

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

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In re:))
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Government of the District of Columbia) NPDES Appeal No. 11-05
Municipal Separate Storm Sewer System))
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NPDES Permit No. DC0000221))
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**DISTRICT DEPARTMENT OF THE ENVIRONMENT'S
RESPONSE TO PETITION FOR REVIEW**

The Attorney General of the District of Columbia through the General Counsel's Office of the District Department of the Environment ("DDOE") files its Response to the Petition for Review filed by the District of Columbia Water and Sewer Authority ("DC Water") and the Wet, Weather Partnership ("WWP") (hereinafter "Petitioners"). In support of its Response, the Attorney General and DDOE state the following.

BACKGROUND

On November 4, 2011, Petitioners filed a Petition for Review with this Board seeking review of the municipal separate storm sewer system ("MS4" or "permit") National Pollutant Discharge Elimination System ("NPDES") Permit No. DC0000221, issued to the Government of the District of Columbia. The Permit was signed by the U.S. Environmental Protection Agency ("EPA") on September 30, 2011, effective October 7, 2001. On November 17, 2011, the Permittee, the Government of the District of Columbia, through DDOE and the Attorney General's Office filed a motion for leave to intervene as party respondent and request to respond to the petition for review. On November 29, 2011, this Board issued an order requiring

additional briefing, specifically requesting DDOE to answer four key questions. DDOE responded on January 12, 2012. Thereafter, on January 19, 2012, this Board ordered Petitioners to show cause why they should be permitted to challenge the Permit. DDOE replied to Petitioners' response on January 31, 2012. This Board then issued an order granting the District's motion to intervene and limited the participation of Petitioner WWP. The Board deferred ruling on all other pending issues until the completion of alternative dispute resolution ("ADR").

The Board, in its February 2, 2012, order encouraged "the DC Attorney General, DDOE and DC Water to make best efforts to resolve their differences and to speak with one voice during ADR proceedings." The parties participated in ADR and while much progress was made ultimately not all of the issues could be resolved. The parties notified this Board that ADR was not successful. The Board lifted the stay and EPA and DDOE were asked to respond to the Petition for Review by June 11, 2012.

ARGUMENT

The MS4 Permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the MS4 owned or operated by the District of Columbia. The Permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded in the Permit.

The MS4 Permit is issued to the Permittee, the Government of the District of Columbia, not the Petitioners. Petitioner DC Water is simply a Stormwater Agency, similarly situated with the other District Stormwater Agencies, and lacks standing to petition for review. Further, the

issues raised by Petitioners lack merit. Accordingly, their Petition for Review must be dismissed.

1. Petitioners Lack Standing to Bring Their Claims.

a. *DC Water is Not a Permittee.*

The MS4 NPDES Permit clearly states that “[T]he Government of the District of Columbia is the permittee. . .” Final NPDES Permit DC0000221 at 7. The final Permit states that:

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

Id.

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

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

D.C. Official Code § 8-151.03(b)(2). Once DDOE was established and stormwater administration/management was transferred to DDOE, the Stormwater Administration was

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

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

D.C. Official Code § 8-152.01(c).

Pursuant to the MS4 Permit as well as District law, the permittee is the Government of the District of Columbia and the permittee has designated DDOE as the agency responsible for managing the MS4 Stormwater Management Program. Furthermore, 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. If DC Water wanted to be a permittee or co-permittee it could have filed or signed the permit application but has chosen not to do so. As such, DC Water is not a permittee or a co-permittee and lacks standing to challenge this Permit.

b. DC Water Does Not Have Standing To File a Petition Under 40 C.F.R. § 124.19.

Additionally, DC Water does not have standing to challenge the Permit as a person that filed comments pursuant to 40 C.F.R. § 124.19. Early in the District’s history, there were three separate sewer, water and sanitation departments.¹ Over many years, the agencies underwent several name and organizational changes. In 1985, the District Government established the

¹ See <http://www.dewater.com/about/history.cfm>

Department of Public Works which included the Water and Sewer Administration.² In 1996, the District Government created the District of Columbia Water and Sewer Authority pursuant to “The Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996”, DC Law 11-111, D.C. Official Code § 34-2202.02.

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

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

D.C. Official Code § 1-204.04(b). Pursuant to this authority, the Council established, “as an independent authority of the District government, the District of Columbia Water and Sewer Authority . . . that has a separate legal existence within the District Government.” D.C. Official Code § 34-2202.02(a) (emphasis added). The goal of establishing DC Water was to improve operational functions and to separate DC Water’s finances from those of the District’s overall budget.

While DC Water is an independent agency, it remains within the District government. As section 34-2202.02 points out, “The Authority shall be a corporate body, created to effectuate certain public purposes, that has a separate legal existence within the District government.” D.C. Official Code § 34-2202.02(a) (emphasis added). Further, with a few exceptions, DC Water is subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District Government. D.C. Official Code § 34-2202.02(b).

² *Id.*

DC Water's reliance on both *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) in earlier briefings to support its independent authority argument is misplaced. The holdings of both of the cases are very narrow in scope. In fact, the District of Columbia Attorney General has issued an opinion stating as much. The District's Attorney General noted that 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 to DDOE's January 31, 2012 Brief Responding to Board's Order to Show Cause).

Even though DC Water is an independent agency, its roles are defined by Council. For instance, Council delegated to DC Water the authority to issue revenue bonds, notes, and other obligations to borrow money to finance or assist in the financing or refinancing of undertakings in the area of utilities facilities, pollution control facilities, and water and sewer facilities. D.C. Official Code § 1-204.90(h)(1).

Thus, while Council clearly delegated to DC Water authority over its finances, budget, and other obligations, many of its functions were left within the jurisdiction of the Mayor and Council. See D.C. Official Code § 34-2202.03. For example, the Mayor, with the consent of Council, appoints the DC Water Board members and a Chair of the Board. D.C. Official Code § 2202.04. In addition, DC Water and its Board may not contract to privatize, to purchase or lease

the Blue Plains Wastewater Treatment Plant without the approval of the Mayor and the Council. D.C. Official Code §§ 34-2202.05(g)(2) and (3).

Another function, and the one relevant to this matter, is that of Stormwater Administrator. Prior to 2007, DC Water served as the District's MS4 Stormwater Administrator and coordinated the District's efforts to comply with the Permit. Once DDOE was created, the function of Stormwater Administrator was transferred to DDOE pursuant to section 8-151.03(b)(2). D.C. Official Code § 8-151.03(b)(2). As stated above, the Stormwater Administration within DDOE is responsible for "monitoring and coordinating the activities of all District agencies, including the activities of the District of Columbia Water and Sewer Authority ("[DC Water]"), which are required to maintain compliance with the Stormwater Permit." D.C. Official Code § 8-152.01(a). This section makes clear that DC Water is similarly situated with all other District agencies that are required to maintain compliance with the MS4 permit and just as with all other District agencies with MS4 responsibilities is under the authority of the Mayor. DC Water must participate in all matters regarding the MS4 permit through the Mayor and DDOE, the Stormwater Administrator. Therefore, DC Water does not have standing to bring an independent action.

c. WWP Does Not Have Standing to Bring this Petition.

WWP joined DC Water in all of the arguments raised in the Petition. However, this Board ruled on February 2, 2012, that the participation of the WWP as a petitioner was limited to challenging only one Permit condition, that of section 4.3.1.3 to the extent of the changes from the draft to the final Permit. Section 4.3.1.3 of the final Permit contains the requirement regarding notifying sewer and public health agencies as well as the public within 24 hours of a sanitary sewer overflow to the MS4. WWP did not file any comments on the

draft Permit. DDOE contends, below, that the only change to Section 4.3.1.3 was the addition of notifying the public of sanitary sewer overflows to the MS4. DDOE contends that this is not a substantive change since notification of sanitary sewer overflows to the MS4 was a requirement in the draft Permit. Therefore, because this is such a minor change, WWP does not have standing to bring this Petition and they must be dismissed.

2. Even if Petitioners Water Had Standing, the Issues Raised in their Petition Lack Merit.

a. The Permit Does Not Need to Define Each Party's Responsibilities.

DC Water argues that the Permit fails to define its responsibilities as a co-permittee. As established above, DC Water is not a co-permittee, but a stormwater agency. The Permit as well as District law, D.C. Official Code § 8-152.01, specifically identifies Stormwater Agencies. DC Water is included in that list. District law is clear that the Stormwater Administrator, 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. The Permit spells out the requirements that the Permittee must meet in order to comply with the Permit. Thereafter, DDOE, as the Stormwater Administrator, delegates to each Stormwater Agency its specific obligations. However, DDOE cannot require a Stormwater Agency to go beyond what its obligations are pursuant to District law. For example, street sweeping is a requirement of the Permit. DDOE will delegate this task to the Department of Public Works as it is the agency tasked with and funded for street sweeping. This will not be a task that is delegated to DC Water as it is outside DC Water's scope of legal responsibilities.

In addition, Section 2.1.3 of the Permit specifically states that the Permittee is not restricted from entering into inter-jurisdictional agreements with other District agencies affected through the Permit. In the past, agreements such as a 2000 Memorandum of Understanding

("MOU") between DDOE and DC Water, have listed the responsibilities that are historically assigned to each agency. At any time, DDOE can enter into an MOU to define a Stormwater Agency's responsibilities. As such, the Permit does not need to define each agency's responsibilities as they are already defined by District law.

b. Development of a Consolidated TMDL Implementation Plan is Not a DC Water Responsibility.

DC Water next argues that the development of a Consolidated TMDL Implementation Plan within two years is impracticable. Again, this argument by DC Water is without merit. The development of the TMDL plan is a requirement of the Permittee. In this case, DDOE as the designated agency is responsible for developing and drafting the plan. While DDOE will need and seek input from all of the Stormwater Agencies, it will not be the responsibility of those agencies to draft the plan. DDOE strongly believes that the TMDL plan can and will be drafted within the timeframe outlined in the Permit. However, should DDOE fail to timely complete the plan it will be the Permittee, through DDOE, that is in violation of the Permit, not DC Water and the other Stormwater Agencies. Therefore, this claim must be dismissed.

c. Permit Section 4.11 Is Not Vague and Overbroad and Is Not a DC Water Responsibility.

DC Water argues that Section 4.11 of the Permit, requiring the Permittee to compile data on additional pollutant sources and implement controls to minimize discharges, is vague and overbroad. This argument is also without merit. The first requirement, to compile data on additional pollutant sources, is a task that DDOE, as the designated agency, has been required to comply with for many permit cycles. This data is readily accessible, and while DDOE may need assistance from the Stormwater Agencies, DDOE has the tools to meet this requirement. It is the

Permittee, through DDOE, not DC Water, that is responsible for ensuring that this requirement is met.

The second requirement of Section 4.11, that the Permittee implement controls to minimize and prevent discharges of pollutants, is a task that has been required of the Permittee in earlier permits. Earlier permits referred to this as “source identification” and “duty to mitigate” requiring the Permittee to identify and manage additional sources of pollutants. The current version of the Permit does not contain any additional or new obligations it simply rewords those sections. This requirement, like many in the Permit is the responsibility of the Permittee, through DDOE. While DDOE may need assistance from the Stormwater Agencies, including DC Water, the ultimate responsibility will be DDOE’s. The Permit requires that DDOE develop a comprehensive stormwater management plan which will address many issues, including this. Therefore, this is not an obligation of DC Water but of the Permittee and this claim must also be dismissed.

d. The Requirements of Permit Section 4.3.1.3 Are Permissible.

Section 4.3.1.3 of the Permit requires notification of the public within 24 hours of a sanitary sewer overflow to the MS4. 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 notification to the public. Notification of sanitary sewer overflows to the MS4 was a requirement of the draft Permit. The only change in this section is to add the phrase “the public.” Because notification has always been a requirement, this addition should not be overly burdensome and is not a substantive change. Therefore, Petitioners’ arguments relating to this section of the Permit must be dismissed.

CONCLUSION

The MS4 Permit and DC law are clear that the Permittee is the Government of the District of Columbia, and DDOE is the designated agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the Permit. DC Water is not a permittee or co-permittee, but a Stormwater Agency similarly situated with all other Stormwater Agencies. While DC Water, like all Stormwater Agencies, will have responsibilities under the Permit, those responsibilities do not need to be specifically spelled out in the Permit as each Stormwater Agency is only required to do what is within its jurisdiction under District law. The issues that Petitioners raise in their petition are without merit as they are all within the purview of DDOE as the designated agency. Neither DC Water nor the WWP have standing to bring this action. As such, the Permittee, through DDOE and the Attorney General's Office, respectfully requests that this Board dismiss the petition for review filed by DC Water and the WWP, and for all other just and proper relief.

Dated: June 11, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 11th day of June, 2012, a copy of the foregoing District Department of the Environment's Response to Petition for Review was served as follows:

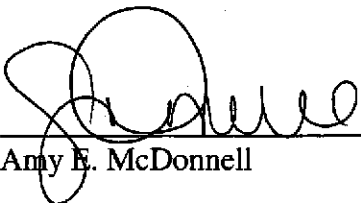
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