

EXHIBIT B



DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

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January 18, 2007

Ms. Mary Letzkus
Office of Permits and Enforcement (3WP41)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Re: Proposed Amendments to Blue Plains NPDES Permit

Dear Ms. Letzkus:

The District of Columbia Water and Sewer Authority (WASA) appreciates the opportunity to submit these comments on the proposed amendments to the NPDES permit for its Blue Plains advanced wastewater treatment plant, which were public noticed on December 14, 2006.

The proposed amendments consist of (1) substituting the current total nitrogen effluent goal with a final total nitrogen effluent limit, and (2) revisions to the Phase II CSO conditions that were added to the permit when it was amended on December 16, 2004. These comments first respond to the proposed final total nitrogen effluent limit and then to the proposed revisions to the Phase II CSO conditions. WASA is also requesting a modification to the deadline for submitting its pretreatment program annual report.

I. PROPOSED FINAL TOTAL NITROGEN LIMIT

A. Overview

As was the case with the earlier proposed interim nitrogen effluent limit, WASA has no objection to moving from a total nitrogen effluent goal to a total nitrogen effluent limit. As reflected in its nitrogen reduction efforts to date, WASA has and continues to support the Chesapeake Bay Program's nutrient reduction initiative and the goals of the Chesapeake 2000 Agreement.

Rather, WASA objects to (1) EPA's failure to offer a plausible explanation and justification for the allocation that is the basis for the proposed limit, (2) the arbitrary process used to derive the allocation for the District of Columbia and the resulting flaws in the proposed limit, (3) EPA's decision to add a final total nitrogen limit to the permit before receiving and acting on WASA's Total Nitrogen/Wet Weather Plan, and (4) EPA's failure to include a nitrogen limit compliance schedule in the permit.

It is apparent from page four of the fact sheet accompanying the draft permit amendment ("Draft Fact Sheet") that the proposed total nitrogen effluent limit is based upon the cap load allocation process described in the publication titled *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*.¹ However, that publication fails to offer a plausible explanation or justification for the proposed limit. If anything, the publication shows that the District of Columbia's total nitrogen allocation, and, in turn, the proposed Blue Plains limit, was arrived at arbitrarily and without considering the relevant science, facts and circumstances affecting the relative benefits to the Bay of reducing the discharge of nitrogen from Blue Plains versus reducing the discharge of nitrogen in Pennsylvania's Susquehanna River basin, the cost and difficulty of meeting the proposed nitrogen limit at Blue Plains, and the cost of the combined sewer overflow (CSO) obligations imposed on WASA's ratepayers in the District of Columbia. Therefore, WASA believes that the record supports a larger nitrogen allocation for the District and proposes that the District's nitrogen allocation be increased from 2.4 million pounds per year to 3.13 million pounds per year. WASA also proposes that the shares of this allocation assigned to non-point sources (280,000 pounds per year) and CSOs (5,300 pounds per year) remain unchanged, resulting in an increase in the total nitrogen allocation for Blue Plains from 4,689,000 pounds per year to 5,419,000 pounds per year.

Irrespective of the validity of the proposed limit, EPA has effectively ignored WASA's existing permit and consent decree wet weather flow treatment obligations by proposing to add the limit to the permit before receiving and acting on WASA's plan for complying with the limit while meeting its existing CSO control obligations (TN/Wet Weather Plan). These obligations pose a significant obstacle to WASA's ability to cost-effectively upgrade Blue Plains to control the discharge of nitrogen. Accordingly, the proposed limit is premature and violates a fundamental premise underlying the process used to derive the allocation that is the basis for the proposed limit. Moreover, EPA should have included in the permit a compliance schedule giving WASA a reasonable period of time to comply with the proposed limit. EPA has offered no explanation or justification for failing to include such a schedule even though total nitrogen effluent limit compliance schedules are being offered in the permits issued to every other significant publicly-owned treatment works (POTW) in the Chesapeake Bay watershed. EPA's stated intention to include a compliance schedule in a "separate enforceable document [to be] issued simultaneously with the final permit" (Draft Fact Sheet at 5) does not relieve EPA of its obligation to include a schedule in the permit.

¹ U.S. Environmental Protection Agency, Region III, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*, EPA 903-R-03-007 (Dec. 2003) (hereafter "December 2003 Publication"). Available at <http://www.chesapeakebay.net/pubs/doc-allocating-whole.pdf>.

B. Background

1. WASA Has Been a Leader in Voluntarily Controlling the Discharge of Nitrogen Under the Chesapeake Bay Program

As pointed out in our October 3, 2006 comments on the earlier proposal by EPA to add an interim total nitrogen limit and schedule to the permit, WASA has been a leader in the Chesapeake Bay Program's efforts to achieve voluntary reductions in the discharge of nitrogen to the Chesapeake Bay watershed. WASA was one of the first municipal wastewater treatment plant operators in the Bay watershed to significantly reduce its discharge of nitrogen, and one of the few to achieve the Chesapeake Bay Program's 40 percent nutrient reduction goal by the December 31, 2000 target date. Since 1996, WASA has removed over 238 million pounds of nitrogen from the Blue Plains effluent at a total cost of over \$57 million.²

In 2004, EPA added a total nitrogen effluent goal of 8,467,200 pounds per year to the Blue Plains permit. This goal was intended to reflect the plant's capability to remove nitrogen utilizing excess nitrification system treatment capacity and methanol addition to the extent that it would not prevent WASA from meeting its permit conditions.³ Although this goal is not an enforceable limit, WASA has met the goal every year since it was established. Moreover, WASA continues to invest in facilities to control the discharge of nitrogen from Blue Plains. Soon after completing facilities to add methanol, which serves as a carbon source required for nitrogen removal, WASA initiated planning for additional improvements to the existing reactors and sedimentation tanks used for nitrogen removal. These internal improvements, which are scheduled for construction between 2007 and 2011, are necessary to maintain the current biological nutrient removal capability, and based on the bids that have been received, will cost in excess of \$130 million.

2. WASA's Combined Sewer Overflow Control Obligations Pose Unique Challenges to WASA's Efforts to Control the Discharge of Nitrogen at Blue Plains

Although the cost has been substantial, WASA has been able to meet the total nitrogen effluent goal in its permit with moderate capital upgrades to Blue Plains. The proposed total nitrogen effluent limit, however, will require significant expenditures involving major plant upgrades to the limit of technology to control for nitrogen.

² The Chesapeake Bay Program's nutrient reduction goals and standards include phosphorus in addition to nitrogen. Phosphorus is not an issue in the proposed amendments because WASA has for many years consistently achieved phosphorus reductions greater than those required by the stringent phosphorus limit in its permit.

³ This goal represents a 40-percent nitrogen reduction from 1985 levels with the qualification that achieving the goal will not interfere with WASA's ability to meet the requirements of its permit.

WASA's dual obligations to (1) capture and treat massive amounts of wet weather flow from the District's combined sewer system, and (2) control nitrogen to levels approaching the limit of technology pose challenges faced by very few municipal wastewater utilities in the Bay watershed. If not accounted for in the design and construction of the upgrades, the large wet weather flows that WASA is required to treat at Blue Plains will significantly reduce the effectiveness of even the most sophisticated nitrogen control facilities, particularly during cold weather. Therefore, WASA must plan not just for nitrogen control to comply with the proposed limit, but for nitrogen control that will comply with the proposed limit and not prevent WASA from meeting its existing wet weather flow treatment obligations. As explained below, the cost and difficulty of meeting both of these obligations is dependent on EPA's approval of WASA's TN/Wet Weather Plan followed by modifications to WASA's existing wet weather flow treatment obligations.

WASA's existing wet weather flow treatment obligations are embodied in (1) the Blue Plains NPDES permit, and (2) two consent decrees between WASA and EPA, one of which is the March 23, 2005 consent decree referenced on page 5 of the fact sheet accompanying the proposed permit amendment. Of these obligations, two are of particular significance to the proposed total nitrogen limit. The first is the permit requirement to provide complete treatment⁴ (including nitrogen control) to peak wet weather flows up to 740 million gallons per day (mgd) for the first four hours after plant flows exceed 511 mgd. The second is the March 23, 2005 consent decree requirement to install four additional primary clarifiers to provide enhanced excess flow treatment.⁵ Based on its latest engineering studies, WASA has determined that it will cost more than \$1.2 billion to meet the proposed total nitrogen limit with these existing requirements.⁶ WASA has also determined and informed EPA that it can meet the proposed total nitrogen limit and achieve greater overall nitrogen removal and other pollutant load reductions at a cost of approximately \$800 million if (1) the permit is amended to reduce the peak wet weather flow requirement from 740 mgd to 555 mgd, and (2) the consent decree is modified to delete the four additional primary clarifiers and substitute enhanced clarification together with conveyance facilities. EPA has for some time known of and been involved in development of the TN/Wet Weather Plan to establish the technical basis to support these changes to its wet weather treatment obligations.⁷ Instead of waiting to receive the Plan, which is almost complete, EPA proceeded with the proposed amendment to add the nitrogen limit.

⁴ Complete treatment at Blue Plains includes primary treatment, secondary treatment, nitrification, biological nutrient removal, post aeration, filtration, and disinfection followed by discharge from Outfall 002.

⁵ Excess flow treatment at Blue Plains includes primary treatment, and disinfection followed by discharge from Outfall 001.

⁶ The cost estimates continue to increase as project planning progresses. These increasing cost estimates reflect steep increases in the price of wastewater infrastructure experienced throughout the Chesapeake Bay watershed. See e.g., Bay Restoration Fund Advisory Comm., Annual Status Report, (Jan. 2006) at 3, available at http://www.mdc.state.md.us/assets/document/brf_annual_report_2006.pdf.

⁷ See, slides and correspondence attached to and incorporated into these comments at Attachment 1.

3. WASA's District Ratepayers are Disadvantaged Relative to Ratepayers in Neighboring Chesapeake Bay States

WASA operates the wastewater collection and treatment system for the District of Columbia, including the Blue Plains plant. Blue Plains serves portions of surrounding areas including suburban Virginia and Maryland in addition to the District of Columbia.⁸ The burden of paying for the over \$2 billion (2006 dollars) CSO control program will fall primarily on the ratepayers in the District of Columbia because the combined system is located entirely within the District's boundaries. Rate projections currently indicate that even before the cost of nitrogen control is added, WASA's District ratepayers will experience steep rate increases during implementation of the CSO control program, with rates approaching 1.7 percent of median household income by 2024.⁹ As proposed, the nitrogen limit will add an additional \$1.2 billion in capital cost (2006 dollars) and \$23 million in annual operating costs. District rates are projected to increase to more than 1.9 percent of median household income when the District ratepayer's share of these costs (approximately \$500 million and \$9 million, respectively)¹⁰ is added to the current rate projections. Further, annual rate increases for District residents are projected to average more than 10 percent per year for at least the next 10-years during implementation of the nitrogen and CSO control programs.

Although WASA is not the only wastewater utility in the Chesapeake Bay watershed with CSOs and a CSO control program, few, if any, wastewater utilities in the watershed are facing the financial burden projected for WASA's District ratepayers. Moreover, ratepayers in Virginia and Maryland benefit from State grant programs that pay a significant portion of the cost of the capital upgrades needed to meet their Chesapeake Bay-related nitrogen and phosphorus limits.¹¹ These grant programs serve to spread the cost of nitrogen control among large state-wide populations, thereby significantly reducing the cost to individual ratepayers. The District's ratepayers, on the other hand, cannot benefit from a State grant program because the District's relatively small population would be the only source of the revenue needed to fund the grants.

Finally, Virginia's municipal wastewater utilities have the benefit of a nutrient credit exchange program which permits them to reduce or defer the cost of nutrient control by purchasing credits from other dischargers in the same watershed.¹²

⁸ Blue Plains treats all of the wastewater generated in the District of Columbia, approximately 90 percent of the wastewater generated in Montgomery County, Maryland, approximately 50 percent of the wastewater generated in Prince George's County, Maryland, and approximately 15 percent of the wastewater generated in Fairfax County, Virginia.

⁹ Assumes no other sources of funding.

¹⁰ Based on the District's approximate 40-percent share in the annual average flow allocation at Blue Plains.

¹¹ Va. Code §§ 10.1-2117 *et seq.*; Md. Code [Envir.] § 9-1605.2.

¹² Va. Code §§ 62.1-44.19:12 to -44.19:19.

In fact, the watershed general permit recently issued for all significant dischargers of nutrients to the Chesapeake Bay in Virginia offers each discharger the opportunity to comply with its nitrogen limit either by upgrading its treatment system or by trading for credits. WASA's ratepayers do not have the benefit of this option.¹³

4. The Process Used to Establish the Blue Plains Allocation

The fact sheet accompanying the proposed permit amendment together with the December 2003 publication titled *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads* (which is referenced on page 5 of the Draft Fact Sheet) do make clear that the proposed limit is based upon the Chesapeake Bay Program's initiative to restore and protect the Bay's water quality and living resources by controlling and limiting the loads of nitrogen, phosphorus, and sediment discharged to the Bay.

As explained in the December 2003 Publication, the principal elements of this initiative include (1) EPA's adoption of water quality criteria and designated uses for the Bay, (2) adoption of water quality standards by the individual Bay states based upon the EPA criteria and uses, (3) establishment of Bay-wide nitrogen, phosphorus, and sediment load caps by the Bay program partners to achieve the standards, (4) a Bay program process for allocating the Bay-wide caps among the States and individual Bay tributaries, and (5) adoption of tributary strategies by the States which allocated the loads under each tributary cap first between point and non-point sources in the tributary and then allocated the point source nitrogen and phosphorus loads among the individual point sources within each tributary.

The allocation process described above produced a total nitrogen cap load allocation of 2.4 million pounds per year (mpy) for the District of Columbia.¹⁴ The District of Columbia government then allocated 280,000 pounds per year of this allocation to the District's non-point sources, and 5,300 pounds per year to WASA's CSOs, leaving 2,115,000 pounds per year as the District's allocation for Blue Plains. Maryland allocated 1,993,000 pounds per year of its Potomac tributary nitrogen allocation to Blue Plains for the Maryland jurisdictions served by the plant, and Virginia allocated 581,000 pounds per year of its Potomac tributary nitrogen allocation to Blue Plains for the Virginia jurisdictions served by the plant. This produced a total Blue Plains nitrogen allocation of 4,689,000 pounds per year, which is the limit proposed in the draft permit amendment.¹⁵

WASA does not object to elements (1), (2), (3), and (5) above because they appear to be based upon rational scientific and policy considerations which are documented in the record.¹⁶ For the reasons discussed in these comments, however,

¹³ 9 Va. Admin. Code §§ 25-820-10 to -70 (eff. Nov. 1, 2006), 23 Va. Reg. Regs. 231 (Oct. 2, 2006).

¹⁴ December 2003 Publication, tbl. IV-7, at 102.

¹⁵ Draft Fact Sheet at 5 and 6.

¹⁶ We note for the record, however, that the Bay-wide 175 mpy nitrogen load cap is not based on a scientific analysis which shows that the Bay's water quality will not be restored if the load cap is exceeded. Rather, it is the product of a stakeholder process which eventually determined that a 175 mpy nitrogen load cap together with the load caps for phosphorus and sediment, generally reflect the Bay Program's water

WASA does object to the process used to arrive at the 2.4 mpy nitrogen allocation for the District of Columbia as well as the allocation itself and proposes that the allocation be increased.

C. The District's Allocation and the Process Used to Arrive at the Allocation are Seriously Flawed

The Chesapeake Bay Program (Bay Program) established and used the following three "guiding principles" in allocating the Bay-wide load caps to the individual states and tributaries:

1. Basins that contribute the most to the problem must do the most to solve the problem.
2. States that benefit most from the Chesapeake Bay recovery must do more.
3. All reductions in nutrient loads are credited toward achieving final assigned loads.¹⁷

Having adopted principles to guide its decision making process, the Bay Program was under an obligation to follow these principles in arriving at the allocations. Unfortunately, however, there is nothing in the record to show that the Bay Program followed the principles as expressed in arriving at the District's nitrogen allocation. To the contrary, the December 2003 Publication relied on by EPA to justify the proposed limit indicates that the principles were not applied correctly to the District, resulting in a smaller nitrogen allocation for the District, and, in turn, the District's share of the Blue Plains allocation. The District's nitrogen allocation would have been larger had the principles been applied correctly.

The foregoing flaws in the allocation process are reflected in the way in which the nitrogen allocations for the District and Pennsylvania's Susquehanna River basin were arrived at and the resulting allocations. A correct application of principles (1) and (2) above would have led to a larger percent nitrogen reduction requirement for Pennsylvania's Susquehanna River basin than the percent nitrogen reduction requirement for the District. However, the preliminary nitrogen allocation for Pennsylvania's Susquehanna River calls for dischargers to that basin to achieve nitrogen reductions totaling 55.4 percent over the baseline¹⁸, while the District's nitrogen load reduction requirement was set at 61.6 percent.¹⁹

quality objectives and are achievable. *See*, Chesapeake Bay Program Principals' Staff Committee Issue Paper (Mar. 21, 2003) and attachment containing list of options, which is attached to and incorporated in these Comments as Attachment 2). *See also*, December 2003 Publication at 83-99. WASA does believe that the relative nature of the Bay-wide nitrogen load cap is relevant to its position that the District's total nitrogen allocation is arbitrary and can be adjusted upward without adversely affecting the Bay water quality restoration effort.

¹⁷ December 2003 Publication at 93.

¹⁸ The baseline was calculated based on the projected nitrogen load from human activity in the year 2010 without any point or non-point source controls in place. December 2003 Publication at 94 - 95.

¹⁹ December 2003 Publication at 99-102.

Although correctly concluding under principle (1) above that the Susquehanna River has a "high" impact on Bay tidal water quality and that the Potomac River has a "moderate" impact, the Bay Program erroneously assumed under principle (2) above that as a "tidal" jurisdiction, the District would benefit equally with Maryland and Virginia from the Bay's recovery.²⁰

Given its location at the headwaters of tidal influence, the District is marginally a tidal jurisdiction, but it was plainly wrong for the Bay Program to assume that the District would benefit equally with Maryland and Virginia from the Bay's recovery. The District places great value on the quality of its tidal waters, but keeping in mind that the nutrient reductions are driven largely by water quality in the main stem of the Bay, there can be no question that the benefits to the District from the Bay's recovery pale in comparison to the benefits to Maryland and Virginia. The District receives no more benefit from improved water quality in the main stem of the Bay than does Pennsylvania. Water quality in the main stem of the Bay, on the other hand, is of immense value to Maryland and Virginia.

The foregoing shows that the Program arbitrarily failed to correctly apply its own allocation principles resulting in nitrogen allocations that call for a greater percent reduction for the District than the percent reduction required of Pennsylvania's Susquehanna River basin even though the District's discharges have less impact on the problem than Pennsylvania's Susquehanna dischargers and even though the District receives no greater benefit from water quality improvement in the main stem of the Bay than the benefit received by Pennsylvania.

Further, after concluding that the reductions required by the preliminary allocations derived from the process described above would not be sufficient to meet the Bay-wide cap, the Bay Program compounded its erroneous application of its own principles by arbitrarily reducing the District's nitrogen allocation from 2.8 mpy to 2.4 mpy in order to bring the allocations in line with the Bay-wide load cap.²¹ Other nitrogen allocations were reduced as well, but it is clear from Table IV-7 of the December 2003 Publication that, on a percentage basis, the District's nitrogen allocation was reduced more than the nitrogen allocation for any other jurisdiction. Particularly significant is the relative percent nitrogen reductions required of the District compared to Pennsylvania's Susquehanna River basin. While acknowledging that, on a pound-for-pound basis, nitrogen reductions in the Susquehanna basin are a greater benefit to water quality in the Bay than nitrogen reductions in the Potomac basin, the Bay Program increased the percent reduction in the nitrogen allocation for the District from 61.6 percent to 67.2 percent (from 2.8 mpy to 2.4 mpy) while only increasing the percent reduction in the nitrogen allocation for the Susquehanna River basin from 55.4 percent to 57.1 percent (from 69.08 mpy to 67.58 mpy). The Bay Program offered no explanation or justification for these reductions.

²⁰ December 2003 Publication at 94.

²¹ December 2003 Publication at 99-102.

D. EPA is Obligated to Correct the Deficiencies in the Allocation Developed by the Bay Program and to Consider the District's Unique Circumstances Before Using the Allocation as the Basis for the Nitrogen Limit in the Blue Plains Permit

It is apparent that EPA did nothing more than simply assume that the District's 2.4 mpy nitrogen allocation and the resulting 2,115,000 pounds per year District portion of the Blue Plains nitrogen allocation are a valid basis for establishing and imposing a nitrogen limit in the Blue Plains permit.²² Consequently, EPA has failed to fulfill its obligation to consider the water quality benefit and fairness of the District's allocations derived from the wholesale process described above; the extraordinary financial burden of WASA's CSO control obligations on District ratepayers; the complexities and difficulties inherent in controlling nitrogen to levels approaching the limit of technology while treating massive volumes of wet weather flow from the District's combined sewer system; grant funding for nitrogen control available to ratepayers in Virginia and Maryland, but not to ratepayers in the District; and WASA's inability to trade for nitrogen credits to comply with the limit.

The proposed nitrogen limit threatens to deprive the District's ratepayers of the opportunity to produce badly needed revenues from the sale of nitrogen credits to Virginia dischargers to the Potomac River basin. Legislation passed by the Virginia General Assembly in 2005 established a nutrient credit exchange program which, among other provisions, specifically authorizes Virginia dischargers to the Potomac to acquire credits generated by Blue Plains.²³ Credits are generated by discharging less nitrogen than authorized by the permit, with one credit generated for every pound of nitrogen below the limit. WASA plans to upgrade Blue Plains to control nitrogen to the limit of technology, which equates to about three milligrams per liter (mg/l) of nitrogen discharged on an annual average basis. The proposed limit reflects a discharge concentration of 4.7 mg/l at the District's 148 mgd reserved capacity in Blue Plains. While the difference between 3 mg/l and 4.7 mg/l will allow the District to generate some revenues from the sale of credits, the amount of these revenues is so small that they would do little to assist the District's ratepayers with the large financial burden imposed by the combined cost of CSO and nitrogen control.

Further, most other jurisdictions in the Potomac watershed have population growth rates that are greater than the District's growth rate. These jurisdictions will need to acquire additional allocations in the future to offset the nitrogen loads produced by population growth. A Blue Plains nitrogen limit based on a fair and equitable allocation for the District would also give WASA the opportunity to generate revenues by making a portion of its allocation available to other Potomac dischargers to accommodate population growth. Consequently, with a larger nitrogen allocation, WASA's financially hard-pressed District ratepayers could benefit from the revenues generated either by WASA's ability to

²² This is WASA's first opportunity to formally comment on the allocation and EPA's intention to use it as the basis for a permit limit.

²³ Va. Code §§ 62.1-44.19:12 to -44.19:19.

Consequently, with a larger nitrogen allocation, WASA's financially hard-pressed District ratepayers could benefit from the revenues generated either by WASA's ability to sell credits to Virginia dischargers in the Potomac basin pursuant to the Virginia nutrient credit exchange legislation or by making a portion of the allocation available to Potomac dischargers serving faster growing jurisdictions.

Based on the above, WASA proposes that the District's total nitrogen allocation be modified to reflect the same percent reduction required of Pennsylvania's Susquehanna River basin. This would change the percent reduction required of the District from 67.2 percent to 57.1 percent, resulting in an increase in the District's nitrogen allocation from 2.4 mpy to 3.13 mpy. Although significant for the District, this increased allocation represents less than one half of one percent of the total nitrogen load cap for the Bay, and, therefore, should have little, if any impact on standards attainment in the Bay's main stem. Further, to the extent EPA believes this 0.73 mpy increase would need to be offset, it should be subtracted from the 67.58 mpy allocation for Pennsylvania's Susquehanna River basin. The impact on individual dischargers to the Susquehanna would be insignificant after the reduction was distributed among dischargers throughout the basin. Moreover, transferring this load reduction would produce a net benefit to the Bay because, as pointed out above, the Bay Program has concluded that nitrogen discharged to the Susquehanna has a greater impact on the Bay than nitrogen discharged to the Potomac. WASA also proposes that the shares of the District's allocation assigned to non-point sources (280,000 pounds per year) and CSOs (5,300 pounds per year) remain unchanged, resulting in an increase in the District's portion of the allocation to 2,845,000 pounds per year, and an increase in the total Blue Plains allocation to 5,419,000 pounds per year.

E. The Proposed Nitrogen Limit is Premature

EPA has known for some time that WASA is developing a Total Nitrogen/Wet Weather Plan that will address critical issues related to WASA's ability to cost-effectively comply with the proposed nitrogen limit while meeting its existing wet weather CSO control obligations.²⁴ Among the issues that will be addressed in the Plan are those discussed above related to the present 740/511 mgd peak wet weather flow complete treatment requirement in the permit and the consent decree requirement to install primary clarification for excess flow treatment. Unless these issues are resolved and (1) the permit is amended to incorporate a 555/511 mgd peak wet weather flow complete treatment requirement, and (2) the consent decree is modified to provide for enhanced clarification in lieu of primary clarification for excess flow treatment, WASA will be forced to spend hundreds of millions of dollars more than necessary to comply with the proposed nitrogen limit. Therefore, WASA submits that it was arbitrary for EPA to propose to amend the permit to add the proposed nitrogen limit before receiving and acting on the Plan. Further, EPA's proposal to amend the permit to add the nitrogen limit before these critical issues are resolved, if finalized, will violate the fundamental premise of fairness and equity underlying the allocation process that is the basis for the proposed limit.

²⁴ See, Attachment 1 to these Comments.

F. EPA Should Have Included a Schedule in the Permit that Would Give WASA a Reasonable Period of Time to Comply with the Final Nitrogen Limit

The fact sheet accompanying the proposed permit amendment acknowledges that Blue Plains “is not currently capable of achieving [the nitrogen] limit [included in the draft permit].”²⁵ However, rather than establishing a schedule of compliance in the permit that would give WASA a reasonable period of time to achieve compliance with the nitrogen limit, EPA stated instead that it intends to establish such a schedule through “a separate enforceable document to be issued simultaneously with the final permit.”²⁶ EPA’s failure to provide a schedule in the permit, or provide a rational justification or legally defensible basis for failing to do so, violates the agency’s own regulations, and arbitrarily puts WASA at significant risk of non-compliance with its NPDES permit. Further, the absence of a schedule in the permit would leave WASA as the only discharger in the Chesapeake Bay watershed without a permit schedule to meet a nitrogen limit based on the Bay Program’s nutrient water quality criteria.

EPA regulations state that when drafting permit conditions the “Director shall establish conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of CWA [Clean Water Act] and regulations. These *shall* include conditions under . . . 122.47(a) (schedules of compliance)”²⁷ Thus, EPA’s regulations require schedules of compliance where they are necessary to assure compliance.²⁸ Applicable EPA regulations also provide that permits include a schedule, where appropriate, that requires compliance “as soon as possible.”²⁹ The draft permit, as EPA has acknowledged, would require compliance with the nitrogen limit *sooner* than possible. EPA provides no justification for this requirement, beyond its stated intention to include a schedule of compliance in some separate document.

Further, all of the relevant criteria governing the establishment of compliance schedules in permits are satisfied in this case. First, the regulations limit the circumstances under which a permit for a new discharger can include a schedule of compliance.³⁰ Since this is not a new discharge, these limitations do not apply. Second, the permit may not allow for compliance at a date later than the applicable statutory deadline under the CWA.³¹ The statutory deadlines are contained in CWA § 301(b) (1) (C) which provides that “not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards” must be achieved.

²⁵ Draft Fact Sheet at 5.

²⁶ *Id.*

²⁷ 40 C.F.R. § 122.43(a) (emphasis added).

²⁸ See, *In re Gov't of District of Columbia MS4*, NPDES Appeal Nos. 00-14 & 01-09, 2002 EPA App. LEXIS 1, at *87 (Env'tl. App. Bd. Feb. 20, 2002).

²⁹ 40 C.F.R. § 122.47(a)(1).

³⁰ 40 C.F.R. § 122.47(a)(2).

³¹ 40 C.F.R. § 122.47(a)(1).

EPA's Environmental Appeals Board ("EAB"), in the leading case on this issue, found that for post July 1, 1977 water quality standards, "EPA may add a schedule of compliance to a permit."³² The water quality standards which are the basis for the proposed nitrogen limit were adopted only recently. Therefore, EPA is not precluded from including a schedule in the permit based on the date that the standards were established. Third, the EAB has held that a schedule can be included in a permit issued by EPA only "if the State has laid the necessary groundwork in its standards or regulations."³³ The fact sheet accompanying the proposed permit amendment states that the proposed total nitrogen limit is based on the water quality standards of the District of Columbia, the Commonwealth of Virginia and the State of Maryland.³⁴ Each of these jurisdictions has, in fact, authorized the use of compliance schedules in permits to meet water quality based effluent limitations.³⁵ In fact, D.C. Code *requires* that a schedule of compliance be included in a permit for any new water quality standard-based effluent limitation.³⁶

As WASA meets all of the criteria noted above, EPA must provide a rational basis for failing to include a schedule of compliance in the amended permit. EPA has failed to provide any basis for including a schedule in the permit, stating only that it will provide a schedule of compliance in a separate enforceable document. However, the foregoing does not relieve the agency of its obligation to provide a schedule in the permit, and EPA's failure to do so is in excess of its authority and arbitrary and capricious.

Aside from EPA's legal obligation, equity requires that a reasonable schedule of compliance be included in the permit. Neighboring states have begun the process of issuing NPDES permits to add nitrogen limits for dischargers in the Chesapeake Bay watershed. In every instance, these dischargers have been or will be granted compliance schedules in their permits with EPA's knowledge and approval.³⁷ WASA should be accorded the same consideration.³⁸

³² *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 176-77 (Env'tl. App. Bd. 1990).

³³ *Id.*

³⁴ See, Draft Fact Sheet at 1.

³⁵ See, D.C. Mun. Reg. tit. 21, § 1105.9; Md. Code Regs. 26.08.04.02(C); 9 Va. Admin. Code § 25-260-186; 9 Va. Admin. Code § 25-31-250.

³⁶ See, D.C. Mun. Reg. tit. 21, § 1105.9. It will take well over three years to design and construct the massive upgrades at Blue Plains required to meet the proposed nitrogen limit. Therefore, the proposed limit more than satisfies the three-requirement in this Code section.

³⁷ See, e.g., 9 Va. Admin. Code § 25-820-40, 23 Va. Regs, Reg. 231, 237 (Oct. 2, 2006) (providing compliance schedules for all holders of individual VPDES permits that discharge or propose to discharge nitrogen or phosphorus to the Chesapeake Bay or its tributaries); Approach for Managing Nutrient Caps for Point Sources in Maryland's Chesapeake Bay Watershed (Preliminary Discussion Draft – April 7, 2006), which is attached to and incorporated into these Comments as Attachment 3.

³⁸ While WASA will require a schedule of compliance longer than five years, nothing in the EPA regulations or the CWA limits the duration of a compliance schedule to the five-year permit term. Instead, EPA regulations only require that compliance be achieved "as soon as possible." 40 C.F.R. § 122.47(a)(1). In addition, D.C. regulations allow compliance schedules beyond three years if the permittee can "demonstrate that a longer compliance period is warranted." D.C. Mun. Reg. tit. 21, § 1105.9. In addition, neither Maryland's nor Virginia's regulations restrict the time period of a compliance schedule beyond the requirement that compliance be as soon as possible. See 9 Va. Admin. Code § 25-31-250(A)(1); 9 Va. Admin. Code § 25-260-186(B); Md. Code Regs. 26.08.04.02(C)(2)(ii).

II. PROPOSED REVISIONS TO PHASE II CSO CONDITIONS

These proposed revisions consist of (1) modification of Part III.E.1 to incorporate a water quality standards compliance requirement that includes both the narrative and numeric standards while limiting the duration of the requirement to the period of LTCP implementation, and (2) modification of Part III.E.2 to .4 to delete the TMDL-derived numeric limits.

A. The Proposed Standards Compliance Requirement at Part III.E.1 Does Not Conform to the CSO Policy

As EPA knows, WASA objected to Part III.E.1 at the time it was added to the permit when the permit was first modified on December 16, 2004. WASA objects to this proposed modification as well for the same reasons. The basis for the objection is set forth in detail in WASA's April 16, 2004 written comments on the proposed modifications that eventually were finalized on December 16, 2004 as well as WASA's January 18, 2005 Petition for Review³⁹ to the EAB. Both of these documents are incorporated by reference in these comments.

In summary, WASA believes that both the existing and proposed water quality standards compliance requirement fail to conform to Section IV.B.2.c of EPA's CSO Control Policy, and, therefore, violate Section 402(q) of the Clean Water Act (Act) because they are water quality-based requirements that are not authorized by the Act. The only kind of water quality-based requirement specifically mentioned in Section IV.B.2.c of the Policy are "numeric performance standards for the selected CSO controls."⁴⁰ Additional water quality-based CSO requirements can be included in the permit, but only if they are shown to be necessary to meet the water quality-based provisions of the Act.

In WASA's case, EPA found that the selected controls in its LTCP will meet the District's water quality standards and designated uses and has included in the permit performance standards for the selected controls that, when achieved, will provide for compliance with the standards and designated uses. Therefore, it is not necessary for EPA to include Section III.E.1 in the permit in order to meet the water quality-based provisions of the Act because the permit includes the performance standards specifically called for in Section IV.B.2.c of the CSO Policy. Part III.E.1 both as it now appears in the permit and as it is proposed to be modified serves no purpose other than to unfairly expose WASA to permit non-compliance, and, therefore, it does not conform to the Policy and violates Section 402(q) of the Act.

EPA's proposal to limit the term of standards compliance requirement at Part III.E.1 does reduce the extent to which it exposes WASA to permit non-compliance, but for the reasons summarized above, it is still not authorized by the CSO Policy and it still unfairly exposes WASA to liability for permit non-compliance.

³⁹ NPDES Appeal Nos. 05-01 and 05-02.

⁴⁰ 59 Fed. Reg. 18,688, 18,696 (Apr. 19, 1994).

Therefore, WASA continues to object to Part III.E.1 and asks that it be removed from the permit in its entirety.

B. WASA Supports the Proposed Modification to Delete the TMDL-Derived Limits in Part III.E.2 to .4

For the reasons stated in our April 16, 2004 written comments on the previous modification and our January 18, 2005 Petition for Review, WASA strongly supports EPA's proposal to delete the TMDL-derived limits and related conditions at Part III.E.2 to .4.

C. The Permit Should Contain a Compliance Schedule for Implementation of the Selected Controls in WASA's LTCP

EPA will recall that WASA objected to and appealed EPA's failure to include an implementation schedule for the selected controls in WASA's LTCP when the permit was modified on December 16, 2004 to incorporate the LTCP-derived performance standards at Part III.C. The LTCP-derived performance standards are not affected by this proposed modification. Therefore, WASA believes that the permit should contain an implementation schedule for the reasons stated in our comments on the previous modification and in our January 18, 2005 Petition for Review and also for the reasons stated above regarding EPA's failure to include a permit schedule affording WASA a reasonable opportunity to comply with its final nitrogen limit. Therefore, WASA objects to EPA's failure to include a compliance schedule for implementation of the selected controls in its LTCP.

III. AMENDMENT TO PRETREATMENT ANNUAL REPORT DEADLINE

Finally, WASA requests that EPA modify Part IV.A.1.b of the permit to authorize WASA's annual pretreatment report to be submitted by March 31 rather than February 28. Blue Plains serves several jurisdictions that have separate NPDES permits. One of the Blue Plains user jurisdictions, the Washington Suburban Sanitary Commission (WSSC), has an NPDES permit with a due date of March 15 for the annual pretreatment report. WASA's needs the information from WSSC's report to complete its report, and a March 31 deadline would give WASA sufficient time to receive WSSC's information and include it in WASA's annual report.

Again, WASA appreciates the opportunity to submit these comments. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,



John T. Dunn
Chief Engineer/Deputy General Manager