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ENVIR. APPEALS BOARD

By Hand Delivery

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

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

Dear Ms. Durr:

Enclosed for filing are original and five copies of the District of Columbia Water and Sewer Authority's Motion for Reconsideration in the captioned consolidated appeals.

Please feel free to contact me at 804-775-4317 if you have any questions regarding the enclosed.

Sincerely,



David E. Evans

DEE
Enclosure

cc: Avis Marie Russell
Jennifer Chavez
David Baron
F. Paul Calamita
Jon A. Mueller
Amy McDowell
Deane Bartlett

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PM 3: 27
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

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

**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S MOTION
FOR RECONSIDERATION**

Pursuant to 40 C.F.R. § 124.19(g), the District of Columbia Water and Sewer Authority (WASA) submits this Motion for Reconsideration of that portion of the Environmental Appeal Board's March 19, 2008, order (Order) denying WASA's petition challenging the Region's decision to include a total nitrogen limit (Limit) in the National Pollutant Discharge Elimination System (NPDES) permit for the Blue Plains Advanced Wastewater Treatment Facility (Permit). Specifically, WASA moves for reconsideration of that portion of the Order rejecting WASA's challenge to the Limit based on deficiencies in the allocation and allocation process (Order at 43-46) and the Region's response to comments. Order at 46-47.

I. STANDARD OF REVIEW ON RECONSIDERATION

A motion for reconsideration must "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). A motion for reconsideration will not be granted "absent a showing that the EAB has made

a clear error, such as a mistake of law or fact.” *See*, EAB Practice Manual at 37 (June 2004) (citing *In re DPL Energy*, PSD Appeal No. 01-02, slip op. at 2-3 (EAB, Mar. 29, 2001). “The reconsideration process ‘should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.’” EAB Practice Manual at 37-38 (quoting *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 2 (EAB Apr. 9, 2001).

II. GROUNDS FOR RECONSIDERATION

WASA respectfully submits that Environmental Appeals Board (Board) rejected WASA’s challenge to the Region’s decision to include the Limit in the Permit based on the following clearly erroneous factual and legal conclusions.

A. Challenge Based on Erroneous Nitrogen Allocation and Deficiencies in Allocation Process (Petition III.B)

In its Petition, WASA challenged the Limit based on the Region’s failure to acknowledge or address the deficiencies in the allocation and allocation process that are the basis for the Limit. WASA Petition, Section III.B, at 15-20. The Board’s erroneous decision on this claim results from, first, the Board’s erroneous conclusion that WASA cannot challenge the Limit by challenging the allocation and the allocation process because the allocation and the process used to derive it are outside of the Board’s jurisdiction (Order at 44); second, the Board’s erroneous conclusion that WASA did not address the Region’s response to comments (Order at 40, n. 49); and third, the Board’s erroneous conclusion that the Limit was the subject of notice and comment. Order at 45.

The Board’s conclusion that it is without jurisdiction to review the allocation and the allocation process overlooks two very important points that were addressed in

WASA's petition. The first point is the undisputed fact that the sole basis for the Limit is the nitrogen allocation derived from the allocation process described in the December 2003 publication titled *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*. (hereinafter, "December 2003 Publication"). See Reg. Appeal 07 Exhibit 3 (April 5, 2007 Fact Sheet), at 5-6; Reg. Appeal 07 Exhibit 4 (April 5, 2007 Response to Comments) at 17-19.¹ The second point is the undisputed fact that the allocation process was not a rulemaking and that the allocation is not a rule. See WASA Petition at 15, n. 26.² Consequently, since the allocation and the process used to derive it are the bases for the Limit and have never been the subject of rulemaking, including formal notice and comment, WASA can and did challenge the Limit both in its comments on the draft Permit and in this appeal by challenging the allocation and the process used to derive it.³

Moreover, since the allocation is not a rule, the Region was obligated to at least consider changes to the allocation at the time it proposed to include the allocation as a limit in the Permit. This, however, the Region refused to do as is clear from the following response to WASA's comments requesting an increase in the Limit:

EPA was only one party to the allocation agreements, accordingly it cannot modify the agreement to benefit any one of the parties.

See Reg. Appeal 07 Exhibit 4 (April 5, 2007 Response to Comments) at 21.

¹ These citations refer to the exhibits that the Region filed with its response to appeal nos. 07-10, 07-11 and 07-12. Hereinafter, "Reg. 07 Ex." will refer to an exhibit that the Region filed in response to these three appeals.

² The Region has never disputed this point or asserted in any way that WASA was accorded an opportunity to formally comment on the allocation before the Region proposed to include it as a limit in the Permit.

³ See e.g. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (striking down a EPA draft guidance as a legislative rule promulgated without notice and comment)(cited in footnote 30 of WASA's Petition). Consequently, an un-promulgated document such as the December 2003 Publication cannot serve as a rule, and the Region's refusal to consider WASA's proposed changes to the allocation derived from that publication is arbitrary and capricious.

Contrary to the Board's conclusion that WASA did not address the Region's response to comments, WASA's Petition quotes this response and correctly asserts that it is clear evidence that the Region decided that it could not and would not change the Limit even before noticing it for comment. Petition at 18-20. Further, WASA's petition cited case law which clearly holds that such agency action is arbitrary and capricious. Petition at 19, n. 33.

Finally, in rejecting WASA's claim that the Region exceeded its authority by adopting the allocation as a permit limit without providing WASA with an adequate opportunity to comment, the Order incorrectly concludes that the "limit at issue, was indeed subject to notice and comment, even if the allocation process itself was not." Order at 45. This conclusion is clearly erroneous because as pointed out above and in WASA's Petition, the opportunity for notice and comment on the proposed limit was meaningless because EPA clearly acknowledged in its response to comments that it had already prejudged the outcome when it stated that it "cannot modify the agreement to benefit any one of the parties." Petition at 19. WASA was not a party to that agreement nor, as the Board noted in its Order, was it the subject of notice and comment. Again, WASA's Petition cites case law which holds that agency decisions are unlawful where the record shows that the agency prejudged the outcome and thereby rendered notice and comment meaningless. Petition at 19, n. 33.

B. Challenge to Region's Response to Comments (Petition III.C)

WASA's Petition also challenged the Limit based on the Region's failure to respond to WASA's comment that the proposed limit did not conform to the guiding principles set forth in the December 2003 Publication because, among other deficiencies,

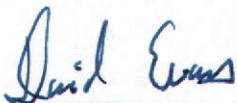
it did not reflect the relative contributions of the Potomac River and Susquehanna River basins thus violating the first principle that basins which contribute the most to the problem must do the most to resolve the problem. Petition at 12-15, 20. The Order rejected this claim, concluding that the Region addressed this complaint on page 20 of its response to comments. Order at 47. A review of the Region's response to comments shows that the Region never responded to this comment. Consequently, the Board's conclusion in this respect is clearly erroneous.

III. CONCLUSION

For the reasons stated above, WASA respectfully submits that the claims set forth in Sections II.B and II.C of WASA's Petition were erroneously decided, and, therefore, should be reconsidered.

Respectfully submitted,

District of Columbia Water and Sewer Authority

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Reconsideration was emailed and mailed first class postage pre-paid, this 1st day of April 2008 to the following:

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