



EARTHJUSTICE

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FAX TRANSMITTAL MEMO

DATE: January 4, 2008
TO: Eureka Durr, Clerk, EPA Environmental Appeals Board
FAX #: 202-233-0121
FROM: Jennifer C. Chavez (phone 202-667-4500 ext. 208)
TOTAL PAGES (including cover page): 6

Dear Clerk:

I hereby submit a copy of the attached "Petitioners Friends of the Earth and Sierra Club's Reply to Region III Supplemental Response to Board Questions" in Consolidated NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12: In re. Blue Plains Wastewater Treatment Plant Permit No. DC0021199.

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

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

Dated: January 4, 2008

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

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In the Matter of:

Blue Plains Wastewater Treatment Plant,
NPDES Permit No. DC0021199

Consolidated NPDES Appeal Nos
05-02, 07-10, 07-11, 07-12

**PETITIONERS FRIENDS OF THE EARTH AND SIERRA CLUB'S
REPLY TO REGION III SUPPLEMENTAL RESPONSE TO BOARD QUESTIONS**

Pursuant to the Board's Order dated December 20, 2007, Petitioners Friends of the Earth and Sierra Club submit the following reply to EPA Region III's Supplemental Response to Board Questions, filed on December 14, 2007.

As the Region correctly notes, the Board at oral argument inquired how its ruling in *In re. D.C. MS4* permit appeal relates to the present Blue Plains NPDES permit appeal, in relation to the requirement for NPDES permits to impose conditions that ensure compliance with applicable water quality standards. See *In re. District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 325 (2002) (discussing the requirement of 40 C.F.R. § 122.4(d) to impose conditions that "ensure compliance with the applicable water quality requirements of all affected States").

In its Supplemental Response, the Region attempts to distinguish the present Blue Plains permit appeal from the D.C. MS4 permit appeal, by arguing that "[i]n contrast to the instant [Blue Plains permit appeal], in the DCMS4 Permit Appeal there was no record, other than the District's Clean Water Act Section 401 certification, to support the Region's reasonable determination that the best management practices set forth in the District's [SWMP] would meet water quality standards." The Region's response is misleading and incorrect. The record in the

MS4 permit appeal was very similar to the instant case and the Board's ruling in that matter is not only highly apposite to the present appeal, it is the controlling authority on the Board's question concerning water quality standards compliance.

In relevant part, the Board in the MS4 permit appeal held that "[S]ection 301 of the CWA requires, among other things, that NPDES permits contain 'any more stringent limitation, including those necessary to meet water quality standards.'" 10 E.A.D. at 329. The Board concluded that the 2000 D.C. MS4 NPDES permit failed to meet this requirement because, *inter alia*, there was "nothing in the record, apart from District's section 401 certification, that supports the conclusion that the Permit would, in fact, achieve water quality standards." *Id.* In other words, EPA's "determination" of compliance underlying the D.C. MS4 permit simply lacked any real support in the record.

The Region's argument that the D.C. MS4 appeal is distinguishable lacks merit. As an initial matter, the Region's characterization of the record in the D.C. MS4 appeal as containing only the District's § 401 certification is inaccurate. The record there contained, and the Region relied upon, not only the District's § 401 certification but also the District's and EPA's own conclusion (albeit unsupported) that the "...the BMPs required in this permit (including those that will be identified in the upgraded SWMP after further information is gathered) are reasonably capable of achieving of water quality standards." EPA Response to NPDES Appeal Nos. 00-14 and 01-09 at 8 (citing Region 3 response to public comments on February 1999 Draft MS4 NPDES Permit No. DC0000221 at 9 (May 6, 2000). *See also* EPA Fact Sheet dated September 30, 1999 (incorporated by reference) (stating that "[a]s authorized by 40 CFR 122.44(k), the permit will be utilizing BMPs as part of a comprehensive SWMP, as the mechanism to implement the statutory requirements).

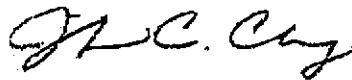
Thus, in response to the appeal of that permit EPA argued that the Region “issued the permit based on its determination (and certification of the Permit by [D.C. Dept. of Health]) that the BMPs set forth in the District’s SWMP are ‘reasonably capable of achieving WQS’”. *Id.* at 10 (emphasis added). EPA also argued that “the ‘reasonably capable’ language [was] “merely a paraphrase of the requirement that [the Region] found that no more stringent limits were necessary to achieve water quality standards.” (Emphasis added). As discussed below, this approach is similar to EPA’s present claim in the Blue Plains NPDES permit appeal that the performance standards associated with the Long Term Control Plan for CSOs (LTCP), are a “more specific articulation of what the permittee must do... to control its discharges as stringently as necessary to meet WQS.” See EPA Response dated July 5, 2007, at 39, 44. But requiring WASA to undertake certain activities that EPA and WASA claim are the *means* for compliance with water quality standards is not the same as requiring WASA *actually to comply* with water quality standards. This is particularly so here because there is evidence in the record that the chosen LTCP measures will not result in compliance with all applicable standards, and because the District and the Region’s “compliance” determination was based on the legally unsupported notion that the permit need not ensure compliance under all weather conditions for both water quality-based and recreation-based standards. For a detailed discussion of these points, see FOE *et al.* Petition for Review at 5-9 and 11-14 (May 7, 2007); and FOE *et al.* Reply to EPA and WASA at 6 and 8-11 (July 23, 2007).

Just as the Region’s determination of water quality standards compliance in the D.C. MS4 case lacked support in the record, its determination of compliance in the Blue Plains permit under review is unsupported by facts in the record, and is based on a misreading of the law. The Petitioners have discussed those defects in detail in their earlier briefs, and incorporate those

discussions here by reference. Thus, the Region has failed to show how the MS4 permit appeal is meaningfully distinguishable from the present Blue Plains NPDES appeal on the issue of compliance with water quality standards, and the Board's ruling in that case indeed applies here.

For the foregoing reasons, the Board should grant the petition for review of the Blue Plains NPDES permit for all the reasons stated herein and in the Petitioners' prior filings, including failure to comply with the Board's ruling in *In re. D.C. MS4* that "[S]ection 301 of the CWA requires, among other things, that NPDES permits contain 'any more stringent limitation, including those necessary to meet water quality standards.'" 10 E.A.D. at 329.

DATED January 4, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Petitioners' Reply to Region III Supplemental Response to Board Questions** were served on each of the following by first-class mail, postage prepaid, on January 4, 2008:

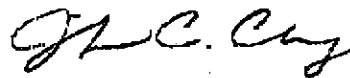
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DATED: January 4, 2008



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