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FAX TRANSMITTAL MEMO

DATE: April 14, 2008

TO: Eureka Durr, Clerk, EPA Environmental Appeals Board

FAX #: 202-233-0121

FROM: Jennifer C. Chavez (phone 202-667-4500 ext. 208)

TOTAL PAGES (including cover page): 6

Dear Clerk:

I hereby submit a copy of the attached "Friends of the Earth and Sierra Club's Opposition to D.C. WASA's Motion for Reconsideration," NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12: In re. Blue Plains Wastewater Treatment Plant Permit No. DC0021199.

In accordance with EAB policy, an original copy will be filed with the Clerk's office and copies will be served on all parties.

Please feel free to contact me or my assistant Francisca Santana if you have any questions.

Dated: April 14, 2008

/s/ Jennifer C. Chavez
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ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Blue Plains Wastewater Treatment Plant, NPDES Permit No. DC0021199	NPDES Appeal Nos.: 07-10, 07-11, 07-12

FRIENDS OF THE EARTH AND SIERRA CLUB'S OPPOSITION TO DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S MOTION FOR RECONSIDERATION

For the following reasons, Friends of the Earth and Sierra Club (FOE/SC) oppose the District of Columbia Water and Sewer Authority's (WASA's) Motion for Reconsideration of that portion of the Board's March 19, 2008 order (Order) denying review of EPA Region 3's decision to include a total nitrogen limit in the Blue Plains Wastewater Treatment Plant NPDES Permit No. DC0021199 (the Permit).

I. Friends of the Earth and Sierra Club have an interest in the issues raised in WASA's Motion for Reconsideration.

Any action that weakens or eliminates the Blue Plains nitrogen permit limit will adversely affect the longstanding interest of FOE/SC and their members in achieving and protecting water quality in the Anacostia and Potomac Rivers. FOE/SC's particular interest in the nitrogen limit was evidenced by their formal comments on the initial proposed Permit which lacked a final nitrogen limit. *See* Ex. 1 to FOE/SC Petition for Review, NPDES 07-12 (May 7, 2007). In particular, FOE/SC asserted that, "[t]o address water quality standards violations in the Bay due to nutrient pollution, EPA and the states participating in the Chesapeake Bay Agreement... have agreed to cap annual nutrient loads for each major tributary basin and jurisdiction sufficient to achieve water quality standards (including water quality criteria) for the

Bay." *Id.* at 4. Accordingly, FOE/SC asserted that the Permit *must* include a final nitrogen limit sufficient to protect water quality and beneficial uses in the Bay. FOE/SC, in their comments on the second permit proposal, supported EPA's decision to add the nitrogen limit. *Id.* pt. 2 at 1.

II. WASA's Motion for Reconsideration Should be Denied

WASA has failed to demonstrate that reconsideration of the Board's decision is warranted. A motion for reconsideration will only be granted if a matter was "erroneously decided," based upon a "showing that the EAB has made a clear error, such as a mistake of law or fact." 40 C.F.R. § 124.19(g); EAB Practice Manual at 37 (June 2004) (internal citations omitted). Because the Board correctly found that WASA failed to allege why the permit limit for nitrogen contravenes the requirements of the Clean Water Act, and failed to allege why EPA's response to WASA's comments regarding the cap load allocation process was inadequate, reconsideration is not warranted.

A. The Board correctly held that WASA's challenge to the allocation and allocation process do not fall within the Board's review jurisdiction

The Board correctly rejected WASA's specific challenges to the final nitrogen limit in the Permit as outside the Board's jurisdiction. The Board acknowledged that a challenge to "the [nitrogen] effluent limitation itself" falls within the Board's review jurisdiction because the limit is a condition of the permit decision. Order at 44, citing 40 C.F.R. § 124.19. However, as detailed in section B below, each of WASA's specific challenges pertained to policy agreements made during the nitrogen limit allocation process between the Bay state partners under the Chesapeake Bay 2000 agreement. WASA failed to allege any reasons why the allocation process or final allocation that formed the basis for the permit limit contravene the Clean Water Act or regulations, and failed to explain why EPA's response to WASA's objections were inadequate. Thus, the Board properly declined to pass upon WASA's objections.

WASA did not allege that EPA's inclusion of the final nitrogen permit limit, based on the cooperative allocation process, violated CWA requirements for EPA's issuance of NPDES permits. In particular, EPA's action was governed by § 402 of the CWA, 33 U.S.C. § 1342. That provision authorizes EPA to issue permits for the discharge of pollutants upon condition that the discharges meet the requirements of the Act (including, *inter alia*, applicable water quality standards and criteria), and any other conditions EPA determines are necessary to carry out the requirements of the Act. *Id.* § 1342(a)(1). EPA "shall prescribe conditions for such permits to assure compliance" with the foregoing section.[1]

EPA and the District implemented the following process to determine the appropriate nitrogen permit limit for the District to achieve water quality criteria for the Chesapeake Bay: First, EPA Region III and EPA's Chesapeake Bay Program Office in 2003 published water quality criteria for nutrients in the Bay aimed at achieving the Bay Agreement goals.[2] *See Ambient Water Quality Criteria for the Chesapeake Bay and its Tidal Tributaries* (EPA-903-R-03-002) (cited in EPA's Response to Comments on the April 5, 2007 final modified permit). The Bay state partners then participated in a cooperative process to identify and allocate the load reductions necessary to achieve those criteria. *See* U.S. EPA, Region III, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*, EPA 903-R-03-007, ch. 1 at 2 (Dec. 2003) (cited in WASA's Petition as "December 2003 Publication"). The District took the

[1] *See* 33 U.S.C. § 1342(a)(1) (EPA may "issue a permit for the discharge of any pollutant... upon condition that such discharge will meet either (A) all applicable requirements under sections [301, 302, 306, 307, 308, and 403] or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter"); and §1342(a)(2) (EPA "shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1)..."). *See also* 40 C.F.R. §122.4(d) ("No permit can be issued... [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.").

[2] FOE/SC do not necessarily endorse EPA's conclusion that the final criteria for the Bay or the cap load allocations are adequate to achieve applicable water quality standards and criteria or to achieve the Chesapeake Bay 2000 Agreement goals.

position that achievement of the District's allocated reduction in nitrogen pollution was necessary to meet Bay criteria, along with reductions by the other Bay state partners. Finally, the District amended its water quality standards to reflect the agreements. *See* EPA Response to Comments at III.A.5.; 21 DCMR § 1104.8 Table 1 note 3. Thus, EPA and the District determined that the Blue Plains nitrogen permit limit was necessary to meet the Bay water quality criteria, and WASA has never offered evidence to the contrary.

B. The Board properly declined to consider WASA's allegations of deficiencies in the allocation process and final allocation to the extent they are irrelevant to CWA requirements for NPDES permits

The Board properly rejected WASA's specific grounds for challenging the permit limit. It is not disputed that the agreed allocations of the Bay-wide nitrogen cap among the Bay states involved "scientific and technical information *and policy agreements*." December 2003 Publication, ch. 1 at 2 (emphasis added). However, WASA has failed to allege that those policy agreements violated the Act or invalidated the final permit limit with respect to the requirements in CWA § 402 for EPA's issuance of NPDES permits. Therefore, the Board correctly concluded that the alleged deficiencies WASA cited are not properly before the Board.

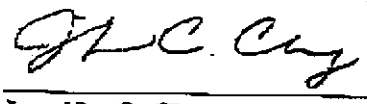
Most of WASA's allegations are based on WASA's view that the nitrogen reduction required of Blue Plains is unfairly high compared to the reductions required of sources in other states. WASA cites financial factors, as well as its belief that other states gain greater benefits from a clean Bay than the District does. *See* WASA Petition at 12-21. These objections are irrelevant to the requirement that a permit limit is necessary to meet applicable water quality standards and criteria for the Bay. The permit limit is not rendered legally invalid merely because of WASA opinion, for example, that "... the benefits to the District from the Bay's recovery pale in comparison to the benefits to Maryland and Virginia," or that "[t]he District

receives no more benefit from improved water quality in the main stem of the Bay than does Pennsylvania." WASA Petition at 14.[3]

Finally, WASA implies that it is not subject to the District's agreed allocation because WASA was not a party to the agreement process. However, as an entity of the District of Columbia, WASA is bound by the District's agreements, and responsible for carrying out the District's responsibility to make nitrogen reductions sufficient to achieve the Bay criteria. D.C. Code §34-2202.02.[4] WASA had ample opportunity to submit relevant evidence that the permit limit itself contravenes applicable CWA requirements, but failed to do so.

For the foregoing reasons, FOE/SC ask the Board to deny WASA's Motion for Reconsideration of the Board's March 19, 2008 Order.

Respectfully submitted this 14th day of April, 2008 by counsel for FOE/SC:



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[3] Nor do WASA's arguments support a claim that the permit limits are arbitrary and capricious as a matter of administrative law. WASA makes no claim that the limits lack any rational basis, nor does it offer evidence that would support such a claim. *See Assoc. of Public-Safety Comm. Officials-Int'l, Inc. v. F.C.C.*, 76 F.3d 395, 398 (D.C. Cir. 1996) ("The [agency] need not demonstrate that it has made the only acceptable decision, but rather that it has based its decision on a reasoned analysis supported by the evidence before the [agency]"); and *Williams Gas Processing-Gulf Coast Co. v. F.E.R.C.*, 331 F.3d 1011, 1018 (D.C. Cir. 2003) (court is generally unwilling to review agency's line-drawing "unless a petitioner can demonstrate that the lines drawn are patently unreasonable, having no relationship to the underlying regulatory problem").

[4] *See also* District of Columbia Water Quality Standards Revision of 2005 Response to Comments ("Through the December 2004 basinwide permitting approach, the District of Columbia reached agreement with EPA and the other six states on exactly how numerical NPDES permits would be put in place to regulate the discharge of nutrients from facilities throughout the 64,000 square mile watershed.")

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Friends of the Earth and Sierra Club Opposition to District of Columbia Water and Sewer Authority's Motion for Reconsideration** was filed via facsimile to Eurika Durr, Clerk of the Board, and served on each of the following by first-class mail, postage prepaid, on April 14, 2008:

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DATED: April 14, 2008

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