

**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 No. DC 0000221**

**DISTRICT DEPARTMENT OF ENVIRONMENT'S
MOTION FOR LEAVE TO INTERVENE AS PARTY RESPONDENT AND
REQUEST TO RESPOND TO PETITIONS FOR REVIEW**

Pursuant to 40 C.F.R. § 124.19, and the Environmental Appeals Board (“EAB” or “Board”) Practice Manual §§IV.D.1, D.3 and D.4, the District Department of the Environment (“DDOE” or “Proposed Intervenor”) hereby moves for leave to intervene in the above-captioned case and respond to the petitions for review filed by Friends of the Earth (“FOE”), Anacostia Riverkeeper, Inc. (“ARK”), Potomac Riverkeeper, Inc. (“PRK”), and Natural Resources Defense Council (“NRDC”) (hereafter “Environmental Petitioners”) and the District of Columbia Water and Sewer Authority (“DC Water”) and the Wet Weather Partnership (“WWP”) (hereafter “DC Water Petitioners” collectively “Petitioners”) and for leave to respond to the issues raised therein. In support of its motion, DDOE submits the following.

1. On November 4, 2011, Petitioners filed their Petitions 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. DC 0000221, 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, 2011.

2. Proposed Intervenor, DDOE, did not seek review of this Permit. However, as the designated agency responsible for managing the Permit, DDOE has a strong interest in these Petitions for Review because of the implications that any revisions to the Permit may have on DDOE's administrative and/or enforcement obligations.

BACKGROUND

3. 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 Permit authorizes and regulates discharges from the municipal separate storm sewer systems to the Potomac River, Anacostia River, Rock Creek and their tributaries.

4. The Permittee is the Government of the District of Columbia and DDOE is the designated agency responsible for managing the MS4 stormwater management program. D.C. Official Code § 8-152.01 and Environmental Petitioners' Exhibit 1, p. 7. The Permit applies to all agencies, departments, offices and authorities of the District, including designated "Stormwater Agencies". Environmental Petitioners' Exhibit 1, p.7. One of the designated Stormwater Agencies is DC Water. *Id.* All of the Stormwater Agencies, including DC Water, are required to maintain compliance with the MS4 Permit. However, DDOE has primary responsibility for oversight of the Permit.

5. EPA initially issued the Permit in 2000 and renewed it in August 2004. Once issued, several environmental organizations petitioned this Board for review. In October 2004,

those organizations participated in settlement discussions with EPA. In March 2006, EPA issued an amendment to the Permit. The environmental organizations and the District again sought this Board's review. After alternative dispute resolution, EPA withdrew the March 2006 amendment. In November 2007, EPA and the District reached an agreement on a number of enhancements to the 2004 Permit. This agreement was amended in August 2008. In February 2009, the District reapplied for its next MS4 Permit. A draft of this Permit was released by EPA for public comment in April of 2010. After considering public comments, EPA issued the final version of this latest MS4 Permit, at issue here, on September 30, 2011, effective on October 7, 2011.

6. Environmental Petitioners have challenged the MS4 permit arguing, *inter alia*, that it fails to comply with the District's water quality standards and wasteload allocations set forth in the relevant total maximum daily loads ("TMDLs").

7. DC Water Petitioners also seek review of the MS4 permit and argue, *inter alia*, (1) the Permit fails to define DC Water's responsibilities, (2) development of a Consolidated TMDL plan within two years is unreasonable, and (3) requirements to issue public notices are unreasonable.

ARGUMENT

The Interests of DDOE, the Designated Agency Responsible for Ensuring Compliance with the Permit, Warrant a Grant of Intervention Under 40 C.F.R. § 124.19 and EAB Practice Manual §§ IV.D.1, D.3 and D.4.

8. Pursuant to 40 C.F.R. § 124.19(a), this Board has jurisdiction to review appeals of federally-issued NPDES permits. The EAB Practice Manual sets the standards for petitions for review. The EAB Practice Manual states that "the EAB will generally grant a request by the permit applicant or permittee to respond to the petition." EAB Practice Manual § IV.D.1.

9. The EAB Practice Manual also sets the standards for motions practice in the context of a permit appeal. *See* EAB Practice Manual § IV.D.3. The Board regularly considers motions received by parties in a petition for review proceeding.

10. While 40 C.F.R. Part 124 does not specifically address non-party participation, the Board has discretion to allow intervention. *See* EAB Practice Manual § IV.D.4. As such, the Board typically grants intervention to permittees when an appropriate motion is filed. *See e.g.*, *In re Dist. Of Columbia Water & Sewer Auth.*, NPDES Appeal Nos. 05-02 & 07-10 through 07-12, at 2 (EAB July 27, 2007) (granting a non-party leave to file a brief); *In re Dist. Of Columbia Water & Sewer Auth.*, NPDES Appeal 07-12, at 2-3 (EAB June 15, 2007) (granting intervenor status to permittee); *In re Aurora Energy, L.L.C.*, NPDES Appeal No. 03-11, at 1 (EAB October 21, 2003) (permittee's motion for leave to intervene granted); and *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 470 (EAB 2002) (permittee's motion to intervene and file response petition granted).

11. While the Consolidated Rules of Practice ("CROP"), 40 C.F.R. Part 22, govern enforcement appeals, this Board has held that it has discretion to refer to section 22.16 of the CROP to manage its permit appeals docket. *See*, EAB Practice Manual, p. 44, fn 48. Part 22, specifically section 22.11(a) addresses intervention before the EAB and states:

Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to Sec. 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information . . . The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties.

40 C.F.R. § 22.11(a)

12. These two approaches, EAB discretion to allow the permittee to intervene in Part 124 proceedings as well as section 22.11, are consistent with the well-established Federal Rules of Civil Procedure, Rule 24, governing intervention. The federal rules allow intervention of right, to anyone who:

Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. Rule 24(a)(2). Further, Fed. R. Civ. P. Rule 24(b)(2) allows permissive intervention to anyone who "has a claim or defense that shares with the main action a common question of law or fact."

13. Here, DDOE has an interest related to the challenged permit and will be substantially and specifically affected by the outcome of this proceeding. While the Government of the District of Columbia is the permittee, it is DDOE, as the designated agency, that is responsible for ensuring compliance with the Permit and managing the MS4 Stormwater Management Program. See D.C. Official Code § 8-152.01 and Environmental Petitioners' Exhibit 1, p. 7. As such, DDOE has overall responsibility for ensuring compliance with the Permit by all parties. While all of the Stormwater Agencies named in the permit have responsibility for complying with those elements of the permit within their jurisdictional scope and authorities, DDOE has primary responsibility to coordinate and implement the programs and requirements necessary to comply with the Permit. In fact, all Stormwater Agencies, including DC Water, shall comply with all requests made by DDOE relating to stormwater related requests, compliance measures, and activities. D.C. Official Code § 8-152.01(c). If any of the provisions in the Permit are modified it could materially impair the District's ability to meet the

Permit's requirements. If the relief requested by either of the Petitioners is granted, DDOE could be exposed to significant additional liabilities associated with implementing the terms of the Permit.

The Existing Parties Do Not Adequately Represent DDOE's Interests.

14. Regarding Fed. R. Civ. P. Rule 24, the Supreme Court has held that "the requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972), *see also Diamond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). Therefore, DDOE need only show that the representation of its interests may be inadequate, not that representation will in fact be inadequate. *See Diamond v. District of Columbia*, 792 F.2d at 192 (D.C. Cir. 1986) (emphasis added).

15. While DC Water and DDOE each have responsibilities under the Permit, their interests are not the same in this case because those responsibilities are vastly different. The Permit applies to all named Stormwater Agencies, including DC Water, and mandates that all must comply with the terms of the Permit. However, it is DDOE that has the burden and responsibility of ensuring overall compliance and that all named Stormwater Agencies meet their obligations. Therefore, should DC Water be successful in its challenge and narrow its responsibilities to those existing in a 2000 Memorandum of Understanding ("MOU"), which did not include TMDL responsibilities, those narrowed responsibilities could then impact the operations of DDOE and its ability to ensure compliance with the requirements of the Permit.

16. DDOE disagrees with Environmental Petitioners' assertions and therefore they cannot adequately represent DDOE's interests.

17. Moreover, while DDOE and EPA may have similar goals in defending portions of the Permit, their interests are not the same in this case because DDOE, not EPA, will bear the burden of the responsibilities, liabilities and costs of compliance with the Permit. Further, DDOE is uniquely situated, as the designated agency by the permittee for oversight of the Permit, to provide this Board with insight into the issues relating to these Petitions for Review.

DDOE's Motion to Intervene Is Timely.

18. The EAB Practice Manual, section IV.D.3 does not set any timelines for filing a motion. However, CROP Rule 22.11(a) states that:

. . . a motion for leave to intervene that is filed after the exchange of information pursuant to Sec. 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information.

19. Both Environmental Petitioners and DC Water Petitioners filed their Petitions for Review on November 4, 2011. This Motion to Intervene and Request to Respond is being filed before the exchange of information and within 30 days. Therefore, DDOE's motion and request to respond is timely.

20. Allowing DDOE to intervene to protect its own rights and interests, as the designated agency responsible for ensuring compliance with the Permit, is consistent with this Board's actions in previous matters, the EAB Practice Manual, CROP Part 22 as well as Fed. R. Civ. P. Rule 24. Should this Motion and Request be granted, DDOE would file an appropriate and timely response within the timeframe ordered by the Board and will comply with all deadlines the EAB imposes in this case. Therefore, DDOE's participation will not unduly delay or prejudice the rights of any other party.

21. Counsel for DDOE has contacted Petitioners regarding this Motion. Counsel for Environmental Petitioners has stated that they do not oppose this intervention. Counsel for DC Water Petitioners takes no position.

CONCLUSION

WHEREFORE, for the foregoing reasons, DDOE respectfully requests that this Board grant its motion to intervene as a party respondent and to respond to the Petitions for Review.

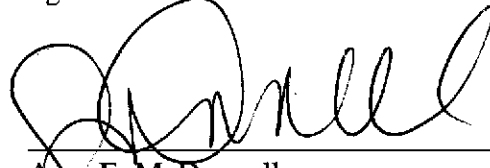
Dated: November 17, 2011

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

ELLEN EFROS
Deputy Attorney General
Civil Litigation Division

By:



Amy E. McDonnell
Alan Barak¹
Office of the Attorney General
District Department of the Environment
1200 First Street, NE, Seventh Floor
Washington, DC 20002
Telephone: (202) 481-3845
Fax: (202) 535-2881

¹ The above-signed attorney has been permitted to practice law in the District of Columbia through the DC Court Rules' exception for AAGs admitted in other jurisdictions:

(a) General Rule. -- No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these Rules.

.....
(c) The following activity in the District of Columbia is excepted from the prohibitions of section (a) of this Rule.

.....
(4) Providing legal services for his or her employer during the first 360 days of employment as a lawyer by the government of the District of Columbia, where the person is an enrolled Bar member in good standing of a state or territory, is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court, and has been authorized by her or his government agency to provide such services.

Certificate of Service

I certify under penalty of perjury that on this 17th day of November, 2011, a copy of the foregoing DDOE's Motion to Intervene as Party Respondent and Request to Respond to Petitions for Review was served as follows:

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

A copy was served by first class mail, postage prepaid on:

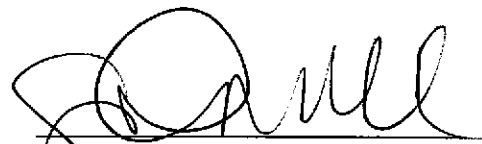
Jennifer Chavez, Esq.
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, DC 20036-2212

Rebecca J. Hammer
Natural Resources Defense Council
1152 15th Street, N.W.
Suite 300
Washington, DC 20005

F. Paul Calamita, Esq.
AquaLaw PLC
6 South 5th Street
Richmond, VA 23219

Randy Hayman, General Counsel
Gregory Hope, Principal Counsel
DC Water
5000 Overlook Avenue, S.W.
Washington, DC 20032

Marcia Mulkey, Regional Counsel
Office of the Regional Counsel
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029



Amy E. McDonnell