectly what it cannot do directly. Among other things, District law precludes the District government from modifying DC Water's budget. *See* D.C. Code § 1-204.53(c). Given the prohibition against the District government directly modifying DC Water's budget, the District government cannot impose financial obligations on DC Water indirectly through either the Permit or the District government's implementation thereof. Thus, DDOE cannot speak for or constrain DC Water with respect to DC Water's obligations under the Permit.

Based on the foregoing, the Petitioners' Petition for Review should be granted, as should DDOE's Motion to Intervene. The parties should proceed to alternative dispute resolution ("ADR") and then proceed with the appeal if ADR is unsuccessful. Concurrent with the ADR process, DDOE will have time to file an action in the Superior Court of the District of Columbia to the extent it believes that DC Water should not be allowed to speak for itself regarding its legal and financial liabilities under the Permit. The Petitioners believe the Board will readily agree that District court precedent makes it extremely unlikely that such a suit will be successful.

ARGUMENT

I. RESPONSE TO DDOE'S ADDITIONAL BRIEFING

A. DC Water Is an Independent Legal Entity Entitled to File a Petition for Review of the Permit

DC Water has the legal authority to file a petition challenging the Permit. Pursuant to 40 C.F.R. § 124.19(a), "any person who filed comments on [a] draft [NPDES] permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision." DC Water timely submitted written comments on the draft Permit on June

4, 2010. DC Water is a "person," defined in the federal regulations as "an individual, association, partnership, corporation, municipality, State [including the District of Columbia], Federal, or Tribal agency, or an agency or employee thereof." 40 C.F.R. § 124.2(a).

Pursuant to its enabling statute, DC Water is an "*independent* authority" that is a "*corporate body*, created to effectuate certain public purposes, that has *a separate legal existence* within the District government." D.C. Code § 34-2202.02(a) (emphasis added). Because it is an independent corporate body with a legal existence separate from the District government, DC Water is a "person" under 40 C.F.R. § 124.2(a). Applying the requirements set forth in 40 C.F.R. § 124.19(a), DC Water is a person which timely filed comments on the draft Permit, so it is entitled to file a petition for review of the Permit. Furthermore, the Permit specifically names DC Water and purports to impose significant legal, regulatory, compliance, and financial obligations on DC Water. Because the Permit imposes obligations on DC Water as though it were a permittee, DC Water is entitled to appeal as a co-permittee.[2]

DC Water's legal independence is at the heart of its identity and provides the basis for DC Water's legal authority to challenge the Permit. This independence is explicitly provided by DC Water's enabling statute, emphasized in legislative history, guarded by Congress, expressly recognized by the courts, and previously acknowledged by the District government.

[2] In addition to the obvious financial responsibilities which the Permit imposes overall, EPA impermissibly delved into how the District government would fund its permit responsibilities by removing from the draft permit the following financial safeguard for the stormwater agencies, including DC Water:

> DDOE's major responsibilities under these MOUs and institutional agreements shall include:
> …
> e. Reviewing and processing requests from the MS4 Task Force agencies for reimbursement from the Stormwater Enterprise Fund for Permit-related tasks.

Draft Permit § 2.3.2.e (April 21, 2010).

As noted above, DC Water was established by statute as an "independent authority" with a "separate legal existence." D.C. Code § 34-2202.02(a). The numerous important powers granted to DC Water by its enabling statute demonstrate DC Water's uniquely independent status. Those powers include an authorization "[t]o sue and be sued." D.C. Code § 34-2202.03. Unlike other District agencies (such as DDOE), DC Water's legal business does not fall within the purview of the Attorney General of the District of Columbia (the "D.C. Attorney General"). D.C. Code §§ 1-301.81(a)(1), 34-2202.03. Examples of DC Water's other legally independent powers include creating its own personnel and procurement system, borrowing money, issuing revenue bonds, entering into contracts, charging and collecting fees for services, and exercising "any power usually possessed by public enterprises or private corporations performing similar functions." D.C. Code §§ 34-2202.03, -2202.05(a)(4),(7). DC Water also has its own Board of Directors responsible for governing DC Water. D.C. Code § 34-2202.04(a)(1). DDOE may not usurp the DC Water Board of Director's independent authority regarding DC Water's legal and financial responsibilities under the Permit.

The legislative history of the District of Columbia Water and Sewer Authority Act of 1996, Pub. L. No. 104-184, 110 Stat. 1696 (1996), which amended the District of Columbia Home Rule Act (the "Home Rule Act"), reveals that DC Water's financial independence was a fundamental element of the legislation.[3] *See* H.R. Rep. No. 104-635 (1996). The House Report explained:

> The new Water and Sewer Authority being created is independent, self-funded, and not in the General Fund of the District of Columbia Budget. H.R. 3663 therefore takes the Authority out of the District's budget process. Other than

[3] Prior to 1996, the Home Rule Act did not allow the District of Columbia government to sell revenue bonds for water and sewer purposes, so when the District proposed the District of Columbia Water and Sewer Authority Enabling Legislation, D.C. Code § 34-2201.01 *et seq.*, the Home Rule Act had to be Congressionally amended to prevent DC Water from being a "de facto nullity." H.R. Rep. No. 104-635, at 8 (1996).

> nominating and confirming [the District of Columbia's] Board members for the Authority, the Mayor and Council will have no other role to play by way of exercising influence over the Authority.

Id. at 15. The Report went on to note that:

> The [House Committee on Government Reform and Oversight] is very pleased that the Council amendments of June 5, 1996 guaranteed the complete fiscal independence of the Water and Sewer Authority. By allowing the Authority to collect its own revenues and deposit them directly with its own trustee, the District government has removed itself from even a pass through role in handling these funds and guarantees that no District official, including the Council, may divert those funds for other purposes. This is the most important feature in signaling a true transformation in the District government structure and delivery of services.

Id. at 17. Because DC Water "is independent, self-funding, and not in the General Fund," Congress deemed it "appropriate to remove it from the regular budget process." *Id*. at 19. This financial independence is completely inconsistent with DDOE's assertion that it can dictate Permit obligations and/or substantive Permit appeal positions to DC Water.

Congress has aggressively guarded DC Water's independence since its formation. In response to the District of Columbia Budget Support Act of 2007, which attempted to transfer financial authority over DC Water from its Board of Directors to the District of Columbia Chief Financial Officer, a group of six U.S. Senators and Congressmen sent a letter to District government and DC Water officials stressing that "Congress intended [DC Water] to have financial independence from the District of Columbia, instead vesting this authority in the [DC Water] Board of Directors." Letter from Chris Van Hollen, Member of Congress, et al. to the Honorable Adrian M. Fenty, Mayor, District of Columbia, et al. (Sept. 17, 2007). Therefore, "it is important that the financial authority for [DC Water] remain within the Board that represents the interests of the entire Region which includes the suburban jurisdictions of Maryland and Virginia." *Id.* In 2008, Congress reasserted DC Water's fiscal independence by enacting a

statute exempting DC Water from control by the District of Columbia's Chief Financial Officer. District of Columbia Water and Sewer Authority Independence Act, Public Law 110-273, 122 Stat. 2491 (July 15, 2008); *see also* D.C. Code § 1-204.25(e) ("The authority of the Chief Financial Officer under this section does not apply to personnel of the District of Columbia Water and Sewer Authority.").

Significantly, the District of Columbia Court of Appeals has held that DC Water is a corporate entity legally separate from the District of Columbia. In *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974 (D.C. 2001), *adopted*, 800 A.2d 686 (D.C. 2002) (per curiam) (en banc), the court confirmed that DC Water is an entity independent from the District. The *Dingwall* court considered whether the plaintiff (Dingwall) had to provide DC Water with the pre-suit notice required by D.C. Code § 12-309 for actions against the District government. *Id.* at 975. The court concluded that DC Water was not included within the ambit of § 12-309 because it is an entity legally distinct from the District. *Id.* at 978. In reaching this conclusion, the Court found significant the fact that DC Water "is '*sui juris*'; i.e., it has the power '[t]o sue or be sued' in its own name." *Id.* at 977 (*quoting* D.C. Code § 43-1673(1) (currently codified at D.C. Code § 34-2202.03(1))). The court also stressed that DC Water has the power to enter into contracts with "*the District*, the United States, Maryland or Virginia, or their political subdivisions." *Id.* (*quoting* D.C. Code § 43-1673(10) (currently codified at 34-2202.03(10))) (emphasis added). The court observed that DC Water's "authority to enter into a contract with the District is inconsistent with the notion that [DC Water] is indistinguishable from the District; *an entity does not contract with itself*." *Id.* (emphasis added). The court also reviewed legislative history related to the Congressional enactment authorizing DC Water to issue revenue bonds for wastewater treatment facilities and noted that the objectives of the

creation of DC Water included removing DC Water from the District's budget, procurement, and personnel processes. *Id.* at 977-78. The court concluded, "[i]n light of this background, [DC Water] demonstrably is not the same entity as the District of Columbia." *Id.* at 978.

In a subsequent case, *District of Columbia Water and Sewer Authority v. Delon Hampton & Associates*, 851 A.2d 410, 412 (D.C. 2004), the District of Columbia Court of Appeals confirmed its holding in *Dingwall*—that DC Water is an entity legally distinct from the District of Columbia. The *Delon* case arose out of a dispute relating to delays in a construction project at DC Water's Blue Plains Wastewater Treatment Plant. The defendant argued that DC Water's claims were time barred under the statute of limitations in D.C. Code § 12-301. *Id*. at 412. DC Water sought to avoid the statute of limitations by asserting that it should fall within a statutory exemption from the statute of limitations for actions brought by the District government. *Id.* Essentially, DC Water attempted to stand in the District's shoes to avoid the operation of the three year statute-of-limitations. The trial court, based on the holding in *Dingwall*, held that the statute of limitations exemption for the District government does not apply to DC Water. *Id.* The District of Columbia Court of Appeals agreed, concluding that the phrase "District of Columbia government" as used in D.C. Code § 12-301 "does not encompass the separate juridical entity of which [DC Water] consists." *Id*. at 416; *see also New 3145 Deauville, L.L.C. v. First American Title Insurance Company, et al.*, 881 A.2d 624 (D.C. 2005) (holding that "functions and activities of [DC Water], a separate corporate body distinct from the District of Columbia, are proprietary in nature and thus beyond the protection of *nullum tempus*" and the exception in D.C. Code § 12-301).

Even the District government has previously acknowledged DC Water's independence. DDOE's Response to Order Requiring Additional Briefing makes much of DC Water having "a

separate legal existence *within* the District government," D.C. Code § 34-2202.02 (emphasis added), claiming that the word "within" sharply constricts DC Water's independence and makes it subject to control by the District government. This assertion is contrary to the decisions noted above and, ironically, to the District government's own previous litigation position in the Superior Court of the District of Columbia. DC Water and the District government were sued by a plaintiff who was struck and injured by a DC Water vehicle. The District government was named by the plaintiff under the theory that the District government was liable for the acts of DC Water through *respondeat superior*. Such a view might be consistent with the idea that DC Water is an entity within the District government. However, the District government rejected that position. It filed a Motion for Summary Judgment which stressed that the District government could not be held liable for actions of DC Water employees because of DC Water's legal independence:

> District of Columbia Official Code § 34-2202.02, established the Water and Sewer Authority as an independent authority of the District government. Pursuant to this Code Section, [DC Water] has the power to sue and be sued. *See* D.C. Official Code § 34-2202.03. [The plaintiff] is an employee of defendant [DC Water], and not an agent or employee of the District of Columbia. . . . In addition, at the time of the occurrence, defendant Thomas Davis was operating a truck owned by defendant [DC Water] and not owned by the District of Columbia . . . . Therefore, plaintiff must look to [DC Water] for relief, and not to the District of Columbia government.

Memorandum of Points and Authorities in Support of the District of Columbia's Motion for Summary Judgment at 3, *Zavala v. District of Columbia Water and Sewer Authority*, No. 06-1864 (D.C. Super. Ct. May 5, 2006) (attached hereto as Exhibit 1). The Superior Court of the District of Columbia granted the District government's Motion for Summary Judgment. Order Granting District of Columbia's Motion for Summary Judgment, *Zavala v. District of Columbia Water and Sewer Authority*, No. 06-1864 (D.C. Super. Ct. May 31, 2006) (attached hereto as

Exhibit 2). Subsequently, the District government stipulated that "[DC Water] is an entity separate and distinct from defendant District of Columbia as set forth in the legislation which created [DC Water]."[4] Stipulation at 1, *Zavala v. District of Columbia Water and Sewer Authority*, No. 06-1864 (D.C. Super. Ct. July 10, 2006) (attached hereto as Exhibit 3).

There can be no dispute that DC Water is a "person" separate from the District government. Because it timely filed comments on the Permit, it is entitled to maintain its Petition for Review of the Permit.

B. Responses to the Board's Questions

(1) The Attorney General of the District of Columbia Is Representing the Government of the District of Columbia in this Matter, and DC Water is Represented by Its Own Counsel.

The District of Columbia's Attorney General's Office is representing the District government, more specifically, the DDOE, in this matter. The D.C. Attorney General is responsible for all of the District's law business and "all suits instituted by and against the government" of the District. D.C. Code § 1-301.81(a)(1). This power extends to suits brought by and against agencies subordinate to the District government, such as DDOE, but not independent agencies, such as DC Water, that are *sui juris*. The D.C. Attorney General also has "the power to intervene in legal proceedings," *id.*, as it seeks to do on behalf of DDOE in the present matter.

DC Water "is not the same entity as the District of Columbia," *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 978 (D.C. 2001), so DC Water does not

[4] The District government's statements acknowledging DC Water's independence in *Zavala* are significant because, in that case, the relationship between the District government and DC Water was squarely at issue and briefed by the parties, being central to the question of whether *respondeat superior* liability existed. This is in stark contrast to DC Water's 2007 motion, cited by DDOE and the Board, which only referred in passing (and vaguely, as explained below) to the relationship between the District government DC Water, without providing any legal analysis or briefing, because that relationship was not at issue in the 2006 permit appeal. *See also* Part I.B(4) below.

represent the government of the District of Columbia in this—or any—matter. Rather, DC Water, as a co-permittee (or a legal "person" under 40 C.F.R. § 124.2(a)), is separately represented by and through its own General Counsel and outside counsel. In challenging the Permit, DC Water is exercising its express statutory power "[t]o sue and be sued" on its own behalf. D.C. Code § 34-2202.03; *Dingwall,* 766 A.2d at 977.

(2) DC Water Has the Legal Authority to File, as a Co-Permittee and/or "Person" that Commented on the Draft Permit, a Petition under 40 C.F.R. § 124.19 Challenging the Permit.

DC Water has the legal authority to file a petition for review of the Permit under 40 C.F.R. § 124.19. DC Water is entitled to challenge the Permit as a co-permittee because the Permit refers to DC Water by name and purports to impose significant legal, regulatory, and financial obligations on DC Water. The Permit explicitly defines "permittee" to include "independent agencies, such as the District of Columbia Water and Sewer Authority." Permit at 51. The Permit also names DC Water as an entity "responsible for complying with those elements of the permit within its jurisdictional scope and authorities" and requires it to "provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit." *Id*. at 7. Because DC Water is a separate legal entity identified by name in the Permit and is subject to legal, regulatory, compliance, and financial obligations under the terms of the Permit, DC Water is entitled to file a petition for review as a co-permittee.

Even if DC Water is not a co-permittee, it is entitled to file a petition for review under 40 C.F.R. § 124.19. To file a petition for review of an NPDES permit, the federal regulation only requires that the petitioner (1) have filed comments on the draft permit or participated in the public hearing and (2) be a "person." 40 C.F.R. § 124.19(a) ("[A]ny person who filed comments

on [a] draft [NPDES] permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision."). DC Water clearly satisfies both of these elements. DC Water has similar standing to challenge permit conditions that were changed from the draft Permit to the final Permit.

It is undisputed that DC Water submitted timely written comments on the draft Permit on June 4, 2010.

Further, DC Water meets the regulatory definition of "person"—"an individual, association, partnership, corporation, municipality, State [defined to include the District of Columbia], Federal, or Tribal agency, or an agency or employee thereof." 40 C.F.R. § 124.2(a). DC Water's enabling statute provides: "There is established, as an *independent* authority of the District government, the District of Columbia Water and Sewer Authority. 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. Code § 34-2202.02(a) (emphasis added). Because it is an independent corporate body, DC Water is a "corporation" meeting the definition of a "person" set forth in 40 C.F.R. § 124.2(a). Alternatively, DC Water satisfies the definition of a "person" as an independent agency of the District of Columbia. *See* Permit at 51.

Thus, as a co-permittee named in the Permit and/or a "person" that timely filed comments on the draft Permit, DC Water is entitled to file, and maintain in its own name, a petition for review of the Permit.

(3) DC Water May Take a Position that Is Separate from, and even Contrary to, the Position of DDOE.

As an independent corporate body with a separate legal existence, D.C. Code § 34-2202.02(a), DC Water may take a position separate from, and contrary to, the position of DDOE. Obviously, the DC Water Board of Directors has a fiduciary responsibility to take action

consistent with its view (not the District government's view) of what is best for DC Water. DDOE cannot substitute its judgment for the DC Water Board's in this or any matter.

As explained in Part I.A above, DC Water was established as a fiscally and legally independent entity, such that the "District of Columbia government . . . does not encompass the separate juridical entity of which [DC Water] consists." *District of Columbia Water and Sewer Authority v. Delon Hampton & Associates,* 851 A.2d 410, 416 (D.C. 2004); *see also Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 978 (D.C. 2001) (DC Water "demonstrably is not the same entity as the District of Columbia."). DC Water is a separate legal entity, governed by its own Board of Directors, so it is not subject to District government or DDOE control as to its financial, legal, and regulatory obligations. *See* D.C. Code §§ 34-2202.02(a), -2202.04. DDOE's position that DC Water is under the authority of the District government has been consistently invalidated and repudiated. For example, when the District government attempted to assert that DC Water personnel were subject to oversight by the District of Columbia's Chief Financial Officer, Congress intervened to reassert DC Water's financial independence. District of Columbia Water and Sewer Authority Independence Act, Public Law 110-273, 122 Stat. 2491 (July 15, 2008); *see also* D.C. Code § 1-204.25(e). As a separate legal entity, DC Water is not bound by the legal position advanced by DDOE and is entitled to take a separate and contrary position as deemed warranted by DC Water's Board of Directors. To hold otherwise would give DDOE (rather than DC Water's Board of Directors) control over DC Water's financial and legal obligations in the area of stormwater management. Again, the District government may not do indirectly (by silencing DC Water's concerns about its legal and financial obligations under the Permit) what it cannot do directly (directing the legal and

financial activities of DC Water and, thereby, usurping the DC Water Board of Director's lawful role).

Furthermore, as the District of Columbia Court of Appeals has recognized, DC Water "is '*sui juris*'; i.e., it has the power '[t]o sue or be sued' in its own name." *Dingwall*, 766 A.2d at 977 (*quoting* D.C. Code § 43-1673(1) (currently codified at D.C. Code § 34-2202.03(1))). The statutory right to bring a lawsuit in its own name distinguishes DC Water from all of the District government's stormwater agencies. This power enables DC Water to protect its separate legal and financial interests implicated by the Permit by speaking for itself in court, regardless of whether its position is contrary to DDOE's—or any other party's—position. Although the D.C. Attorney General has charge of all suits instituted by the District government (including subordinate agencies like DDOE), he does not have charge of suits instituted by DC Water, a "separate juridical entity" not encompassed by the District government. *See* D.C. Code § 1-301.81(a)(1); *District of Columbia Water and Sewer Authority v. Delon Hampton & Associates*, 851 A.2d 410, 416 (D.C. 2004). DC Water is, therefore, entitled to take a position separate from and contrary to the position of DDOE to protect its legal and financial independence. DDOE's position that it has the right to speak for DC Water would undermine DC Water's independence, which was at the heart of the decision by the District and Congress to establish DC Water in the first place. *See* H.R. Rep. No. 104-635, at 15-17 (1996).

As explained in Part I.B(2) above, DC Water has met the federal regulatory requirements (as an independent "person" that filed comments on the draft Permit) for filing a petition for review with the Board. *See* 40 C.F.R. § 124.19(a). To the extent that DDOE believes that District law precludes DC Water from taking a separate position, the proper forum to address the issue would be in the Superior Court of the District of Columbia, with a suit for declaratory

judgment or injunctive relief. In the absence of a declaratory judgment ruling to the effect that DDOE speaks for DC Water, the Board must, as a matter of federal law, allow DC Water's Petition for Review to proceed.

(4) DC Water's 2007 Motion Is Not Relevant to DC Water's Legal Standing to Bring the Petition for Review.

DC Water's 2007 Motion for Leave to Withdraw as a Petitioner (the "2007 Motion") has no bearing on DC Water's authority to file a petition for review in the present matter. Because it is an independent authority with a separate legal existence and with the right to file lawsuits, DC Water cannot legally participate in a permit appeal through the Mayor of the District of Columbia and the District of Columbia Stormwater Administrator (DDOE), as suggested by the D.C. Attorney General.[5]

The 2007 Motion filed in the previous permit appeal has no legal effect on DC Water's legal standing as a co-permittee and "person" under federal law, entitled to file a petition for review of the Permit. DC Water's legal status was not briefed in the prior appeal or the 2007 Motion, nor was it decided by the Board. DC Water is incapable of unilaterally abdicating its statutorily-mandated legal independence, giving up its power "[t]o sue or be sued" in its own name, or nullifying the federal regulatory standard for challenging permits. *See* D.C. Code §§ 34-2202.02(a), -2202.03(1); 40 C.F.R. § 124.19(a). Even if DC Water wanted to stand in the District's shoes and participate through the District government, the District of Columbia courts' rulings noted above would clearly disallow it. *See District of Columbia Water and Sewer*

[5] Notably, in the 2006 appeal, DC Water was not specifically named in the permit, so it was not as clearly a co-permittee in that case, particularly once it was removed as Stormwater Administrator. However, the current permit refers to DC Water by name and imposes potentially extensive legal and financial obligations. Such obligations constitute a material change of circumstances which support DC Water's independent appeal of the Permit.

Authority v. Delon Hampton & Associates, 851 A.2d 410, 416 (D.C. 2004); *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 978 (D.C. 2001).

Finally, the 2007 Motion referenced by the Board was an unopposed motion seeking leave for DC Water to withdraw as a petitioner from a previous permit appeal which had been filed jointly by the District government and DC Water. *In re: Government of the District of Columbia Municipal Separate Storm Sewer System*, NPDES Permit No. DC 0000221, NPDES Appeal Nos. 06-07 and 06-08. DC Water joined with the District government in the Petition for Review of the 2006 amendments to the District's MS4 permit because, at that time, DC Water served as the District's Stormwater Administrator, charged with coordinating permit compliance among the stormwater agencies. In its then-capacity as Stormwater Administrator, DC Water raised issues of concern affecting the District as a whole, not DC Water in particular, in the 2006 Petition for Review. Notably, neither the District government nor the EAB questioned DC Water's right to jointly file the 2006 Petition for Review or to participate as a party in the ADR process which followed. The 2007 Motion was filed when Stormwater Administrator responsibilities were transferred from DC Water to DDOE, so DC Water had no remaining issues of concern warranting continued participation in the appeal that directly impacted DC Water.

DC Water's statements from the 2007 Motion, quoted in the Board's Order Requiring Additional Briefing and DDOE's Response, were very cursory and were not accompanied by any substantive legal analysis or briefing. The issue of DDOE's ability to represent DC Water was neither contested nor actually litigated in the 2006 appeal. Although the Board granted the 2007 Motion, it did not actually determine the issue or provide any legal analysis of whether DC Water could participate in the permit appeal through DDOE and the Mayor.

Because it was not accompanied by any legal analysis, the meaning of the following statement from the 2007 Motion is ambiguous: DC Water "no longer need be separately identified in the petition, but simply can participate with all other affected District agencies through the mayor and the Stormwater Administrator." The District of Columbia Water and Sewer Authority's Motion for Leave to Withdraw as a Petitioner, *In re. Gov't of the District of Columbia Municipal Separate Storm Sewer* System, NPDES Appeals Nos. 06-07 & 06-08 (EAB June 7, 2007). It is unclear exactly what DC Water's outside counsel meant by the use of the term "participate." Most likely, the intent of this statement was that, as a stormwater agency, DC Water could participate, in a practical sense, cooperatively through formal and informal coordination with the Mayor of the District of Columbia and DDOE.

To the extent that the 2007 Motion suggested that DC Water could legally participate through the District government in the permit appeal, or that it could be legally represented in a lawsuit by the Mayor of the District of Columbia and the District of Columbia Stormwater Administrator (DDOE) through the D.C. Attorney General, the motion was clearly legally incorrect and has no bearing on DC Water's true legal status in this appeal.

II. RESPONSE TO THE BOARD'S ORDER TO SHOW CAUSE

A. DC Water's Response to the Board's Order to Show Cause

For the reasons stated in Part I above, hereby incorporated by reference, DC Water is entitled under 40 C.F.R. § 124.19 to file and maintain its Petition for Review of the Permit. As the District government has previously stipulated, "[DC Water] is an entity separate and distinct from [the] District of Columbia as set forth in the legislation which created [DC Water]," Stipulation at 1, *Zavala v. District of Columbia Water and Sewer Authority*, No. 06-1864 (D.C.

Super. Ct. July 10, 2006) (Exhibit 3), and it cannot be denied its statutory right to "sue or be sued" in this matter which affects its legal and financial obligations. D.C. Code § 34-2202.03(1).

B. WWP's Response to the Board's Order to Show Cause

The WWP has independent standing to appeal all provisions of the Permit which were changed from the draft that was published for public comment. Pursuant to federal regulation, a person who did not comment on a draft permit or participate in a public hearing may petition for administrative review "to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a). The WWP is a nationwide association of communities owning and operating combined sewer systems and separate storm sewer systems, many of which hold MS4 permits like the Permit at issue in this case; DC Water is a member of the WWP. A "person" is defined in 40 C.F.R. § 124.2(a) to include an association, so the WWP qualifies as a "person" because it is a trade association. Therefore, the WWP is entitled to challenge provisions of the Permit that were changed from the draft to final versions.

Among the Permit provisions challenged in DC Water's and WWP's Petition for Review are the provisions setting forth DC Water's and DDOE's respective responsibilities under the Permit, including the Stormwater Management Program Administration and Permittee Responsibilities set forth in section 2.3 of the Permit. Extensive changes were made to provisions in the draft Permit regarding DC Water's financial and legal responsibilities under the Permit. For example, as noted in footnote 2 above, EPA removed section 2.3.2.e. of the draft Permit, eliminating the following safeguard for the stormwater agencies, including DC Water: "DDOE's major responsibilities under these MOUs and institutional agreements shall include . . . Reviewing and processing requests from the MS4 Task Force agencies for reimbursement from the Stormwater Enterprise Fund for Permit-related tasks." Draft Permit § 2.3.2.e (April 21,

2010). The deletion of this essential financial safeguard included in the draft Permit could have profound implications for DC Water's financial responsibility for all compliance requirements contained in the Permit. DC Water does not have an independent stormwater fee to fund MS4 Permit compliance, so the elimination of the Stormwater Enterprise Fund reimbursement provisions places DC Water at risk of financial liability for compliance with the Permit terms without having an alternative funding source. Because the final Permit includes changes in the responsibilities of DDOE and DC Water, the WWP is entitled to appeal those provisions.

The provisions in section 4.10.3 of the final Permit pertaining to the Consolidated TMDL Implementation Plan to be submitted by the District within two years of the effective date of the Permit, which were challenged by the WWP and DC Water in their Petition for review, are different from the requirement that was proposed in Section 8 of the draft Permit. Because the requirements related to the Consolidated TMDL Implementation Plan were changed from the draft permit to the final permit, the WWP is entitled to challenge them.

Changes were also made from the draft to the final Permit with respect to section 4.11 of the final Permit, entitled "Additional Pollutant Sources." The draft Permit's provisions required compilation and submittal of pertinent information on known or potential pollution sources "as soon as practicable after it becomes aware of such information." Draft Permit § 3.1 (April 21, 2010). That quoted qualification was removed from the final Permit, making section 4.11 even more overbroad and vague than the provisions in the draft Permit. WWP should be permitted to challenge the provisions in section 4.11 of the final Permit to the extent that they diverge from provisions in the draft Permit.

Finally, as the Board notes in its order to show cause, DC Water's and WWP's Petition for Review identifies section 4.3.1.3 of the Permit as a change from the draft to the final Permit.

Without notice, EPA added to the final Permit the requirement in section 4.3.1.3 that the permittee notify "the public within 24 hours when the sanitary sewer overflows to the MS4." Because this provision was not included in the draft Permit, the WWP may challenge it.

CONCLUSION

DC Water is a corporate body legally independent from the District government. D.C. Code § 34-2202.02(a). DC Water is a "person" under 40 C.F.R. §124.2(a). Because DC Water timely filed comments on the draft Permit, it has an absolute right under 40 C.F.R. § 124.19(a) to appeal the Permit. Furthermore, DC Water is entitled to challenge the Permit as a co-permittee because the Permit identifies it by name and imposes on it legal, regulatory, compliance, and financial obligations. DC Water is a proper Petitioner in this case.

The same is true of the WWP. It is a "person" under 40 C.F.R. § 124.2(a) and is, therefore, permitted to challenge any provisions that were changed from the draft to the final Permit pursuant to 40 C.F.R. § 124.19, including provisions related to the scope of DC Water's and DDOE's responsibilities under the Permit, the Consolidated TMDL Implementation Plan, Additional Pollutant Sources, and the post-draft 24-hour public notice requirement for sewer releases which reach the MS4 system.

As a separate legal entity from the District government, DC Water has the legal authority to take a position separate from, and even contrary to, the position of the District government. However, even if that District law proposition were in question, it would not affect DC Water's right to file and maintain its Petition for Review of the Permit under federal law.

If the District government believes that it can speak for DC Water on these legal and financial obligations proposed in the Permit for DC Water, the District government should bring that argument to Superior Court of the District of Columbia. Given the District of Columbia

courts' consistent holdings (in *Dingwall, Delon Hampton,* and *Zavala*), such an argument should be readily rejected. *District of Columbia Water and Sewer Authority v. Delon Hampton & Associates,* 851 A.2d 410, 416 (D.C. 2004); *Dingwall v. District of Columbia Water and Sewer Authority*, 766 A.2d 974, 978 (D.C. 2001); Order Granting District of Columbia's Motion for Summary Judgment, *Zavala v. District of Columbia Water and Sewer Authority*, No. 06-1864 (D.C. Super. Ct. May 31, 2006).

Finally, DC Water does not object to DDOE's intervention into the Permit appeal. DC Water remains hopeful that the Board's ADR process will yield the necessary and appropriate clarifications to the Permit that will resolve DC Water's concerns. In DC Water's view, allowing DDOE to participate in ADR provides the best opportunity to facilitate such an outcome.

DC Water respectfully requests that the Board leave standing Petitioners' Petition for Review and grant DDOE's Motion to Intervene. The parties would then pursue ADR and, if unsuccessful, litigate the appeal to a conclusion.

If the Board either dismisses DC Water's Petition or denies DDOE's intervention, an appeal is almost certain. Allowing all parties to participate in ADR would promote judicial economy and avoid dual judicial proceedings on the same permit before the Board (Friends of the Earth, et al. Petition for Review) and the Circuit Court of Appeals (either or both DDOE's appeal of any denial of its motion to intervene or DC Water's appeal of any dismissal of its Petition for Review). This will avoid the risk of inconsistent opinions between the Board and Circuit Court of Appeals. Moreover, allowing DC Water to maintain its Petition while also allowing DDOE to intervene would ensure one consolidated appeal, should one be necessary, and any such appeal would have the benefit of the EAB's decision.

Again, DC Water and the WWP appreciate the opportunity to submit this brief.

Dated: January 26, 2012

Respectfully submitted,

THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to District Department of the Environment's Additional Briefing and to the Board's Order to Show Cause was filed electronically with the Environmental Appeals Board and was served by regular first class U.S. Mail, postage prepaid, this 26th day of January, 2012, upon the following:

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