GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

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

Re: Second Supplemental Comments on the 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 a second set of supplemental 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 submitted its initial comments on June 20, 2010, requesting, among other things, an iterative and adaptive process that would demonstrate quantifiable progress towards achieving water quality standards, using the best management practices proposed by the District in its stormwater management plan. On July 26, 2010, the District submitted it first supplemental comments in response to the case of United States of America v. Washington State Department of Transportation ("WDOT"), Case No. C08-5722RJB, 2010 U.S. Dist. LEXIS 58952 (W.D. Wash. June 7, 2010), where the court ruled that WDOT's design, construction, and operation of drainage systems, and its ability to redirect, contain, and treat its contaminated runoff, rendered WDOT 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). Therefore, the District asked that EPA confirm that it will not pursue the District under a CERCLA liability theory for the very same acts EPA is requiring that the District perform under the MS4 permit.

Today, DDOE is compelled to add these additional comments based on a recent letter from the federal Government Accountability Office (GAO) to the District of Columbia stating that it deems the District's stormwater fee a tax that it will not pay, beginning with the October 2011 bill (see attached letter from GAO dated September 29, 2010).

In its letter, GAO explained that it had determined that liability for the stormwater fee arises not upon the provision of a service or granting of a privilege, but as a result of property ownership in order to raise revenue to defray the costs of the District government in carrying out the District's stormwater management activities. Essentially, GAO determined that since measurement of stormwater discharges is equated or associated with an impervious property area, it is a tax. This is contrary to Environmental Protection Agency's (EPA) finding that the amount of surface

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imperviousness in an area (ISA) directly corresponds to the amount of harmful downstream pollution from stormwater runoff (64 Fed. Reg. at 68, 724-27). Therefore, The District instituted a fee based on the imperviousness in an area that finances the implementation of best management practices to control stormwater discharges. Unfortunately, the GAO decision finding the ISA fee to constitute a tax will have far reaching effects on the District's ability to comply with the proposed draft permit management measures and obligations. Accordingly, EPA files the objections to the draft permit, and requests that EPA revise the draft permit to address the new issues discussed below.

Decrease in fees

First, the MS4 Permit requires for treatment of the stormwater discharged to the MS4 a number of costly management practices described in the District's storm water management plan (SWMP) dated February 19, 2009. The District anticipates that the SWMP will cost approximately $57.6 million in FY 2011 (based on the District's FY 2011 Implementation Plan, submitted to EPA Region III on August 19, 2010). Approximately $44.4 million of these costs are core services of the District government that are funded by tax revenue and the District's general obligations budget. The remainder of these costs is the amount directly attributable to complying with the terms of the MS4 Permit. The District estimated and budgeted for $13.2 million annually for these Permit compliance costs. These costs are charged as a fee to property owners based on the amount of imperviousness on their property which fairly approximates their use of the MS4, and bears a rough relation to the District's costs in managing their stormwater. GAO has refused to pay its fee in the amount of $7,494.12 for fiscal year 2011. The District anticipates that other federal facilities will follow GAO's lead, causing a decrease in the amount of $2.65 million, or 20 percent of the fees to be collected. In addition to a decrease from federal fees, the District may also face a refusal to pay from tax-exempt properties following GAO's determination that the District's fee is a tax, for which they are exempt.

Effect of decrease in fees

A decrease in fees will cause DDOE to be unable to meet its obligations as listed in the SWMP and acceptance of the MS4 Permit may be in violation of the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, and (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.).

In its storm water management plan (SWMP), the District identified a list of storm water management practices to effectively reduce the amount of pollutants to the maximum extent practicable (33 U.S.C. § 1342(p)(3)(B)(iii), 40 C.F.R. § 122.44(k)(2) and (3)). The SWMP was developed based on consideration of environmental factors, implementation costs, scheduling, and technical factors. A decrease in the fees collected would require a reduction in the funds available, and therefore a reduction in the number or scope of the management practices that would be practicable for the District to implement. Therefore, EPA should reduce the number or scope of these practices according to the percentage of reduction in the fees.

Potential Solutions

Therefore, the District is requesting that for the reasons discussed above, EPA consider one or more of the options listed below:

(1) Suspend the issuance of the MS4 Permit, until the determination that the MS4 charge is a permissible fee is resolved by Courts or other political mechanisms;

(2) Reduce the number and/or scope of the management practices that the permit would require the District to implement at a corresponding rate of the anticipated fee decrease; or

(3) Implement alternative permitting options for the approximately 1,498 federal properties and other properties who refuse coverage under the MS4 Permit, by issuing individual permits, 40 CFR 122.26(a)(5), small MS4 Permits to certain federal properties, such as military bases, 40 CFR 122.26(b)(16), or issuing a general permit to federal facilities, 40 CFR 122.28(a)(2). This should be done prior to the issuance of the final MS4 Permit, or be specifically identified as a reason for a permit reopener in its eventuality.

Thank you in advance for consideration of these supplemental comments. If you would like to discuss these comments or have any questions please feel free to contact the District's Stormwater Administrator, Jeff Seltzer, at (202) 535-1603 or jeffrey.seltzer@dc.gov.

Sincerely,

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