ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	
Blue Plains Wastewater Treatment Plant, NPDES Permit No. DC0021199	Docket No. _____
Friends of the Earth and Sierra Club, Petitioners,	NPDES Appeal No. _____
U.S. Environmental Protection Agency, Region III, Respondent.	

PETITION FOR REVIEW

Pursuant to 40 C.F.R. §124.19, Friends of the Earth (FOE) and Sierra Club (collectively, "Petitioners") hereby petition the Environmental Appeals Board to review the final decision of the Regional Administrator, U.S. Environmental Protection Agency Region III (the Region) to modify NPDES permit No. DC0021199 (the permit) for the District of Columbia Water and Sewer Authority (WASA). The permit, last reissued December 16, 2004, governs the discharge of municipal wastewater from the Blue Plains Wastewater Treatment Plant (Blue Plains) and the discharge of wastewater and stormwater from WASA's combined sewer system (CSS), located within the District of Columbia.

Petitioners, as well as WASA, petitioned this Board for review of the December 16, 2004 version of the permit. After negotiations among the parties, the Region withdrew certain provisions of that permit and proposed draft permit modifications on August 18, 2006. Petitioners timely filed comments on October 5, 2006. In response to public comments, on

December 14, 2006, EPA proposed a different modification to the nitrogen limit in the permit, including a total nitrogen effluent limit of 4,689,000 pounds per year. The Petitioners timely filed comments on the December 14, 2006 version of the proposed permit modification on January 19, 2007. The Regional Administrator's delegee signed the final permit modification ("the permit" or "final permit") on April 5, 2007, and served the final permit on Petitioners via Federal Express.

I. Interests of Petitioners

Friends of the Earth is a nonprofit corporation with its offices at 1717 Massachusetts Avenue, NW, #600 Washington, DC 20036-2002, telephone (202) 783-7400. FOE is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. FOE is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land.

Sierra Club (the Club) is a nonprofit corporation with its offices at 85 Second Street, San Francisco, CA 94105-3441, telephone (415) 977-5500. The Club is a national conservation organization with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. The Club is dedicated to exploring, enjoying, and protecting the wild places of the earth, and to protecting and restoring the quality of the natural and human environment.

Actions by FOE and Sierra Club to protect and enhance the environment include administrative advocacy and litigation to enforce environmental laws. Both organizations have a long history of involvement in water-quality-related activities, and their members are greatly concerned about water quality. Members of FOE and Sierra Club use, enjoy, live adjacent to or near, and otherwise benefit from waters and riparian areas that are adversely impacted by

discharges from Blue Plains and the CSS. Members of both organizations use and enjoy such waters and riparian areas for a variety of purposes, including, but not limited to, boating, sightseeing, hiking, wildlife watching, aesthetic enjoyment, and other recreational pursuits.

Discharges governed by the permit at issue here cause or contribute to pollution levels in waters used by FOE and Sierra Club members that are injurious to human health, wildlife, the aesthetic qualities of those waters, and to uses pursued and enjoyed by such members. Such discharges, and EPA's failure to adequately limit them in the permit as further described below, threaten the health and welfare of FOE and Sierra Club members, impair and threaten their use and enjoyment of the above-mentioned waters, and deny them the level of water quality to which they are entitled under the Clean Water Act ("CWA" or the "Act"). The permit also deprives FOE, Sierra Club, and their members of information and procedural rights required under the CWA, as further described below. FOE and Sierra Club have commented extensively on proposed versions of the permit and intend to comment on future proposals to reissue or modify the permit as they are put forth for public comment. The Region's failure to respond adequately to comments by FOE and Sierra Club and its failure to allow public notice and comment on substantial changes in permit requirements, all as further described below, substantially impair Petitioners' public notice and comment rights.

Earthjustice is a nonprofit, public interest law firm that is representing FOE and Sierra Club in this matter. Its address is 1625 Massachusetts Avenue, NW, Suite 702, Washington, D.C. 20036-2212, telephone (202) 667-4500. The undersigned are the Earthjustice attorneys handling this matter.

On Petitioners' behalf, Earthjustice filed timely comments with EPA during the public comment period on the permit. The comments were made by letters dated October 5, 2006 and

January 19, 2007, and are a part of the administrative record in this matter. Exhibit 1. Petitioners incorporate those comments herein by reference, as well as all items referenced in those comments. The issues presented below were raised in Petitioners' October 5, 2006 and January 19, 2007 comments, and other documents referenced therein, except for those issues arising as a result of changes in the final permit.

II. Grounds for Review

A. Background

This is an appeal of EPA's modification of an NPDES permit for the Blue Plains Wastewater Treatment Plant and the combined sewer system within the District of Columbia. Blue Plains treats sanitary sewage from the District of Columbia (the District) and portions of Maryland and Virginia. It is the largest advanced wastewater treatment plant in the world, with a design capacity of 370-million gallons per day (mgd), and a peak capacity of 1.076 billion gallons per day.

Two types of collection systems deliver wastewater flows to Blue Plains: 1) separate sanitary sewer systems in Maryland, Virginia and portions of the District, which collect only sanitary sewage; 2) a combined sewer system (CSS) within older portions of the District that collects both sanitary sewage and stormwater runoff in the same pipes. During rain events, the combined sewer system is often unable to handle the combined flow of sewage and rainwater. When this happens, sewage from the combined system is discharged directly to waters of the District without being treated at Blue Plains. Such combined sewer overflows (CSOs) occur at CSO outfalls located variously along the Anacostia River, Potomac River, Rock Creek, and their tributaries. There are 57 CSO outfalls specified in the permit. Collectively, more than three billion gallons of sewage

overflows are discharged through these outfalls in an average year. WASA, Combined Sewer System Long Term Control Plan (July 2002) (hereinafter "LTCP"), at 6-2. These overflows contain untreated human sewage, with bacteria levels routinely reaching hundreds (and sometimes thousands) of times over safe levels.[1] *Compare* LTCP at 4-9 (showing fecal coliform counts often in excess of 900,000 MPN/100 ml, and e-coli in excess of 680,000 MPN/100 ml) with 21 DCMR 1104.8 (showing fecal coliform limit of 200 MPN/100 ml and e-coli limits of 126 and 410 MPN/100 ml in D.C. water-quality standards).

Pursuant to §402(q) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §1342(q), NPDES permits governing combined sewer overflows must conform to the Combined Sewer Overflow Control Policy (CSO Policy) signed by the EPA Administrator on April 11, 1994, and published at 59 Fed. Reg. 18688 (1994). That policy states that "CSOs are point sources subject to NPDES permit requirements, including both technology-based and water quality-based requirements of the CWA." 59 Fed. Reg. at 18689.

B. Issues

Petitioners appeal on the following grounds:

On January 22, 1997, EPA reissued NPDES permit No. DC0021199 governing discharges from Blue Plains and the CSS ("1997 Permit"). Among other things, that 1997 permit contained the following language limiting discharges from the CSS:

> (2) Water quality-based requirements for CSOs
>
> Consistent with the Clean Water Act, section 301(b)(1)(c), the permittee must not discharge in excess of any limitation necessary to meet the water qulaity standards established pursuant to District of Columbia law.

1997 Permit Part III.2(c)(2) (page 40).

[1] Chlorination and dechlorination is provided at one CSO outfall (No. 019), but bacteria levels at that outfall still routinely exceed safe levels by hundreds of times. LTCP at 4-9.

On January 24, 2003, EPA issued a revised version of the above-referenced permit ("2003 Permit"). The 2003 Permit supplemented the above-quoted language of the 1997 Permit, as follows:

> SECTION C. WATER QUALITY-BASED REQUIREMENTS FOR CSOs
>
> 1. Consistent with the Clean Water Act, section 301(b)(1)(c), the permittee must not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law.
>
> 2. Permittee shall not discharge pollutants in amounts exceeding Waste Load Allocations (WLAs) as set forth in the Total Maximum Daily Loads for BOD (approved by the District of Columbia on December 14, 2001); and TSS (issued by EPA on March 1, 2002).

2003 Permit Section III.C. WASA filed a petition before this Board challenging the above-quoted provision from the 2003 Permit. In response to WASA's petition, and one filed by FOE and Sierra Club challenging other provisions of the 2003 Permit, EPA proposed another version of the permit on March 13, 2004.

Part III.E.1 of the March 13, 2004 draft permit modification contained the following language relative to water-quality based requirements for CSO discharges:

> 1. Except as otherwise specified below, the permittee shall not discharge any pollutant at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above District of Columbia water quality standards, including numeric or narrative criteria for water quality.

Petitioners' comments expressly supported inclusion of this clause, although they objected to the introductory clause ("Except as otherwise specified below") on the ground that there was no possible basis, consistent with the Clean Water Act, for allowing discharges that cause or contribute to water quality standards violations. WASA, on the other hand, argued that the "general water quality standards compliance requirement in Section III.E.1" should be stricken from the final permit. The Region's response to both objections reaffirmed the Region's

underlying position that "the permit must contain requirements necessary to achieve WQS, including state narrative criteria, pursuant to 33 U.S.C. § 1311(b)(1)(C) and 40 C.F.R. § 122.4(d) and 122.44(d).... As in all NPDES permits, the discharge is required to achieve any more stringent limits necessary to meet D.C. water quality standards." *See* EPA Region III Response to Comments for December 2004 NPDES permit DC 0021199 at 8 (response to FOE and Sierra Club comments).

In response to WASA's comment that the provision should not be included at all, EPA stated that "EPA has enumerated D.C.'s narrative WQS as narrative WQBELS because EPA finds that, at the time of the permit issuance, the CSO discharges are likely to cause, have the reasonable potential to cause, or contribute to non-attainment of these narrative WQS." *Id.* at 20. At the same time, the Region included in the December 2004 permit modification the LTCP performance standards as effluent limits (located in Part III.C. of that permit), just as it has in the current final permit modification.

In the December 16, 2004 final permit modification, the Region maintained the requirement for compliance with certain water quality standards, but substantially changed the above-referenced provision to read as follows:

> 1. Discharges shall be of sufficient quality that surface waters shall be free from substances in amounts or combinations that do any of the following: settle to form objectionable deposits; float as debris, scum, oil, or other matter to form nuisances; produce objectionable odor, color, taste or turbidity; cause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans, plants or animals; produce undesirable or nuisance aquatic life or result in the dominance of nuisance species; or impair the biological community that naturally occurs in the waters or depends on the waters for its survival and propagation.

Thus, the final December 2004 permit modification contained a substantially different requirement for compliance with only a limited subset of D.C.'s water quality standards. The Region gave no explanation for this substantial change in language, other than to state that the

permit had been revised "to set forth the applicable narrative conditions of the DC WQS." Fact Sheet for December 16, 2004 permit modification at 16.

FOE and Sierra Club petitioned this Board for review of the December 2004 modification, on the grounds that (among other things), that the Region had failed to provide any notice of its intent to adopt this language, and that the final version of Part III.E.1 was unlawful and arbitrary. WASA also petition for review on various grounds that included objections to Part III.E.1. The petitions were stayed for a number of months while the parties attempted to negotiate a settlement. After the negotiations failed to produce agreement, EPA filed with this Board a Notice of Partial Withdrawal of the Modified Permit, withdrawing the above-quoted section and stating its intent to prepare a new draft permit addressing the withdrawn permit terms.

In the August 18, 2006 proposed permit modification, the Region proposed to modify the above-referenced provision as follows:

> 1. The Long Term Control Plan (LTCP) performance standards contained in Part III. Section C.2.3. through 9. are the water quality-based effluent limits for CSO discharges. In addition, until such time as all of the selected CSO controls set forth in the LTCP have been placed into operation, and the Permittee so certifies to EPA, in writing, consistent with the Clean Water Act, Section 301(b)(1)(C), the permittee must not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law.

Petitioners' comments objected to the portion of this proposed provision that terminated the prohibition on violating water quality standards at "such time as all of the selected CSO controls set forth in the LTCP have been placed into operation." Petitioners argued that this additional language created a limit that is less stringent than the comparable effluent limits in the previous permit, and consequently violated the anti-backsliding provisions of the CWA.

In the final permit modification issued April 5, 2007 – without prior public notice of the change – the Region again did a drastic about-face, entirely eliminating the language prohibiting discharges in excess of any limitation necessary to meet water quality standards of the District of Columbia. The final language in the permit now reads as follows:

> 1. The Long Term Control Plan (LTCP) performance standards contained in Part III. Section C.2.3. through 9. are the water quality-based effluent limits for CSO discharges.

The language of the final permit ("final language") is arbitrary, capricious, and contrary to law for the following reasons.

2. The Region did not provide adequate notice and opportunity to comment on the final language

Petitioners were denied a fair and legally sufficient opportunity to comment on the permit because the final language deviated materially and substantially from the proposal in a way that was not reasonably foreseeable. While the proposal prohibited any "discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law," albeit for a limited time period "until such time as all of the selected CSO controls set forth in the LTCP have been placed into operation, and the Permittee so certifies to EPA," the final language contains no such prohibition of discharges in excess of D.C. water quality standards. Nowhere in the proposed permit, the accompanying fact sheet, or the public notice did the Region state or suggest in any way that it was considering such a substantial change. Had petitioners known that the Region was considering a change in Part III.E.1 that would entirely eliminate its prohibition relating to water quality based effluent limits, they would certainly have objected for a variety of reasons, including those further set forth below. Other members of the public may have done so as well. For all these reasons, the Region did not provide adequate notice and opportunity to comment on the proposed permit

modification, as required by the Clean Water Act and EPA rules. 40 C.F.R. § 124.10; *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 223 (EAB 2002) (holding that change in monitoring location required permit modification preceded by public notice and comment). For the same reasons, the Region unlawfully deprived petitioners and other members of the public of their right to adequate notice and opportunity to comment on the proposed permit modification. *See National Mining Assn' v. Mine Safety & Health Admin.,* 116 F.3d 520, 530-32 (D.C. Cir. 1997)(vacating final agency action that was not a logical outgrowth of proposal: public notice and opportunity to comment inadequate where interested parties could not reasonably have anticipated final rulemaking from the draft).

EPA rules specify procedures for the Region to follow where data, information or arguments submitted during the public comment period appear to raise substantial new questions about a permit. 40 C.F.R. § 124.14(b). These include proposing a new draft permit and reopening the public comment period. Thus, if the Region felt that substantial changes in the draft permit's water quality standards language were warranted based on information or arguments submitted during the comment period, it was required to follow the procedures in 40 C.F.R. §124.14(b), and either issue a new draft permit or reopen the comment period on the initial proposal. The Region failed to follow the procedures specified in 40 C.F.R. §124.14(b) here.

For all the foregoing reasons, the final permit must be remanded with instructions for the Region to follow required notice and comment procedures.

3. The final language violates antibacksliding provisions of the CWA and EPA rules

Section 402(o) of the Act prohibits modification of an NPDES permit to contain effluent limits based on §301(b)(1)(C) of the Act ("water quality based limits") that are less stringent than the comparable effluent limits in the previous permit. EPA regulations contain a similar prohibition. 40 C.F.R. §122.44(l). The final language violates these "antibacksliding" prohibitions because it is a water quality based limit that is less stringent than comparable effluent limits in the previous permit.

The final language is weaker than both the analogous provision from the December 16, 2004 permit (cited above), which the Region has since withdrawn, and the previous permit issued effective February 25, 2003, where the comparable effluent limit appeared in part III.C.1., and provided as follows:

> Consistent with the Clean Water Act, Section 301(b)(1)(c), the permittee shall not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law. The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion above narrative criteria developed or adopted as part of the District of Columbia water quality standards or otherwise prevents existing designated uses.

This language was challenged in an appeal by WASA to this Board, and was later withdrawn by the Region. However, the permit previous to the February 25, 2003 version contained similarly broad language:

> Consistent with the Clean Water Act, section 301(b)(1)(c), the permittee must not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law.

NPDES Permit DC0021199, signed and effective January 22, 1997, Part III.2.c (2).

Regardless of which of the above-referenced permits is deemed to be the "previous" permit, the final language in the most recent modification violates the anti-backsliding

provisions of the Act and EPA rules. The previous permits broadly prohibited any discharges causing or contributing to violation of D.C. water quality standards, including both numeric and narrative standards. The final language drops this prohibition entirely.

For all the foregoing reasons, the final language is less stringent than the water quality based provisions in the previous permit(s), and therefore violative of the above-referenced antibacksliding provisions of the Act and EPA rules. Moreover, none of the exceptions to the antibacksliding requirements apply here. Indeed, the Region has provided no explanation at all for its adoption of the weaker final language provisions, let alone claim that backsliding is justified by one of the statutory exceptions.

4. The final language violates 33 U.S.C. 1311(b)(1)(C) and EPA rules

As the Region acknowledges, CSO discharges covered by the permit cause or contribute to, or have the reasonable potential to cause or contribute to violations of D.C. water quality standards. EPA Region 3, Response to Comments, December 16, 2004, NPDES Permit Number DC0021199, at 20-21. Data cited in the WASA's Long Term Control Plan (LTCP) show that these CSO discharges repeatedly cause or contribute to violations of the District's numeric water quality standards for bacteria, dissolved oxygen, suspended solids, and other parameters. Moreover, the CSO discharges plainly violate the District's narrative standard in 21 DCMR 1104.3, which directs that "Class A waters shall be free of discharges of untreated sewage" and of litter. They also violate the District's narrative standards in 21 DCMR 1104.4, which require that the aesthetic qualities of Class B waters be maintained, and 21 DCMR 1104.5, which require that Class C streams be maintained to support aquatic life.

Pursuant to 33 U.S.C. §1311(b)(1)(C), the permit must contain any effluent limitations necessary to meet D.C. water quality standards. Pursuant to 40 C.F.R. §122.4(d), permit

conditions must "ensure" compliance with applicable water quality requirements. Pursuant to 40 C.F.R. §122.44(d), the permit must contain any requirements necessary to achieve state water quality standards, including narrative criteria. The final permit here fails to meet these requirements because it does not contain effluent limitations adequate to assure compliance by CSO discharges with: a) the District's numeric water quality criteria for bacteria, dissolved oxygen, suspended solids, and other parameters; b) the District's narrative criteria in 21 DCMR 1104.3, 1104.4 and 1104.5; c) the District's designated uses for its waters, and its related antidegradation rules, all of which are integral parts of the District's standards.

These deficiencies are not excused merely because the final language states that the "LTCP performance standards contained in Part III Section C.2.3 through 9 are the water quality-based effluent limits for CSO discharges." As an initial matter, the LTCP performance standards are not water quality-based effluent limitations (WQBELs), but rather are a form of technology-based limits. The LTCP performance standards were not based only on water quality, as a WQBEL would be. Instead, they involved a balancing of cost, technology, and timing concerns. *See* 2002 Final LTCP report sections 9.5.4 and 9.5.5.

Further, the LTCP itself states that it will not ensure compliance with water quality standards at all times. E.g., LTCP at 14-1 ("The recommended LTCP does not result in compliance with existing District of Columbia Water quality standards under all wet weather situations..."). [2] The Region made no demonstration that the LTCP performance standards would be sufficient to assure compliance with all of the District's numeric and narrative standards, nor would the record support such a finding or demonstration. Among other things, as noted above, the District's standards require D.C. waters to be free from untreated sewage. Although the LTCP will substantially reduce combined sewer overflows, discharges of raw

sewage will still occur during rain events that exceed the LTCP's tunnel storage capacity – i.e., during a storm of greater intensity than approximately a 1-year storm event. Because the selected controls will not in fact prevent all standards violations, a permit modification that effectively allows violations that are currently prohibited would not only amount to illegal backsliding, but also violate 33 U.S.C. §1311(b)(1)(C), and 33 C.F.R. §§122.4(d) & 122.44(d).

EPA itself took a similar position in responding to comments on the proposed version of the December 2004 permit revision. In response to WASA's comment that the provision prohibiting violation of standards should not be included at all, EPA stated that "EPA has enumerated D.C.'s narrative WQS as narrative WQBELS because EPA finds that, at the time of the permit issuance, the CSO discharges are likely to cause, have the reasonable potential to cause, or contribute to non-attainment of these narrative WQS." *Id.* at 20. At the same time, the Region included in the December 2004 permit modification the LTCP performance standards as effluent limits (located in Part III.C. of that permit), just as it has in the current final permit modification. The Region offers no evidence, discussion or analysis in the current permit modification or fact sheet to justify abandoning its previous finding that CSO discharges are likely to cause or contribute to non-attainment of D.C.'s water quality standards, therefore warranting inclusion of a prohibition on discharges violating water quality standards.

In addition, both the permit and the LTCP require extensive post construction monitoring to determine the impact of the selected controls in reducing standards violations. EPA cannot possibly know today, 20 years before LTCP completion, what that monitoring will reveal. Nor can EPA know whether the LTCP will even work as predicted. To provide for eliminating of the water quality standards narrative provision before EPA knows whether the selected controls are performing as promised, let alone well enough to protect water quality

[2] http://www.dcwasa.com/education/css/Complete%20LTCP%20For%20CD.pdf

standards, would be arbitrary and irrational in the extreme, and contrary to 33 U.S.C. §1311(b)(1)(C), 33 C.F.R. §§122.4(d) & 122.44(d).

Conclusion

For all the foregoing reasons, Petitioners ask that the Permit be remanded to the Region for correction of the deficiencies specified above.

DATED this 7th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review were served on each of the following by first-class mail, postage prepaid, on May 7, 2007:

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