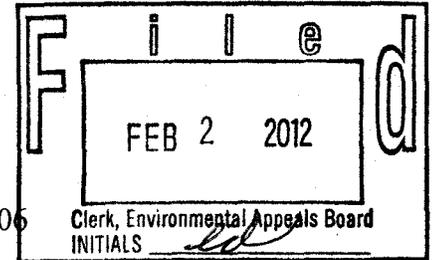


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
Government of the District of)
Columbia, Municipal Separate)
Storm Sewer System)
)
)
NPDES Permit No. DC0000221)

NPDES Appeal Nos. 11-05 & 11-06



**ORDER GRANTING DISTRICT OF COLUMBIA MOTION TO INTERVENE AND
LIMITING PARTICIPATION OF WET WEATHER PARTNERSHIP**

On November 4, 2011, the District of Columbia Water and Sewer Authority (“DC Water”) and the Wet Weather Partnership (“WWP”) jointly filed a petition requesting that the Environmental Appeals Board (“Board”) review a final Municipal Separate Storm Sewer System (“MS4”) NPDES permit (the “MS4 Permit”) issued by the United States Environmental Protection Agency Region III (“Region III”) to the Government of the District of Columbia. *See generally* DC Water and WWP Petition for Review (“Joint Petition”), NPDES Appeal No. 11-05. In the Joint Petition, DC Water asserts that it is a co-permittee for the MS4 Permit. *Id.* at 1. On the same date, the Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (jointly the “Environmental Petitioners”) also filed a petition for review with the Board challenging the MS4 Permit. *See* Petition for Review, NPDES Appeal No. 11-06.

On November 17, 2011, the District Department of the Environment (“DDOE”) requested leave to intervene in this proceeding to respond to the Petitions. On November 29, 2011 this Board requested the Attorney General of the District of Columbia (“DC Attorney General”) to file a brief answering certain questions pertaining to the legal authority of Petitioner DC Water including, *inter alia*, DC Water’s authority to represent the permittee in this matter, the District of Columbia Government.

On January 12, 2012, the DC Attorney General and DDOE filed a response to the Board’s Order. *See* District Department of the Environment’s Response to Order Requiring Additional Briefing (“AG and DDOE Response”). In their Response, the DC Attorney General states, *inter alia*, that he has authorized DDOE to represent the permittee, the Government of the District of Columbia, in all matters relating to the MS4 Permit, and that DC Water is not authorized to represent the permittee. *Id.* at 2-5. The Attorney General and DDOE further request the Board to dismiss DC Water as a party to this matter. *Id.* at 9.

On January 19, 2012, citing the AG and DDOE Response, the Board issued an Order to Show Cause directing DC Water to show cause why it should not be dismissed as a petitioner in this matter. The Board also noted that DC Water’s co-Petitioner, WWP, had not participated in the public comment process on the draft MS4 permit and ordered it to show cause why it should be permitted to challenge any conditions of the Permit other than condition 4.3.1.3, the sole condition of the final Permit alleged in the Joint Petition to have changed subsequent to completion of the public comment process.

On January 26, 2012, DC Water and WWP filed a joint Response to Board's Order to Show Cause and the AG and DDOE Response ("Joint Response"). In their Joint Response, DC Water and WWP argue, *inter alia*, that DC Water has legal authority and standing to maintain its Petition under 40 C.F.R. § 124.19, *both* as a co-permittee for the MS4 Permit and as a person who filed comments on the draft Permit. *See* Joint Response at 4-13. DC Water and WWP apparently concede that WWP did not file comments on the draft MS4 Permit, but maintain that WWP has standing under 40 C.F.R. § 124.19 to challenge *any* conditions of the final Permit that were changed after the close of the public comments period. *Id.* at 19-21. In the Joint Response, WWP cites three additional conditions, in addition to condition 4.3.1.3, of the final Permit, that it alleges were changed after the close of public comment. *Id.* at 20. The Board declines to accept WWP's apparent request to expand the scope of its challenge to conditions of the Permit that were not specified in the Petition.¹

On January 26, 2012, Region III also filed a response to the AG and DDOE Response, pursuant to the Board's Order of November 29, 2011. *See* EPA Region III's Response to District Department of the Environment's Response to Order Requiring Additional Briefing ("Region III's Response"). Region III generally defers to the DC Attorney General's

¹ *See EAB Practice Manual*, Sept. 2010, at 41, available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Environmental+Appeals+Board+Guidance+Documents?OpenDocument ("Petitioners should be aware that '[a] petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although additional briefing may occur in the event formal review is granted, the discretion to grant review is to be sparingly exercised, and therefore, * * * a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted.' *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993)").

interpretation of District of Columbia law with respect to the legal status and authority of DC Water, but notes that “DC Water is not named as a permittee or co-permittee of the DC MS4 Permit, and that the DC MS4 Permit does not explicitly require DC Water to carry out any particular permit requirements.” *Id.* at 1. Region III did not brief, but explicitly reserved the right to address, the substantive issue of whether DC Water and WWP have met the requirements of 40 C.F.R. § 124.19 or otherwise have standing to file a petition.

On January 31, 2012, the DC Attorney General and DDOE requested leave to file a Reply to DC Water’s and WWP’s Response to the Board’s Order to Show Cause.

The Board notes that all the parties have indicated their willingness to participate in the Board’s alternate dispute resolution (“ADR”) process, and that the partial stay of proceedings for this purpose expires at the end of this month, on February 29, 2012. The Board encourages the parties to attempt to resolve their differences concerning the substantive terms of the MS4 Permit through the ADR proceedings, despite the apparent dispute between the DC Attorney General, DDOE and DC Water as to DC Water’s legal authority to act as a “co-permittee” for the MS4 Permit.

Therefore, after reviewing all the parties’ submissions and considering the need to proceed expeditiously with ADR, the Board rules as follows:

1. The DC Attorney General and DDOE’s Motion for Leave to File a Reply is
GRANTED.

2. The District of Columbia Government, through its Attorney General and the DDOE, is GRANTED permission to intervene in this proceeding, as the permittee for the MS4 Permit.
3. The participation of WWP as petitioner in this proceeding is LIMITED to challenging condition 4.3.1.3 of the final MS4 Permit, to the extent of the changes in that condition from the draft to the final MS4 Permit.

The Board defers ruling on all other pending issues until the completion of the ADR proceedings. In the meantime, DC Water may participate in the ADR proceedings, but the Board urges the DC Attorney General, DDOE and DC Water to make best efforts to resolve their differences and to speak with one voice during the ADR proceedings.

So Ordered.

ENVIRONMENTAL APPEALS BOARD

By:



Catherine R. McCabe
Environmental Appeals Judge

Dated:

February 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting District of Columbia Motion to Intervene and Limiting Participation of Wet Weather Partnership in the matter of the Government of the District of Columbia, NPDES Appeal Nos. 11-05 and 11-06, were sent to the following persons in the manner indicated:

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