

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

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

SETTLEMENT AGREEMENT

This Settlement Agreement allocating responsibility under the District of Columbia’s Municipal Separate Storm Sewer System Permit (“MS4 Permit”) is entered by and between the District Department of the Environment (“DDOE”) on behalf of the Government of the District of Columbia and the District of Columbia Water and Sewer Authority (“DC Water”) collectively referred to herein as the “Parties,” to specify DC Water’s responsibilities under the District’s MS4 Permit issued October 7, 2011, as modified on November 9, 2012, and to specify the funding source for each such responsibility.

1. Background

(a) On September 30, 2011, the U.S. Environmental Protection Agency (“EPA”) issued the Phase I National Pollutant Discharge Elimination System (“NPDES”) permit for the District of Columbia’s Municipal Separate Storm Sewer System, Permit No. DC0000221, which was effective October 7, 2011.

(b) On November 4, 2011, DC Water and the Wet Weather Partnership filed a petition with the EPA Environmental Appeals Board (“EAB”) for review of certain conditions of the District’s MS4 permit.

(c) On November 17, 2011, DDOE, on behalf of the District of Columbia, the Permittee, moved to intervene in this action.

(d) On November 9, 2012, the Permit was modified.

(e) DDOE and DC Water have agreed to settle this action without admission of fact or law, which the Parties consider to be a just, fair and equitable resolution of the claims raised in this action.

2. Parties Bound.

(a) The Parties agree that the provisions of this Settlement Agreement shall apply to and be binding upon DDOE and DC Water, and each and any of its officers, employees, contractors, agents, successors, and assigns.

(b) This Settlement Agreement shall not constitute an admission or evidence or any fact, wrongdoing, misconduct, or liability on the part of the District of Columbia Government, DDOE, DC Water or their respective officers and agencies, or any person affiliated with them.

3. Enforcement. This Settlement Agreement shall be enforceable by either party in the District of Columbia Superior Court. Solely with respect to an action to enforce this Settlement Agreement or the terms thereof, the Parties waive any and all objections and defenses they might have as to the jurisdiction of the District of Columbia Superior Court. Such waiver and consent do not constitute a waiver or limitation of any jurisdictional, procedural, or substantive entitlements, defenses, or claims the Parties may have with respect to any administrative or

judicial action that pertains, in whole or in part, to matters other than enforcement of the terms of this Settlement Agreement.

4. Terms of Settlement.

(a) DC Water's Compliance Responsibilities under the MS4 Permit are as follows:

(i) Inspection, repair as necessary, and cleaning of storm water catch basins annually.

Through the end of Fiscal Year ("FY") 2014, DDOE will reimburse DC Water for water quality catch basin maintenance. In FY 2015, DDOE will provide DC Water funding to purchase appropriate equipment suitable for water quality catch basin maintenance. Thereafter, DC Water shall fund all costs associated with inspection, repair and cleaning stormwater catch basins;

(ii) Inspection, repair and cleaning of storm water outfall structures (including any adjacent areas, as necessary, to ensure the physical integrity of and the free flow of water through the storm sewer outfall structures) located within the MS4 area;

(iii) Inspection and repair of, and clearing blockages as necessary from, storm sewer lines in District of Columbia public space, including easements, to ensure structural integrity is maintained;

(iv) Development and implementation of stormwater pollution prevention plans at DC Water facilities;

(v) Continuance, at the current level of effort DC Water's Floatable Debris Removal Program (skimmer boats, etc.);

(vi) Support for DDOE's Illicit Discharge Identification and Monitoring Program;

- (vii) Enforcing DC Water regulations as they relate to illicit discharges and dumping into catch basins within the MS4 area, and supporting the District of Columbia Homeland Security and Emergency Management Agency response to spills;
- (viii) Compliance with any applicable Historic Preservation notification requirements triggered by DC Water's activities within the MS4 area;
- (ix) Compliance with applicable Endangered Species Act requirements triggered by DC Water's activities within the MS4 area;
- (x) Providing existing DC Water data and computer models to the Stormwater Administration (consistent with licensing and any other legal requirements); and
- (xi) For purposes of developing MS4 Annual Reports required by EPA, report to the Stormwater Administrator on DC Water MS4-related activities.

(b) Provisions for Additional Tasks:

- (i) Any (1) additional tasks or (2) increased level of effort (eligible for funding under D.C. Official Code § 8-152.02(e)(1) and (2)) for tasks identified in Section 4(a) above during the effective period of the MS4 Permit, must be agreed to by DDOE and DC Water in writing. Upon agreement by DDOE and DC Water, funding shall be provided from the District of Columbia's Stormwater Enterprise Fund. These additional tasks, if any, and funding levels shall be detailed in an annual MOU which specifies funding for services of DC Water and DDOE to maintain compliance with the District's MS4 Permit; and
- (ii) Additional annual tasks that are covered by the Enterprise Fund include DC Water's administrative costs for billing and collection of the District Stormwater Fee. Administrative costs for DC Water's Stormwater Enterprise Fund Fee billing and

collection services shall be based on actual costs¹. Any (i) change in the current scope of service or (ii) additional administrative level of effort, such as implementing new rate structures or processing and managing billing inserts, which may be requested by DDOE, which results in an increase in DC Water's administrative costs in billing and collecting the District's Enterprise Fund Stormwater Fee shall be detailed in an agreed written amendment to this Settlement Agreement. DC Water's administrative costs for billing and collection of the District Stormwater Fee shall be subject to quarterly reconciliation with DDOE, and to annual review by an independent financial auditor upon DDOE request.

(c) Upon execution, this Settlement Agreement will represent an agreement referenced in Section 2.3.2 of the MS4 Permit.

(d) The terms of this Settlement Agreement shall not be binding on the Parties with respect to permits issued subsequent to the expiration of the current permit five (5) year term.

5. Withdrawal. Upon execution of this Settlement Agreement, DC Water shall withdraw with prejudice its November 4, 2011, Petition for Review of the District's MS4 Permit, in the above-captioned case with the express understanding that there shall be no right to raise any of these issues or any subject matter allegation based thereon in relation to the current MS4 permit (November 9, 2012), at a later date in any forum; except that the Parties will retain the right to enforce the terms of this Settlement Agreement. This withdrawal is automatically and immediately effective as of the date of this Settlement Agreement. Within three (3) business days after executing this Settlement Agreement, the parties will file a Joint Stipulation of

¹ Actual allowable costs shall include: (1) Fifty (50%) percent direct IADB (impervious area database), (2) Five (5%) percent customer service costs applicable to DDOE stormwater fee (less metering and emergency command center costs); (3) Fringe benefits and overhead applied; and (4) One hundred (100%) percent of DDOE stormwater fee-only requests/requirements.

Dismissal with Prejudice in the pending matter before the EPA EAB associated with this Settlement Agreement. This Settlement Agreement in no way absolves DC Water from liability related to any matters not specified herein, including any actions brought by the U.S. EPA or the District of Columbia, which do not arise out of the circumstances contained in DC Water's Petition for Review or this Settlement Agreement.

6. No relief from compliance; no endorsement by the District. This Settlement Agreement shall not relieve DC Water of its obligation to comply with all applicable provisions of federal, state or local law; nor shall it be construed to be a prospective ruling on, or determination of, any issue related to any federal, state or local permit, approval or other requirement other than the MS4 Permit which is the subject of this Settlement Agreement.

7. No private right of action for third parties. Nothing in this Settlement Agreement is intended to, or does, create a private right of action or defense in any person or entity other than the District and DC Water. No person or entity may assert any claim or right as a third-party or other beneficiary, or as a member of a protected class, under this Settlement Agreement in any civil, criminal, or administrative action, against the District or DC Water.

8. DC Water's Release and Covenant not to Sue. DC Water hereby waives any right it has to an administrative hearing arising from its Petition for Review or any violations of the District's MS4 Permit that is the subject of this action. DC Water covenants not to sue or to commence any other form of administrative or judicial action against the District with respect to any and all acts or omissions within the scope of, arising from, or otherwise related to the matters that were asserted, or could have been asserted, by Petitioners in the Petition.

9. Breach. If DC Water or DDOE breaches any provision of this Settlement Agreement, and fails to cure the asserted breach within fourteen (14) days of written notice from

the non-breaching party, the non-breaching party shall have the right to enforce the terms of this Settlement Agreement before the District of Columbia Superior Court or any other court of competent jurisdiction. In addition to any other remedy for breach of this Settlement Agreement available in law or equity, the non-breaching party shall be entitled to recover its reasonable attorney's fees and costs associated with having to enforce the terms of this Settlement Agreement.

10. Modification. There shall be no modification of this Settlement Agreement except in writing and signed by authorized representatives of the District and DC Water.

11. Capacity and Authority of Signatories. The undersigned representatives of DC Water certify that they are fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind DC Water. The District certifies that signature of the Settlement Agreement by all of its undersigned representatives constitutes full authorization, pursuant to D.C. Official Code § 2-406 and Mayor's Order 92-54 (May 6, 1992), to enter into the terms and conditions of this Settlement Agreement, to execute the Settlement Agreement on behalf of the District, and to legally bind the District.

12. Construction. This Settlement Agreement shall be construed without regard to any presumption or other rule of law requiring construction against the party who caused it to have been drafted.

13. Governing Law. This Settlement Agreement shall be governed by and construed and enforced in accordance with the laws of the District of Columbia.

14. Notice. Written communications submitted under this Settlement Agreement shall be deemed effective (1) upon receipt if sent by U.S. Post or (2) upon the date sent if sent by overnight delivery, facsimile, or email. In addition, to be effective, any such notice must be

addressed as follows, unless the listed individuals or their successors give written notice of change(s) to the parties:

District of Columbia

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202-481-3845

DC Water

Paul Calamita
AquaLaw
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Richmond, VA 23219
paul@aqualaw.com
804-716-9021 x201

15. Entire Agreement. This Settlement Agreement constitutes the entire understanding between the Parties hereto and is intended as the complete and exclusive statement of the agreement between the Parties with respect to the subject matter hereof, and supersedes all prior agreements, negotiations, and understandings.

16. Counterparts. Provided that all parties hereto execute a copy of this Settlement Agreement, the Settlement Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. Executed copies of this Settlement Agreement may be delivered by facsimile transmission or other comparable means. This Settlement Agreement shall be deemed fully executed and entered into on the date of execution by the last signatory required hereby.

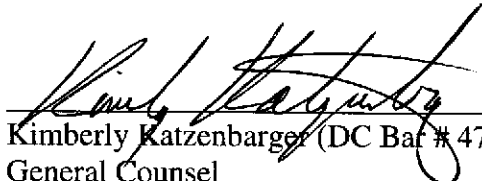
17. Consultation with Counsel and Understanding of Terms. The Parties have read this Settlement Agreement, have had a full opportunity to consult (and have in fact consulted) with legal counsel with regard to it, and have signed this Settlement Agreement voluntarily and freely and with the full understanding of its terms. The Parties further understand and agree that each has relied wholly upon its own judgment, belief and knowledge of the nature, extent, effect and duration of the settlement, and enter into this Settlement Agreement without reliance upon any statements or representations by any other Party or its representatives except those expressly set forth herein. Each Party waives and assumes the risk of any and all claims which exist as of the date of this Settlement Agreement or in the future, which that Party does not know of or suspect to exist, whether through ignorance, oversight, error, negligence or otherwise with respect to either facts or law, and which, if known, would materially affect its decision to enter into this Settlement Agreement.

Dated and Entered this ____ day of _____, 2012


FOR THE DISTRICT OF COLUMBIA:

IRVIN B. NATHAN
Attorney General for the
District of Columbia


ELLEN EFROS
Deputy Attorney General
Public Interest Division



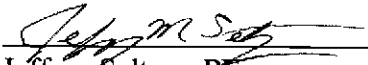
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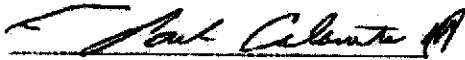
Keith A. Anderson
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Jeffrey Seltzer, PE
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DATE: 1/11/13

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DATE: _____

1/10/13