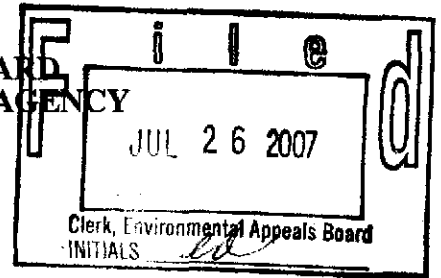


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
District of Columbia Water and Sewer Authority)

NPDES Permit No. DC0021199)

NPDES Appeal Nos. 05-02, 07-10,
07-11, 07-12

ORDER GRANTING LEAVE TO FILE NON-PARTY BRIEF, GRANTING LEAVE TO REPLY, CONSOLIDATING CASES, AND SCHEDULING ORAL ARGUMENT

Each of the above-captioned petitions seeks review of NPDES Permit No. DC0021199 (the "Permit"), which United States Environmental Protection Agency ("EPA") Region 3 (the "Region") issued to the District of Columbia Water and Sewer Authority ("WASA") to authorize the discharge of treated wastewater from WASA's Blue Plains Wastewater Treatment Plant.

NPDES Appeal No. 05-02 ("Appeal 05-02"), which WASA filed on January 18, 2005, seeks review of a modification to the Permit made on December 16, 2004. The Board has dismissed all of the issues in Appeal 05-02, pursuant to an August 23, 2006 order, except for one: review of the Region's decision not to include a compliance schedule for implementation of WASA's long-term control plan, which was designed to bring WASA's combined sewer overflow ("CSO") discharges into compliance with applicable water quality standards, as required by the Clean Water Act.¹ The Region filed a response to this one remaining issue on

¹ The August 23, 2006 order also dismissed in its entirety NPDES Appeal 05-01, which previously had been consolidated with Appeal 05-02. See *In re Blue Plains Wastewater Treatment Plant*, NPDES Appeal Nos. 05-01, 05-02, at 2 (EAB Aug. 23, 2006) (order dismissing petitions for review and staying one issue); *In re Blue Plains Wastewater Treatment* (continued...)

April 27, 2007.² See Region III Response to Remaining Issue in the District of Columbia Water and Sewer Authority Petition for Review.

On May 13, 2005, the National Association of Clean Water Agencies (“NACWA”) filed a motion for leave to participate in Appeal 05-02 and file a non-party brief.³ The Region responded on June 1, 2005, opposing NACWA’s motion to the extent it proposes to introduce legal arguments not made by the parties. To date, the Board has not ruled on NACWA’s motion. Because neither the EAB Practice Manual nor 40 C.F.R. part 124 address the filing of non-party briefs, the Board exercises its discretion in determining whether to accept non-party briefs. As a non-party, issues raised by NACWA would not expand the scope of the appeal. To assist in its deliberations, the Board hereby grants NACWA leave to file a non-party brief in Appeal 05-02 no later than August 9, 2007. Such brief shall be limited to the remaining legal arguments or issues raised by the parties in Appeal 05-02, relating to the lack of a compliance schedule for implementation of WASA’s long-term control plan in the Permit.

¹(...continued)

Plant, NPDES Appeal Nos. 05-01, 05-02 (EAB Feb. 25, 2005) (order granting motion to consolidate).

² Prior to the partial dismissal of Appeal 05-02, the Board had granted several unopposed motions filed by the Region to stay the case, along with NPDES Appeal No. 05-01, while the parties continued negotiations. Subsequent to the partial dismissal, the Board continued to stay the compliance schedule issue, until April 30, 2007, pending issuance of an additional permit modification. See *In re Blue Plains Wastewater Treatment Plant*, NPDES Appeal Nos. 05-01, 05-02, at 2 (EAB Aug. 23, 2006) (order dismissing petitions for review and staying one issue); *In re Blue Plains Wastewater Treatment Plant*, NPDES Appeal No. 05-02 (Feb. 20, 2007) (order granting unopposed motion for sixth stay of proceedings).

³ NACWA’s motion also sought leave to participate in NPDES Appeal No. 05-01, which was dismissed on August 23, 2006. Additionally, NACWA’s motion proposed to file a joint non-party brief with the CSO Partnership, which had filed a motion seeking leave to participate in NPDES Appeal No. 05-01 only, on February 25, 2005. Because NPDES Appeal No. 05-01 has been dismissed, it is not necessary for the Board to rule on NACWA’s or the CSO Partnership’s motions with respect to that appeal.

NPDES Appeal Nos. 07-10, 07-11, and 07-12 (“Appeals 07-10, 07-11, and 07-12,” respectively) each were filed on May 7, 2007, and seek review of a modification to the Permit made on April 5, 2007, imposing a total nitrogen discharge limit. Appeal 07-10, filed by the Chesapeake Bay Foundation, challenges the Region’s decision not to include a compliance schedule for the achievement of the total nitrogen limit. Appeal 07-11, filed by WASA, seeks review of the provision imposing the total nitrogen discharge limit, and, like Appeal 07-10, also appeals the Region’s decision not to include a compliance schedule. Appeal 07-12, filed by Friends of the Earth and the Sierra Club (together, “FOE/SC”), seeks review of the section of the permit that establishes water-quality-based effluent limits for CSO discharges. On June 12, 2007, WASA moved to intervene as a party respondent in Appeal 07-12. The Board granted this motion, and WASA filed a response to FOE/SC’s petition on July 6, 2007. The Region filed a response that addressed all three petitions on July 6, 2007.⁴

On July 23, 2007, FOE/SC filed a Motion for Leave to Reply to WASA’s and the Region’s responses concerning Appeal 07-12, along with a corresponding Reply Brief. In the Motion for Leave to Reply, FOE/SC state that they “require an opportunity to reply to arguments raised by EPA and WASA for the first time in their responses.” Motion for Leave to Reply at 1. FOE/SC also assert that the Motion for Leave to Reply is timely and that granting leave to reply would aid the Board in its resolution of the issues raised in the petitions for review and would not cause prejudice to any of the parties in the above-captioned proceedings. *Id.*

The EAB Practice Manual provides that petitioners may “upon motion explaining why a reply brief is necessary, be granted leave to file a reply brief.” EAB Practice Manual

⁴ The Board routinely requests a response from the permitting authority whose permit decision has been challenged, addressing whether the petition satisfies the requirements for obtaining review under 40 C.F.R. § 124.19. See EAB Practice Manual § III.D.5 at 35.

§ III.D.5 at 36. For good cause shown, and because the Board believes that FOE/SC's Reply Brief will assist in its resolution of the issues in the above-captioned cases, the Board hereby grants FOE/SC's Motion for Leave to Reply, and accepts its Reply Brief for filing.⁵

Additionally, upon consideration, the Board has determined to administratively consolidate the processing and consideration of all of the above-captioned petitions. Administrative consolidation means that the Clerk of the Board will maintain for all appeals a single case file in which all documents filed in the cases will be lodged. Accordingly, any filing that applies to more than one case may be submitted to the Board as one filing, with the appropriate appeal numbers listed in the caption. Collectively, the appeals may be captioned as "District of Columbia Water and Sewer Authority, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12."⁶

Furthermore, the Board has determined that oral argument will assist it in its deliberations regarding these above-captioned petitions for review. Accordingly, WASA, FOE/SC, the Chesapeake Bay Foundation, and the Region are hereby requested to participate in oral argument beginning at 10:30 a.m. on Thursday, November 15, 2007, in the Administrative Courtroom,

⁵ In a footnote to FOE/SC's Motion for Leave to Reply, FOE/SC also state that "WASA filed a separate petition for review (NPDES 07-11) and FOE/SC filed a motion for leave to intervene and to respond to the issues raised in WASA's petition (Dkt. #20). That motion is awaiting decision by the Board. Based on a review of WASA's petition and EPA's response thereto, FOE/SC have determined that it is not necessary to file a separate response to WASA's petition. However, FOE/SC request the Board to allow this response to serve as FOE/SC's reply to WASA's petition, to the extent the issues raised in WASA's petition overlap with the issues discussed herein." Motion for Leave to Reply at 1 n.1. The Board interprets this statement to mean that FOE/SC's Motion for Leave to Reply supersedes its June 26, 2007 Motion for Leave to Intervene, in which FOE/SC requested leave to intervene in Appeal 07-11 and to respond to this issues raised therein. Accordingly, in light of the Board's acceptance of FOE/SC's Reply Brief, it is unnecessary for the Board to rule on the Motion for Leave to Intervene.

⁶ Appeal 05-02 previously was captioned "Blue Plains Wastewater Treatment Plant, NPDES Appeal No. 05-02."

U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. The Board anticipates issuing a subsequent order identifying the issues to be heard at oral argument, and allocating time among the parties. The parties shall notify the Clerk of the Board in writing by November 8, 2007, of the names of counsel who will present arguments. Counsel for any of the parties who wish to participate in this oral argument via the EPA video-conferencing equipment in the Administrative Courtroom shall contact the Clerk of the Board, at 202-233-0122, no later than Thursday, October 18, 2007, to make arrangements for use of such equipment.

So ordered.

Dated: July 26, 2007

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Granting Leave to File Non-Party Brief, Granting Leave to Reply, Consolidating Cases, and Scheduling Oral Argument, in the matter of District of Columbia Water and Sewer Authority, NPDES Petition Nos. 05-02, 07-10, 07-11, and 07-12 were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid,
and Facsimile:

David E. Evans
Stewart T. Leeth
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219
fax: (804) 225-5341

By First Class Mail,
Postage Prepaid:

Avis Marie Russell
General Counsel
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, SW
Washington, D.C. 20032

Jennifer Chavez
David Baron
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036

F. Paul Calamita
John A. Sheehan
AquaLaw PLC
801 E. Main St., Suite 1002
Richmond, VA 23219

By Pouch Mail
and Facsimile:

Deane Bartlett
U.S. Environmental Protection Agency
Region 3
1650 Arch Street
Philadelphia, PA 19103-2029
fax: (215) 814-2603

Dated: JUL 26 2007



Annette Duncan,
Secretary