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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

April 27, 2007

Via Federal Express

Ms. Eureka Durr  
Clerk of the Board, Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G Street N.W., Suite 600  
Washington, DC 20005

Re: Region III Response to Remaining Issue in the District of Columbia Water and Sewer  
Authority Petition for Review  
Permit Number: DC 0021199  
Appeal No. 05-02

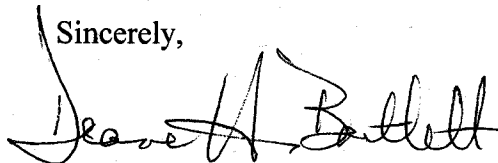
Dear Ms. Durr:

Enclosed please find one original and five copies of the above referenced document,  
which I am also serving on counsel for Petitioners in this matter.

Please contact me at 215-814-2776 if you have any questions with regard to this filing.

Thank you for your attention to this matter.

Sincerely,



Deane H. Bartlett  
Senior Assistant Regional Counsel

Enclosures

cc: via regular mail (with enclosures):  
David Evans, Esquire - McGuireWoods LLP

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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2007 APR 30 AM 11: 20

**In re:**

Blue Plains Wastewater Treatment Plant

NPDES Permit No. DC 0021199

ENVIR. APPEALS BOARD

NPDES Appeal No. 05-02

**REGION III RESPONSE TO REMAINING ISSUE IN  
THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY  
PETITION FOR REVIEW**

The United States Environmental Protection Agency, Region III ("Region" or "Respondent") hereby files this Response to the above-captioned petition. Attached to this response is a certified index of the administrative record for the challenged permitting decision, as well as several exhibits, consisting of copies of those parts of the record which pertain to the specific permitting decision currently before the Board.

As set forth below, the Petitioner has failed to meet its burden to obtain review by the Board, and therefore the Petition for Review as to this issue should be denied and the Petition dismissed in its entirety.

**I. Background**

**A. Factual and Procedural**

The District of Columbia (District) is not delegated National Pollutant Discharge Elimination System (NPDES) permitting authority pursuant to Section 402(b) of the Clean Water Act (CWA), 33 U.S.C. §1342(b). Therefore, the Region is the permitting authority for

wastewater discharges in the District.

On January 24, 2003, the Region reissued NPDES Permit No. DC0021199 to the District of Columbia Water And Sewer Authority (WASA) for its Blue Plains wastewater treatment facility. Petitions for review were filed by both WASA and Friends of the Earth and the Sierra Club (jointly) (FoE/SC). After a period of negotiations, EPA withdrew the contested permit provisions, proposed a draft modified permit for public comment, and, on December 16, 2004, EPA issued a final permit modification. Exhibit 1, December 16, 2004 Final Permit Modification, NPDES Permit No. DC 0021199. In addition to addressing the previously challenged permit conditions, the December 16, 2004 permit modification added Phase II permitting conditions pursuant to EPA's Combined Sewer Overflow Control Policy, April 19, 1994, 59 FR 18688 (CSO Policy). The Region included the Phase II permit conditions because following the issuance of the permit in January 2003, WASA had completed its long term combined sewer overflow control plan (LTCP) identifying the controls designed to bring WASA's combined sewer overflow (CSO) discharges into compliance with applicable water quality standards (WQS), as required by the CWA. The District of Columbia Department of Health provided certification of the permit's compliance with the District's WQS pursuant to Section 401 of the CWA, 33 U.S.C. §1341. Exhibit 5, December 15, 2004 District CWA 401 Certification.

Timely petitions for review of the December 16, 2004 permit modification were filed by FoE/SC and WASA, designated Appeal No. 05-01 and 05-02, respectively. Each of the petitions sought review of the water-quality based requirements for CSOs, although for different reasons. In addition, WASA sought Board review of the Region's decision not to

include a schedule of compliance for implementation of its LTCP in the modified permit.<sup>1</sup>

Again, following a period of negotiations among the parties, having determined that it would not be possible to reach a negotiated resolution of the contested permit terms, EPA withdrew the contested permit terms and stated its intention to propose modifications to those terms. Subsequently, the parties filed a Motion on Consent to Dismiss FoE/SC's petition in its entirety and WASA's Petition as to all issues save one. That motion was granted by the Board's Order of August 23, 2006, which dismissed both the FoE/SC and the WASA petitions in their entireties, except for WASA's sole outstanding issue, which was stayed.<sup>2</sup> The one outstanding issue is WASA's request for Board review of Region III's decision not to include a compliance schedule for implementation of WASA's LTCP in the permit. EPA and WASA sought and were granted stays of the Region's deadline to respond to this specific issue, pending issuance of an additional permit modification. The present deadline for EPA's response is April 30, 2007.

On April 5, 2007, EPA issued a final modification of WASA's permit addressing the challenges to the provisions of the December 16, 2004 permit modification. The April 5,

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<sup>1</sup> As will be discussed, *infra*, the compliance schedule for implementation of the LTCP is embodied in a judicial Consent Decree between WASA and the United States.

<sup>2</sup> The Board also has pending before it two virtually identical motions, one by the CSO Partnership (CSOP) and one by the National Association of Clean Water Agencies (NACWA), pursuant to 40 C.F.R. §22.11(b), for leave to file a non-party brief in this matter. Each of those petitions seeks leave to file a brief related to the general water quality standards compliance requirement contained in Part III. Section E. 1. of the December 16, 2004 permit modification. The Region believes that these Motions were mooted by EPA's withdrawal of that condition, and by the April 5, 2007 permit modification, which, *inter alia*, modifies that permit provision. See, Respondent's Notice of Partial Withdrawal of Modified Permit, August 10, 2006 and the April 5, 2007 final permit modification, both of which are in the Board's docket of this appeal.

2007 permit modification also added a nitrogen discharge limit to the permit.<sup>3</sup> It appears that WASA will not seek to dismiss its challenge on the issue of a LTCP implementation compliance schedule, and therefore EPA is responding to that aspect of WASA's petition for review of the December 16, 2004 permit modification.

There is enforcement background relevant to this appeal. On December 6, 2002, the United States Department of Justice (United States), on behalf of EPA, filed a judicial complaint pursuant to Section 309 of the CWA against WASA alleging that WASA violated the CWA and its 1997 final NPDES permit by failing to comply with the Nine Minimum Controls (NMC) set forth in the permit and the CSO Policy and by violating the District's WQS. U.S. v. District of Columbia Water and Sewer Authority, Civ. Action No. 1:02-12511(TGH)(D.D.C.). The District was also named in the judicial complaint as a statutory defendant pursuant to Section 309(e) of the CWA, 33 U.S.C. §1319(e). In January 2000, a similar judicial complaint had been filed against WASA by several environmental organizations, alleging violations of the CWA and WASA's NPDES permit. Anacostia Watershed Society et al. v. District of Columbia Water and Sewer Authority, Civ. Action No. 1:00CV00183TFH (D.D.C.). (These actions were consolidated as Consolidated Civil Action No 1:CV00813TFH. See Exhibit 3, Fact Sheet for December 16, 2004 Final Permit Modification and Exhibit 6, LTCP Consent Decree.) A partial Consent Decree among the United States, WASA and the environmental group plaintiffs resolving the NMC portion of the case was entered by the District of Columbia District Court on October 10, 2003.

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<sup>3</sup> Petitions for review of the April 5, 2007 permit modification must be filed by May 7, 2007.

On December 16, 2004, in coordination with issuance of the modified permit - which is the subject of this petition for review - a judicial Consent Decree resolving all remaining allegations, including the WQS violations, was lodged with the United States District Court for the District of Columbia. Exhibit 7, LTCP Consent Decree. The Decree was subsequently entered on March 25, 2005.<sup>4</sup> The majority of the Consent Decree describes the requirements for WASA's implementation of its LTCP, according to a schedule, specified therein, that spans twenty (20) years and which may be extended under certain circumstances set forth in the Consent Decree.

#### B. Statutory and Regulatory

Discharges of pollutants to waters of the United States from point sources are prohibited unless authorized by a permit or an applicable statutory provision. 33 U.S.C. §§ 1311(a). The primary means through which EPA implements this regulatory regime is the NPDES permit program. NPDES permits issued to point source dischargers must include effluent limitations based upon the capabilities of the equipment or "control technologies" available to control those discharges and, where these technology-based effluent limitations prove insufficient to attain or maintain applicable water quality standards, additional water quality-based effluent limitations. See, Weinberger v. Romero Barcelo, 456 U.S. 305, 319 (1982). The CWA provides that by July 1, 1977 all discharges from publicly-owned

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<sup>4</sup> Although the LTCP Consent Decree was lodged with the Court simultaneously with issuance of the permit modification, because of the time required for public comment on the Decree, it was not entered by the Court until March 25, 2005. Therefore, the LTCP Consent Decree as entered by the Court is not part of the administrative record for the permit decision. The Region asks the Board to take judicial notice of the entry of the LTCP Consent Decree, unchanged from the document that was lodged. The Region has attached a copy of the Motion to Enter the LTCP Consent Decree and the entered Consent Decree to this Response. See Attachments 1 and 2 to this Response.

treatment works ("POTWs") were to meet effluent limitations based upon secondary treatment. CWA Section 301(b)(1) (B), 42 U.S.C. § 1311 (b) (1)(B). In addition, section 301(b)(1)(C) of the CWA provides a statutory deadline of July 1, 1977 for effluent limitations based on water quality standards<sup>5</sup> established prior to July 1, 1977. In the Matter of Star-Kist Caribe, Inc., 3 E.A.B. 172, 174 (1990).

A POTW is defined to include the collection system which carries wastewater to the treatment facility. 40 C.F.R. § 403.3(o). A combined sewer system (CSS) is a wastewater collection system which conveys sanitary wastewaters (domestic, commercial and industrial wastewaters) and storm water through a single-pipe system to a POTW. CSOs occurring within a CSS are point sources subject to NPDES permit requirements, including both technology-based and water quality-based requirements of the CWA. See Section 301(a) of the CWA, 42 U. S. C. §1311 and Montgomery Environmental Coalition v. Costle, 646 F. 2d. 568, (D.C. Cir. 1980).

The main purposes of EPA's CSO Policy are "to elaborate on EPA's National CSO Control Strategy published on September 8, 1989, at 54 FR 37370<sup>6</sup> and to expedite compliance with the requirements of the Clean Water Act." Exhibit 8, 59 FR 18688, col 1.

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<sup>5</sup> WQS are provisions of state or federal law which consist of a designated use or uses for the waters of the United States, water quality criteria to protect the most sensitive uses for such waters, and an antidegradation policy. P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 704 (1994).

<sup>6</sup> In 1989, in recognition of the fact that there was no uniform, nationally-consistent strategy for developing and issuing permits for the estimated 15,000 - 20,000 CSO discharge points in operation, yet not in compliance with the CWA, EPA issued the National Combined Sewer Overflow Control Strategy Document ("CSO Strategy"). The CSO Strategy stated that "Compliance dates for water-quality based and technology-based limitations are governed by the statutory deadlines in Section 301 of the CWA." Further, the CSO Strategy specifically noted "To the extent technology and water quality-based limitations cannot be met by the applicable dates, the permit should contain the statutory dates and public notice should be given simultaneously with an administrative enforcement order or other appropriate enforcement action requiring compliance within the shortest reasonable time." 54 FR at 37372.

The CSO Policy reiterated the three primary goals of the 1989 Strategy:

1. To bring all wet weather CSO discharge points into compliance with technology-based and water quality-based requirements of the CWA;
2. To minimize water quality, aquatic biota, and human health impacts from CSOs; and
3. To ensure that if CSOs occur, they are only as a result of wet weather.

Id. Section I.A., 59 FR 18689, col 2.

The CSO Policy establishes a two-phased approach through which compliance with existing requirements must be met, combining permitting and enforcement strategies. The CSO Policy sets forth short-term and long-term implementation objectives, focused on the attainment of WQS. Initially, no later than January 1997, permittees were to have implemented and documented implementation of the nine minimum CSO controls identified in the CSO Policy. These requirements were to be set forth in a "Phase I" permit, along with the requirement to develop a CSO LTCP designed to achieve compliance with WQS.<sup>7</sup> See 59 FR 18695-6. Phase I permits are required to include applicable narrative effluent limits necessary for WQS compliance. Following development of the LTCP, the Policy provides for issuance of a "Phase II" permit requiring LTCP implementation, including water quality-based limits necessary to achieve WQS. Id., 59 FR 19696, Sections IV. B.1. and B. 2.

The CSO Policy states that "unless the permittee can comply with all of the requirements of the Phase II permit, the NPDES authority should include, in an enforceable mechanism, compliance dates on the fastest practicable schedule for those activities directly

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<sup>7</sup>An LTCP evaluates and recommends alternatives for attaining compliance with the CWA, including compliance with WQS.



related to meeting the requirements of the CWA. For major permittees, the compliance schedule should be placed in a judicial order.” *Id.*, 59 FR 118696, col 3. In discussing phasing considerations, the Policy provides that, “If compliance with the Phase II permit is not possible, an enforceable schedule, consistent with the Enforcement and Compliance Section of this Policy, should be issued *in conjunction* with the Phase II permit which specifies the schedule and milestones for implementation of the long-term CSO control plan.” *Id.*, emphasis added. In discussing enforcement and compliance for Phase II permit, the Enforcement and Compliance section of the CSO Policy states: “The main focus for enforcing compliance with Phase II permits will be to incorporate the long-term CSO control plan through a civil judicial action, an administrative order, or other enforceable mechanism requiring compliance with the CWA and imposing a compliance schedule with appropriate milestone dates necessary to implement the plan. In general, a judicial order is the appropriate mechanism for incorporating the above provisions for Phase II.” *Id.*, 59 FR 18697, col. 2.

On December 15, 2000, Congress enacted the Wet Weather Water Quality Control Act (“WWWQA”), which *inter alia* effectively ratifies the permitting and enforcement provisions of the 1994 CSO Policy, by adding Section 402(q) to the CWA , providing in pertinent part: <sup>8</sup>

(1) Requirements for permits, orders and decrees

Each permit, order or decree issued pursuant to this chapter after December 21, 2000

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<sup>8</sup> The WWWQA also amended the CWA to add provisions requiring the provision of technical assistance and grants for treatment works for wet weather discharges and required EPA to report to Congress on a number of issues related to wet weather discharges. See CWA Sections 121 and 221, 42 U.S.C. §1274 and §1301.

for a discharge from a municipal combined storm and sanitary sewer *shall conform* to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994...

42 U.S.C. §1342(q). Emphasis added.

The plain language of the WWWWQA does not alter any provision of the CSO Policy nor the deadlines contained in Section 301 of the CWA.

Under the CWA, EPA may only include a compliance schedule in a NPDES permit for achieving compliance with state water quality standards where the state WQS or implementing regulations contain a provision authorizing a compliance schedule. In re Starkist Caribe, Inc. 3 E.A.D. 172, 175 (Adm'r 1990), modification denied, 4 E.A.D. 33, 34 (EAB 1992). EPA often refers to these types of provisions as compliance schedule authorizing provisions.<sup>9</sup> If a state has adopted a compliance schedule authorizing provision in its regulations and if a discharger requests a compliance schedule in a particular permit, the permitting authority then makes a discretionary decision whether to include a compliance schedule in the permit under the applicable regulations governing compliance schedules at 40 C.F.R. § 122.47. Significantly, these regulations give the permit authority discretion to determine whether granting a compliance schedule is "appropriate." 40 C.F.R. § 122.47(a). *See e.g., New England Plating Co.*, 9 E.A.D. 726, 736-739 (compliance schedules are allowed as an exception to this general rule requiring immediate compliance upon the effective date of the permit when deemed 'appropriate' by the permit issuer).

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<sup>9</sup> See In re City of Ames, Iowa, 6 E.A.D. 374, 381 (1996)(E.A.B. distinguishes between a "schedule of compliance" in a particular permit (see definition at 40 C.F.R. § 122.2) from the type of statute or regulation *authorizing* the inclusion by the Region of a compliance schedule in a particular permit under the Star-Kist decision.). CWA section 309(a)(5)(A) also uses the term compliance schedule in the context of an enforcement order. 33 U.S.C. § 1319 (a)(5)(A).

The District has a compliance schedule authorizing provision in its regulations. See, Title 21- District of Columbia Municipal Regulations, Chapter 5, Water Quality and Pollution. The District WQS include the following provision:

1105.9 When the Director requires a new water-quality standard-based effluent limitation in a discharge permit, the permittee shall have no more than three (3) years to achieve compliance with the limitation, unless the permittee can demonstrate that a longer compliance period is warranted. A compliance schedule shall be included in the permit.

21 DCMR 1105.9.

## II. STANDARD OF REVIEW

There is no appeal as of right from a final Agency permit decision. In re Miner's Advocacy Council, 4 E.A.D. 40, 42 (EAB, May 29, 1992). As set forth in 40 CFR § 124.19(a) and as explained below, on appeal to the Board the Petitioner has the burden to show that the Permit condition in question is based on either:

- (1) a finding of fact or conclusion of law which is clearly erroneous, or
- (2) an exercise of discretion or an important policy consideration which the Board should, in its discretion review.<sup>10</sup>

As set forth below, the permit provisions in question meet the requirements of and advance the goals of the CWA. Moreover, they are consistent with existing regulatory requirements, conform to the 1994 CSO Policy and are rational in light of all of the information in the record. Petitioner has failed to meet its burden. The Respondent's

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<sup>10</sup> The Board has broad authority to review important policy issues in NPDES permits, however, "the Agency intended this power to be exercised "only sparingly." 45 FR 33,290, 33,412 (May 19, 1980), In re Jett Black, Inc., 8 E.A.D. 353,3582 (EAB 1999). Agency policy favors final adjudication of most permits at the Regional level. 45 FR at 33, 412.

permitting decision was not clearly erroneous, nor does it otherwise present an important policy issue which warrants discretionary review by the Board.

III. ARGUMENT - Petitioner Has Failed to Show that EPA Erred in Including the LTCP Implementation Compliance Schedule in a Judicial Consent Decree Rather than in the Permit

The Region's inclusion of the compliance schedule for LTCP implementation in the Consent Decree, rather than the permit, fully conforms to the CSO Policy and with Section 402(q) of the CWA. WASA's assertion that it has a "right" to a compliance schedule in the permit under the District WQS regulations and the CSO Policy is wrong. Even where the state WQS allows for compliance schedules in a permit, whether to include a compliance schedule in the permit is at the discretion of the permitting authority - in this case the Region. Applying the facts of this permit to the Phase II permitting requirements, the Region's decision to place the compliance schedule for the LTCP in the Consent Decree was an appropriate exercise of its discretion.

The Phase II permitting provisions of the CSO Policy provide that once the LTCP controls have been selected, the permitting authority should include a schedule for implementation of the plan in "an appropriate enforceable mechanism". Exhibit 8, 59 FR 18696, col.1. The Consent Decree is an appropriate enforceable mechanism in these circumstances. An enforcement action was underway prior to issuance of the modified permit and the compliance schedule for LTCP implementation was negotiated by the parties and embodied in a Consent Decree signed by the permittee and lodged with the Court on the same day the permit was issued. See Exhibit 4 Fact Sheet, page 3, Exhibit 5 Response to

Comments, page 2 and Exhibit 7, LTCP Consent Decree.

In December 2002, well before the modified permit was issued, the United States filed a judicial complaint against WASA, alleging, *inter alia*, violations of its existing NPDES permit, including failure to comply with District WQS and “ failing to properly manage, operate and maintain all collection, pumping facilities, treatment and/or combined sewer overflow (CSO) control facilities or combined sewer systems....” See Consent Decree, Exhibit 7, page 2. The Consent Decree acknowledges the permit modification, noting the March 18, 2004 public notice of the draft permit containing the Phase II permit conditions. Exhibit 7, page 4. The LTCP implementation schedule, which was negotiated between the United States and WASA simultaneously with development of the modified permit, is incorporated into the Consent Decree, which was lodged with the Court at the same time that the permit modification was issued. Exhibit 7, LTCP Consent Decree. Moreover, the Permittee had agreed, with full knowledge of the pending permit modification, to the Consent Decree, which included the LTCP implementation schedule. The Consent Decree includes the following provision:

WHEREAS, the Parties agree, without adjudication of facts or law, that settlement of this matter in accordance with the terms of this Consent Decree is in the public interest and have agreed to entry of this Consent Decree without trial of any issues, and the parties hereby stipulate that, in order to resolve the claims for alleged violations of water quality standards stated in the Complaint of the United States, and **to provide for compliance with the water quality-based effluent CSO limits in WASA’s modified NPDES permit**, this Consent Decree should be entered:”...

Exhibit 7, page 5. Emphasis added.

As noted above, the CSO Policy further provides that: “Unless the permittee can

comply with all of the requirements of the Phase II permit, the NPDES authority should include, in an appropriate enforceable mechanism, compliance dates on the fastest practicable schedule for those activities.” Exhibit 8, 59 FR 18696, col. 1. There is no dispute that WASA cannot immediately comply. This is reflected in the Consent Decree itself which includes the following provision:

WHEREAS, since WASA is unable to comply with the water quality based CSO effluent limits in the PHASE II conditions of its NPDES Permit until such time as it has completed implementation of the CSO controls in its LTCP, the Parties have agreed to enter into this Consent Decree to establish a judicially enforceable schedule for implementation of the CSO controls in the LTCP.

Exhibit 7, LTCP Consent Decree, page 4.

In determining what the “appropriate enforceable mechanism” should be for this compliance schedule, the Region looked to the CSO Policy for its decision not to include the compliance schedule in the permit but rather to rely on the schedule in the Consent Decree. See Exhibit 5, Response to Comments, page 2. The Region considered the statements in the CSO Policy regarding permittees who are not able to comply with their Phase II permit conditions. In particular, with respect to “major permittees,” that cannot comply with all of the requirements of the Phase II permit, the CSO Policy states that “the compliance schedule should be placed in a judicial order.” Exhibit 7, 59 FR 18696, col 3. WASA is a major permittee.<sup>11</sup> Given that, at the time of permit issuance, a judicial order in the form of the Consent Decree was imminent, and that the Consent Decree contained a compliance schedule

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<sup>11</sup> EPA considers major municipal dischargers to be those that have a design flow of 1 million gallons per day (mgd) or greater or a service population of 10,000 or greater. See e.g. USEPA NPDES Permit Writer’s Manual, December 1996, page G-6. As the largest advanced wastewater treatment plant in the world, with a design capacity of 370 mgd and a peak capacity of 1.076 billion gallons per day, serving millions of people in the Washington D.C. area, Blue Plains is a major facility. See Exhibit 3, Fact Sheet, page 8.

for implementing the very LTCP provisions included in the permit, the Region's decision to impose the schedule through the Consent Decree was entirely appropriate and consistent with agency policy.<sup>12</sup>

One of WASA's arguments is that the Consent Decree was only lodged and not entered at the time that the permit modification was issued. Exhibit 2, WASA Petition at pages 23-24. That argument has been mooted with the entry of the LTCP Consent Decree by the Court. See, Attachments 1 and 2 to this Response.

WASA also argues that the District's WQS authorize the use of compliance schedules in permits whenever a new WQS based effluent limit is required in a permit. The existence of an authorizing provision, however, does not guarantee that every discharger will be granted such a schedule in its permit. Instead, EPA applies the regulations at 40 C.F.R. § 122.47(a) that provide that "the permit may, when appropriate, specify a schedule of compliance." Here, in consideration of the facts and circumstances of this matter, the applicable regulations and the CSO Policy, EPA reasonably determined that it was not appropriate to include a compliance schedule in the permit; but rather to proceed with an enforcement order containing a compliance schedule.

The Region considered the fact that the schedule agreed to in the Consent Decree for LTCP implementation would encompass several permit cycles. See Exhibit 5, Response to

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<sup>12</sup> In its petition, WASA refers to a Congressional conference committee report related to EPA's fiscal year 2005 appropriation, arguing that it reflects Congress' intent that compliance schedules be included in permits. See WASA Petition, p. 22, fn 9. However, the Conference Report also specifically states, "This clarification does not preclude state and/or federal enforcement actions where appropriate." At the time the Report was issued, in November 2004, the federal enforcement action against WASA had been underway for two years. See Exhibit 2, WASA Petition, Exhibit E.

Comments, page 2. It should also be noted that the District Department of Health provided certification, pursuant to Section 401 of the CWA that the permit complied with District WQS. Exhibit 6, CWA 401 Certification, dated December 15, 2004. In light of the stage that had been reached in an ongoing enforcement action at the time of permit issuance, EPA's decision to place the LTCP compliance schedule in the Consent Decree is entirely reasonable and consistent with applicable law.

While acknowledging that the Consent Decree establishes a schedule for LTCP implementation, WASA argues that it does not address "WASA's continued non-compliance with the Phase II water quality-based effluent limits in its permit or insulate WASA from enforcement action by the United States based on non-compliance with these limits". Exhibit 2, WASA Petition at page 24. WASA did not make this comment on the draft permit modification and therefore should not be advancing it in its petition. See Exhibit 9, WASA Comments on Draft "Phase II" Permit Conditions and Fact Sheet, March 18 Draft Permit for Public Notice.. Regardless, the Region does not believe that it is obligated to issue a permit that protects WASA from potential future claims of non-compliance. Even were it, WASA's assertion is wrong. While EPA may have reserved its rights under the Decree to bring an enforcement action for violations of the Permit - there are numerous other provisions which



could be violated - it is understood that compliance with WQS will not be achieved for some time. And, while Consent Decrees do not specifically provide releases from future violations, the United States has, through the Consent Decree, entered into an agreement, including a compliance schedule for correcting the cause of those violations, that addresses those specific future violations.

The Consent Decree explicitly resolves the allegations of failure to comply with WQS, and embodies the mechanism by which - it is hoped - WASA will achieve compliance. One of the conditions for Termination of the Consent Decree is that WASA must demonstrate that it has achieved and maintained compliance with the water quality-based CSO numerical effluent limitations and associated performance standards for two years after LTCP controls are in operation. Exhibit 7 at page 52. Contrary to WASA's representation, its compliance status with respect to future CSO violations is fully addressed by the Consent Decree. WASA is not in compliance, but is obligated by the Consent Decree to, in accordance with an enforceable schedule, take the actions designed to achieve compliance.

#### IV. CONCLUSION

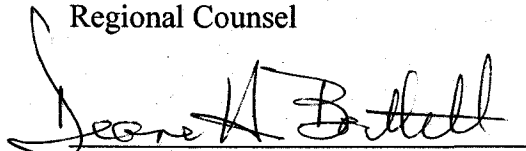
WASA has failed to meet its burden. The Petition for Review fails to show that the Region's December 16, 2004 permit decision with respect to the LTCP compliance schedule was based upon a finding of fact or conclusion of law which is clearly erroneous, nor does it involve an exercise of discretion or an important policy consideration which the Board in its

April 27, 2007

discretion should review. Accordingly, the Petition for Review should be denied.

Respectfully submitted this 27th day of April 2007,

William C. Early  
Regional Counsel

A handwritten signature in black ink, appearing to read "Deane H. Bartlett", written over a horizontal line.

Deane H. Bartlett  
Senior Assistant Regional Counsel  
EPA, Region III

OF COUNSEL  
Sylvia Horwitz  
Office of General Counsel

**EXHIBIT AND ATTACHMENT LIST FOR  
REGION III's RESPONSE TO PETITION FOR REVIEW**

Exhibits

1. Certified Index of the Administrative Record for District of Columbia Water and Sewer Authority Permit No. DC0021199, Final Modification Issued December 16, 2004
2. Petition, dated January 18, 2005, filed by the District of Columbia Water and Sewer Authority regarding the Region's final decision to issue the December 16, 2004 modified NPDES Permit No. DC 0021199 for the Blue Plains Waste Water Treatment Plant, includingonly Exhibits D and E thereto.
3. Permit No. DC0021199 issued December 16, 2004.
4. Fact Sheet, Permit No. DC0021199 issued December 16, 2004.
5. Regional Response to Comments on March 18, 2004 Draft Permit, issued on December 16, 2004.
6. District of Columbia Department of Health certification, pursuant to Section 401 of the CWA dated December 15, 2004, finding that the draft permit will not violate the District's water quality standards
7. Notice of Lodging and LTCP Consent Decree in Anacostia Watershed Society, et. al. v. District of Columbia Water and Sewer Authority, et al, consolidated Civil Action No. 1:CV00183TFH (lodged on December 16, 2004).
8. Combined Sewer Overflow (CSO) Control Policy, April 19, 1994.
9. WASA Comments on Draft "Phase II" permit Conditions and Fact Sheet for March 18, 2004 Draft permit for Public Notice, Attachment No.3 to WASA's April 16, 2004 comments on the draft permit and included with Attachment B to WASA's Petition for Review.

Attachments

1. United States' Motion to Enter LTCP Consent Decree, filed March3, 2005.
2. LTCP Consent Decree, entered March 25, 2005.

April 27, 2007

CERTIFICATE OF SERVICE

I hereby certify that Respondent's April 27, 2007 Response to Remaining Issue in the District of Columbia Water And Sewer Authority Petition for Review, Appeal No. 05-02, was served on this date as set forth below:

The original and five copies were mailed by Federal Express to:

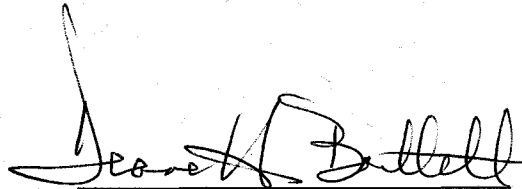
Ms. Eurika Durr  
Clerk of the Board, Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G. Street, N.W., Suite 600  
Washington, DC 20005

One copy was mailed by first class mail, postage prepaid to counsel for Petitioner:

District of Columbia Water and Sewer Authority:

David E. Evans, Esq.  
McGuireWoods LLP  
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