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EPA REGION III

To:

Eivette Sauer, Clerk of the Boardat FAX No: 202/233-0121Date: 12/13/07 Number of pages (including cover): 8Subject: Blue Plans : Appeal Nos 05-02, 07-10, 07-11 & 07-12

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

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ENVIR. APPEALS BOARD

December 13, 2007

Via Facsimile and Federal Express

Ms. Eureka Durr  
Clerk of the Board  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G Street N.W., Suite 600  
Washington, DC 20005

Re: Region III Supplemental Response to Board Questions  
Permit Number: DC 0021199  
EAB Appeals Nos. 05-02, 07-10, 07-11 and 07-12

Dear Ms. Durr:

Enclosed please find the original and five copies of the above-referenced document, which was telefaxed today and which I am also serving on the other parties in these matters.

Please contact me at 215-814-2776 if you have any questions.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Deane H. Bartlett".

Deane H. Bartlett  
Senior Assistant Regional Counsel

Enclosure

cc: via regular mail (with enclosure):

Jennifer Chavez/David Baron, Esquire - EarthJustice Legal Defense Fund  
David Evans, Esquire - McGuireWoods LLP  
John Mueller, Esquire/Amy McDonald - Chesapeake Bay Foundation  
John Sheehan, Esquire - Aqualaw



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

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ENVIR. APPEALS BOARD

**In re:**

Blue Plains Wastewater Treatment Plant

NPDES Permit No. DC 0021199

NPDES Appeal Nos.  
05-02, 07-10, 07-11 and  
07-12

**REGION III SUPPLEMENTAL RESPONSE TO BOARD QUESTIONS**

The United States Environmental Protection Agency Region III (Region) submits this supplemental information in response to the Environmental Appeals Board's (Board) questions at the November 15, 2007 oral argument in these consolidated petitions for review.

At the oral argument, in reference to the petition for review by Friends of the Earth and the Sierra Club (FOE/SC), Appeal No. 07-12, Judge Stein asked counsel for the Region to "point me to where in the record EPA has made a finding or determination" that implementation of WASA's Long Term Control Plan (LTCP) would meet the requirements of 40 C.F.R. § 122.4(d). Transcript, pages 122-123. That regulation provides: "No permit may be issued: ... (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states...". In its Response Brief and at oral argument, the Region pointed the Board to Exhibits 6, 7 and 8 to the Response Brief for the Region's evaluation of whether implementation of the LTCP would result in attainment

of WQS. Transcript, pages 110 - 111.<sup>1</sup> These Exhibits document EPA's finding that implementation of WASA's LTCP would meet the requirements of 40 C.F.R. § 122.4(d). In turn, each of those exhibits refers to the August 28, 2003 letter to Jon Capacasa, Director, Water Protection Division, USEPA Region III, from James Collier, Bureau Chief, Bureau of Environmental Quality, Environmental Health Administration, Department of Health, Government of the District of Columbia, which sets forth the DC DOH's evaluation of the LTCP and determination that implementation of the LTCP will meet applicable WQS as required by 40 C.F.R. § 122.4(d). A copy of this document was provided to the Board upon request via facsimile on November 20, 2007.

The Board also noted that its interest in Section 122.4(d) relates in part to that issue having come up in another matter, In re Government of the District of Columbia Municipal Separate Storm Sewer System, 10 E.A.D. 323 (2002) (DCMS4 Permit Appeal). Transcript,

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<sup>1</sup> The exhibits include: Exhibit 6 - November 3, 2004 Memorandum from James Collier, Chief, Bureau of Environmental Quality, Environmental Health Administration, District Department of Health, to Doreen E. Thompson, Esq., Interim Senior Deputy Director, Re: CSO LTCP (Memorandum prepared at the request of the Region, summarizing the activities that the District DOH conducted that were the basis for the approval of the WASA LTCP, including the conclusion that the CSO discharges remaining after LTCP implementation would not result in violation of the District's WQS.); Exhibit 7 - November 4, 2004 Memorandum from Caroline Burnett, Attorney-Advisor, Watershed Protection Division, Water Quality Division, Office of Enforcement, Compliance and Environmental Justice, Environmental Health Administration, District Department of Health, to Bruce Brennan, Assistant Attorney General, Office of the Attorney General, Re: Legal Sufficiency Review of the District of Columbia Certification of the Long Term Control Plan Submitted by WASA Pursuant to 1994 CSO Policy (Legal analysis done by the District, at the request of the Department of Justice, of whether the DCDOH certification that the LTCP will provide for achievement of WQS is legally sufficient, including an analysis finding that the remaining CSO discharges after LTCP completion will achieve the District's WQS, including 21 DCMR §1104.3 which provides that "Class A waters shall be free from discharges of untreated sewage"); and, Exhibit 8 - November 29, 2004 Region III Memo to File: WASA LTCP Water Quality Standards (which reflects the Region's conclusion that the LTCP controls are adequate to meet WQS and protect designated uses.)

page 123. In contrast to the instant case, 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 Storm Water Management Plan would meet water quality standards. *Id.* at 341-343.

In addition to the foregoing, the Region wishes to clarify its response to the Board's question as to whether a compliance schedule could have been placed in both WASA's enforcement Consent Decree and its permit. Transcript, page 88. The answer to this question is "no" because, if the compliance schedule had been placed in WASA's permit, WASA would no longer have been in violation of any effluent limitations. Compliance schedules contained within permits are a component of effluent limitations. 33 U.S.C. § 1362(11). Accordingly, there would have been no violation upon which to base an enforcement order (with or without a compliance schedule) related to those effluent limitations.

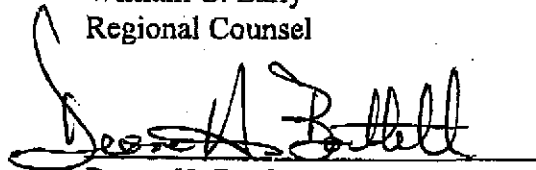
Finally, the Board asked whether the District's compliance schedule authorizing provision on its face requires some form of compliance schedule to be included in WASA's permit. Transcript, pages 95-96. The answer is "no." The District's regulation provides that the time frame that may be given to the permittee shall be "*no more than three (3) years to achieve compliance with the limitation, unless the permittee can demonstrate that a longer compliance period is warranted.*" 21 DCMR 1105.9 (emphasis added). Because the District's authorizing provision states that a compliance schedule may be granted for "no more than three years" . . . unless a longer period "is warranted," EPA views this provision as providing discretion to grant a compliance schedule in a permit as is consistent with EPA's

implementing regulations at 40 C.F.R. § 122.47. EPA's NPDES permitting regulations at 40 C.F.R. § 122.47 provide that a State "may" include a compliance schedule in a permit only when "appropriate" and requires compliance with the permit's final WQBEL "as soon as possible." 40 C.F.R. §122.47(a)(1).<sup>2</sup> In the Region's view, when read in the context of EPA's regulation, the District's regulation must be understood as providing the limit to the time frame that *may* be allowed to achieve the final effluent limitation, assuming the permitting authority determines that it is "appropriate" to include a compliance schedule in the permit.

We appreciate the opportunity to provide this additional information to the Board.

Respectfully submitted,

William C. Early  
Regional Counsel



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

OF COUNSEL  
Sylvia Horwitz  
Office of General Counsel

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<sup>2</sup> This discretionary and conditional regulatory authority to include compliance schedules in NPDES permits is distinct from EPA's enforcement authority to include compliance schedules in consent orders under CWA Section 309(a)(3), 33 U.S.C. §1319(a)(5).

## CERTIFICATE OF SERVICE

I hereby certify that Respondent's Supplemental Response to Board Questions in Appeal Nos. 05-02, 07-10, 07-11 and 07-12, was served on this date as set forth below:

A copy was telefaxed and the original and five copies were mailed by Federal Express to:

Ms. Erika Durr  
Clerk of the Board,  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G. Street, N.W., Suite 600  
Washington, DC 20005

One copy was mailed by first class mail, postage prepaid to counsel for each of the Petitioners, as well as to counsel for NACWA and the Wet Weather Partnership:

Chesapeake Bay Foundation:

Amy McDowell, Esquire  
Jon A. Mueller, Esquire  
Chesapeake Bay Foundation  
Philip Merrill Environmental Center  
6 Herndon Avenue  
Annapolis MD 21403

District of Columbia Water and Sewer Authority:

Stewart T. Leeth, Esquire  
David E. Evans, Esquire  
McGuire Woods LLP  
Washington Square  
1050 Connecticut Avenue, N. W.  
Washington, D.C. 20036-5317

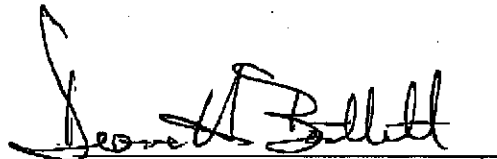
**Friends of the Earth and Sierra Club:**

Jennifer C. Chavez, Esquire  
David Baron, Esquire  
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**NACWA and Wet Weather Partnership:**

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Date: 12/13/07



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