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October 16, 2007

Overnight Mail

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

Re: NPDES Permit Appeal Nos. 05-02, 07-10, 07-11, 07-12
District of Columbia Water and Sewer Authority
Permit No. DC0021199

Dear Ms. Durr:

Enclosed please find the original of the following documents:

(1) Motion for Leave by NACWA and the Wet Weather Partnership to File a Non-Party Brief in Appeal Nos. 07-10 and 07-11.

(2) Joint Non-Party Brief of NACWA and the Wet Weather Partnership in Appeal Nos. 07-10 and 07-11.

Please contact me at 804-716-9021 or by e-mail at john@aqualaw.com if you have any questions about this filing.

Thank you for your assistance.

Sincerely,

John A. Sheehan

Enclosures

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

In re:	)	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY	)	NPDES Permit Appeal Nos. 05-02, 07-10, 07-11, 07-12
NPDES Permit No. DC0021199	)	

MOTION FOR LEAVE BY NACWA AND THE WET WEATHER PARTNERSHIP TO FILE A JOINT NON-PARTY BRIEF IN APPEAL NOS. 07-10 AND 07-11

The National Association of Clean Water Agencies ("NACWA") and the Wet Weather Partnership ("WWP") move for leave to file a joint non-party brief in Appeal Nos. 07-10 and 07-11, two of the four cases consolidated for review by the EAB in its order dated July 26, 2007. Appeals Nos. 07-10 and 07-11 challenge the modified NPDES permit issued to the District of Columbia Water and Sewer Authority (DC WASA) on April 5, 2007 and raise the issue of whether EPA Region Three should have included a compliance schedule in the permit. NACWA and the WWP seek to file a joint non-party brief limited to addressing the issue of whether a compliance schedule should have been included in the permit.

The EAB previously granted leave for NACWA and the WWP to file a brief in Appeal 05-02, which has been consolidated with the three petitions to review the modified NPDES permit issued on April 5, 2007. (EAB Order, July 26, 2007). That brief, filed with the EAB on August 22, 2007, was limited to the issue of whether a

compliance schedule should have been included in an earlier permit modification. NACWA and the WWP now seek to file the attached brief to address the same issue but in slightly different factual context. Appeal 05-02 involves the issue of whether a compliance schedule is required for implementation of a new combined sewer overflow discharge limitation. These appeals, Appeal Nos. 07-10 and 07-11, involve the issue of whether a compliance schedule is required for the implementation of a new nitrogen limit in the Blue Plains permit.

The Board has the discretion to determine whether to accept non-party briefs.[1] Because the proposed joint non-party brief will assist in the resolution of the issues in these consolidated cases and will address an issue on which the Board has already granted leave for NACWA and the WWP to address in another context, the Board should grant this motion for leave.

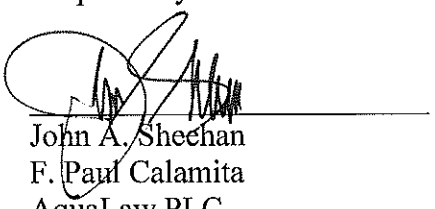
Counsel for NACWA and the WWP contacted counsel for the other parties in these consolidated cases to determine, pursuant section III.D.7(b) of the EAB Practice Manual, whether the parties concur or object to NACWA and WWP's filing of a non-party brief limited to the issue of whether a compliance schedule was required in the permit. DC WASA concurs in the filing of the non-party brief; CBF does not oppose the filing as long as it is limited to the compliance schedule issue; Friends of the Earth and the Sierra Club advised that they would not take a position on the motion; and EPA

[1] Neither the EAB Practice Manual nor 40 C.F.R. part 124 addresses the filing of non-party briefs in the context of appeals from permit decisions. However, 40 C.F.R § 22.11(b) and EAB Practice Manual, II.I.2, related to appeals in agency enforcement proceedings, do permit any party not a party to a proceeding to move for leave to file a non-party brief.

advised counsel for NACWA and the WWP that it would wait to review the motion before deciding what position to take.

For the foregoing reasons, NACWA and the WWP respectfully request that the EAB grant its motion to file a non-party brief in Appeal Nos. 07-10 and 07-11 and accept the attached brief for filing.

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave by the National Association of Clean Water Agencies ("NACWA") and the Wet Weather Partnership to file a Non-Party Brief in Appeal Nos. 07-10 and 07-11 was filed electronically with the Environmental Appeals Board and was served by regular first class U.S. Mail, postage prepaid, this 16th day of October, 2007, upon the following:

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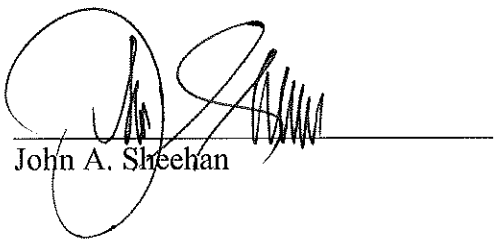

John A. Sheehan

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

In re:	)	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY	)	NPDES Permit Appeal Nos. 05-02, 07-10, 07-11, 07-12
NPDES Permit No. DC0021199	)	

JOINT NON-PARTY BRIEF OF NACWA AND THE WET WEATHER PARTNERSHIP IN APPEAL NOS. 07-10 AND 07-11

The National Association of Clean Water Agencies ("NACWA") and the Wet Weather Partnership ("WWP") submit this non-party brief in Appeal Nos. 07-10 and 07-11.[1] This brief addresses only one issue raised in the petitions -- whether the Region's decision not to include a compliance schedule in the District of Columbia Water and Sewer Authority's (DC WASA) modified discharge permit was legally correct.

For the reasons set forth below, the Region's decision not to include a compliance schedule in DC WASA's discharge permit must be set aside. A compliance schedule was required to be included in the DC WASA permit as a matter of law and the Region did not have the discretion to decide not to include a compliance schedule in the permit.

[1] The EAB order dated July 26, 2007 consolidated four petitions for review into one consolidated case. This brief is filed in the two petitions (07-10 and 07-11) that raised the issue of whether EPA should have included a compliance schedule in WASA's modified discharge permit issued on April 5, 2007. Appeal No. 07-12, filed by the Friends of the Earth and the Sierra Club, also challenged the modified permit but did not raise the issue of whether the Region should have included a compliance schedule in its discharge permit.

THE INTEREST OF NACWA AND WWP

The interest of NACWA and the WWP on the issue of whether a compliance schedule is required in DC WASA's discharge permit is fully set forth in the non-party brief filed by NACWA and the WWP in Appeal No. 05-02.[2] To summarize briefly and to discuss the issue in the context of the facts of this case, the issue -- whether compliance schedules are required in permits when a permitting authority establishes a new discharge limit that the authority acknowledges cannot be achieved immediately -- is one of critical importance to communities. The practice of imposing new limits without a reasonable schedule designed to achieve compliance with that new limit poses serious compliance issues for communities. Communities with new limits they cannot immediately achieve will either face exposure to enforcement actions that could disrupt their operations and future planning or they will be forced to challenge the new limits and seek to obtain the necessary time to comply. Even though consent decrees containing a compliance schedules may protect communities against suits alleging non-compliance with their permits, consent decree schedules do not completely resolve their compliance status. Without a compliance schedule in its permit, a community with an effluent limit it cannot meet risks non-compliance with its permit, perhaps over an extended period of time.[3] While the placement of a compliance schedule in a modified consent decree may address a community's compliance with regard to U.S. EPA, it may not prevent a citizens' suit

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[2] The joint non-party brief of NACWA and WWP was filed on August 23, 2007.

[3] The Region acknowledges this fact in its brief stating that "WASA's assertion that the lack of a compliance schedule in the Permit will place it at risk of non-compliance may well be correct." Region Br. at 27.

seeking to challenge the community's compliance with its permit. This could lead to duplicative litigation over the same compliance schedule issue.

BACKGROUND

While the context in Appeal Nos. 07-10 and 07-11 (a new nitrogen effluent limit) is different from Appeal No. 05-02 (a new combined sewer overflow discharge requirement), the issue is essentially the same -- whether the Region has the discretion to decide not to include a compliance schedule in DC WASA's discharge permit, or whether it is legally required to include a compliance schedule, based on Clean Water Act's permitting scheme and the compliance schedule provision in the District of Columbia's water quality standards regulations.

The necessary factual background is set forth in the petitions for review by DC WASA and the Chesapeake Bay Foundation and Region Three's response to the petitions for review. The key facts are as follows:

- Prior to the April 5, 2007 permit modification, DC WASA's permit contained a nitrogen discharge goal of no greater than 8,467,200 pounds per year.
- The April 5, 2007 permit modification established a new nitrogen effluent permit limit – 4,689,000 pounds per year of total nitrogen.
- EPA's Final Fact Sheet, published with the permit, states the following about the implementation of the new total nitrogen limit:

> EPA understands that the Blue Plains facility is not designed to achieve the limit on a consistent basis. In order to do so, it is anticipated that new and/or retrofitted treatment technologies must be installed at the Blue Plains facility. Therefore, EPA intends to establish a schedule for compliance with the nitrogen limit in a separate enforceable document.

ARGUMENT

I. The Region's Argument that it has the Discretion Where to Place a Compliance Schedule is Incorrect as a Matter of Law.

The Region's entire argument supporting its decision to place a compliance schedule in a consent decree rather than in DC WASA's NPDES permit rests on the assumption that the agency has discretion where to place a schedule of compliance. Region Br. at 19 - 23. The Region's brief assumes from the outset that the only issue regarding a compliance schedule is where it should be placed. The Region offers little in support of this assumption and the only justifications the Region offers are: (1) its assertion that "[n]othing in the CWA or EPA regulations mandates where a schedule of compliance may be placed," and (2) its assertion that the Star-Kist decision "simply stands for the proposition" that when EPA is the permitting authority, the Agency may, under certain circumstances include a compliance schedule in a permit where applicable state water quality standards or implementing regulations contain a compliance schedule authorizing provision. Region Br. at 19, 23. As explained below, both of these attempted justifications are incorrect.

A. Because the District's Water Quality Standards Require that a Compliance Schedule Be Placed in the Permit, the Region was Legally Required to Include One.

In the Clean Water Act, Congress established a permitting structure whereby individual states play a leading role in formulating their own water quality policies and EPA's authority is derivative of the states. See, 33 U.S.C. § 1342(a)(3). Congress gave certain permitting authority to EPA but did not want EPA to preempt the state's rights to impose and enforce water quality requirements. 33. U.S.C. § 1251. With regard to establishing timetables and schedules and, specifically, schedules of compliance, "the Act

keeps them in the hands of the States, not EPA" and Congress intended the states to become the proper authorities to define appropriate deadlines for complying with their own state law requirements. In the Matter of Star-Kist Caribe, Inc., 3. E.A.D. 172 (Adm'r 1990), modification denied, 4 E.A.D. 33 (EAB 1992). Schedules of compliance are "purely matters of state law, which EPA has no authority to override." Star-Kist, 3. E.A.D. 172 (1990). Thus, the Clean Water Act does mandate that a state's water quality standards be adhered to and, in this case, as more fully set forth below, that means that a compliance schedule must be included in the permit.

Because the District of Columbia has not been delegated to administer the NPDES Program, that authority remains with US EPA. The District, however, has the authority to set its own water quality standards and to set an implementation strategy to achieve those water quality standards. See, 33 U.S.C. § 1313. The District's water quality standards regulations contain an implementation strategy that requires that a compliance schedule be included in a permit when a new water quality standard-based effluent limitation is included in the discharge permit, as is the case here.[4] The District's implementing regulations state in relevant part:

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

D.C. Mun. Regs. Tit. 21 § 1105.9 (emphasis added).

Because the District's water quality standards require a compliance schedule in these circumstances, the Region was required to follow the District's regulations and

[4] The new total nitrogen discharge limit is contained in the permit at Part IV Section E.

place such a schedule in DC WASA's Blue Plains permit.[5] The Region does not have the authority or discretion to override the District's federally-approved directive to place a compliance schedule in the permit.

The Region refers to section 1105.9 of the District's Municipal Regulations as a "compliance schedule authorizing provision." Region Br. at 23. While some state water quality standards may be written in manner that authorize compliance schedules but do not prescribe where they should be placed, that is not the case here. Section 1105.9 does more than just authorize the use of a compliance schedule. It requires that a schedule "shall be placed in the permit." Consistent with the statutory scheme described above, the Region was required to carry out the state law requirement and place the compliance schedule in the permit.

B. The Region Incorrectly Relies on Star-Kist as Authority to Support its Assumption that it Has the Discretion Not to Place Compliance Schedule Provision in DC WASA's permit.

In response to the briefs by the Chesapeake Bay Foundation and DC WASA contending that the Region does not have the discretion to decide whether or not to include a compliance schedule in DC WASA's permit, the Region includes a one-sentence reference to the Star-Kist case and argues that the decision "simply stands for the proposition that, when EPA is the permitting authority, the Agency **may**, under certain conditions, include a compliance schedule in a NPDES permit where applicable state WQS or implementing regulations contain a compliance schedule authorizing

[5] EPA does not dispute that more than three years are needed to achieve compliance with the new total nitrogen limitation.

provision." Region Br. at 23 (emphasis included in the Region's brief).[6] This contention, however, misstates the ruling in the Star-Kist case.

In Star-Kist, the question presented was whether EPA could include a compliance schedule in a federally issued permit in the Commonwealth of Puerto Rico when Puerto Rico's water quality standards did not authorize schedules of compliance. EPA Region II argued that it had the authority to establish schedules of compliance when state water quality standards did not provide the authorization for them. EPA Administrator Reilly's 1990 Order in Star-Kist reviewed what authority EPA has and what authority the states have in issuing permits with compliance schedules. While the facts in Star-Kist are different from the facts here, the discussion of the federal-state permitting scheme explains EPA's role and the state's role and provides the legal framework to answer the question here -- whether EPA had the discretion to decide not to include a compliance schedule in DC WASA's permit. The Administrator's Order reviewed the "language structure, and objectives" of the Clean Water Act as set forth in sections 101(a) and (b), 402 (a)(3) and 510 of the Act, and concluded that all of these sections support an interpretation that "Congress intended the States, not EPA, to become the proper authorities to define appropriate deadlines for complying with their own state law requirements." Star-Kist Caribe, Inc., 3 E.A.D. 172 (Adm's 1990).[7] The Administrator concluded that the decision whether or not to allow schedules for delaying compliance

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[6] In its brief, the Region puts the word "may" in bold letters but fails to cite to any page reference or even identify which of the three Orders rendered in this case supports the view that the Region has the discretion to decide where a schedule should be placed.

[7] EPA Region II petitioned the Environmental Appeals Board to modify Administrator Reilly's April, 1990 decision. The EAB denied the petition on May 26, 1992, and upheld the decision and the analysis in the Administrator's April, 1990 decision.

with state water quality standards was up to the states that established those standards and explained as follows:

> Congress intended states, not EPA, to become the proper authorities to define the appropriate deadlines for complying with their own state law requirements. Just how stringent such limitations are, or whether limited forms of relief such as variances, mixing zones, and compliance schedules should be granted are purely matters of state law, which EPA has no authority to override.

Star-Kist, 3 E.A.D. 172 (emphasis added).

Thus, because the District's water quality standards require that a compliance schedule be included in DC WASA's permit, this is purely a matter of state law, and the Region was obligated to include a compliance schedule in the permit. Thus, the Region's attempted reliance on the Star-Kist decision is misplaced.[8]

In the face of the clear language in the District's water quality standards stating that "a compliance schedule shall be included in the permit," the Region argues that neither CBF nor WASA "has provided any evidence ... how the District interprets this provision." Region Br. at 24. The District's requirement that the permit in question "shall contain a schedule in the permit" could not be any clearer on its face. Accordingly, the Board must reject the Region's invitation for the

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[8] The Region filed a motion for leave to reply to NACWA and the WWP's joint non-party brief in Appeal No. 05-02 and the EAB granted the motion on October 1, 2007, and accepted the brief for filing. The Region argues in its brief that the reach of Star-Kist must be confined to the facts in that case where the state water quality standard did not authorize schedules of compliance. Limiting the scope of the case in that fashion, however, ignores the Administrator's discussion of the proper roles of the federal and state governments in the NPDES permitting scheme. That discussion explains why the Clean Water Act's permitting scheme provides that when state water quality standards do contain a requirement for compliance schedules in permits, EPA is required to follow that state law and include a compliance schedule in the permit.

Board to rewrite this provision through this appeal from "shall contain a schedule in the permit" to EPA's preferred "may include a schedule in a separately enforceable document."

Finally, the Region argues that the District "affirmed the Region's decision to include the compliance schedule in a separate enforceable document" as reflected in its CWA Section 401 certification. Region Br. at 25. A review of the certification and underlying permit documents on which the certification was based, however, do not demonstrate that the District affirmed the Region's decision. The District's certification states that the Region "should establish a schedule for compliance with the nitrogen limit." Exhibit 5 to Region's Brief. The certification does not specify where the compliance schedule will be placed (likely because the District's regulations require it to be in the permit). The fact sheet that the certification was based on and that the Region references in its brief on this issue refers to an interim schedule in the current permit and a more comprehensive schedule when the permit is reissued in 2008. Exhibit 10 to Region's Br. at 5. Thus, the District's certification supports the placement of the compliance schedule in the permit.

C. The Compliance Schedule May Exceed the Permit Term Where Justified

In its brief arguing that the Region is required to include a compliance schedule in the new permit for the Blue Plains facility, CBF contends that the Region may not permit a compliance schedule that exceeds the life of the permit. CBF Br. at 10. NACWA and the WWP disagree with this assertion. However, because a compliance schedule has not

been established in the permit at issue before the Board, the EAB need not address this issue at this time.

CONCLUSION

For the reasons set forth above, DC WASA's Petition for Review should be granted and the EAB should remand the permit to the Region with instructions to re-issue DC WASA's discharge permit with an appropriate compliance schedule contained in it.

Respectfully submitted,

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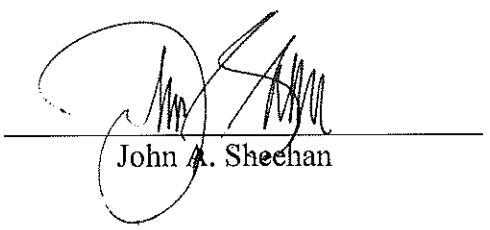

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