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ENVIR. APPEALS BOARD

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July 6, 2007

**BY HAND**

Eurika Durr  
Clerk of the Board, Environmental Appeals Board  
Colorado Building  
1341 G Street, NW  
Suite 600  
Washington, D.C. 20005

Re: NPDES Appeal No. 07-12, NPDES Permit No. DC0021199

Dear Ms. Durr:

Enclosed for filing is the original and five copies of intervenor the District of Columbia Water and Sewer Authority's Response to Friends of the Earth's and Sierra Club's Petition for Review. We ask that a copy of the Response be date-stamped and returned with the courier.

Thank you for your assistance.

Sincerely,

*David E. Evans* | CEA

David E. Evans

Enclosure

cc: Avis M. Russell, General Counsel, D.C. Water and Sewer Authority  
Counsel of Record

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

	)	
In the Matter of:	)	
	)	
District of Columbia Water and Sewer	)	
Authority, NPDES Permit No. DC0021199	)	NPDES Appeal No. 07-12
	)	
	)	

**THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S  
RESPONSE TO FRIENDS OF THE EARTH'S AND SIERRA CLUB'S PETITION  
FOR REVIEW**

Pursuant to the Board's Orders dated June 15, 2007, and June 26, 2007, intervenor District of Columbia Water and Sewer Authority ("WASA") hereby files this response to the petition for review filed by Friends of the Earth and Sierra Club ("FOE/SC").<sup>1</sup>

**I. INTRODUCTION AND BACKGROUND**

FOE/SC seeks review of a certain modification to NPDES Permit No. DC0021199 (the "Permit"), issued by Region 3 of the Environmental Protection Agency (the "Region") on April 5, 2007. Specifically, FOE/SC challenges the Region's decision to revise Part III.E.1 titled "Water Quality-Based Requirements for CSOs" to delete a portion of the language that was proposed in the August 18, 2006 draft modification to

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<sup>1</sup> WASA has filed a separate petition seeking review of portions of the Permit in the matter styled *In re NPDES No. DC0021199*, NPDES Appeal No. 07-11. WASA's petition does not seek review of the condition that is the subject of the FOE/SC petition, and this response does not address matters in that case.

Part III.E.1. FOE/SC Pet. at 8. As proposed on August 18, 2006, Part III.E.1 read as follows:

The Long Term Control Plan (LTCP) performance standards contained in Part III. Section C.2.3. through 9.<sup>2</sup> are the water quality-based effluent limits for CSO discharges. In addition, until such time as all of the selected CSO controls set forth in the LTCP have been placed in operation, and the Permittee so certifies to EPA, in writing, consistent with the Clean Water Act, Section 301(b)(1)(C), the permittee must not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law.

In the final permit modification issued on April 5, 2007, the Region retained the first sentence quoted above, but deleted the second sentence in response to WASA's October 3, 2006 comments on the August 18, 2006 draft permit modification.<sup>3</sup> FOE/SC challenges the Region's decision to delete the second sentence quoted above.

The Permit authorizes the discharge of treated wastewater from WASA's Blue Plains Wastewater Treatment Plant ("Blue Plains") as well as the discharge of combined sewer overflow from the District of Columbia's combined sewer system under the terms and conditions set forth in the Permit. The challenged provisions apply exclusively to the combined sewer system, which is the source of combined sewer overflows ("CSOs") during and following rainfall events. Consequently, resolution of the issues raised in this appeal requires a basic understanding of the Environmental Protection Agency's ("EPA's")

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<sup>2</sup> Technically, the correct citation to the Permit numeric performance standards is "Part III.2.A.3 through 9." WASA uses this citation in this response.

<sup>3</sup> Before it was finalized on April 5, 2007, the proposed permit modifications were amended and issued for public notice a second time on December 14, 2006. Part III.E.1, as proposed on August 18, 2006, remained unchanged and was not affected by the December 14, 2006 amendments and public notice. WASA's October 3, 2006 comments are on file with the Region and are incorporated herein by reference.

1994 Combined Sewer Overflow Control Policy (“CSO Policy” or “Policy”)<sup>4</sup> which governs the establishment of permit conditions for combined sewer systems.

**A. Applicable Provisions of EPA’s CSO Policy**

The CSO Policy, which was incorporated into the Clean Water Act in 2000,<sup>5</sup>

represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives.

56 Fed. Reg. 18,688.

The Policy generally provides that communities with CSOs must comply with the technology-based and water quality-based requirements of the Clean Water Act (“CWA”). The technology-based requirements for combined sewer systems (“CSS”) are known as the Nine Minimum Controls (“NMCs”). The NMCs consist of a wide variety of best management practices tailored to the site-specific characteristics of individual combined sewer systems, and are intended to reduce, to the extent possible, CSO pollutant loads pending development and implementation of Long Term CSO Control Plans that provide for compliance with the water quality-based requirements of the CWA. CSO Policy at II.B, 59 Fed. Reg. at 18,691.

The Policy provides for compliance with the water quality-based requirements of the CWA through the development and implementation of Long Term CSO Control Plans (“LTCPs”). CSO Policy at II.C, 59 Fed. Reg. at 18,691-94. LTCPs consist of a number of elements, but their ultimate purpose is to identify the controls needed to

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<sup>4</sup> EPA 830-B-94-001 (Apr. 1994), 59 Fed. Reg. 18,688 (Apr. 19, 1994).

<sup>5</sup> Clean Water Act § 402(q), 33 U.S.C. § 1342(q).

prevent discharges from the CSS from causing or contributing to violations of applicable water quality standards. The CSO Policy allows communities to develop their LTCPs using either a “presumption” approach or a “demonstration” approach. CSO Policy at II.C.4, 59 Fed. Reg. at 18,692-93. Communities selecting the presumption approach can choose from among three control alternatives which are “presumed” to meet water quality standards so long as the presumption is reasonable in light of the available data and information. CSO Policy at II.C.4.a, 59 Fed. Reg. at 18,692-93. Communities selecting the demonstration approach must show through data collection and modeling performed during LTCP development that the selected controls are projected to meet water quality standards following LTCP implementation. CSO Policy at II.C.4.b, 59 Fed. Reg. at 18,693. Under either approach, CSO communities must ultimately show through post-construction water quality monitoring and assessment that the CSO discharges remaining after LTCP implementation are not causing or contributing to violations of applicable water quality standards.

The Policy also establishes a two-phased permitting approach. CSO Policy at IV.B, 59 Fed. Reg. at 18,695-96. Phase I permits are issued to CSO communities in the initial stages of their CSO programs, and generally contain (1) requirements to implement the NMCs, and (2) schedules to develop and submit LTCPs to the permitting authorities. CSO Policy at IV.B.1, 59 Fed. Reg. at 18,696. Phase II permits are issued to CSO communities following completion of their LTCPs and the permitting authority’s determination that the LTCP meets the requirements of the selected approach. The CSO Policy calls for Phase II permits to contain the water quality-based requirements for the CSS based on the selected controls in the LTCP. CSO Policy at IV.B.2, 59 Fed. Reg. at

18,696. These requirements and their specific application to the District's CSS and WASA's LTCP are discussed in detail below.

**B. WASA's Wastewater Collection and Treatment System**

WASA is an independent authority of the Government of the District of Columbia. It was created in 1996 by the United States and the Government of the District of Columbia to provide drinking water to the residents of the District of Columbia and regional wastewater collection and treatment to citizens and businesses in the metropolitan Washington, D.C. area. Prior to 1996, both Blue Plains and the District's wastewater collection system, including the CSS, were operated by the District of Columbia government. Since 1996, they have been operated by WASA.

Blue Plains serves portions of surrounding areas including suburban Virginia and Maryland in addition to the District of Columbia.<sup>6</sup> The service area for Blue Plains covers approximately 735 square miles. Approximately one-third of the wastewater collection system in the District of Columbia consists of combined sewers, which convey both sanitary wastewater and storm water. The CSS serves the central, older portions of the District and covers about 20 square miles. Approximately 66 percent of this area drains to the lower Anacostia River, with the remainder to the Potomac River and Rock Creek. There are 53 active CSO outfalls listed in the Permit. When the capacity of the CSS is exceeded during storms, the combined excess flow, which is a mixture of wastewater and storm water, is discharged to the receiving streams through the CSO outfalls.

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<sup>6</sup> 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.

Blue Plains is designed to provide advanced wastewater treatment (complete treatment) and excess flow treatment during CSS flow (wet weather) conditions. Flow receiving complete treatment is discharged from Outfall 002 and flow receiving excess flow treatment is discharged from Outfall 001. The complete treatment facilities have capacity for an annual average flow of 370 million gallons per day (“mgd”) and a four-hour peak rate of 740 mgd during wet weather conditions. After four hours of wet weather event peak flow, the complete treatment facilities have capacity for 511 mgd. The excess flow treatment facilities comprise primary treatment and chlorination and dechlorination with a capacity of 336 mgd that is discharged from Outfall 001. Outfall 001 is a wet weather outfall and discharges only when wet weather conditions exist.

**C. WASA’s Long Term CSO Control Plan**

With financial assistance from EPA, and after implementation of an extensive monitoring and modeling program that was endorsed by EPA, local regulators and representatives of the environmental community, WASA completed its LTCP Final Report in July 2002 and submitted it to EPA and the District of Columbia Department of Health (“DOH”) in early August 2002 for these agencies’ review and approval.

WASA’s LTCP was developed in strict accordance with the CSO Policy. During development of its LTCP, WASA characterized, monitored, and modeled its combined sewer system, considered sensitive areas, evaluated a wide range of control alternatives, and ultimately selected as its control program a separation, storage, conveyance, and treatment system under the “demonstration” approach discussed above.

The LTCP calls for the construction and operation of an extensive underground tunnel system that will capture combined excess flow during and following rainfall

events. The LTCP also calls for use of wet weather capacity at Blue Plains to treat excess flow not captured by the tunnels. As wet weather flows to Blue Plains begin to recede following rainfall, capacity at the plant will be used to empty the tunnels. Approximately \$860 million in treatment plant and system upgrades are currently under design or construction, and when these upgrades are completed in 2008, Blue Plains is projected to have the capacity to treat a four-hour peak rate of 1076 mgd during wet weather events. When fully implemented, the selected controls in WASA's LTCP will reduce CSO discharges by approximately 96 percent over uncontrolled levels based on the average wet weather condition at an estimated cost of \$1.265 billion in 2001 dollars. CSO discharges will continue following LTCP implementation, but they will be few and far between.

As provided in the CSO Policy and its implementing guidances, WASA developed its LTCP and designed the selected CSO controls around average rainfall conditions. CSO discharge and instream data collected during an extensive monitoring program were used with mathematical models of the CSS and CSO receiving waters to characterize the discharges from the CSS and their impacts on the receiving waters. The models provide dynamic and continuous simulation of the CSO discharges and their water quality impacts. Based on review of 50 years of rainfall data, the years 1988, 1989, and 1990 were selected as representative of the climatic conditions for the wet weather events causing CSO discharges and their impacts on the receiving waters. Average design conditions were developed from these representative climatic conditions. The models and the average design conditions were then used by WASA for the LTCP.



As reflected in the fact sheet accompanying the December 16, 2004 permit modification,<sup>7</sup> both EPA and DOH have found that following implementation of the selected controls in the LTCP, the remaining CSO discharges from WASA's CSS are not expected to cause or contribute to violations of the applicable District of Columbia water quality standards or contribute to impairment of the designated uses of the receiving waters. As provided in the CSO Policy and as reflected in the same fact sheet, however, this standards compliance determination must be confirmed through post-construction monitoring.<sup>8</sup>

**D. The Phase II Permit Conditions**

The CSO Policy lists seven requirements that should be included in Phase II permits. Policy at IV.B.2, 59 Fed. Reg. at 18,696. Of these requirements, the requirements at IV.B.2.c, d, and g are relevant to the issues raised in this appeal.

The requirement at IV.B.2.c states, in relevant part, that Phase II permits providing for implementation of the selected controls in LTCPs employing the demonstration approach should include

[w]ater quality-based effluent limits under 40 CFR 122.44(d)(1) and 122.44(k), requiring, at a minimum, compliance with, no later than the date allowed under the State's WQS, the numeric performance standards for the selected CSO controls, based on average design conditions specifying ... iv. performance standards that are consistent with II.C.4.b. of the Policy.

CSO Policy at IV.B.2.c, 59 Fed. Reg. at 18,696. Policy § II.C.4.b, which is referenced in IV.B.2.c, sets out four criteria that must be satisfied by permittees seeking to use the demonstration approach. Of these criteria, only the criterion at II.C.4.b.ii is relevant to

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<sup>7</sup> Fact Sheet at 15. This fact sheet is on file with the Region and is incorporated herein by reference.

<sup>8</sup> *Id.*

the issues raised in this appeal. This criterion states that permittees wishing to employ the demonstration approach should demonstrate that

[t]he CSO discharges remaining after implementation of the planned control program will not preclude the attainment of WQS or the receiving waters' designated uses or contribute to their impairment. Where WQS and designated uses are not met in part because of natural background conditions or pollution sources other than CSOs, a total maximum daily load, including a wasteload allocation and a load allocation, or other means should be used to apportion pollutant loads.

Policy at II.C.4.b.ii, 59 Fed. Reg. at 18,693.

Taken together, these two CSO Policy sections establish a two-step process for developing and including water quality-based effluent limits in Phase II permits where the permittee employs the demonstration approach in its LTCP. The first step is for the permitting authority to find that the planned control program meets the demonstration approach criteria at CSO Policy § II.C.4.b, including a finding that the CSO discharges remaining after implementation of the planned control program will not preclude the attainment of water quality standards or the receiving waters' designated uses or contribute to their impairment. Once the permitting authority has determined that selected controls will meet the criteria at CSO Policy § II.C.4.b (including the standards compliance determination required by that section), pursuant to CSO Policy § IV.B.2.c, the permitting authority must then develop and include in the permit, numeric performance standards for the selected controls, based on average design conditions that are consistent with CSO Policy § II.C.4.b.

The Region followed this two-step process in modifying WASA's permit on December 16, 2004 to include the Phase II permit conditions. First, it found that WASA's planned control program and selected controls satisfied the criteria at CSO

Policy § II.C.4.b, including a specific finding by the Region that “WASA has demonstrated, pursuant to Section II.C.4.b of the 1994 CSO Policy, that the CSO control program will not preclude the attainment of WQS or the receiving waters designated uses or contribute to their impairment.” Fact Sheet Accompanying December 16, 2004 Permit Modification at 15. Then, pursuant to CSO Policy § IV.B.2.c, the Region developed numeric performance standards for the selected CSO controls, based on average design conditions, that were consistent with its standards compliance determination under CSO Policy § II.C.4.b., and included these performance standards at Part III.C.2.A.3 through 9 of the Permit when it was modified on December 16, 2004. These performance standards, therefore, constitute the water quality-based effluent limits under 40 CFR §§ 122.44(d)(1) and 122.44(k) that are called for in CSO Policy § IV.B.2.c.

It must be emphasized that the Region has necessarily concluded that if WASA complies with the performance standards in the Permit, the discharges from WASA’s CSS will not cause or contribute to violations of water quality standards. WASA submits that the performance standards in Part III.C.2.A.3 through 9 of the Permit conform to the CSO Policy’s directive that permitting authorities should include water quality-based effluent limits in Phase II permits.

Further, when it modified the Permit on December 16, 2004, the Region added a condition at Part III.D requiring that WASA undertake a post-construction monitoring program following LTCP implementation as required by CSO Policy § IV.B.2.d. This condition is designed to ensure that the LTCP performance standards at Part III.C.2.A.3 through 9 do, in fact, provide for compliance with the District’s water quality standards. Finally, pursuant to CSO Policy § IV.B.2.g the Region added a re-opener provision at

Part II.A.13(2) of the Permit which authorizes the Region to modify or revoke and reissue the Permit to include new or revised conditions in the event new information “indicates that CSO controls imposed under the permit have failed to ensure the attainment of State WQS.”

When it incorporated the CSO Policy into the CWA in Section 402(q), Congress gave EPA clear direction with respect to its CSO permitting responsibilities. Section 402(q)(1) provides, in relevant part, that “[e]ach permit ... issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Policy signed by the Administrator on April 11, 1994.” 33 U.S.C. § 1342(q). Therefore, permit conditions that do not conform to the CSO Policy violate Section 402(q) of the CWA and are unlawful.

## II. RESPONSE TO PETITION

### A. **FOE/SC Had More Than Ample Opportunity To Comment On the Water Quality-Based Effluent Limitations in the Permit.**

FOE/SC asserts that it was denied a fair and legally sufficient opportunity to comment on the Permit because the final language in Part III.E.1 “deviated materially and substantially from the proposal in a way that was not reasonably foreseeable.” FOE/SC Pet. at 9. FOE/SC’s claim is unfounded and is contradicted by the record and their own petition.

First, an agency satisfies notice-and-comment requirements, and need not conduct further rounds of public comment, when its final decision is a “logical outgrowth” of the rule it originally proposed. *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004). If interested parties “should have anticipated” that the change

was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period, then the rule is deemed to constitute a logical outgrowth of the proposed rule. *See City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003); *Am. Med. Ass'n v. United States*, 887 F.2d 760, 768 (7<sup>th</sup> Cir. 1989) (stating that “the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was ‘on the table’”).

Here, the Region’s August 18, 2006 proposed permit modification included changes to Part III.E.1. *See* August 18, 2006 Draft Permit Modification and Accompanying Fact Sheet.<sup>9</sup> Thus, the fact that the Region proposed changes to Part III.E.1 when it released the draft permit modification for public notice made it clear that further changes were possible after the Region received comments. The Region was not required to adopt a final permit that is identical to the one proposed.<sup>10</sup> Indeed, “[i]f that were the case, [the Region] could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end.” *First Am. Discount Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (internal quotations and citation omitted). Agencies are free to modify proposed decisions as a result of the comments they receive. *See Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000) (noting that “the Agency’s change of heart ... only demonstrates the value of the comments it received”), *cert. denied*, 532 U.S. 970 (2001); *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (“It is an elementary principle of rulemaking

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<sup>9</sup> The draft permit modification and fact sheet are on file with the Region and are incorporated herein by reference.

<sup>10</sup> EPA’s regulations providing for notice and public participation in permit proceedings under the Clean Water Act provide, in part, that public notice of the proposed issuance, denial or modification of every permit shall be circulated in a manner designed to inform interested and potentially interested persons of the agency’s action. *See* 40 C.F.R. § 124.10(d). There is no claim in FOE/SC’s petition that the Region failed to comply with these procedural requirements.

that a final rule need not match the rule proposed, indeed must not if the record demands a change.”).

Moreover, as is apparent from FOE/SC’s Petition, Part III.E.1 of the Permit has been highly controversial, and over the years, has been the subject of successive proposed amendments, comment periods and petitions for review. In fact, as reflected in FOE/SC’s Petition, in response to each amendment, WASA has objected to different versions of the narrative limitation in Part III.E.1 that eventually was deleted by the Region in the April 5, 2007 modification. FOE/SC Pet. at 5-9. Consequently, there can be no doubt that FOE/SC was on notice that Part III.E.1 was “on the table” for possible further amendment, that WASA would object to the language that the Region eventually deleted in the final modification issued on April 5, 2007, and that the Region could respond to WASA’s comments by deleting the language.

Second, FOE/SC must show prejudice from a claimed procedural notice violation. *See* 5 U.S.C. § 706. In making such a showing in the context of a violation of notice-and-comment requirements, FOE/SC must demonstrate that, had proper notice been provided, they would have submitted additional, different comments that could have invalidated the rationale for the revisions. *See Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (citing *Air Transport Ass’n v. CAB*, 732 F.2d 219, 224 n.11 (D.C. Cir. 1984)). FOE/SC makes no such demonstration. In fact, FOE/SC provided comments on the same narrative limitation for which it now says it had no notice. FOE/SC (1) objected to the Region’s proposed elimination of the narrative limitation in the future; and (2) claimed that any such elimination would violate anti-backsliding requirements of the CWA. Response to Comments (on Aug. 18, 2006 Proposed Modification) at II.D. In other

words, FOE/SC filed the very comments that it now claims it was denied an opportunity to present. The Region reviewed those contentions and rejected them. FOE/SC certainly understood that the Region was considering further changes to Part III.E.1, and given the recitals in their own petition, it is inconceivable that they could have been denied a fair opportunity to comment or that they were prejudiced because the Region responded to WASA's comments by deleting the second sentence in Part III.E.1.

**B. The Amendment to Part III.E.1 Does Not Violate Anti-backsliding.**

The CWA's anti-backsliding provisions provide that a permit "may not be renewed, reissued, or modified ... to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."<sup>11</sup> 33 U.S.C. § 1342(o). FOE/SC's assertion that the Region violated anti-backsliding by deleting the second paragraph of Part III.E.1 is fatally flawed because Part III.E.1, as finalized in the April 5, 2007 permit modification, is not less stringent than its previous versions. As explained below, the final version of Part III.E.1 in the April 5, 2007 modification simply reflects the transition from a Phase I CSO permit to a Phase II CSO permit in accordance with EPA's CSO Policy. The final version is no less stringent than the previous versions because like the previous versions, the final version provides for compliance with the District's water quality standards, but, as required by the CSO Policy, takes a different approach to the standards compliance requirement.

As discussed above, the Policy establishes a two-phased permitting approach for CSOs, with Phase I permits issued to CSO communities in the initial stages of their CSO programs and Phase II permits issued to communities following completion of their

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<sup>11</sup> Petitioners cite to the provisions at 33 U.S.C. § 1311(b)(1)(C) which relate to a state's authority to develop more stringent water quality standards, treatment standards or schedules of compliance, rather than the anti-backsliding provisions.

LTCPs and the permitting authority's determination that the LTCP meets the requirements of either the presumption approach or demonstration approach. The CSO Policy recognizes that it is impossible to establish numeric water quality-based effluent limits for CSOs in the absence of a final LTCP that identifies the controls needed to meet water quality standards. Therefore, the Policy authorizes the narrative standards limitation in Phase I permits. CSO Policy § IV.B.1.c, 59 Fed. Reg. at 18,696.

Beginning in 1997, this narrative limitation was included in WASA's Phase I permits. However, following completion of WASA's LTCP and EPA's standards compliance determination in 2004, the Permit was converted from a Phase I permit to a Phase II permit when it was modified on December 16, 2004 to add the Phase II conditions required by the CSO Policy, including the numeric LTCP performance standards at Part III.C.2.A.3 through 9, the post-construction monitoring program at Part III.D, and the water quality-based requirements for CSOs at Part.III.E.1.<sup>12</sup> Unfortunately, however, rather than acknowledging that the conditions at Part III.C.2.A.3 through 9 were the water quality-based effluent limits for the CSO discharges as required by CSO Policy § IV.B.2.c, the Region retained the old Phase I narrative standards limitation in Part III.E.1. The Policy calls for the narrative limitation to be replaced with the more specific numeric performance standard as CSO communities transition from Phase I to Phase II permits. *Compare* CSO Policy § IV.B.1.c (Phase I permits) *with* CSO Policy § IV.B.2.c (Phase II permits).

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<sup>12</sup> The Region also added TMDL-derived effluent limitations at Part III.E.2 in the December 16, 2004 modification. These limitations were removed from the Permit in the April 5, 2007 modification.



WASA objected to the Region's decision to retain the narrative limitation, petitioned this Board for review of the limitation,<sup>13</sup> and continued to object to the limitation when the Region withdrew it and proposed another version of the limitation in the August 18, 2006 draft.<sup>14</sup> In response to WASA's comments on the August 18, 2006 version, the Region finally agreed that the narrative limitation was no longer needed now that the numeric performance standards had been added to the Permit and were expressly acknowledged to be the water quality-based requirements for the CSOs. *See* Response to Comments (on August 18, 2006 Proposed Modifications) at II.A.2. Therefore, there is no basis for FOE/SC's claim that the Region's decision to delete the narrative standards compliance requirement in Part III.E.1 violates the anti-backsliding provisions of the CWA.

**C. The Final Language Does Not Violate Either 33 U.S.C. § 1311(b)(1)(C) or EPA's Rules.**

The Petitioners' assertion that the Region violated 33 U.S.C. § 1311(b)(1)(C) and EPA's own rules when it removed the narrative standards limitation from Part III.E.1 of the Permit is flawed because it totally ignores the provisions of the CSO Policy which govern the establishment of Phase II permit conditions.

As discussed above, CSO Policy § IV.B.2.c specifies the water quality-based requirements that should be included in Phase II permits. The narrative limitation in Part III.E.1 that EPA removed from the Permit was, without question, a water quality-based requirement.<sup>15</sup> Therefore, in order to conform to the CSO Policy, the language removed

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<sup>13</sup> *See* WASA's Petition for Review filed January 18, 2005 which is incorporated herein by reference.

<sup>14</sup> The August 18, 2006 version of Part III.E.1 did, however, acknowledge for the first time that the LTCP performance standards at Part III.C.2.A.3 through 9 are the water quality-based requirements for the CSOs.

<sup>15</sup> In their petition, FOE/SC contend that the LTCP performance standards are not water quality-based limitations, but rather are "a form of technology-based limits." FOE/SC Pet. at 13. This assertion is not

from Part III.E.1 must have been authorized by and consistent with CSO Policy § IV.B.2.c.

The only kind of water quality-based effluent limits specifically authorized for Phase II permits in CSO Policy § IV.B.2.c are “numeric performance standards for the selected CSO controls.” Section IV.B.2.c does state that the performance standards are the “minimum” water quality-based effluent limits that must be included in Phase II permits. Therefore, it appears that EPA can include water quality-based effluent limits in addition to the performance standards specifically mentioned in Policy § IV.B.2.c so long as they conform to the CSO Policy. However, where not expressly authorized by the Policy, such additional limits can conform to the Policy only where they are shown to be necessary to achieve the goals and purposes of the Policy; namely, to meet the water quality-based requirements of the CWA. CSO Policy § I.A, 59 Fed. Reg. at 18,689.

In this case, as discussed above and contrary to FOE/SC’s groundless assertions, the Region has found that the selected controls in WASA’s LTCP are projected to meet

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only groundless, but improperly seeks to attack a determination made by the Region when it issued the December 16, 2004 permit modification. *See* Fact Sheet Accompanying December 16, 2004 Permit Modification. In contending that the LTCP performance standards are not water quality-based limitations, FOE/SC are effectively asserting that EPA’s determination in the December 16, 2004 permit modification that the LTCP would comply with water quality standards under the demonstration approach was flawed. This is because under CSO Policy § IV.B.2.c, EPA could not have legally added the performance standards to the permit without first determining that they were consistent with the demonstration approach to water quality standards compliance. Consequently, if FOE/SC believed that the LTCP performance standards were not sufficient to provide for standards compliance under the demonstration approach, it could and should have challenged that determination in the December 16, 2004 permit modification proceeding by challenging the addition of the LTCP performance standards at Part III.2.A.3 through 9. FOE/SC had 30 days after the December 16, 2004 permit modification to challenge these permit determinations. It is too late to challenge them now.

In any event, the assertion is groundless because it ignores the District of Columbia’s and the Region’s conclusion that the beneficial use classifications in the standards would be maintained given the circumstances under which the remaining CSO discharges would occur after LTCP implementation. This conclusion superseded the mistaken conclusion in the LTCP that the selected controls had to maintain the standard’s primary contact recreation beneficial use designation under all wet weather conditions. FOE/SC’s assertion also ignores the District’s determination in 2004 that the prohibition on the discharge of untreated sewage would not be violated following LTCP implementation because the few remaining overflows would receive some level of treatment.

the District's water quality standards and designated uses under the demonstration approach and has included in the Permit performance standards for the selected controls that, when achieved, are projected to provide for compliance with the standards and designated uses.<sup>16</sup> If the post-construction monitoring program required by Part III.D of the Permit shows that compliance with the LTCP performance standards in Part III.C.2.A.3 through 9 is not achieving compliance with water quality standards, the Region can re-open the Permit to require the additional controls needed to meet the standards. Therefore, there was no need for the Region to include the narrative limitation in Part III.E.1 of the Permit in order to meet the water quality-based requirements of the CWA because the Permit includes the performance standards specifically called for in CSO Policy § IV.B.2.c. The Region's decision to remove the second sentence in Part III.E.1 was reasonable, conformed to the CSO Policy, and without question, was not arbitrary and capricious. The language removed from Part III.E.1 served no purpose other than to unfairly expose WASA to permit non-compliance, and, therefore, did not conform to the Policy and violated CWA § 402(q).

Part III.E.1, as proposed, would have exposed WASA to enforcement and potential liability for violations of the District's narrative standard after implementation of the selected CSO controls even if WASA meets the performance standards in the Permit and even though the Region has determined that these same performance standards are projected to provide for compliance with these very same water quality standards. Surely, Congress did not intend such a result when it incorporated the Policy into the CWA.

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<sup>16</sup> See Fact Sheet Accompanying December 16, 2004 Permit Modification at 14-15, which is on file with the Region and incorporated herein by reference.

WHEREFORE, for the reasons stated above, FOE/SC has failed to meet its burden to obtain review by the Board. Therefore, WASA respectfully submits that FOE/SC's Petition should be a denied and its appeal dismissed in its entirety.

Respectfully submitted,

**DISTRICT OF COLUMBIA  
WATER AND SEWER AUTHORITY**

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Response was served by email and first class

U.S. Mail, postage prepaid, this 6<sup>th</sup> day of July, 2007, upon the following:

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