GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

July 22, 2010

Mr. Garrison D. Miller
U.S. EPA Region III (3WP41)
Water Protection Division
Philadelphia, PA 19103-5103

Re: District of Columbia Supplemental Comments on Draft District of Columbia Municipal Separate Storm Sewer System – NPDES Permit No.DC0000221

Dear Mr. ~~Miller~~: Garry

The District Department of the Environment (DDOE), on behalf of the Government of the District of Columbia (the "District"), submits this letter as a supplement to its June 21, 2010 comments on the Draft Municipal Separate Storm Sewer System ("MS4") permit to the Government of the District of Columbia, published on April 20, 2010.

The District's supplemental comments respond to the recently decided case of United States of America v. Washington State Department of Transportation ("WSDOT"), Case No. C08-5722RJB, 2010 U.S. Dist. LEXIS 58952 (W.D. Wash. June 7, 2010). In that case, the court ruled that WSDOT's design, construction, and operation of drainage systems, whose sole function was to collect highway runoff and dispose of it in nearby water-bodies; its actual knowledge that the runoff that it was discharging contained hazardous substances; and its ability to redirect, contain, and treat its contaminated runoff, rendered WSDOT liable as an "arranger for disposal of hazardous substances" under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601, *et seq*., 42 U.S.C. § 9607(a)(3). The court declined to award summary judgment as to whether the releases of hazardous substances -- which WSDOT argued were authorized, indeed, compelled, by its MS4 permit -- were "federally permitted" and, therefore, immune from CERCLA liability under CERCLA §§ 101(10), 107(j), 42 U.S.C. §§ 9601(10), 9607(j). The court also declined to rule at this juncture on whether WSDOT's application for, and compliance with, its MS4 permit constituted "due care," entitling it to a third party defense.

Nevertheless, it is deeply troubling that the United States argued that WSDOT's collection and discharge of surface water did not constitute MS4 permit compliance, but rather, served as the basis for establishing WSDOT's arranger liability under CERCLA. It is also troubling that the United States, on behalf of EPA, appeared to use CERCLA as a "back door" for extracting relief pertaining to stormwater runoff, arguing, for example, that WSDOT's failure

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to retrofit a state highway constituted a failure to "add best management practices for treatment of stormwater," and therefore, a failure to exercise "due care" under CERCLA.[1]

The District is proud of its reputation as an environmental leader, and as such, the District is concerned that the use of CERCLA to assign liability for activities authorized under an MS4 Permit could, on a nationwide basis, cause negative unintended consequences environmentally. In addition to discouraging MS4 permit compliance (since such compliance could render the entity liable as a CERCLA arranger), the threat of CERCLA liability could discourage municipal agencies from going above and beyond its permit obligations to control stormwater pollution (that is, taking action outside the scope of the permit) since such proactive efforts could also render the municipality liable under CERCLA. This could result in half-hearted, letter-of-the-law compliance with MS4 permits and undermine EPA, state, and municipal efforts to develop and implement progressive MS4 programs.

Accordingly, the District objects to the draft MS4 permit, to the extent that the District's very acts of compliance therewith may incriminate it under CERCLA. The District asks that EPA state in the permit that it intends to regulate municipal stormwater discharges under a federal permitting scheme, not under a CERCLA liability theory. The District would certainly be remiss if its expenditures of MS4 fees on MS4 permit compliance, even while achieving beneficial stormwater controls to protect and restore District waters, also led to CERCLA liability.

If you require further assistance, or have any questions or comments, please contact the DDOE Stormwater Administrator Jeffrey Seltzer at 202-535-1603, or at Jeffrey.Seltzer@dc.gov.

Sincerely,

Hamid Karimi, Ph.D.
Deputy Director
District Department of Environment

[1] Neither the exhaustive storm water management plan requirements in 40 CFR §122.26, nor the storm water management plan requirements contained in the draft permit, support the contention that best management practices and due care require retrofitting roadways as the best methods and practices for treatment of stormwater, as advocated by EPA in this case.