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

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In re: :

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District of Columbia : NPDES 05-02, 07-10,

Water & Sewer Authority : 07-11, 07-12

:

NPDES Permit No. DC0021199 :

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Washington, D.C.

Wednesday, November 5, 2007

The above-entitled matter came on
for ORAL ARGUMENT at approximately 1:34 p.m.
at the Environmental Protection Agency, EPA
East Building, 1201 Constitution Avenue, NW,
Washington, D.C.

BEFORE:

KATHIE A. STEIN

EDWARD E. REICH

ANNA L. WOLGAST

Presiding Judges

1 APPEARANCES:

2 On behalf of D.C. Water and Sewer Authority:

3 DAVID E. EVANS, ESQUIRE

4

On behalf of Chesapeake Bay Foundation:

5

JON A. MUELLER, ESQUIRE

6

7 On behalf of Friends of the Earth/Sierra Club:

8 JENNIFER CHAVEZ, ESQUIRE

9

On behalf of Environmental Protection Agency:

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DEANE BARTLETT, ESQUIRE

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1 PROCEEDINGS

2 CLERK: The Environmental Appeals
3 Board of the United States Environmental
4 Protection Agency is now in session for oral
5 argument. In re: District of Columbia Water
6 and Sewer Authority, Docket No. DC0021199
7 NPDES appeal numbers 05-02, 07-10, 07-11, and
8 07-12. Honorable Judges Anna Wolgast, Kathie
9 Stein, and Ed Reich presiding.

10 Please be seated.

11 JUDGE STEIN: Good morning,
12 everyone. We're hearing argument this
13 morning, or actually this afternoon, in four
14 different appeals, and we have three
15 different Petitioners, as I understand it.
16 The Board has issued an order allocating a
17 total of 90 minutes for oral argument.

18 Washington Area Sewer Authority, or
19 WASA, the permittee, shall proceed first, and
20 shall have 30 minutes for argument, of which
21 they may reserve up to five minutes for
22 rebuttal.

1 The Chesapeake Bay Foundation shall
2 proceed second; it has been allocated 15
3 minutes for argument, and may reserve up to
4 five minutes of its time for rebuttal. Earth
5 Justice, representing the Sierra Club and
6 Friends of the Earth, shall proceed third,
7 and similarly may reserve up to five minutes
8 of its 15-minute allotment for rebuttal; and
9 EPA, the permit issuer, has 30 minutes for
10 argument and shall go last.

11 This is an important and a complex
12 matter, and the Board will be most interested
13 in asking you questions that focus on a
14 couple of different areas: one, the
15 compliance schedule issues to the
16 anti-backsliding issues, and to some extent,
17 the water quality standard issues in the
18 FOE/Sierra Club's brief.

19 While you're free to use your time
20 as you see fit, these are the areas where I
21 believe the Board would benefit most from
22 your arguments. You should assume that the

1 Board has read and is familiar with your
2 briefs, understanding of course that this is
3 a complicated matter, and any clarity you can
4 bring to the issues would be most
5 appreciated.

6 If the parties could please
7 identify themselves for the record, and let
8 me know whether or not you'll be reserving
9 any time for rebuttal, beginning with counsel
10 for WASA.

11 MR. EVANS: Good afternoon. If it
12 please the Board, my name is David Evans. I
13 represent the District of Columbia Water and
14 Sewer Authority in these appeals. I'd like
15 to reserve five minutes of my time for
16 rebuttal.

17 These are consolidated appeals of
18 amendments to the NPDES permit for the Blue
19 Plains Advanced Wastewater Treatment Plant,
20 and the combined and separate sanitary sewer
21 systems that serve Blue Plains. The relevant
22 facts related to Blue Plains and history of

1 the plant and the permit amendments are set
2 forth in quite some detail in the briefs, so
3 I won't take the time to repeat those here.
4 However, of course, if the Board has any
5 questions about the Blue Plains plant or its
6 history, I'll be happy to answer those.

7 I'd like to address the issues in
8 the order listed by the Board, and then move
9 onto WASA's appeal of the effluent limitation
10 for total nitrogen.

11 Turning first to the compliance
12 schedule issues. There are two compliance
13 schedules at issue here. The first is the
14 compliance schedule for the Long Term Control
15 Plan derived performance standards for the
16 District's combined sewer system. And the
17 second is the compliance schedule for the
18 effluent limitation for total nitrogen.

19 Both involve the same basic
20 question; namely, does the compliance
21 schedule provision in the District of
22 Columbia's Water Quality Standards Regulation

1 impose upon the Region a non-discretionary
2 duty to include schedules in the permit when
3 establishing effluent limitations in the Long
4 Term Control Plan performance standards and
5 the effluent limitation for total nitrogen.
6 WASA submits that it does, and that EPA
7 committed error when it refused to include
8 compliance schedules in the permit in
9 establishing these limitations.

10 JUDGE STEIN: Mr. Evans, in the
11 certification the District of Columbia
12 provided with respect to the compliance
13 schedule for the Long Term Control Plan, did
14 they include anything in their certification
15 pertaining to the compliance schedule issue?

16 MR. EVANS: Yes, Your Honor. They
17 said that a compliance schedule should be
18 included for the total effluent limitation
19 for nitrogen; they did not specify where that
20 compliance schedule should go, but I think it
21 should be assumed that the District was fully
22 aware of the mandate of its own regulation,

1 and therefore intended that that compliance
2 schedule be included in the permit.

3 JUDGE STEIN: But as to Appeal No.
4 05-02, am I correct in understanding that
5 they did not say anything in their
6 certification about the compliance schedule?

7 MR. EVANS: I don't believe they
8 did, Your Honor.

9 JUDGE REICH: What significance do
10 you think that has, since they expressly
11 included it relative to the nitrogen limit?

12 MR. EVANS: I think there were a
13 different set of circumstances -- when the
14 limit was established for the Long Term
15 Control Plan performance standards, that was
16 part of a package that included not only the
17 permit amendment, also a consent decree that
18 included a compliance schedule in it.

19 So the District of Columbia
20 government was fully aware of the fact that a
21 compliance schedule had been established in
22 the consent decree, and so I think it could

1 be safely assumed that the District felt that
2 there was no need to mention a compliance
3 schedule in the certification because it had
4 already had been addressed as part of the
5 consent decree.

6 JUDGE REICH: But if their
7 requirements were that it had to be included
8 in the permit, and they knew it wasn't in the
9 permit, why would they not have mentioned
10 that? I mean, your answer seems to suggest
11 that they thought it was acceptable to put it
12 in the consent decree, which seems
13 inconsistent with the argument that that
14 provision is mandatory?

15 MR. EVANS: Your Honor, I think we
16 have to look at the language of the
17 regulation, which is mandatory. It says, "A
18 compliance schedule shall be included in the
19 permit." If you take that regulation at face
20 value, it would seem that the District need
21 not specify exactly where the schedule ought
22 to go. And even if they had intended that

1 the schedule go in a consent decree, we don't
2 believe that they could have specified
3 otherwise. The regulation is mandatory.

4 I think it's well-established in
5 the law that certifications, permits or other
6 forms of individual authorizations cannot be
7 used to modify a rule. We have a rule here
8 that was adopted following notice and the
9 opportunity for comment. The formal
10 certification did not go through any public
11 comment period.

12 So to interpret D.C.'s water
13 quality certification in the case of the
14 total nitrogen effluent limitation as
15 effectively having superseded the clear
16 mandate of its own regulation, would in
17 effect allow the District to have modified a
18 rule that had been through full public
19 comment review.

20 JUDGE STEIN: Go ahead.

21 JUDGE REICH: I was trying to
22 understand your earlier statement that the

1 reason they would not have raised the issue
2 in the 05-02 context was because they were
3 aware there was this schedule in the consent
4 decree -- if they felt that was inconsistent
5 with the requirement of their own law and
6 that their own law required it to be in the
7 permit, I would've thought that they would
8 mention that.

9 MR. EVANS: Again, Your Honor, I
10 don't know why they did or did not mention
11 it. I can only assume that the fact that
12 there had been an agreement on a consent
13 decree at the time the amendment went forward
14 and the certification was issued, the
15 District of Columbia government knew full
16 well that there would be a compliance
17 schedule in the decree.

18 I should add that WASA, of course,
19 in its comments on the amendment requested
20 that in addition to putting the schedule in
21 the decree, they also put the schedule in the
22 permit, and I might add there's nothing

1 inconsistent with putting a compliance
2 schedule in the consent decree and also
3 putting it in the permit. Had EPA wanted to,
4 they could've put the compliance schedule in
5 the consent decree, which they did,
6 commensurate with the Phase I CSO permit, and
7 at the time -- and this is exactly what WASA
8 asked the Region to do -- ask EPA -- okay, we
9 have a compliance schedule in the consent
10 decree, we also want to have a compliance in
11 the permit as well, and we believe that the
12 Region is obligated to put that schedule in
13 the permit by virtue of a mandate of the
14 District of Columbia regulation.

15 JUDGE STEIN: How does the D.C.
16 regulation interface with 122.47 40 CFR,
17 which is the schedules of compliance -- in
18 the federal permitting regulation? Why is it
19 that EPA needs to adhere to the schedule of
20 compliance specified in the D.C. reg rather
21 than what's in the federal regulation?

22 MR. EVANS: I think we looked at

1 the holding in the Star-Kist Caribe case for
2 that. That -- of course, as the Board knows,
3 that decision was first decided by the
4 administrator in 1990. That decision
5 contains a comprehensive analysis and
6 discussion of the relationship between the
7 states and EPA in the establishment of
8 compliance schedules.

9 It's true that the facts of that
10 case revolved around an instance where the
11 state's water quality standard regulation did
12 not provide for a compliance schedule, but I
13 think it's safe to say that a fair reading of
14 both the 1990 decision by the administrator
15 as well as this Board's decision in 1992 in
16 the same case on a request for modification
17 from EPA also endorsed, in essence, the
18 comprehensive analysis and conclusions that
19 were reached by the administrator as to the
20 relationship between the states and EPA when
21 establishing compliance schedule.

22 In essence, I think the holding of

1 those cases in essence is that we first look
2 to whether or not there is authorization in
3 the state water quality standard regulation
4 for including a compliance schedule. If that
5 authorization in essence confers upon EPA
6 discretionary authority, then EPA uses its
7 own regulations, 40 CFR 122, for purposes of
8 determining whether to put the schedule in
9 the permit, and if so, what that schedule
10 should be.

11 In this particular case, we have a
12 water quality standard regulation which not
13 only authorizes a compliance schedule in the
14 permit, but mandates that the schedule be
15 included in the permit. And I think if you
16 look to the holdings in the two Star-Kist
17 Caribe decisions, they effectively stand for
18 the proposition within this particular
19 case -- where we have a water quality
20 standards regulation that mandates that the
21 schedule go in the permit -- then that
22 mandate overrides and supersedes the

1 discretionary authority that EPA has under
2 its own regulations.

3 JUDGE REICH: Is there any case law
4 or guidance or anything else other than the
5 plain language of the regulation that
6 addresses the issue of whether this is
7 mandatory or discretionary?

8 MR. EVANS: I'm not aware of any
9 other than case law, which generally holds
10 that you first give plain reading to the --

11 JUDGE REICH: Right.

12 MR. EVANS: Language of the rule or
13 statute.

14 JUDGE REICH: Right.

15 MR. EVANS: Probably the most
16 notable and recent example of that is the
17 recent TMDL decision by the D.C. Circuit,
18 where the D.C. Circuit held that daily means
19 daily. We think the word shall means shall.

20 JUDGE REICH: It is nothing
21 specific to 1105.9?

22 MR. EVANS: No, Your Honor, I'm not

1 aware of anything.

2 JUDGE REICH: Okay.

3 JUDGE STEIN: Is it your reading of
4 D.C. regulations that whatever compliance
5 schedule is in the consent decree would need
6 to be identical to what would be put in the
7 permit? Or is there some room to have
8 perhaps a more general schedule in the permit
9 and a more specific schedule in the consent
10 decree?

11 MR. EVANS: Your Honor, I think in
12 instances where -- such as this where you
13 have a schedule both in the consent decree
14 and the permit, it would -- probably the more
15 appropriate way to go about dealing with that
16 would be to have a more detailed schedule in
17 the consent decree, and have a more general
18 schedule with probably an end date, and some
19 interim milestones and reporting requirements
20 in the permit itself.

21 And I do think that having a
22 consent decree in place in this particular

1 instance certainly I think would limit the
2 extent to which you could have a schedule in
3 the permit that would be at variance or at
4 odds with that judicial consent decree
5 schedule. And if -- obviously, to the extent
6 you did, then it would require some
7 modification to the consent decree.
8 Certainly I don't think that would be
9 appropriate in this particular case.

10 JUDGE STEIN: So how does this work
11 in real world terms? You come across a
12 circumstance, there needs to be a change
13 to a provision in the consent decree, you
14 would need to both modify the consent decree
15 and modify the permit?

16 MR. EVANS: To the extent that they
17 involved the same interim milestones or
18 deadlines, but to the extent that you have a
19 consent decree with a more detailed schedule
20 in it, more detailed interim milestones, and
21 a permit that has a more general schedule in
22 it, to the extent that you're only involved

1 with modifications of the interim milestones
2 that are not present in the permit,
3 obviously, you'd just be dealing with the
4 consent decree.

5 JUDGE WOLGAST: And again, looking
6 from a practical standpoint, what is WASA's
7 potential liability whether there is a
8 compliance schedule in the permit or not?

9 MR. EVANS: Your Honor, WASA
10 maintained its position on the compliance
11 schedule for the Long Term Control Plan for
12 two reasons. One, of course, it places great
13 value on its compliance status, and the
14 reality is that without a compliance schedule
15 in the permit, it is in ongoing
16 non-compliance with its permit. So this is a
17 question -- it really goes to maintaining
18 WASA's compliance status with its permit.

19 Secondly, Section 13 of the consent
20 decree -- while it does dissolve all claims
21 against WASA at the time the consent decree
22 was entered, there's an express reservation

1 of rights in that consent decree where the
2 Justice Department and EPA reserve the right
3 to proceed against WASA for an enforcement
4 action for any future violations that would
5 occur. Certainly, we believe that exposes
6 WASA -- it leaves WASA exposed to future
7 enforcement actions for non-compliance with
8 the permit and the consent decree.

9 I'd like to move to the petition
10 provided by the Friends of the Earth and the
11 Sierra Club having to do with a challenge to
12 the Region's decision to delete the second
13 sentence in part 3(e)(1) of the permit. That
14 sentence prohibited any CSO discharge in
15 excess of any limitation necessary to achieve
16 compliance with water quality standards,
17 pending operation of the selected controls in
18 WASA's Long Term Control Plan.

19 Friends of the Earth and the Sierra
20 Club first claimed that the Region's action
21 was erroneous because they were denied a fair
22 and legally sufficient opportunity to comment

1 on the final language in the permit. In
2 fact, in WASA's view, the Friends of the
3 Earth and Sierra Club had more than adequate
4 opportunity to have a fair opportunity to
5 comment on that particular condition, and
6 should've been well aware that the sentence
7 would be deleted with the final amendment.

8 Now, if you look at the history of
9 this amendment, it goes back several years,
10 it's been a very contentious amendment.
11 There've been different versions of this
12 particular condition in prior amendments to
13 this permit, and in each of those cases, this
14 permit condition was vigorously contested by
15 WASA and by Friends of the Earth and the
16 Sierra Club, with WASA arguing that the
17 condition should be taken out altogether;
18 Friends of the Earth arguing on various
19 occasions that the condition should be made
20 more expansive, should apply not only to the
21 period of implementation of the Long Term
22 Control Plan, but also the period following

1 the Long Term Control Plan implementation.

2 Again, Friends of the Earth and the
3 Sierra Club actively participated in these
4 amendment processes; they knew the positions
5 that were being advanced by WASA. So they
6 were full aware of the possibility that as a
7 result of WASA's comments, EPA could
8 ultimately decide to delete the prohibition
9 altogether and then -- that's exactly what
10 they did.

11 So we believe that there's no merit
12 to the Sierra Club's and Friends of the
13 Earth's position that they did not have fair
14 notice and a fair opportunity to comment on
15 the deleted language.

16 JUDGE WOLGAST: But in none of
17 these other -- as I understand it, in none of
18 these other iterations had the Region
19 proposed to delete the language that's found
20 in 3(e)(1).

21 MR. EVANS: That's right, they had
22 never proposed to completely delete it, they

1 had proposed to change it in several
2 fashions, have it apply at various times or
3 another. In each one of these successive
4 amendments -- and the fact this went up on
5 appeal to this Board a couple of times -- and
6 in each of these instance, WASA consistently
7 maintained that the prohibition should come
8 out altogether. And so certainly, the
9 Friends of the Earth and Sierra Club are well
10 aware of the fact that -- in response to
11 WASA's specific comment, that the Region
12 could decide to delete that provision.

13 JUDGE STEIN: But do you look at
14 WASA's comments, or do you look at what the
15 agency is proposing as a mechanism for
16 determining whether or not they had a fair
17 opportunity to comment? I mean surely, it's
18 not someone's job to scour everybody else's
19 comments to see what they're proposing as a
20 mechanism for determining what the agency's
21 asking, is there?

22 MR. EVANS: Your Honor, I might

1 agree that that would've been the case had
2 this amendment come up one time, had this
3 been the first opportunity for all of the
4 parties to have participated in commenting on
5 this particular amendment.

6 There possibly could be some
7 plausible argument in that instance.

8 But in this particular instance,
9 and we believe that when the Board is called
10 upon to decide issues about having -- about
11 fair opportunity and notice to comment, and
12 having a meaningful say in the outcome of an
13 administrative process, you look at the
14 circumstances of each individual case.

15 When you look at the circumstance
16 of this case and the history of this
17 amendment, and the comments back and forth,
18 it's difficult to imagine that the Friends of
19 the Earth and Sierra Club weren't well aware
20 of the fact that when all was said and done,
21 there was a distinct possibility that the
22 language could be deleted, not because of the

1 comments that were submitted on the last
2 round in which the language was deleted, but
3 the comments that were submitted on previous
4 rounds.

5 Certainly -- and the case law holds
6 that basically when you -- in analyzing these
7 types of issues, you look at whether or
8 not -- were the issues on the table, and was
9 the final result a logical outgrowth of the
10 comments that were submitted? We believe
11 that the only way that you conclude in this
12 particular case that this condition ought to
13 be remanded because Friends of the Earth and
14 Sierra Club didn't have an adequate
15 opportunity to comment, would be if you
16 concluded that EPA could never change a
17 permit condition from the proposal.

18 And of course, the courts have
19 consistently held that EPA, as long as
20 the changes they make to conditions are
21 responsive comments -- as long as under the
22 facts and circumstance of the case, if the

1 issues were on the table so that all parties
2 had fair notice of the issues and the
3 possible outcome, we believe that they had a
4 fair -- fair opportunity to comment.

5 JUDGE STEIN: Shouldn't we just
6 exclusively be looking to the provision of
7 Part 124 that talks about whether there's a
8 substantial new question that's raised,
9 rather than the logical outgrowth cases? I
10 mean, it strikes me that in this case, we
11 have a regulation that specifically applies
12 to this kind of permit proceeding. Why isn't
13 that the test that we should be looking at?

14 MR. EVANS: I think under either
15 test, the Sierra Club's and Friends of the
16 Earth's petition fails here. I mean, the
17 reality is -- and another point that we made
18 in our petition is that -- and one of the
19 other issues before the Board is whether or
20 not they were prejudiced in any way by the
21 outcome of this process.

22 Certainly -- and we can't -- we

1 cannot see in their petition or in any of the
2 briefs that they've failed any instance or
3 example of how they would've filed comments
4 that would've been any different from the
5 comments that they would've filed had EPA
6 specifically proposed to delete the provision
7 in its entirety.

8 JUDGE STEIN: Could you walk
9 us -- moving to the merits of this challenge
10 as opposed to the procedural piece, could you
11 walk us through the relationship between the
12 Phase I and the Phase II permit? I mean,
13 frankly, there've been so many different
14 iterations of this that it's a little
15 difficult to track what's in and what's out,
16 but I'm most interested in the differences
17 between the 1997 permit and the current
18 permit, and how these pieces fit together,
19 and why you believe that the current permit
20 is not less stringent?

21 MR. EVANS: Your Honor, the process
22 here, the Phase I, Phase II CSO permit

1 provisions are set forth in some detail in
2 the CSO policy, but to summarize, the process
3 is basically this: CSO communities like WASA
4 receive a Phase I permit at the outset of
5 their programs; that Phase I permit has both
6 technology-based requirements and water
7 quality requirements in it. Keeping in mind,
8 the Phase I permits are issued at the outset
9 of the Long Term Control Plan process, at the
10 outset of the process of actually developing
11 your CSO control program.

12 JUDGE REICH: Can I go back one
13 step before you get into that, just for my
14 understanding? Prior to beginning to
15 implement the CSO policy, did D.C. have water
16 quality standards, and what was the nature of
17 those standards: were they narrative
18 standards, numerical standards?

19 MR. EVANS: Both narrative and
20 numerical that were adopted in the '80s and
21 the '90s.

22 JUDGE REICH: Okay --

1 MR. EVANS: And the Long Term
2 Control Planning process, which is the water
3 quality planning element of the CSO control
4 policy, was designed to lead to a plan that
5 would, either through one or two approaches,
6 provide for compliance with water quality
7 standards.

8 JUDGE REICH: Both narrative and --

9 MR. EVANS: Both narrative and
10 numeric. And that Phase I permit again had
11 both water quality-based and technology-based
12 requirements -- the technology-based
13 requirements were the so-called Nine Minimum
14 Controls. These controls in essence called
15 for maximizing the operation and maintenance
16 of the system, recognizing that until the
17 Long Term Control Plan is completed, it's not
18 possible or it's not feasible or prudent to
19 put in place large-scale capital projects.

20 So the Phase I permit that was
21 issued in 1997 had the Nine Minimum Controls
22 in it, technology-based requirement, it also

1 had a water quality-based requirement
2 pursuant to the permit, and that was the
3 discharge prohibition. And that discharge
4 prohibition basically said that WASA could
5 not have any discharges from the combined
6 system -- CSO discharge -- combined system
7 that would cause or contribute to a violation
8 of the water quality standards in excess of
9 any limitation necessary to meet the water
10 quality standards. So the original
11 prohibition was in there.

12 WASA never objected to that,
13 because that is clearly provided for in the
14 CSO policy as a -- the water quality-based
15 element of the plan, the program. At the
16 same time, there was a schedule established
17 for completing the Long Term Control Plan, a
18 massive undertaking -- it took several years
19 to complete -- and this Long Term Control
20 Plan, which was designed to identify the
21 upgrades and improvements that needed to be
22 made in order to ultimately bring the system

1 into compliance with water quality standards.
2 That Long Term Control Plan was completed and
3 submitted to EPA and ultimately accepted by
4 EPA and the District of Columbia government
5 in 2003.

6 Once they accepted that, then we
7 went about the process of establishing
8 performance standards for that system. And
9 those performance standards reflected a
10 determination that EPA and the District of
11 Columbia government had made that once
12 implemented, these controls, if they were
13 functioning as they were designed and set
14 forth in the Long Term Control Plan, would
15 provide for compliance with water quality
16 standards.

17 I might add, the CSO policy
18 provides for two separate ways of making the
19 demonstration required in the policy -- you'd
20 either use the presumption approach, which in
21 essence is an approach which calls for so
22 many overflows per year, or a percent removal

1 requirement, or you can use a demonstration
2 approach, where in essence you attempt to
3 demonstrate to EPA in the state that in fact
4 once you implement these controls, you'll be
5 in compliance with water quality standards.

6 WASA chose the demonstration
7 approach. Ultimately, the District of
8 Columbia EPA accepted that. Of course, under
9 the demonstration approach, under the policy,
10 it's clear that you have to include a
11 post-construction monitoring program in the
12 permit, which in essence says that once you
13 complete implementing all of these controls,
14 you then go and monitor for water quality
15 compliance, and if in fact you can
16 demonstrate compliance at that point, then
17 you're deemed to be in compliance with
18 standards and you've completed your
19 obligation.

20 If on the other hand that
21 post-construction monitoring says that you're
22 not in compliance with water quality

1 standards, then you have to submit a plan for
2 enhancing your system to do whatever else
3 needs to be done to come into compliance.
4 And it's that point that's the heart of the
5 dispute over this water quality standards
6 prohibition, because -- and our view, it's
7 fundamentally inconsistent with the policy to
8 retain that water quality standards
9 prohibition language in the policy, because
10 in essence, it would be fundamentally
11 inconsistent with the policy.

12 The policy in essence provides that
13 once you complete that Long Term Control Plan
14 in the demonstration approach, you go ahead
15 and do your monitoring, your obligation at
16 that point is to upgrade your program.
17 You're not -- the policy doesn't intend for
18 discharge to be deemed to be a non-compliance
19 with a permit. If you retain that water
20 quality standards prohibition in the permit,
21 if WASA were to go out and do its
22 post-construction monitoring program, and if

1 in fact that monitoring showed non-compliance
2 with water quality standards, WASA would be
3 in non-compliance with its permit. That's
4 not the way the policy works.

5 JUDGE REICH: And why does that not
6 violate the anti-backsliding provision for
7 the period of time prior to the time you come
8 into compliance with performance standards in
9 the long term compliance plan?

10 MR. EVANS: First off, the
11 performance standards take effect
12 immediately. We have -- as a -- as the
13 permit is currently written.

14 JUDGE WOLGAST: But the performance
15 standards themselves as you describe are in
16 part at least large capital improvement
17 projects that -- even though they may be on
18 the books --

19 MR. EVANS: That's right.

20 JUDGE WOLGAST: They don't exist in
21 reality for some time -- some time being up
22 to at least 20 years.

1 MR. EVANS: That's correct, Your
2 Honor. And that's consistent with the
3 policy. The way the policy is
4 structured -- what the policy in essence says
5 is that we understand that communities like
6 WASA, the District of Columbia, are being
7 called upon to undertake massive expenditures
8 to install these systems, and -- and we've
9 set forth a process.

10 You develop your Long Term Control
11 Plan, your Long Term Control Plan is
12 approved, we impose an obligation to
13 implement that Long Term Control Plan. Once
14 you complete that Long Term Control Plan, you
15 go ahead and you monitor for compliance. If
16 you cannot show compliance with the water
17 quality standards, you upgrade your system.

18 The policy is structured, very
19 carefully structured in a way so as to avoid
20 putting communities like WASA and the
21 District of Columbia into non-compliance with
22 their permit as long as they're doing what

1 the policy has told them to do, and they're
2 complying with the provisions of their permit
3 and the policy.

4 What the Friends of the Earth and
5 Sierra Club are contending is that
6 notwithstanding all of that, notwithstanding
7 what the policy says, we think WASA should be
8 held continually liable for any events of
9 non-compliance with the water quality
10 standards while it's undertaking this
11 multimillion dollar Combined Sewer Overflow
12 control program. The other point we make in
13 our petition is that if you look at the
14 policy, the policy clearly identifies the
15 conditions that go in Phase I permits,
16 identifies the conditions that go in Phase II
17 permits.

18 The Phase I conditions clearly
19 provide for narrative water quality standards
20 compliance condition while you're developing
21 your Long Term Control Plan. Once that Long
22 Term Control Plan has been developed and

1 approved and incorporated into the permit, it
2 does -- has no mention whatsoever of a
3 narrative water quality standards compliance
4 condition. What it says is that the water
5 quality-based provisions of that permit
6 should be -- under the demonstration
7 approach, should be performance standards
8 derived from the Long Term Control Plan.

9 JUDGE STEIN: Yeah, I have a
10 question about that. Because as I read the
11 CSO policy in the middle column of the
12 Federal Register at 18696, it said your
13 Phase II permit should include the
14 technology-based controls, narrative
15 requirements, as well as water quality
16 effluent limitations. So why would you not
17 continue to retain this language in the form
18 of some kind of a narrative limitation that
19 was in the prior permit?

20 MR. EVANS: If you read the Phase I
21 and the Phase II provisions together, we
22 think that there was a clear -- I mean, it

1 was -- it's clear to us that there was
2 obvious omission of that express provision
3 for a narrative water quality standards
4 compliance obligation in the Phase II
5 permit -- it was not -- it was clearly not
6 included in the Phase II conditions. By the
7 same token, there's no mention of a narrative
8 discharge prohibition in the Phase II
9 permits, but a clear reference to Long Term
10 Control Plan-derived performance standards.

11 If you --

12 JUDGE STEIN: Are you suggesting
13 that the provision that was in your prior
14 permit was a compliance obligation
15 specifically required by the Phase I
16 permitting process?

17 MR. EVANS: That's right, Your
18 Honor.

19 JUDGE STEIN: Is that cited in your
20 briefs?

21 MR. EVANS: Yes. I believe it is.

22 JUDGE WOLGAST: Going back to sort

1 of -- what's the fundamental legal authority
2 for WASA to in essence be out of compliance
3 with water quality standards for an extended
4 period of time?

5 MR. EVANS: The policy itself,
6 which of course as this Board knows has been
7 incorporated into the Clean Water Act at
8 Section 402(q). If you look at the structure
9 of the policy, it set up a special
10 programming process for combined sewer
11 systems.

12 In essence, what it said is that
13 we're going to -- we have a set of
14 technology-based and water quality-based
15 requirements that we're going to impose on
16 CSO communities. If they follow that
17 process -- if they follow that process and do
18 what is required of them in the Long Term
19 Control Plan, we're not going to hold them
20 liable and subject to non-compliance and
21 enforcement action as long as they do what
22 the policy calls for them to do under both

1 the technology-based requirements and the
2 water quality-based requirements.

3 JUDGE REICH: Can I go back to my
4 question in the sense that if we had the same
5 circumstances we have today, but there were
6 no formal EPA CSO policy -- it was just
7 something that was done ad hoc in this case,
8 would the permit violate the anti-backsliding
9 provision in that case?

10 MR. EVANS: If --

11 JUDGE REICH: I'm trying to ask in
12 essence whether you are saying the CSO policy
13 provides an exception to the anti-backsliding
14 requirement, or would you say the
15 anti-backsliding requirement still would not
16 be applicable even if there were no CSO
17 policy?

18 MR. EVANS: Let me address the
19 policy first. And the point I want to make
20 here is that we think it's appropriate to
21 note that the Friends of the Earth and Sierra
22 Club have not alleged in their petitions that

1 the deletion of the narrative discharge
2 prohibition is inconsistent with the CSO
3 policy; they've said they weren't given fair
4 notice, they said it violates
5 anti-backsliding.

6 So we believe that they have
7 effectively conceded that the deletion of the
8 narrative discharge prohibition is consistent
9 with the CSO policy, which again is
10 incorporated into Section 402(q) of the Clean
11 Water Act. We don't believe that you can
12 persuasively argue that the deletion is -- or
13 at least acknowledge the deletion is
14 consistent with Section 402(q) of the Clean
15 Water Act, while at the same time asserting
16 that it violates the anti-backsliding
17 provisions of Section 402(o).

18 And if nothing else, you've got to
19 read those two together. So again, without
20 having asserted that it's inconsistent with
21 the policy, they must've acknowledged it's
22 consistent with the policy -- to accept their

1 argument would in essence would be to read a
2 conflict between 402(q) and Section 402(o).
3 Now, if there were no policy today --

4 JUDGE REICH: Uh-huh.

5 MR. EVANS: And the permit was
6 written the way it's written, I don't think
7 there would be an anti-backsliding problem,
8 because I don't think it would be
9 anti-backsliding, because there's only
10 backsliding if in fact the new effluent
11 limitation is less stringent than the
12 effluent limitation that it replaced in the
13 previous permit.

14 Here we have numeric sites -- we
15 have numeric Long Term Control Plan-derived
16 performance standards which impose rigorous
17 numeric criteria on the combined system,
18 which by their very nature are not present in
19 a narrative prohibition.

20 So we believe our position is that
21 the Long Term Control Plan-derived specific
22 performance standards are more stringent,

1 certainly equally stringent to the discharge
2 prohibition. So if the condition is not less
3 stringent, there's no backsliding, we don't
4 think anti-backsliding even comes into play.

5 JUDGE STEIN: But the --

6 CLERK: Go ahead.

7 JUDGE REICH: Uh-huh.

8 JUDGE STEIN: Provisions are
9 different. I mean, you clearly have a
10 difference between what existed before and
11 what EPA is proposing to do now. Isn't it
12 conceivable that it may be more stringent in
13 some areas, but less stringent in other
14 areas?

15 MR. EVANS: No, Your Honor -- they
16 may be different, but they're different for a
17 specific purpose, and consistent with the CSO
18 policy. But they cover the same subject
19 matter. The narrative discharge prohibition
20 basically is designed to hold WASA or any
21 other CSO community liable for water quality
22 standards violations that may be caused by

1 its combined system.

2 The Long Term Control Plan-derived
3 performance standards are designed to -- are
4 in essence a translation of the elements of
5 the Long Term Control Plan for which WASA
6 would be held liable -- and they're all based
7 upon compliance with water quality standards,
8 WASA would be liable if it fails to comply
9 with those performance standards.

10 Both -- at the heart of it, both of
11 them are the water quality-based effluent
12 limitations for a combined system under the
13 CSO policy. Under Phase I permit, that water
14 quality-based effluent limitation is a
15 narrative discharge prohibition; under the
16 Phase II permit, it's the performance
17 standards derived from the Long Term Control
18 Plan. Yes, they're very different, but they
19 do the same thing, or they're intended to do
20 the same thing.

21 JUDGE WOLGAST: Well, I understand
22 your argument, but I basically understand you

1 at bottom to be saying that the CSO policy
2 sets up a scheme that is inherently
3 inconsistent with the anti-backsliding
4 provision of the Act, in the sense that the
5 original plan with the 3(e)(1) language, it
6 may have been less specific, but it did
7 prohibit discharges in amounts that exceeded
8 water quality standards.

9 Now we have more specific
10 provisions, but we also all acknowledge there
11 is a delta in which there will be discharges
12 that exceed water quality standards, and
13 that's what I'm trying to -- I think you hear
14 some frustration of how these things fit
15 together with the anti-backsliding provision
16 of the Act.

17 MR. EVANS: Well, the fundamental
18 question is whether or not the limitation is
19 less stringent, and we believe to look at
20 whether or not the limitation was less
21 stringent, we have to look to what -- what do
22 those effluent limitations -- what do those

1 permit conditions require WASA to do.

2 JUDGE WOLGAST: So you're saying
3 that because the provisions themselves that
4 are on the books eventually will get to the
5 same place, those specific provisions or
6 limitations don't constitute
7 anti-backsliding, even if in between, we know
8 on the ground there's going to be discharges
9 that violate water quality standards?

10 MR. EVANS: That's correct, Your
11 Honor. Take, for example, if EPA were to
12 enforce against WASA, or the citizens' group
13 were to enforce against WASA for
14 non-compliance with water quality standards
15 under the narrative discharge prohibition,
16 and let's say that enforcement action was
17 began while the narrative discharge
18 prohibition was still in the permit and yet
19 we had an approved Long Term Control Plan
20 with the performance standards, and you had
21 an EPA determination that once this plan was
22 implemented, it would provide for compliance

1 with water quality standards, we believe that
2 in that enforcement action, the injunctive
3 relief that the court would enter against
4 WASA would be to implement the Long Term
5 Control Plan and achieve compliance with the
6 Long Term Control Plan compliance standard.

7 So ordering compliance with a
8 narrative discharge prohibition and ordering
9 compliance with the Long Term Control Plan
10 performance standards is the same thing --

11 JUDGE WOLGAST: But if that's the
12 case, then why is it so important to have the
13 compliance schedule in the permit itself, if
14 that's -- if an enforcement action on this
15 permit would end up at the same place,
16 compliance with the Long Term Control Plan?

17 MR. EVANS: Because of the penalty
18 issue, Your Honor. WASA remains exposed to
19 potential penalties for non-compliance
20 because of the exclusions built into the
21 consent decree, and also because -- again,
22 WASA places great value on its compliance

1 status.

2 JUDGE REICH: Would there be any
3 difference in the analysis if we agreed with
4 you that there should be a compliance
5 schedule in the permit itself? If the permit
6 contained a compliance schedule, doesn't that
7 in essence show that the effluent limitations
8 aren't going to be met for some substantial
9 period of the time, and doesn't it aggravate
10 the problem that Judge Wolgast was talking
11 about about a period in which as a practical
12 matter, the discharge limits have been
13 relaxed?

14 MR. EVANS: No, Your Honor. Keep
15 in mind that -- during the period of
16 implementation, whether you put the schedule
17 in the permit or not, during the period of
18 implementation, you have the Nine Minimum
19 Control obligations that WASA has to comply
20 with. You also of course have the obligation
21 to design and construct and then to begin
22 operating that system.

1 So yes, you may -- you have a --

2 JUDGE REICH: But neither of those
3 goes to the question of meeting the current
4 water quality standards.

5 MR. EVANS: Unquestionably, whether
6 you've got a narrative discharge prohibition
7 or a Long Term Control Plan-derived
8 performance standards, the reality is, until
9 these massive -- and right now the total cost
10 of this is over \$2 billion -- until these
11 massive controls are installed, and the
12 reality is you can't snap your fingers and
13 install them -- and whether you got one
14 condition or another, you're still going to
15 have a period in which the combined system
16 will violate water quality standards during
17 periods of rainfall --

18 JUDGE REICH: But doesn't including
19 it in a schedule sanction it in a way that
20 responding to that a consent decree does not?
21 I mean, putting it in the permit in essence
22 legitimatizes it, that's the reason that you

1 want it there, so you're not exposed to
2 penalties. So it seems to suggest that it
3 reinforces the idea that there will be this
4 gap.

5 MR. EVANS: First, Your Honor, I
6 don't believe that has to be the result. As
7 I said before, one possible approach that
8 states could take -- EPA or states could take
9 to this issue would be at the time that
10 narrative discharge prohibition is still in
11 effect under the Phase I permit, you can
12 negotiate and enter a consent decree at that
13 point in time, because there is
14 non-compliance. Then once that Phase II
15 permit is issued, that includes the
16 scheduling of the Phase II permit with a Long
17 Term Control Plan-derived performance
18 standard.

19 So you have both a consent decree
20 and you have a permit with a compliance
21 schedule in it. I don't believe it sanctions
22 non-compliance. Keeping in mind that these

1 communities aren't getting a free ride here.
2 WASA, unlike any other community in the
3 Metropolitan District area, and WASA's
4 ratepayers, the District ratepayers are
5 spending over \$2 billion to control this
6 problem, and that's essentially what the
7 policy and Congress in adopting the policy in
8 the Clean Water Act recognizes.

9 If we're going to ask communities,
10 and not all communities -- a relatively small
11 percentage of communities in the United
12 States have combined systems -- if we're
13 going to ask this small subset of
14 municipalities in this country to bear the
15 extraordinary burden -- and there's no grant
16 funding available to speak of for these
17 programs -- if we're going to ask them to
18 bear this extraordinary burden of these
19 combined systems, we're going to mandate
20 these controls -- the least we can do is not
21 hold them in non-compliance while they're
22 doing what they're supposed to be doing and

1 we've asked them to do under the CSO control
2 policy.

3 That's the fundamental rationale
4 for the way the policy is structured, it is a
5 question of question of fundamental fairness
6 and Congress endorsed that approach to
7 combined systems when it incorporated the
8 policy into the Clean Water Act.

9 JUDGE STEIN: I believe your time
10 has been up for several minutes. So we
11 appreciate your answering our questions, and
12 if we could move on to Mr. Mueller.

13 Will you be reserving any of your
14 time for rebuttal?

15 MR. MUELLER: Yes, I am. Five
16 minutes, please.

17 JUDGE STEIN: Okay.

18 MR. MUELLER: Good afternoon. Good
19 to see you a couple of you again, it's been a
20 few years. A pleasure to be here. I
21 represent the Chesapeake Bay Foundation. And
22 I think while we all seem to get caught up in

1 the facts and fine points of the rules and
2 the regulations and the statute, I think it's
3 very important for this Board to be aware of
4 the bigger picture, and the reason why they
5 Chesapeake Bay Foundation is involved in this
6 challenge, and why we believe that a
7 compliance schedule is required in the
8 permit. And that is that the Chesapeake Bay
9 is impaired.

10 And D.C., EPA and all of the states
11 in the Bay region, signed an agreement that
12 said they were going to get the Bay off the
13 303(d) list by 2010. Well, it's 2007, right
14 on the cusp of 2008, and we still have one of
15 the largest -- the largest pointsource in the
16 Bay region that hasn't complied, or even
17 begun to come into compliance with a standard
18 that will help the Bay get off that list.

19 And so we believe that a compliance
20 schedule has to be in the permit.

21 Now, a couple of the -- points you
22 raised with Mr. Evans, and you asked about

1 what's the language in D.C. law, and how does
2 the interplay with the Clean Water Act and
3 the certification from EPA -- and I wanted to
4 kind of jump to that if we could. First, the
5 D.C. law that we believe is governing -- if I
6 can get this to come over here --

7 JUDGE STEIN: We can see it up
8 here.

9 MR. MUELLER: Okay, great. They're
10 in the center of the page. D.C. statute
11 says, "When the director requires a new water
12 quality standard based effluent
13 limitation," -- which is what we have
14 here -- "in a discharge permit, the permittee
15 shall have no more than three years to
16 achieve compliance with the limitation unless
17 the permittee can demonstrate that a longer
18 compliance period is warranted." And the
19 last sentence says, "The compliance schedule
20 shall be included in the permit."

21 There is unequivocal language that
22 D.C. law requires a compliance schedule in

1 the permit. Now, the question has been
2 raised, well, did EPA waive that in its
3 certification letter? And as Mr. Evans
4 pointed out, that certification letter is not
5 entirely clear on that point. It says in
6 paragraph 2, "DDOE concurs with EPA that EPA
7 should establish a schedule for compliance
8 with a nitrogen limit."

9 It doesn't say where.

10 And I believe it's important to
11 recognize, again, the bigger picture here in
12 the circumstances behind the certification
13 letter, which was -- on August 18, 2006, EPA
14 submitted a fact sheet about the proposed
15 permit that said there will be a compliance
16 schedule, there is an interim compliance
17 schedule in the proposed permit, and there
18 will be a compliance schedule in the final
19 permit when it's issued -- it comes up for
20 re-issuance again in 2008.

21 So EPA's on record saying in August
22 that they're going to have a compliance

1 schedule in the permit. Then in December,
2 after they've received comments on that first
3 permit, EPA turns around and says, well, we
4 believe there should be a compliance
5 schedule, but we think that it should be in
6 some kind of other enforceable document. And
7 we think that enforceable document may be a
8 consent decree. Now --

9 JUDGE STEIN: Do you know why they
10 changed their mind?

11 MR. MUELLER: I --

12 JUDGE STEIN: I'll ask them that
13 question, too.

14 MR. MUELLER: Wasn't part of that
15 conversation, so I can't really answer it.
16 But the thing I think is frustrating for us
17 is that -- and I understand it's probably
18 true for WASA, is that you've got a new
19 permit limit that basically cuts their load
20 in half. They're down to 4.689 million
21 pounds of nitrogen a day. That's a 150 dump
22 truck loads of nitrogen a day in the Potomac

1 out to the Bay. So they've got to figure out
2 how they're going to cut their load in half,
3 that's not significant -- insignificant,
4 that's a long way to go.

5 And to issue a permit that has no
6 schedule, doesn't meet the requirements of
7 the Clean Water Act, let alone D.C. Code,
8 because the Act says that -- and we agree
9 that it's discretionary with the
10 administrator whether to have a compliance
11 schedule in the permit or not -- but we
12 believe that that discretion is tempered when
13 the Act requires that there are assurances
14 that the water quality standards which this
15 permit is based upon will be met. And when
16 you just issue a bare permit or just a number
17 and no schedule on how you're going to get
18 there for the largest plant in the Bay
19 watershed, indeed the world, we think there
20 is -- that is an abuse of discretion.

21 JUDGE STEIN: Are you proposing
22 simply taking the existing consent decree and

1 plugging it into the permit, or you're
2 talking about the nitrogen limit here --

3 MR. MUELLER: Exactly

4 JUDGE STEIN: A new schedule has to
5 be developed.

6 MR. MUELLER: Exactly. All we're
7 focusing on is -- our objection is to the
8 total nitrogen limit, failure to have a
9 compliance schedule. We agree with the
10 limit, we agree with the total load, we agree
11 with the concentration limits. And all we're
12 talking about is the timeline for compliance.

13 JUDGE STEIN: But for the provision
14 in the District of Columbia regulations that
15 you put up on the screen, would it be
16 mandatory to put the compliance schedule on
17 the permit?

18 MR. MUELLER: We think so under the
19 facts that I just gave to you, which is -- we
20 agree it's discretionary, but that discretion
21 is tempered by the fact that the
22 administrator must make certain that there

1 are assurances, reasonable assurances that
2 that is water quality standards, and we
3 believe that the permit limit meets that
4 water quality standard, because that's what
5 the Chesapeake Bay Program -- EPA's office,
6 Bay program and the states agreed was the
7 right number for Blue Plains. And so we
8 believe that's going to help drive down the
9 nitrogen pollution to the Bay.

10 And we believe therefore that the
11 administrator must look at this. I mean,
12 it's the biggest one in the watershed. We've
13 got to figure out how that one's going to
14 come into compliance. If we don't give them
15 a schedule, all the other little ones
16 throughout the Bay region are going to say,
17 wait a minute, you cut D.C. a break, why
18 aren't you giving us a break? Why can't we
19 slide from the date that we have to meet
20 that?

21 JUDGE STEIN: If EPA were to enter
22 into a consent decree with WASA, a judicially

1 enforceable consent decree that had a
2 schedule, why would that not be satisfactory
3 to the Bay Foundation?

4 MR. MUELLER: Because it basically
5 cuts out public process. You all have been
6 there before. I mean, we know the process.
7 Citizens submit comments on a consent decree,
8 DoJ reads them, maybe they respond to them,
9 maybe they don't. The judge may never even
10 know exactly -- the full extent of what the
11 comment is, and the law is pretty clear that
12 when a court is reviewing a consent decree,
13 it basically has to make sure that there was
14 a meeting of mind between the parties and
15 there's not some complete failure to comply
16 with the law.

17 Now, we'd have a real hard argument
18 trying to get that changed at -- before our
19 District Court. Plus, if we were to appeal
20 it, trying to get an appellate court to
21 believe that a lower court made a decision
22 issuing a consent decree, that hurdle is

1 huge. And we believe that given the deadline
2 for compliance, 2010 deadline, and the amount
3 of work that needs to be done, we think there
4 absolutely has to be a compliance schedule in
5 the permit.

6 The other issue is, we all know,
7 sadly, that oftentimes consent decrees are
8 written and things change and deals are made
9 after the fact, the dates on the consent
10 decree slide, sometimes the region doesn't
11 enforce it or the state doesn't enforce it,
12 and then citizens have to come in and do the
13 job.

14 JUDGE REICH: Can I make sure I
15 understand what you're saying? I understand
16 you to be saying that you think that even if
17 it's a question of discretion, EPA would be
18 required by the facts to put a compliance
19 schedule in the permit, but what is your
20 interpretation of 1105.9? Do you think EPA
21 has discretion, or do you think that EPA has
22 no discretion under that provision?

1 MR. MUELLER: Again, as Mr. Evans
2 pointed out, we think this court has dealt
3 with that issue in the Star-Kist Caribe case,
4 in which it said EPA can impose its own
5 deadlines when a state has already done so.
6 Here, D.C. has already imposed those
7 deadlines, and in fact gives them the ability
8 to have some wiggle room on that three-year
9 time period if they can show a reasonable
10 reason for extending that compliance period.
11 So we think EPA is bound by D.C. law.

12 JUDGE REICH: Okay.

13 JUDGE WOLGAST: Does the Bay
14 Foundation have a position on whether the
15 D.C. reg applies to any compliance schedule
16 for CSOs in the Long Term Control Plan?

17 MR. MUELLER: We haven't noted an
18 objection or addressed that issue at all,
19 Your Honor. So in closing, I think -- again,
20 it's important to look at the totality of the
21 circumstance, the discharge that we have, the
22 volume that we're talking about, the Bay

1 agreement that all these parties have signed
2 onto basically is being cast aside, and the
3 deadlines set in there that they all agreed
4 to seem to be getting pushed farther and
5 farther back.

6 In fact, the plan that we've seen
7 submitted by WASA suggests that they won't
8 even come into compliance until six or seven
9 years after EPA approves their plan. So if
10 that is 2008, we're now -- you know,
11 2014-2015, and in some places we've seen
12 references that suggest it might be out as
13 far as 10 years. So again, we feel like that
14 the public needs to have some input on their
15 compliance schedule. The only way to have
16 that input is if it's in a permit, and we
17 need to have the ability to enforce those
18 permit terms. And we can't do that if it's
19 in a consent decree.

20 Thank you.

21 JUDGE STEIN: If there were to be a
22 consent decree between EPA and WASA as to the

1 nitrogen compliance schedule, is there any
2 ability of citizens to enforce that under the
3 citizen suit provision?

4 MR. MUELLER: Well, it's -- there
5 is some question about that, and in fact, I'm
6 only aware of one case out of the First
7 Circuit that suggests that. If there is a
8 consent decree -- and this was a RCRA
9 case -- if there is a consent decree out
10 there that has set time limits for a
11 defendant to do something and they fail to do
12 it and EPA hasn't enforced those provisions,
13 if the citizens can come back in and show
14 that there is some harm, then -- because it
15 was a RCRA case, then they were allowed to
16 try to enforce that consent decree, but that
17 is a very rare factual scenario and a very
18 difficult hurdle.

19 Not certain whether it would apply
20 here in the D.C. Circuit as well.

21 JUDGE STEIN: EPA hasn't proposed a
22 compliance schedule at this point to your

1 knowledge?

2 MR. MUELLER: Not that I'm aware
3 of. I mean, I know there are negotiations
4 going on about that. We know that WASA has
5 submitted a plan; it's a very barebones
6 schedule about when they're going to do
7 design and when they're going to build
8 certain portions of the total nitrogen wet
9 weather program. But again, all we have are
10 kind of beginning and ending dates, and we
11 have no way of really drilling down to see if
12 those dates are reasonable ones.

13 JUDGE STEIN: Okay, thank you.

14 MR. MUELLER: Thank you.

15 MS. CHAVEZ: Good afternoon, Board.

16 My name is Jennifer Chavez. I'm here on
17 behalf of Friends of the Earth and Sierra
18 Club. And we would like to reserve five
19 minutes for rebuttal. As you know, Friends
20 of the Earth and Sierra Club are challenging
21 the deletion of the water quality
22 standards-based limitation in the prior

1 permit without notice for two reasons.

2 First, the deletion of the language without
3 notice violated the notice and comment
4 requirements.

5 Secondly, it violated the Act's
6 anti-backsliding provision. It did so both
7 with respect to the proposed permit which
8 proposed to phase out that requirement
9 decades in the future, but now also with
10 respect to the time, the intervening time
11 between now and then. And those two effects
12 differ. They're not the same, and that is
13 what brings us back to the problem with the
14 lack of notice.

15 Friends of the Earth and Sierra
16 Club certainly were aware that this provision
17 generally was on the table -- it's on the
18 table every time that the permit is proposed,
19 but EPA never once proposed to delete the
20 language. And as Your Honor pointed out,
21 we're not required to sift through comments
22 or attempt to divine EPA's thoughts.

1 If this is such an important
2 provision, then certainly EPA was required to
3 give notice of its intention or if -- even of
4 the fact that it was considering the
5 possibility of deleting the water quality
6 standards limitation.

7 Now, WASA has suggested that our
8 position means that EPA could never change a
9 permit between the proposed permit and the
10 final permit; this is a fallacy. Of course,
11 the -- that is the entire purpose of the
12 committing -- commenting procedure, is to
13 allow the public to potentially influence the
14 final permit. But there are also
15 proceedings, procedures, as Your Honor
16 pointed out in 40 CFR 124 that provide that
17 if a substantial question is raised during
18 the comment period, then EPA should propose a
19 new draft permit and reopen the comment
20 period.

21 There's absolutely no reason why
22 EPA would not do this. It would simply

1 involve an additional period of time. It
2 would have allowed Friends of the Earth and
3 Sierra Club and other members of this -- the
4 public who are essentially lulled by the
5 proposed permit to come in and direct their
6 comments specifically to the effect of
7 deleting this language entirely immediately,
8 as opposed to what they did direct their
9 comments to. And the Petitioners directed
10 their comments in the only rational way that
11 they could be expected to, they directed
12 their comments to what EPA proposed.

13 JUDGE STEIN: Given that you have
14 an opportunity to argue to this Board that
15 the particular language that they deleted on
16 the merits should not have been deleted, how
17 is it that you've been prejudiced by their
18 failure to provide notice and comment?

19 MS. CHAVEZ: Well, Your Honor, I
20 would submit that that opportunity exists
21 with any permitting process or any regulatory
22 process. Of course, the citizens always have

1 a chance to raise the challenge before a
2 court or an appeals board, but if they
3 haven't done so in public comment, for one
4 thing, they could be -- that it could be
5 decided that they did not properly or did not
6 adequately raise the comment in the
7 administrative proceedings, and therefore
8 they're precluded somehow from raising it
9 later.

10 More fundamentally, the citizens
11 have a right to comment -- have notice of a
12 proposed action and to comment on it, and
13 then to attempt to influence that decision.
14 It could have been that -- it could have been
15 the case that the public could've persuaded
16 EPA that its action that it took in the final
17 permit was a violation of water -- I'm sorry,
18 of the anti-backsliding provision, and of the
19 other requirements in the Act, and it
20 could've been that we wouldn't have to appeal
21 the language. So the notice and comment
22 requirements of themselves exist for a

1 reason, and those reasons were evaded when
2 EPA issued the final permit without notice.

3 JUDGE WOLGAST: What's the
4 practical effect of the deletion of the
5 language?

6 MS. CHAVEZ: The limitation itself
7 is more stringent than the limitation in the
8 final permit. So the effect is that now we
9 have a limitation that, true, is more
10 specific, but only more specific with respect
11 to the Long Term Control Plan controls that
12 are addressed in the LTCP and in EPA's
13 underlying enforcement action. That
14 enforcement action covers a certain type and
15 class of violations, but there could be other
16 violations of water quality standards that
17 are not contemplated by the Long Term Control
18 Plan and that are not addressed by EPA's
19 enforcement action, and indeed there are
20 other types.

21 The prior water quality standards
22 limitation would provide protection in the

1 permit against those other kinds of water
2 quality violations, but in the final permit,
3 there is no protection now against anything
4 other than simply failure to implement the
5 Long Term Control Plan performance standards.

6 JUDGE WOLGAST: Could you give us
7 an example of something that would not be
8 covered --

9 MS. CHAVEZ: Well --

10 JUDGE WOLGAST: Of the Long Term
11 Control Plan?

12 MS. CHAVEZ: One fairly simple
13 example would be a leakage in the system that
14 causes violations of water quality standards.
15 Without the water quality standards
16 limitation in the permit, WASA's simply
17 required to march on with its performance
18 standards under the Long Term Control Plan.
19 But those have nothing to do with other kinds
20 of water quality standards violations like
21 the leakage or -- anything else that you
22 could imagine that has nothing to do with the

1 Long Term Control Plan.

2 JUDGE STEIN: How many different
3 water quality standards does the District
4 have? I mean, are they just reflected in one
5 provision, are they reflected in several
6 provisions? I think it would be helpful to
7 the Board to try to get a more specific
8 handle on the question that Judge Wolgast is
9 asking, because we've had a little bit of
10 difficulty sort of getting our arms around
11 sort of what's in and what's out, and if you
12 could point us to that, that would be most
13 helpful.

14 MS. CHAVEZ: Sure. I don't have
15 all of the section numbers before me, but the
16 District water quality standards contain
17 several numeric limitations that would be
18 relevant to CSO, such as bacterial limits and
19 numeric limits for turbidity and clarity and
20 so forth. The narrative water quality
21 standards are mainly contained in -- I'm
22 sorry, 21 DCMR sections 1104.1 and 1104.3.

1 And those narrative water quality
2 standards require that the District waters be
3 free from substances that cause objectionable
4 deposits, objectionable odor, color, taste or
5 turbidity, cause injury to humans, plants and
6 animals. No one would question that the
7 discharge of raw sewage into a waterway
8 causes all of these things.

9 Likewise, Section 1104.3 explicitly
10 calls for Class A waters, of which these are,
11 to be free of discharges of untreated sewage
12 and litter, and there's no question that CSOs
13 violate that water quality standard.

14 The Long Term Control Plan itself,
15 on its face, concedes that all water quality
16 standards under all weather conditions will
17 not be met, because there will continue to be
18 some overflow events -- four per year -- per
19 average year in the Potomac for -- in Rock
20 Creek and two in the Anacostia. Now, some
21 subsequent changes and adjustments may have
22 changed that, but they've minimized sewer

1 overflows; they haven't in any way eliminated
2 the possibility -- and circumstances can
3 change. No one knows what water -- what
4 stormwater events are going to happen 10 or
5 20 years from now. The Long Term Control
6 Plan was only designed to meet an average
7 year -- you know, a one-year storm, which as
8 we all know is not going to include all
9 circumstances.

10 JUDGE STEIN: If the narrative
11 language stays out of the permit, and if
12 there is some kind of spill or situation
13 where the bacterial limits are exceeded, does
14 a citizens group have the ability to enforce
15 that in the absence of this language in the
16 permit?

17 MS. CHAVEZ: Well, assuming that
18 that violation is not something that's
19 covered by EPA's existing enforcement action,
20 which was what produced the LTCP --

21 JUDGE STEIN: Right.

22 MS. CHAVEZ: Assuming it was

1 something not covered by that, then the
2 citizens would -- well, presumably there
3 would be an enforcement of permit
4 limitations. I hesitate to give a direct
5 answer to whether a citizen can enforce the
6 water quality standards directly, but the way
7 the Clean Water Act is structured is to
8 ensure that applicable water quality
9 standards are incorporated into a permit so
10 that they can be enforced against individual
11 dischargers.

12 JUDGE STEIN: So you would be
13 enforcing, at least theoretically, the
14 substantive bacterial or other limits rather
15 than relying on this generic provision?

16 MS. CHAVEZ: Well, we would be --

17 JUDGE STEIN: I'm really trying to
18 understand the practical consequence of
19 taking that generic provision out of the
20 permit. What it does? Is it
21 anti-backsliding, is it not? So if you could
22 speak to that.

1 MS. CHAVEZ: Well, in the prior
2 permit, there was a direct prohibition in the
3 permit against dischargers that cause
4 exceedences of water quality standards.
5 Without that, the WASA could comply with all
6 of the performance standards in the LTCP and
7 still cause some other kind of violation, and
8 there would be no prohibition in the permit
9 to protect against that kind of violation.

10 JUDGE WOLGAST: Let me ask you,
11 what is our baseline for looking at the
12 statutory prohibition against
13 anti-backsliding? When it talks about the
14 previous permit; in this case, what previous
15 permit should we be looking to? Is that the
16 1997 permit, or is it some other iteration?

17 MS. CHAVEZ: Well, we laid out the
18 language in both the '97 permit and the 2003
19 permit, and acknowledged that the prior
20 permit could be read as being either of
21 those, and under either of those scenarios,
22 we contend that it does violate the

1 anti-backsliding provision. I'm not sure
2 what the answer to that is except that there
3 are certain provisions in the 1997 permit
4 that existed in the permit and they were not
5 contested, and so we have looked to those as
6 the last permit that was not either
7 withdrawn, remanded, or so -- and so forth.
8 But whether you read the last permit to be
9 1997 or the 2003 permit, both scenarios
10 violate the anti-backsliding provision.

11 JUDGE WOLGAST: Could you speak to
12 WASA's argument anti-backsliding that -- and
13 if I mischaracterized it, Mr. Evans is going
14 to correct me, so -- but as I understand it,
15 in essence, WASA is saying that the only way
16 to read the CSO policy as it's been
17 incorporated into the Act is to look at the
18 limitations of the previous permit, whether
19 that's 1997 or the 2003 amendment -- and look
20 at the limitations that will ultimately come
21 into effect under the Long Term Control Plan,
22 and compare those to determine if there is or

1 is not anti-backsliding.

2 MS. CHAVEZ: First of all, I would
3 say that the plain languages of the Act is
4 the bedrock requirement, and that that is
5 what we would go to. So whether the
6 limitation is less stringent is the basic
7 touchstone. Now, likewise, with respect to
8 the CSO policy and how to read that in the
9 interplay between the CSO policy and the
10 anti-backsliding provision, again, the
11 statute itself provides that -- let me just
12 go to my notes. Section 402 simply states
13 that permits for combined sewers shall
14 conform to the CSO policy.

15 This is a minimum requirement, not
16 a ceiling. Nothing in here suggests that
17 somehow this trumps the anti-backsliding
18 provisions. Nothing in it suggests that the
19 CSO policy can somehow authorize violations
20 of water quality standards. The CSO policy
21 itself likewise, as Your Honor pointed out,
22 calls for water quality-based affluent limits

1 requiring at a minimum compliance with -- and
2 so on. So this is on its face a minimum
3 requirement. It doesn't prohibit other water
4 quality standards-based requirements from
5 being in the permit, and it certainly doesn't
6 call for them to be replaced by the Long Term
7 Control Plan.

8 JUDGE WOLGAST: And yet the CSO
9 policy does obviously contemplate that in
10 certain instances, there will be compliance
11 over time, so that there will be some delta
12 of time before whatever capital improvements
13 come about in complying sewer situations?

14 MS. CHAVEZ: I agree. However, the
15 CSO policy and the EPA's enforcement action
16 are remediations to address violations of
17 this very language in the permit. The fact
18 that we've got a Long Term Control Plan to
19 start to address that violation doesn't mean
20 that we then withdraw the language from the
21 permit. So there's nothing inconsistent with
22 maintaining the basic requirement in the

1 permit while the permittee is coming into
2 compliance.

3 Now, WASA has suggested that it
4 will be unfairly exposed to liability. As an
5 initial matter, WASA's exposure isn't a valid
6 reason to weaken the permit requirements, and
7 secondly, as long as EPA has an enforcement
8 action on the books and is diligently
9 prosecuting that enforcement action, then any
10 violations that would fall within that
11 enforcement action would be directly related
12 to that case, and so citizens could intervene
13 or could participate in that enforcement
14 action, but there wouldn't be some kind of
15 double liability.

16 On the other hand, the citizens are
17 not somehow tied -- their hands are not tied
18 from enforcing other water quality violations
19 simply because EPA is pursuing an enforcement
20 action that covers a certain class or a
21 certain type of violations. So I hope that
22 answered your question.

1 JUDGE WOLGAST: I guess I
2 understand you to be saying that in essence,
3 in this situation where there is a Long Term
4 Control Plan, there's going to be some
5 extended period of time before water quality
6 standards are met; that the way to marry
7 these provisions is that WASA should be
8 considered to be in violation for whatever
9 period of time it takes for all of the
10 provisions of the Long Term Control Plan to
11 be implemented. Is that correct?

12 MS. CHAVEZ: That is correct. And
13 WASA can be in violation of permit
14 requirements and in violation of water
15 quality standards as it is right now, but not
16 be subject to double liability, that its
17 liability has already been addressed in the
18 enforcement action. And so the purpose of
19 maintaining the language there is not to come
20 back and hit them over and over, but that
21 protection needs to be maintained in the
22 permit.

1 JUDGE STEIN: Mr. Evans indicated
2 that there was language required for Phase I
3 permits that basically related to this
4 discharge prohibition that was in at least
5 the '97 permit, and that requirement for that
6 specific compliance obligation or discharge
7 prohibition is absent from a discussion of
8 the CSO policy with regard to Phase II
9 permits. At least that's how I understood
10 it. Can you speak to that? Do you agree
11 with his statement? Do you disagree with it?

12 MS. CHAVEZ: I can speak to it, and
13 I disagree with it. I believe that what
14 Mr. Evans is referring to is in Section 4(b)
15 of the CSO policy. Section 4(b)(1) relates
16 to Phase I permits, and Section 4(b)(2)
17 relates to Phase II permits. And there's
18 nothing in these two provisions that is
19 mutually exclusive. They set minimum
20 requirements.

21 So for Phase I, the minimum
22 requirement is to have compliance with

1 applicable water quality standards expressed
2 in the form of a narrative limitation. Under
3 Phase II, the requirement is -- this is on
4 its face, requiring at a minimum compliance
5 with the numeric performance standards for
6 the selected CSO controls.

7 So there's no conflict between
8 those two provisions. They can exist happily
9 next to one another, but they are both
10 minimums; neither -- it would take much more
11 explicit language than this for EPA's CSO
12 policy to somehow suggest that you gut the
13 existing narrative requirement in the permit
14 and replace it with the Long Term Control
15 Plans; nothing suggests that at all.

16 And it's just not enough to connect
17 numerous dots and say this must be what the
18 control -- what the CSO policy must've
19 intended. That's not what the CSO policy
20 says.

21 If there are no further questions,
22 I'll reserve the remainder of my time.

1 JUDGE STEIN: Thank you.

2 EPA?

3 MS. BARTLETT: Good afternoon, Your
4 Honors. My name is Deane Bartlett, and I'm
5 representing the Region this afternoon. And
6 I feel like I should immediately launch into
7 answers to all of the questions that you've
8 already posed, because I'm sure you want to
9 know what the Region has to say about them.

10 Let me just start by saying that
11 the burden here is on the Petitioners, and we
12 don't think any one of them have met their
13 burdens to show that there has been any sort
14 of clearly erroneous finding of fact or
15 conclusion of law in the agency's permitting
16 decisions. Our decisions are rational and
17 they're supported by the record.

18 With respect to the decision not to
19 include a compliance schedule for the Long
20 Term Control Plan in the permit, we made that
21 decision first of all because we believe we
22 have the discretion to make that decision,

1 and that that's not been taken away from us
2 by either the District's water quality
3 standard implementing regulation or the
4 Star-Kist decision. I suppose I should just
5 clarify that the District's
6 certification -- well, I'll get to that on
7 the TN limit.

8 JUDGE REICH: Before you do that,
9 when I looked at the December 16, 2004 fact
10 sheet, and looked at what it said about
11 compliance schedules, it says the 1994 CSO
12 policy provides implementation schedules for
13 compliance deadlines which if passed may not
14 generally be included in permits, that the
15 Phase II permit reflecting the requirements
16 of the LTCP will be accompanied by a separate
17 and forceful mechanism in the case of a major
18 facility, or judicial order contained in
19 compliance dates on the fastest practicable
20 schedule.

21 Reading that in isolation, it
22 seemed to be saying that you really had no

1 choice, because under the Clean Water Act,
2 you could not include a schedule in the
3 permit. When I looked at your response to
4 the petition in 05-02, it clearly talked
5 about this being a proper exercise of
6 discretion in choosing not to put the
7 compliance schedule in the permit and putting
8 it in the consent decree instead.

9 Am I misunderstanding what this
10 said in the fact sheet, or did your thinking
11 evolve as to whether or not you had a legal
12 basis for putting it in the permit between
13 the time the fact sheet was issued and the
14 time the permit was issued or the response to
15 the petition was submitted?

16 MS. BARTLETT: I don't think we've
17 really changed our mind. I still think that
18 we believe that what we've done is consistent
19 with the Clean Water Act including the CSO
20 policy and 402(q). And that certainly at the
21 very least, the CSO policy expresses a clear
22 preference under these facts for any schedule

1 of compliance to be placed into a companion
2 enforcement action.

3 JUDGE REICH: Do you think in terms
4 of the requirements for the LTCP, the
5 compliance deadlines have passed, and if they
6 haven't passed, is this discussion in the
7 fact sheet kind of irrelevant? I'm
8 struggling with that.

9 MS. BARTLETT: You mean the -- for
10 the water quality standards, because I'm not
11 sure that I'm --

12 JUDGE STEIN: Referring to the
13 challenge in 05 --

14 JUDGE REICH: In the 05-02.

15 MS. BARTLETT: 05-02? I'm sorry.

16 JUDGE STEIN: Appeal No. 05-02 --

17 MS. BARTLETT: The Appeal No. --

18 JUDGE REICH: Right.

19 MS. BARTLETT: Yes, but you're
20 talking about the water quality standards,
21 that the deadlines have passed for them to
22 comply with the applicable water quality

1 standards?

2 JUDGE REICH: Such that under your
3 reading of the policy as set forth in the
4 fact sheet, you would not have been able to
5 include a compliance schedule.

6 MS. BARTLETT: I'm not sure that
7 we've reached that conclusion, because I
8 don't know, frankly, whether all of these
9 standards would have been pre-July 1, 1977.

10 I think just in general, the way
11 the CSO policy reads that in the case of a
12 major permittee that cannot be in compliance
13 with its Long Term Control Plan immediately
14 upon the effective date of the permit, that
15 the preference is for any schedule to be in a
16 companion enforcement action. And it's --

17 JUDGE WOLGAST: But does that
18 contemplate that it could -- that it could be
19 in the permit, or in a judicial or some other
20 enforceable document?

21 MS. BARTLETT: That may be the
22 case, but I don't think the Board really

1 needs to address that here, because the fact
2 of the matter is, there was an ongoing
3 enforcement action.

4 In the year 2000, EPA filed an
5 enforcement action against WASA for violating
6 its water quality standards.

7 JUDGE WOLGAST: But just again to
8 understand your answer to Judge Reich's
9 question, could you have put the compliance
10 schedule in the permit?

11 MS. BARTLETT: Under these facts, I
12 think our position is no, we could not.

13 JUDGE WOLGAST: Because?

14 MS. BARTLETT: Because -- well,
15 because of the existing enforcement action
16 and because of the clearly stated preference
17 in the CSO policy for placing under these
18 facts a compliance schedule for the Long Term
19 Control Plan in a judicial order.

20 JUDGE WOLGAST: I don't understand
21 that, though. Are you saying that it
22 couldn't be both in the enforcement consent

1 decree and in the permit?

2 MS. BARTLETT: I suppose it's
3 possible, but I certainly feel like our
4 decision was rational under the
5 circumstances, and that it would be awfully
6 difficult to have it in both places and to
7 manage it in both places.

8 I believe the Board raised that
9 question earlier and posed it to Mr. Evans,
10 having to have -- especially in this case
11 where you've got a schedule that spans 20
12 years.

13 And if there needs to be some
14 change made, having to effect that in both
15 the consent decree and the permit would be
16 administratively difficult and confusing
17 potentially to the public in terms of what's
18 applicable when.

19 JUDGE WOLGAST: That argument
20 actually just goes to the Long Term Control
21 Plan and to CSO. Does that mean, as to
22 nitrogen, there is no compliance schedule?

1 MS. BARTLETT: That is true.

2 Asking the question, I thought you were
3 referring to the LTCP compliance schedule.

4 With respect --

5 JUDGE WOLGAST: Yes. Yes, I was,
6 and I understand your answer.

7 MS. BARTLETT: Okay.

8 JUDGE WOLGAST: But I was saying
9 the same rationale wouldn't apply to
10 nitrogen.

11 MS. BARTLETT: Not necessarily,
12 except that in these facts, EPA made the
13 decision that it made sense to put the
14 compliance schedule for nitrogen in the
15 existing consent decree, because, getting
16 beyond whether or not we have the discretion
17 to do that -- because the plan that's been
18 proposed by WASA to achieve the nitrogen
19 limit involves -- the only way they can do
20 what they are proposing is to have the
21 long-term consent decree modified, because it
22 will involve a change to one of the

1 components of the Long Term Control Plan.

2 JUDGE STEIN: I -- I'm sorry.

3 JUDGE WOLGAST: I was just going to
4 say, my basic sort of question -- concern is,
5 just that at this time, though, today as you
6 ask us to approve the permit, you have no
7 analogue to the Long Term Control Plan.

8 You have no enforceable document
9 with which there is a compliance schedule for
10 nitrogen. You have an aspiration to have
11 such a enforceable compliance schedule.

12 MS. BARTLETT: We do -- we do, and
13 we have ongoing discussions with WASA with
14 respect to that.

15 JUDGE STEIN: I'm having a lot of
16 difficulty with EPA's argument in this area.
17 Going back to where you started -- where you
18 were suggesting that the CSO policy expressed
19 a preference, I don't understand how that
20 preference for something being in a judicial
21 decree translates into an inability to put it
22 in a permit, particularly in the face of the

1 D.C. regulations we have here, which says
2 that a compliance schedule shall be in the
3 permit.

4 Now, I understand there may be
5 circumstances where you are prohibited by law
6 from putting it in the permit for giving more
7 time, but I don't understand how that
8 preference allows you to ignore the D.C.
9 regulations.

10 So perhaps you could address that.

11 MS. BARTLETT: First of all, we
12 don't think that the D.C. regulations can be
13 read to alter the Clean Water Act and the
14 regulations at 122.47 that gives EPA the
15 discretion as to whether or not to place a
16 compliance schedule in a permit.

17 We think to read it that way --

18 JUDGE REICH: Are you saying a
19 state has no authority to adopt a mandatory
20 compliance schedule provision?

21 MS. BARTLETT: I don't think that
22 they can override the Agency's discretion,

1 and that to read it that way would take away
2 the Agency's enforcement discretion as well
3 as its permitting discretion.

4 JUDGE STEIN: Didn't EPA have a
5 choice as to whether or not to approve these
6 regulations?

7 MS. BARTLETT: We did. We did,
8 Your Honor, and frankly, I can't account for
9 what happened in terms of the regulations
10 being approved, except that I don't think we
11 interpreted them as being as stringent as to
12 limit our discretion, and neither does the
13 District. The District was very clear --

14 JUDGE REICH: Do you know what --

15 MS. BARTLETT: In its
16 certification.

17 JUDGE REICH: What EPA's experience
18 has been in approving regulations in other
19 states? Do you feel confident in saying that
20 EPA has never approved regulations in other
21 states that contain mandatory compliance
22 schedule provisions?

1 MS. BARTLETT: I'm not familiar
2 with every other state's water quality
3 standards, but I would be very surprised,
4 frankly. And I think what happened in this
5 instance is that when EPA, when it was
6 reviewing the regulations, was focusing more
7 on the substantive water quality standards
8 regulations.

9 JUDGE REICH: How do you relate
10 giving priority to EPA regulations over state
11 regulations with the discussion in Starkist
12 that does seem to suggest that compliance
13 schedule is an area where EPA should be
14 looking to the states, not the other way
15 around?

16 MS. BARTLETT: Well --

17 JUDGE REICH: I mean, I understand
18 the specific holding, and Star-Kist does
19 comply, but I think some of the language
20 seems to suggest that.

21 MS. BARTLETT: Well, I think the
22 overall thrust of the decision in Star-Kist

1 was looking at the question of whether, when
2 EPA is the permitting authority, it can issue
3 a permit that's less stringent than state
4 law. And I think it made a statement about
5 what EPA may do when state law allows it.

6 I don't think it decided what EPA
7 must do if there's a state law provision that
8 allows a compliance schedule.

9 JUDGE STEIN: But doesn't the D.C.
10 law do more than just allow a compliance
11 schedule? Doesn't it specify that it shall
12 be in the permit? I mean, that's the -- I
13 mean, I think in Star-Kist, the Board was
14 grappling with a circumstance just different
15 from this circumstance in that there wasn't
16 the authority, as I understand it, for a
17 compliance schedule.

18 Here there is the authority, but
19 the regulation goes beyond that, and it seems
20 on its face to require at least some form of
21 a compliance schedule in the permit. I mean,
22 if this Board were to determine that the

1 language means a compliance schedule needs to
2 be in the permit, how would EPA go about
3 putting a schedule in the permit? Have you
4 thought that through?

5 MS. BARTLETT: What we would do for
6 the Long Term Control Plan or for the total
7 nitrogen?

8 JUDGE STEIN: Both.

9 MS. BARTLETT: I don't know what we
10 would do. I would be speculating. You know,
11 certainly if the Board directs the Agency to
12 do so, we'll figure out how to do so, and
13 we'll figure out what is an appropriate time
14 frame for a schedule in a permit.

15 JUDGE REICH: If we interpret --

16 MS. BARTLETT: It might not be the
17 same.

18 JUDGE REICH: If we interpreted
19 that provision as mandatory, and therefore it
20 appeared from your perspective that it was
21 approved incorrectly, does that enable the
22 Agency to just ignore it, or does the Agency

1 have to honor it as long as it's still an
2 approved regulation?

3 MS. BARTLETT: I think what we're
4 doing is reading it the way that we think it
5 makes sense in accordance with the law, and
6 in accordance with the District's
7 interpretation of its own regulation.

8 JUDGE REICH: Where is the
9 District's interpretation clearly
10 articulated?

11 MS. BARTLETT: It's articulated in
12 the 401 certification that it provided.

13 JUDGE REICH: Do you think that's
14 the clearest statement of the District's
15 interpretation of that provision?

16 MS. BARTLETT: That's the clearest
17 one we've been able to find.

18 JUDGE REICH: Okay.

19 MS. BARTLETT: If there were
20 something else, we would have presented it to
21 the Board.

22 JUDGE STEIN: Given that at the

1 time the District certified EPA had proposed
2 to put a compliance schedule in a permit, at
3 least according to the fact sheet, how is it
4 that we're supposed to read the District
5 certification as endorsing the notion that it
6 can be in a consent decree? I mean, it
7 strikes me that there's at least -- in the
8 minimum, there's some ambiguity on that
9 point.

10 MS. BARTLETT: Actually, no. If
11 you're talking about the 401 certification
12 for the nitrogen limit.

13 JUDGE REICH: Uh-huh.

14 MS. BARTLETT: Which originally we
15 did propose giving -- including a schedule in
16 the permit that would allow WASA to come up
17 with a plan. But in the subsequent proposal,
18 we indicated very clearly that we were not
19 going to include a compliance schedule in the
20 permit, and that we were going to include it
21 in a separate enforceable action, ideally in
22 the -- in a modification to the LTCP consent

1 decree.

2 JUDGE REICH: What was the date of
3 that proposal?

4 MS. BARTLETT: The date of that
5 proposal was -- it was in December 2006, and
6 the certification, which is Exhibit 5 to the
7 Agency's response, or the Region's response,
8 clearly states that the December 7, 2006
9 modified permit; in other words, what we had
10 given them as our second proposal, is in
11 compliance.

12 And further, just to clarify, I
13 don't think there's any ambiguity about the
14 District's position here, because the
15 certification clearly states that DDOE
16 concurs with EPA that EPA should establish a
17 schedule for compliance with the nitrogen
18 limit, and what EPA had proposed was to put
19 it in a separate document and not put it in
20 the permit.

21 JUDGE STEIN: Given that it seems
22 undisputed that WASA cannot currently comply

1 with that limit, and that D.C. has made a
2 condition of its certification that there be
3 a compliance schedule, which is part of their
4 certification, how is it that the Board could
5 approve the issuance of this permit without,
6 at a minimum, there being a compliance
7 schedule either in the consent decree or in
8 the permit?

9 MS. BARTLETT: Well, I think that
10 the certification doesn't include that as a
11 condition. It's not a condition. It's a
12 consideration, which is very different
13 than -- you know, when we get a 401
14 certification that says this permit will meet
15 applicable water quality standards, with the
16 exception of this condition and that
17 condition.

18 So what the District stated in its
19 401 certification was very different. It
20 didn't withhold it, it didn't say "only if."
21 So it's not a condition.

22 JUDGE STEIN: In the 2005 EPA

1 budget, I believe one or more of the parties
2 pointed us to a budget amendment or
3 discussion about whether or not compliance
4 schedules -- I believe for long-term control
5 plans should be in permits, and I believe I
6 saw language that talked about putting them
7 in a permit, but there was also some
8 additional language that said that it didn't
9 preclude you having it elsewhere.

10 How is it that that language
11 squares with your view that the CSO policy
12 expresses a strong preference for these kinds
13 of compliance schedules being in consent
14 decrees?

15 MS. BARTLETT: I think it squares,
16 because the -- and I'm not recalling the
17 exact language, but it says in certain
18 circumstances, it may be appropriate. And
19 when you look at the CSO policy and you
20 analyze what it says and line it up with the
21 facts of this particular case, the preference
22 is that the compliance schedule be in a

1 separate enforcement document.

2 JUDGE STEIN: What was the broader
3 context of that budget language? And is this
4 an issue that is bigger than this case? I
5 mean, are there issues nationwide about
6 whether or not these kinds of compliance
7 schedules should be in permits versus consent
8 decrees?

9 MS. BARTLETT: There may be, but I
10 don't know that that issue is before the
11 Board.

12 JUDGE STEIN: I'm trying to
13 understand the context of an amendment that's
14 been cited to us by more than one party as
15 bearing on how we should address this issue.
16 I'm trying to understand the context of that
17 budget amendment, to the extent that you know
18 it.

19 MS. BARTLETT: I wasn't involved in
20 the budget amendment, so I can't really
21 address that. I can say that the issue of
22 compliance schedules is coming up here and

1 there, as the Board is probably aware. Not
2 so much in situations -- I don't think like
3 this one -- where you have a pre-existing
4 companion enforcement action, a discharge as
5 big as WASA, and a Long Term Control Plan
6 schedule that spans 20 years.

7 JUDGE STEIN: Unless there are
8 other questions on the compliance schedule
9 issue, I was going to suggest we move to the
10 some of the other issues.

11 If you could address both the
12 anti-backsliding and also the water quality
13 standards issue.

14 MS. BARTLETT: With respect to
15 anti-backsliding, our position is
16 fundamentally that the current provision is
17 no less stringent than the pre-existing
18 provision, which we believe to have been the
19 provision that was in the 1997 permit,
20 because that was the last fully effective
21 permit provision. And that included a
22 general prohibition against discharges in

1 excess of any limitation necessary to comply
2 with D.C. water quality standards.

3 JUDGE WOLGAST: Could you explain
4 what -- because I've read this seemingly
5 stated differently by the Region in different
6 iterations. What does that sentence mean to
7 you?

8 MS. BARTLETT: Frankly, I'm not
9 sure what that sentence means. It almost
10 smacks of a duty to comply with water quality
11 standards regulations rather than a specific
12 QBEL (?), which is --

13 JUDGE WOLGAST: And frankly, with
14 that statement, that it's a -- basically for
15 shorthand a backstop of the prohibition
16 against any discharges that would exceed
17 water quality standards is what I interpreted
18 from your brief at page 43 and 44. So I just
19 wanted to understand if that in fact was your
20 position.

21 MS. BARTLETT: Yes. Once WASA
22 completed its Long Term Control Plan using

1 the demonstration approach which I believe
2 Mr. Evans explained, and what their
3 obligation is using the demonstration
4 approach is to demonstrate that the selective
5 Long Term Control Plan controls are adequate
6 to meet the water quality standards of the
7 District.

8 So what happened is WASA completed
9 its Long Term Control Plan. EPA and the
10 District reviewed it to see if they had
11 indeed made that demonstration. And the
12 record includes our review and the District's
13 review.

14 Having made that conclusion, we
15 then went on to the Phase II permitting
16 provisions, which as pointed out earlier,
17 indicate that the Agency is supposed to
18 include water quality-based effluent limits
19 under 40 CFR 122.44(d)(1) and 122.44(k),
20 requiring at a minimum -- and then it
21 enumerates what those water qualities
22 standard-based limitations would be -- and

1 the applicable provision for when a permittee
2 has used the demonstration approach is IV,
3 which says performance standards and
4 requirements that are consistent with Section
5 2(c)(4)(b), that's the demonstration approach
6 of the policy.

7 JUDGE WOLGAST: Before you --

8 MS. BARTLETT: So we put the
9 performance standards in the in the permit.

10 JUDGE STEIN: Just above that point
11 C, in the middle column at 18696, there's a
12 reference to -- there's an A and B,
13 "Requirements to implement technology-based
14 controls including the nine minimum
15 controls," and then there's a B for a
16 narrative requirements. Why wouldn't this
17 duty to comply provision or whatever you call
18 it come under the narrative requirements?

19 MS. BARTLETT: The narrative
20 requirements -- it says narrative
21 requirements which ensure that the selected
22 CSO controls are implemented operated and

1 maintained as described in the long-term CSO
2 control plan. There is such a provision in
3 the permit. That exists. That is covered.

4 JUDGE STEIN: But you're saying
5 that this particular provision that you have
6 now proposed or decided to take out is a
7 narrative requirement, but it's not a
8 narrative requirement pertaining to CSO
9 controls?

10 MS. BARTLETT: It is, but what B
11 addresses, I think, is a requirement to
12 ensure that the selected CSO controls are
13 implemented, operated, and maintained as
14 described in the long-term CSO control plan.
15 So that's kind of a separate provision, and
16 that is the permit. That's under Part 3
17 section C(2)(a), which says that the
18 permittee shall implement and effectively
19 operate and maintain the CSO controls
20 identified in the Long Term Control Plans.
21 So that's already in the permit.

22 JUDGE STEIN: Was it --

1 MS. BARTLETT: I think the
2 difference that we're -- what's confusing
3 here is, in part whether the performance
4 standards that -- of the Long Term Control
5 Plan that are set forth in the permit as
6 QBELs cover both the narrative water quality
7 standards and numeric water quality standards
8 of the District. And they do. And I think
9 one of the things that's at issue here, and I
10 think the Board has asked the question, what
11 if that second sentence in our two-sentence
12 proposal isn't there? What do you lose?

13 And I don't think the Petitioners
14 have identified anything that we do lose.
15 Water quality, there's an immediate
16 requirement -- those water quality
17 standard-based effluent limits are
18 immediately affected. Is WASA out of
19 compliance? Absolutely. WASA has a consent
20 decree that requires it to take about \$1.2
21 billion worth of steps over the next 20 years
22 to get into compliance. In the meantime,

1 some -- I'm sorry.

2 JUDGE STEIN: Okay.

3 MS. BARTLETT: Some of the things
4 that were raised by Petitioners Friend of the
5 Earth in their brief were it's -- WASA is
6 excused. WASA isn't excused. WASA has been
7 sued and WASA has a consent decree that they
8 have to comply with. And here's one place
9 where we disagree with WASA. We think that
10 they need to be in compliance. The consent
11 decree allows them to take the steps, but
12 they were found in violation of the water
13 quality standards. Now, the other --

14 JUDGE WOLGAST: Could I just
15 interrupt you for one second here?

16 MS. BARTLETT: Sure.

17 JUDGE WOLGAST: What would you
18 point us to as the most explicit answer to
19 Sierra Club's argument that you lose some of
20 the numeric or narrative standards that
21 otherwise would've been swept into the
22 general prohibition? What would you point us

1 to?

2 MS. BARTLETT: I'd point you to
3 several exhibits to the government decree,
4 specifically Exhibit 6. Do you want me to
5 say what they are or do you just --

6 JUDGE WOLGAST: That would be
7 helpful.

8 MS. BARTLETT: Exhibit 6, which is
9 a November 3, 2004 memorandum from James
10 Collier, Chief, Bureau of Environmental
11 Quality and Environmental Health
12 Administration, District Department of
13 Health, to Doreen E. Thompson, Esquire,
14 interim senior deputy director, Rika Ray (?)
15 CSO LTCP. And one of the things -- the
16 primary focus of that memorandum is whether
17 the Long Term Control Plan -- selected
18 controls once implemented, the discharges
19 that will remain, whether they will meet
20 District water quality standards.

21 JUDGE WOLGAST: But --

22 MS. BARTLETT: There's --

1 JUDGE WOLGAST: But I guess what
2 I'm looking for is where in the permit or
3 where is there an enforceable mechanism like
4 sentence 2 that clearly sweeps in everything
5 that would otherwise have been included in
6 the general prohibition?

7 MS. BARTLETT: I guess our position
8 is that there's nothing that's not included,
9 and that the Petitioners haven't really been
10 able to identify anything that's not
11 included. And if you read Exhibit 6,
12 Exhibit 7, and Exhibit 8, then you can see
13 what all has been considered and encompassed
14 in terms of water quality standards
15 compliance to be included and covered by the
16 Long Term Control Plan selected controls.
17 The two things --

18 JUDGE WOLGAST: What's the
19 range -- oh, I'm sorry, go ahead.

20 MS. BARTLETT: I just want to point
21 out that I don't think that in reality,
22 Friends of the Earth and Sierra Club have

1 been able to identify anything that's not
2 covered by that. One of the things that they
3 mentioned in their briefs was there's nothing
4 to require -- and in their argument, what if
5 there's a leak.

6 Well, if there's a leak in a
7 system, then that may indicate that there's a
8 problem with operation and maintenance, the
9 general operation and maintenance of the
10 system, and there's a provision in the permit
11 that the general permit provision for CSOs
12 and everything that requires WASA to properly
13 operate and maintain its system in addition
14 to the general O&M provision -- there's also
15 a provision under the nine minimum controls,
16 the technology-based CSO controls, that
17 specifically relates to operation and
18 maintenance of the CSO portions.

19 So that's already covered. So I
20 guess we have a hard time seeing, and don't
21 believe that the Petitioner have identified
22 anything that's not covered by that

1 provision.

2 JUDGE WOLGAST: What was the
3 rationale for deleting the general
4 prohibition?

5 MS. BARTLETT: That it was
6 duplicative, that the specific performance
7 standards are much more specific and much
8 more clearly articulate exactly what it is
9 the permittee has to do in order to comply
10 with water quality standards. So there's
11 more certainty on the part of the permittee.
12 There's also more certainty on the part of
13 the agency should we find ourselves in the
14 position of needing to enforce those
15 provisions somewhere down the line.

16 JUDGE STEIN: If it's duplicative,
17 why not just put it in the permit? I mean,
18 at one point EPA had proposed it in the
19 permit. If it's simply something additional,
20 why take it out? I mean, maybe the
21 difficulty we're having is that through most
22 of the iterations of this permit, some form

1 of this provision was there, and all of a
2 sudden, suddenly, in the last iteration, it's
3 gone. I understand that you're trying to
4 point us to a roadmap that shows that
5 everything else is really there, but if it's
6 really just additional, why not just put it
7 in? What's the downside?

8 MS. BARTLETT: Because potentially
9 it could create confusion about what the
10 permittee's obligations exactly are. And
11 clearly, our brief and the history, the
12 evolution of this permit, reflects that we
13 have -- that the agency has struggled with
14 what is the right water quality
15 standard-based effluent limit provision for
16 CSOs.

17 And ultimately, we concluded that
18 the performance standards provide for or
19 certainly can provide for compliance with the
20 District's water quality standards, they're
21 intended to, and they cover everything that
22 was included in that prior provision, except

1 much more specifically.

2 JUDGE STEIN: So your
3 anti-backsliding defense or whatever you want
4 to call it, or defense to claim that there's
5 anti-backsliding, is exclusively that the two
6 provisions are as stringent as one another
7 and therefore, there's no anti-backsliding?
8 Is that the sole basis of your defense, or
9 you're arguing there's some kind of an
10 exception to anti-backsliding?

11 MS. BARTLETT: I think the only
12 exception -- that's primarily our argument.
13 I think the only exception there might be
14 would be related to new information because
15 of the new information on the Long Term
16 Control Plan. But I think since the
17 requirement that was in the permit previously
18 was to comply with -- not to discharge in a
19 way that would violate District water quality
20 standards, that the new provision is no less
21 stringent.

22 JUDGE REICH: In that context of

1 Judge Stein's question, in your response, you
2 indicate even if this limit is less stringent
3 than the previous one, which had -- has not
4 meets the exception for backsliding under
5 Section 303(d)(4)(a) and I know that the
6 Friends of the Earth basically argued that
7 that provision wasn't applicable here, are
8 you still maintaining that that provision is
9 applicable, or are you conceding that that
10 provision is not applicable?

11 MS. BARTLETT: Upon reflection, I'm
12 not sure, depending upon how you read that
13 provision, if it's read to require that the
14 previous provision was based upon TMDL or a
15 waste-load allocation. The previous
16 provision was not. So in that case, I think
17 we have to concede that that would not apply.

18 JUDGE REICH: Okay, thank you.

19 JUDGE STEIN: I presume that EPA is
20 issuing several Phase II permits around the
21 country, or has been in the process, and that
22 some of those Phase I permits may have

1 included this sort of duty-to-comply language
2 as a shorthand for expressing what was there.
3 Has EPA made a policy decision that that kind
4 of language goes out in the Phase II permits?
5 And I guess I'm just trying to understand
6 this case in the broader context, because it
7 seems to me that this anti-backsliding issue,
8 to the extent that these generic kinds of
9 provisions are coming out in more than just
10 one permit, could represent perhaps
11 potentially a bigger issue, and I'm wondering
12 if you could shed any light on that question.

13 MS. BARTLETT: Unfortunately I
14 can't. I can only shed light on -- it's just
15 been confirmed that I really can't answer
16 that outside of the context of this
17 particular permitting decision that was made
18 by Region 3. You know if that's something --

19 JUDGE STEIN: You can't answer it
20 because you don't know or because they --

21 MS. BARTLETT: Because I don't
22 know. Because I don't know, not because I'm

1 keeping a secret, but obviously if that were
2 something that the Board wanted to see some
3 additional discussion of, we could certainly
4 provide a supplemental brief.

5 JUDGE STEIN: Okay.

6 JUDGE WOLGAST: Just to understand,
7 is it your position that the agency within
8 the context of the anti-backsliding question
9 has discretion to set any schedule -- and
10 basically, I'm assuming that in essence
11 you're stating that same argument that WASA
12 had. You look to the limitation as it
13 existed in the '97 permit, you look to the
14 specifics of the Long Term Control Plan as
15 long as those both get to -- complies with
16 water quality standards, it doesn't matter
17 how long. So if you all had come up with a
18 schedule that was 50 years, in your opinion
19 that wouldn't have been a backsliding
20 problem.

21 MS. BARTLETT: I think we defer
22 with WASA on that because I don't -- the

1 Region is not taking the position that WASA
2 doesn't have to be in compliance now, but
3 they don't have to be in compliance until the
4 Long Term Control Plan has been fully
5 implemented. We've got an enforcement action
6 out there.

7 JUDGE WOLGAST: But again, just
8 looking at the anti-backsliding aspect, so do
9 you only look to the terms of the '97 permit
10 and the terms of the Long Term Control Plan
11 to deduce whether or not this last iteration
12 is less stringent than the '97 terms?

13 MS. BARTLETT: I think based on the
14 plain language of 402(o), yes.

15 JUDGE WOLGAST: But -- and then you
16 were going on to say -- and I understand you
17 then agree with Sierra Club that the
18 compliance status of the District is that
19 they are in violation?

20 MS. BARTLETT: Yes, but they have a
21 consent decree right now that covers their
22 non-compliance and contains specific

1 provisions for how they're going to achieve
2 compliance.

3 JUDGE WOLGAST: If the compliance
4 schedule were included in the permit itself,
5 as well as in -- say, let's just say
6 hypothetically -- as well as in the consent
7 decree, what would be their compliance
8 status. Would they be in violation?

9 MS. BARTLETT: I think then they
10 could certainly argue that they have the
11 permit as a shield, and I assume that's one
12 of the reasons why they would like to have
13 the compliance schedule in the permit.

14 JUDGE WOLGAST: And I guess that's
15 a question that I'm confused about as to the
16 CSO policy, when it seems to contemplate that
17 the agency has discretion to include such
18 less schedule, a long-term schedule, either
19 in the permit or in the judicial consent
20 decree or in some other enforceable
21 agreement, and the idea that however EPA
22 exercise that discretion would have the

1 consequence of making the permittee in or out
2 of violative status seems pretty significant.

3 MS. BARTLETT: I guess that's true,
4 although if you're looking at it from the
5 standpoint of are they vulnerable to some
6 sort of citizen suit, I think they are
7 covered under either one of those -- any of
8 those scenarios.

9 JUDGE WOLGAST: However under this
10 scenario, we heard WASA say that they could
11 still be sued, they could still be subject to
12 penalties even if the injunctive relief from
13 such an action may well end up being the same
14 terms as the technology improvements included
15 in the Long Term Control plan. Why isn't
16 that right?

17 MS. BARTLETT: Well, I'm not sure.
18 I mean, I'm not sure exactly where WASA was
19 going with that argument, but frankly, I
20 don't see them as being vulnerable, as being
21 sued. Given the provision that we currently
22 have in the permit, I think their objection

1 was primarily under the more general
2 language.

3 Certainly, EPA is not going to take
4 an enforcement action against them. We've
5 already done that. We've got them under a
6 consent decree, and they're going to be
7 doing -- you know, we would move to enforce a
8 consent decree if we needed to, and I don't
9 think there's a basis to suggest that the
10 agency is not diligently prosecuting.

11 JUDGE STEIN: I had a question,
12 just a final question about this water
13 quality-based effluent limits. In the
14 Region's response to comments, in their '07
15 Exhibit 4, pages 10 to 11, EPA states, "EPA
16 has concluded that implementation of a Long
17 Term Control Plan will not preclude
18 compliance with water quality standards.
19 Therefore, use of the Long Term Control Plan
20 performance standards as water quality-based
21 effluent limits does not violate 122.4(d),
22 which precludes the issuance of a permit that

1 can't ensure compliance with water quality
2 standards of all effective states."

3 How does the Region's language of
4 not precluding compliance with water quality
5 standards meet the requirements of 122.4(d),
6 which requires EPA to ensure that the limits
7 shall ensure compliance with water quality
8 standards?

9 I'm taking issue with that language
10 in part because that's an issue that has so
11 much different but related issue cropped up
12 in an earlier appeal to the Board, I think
13 the DCMS4 case. So I wanted you to explain
14 how that language meets 122.4(d), or to point
15 me to where in the record EPA has made a
16 finding or determination that would meet
17 122.4(d).

18 MS. BARTLETT: I believe we covered
19 that in exhibit -- I believe we did address
20 it in the record, Your Honor, but I'm not
21 able to pinpoint where that is. I can
22 certainly get back to you on that.

1 JUDGE STEIN: If you could provide
2 that --

3 MS. BARTLETT: Or if we did not,
4 then --

5 JUDGE STEIN: Do you concede that
6 the particular language that I've quoted is
7 problematic in light of 122.4(d)?

8 MS. BARTLETT: It may be. It may
9 be, Your Honor, but on the other hand, I
10 think the CSO policy is pretty clear on what
11 the water quality standard-based effluent
12 limitations should be.

13 JUDGE STEIN: No further questions.
14 We appreciate your patience and answering all
15 of our many questions.

16 And if we could go to the rebuttals
17 now, that would be great.

18 MR. EVANS: If I can move directly
19 to a couple of the last items that we were
20 covering with EPA. First, with respect to
21 the question whether this narrative
22 prohibition is duplicative of the Long Term

1 Control Plans-derived specific performance
2 standards, it is not duplicative, but in
3 fact, one of the principal reasons why WASA
4 objected to it was because it was
5 fundamentally inconsistent with the CSO
6 policy.

7 If you look at the CSO policy in
8 its entirety and you look at the scheme
9 that's set out in that policy with respect to
10 how communities like WASA go about bringing
11 themselves into compliance with water quality
12 standards using the demonstration approach,
13 in essence as you submit your Long Term
14 Control Plan, EPA and the state make a
15 determination whether that Long Term Control
16 Plan, at least under the demonstration
17 approach, will comply with water quality
18 standards.

19 But because a demonstration
20 approach is based upon modeling, and you
21 haven't installed the system yet, there is
22 also a express provision in CSO policy which

1 says that when you use demonstration approach
2 and you incorporate the results of that
3 demonstration approach in the permit, you
4 also have to include a provision requiring
5 post-construction monitoring. In other
6 words, you go out to determine whether or not
7 in fact, based upon actual mainstream data,
8 whether or not the original demonstration has
9 proven to be correct.

10 The problem with this narrative
11 discharge prohibition is that even with the
12 consent decree -- the consent decree simply
13 has a schedule for the implementation of a
14 Long Term Control Plan. In essence, once
15 that Long Term Control Plan has been
16 implemented and the system has been placed in
17 operation, the shield -- the protections
18 afforded by the consent decree go away.

19 So with that narrative discharge
20 prohibition in there, if WASA's
21 post-construction monitoring program shows
22 that they are out of compliance with water

1 quality standards, contrary to the
2 demonstration that was made at the time the
3 plan was developed and approved by EPA and
4 the state, then WASA and any other CSO
5 community can be sued for violation of the
6 water quality standards. That's not the way
7 the policy is intended to work, and that's
8 what this issue really comes down to.

9 So it is not duplicative; it is
10 imposing a compliance obligation, a liability
11 on WASA and every other community. And I
12 might add, although it doesn't appear at this
13 point that EPA has made any larger policy
14 decisions with respect to how to deal with
15 this issue, in other CSO permits, it is an
16 issue of national importance.

17 That's why NACWA -- where the
18 partnerships submitted, for instance, the
19 court briefs in this case, because you've got
20 hundreds of other CSO communities out there
21 who have been called upon to invest literally
22 billions of dollars over the next 20-25

1 years, and yet having invested that money
2 face the prospect of being yet sued again.

3 Even though they did everything the
4 policy asked them to do, yet they're still
5 being held for non-compliance. It is a
6 critical issue for CSO communities.

7 And to suggest that these
8 communities should be held liable because
9 their demonstration -- because their
10 post-construction monitoring demonstration
11 doesn't show compliance with standards, is
12 fundamentally inconsistent with the policy,
13 because the policy said so and expressed
14 process for what you do at the point at which
15 non-compliance are shown.

16 It doesn't say that -- the policy
17 doesn't say the community is in
18 non-compliance with its obligation. What it
19 says is that if the demonstration doesn't
20 show compliance to water quality standards,
21 the community must then submit a revised Long
22 Term Control Plan explaining what additional

1 measures it's going to take to bring itself
2 into compliance. That's how the policy is
3 supposed to work, and that's why this
4 provision -- this prohibition is
5 fundamentally inconsistent with it.

6 In addition to being fundamentally
7 inconsistent with the overall scope, intent,
8 purpose, direction of the policy, we believe
9 it is fundamentally inconsistent with the
10 clear language of the policy itself. Now, if
11 you look at the language of the policy and
12 this is -- the provision is dealing with a
13 Phase II permit and relevant language says,
14 permit shall include a water quality-based
15 effluent limitations, and so forth requiring
16 at a minimum -- well, Friends of the Earth
17 and the Sierra Club are picking up on the
18 language "at a minimum."

19 Well, if you take that literally,
20 then in essence, in order to accept their
21 position on this, you have to do one of two
22 things. Either you have to assume, and in

1 essence it would constitute a collateral
2 attack on the Long Term Control Plan, that it
3 doesn't provide for compliance with water
4 quality standards, or at least the evidence
5 currently available, and the resulting
6 performance standards don't provide for
7 compliance with water quality standards.

8 And if in fact that's their
9 position, then we would respectfully submit
10 that if they didn't think that the plan met
11 the requirements of the CSO policy, didn't
12 contain a demonstration water standards
13 quality compliance, they had an opportunity
14 back then when EPA approved it to have
15 challenged that. They never challenged the
16 determination. We would submit they are
17 precluded from collaterally attacking the
18 Long Term Control Plan at this late date.

19 If they think that plan was
20 inadequate to provide for compliance with
21 water quality standards, they should've
22 attacked it then. They didn't. We think

1 they are precluded from collaterally
2 attacking it now.

3 So we think that this Board should
4 approach this issue on the presumption that
5 this plan provides for compliance with water
6 quality standards. And if it provides for
7 compliance with water quality standards, then
8 to retain the narrative discharge prohibition
9 in addition to the requirement for the Long
10 Term Control Plan performance standards in
11 essence will be reading that requirement of
12 that, why have it? Why have numeric Long
13 Term Control Plan drive performance
14 standards, if in fact you are going to
15 include a narrative prohibition in it?

16 It serves no purpose.

17 JUDGE STEIN: Are you aware of
18 anywhere in the record where there is an
19 analysis of the effect of removing this
20 provision? Any kind of analysis EPA might
21 have done that was put into the record that
22 would explain why the deletion of the

1 language is not less stringent?

2 MR. EVANS: I don't think you can
3 refer to -- I think you need to look at
4 the -- you need to look at the entirety of
5 the records, specifically the exhibits to
6 EPA's response, which include -- I think one
7 of them is Exhibit 8, the EPA memorandum.
8 But there are two memoranda in there of
9 particular relevance. One is the EPA
10 memoranda. The other is the memoranda from
11 the District of Columbia which contain an
12 analysis of the Long Term Control Plan,
13 ultimately leading to a conclusion that the
14 Long Term Control Plan will provide for
15 compliance with water quality standards.

16 Because the two agencies with
17 responsibility for making their determination
18 have concluded that this Long Term Control
19 Plan will provide for compliance with water
20 quality standards, then in essence, it is a
21 part and parcel of the same thing as the
22 discharge prohibition. This Board, in my

1 view, would have to, in essence, discount or
2 not take into consideration the findings that
3 have already been made by the two agencies
4 charged with responsibility for making their
5 determination.

6 Again, the Petitioners had an
7 opportunity to challenge that determination
8 if they wanted to. They haven't. We think
9 that what they are doing now is really
10 nothing more than a collateral attack on a
11 decision that was made several years ago.

12 JUDGE WOLGAST: Could you very
13 briefly address Sierra Club's argument
14 that -- I understand your point about what
15 may happen at the end of the day, but that in
16 the interim, there are potential violations
17 that would have been included in the 3(e)1
18 general prohibition language that are not
19 picked up by either the Long Term Control
20 Plan or the enforcement case?

21 MR. EVANS: Yes, Your Honor. We
22 frankly can't think of any circumstance under

1 which a discharge could occur that either
2 would not violate the Long Term Control Plan
3 performance standards or would not violate
4 the technology-based requirements and also
5 the water quality-based requirements of the
6 permit. We have the nine minimum controls
7 requirements. One of those is a prohibition
8 on dry weather discharges. So if there is a
9 leak or a spill that is unrelated to a wet
10 weather event, that's absolutely prohibited,
11 that would be a violation of a permit.

12 If on the other hand, WASA didn't
13 properly operate and maintain its system, the
14 combined system in some way, this is while
15 the Long Term Control Plan is being
16 implemented, then there are any number of
17 those nine minimum control obligations that
18 could be violated depending upon the facts of
19 that particular case.

20 If there is a release from the
21 system at a point other than the permitted
22 outfalls under the permit, the combined

1 system has outfalls that are specifically
2 identified in the permit.

3 If WASA were to release flow from
4 some location other than those permitted
5 outfalls, that would be a violation of the
6 permit. So in sum and substance, it is
7 difficult for us to imagine any circumstance
8 under which WASA would have a discharge other
9 than a normal CSO discharge associated with
10 the normal functioning of the system and it
11 not be a violation of the permit.

12 JUDGE STEIN: Thank you very much.

13 MR. EVANS: Thank you.

14 MR. MUELLER: Just a couple of
15 points on rebuttal. First, I think again, it
16 is important to remember that in about three
17 different places, EPA has said that there are
18 certain situations in which their compliance
19 schedule and -- compliance schedules need to
20 be in permits. There need to be assurances
21 that the standards that are set in the permit
22 are going to be obtained.

1 Those are in EPA's permitting
2 manual, Chapter 8, in the CFR 122.47, and
3 also in the permitting approach that D.C.
4 signed along with EPA and all the other Bay
5 states, to our petition in which they said
6 that we petitioned EPA asking them to require
7 merit limits in all significant discharge
8 permits, and that there be compliance
9 schedules.

10 And in response, we got back this
11 permitting approach, which basically says or
12 it says in fact, "generally these compliance
13 schedules should require the facility to come
14 into compliance with the nutrient base
15 requirements of the permit or order as soon
16 as possible in keeping with the 2010 deadline
17 and objective with the Chesapeake 2000
18 agreement".

19 So clearly, D.C. and EPA all
20 realized when they signed that document in
21 December of 2004 that any permits that they
22 were going to issue after that fact should

1 have compliance schedules and permits that
2 assure compliance with that 2010 deadline.

3 One of the other things I struggled
4 a bit with was the statement that -- I
5 believe one of the questions to EPA was,
6 "Well, why do you think you should do this in
7 a consent decree and not in the permit?"

8 And Ms. Bartlett's statement was,
9 "Well, under the facts of this case, it was
10 rational to make that decision." Well, we
11 challenge that in the sense that there is no
12 enforcement action ongoing with respect to
13 the total nitrogen limit.

14 There is for the Long Term Control
15 Plan, and we perfectly understand the
16 Agency's position on that. But with respect
17 to the total nitrogen, there is no violation
18 until the permit is issued or is final.

19 So we don't really understand
20 why -- and the rationale was, well, the Long
21 Term Control Plan consent decree has to be
22 modified to now add the total nitrogen plan.

1 Well, we understand all that, but
2 don't really see the significance of why you
3 need to have the compliance schedule in the
4 consent decree. What does EPA lose by not
5 having it in the permit? And I have not
6 heard any reason articulated by the Agency
7 why it loses any authority whether it is in
8 the consent decree, or it is in the permit.
9 And in fact, there is no guarantee that a
10 consent decree is going to be entered with
11 respect to total nitrogen, and that's one of
12 our biggest worries, is that this proceeding
13 will go by the Board's.

14 If the Board decides that it is not
15 going to require a compliance schedule in the
16 permit and the parties are left to their own
17 devices, that there may never be a consent
18 decree that addresses this particular issue.
19 And then we've got long protracted litigation
20 fighting over whether WASA can meet the new
21 limit, and when it gets to meet that limit,
22 and again, the objectives of the Chesapeake

1 2000 agreement are not met.

2 The other issue that I was
3 concerned with was the statement that EPA did
4 not have to honor D.C.'s more strict
5 requirement of either a three-year compliance
6 schedule and having compliance schedule in
7 the permit. And the Clean Water Act
8 absolutely suggests or states it requires
9 that states have the ability to enact more
10 stringent limits, and clearly, D.C.'s law is
11 more stringent than the five year of the life
12 of the permit requirement in the Act.

13 They require three years to
14 compliance unless you can show a reason not
15 to meet that deadline, and then require a
16 compliance schedule in the permit. That is
17 more strict than EPA's regulations and the
18 Act, and it is entirely permitted by the Act.

19 The other point was that there was
20 something that could be read in D.C.'s
21 certification statement of "we agree that EPA
22 should set a compliance schedule, but doesn't

1 specify where by the fact that there were
2 some statement in the December 2006 fact
3 sheet that let D.C. know that this was going
4 to be in a consent decree".

5 Well in fact, what that statement
6 says is, in the fact sheet on page 5, is one
7 means of achieving an enforceable standard is
8 through modification to the consent decree
9 between EPA, and it cites the ongoing Long
10 Term Control Plan case.

11 That's one means of achieving. It
12 is clear that there are other means out
13 there. It doesn't say we are going to put it
14 in the consent decree. So there is no
15 inference that can be drawn from D.C.'s
16 statement that we think you should have a
17 compliance schedule and EPA should set it for
18 total nitrogen.

19 So again, I don't think it is
20 rational to assume that WASA is going to meet
21 that limit within the deadline set by the
22 Chesapeake 2000 agreement if there is no

1 compliance schedule in the permit. And we'd
2 urge the Board to so order EPA to do so.

3 Thank you.

4 MS. CHAVEZ: Thank you for giving
5 me a few extra moments. First of all, I'd
6 like to point out, going back to the notice
7 and comment issue, that all of these
8 questions about the water quality standards
9 provision, most of which EPA did not address
10 below, shows very graphically why we needed
11 notice and comment on this issue.

12 If -- and indeed, we agree with
13 Mr. Evans that this is an issue of national
14 importance, not only to sewer systems around
15 the country, but to citizens around the
16 country who are looking at their systems and
17 looking at the permits that cover those
18 systems and who are assured right now within
19 the permits that they have protection against
20 violations of water quality standards, it
21 would be certainly a major change in that
22 circumstance for EPA to adopt some kind of

1 policy, or even to set the precedent with
2 this permit that somehow it is permissible
3 simply to gut those underlying requirements
4 with respect to the question of what is lost
5 if that language is deleted.

6 Deletion plainly does impair our
7 ability to remedy water quality violations
8 that are not addressed by an EPA enforcement
9 action, or if the action is not being
10 prosecuted diligently, and there is no way
11 that counsel here today can guarantee that in
12 two decades, EPA will decide simply not to
13 enforce some provision of even the consent
14 decree. So that is one tool in our
15 enforcement toolbox that is gone forever if
16 this language is deleted.

17 The leak example is not the end of
18 the story. The narrative standards prohibit
19 all of the things that I read to you earlier
20 under the D.C. Code, all of which are
21 expected to continue after the Long Term
22 Control Plan is implemented. Presently in

1 the District, there are over 3.5 billion
2 gallons overflowing into the rivers every
3 year, and the District had a leak in its
4 system just last week or a couple of weeks
5 ago, as we read in the papers.

6 So we don't want to get caught in a
7 gotcha situation by giving one example, but
8 this is the reason why we needed notice and
9 comment, so that we could consider all of the
10 relevant factors and direct our comments
11 accordingly.

12 With respect to EPA's findings of
13 compliance, first of all, EPA never proposed
14 in its proposed permit to make a finding that
15 the new limit is as stringent as the prior
16 limit. At best, at most, the final permit,
17 not the proposed permit, but the final permit
18 only says the EPA finds that the Long Term
19 Control Plan will not preclude water quality
20 standards violations.

21 It is unclear what this means, and
22 this finding that it will not preclude

1 violations is not -- it is far from the
2 finding that the Long Term Control Plan will
3 ensure achievement of compliance. If it
4 purports to be a finding that the Long Term
5 Control Plan will ensure compliance with
6 water quality standards under all conditions,
7 under all wet weather conditions, that would
8 be an unbelievable claim, because the Long
9 Term Control Plan on its face acknowledges
10 that discharges of raw sewage into the rivers
11 will continue even after the Long Term
12 Control Plan is implemented perfectly.

13 And I would encourage the Board
14 absolutely to take a look at Exhibits 6
15 through 8, where first the District and then
16 EPA adopts the District's findings of
17 compliance. Those findings are based on the
18 preposterous notion that sewage overflows are
19 in effect treated if they pass through some
20 baffles or netting systems or wire grates,
21 trash skimmers. The common understanding of
22 sewage treatment requires more than the

1 sewage simply flows through a few pieces of
2 wire.

3 So the fact that EPA is now relying
4 on this so-called finding that it made
5 several years ago that was never subjected to
6 public comment is another example of why this
7 should have been included in the proposed
8 permit and part of the record of the permit
9 that the citizens were allowed to review and
10 comment on.

11 JUDGE STEIN: You have nothing
12 further? Thank you. I want to thank and
13 commend everybody for the caliber of their
14 arguments this afternoon. As I said at the
15 outset, it is a complicated case, it is an
16 important case, and we appreciate you bearing
17 with us as we work our way through these
18 issues. And with this, I think the Board
19 will conclude the hearing.

20 (Whereupon, at 4:00 p.m., the
21 HEARING was adjourned.)

22

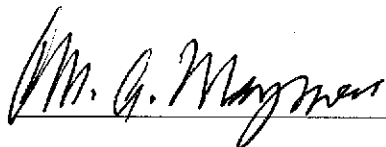
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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Christopher Mazzochi, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the foregoing transcript is true and accurate record of the testimony given by the said witness.

I further certify that I am not related to any of the parties to the action by blood or marriage and I am in no way interested in the outcome of this matter.



My Commission Expires:

January 1, 2010