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WATER & WASTEWATER SOLUTIONS

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May 12, 2005

**Overnight Mail**

U.S. Environmental Protection Agency  
Clerk, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

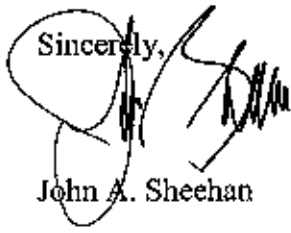
RECEIVED  
MAY 13 2005  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
CLERK, ENVIRONMENTAL APPEALS BOARD  
1341 G STREET, N.W., SUITE 600  
WASHINGTON, D.C. 20005

Re: NPDES Permit Appeal No. 05-01  
Petitioner: District of Columbia Water and Sewer Authority  
Permit No. DC0021199

Clerk of the Board:

Enclosed please find the original and one copy of the Motion by the National Association of Clean Water Agencies for Leave to Participate in Case and File a Non-Party Brief.

Please contact me at 804-716-9021 or by e-mail at [john@agualaw.com](mailto:john@agualaw.com) if you have any questions about this filing.

Sincerely,  
  
John A. Sheehan

Enclosures

RECEIVED  
05/11/05

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
ENVIRONMENTAL APPEALS BOARD

ENVIRONMENTAL APPEALS BOARD

_____	)	
	)	
<b>In Re:</b>	)	
	)	
<b>Blue Plains Wastewater Treatment Plant</b>	)	<b>NPDES Permit Appeal No. 05-01</b>
	)	<b>and 05-02</b>
	)	
<b>NPDES Permit No. DC0021199</b>	)	
	)	
_____	)	

**MOTION BY THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES  
FOR LEAVE TO PARTICIPATE IN CASE AND FILE A NON-PARTY BRIEF**

The National Association of Clean Water Agencies ("NACWA")<sup>1</sup> moves pursuant to 40 C.F.R. § 22.11(b) for leave to file a non-party brief in this case. Because NACWA has an interest in the outcome of this case and is qualified to provide additional legal argument and a nationwide perspective on the issues before the Board, the filing of a non-party brief is appropriate. NAWCA seeks to participate in this case because EPA Region III's permit language here is contrary to the Clean Water Act and inconsistent with permit language used by Region III in other permits throughout the Region as well as with language imposed by other EPA Regions. NACWA proposes to file a joint non-party brief with the CSO Partnership which has previously moved for leave to file a non-party brief.<sup>2</sup> The CSO Partnership is amenable to joint briefing with NACWA.

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<sup>1</sup> On May 2, 2005, the Association of Metropolitan Sewerage Agencies ("AMSA") amended its Articles of Incorporation to change its name to the National Association of Clean Water Agencies ("NACWA").

<sup>2</sup> The CSO Partnership's motion for leave to file a non-party brief was filed on February 25, 2005. In its Order dated March 1, 2005, the EAB took the CSO Partnership motion

## DISCUSSION

40 C.F.R. § 22.11(b) provides that a person who is not a party to a proceeding may move for leave to file a non-party brief and its motion “shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding.”

### **I. The Interest of NACWA.**

NACWA represents the interests of nearly 300 of the nation's wastewater treatment agencies. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. Numerous NACWA members have combined sewer collection systems and are subject to the Clean Water Act's combined sewer overflow (“CSO”) control requirements. 33 U.S.C. § 1342(q). NACWA members have invested hundreds of millions of dollars in the planning, design, permitting and construction of CSO long-term control plans (“LTCP”) in accordance with EPA’s Combined Sewer Overflow Policy issued on April 11, 1994. NACWA members hold permits for CSO discharges in each State within EPA Region III. Those permits impose different requirements from those now proposed by EPA for DC WASA’s permit. NACWA members nationwide hold permits for CSO discharges that are different from that now being imposed by EPA in DC WASA’s permit.

This case is of great importance to NACWA members because an adverse ruling could jeopardize the investments NACWA members have made toward complying with the CSO-related requirements in their NPDES permits. Generally, a community’s LTCP specifies the performance standards that must be met in order for CSO discharges to comply with the states’ water quality standards as translated into NPDES permits. A

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under advisement until after EPA Region III files its response to the two petitions for review. By Order dated May 5, 2005, EPA’s response is due on May 13, 2005.

provision such as the one contained in WASA's permit, which requires a permittee to comply with the states' water quality standards before implementation of the LTCP controls and in a general manner outside the context of the approved LTCP, poses serious compliance issues for communities and exposes communities to enforcement actions and citizens' suits that could disrupt implementation of their approved LTCPs. Even though the community may be in full compliance with a LTCP approved by a state or EPA, a suit could be brought arguing that the entity is not in compliance with the general water quality standards compliance language in its permit. For these reasons, NACWA members within EPA Region III and beyond have a significant interest in the outcome of this case.

## **II. Relevance of NACWA's Proposed Brief.**

NACWA intends to submit a brief in support of WASA's position that the general narrative water quality standards language in WASA's NPDES permit conflicts with EPA's 1994 Combined Sewer Overflow Control Policy ("CSO Policy"), the Clean Water Act, and a recent congressional directive in EPA's FY 2005 budget. NACWA will present additional legal arguments on the issue of whether the condition set forth in Section III.E of the permit at issue (Water Quality-Based Requirements for CSOs) is necessary in light of EPA's prior determination that WASA's long-term control plan will meet the District's water quality standards and designated uses. NACWA will further argue that compliance with the narrative water quality standards provision at issue is not required at this time by the Policy, CWA, or the recent congressional directive. Counsel to NACWA and the CSO Partnership drafted and successfully lobbied the inclusion of the congressional budget directive regarding when CSO discharges have to achieve water quality standards.

As EPA noted in its motion for extension of time to file a response to the petitions for review and as the EAB noted in its order granting the motion, this case involves issues

of first impression because this permit was the first Phase II permit EPA has issued under the 1994 Combined Sewer Overflow Policy. See EAB Order of March 1, 2005. There are two critical issues of first impression to be addressed by the Board in this appeal. The first is whether compliance with WQS is required of CSO discharges during LTCP implementation. The second is how water quality-based requirements for CSO communities should be expressed in their "Phase II" permits under the CSO Policy. Resolution of these issues will affect the obligations and compliance status of every CSO community in the country and warrants the participation of NACWA through joint briefing with the CSO Partnership.

**III. NACWA's Participation by Filing a Non-party Brief Will Assist the EAB and Will Not Burden the Parties.**

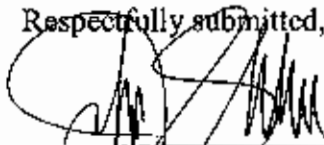
NACWA (under its former name AMSA) and the CSO Partnership have submitted friend of the court briefs in other recent cases which were recognized by the courts as providing assistance in resolving legal issues not brought to the courts by the other parties in the case. Friends of the Earth v. EPA, 346 F.Supp.2d 182, 186 (D.D.C. 2004)(AMSA and the CSO Partnership provide key statutory references for the District of Columbia federal district court on issue of statutory interpretation). NAWCA submits that its participation in this case by filing a non-party brief will similarly assist the Board in appropriately resolving the issues of first impression here. Since NACWA and the CSO Partnership propose to file a joint brief, this will limit any burden on the parties in the case.

Rather than just having the input of DC WASA regarding the issues of first impression identified in this case, allowing NACWA to participate jointly with the CSO Partnership will provide the EAB with the benefit of input from CSO communities, large and small, from virtually all of the 34 states with CSO systems. The CSO Partnership and

NACWA are uniquely situated to provide critical input on issues such as how the recent congressional budget directive regarding CSOs bears on the resolution of this case.

Accordingly, because NACWA has an interest in the outcome of this case and is uniquely qualified to provide additional legal grounds and a nationwide perspective on the issues before the Board, leave to participate and file a joint brief with the CSO Partnership should be granted.

Respectfully submitted,



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Attorneys for the NACWA

May 12, 2005

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion by the National Association of Clean Water Agencies for Leave to Participate in Case and File a Non-Party Brief was served by regular first class U.S. Mail, postage prepaid, this 12h day of May, 2005, upon the following:

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