

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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| |) | |
| In the Matter of: |) | |
| District of Columbia Water and Sewer Authority |) | NPDES Appeal Nos. 05-02, 07-10 |
| NPDES permit No. DC0021199 |) | 07-11 and 07-12 |
| |) | |
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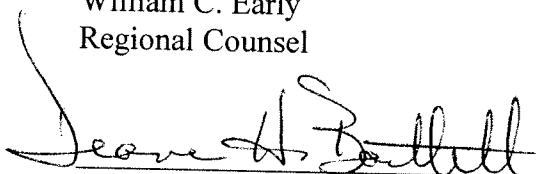
**REGION III MOTION FOR LEAVE TO FILE REPLY TO JOINT NON-PARTY BRIEF
OF NACWA AND THE WET WEATHER PARTNERSHIP ON THE REMAINING
ISSUE IN APPEAL NO. 05-02**

The United States Environmental Protection Agency, Region III (Region) hereby moves the Environmental Appeals Board (Board) for leave to file a Reply to the Joint Non-Party Brief of the National Association of Clean Water Agencies (NACWA) and the Wet Weather Partnership (WWP) on the remaining issue in Appeal No. 05-02 - the issue of whether the Region erred in not placing a compliance schedule for implementation of the Permittee's Combined Sewer Overflow Long Term Control Plan in the Permit. The Reply will briefly address one aspect of the arguments made by NACWA and the WWP in an effort to clarify some of the issues before the Board. Filing of this Reply will not prejudice any of

the parties to the above-captioned proceedings; it is simply offered to provide information designed to aid the Board in its resolution of the issues in this matter.

Respectfully submitted,

William C. Early
Regional Counsel

A handwritten signature in black ink, appearing to read "Deane H. Bartlett", written over a horizontal line.

Deane H. Bartlett
Senior Assistant Regional Counsel
EPA, Region III

OF COUNSEL
Sylvia Horwitz
Office of General Counsel

CERTIFICATE OF SERVICE

I hereby certify that the Region III Motion for Leave to Reply to Joint Non-Party Brief of NACWA and the Wet Weather Partnership on the Remaining Issue in Appeal No. 05-02 was served on this date as set forth below:

The document was filed electronically with the Environmental Hearing Board and the original mailed via overnight mail to:

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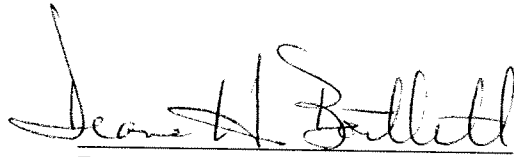
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REGION III REPLY TO JOINT NON-PARTY BRIEF OF NACWA AND THE WET WEATHER PARTNERSHIP ON THE REMAINING ISSUE IN APPEAL NO. 05-02

The United States Environmental Protection Agency, Region III (Region) hereby responds to the Joint Non-Party Brief of the National Association of Clean Water Agencies (NACWA) and the Wet Weather Partnership (WWP) on the remaining issue in Appeal No. 05-02 (Joint Non-Party Brief). The issue remaining is whether the Region's decision not to include a compliance schedule for implementation of the District of Columbia Water and Sewer Authority's (DC WASA) Long Term Control Plan (LTCP) to control combined sewer overflows in the DC WASA NPDES permit was either clearly erroneous or constituted an exercise of discretion or important policy warranting the Board's review. See, In re Miner's Advocacy Council, 4 E.A.D. 40, 42 (May 29, 1992). In addition to the arguments made in the Region III Response to Remaining Issue in The District of Columbia Water and Sewer Authority Petition for Review (Region III Brief), Region III responds as follows:

NACWA and WWP argue that the Region lacked any discretion and was required to place a schedule of compliance to implement the LTCP in the NPDES permit, notwithstanding that a schedule of a compliance to implement the LTCP was placed in a judicial consent decree, pursuant to the Administrator's decision in 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).

The Region submits that this is an incorrect reading of the Star-Kist decision.

NACWA and WWP argue that Star-Kist "provides the legal framework for the question here – whether EPA had the discretion to decide not to include a compliance schedule in DC WASA's permit." (Joint Non-Party Br. at 6). In support of this contention, NACWA and WWP emphasize the statement in Star-Kist that relief such as schedules of compliance are "purely matters of state law, which EPA has no authority to override." Id. at 4, 6. However, the meaning of the language from the Star-Kist decision quoted by NACWA and WWP is only properly understood when read with the sentence that follows the quoted language:

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. Consequently, if a State elects not to include a provision for a schedule of compliance in a water quality standard, EPA has no authority to override the State's authority by adding a schedule of compliance of its own invention."

3 E.A.D. 172 (emphasis added). Thus, Star-Kist concerns only whether EPA has authority to

include a schedule of compliance in a permit when EPA is the permitting authority. In other words, the issue addressed was whether, absent explicit authority in state law, EPA as the permitting authority may provide a compliance schedule in an NPDES permit to meet water quality-based effluent limits (WQBELs). The EAB answered this question by saying that absent such express authority in state law, there can be no compliance schedule.

Contrary to NACWA and WWP's argument, the Star-Kist decision does not stand for the proposition that in a state where EPA may include a compliance schedule to meet water quality-based effluent limits in an NPDES permit, EPA must include such a schedule in the permit. The Star-Kist opinion did not address this question. Rather than expanding the use of compliance schedules in permits, the effect of Star-Kist was to limit their availability to only where the state expressly authorizes their inclusion in permits.

NACWA and WWP argue that Star-Kist leaves EPA no discretion as to whether to include a compliance schedule to implement the LTCP in DC WASA's permit, because the District's water quality standards "require" that a compliance schedule be included in the permit. (Joint Non-Party Br. at 6-7.)¹ However, nothing in Star-Kist limits EPA's exercise of its discretion as to whether or not to include a schedule of compliance in a particular

¹ An argument that the District's authorizing provision leaves EPA no discretion regarding inclusion of a compliance schedule in the permit was also made with respect to a compliance schedule to meet another WQBEL in this NPDES permit by the Chesapeake Bay Foundation and DC WASA in NPDES Appeals Nos. 07-10 and 07-11, respectively. For the reasons stated in the Region's response to those petitions for review, this argument should be rejected here as well. See Region III Response to Petitions for Review in NPDES Appeals Nos. 07-10-, 07-11, 07-12 at 24-26.

permit. As the Region explained in its brief, under EPA's NPDES permit regulations, where state law authorizes inclusion of a compliance schedule, EPA may, "when appropriate, specify a schedule for compliance leading to compliance with CWA and regulations." 40 C.F.R. §122.47. (Region III Br. at 9-10.)

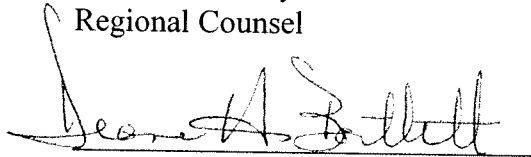
Finally, NACWA and WWP also misconstrue the Region's argument as to why it was not appropriate to place the compliance schedule for implementing the LTCP in the permit. Contrary to their assertion, the Region did not argue, and does not contend, that the Combined Sewer Overflow Policy (59 Fed. Reg. 18688, April 19, 1994) ("CSO Policy") required the Region to place the schedule of compliance in a consent decree. (Joint Non-Party Br. at 7). Rather, the Region explained why it decided, on the basis of the CSO Policy as well as for other reasons, that the consent decree was the better place for the compliance schedule. (Region III Br. at 11-16). Inclusion of compliance schedules to meet enforceable requirements in an enforcement order is expressly authorized by Section 309(a)(5) of the Clean Water Act, 33 U.S.C. §1319(a)(5), thus the Region's decision to include the schedule of compliance in the consent decree arising from EPA's enforcement action was reasonable under these circumstances.

In conclusion, Region III's decision to place a compliance schedule for implementation of the LTCP in a consent decree rather than in the NPDES permit is not based upon a finding of fact or conclusion of law which is clearly erroneous, nor does it

involve an exercise of discretion or important policy consideration which the Board should review.

Respectfully submitted,

William C. Early
Regional Counsel

A handwritten signature in cursive script, appearing to read "Deane H. Bartlett", written over a horizontal line.

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