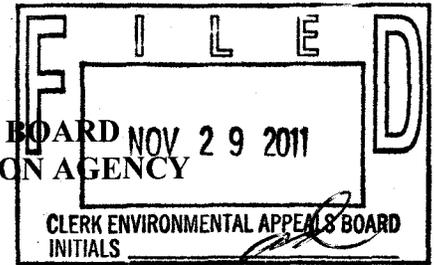


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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

**ORDER REQUIRING ADDITIONAL BRIEFING**

On September 30, 2011<sup>1</sup>, the United States Environmental Protection Agency Region 3 (“Region 3”) issued a final municipal separate storm sewer system (“MS4”) NPDES permit to the “Government of the District of Columbia.” Final NPDES Permit DC0000221 at 1. 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 the Environmental Appeals Board (“Board”) to review the permit. On the same day, 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. By letter dated November 9, 2011, the Board requested Region 3 to file a response to the two petitions for review by December 27, 2011.

On November 17, 2011, the District Department of the Environment (“DDOE”), by D.C. Attorney General Nathan B. Irvin, filed a motion with the Board requesting that it be allowed to intervene in this proceeding and file a response to both petitions for review. DDOE’s Motion to Intervene as Party Respondent and Request to Respond to Petitions for Review (“DDOE’s

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<sup>1</sup> The effective issuance date of the permit was October 7, 2011. *See* Final NPDES Permit DC0000221 at 1.

Motion”) at 1. In its motion, DDOE states that, while the Government of the District of Columbia is the permittee, *it* is “the designated agency responsible for managing the MS4 stormwater management program” for the Government of the District of Columbia. *Id.* at 2. DDOE further states that the existing parties – in particular DC Water, EPA, and the Environmental Petitioners – do not adequately represent DDOE’s interests in the matter. *Id.* at 6-7.

Significantly, DDOE and DC Water are both agencies and/or authorities within the Government of the District of Columbia, the named permittee. Final NPDES Permit DC0000221 at 7; *see also* DDOE’s Motion at 2; DC Water and WWP Petition for Review at 1. One entity is currently a petitioner in the case and the other is requesting leave to file a response to that same petition (as well as to the other petition). The Final Permit, however, provides that “[t]he permittee has designated the [DDOE] as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit \* \* by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to \* \* \* [DC Water].” Final NPDES Permit DC0000221 at 7; *see also* DC Code § 8-152.01(a) (assigning the Stormwater Administration within DDOE the “responsib[ility] for monitoring and coordinating the activities of all District agencies, including [DC Water], which are required to maintain compliance with the Stormwater Permit”).

Also of note, this permit was previously appealed to the Board on several occasions. *See, e.g., In re Gov’t of the District of Columbia MS4 (“DC MS4 IIP”),* NPDES Appeal Nos. 06-07 & 06-08, at 1 (EAB Nov. 8, 2007) (Order Dismissing Petitions for Review); *In re Gov’t of the*

*District of Columbia MS4*, 10 E.A.D. 323, 326 (EAB 2002). While the last appeal was pending before the Board, DC Water (referred to as “WASA” in that case) filed a motion requesting that it be allowed to withdraw as a petitioner in the case. The rationale it provided in its 2007 motion was as follows:

Effective February 15, 2007, the responsibilities and title of the Storm Water Administrator were transferred from WASA to the newly created Department of the Environment within the executive branch of Government of the District of Columbia. *See* D.C. Code § 8-151.03(b)(2). Therefore, WASA 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.

*DC MS4 III*, DC WASA’s Motion for Leave to Withdraw as Petitioner at 2 (filed June 7, 2007). The Board granted WASA’s motion. *See DC MS4 III*, Order Granting Leave for DC WASA to Withdraw as Petitioner and the District Government to Substitute Counsel at 1 (June 13, 2007).

In light of these facts, prior to deciding DDOE’s motion to intervene, the Board directs the Attorney General of the District of Columbia to file a brief addressing the following questions:

- (1) Who is representing the permittee, i.e., the Government of the District of Columbia, in this matter?
- (2) Does DC Water have the legal authority to file, as a permittee, a petition under 40 C.F.R. § 124.19 challenging the District of Columbia’s MS4 NPDES permit?
- (3) If DC Water has such legal authority, may DC Water take a position that is separate from, and possibly contrary to, the position of DDOE, the agency that has been designated lead responsibility to coordinate stormwater issues on behalf of the Government of the District of Columbia?
- (4) Has there been a change of law or circumstance affecting any of the above issues since DC Water’s/WASA’s filing of its 2007 motion requesting substitution of DDOE as the representative of the permittee, the District of Columbia?

The District of Columbia's brief is due on December 8, 2011. The Board also directs Region 3 to file a response to the District of Columbia's brief. Such response brief is due on December 15, 2011.

So ordered.

ENVIRONMENTAL APPEALS BOARD

A handwritten signature in black ink, appearing to read "Catherine R. McCabe", written over a horizontal line.

Catherine R. McCabe  
Environmental Appeals Judge

Date:

11/29/11

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Requiring Additional Briefing 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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Dated: NOV 29 2011



Annette Duncan  
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