BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
District of Columbia Water and Sewer Authority	)
Permit No. DC0021199	)

OBJECTION TO SUPPLEMENTAL RESPONSE OF REGION III

INTRODUCTION

The Chesapeake Bay Foundation, Inc. ("CBF") objects to United States Environmental Protection Agency Region III's Supplemental Response to Board Questions ("Supplemental Response") served on December 14, 2007.

Oral argument on the petitions for review filed by CBF, Friends of the Earth, Sierra Club, and the District of Columbia Water and Sewer Authority ("WASA") was held on November 15, 2007. During the argument, the Board asked counsel for U.S. EPA Region III questions about the Long Term Control Plan (LTCP). At one point, Judge Stein asked counsel for EPA: "So I wanted you to explain how that language meets 122.4(d), or to point me to where in the record EPA has made a finding or determination that would meet 122.4 (d)." Transcript at page 123, lines 13-17. Counsel for EPA stated she thought that issue had been covered in the record but could not immediately point to where in the record that had occurred. Counsel then stated that she would "get back" to the Court with that information, *id.* lines 18-22, which Judge Stein asked her to provide. *Id.* page 124, lines 1-2. This is the only information EPA was asked to provide the Board after the close of oral argument.

Now, one month later, EPA "wishes to clarify its response" to two additional questions raised by the Board during oral argument. Supplemental Response, p. 3. These two "clarifications" have nothing to do with the LTCP and concern the issue of whether a Nitrogen compliance schedule was required in the permit. This issue was thoroughly addressed by EPA both in its brief and in oral argument. Region III Response to Petitions for Review, pp. 13-14 and 19-27; Transcript, pp. 91-103. Because there is no provision in the EAB Manual for post trial briefing and because this issue has been thoroughly briefed and argued, CBF objects to this post hoc "clarification" by EPA.

Because the Board has agreed to accept EPA's Supplemental Response in its entirety, CBF responds to these two additional "clarifications".

1. Could a compliance schedule have been placed in both the existing consent decree with WASA and in the final permit?

EPA says that could not have been done because if there was a compliance schedule in the permit, WASA would not have been in immediate non-compliance with an effluent limitation. Supplemental Response at p. 3. In support, EPA cites to Transcript page 88. That portion of the argument concerned the Board's question relative to the LTCP. Later, the Board asked a similar question concerning the nitrogen limit in WASA's permit. Transcript pp. 89-90. CBF responds to EPA's argument relative to the failure of EPA to provide a nitrogen limit compliance schedule in WASA's permit.

EPA admitted at oral argument that the rationale it applied to this question with respect to the LTCP did not apply to the nitrogen limit. Transcript p. 90, line 11. In fact, EPA could have placed a nitrogen compliance schedule in both the consent decree and in the permit. First, EPA could, as it has, issue a permit with new effluent limitations for nitrogen that were immediately

effective. EPA could state in the permit that it would forebear suit if WASA complied with an enforceable construction schedule also provided in the permit. EPA and WASA could then agree, as they apparently do now, to amend the original complaint to allege violations of the effluent limitations and settle those violations by amending the consent decree to include the compliance schedule set forth in the new permit. Just because the LTCP must be amended to recognize the need for additional construction relative to the nitrogen effluent limitation, does not mean that a compliance schedule cannot be in the permit. Thus, a compliance schedule could appear in both the permit and the consent decree.

The Board correctly noted at oral argument that all EPA presently has is an "aspiration" to resolve the nitrogen compliance schedule issue in the consent decree. Transcript p. 91, lines 3-11. There is no current compliance schedule and what those terms may finally be are unknown to EPA, the Board, and the public. The failure to provide a compliance schedule in the permit is a violation of the Clean Water Act and D.C. law.

2. Does the District's regulation requiring a compliance schedule in all permits establishing new effluent limitations mandate that EPA place a compliance schedule in WASA's permit?

EPA says it does not. Supplemental Response at p. 3. However, the rationale provided by EPA both at oral argument, Transcript pp. 92-94, and in its Supplemental Response, pp. 3-4, is extremely convoluted and inaccurate. EPA argues that District law cannot alter the Clean Water Act or override EPA discretion. Transcript at p. 92. However, it is EPA who is altering the Clean Water Act by ignoring Congress' intent to preserve state rights and to grant states the authority to impose and preserve water quality standards and time tables of compliance more stringent than federal regulations. 33 U.S.C. §§ 1251(b); 1311(b)(1)(C); 1370.

In passing the Clean Water Act, Congress clearly recognized the obligation of the states to protect and preserve waters found within their respective boundaries. 33 U.S.C. § 1251(b)("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,...."). To support that intent, Congress required that state water quality standards, including schedules of compliance, be met, that states could enact standards more stringent than federal law, and provided states the ability to enforce and preserve those standards.

In Section 301, Congress provided that all discharges were illegal unless granted by permit and subject to specific timetables for achievement of water quality objectives. 33 U.S.C. § 1311(b)(1)(C)("In order to carry out the objectives of this chapter there shall be achieved - ... any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations **(under authority preserved by section 510)** or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.")(emphasis added).

Later, in Section 401, Congress provided that before a federal permit could be issued, the permitee must obtain certification from the state that the permit will meet state standards and timetables for compliance. 33 U.S.C. § 1341. *See United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99 (1st Cir. 1989)(recognizing the requirement for state certification that the permit meets state water quality standards).

In Section 501, Congress unequivocally granted states the authority to adopt their own water quality standards and effluent limitations that may be more stringent than federal law. 33 U.S.C. § 1370. As early as 1976, the United States Supreme Court recognized that EPA must

place in permits and enforce state water quality requirements that are more stringent than federal law. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 219-220 (1976). Although the case concerns the now outdated concept that only federal water quality standards could be applied to federal dischargers, the Supreme Court thoroughly reviewed the statutory scheme and Congress' intentions when enacting the Clean Water Act. The Court held that,

> Congress contemplated that there may be some States, which would elect not to develop an NPDES program but would nonetheless determine - as § 510 permits - to adopt water quality standards or other limitations stricter than those the EPA itself had promulgated and would otherwise apply. ... A permit thus transforms generally applicable effluent limitations and other standards - including those based on water quality - into obligations (including a timetable for compliance) of the individual discharger.

Id. at 205 (emphasis added). *See also, United States Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1977)("Section 510 preserves the right of any state to impose limitations more stringent than the federal limitations under the Act. Because the Administrator is required by the Act to include in the permit any more stringent state limitations, including those necessary to meet state water quality standards, and is given no authority to set aside or modify those limitations in a permit proceeding, he correctly ruled that he had no authority to consider challenges to the validity of the state water quality standards in such a proceeding."); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999)(same, stormwater); *City of Albuquerque v. Browner*, 865 F. Supp. 733, 739 (D.NM 1993)("Section 510 forbids any state from imposing any "effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance" which is less stringent than federal standards. Clean Water Act § 510, 33 U.S.C. § 1370. The section preserves the state's right to impose standards or limits that are more stringent than those imposed by the federal government.").

EPA argues that because the District's regulation grants the authority to extend the compliance schedule beyond three years, the regulation somehow recognizes EPA's regulation providing that compliance schedules may be placed in permits at the Administrator's discretion. Supplemental Response at 3-4. Such an argument ignores the plan meaning of the District law, several provisions of the Clean Water Act, and over 30 years of federal case law.

CONCLUSION

EPA has violated the Clean Water Act and the District of Columbia's water quality standards by failing to include a compliance schedule within the NPDES permit for the Blue Plains facility. Thus, the permit should be modified to include such a compliance schedule.

Date: January 4, 2008

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CERTIFICATE OF SERVICE

I hereby certify that the Objection of the Chesapeake Bay Foundation, Inc. to the Supplemental Response of EPA Region III in Appeal Nos. 05-02, 07-10, 07-11, and 07-12, was served on January 4, 2008, as follows:

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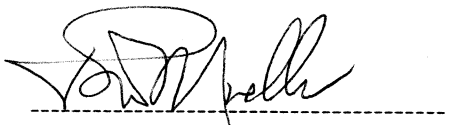

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