

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

RECEIVED
U.S. E.P.A.
JUN 14 02 3:06
ENVIR. APPEALS BOARD

-----x

In re :

GOVERNMENT OF THE DISTRICT : Permit No. DC0000221
OF COLUMBIA, MUNICIPAL : Appeal No. 06-07
SEPARATE STORM SEWER SYSTEM.:

-----x

1201 Constitution Avenue, NW.
Washington, D.C.
Friday, June 8, 2007

The HEARING in this matter began at
approximately 10:01 a.m. pursuant to notice.

BEFORE:

ANNA WOLGAST
Hearing Officer

1 APPEARANCES:

2 On behalf of District of Columbia:

3 DAVID E. EVANS, ESQUIRE

McGuireWoods, LLP

4 901 East Cary Street

Richmond, Virginia 23219-4030

5 (804) 775-1000

6 On behalf of Friends of the Earth and

Defenders of Wildlife:

7

JENNIFER C. CHAVEZ, ESQUIRE

8 Earthjustice

1625 Massachusetts Avenue, NW., Suite 702

9 Washington, D.C. 20036

(202) 667-4500

10

On behalf of EPA Region III:

11

LORI G. KIER, ESQUIRE

12 United States Environmental Protection Agency

1650 Arch Street

13 Philadelphia, Pennsylvania 19103-2029

(215) 814-2656

14

15 ALSO PRESENT:

16 CAROLINE BURNETT

17 GEORGE HAWKINS

18 HAMMID KARIMI

19 NICOLINE SHILDEBRAND

20 GARRISON MILLER

21 DAVID McGUIGAN

22 SILVIA HOROWITZ

1 PROCEEDINGS

2 HEARING OFFICER WOLGAST: Good
3 morning. We're here today pursuant to the
4 Board's order of April 12th of this year, and
5 the purpose of this hearing is twofold:
6 First, to hear with some specificity from the
7 parties as to the current status of your
8 settlement negotiations. And the second
9 purpose is to help the Board determine
10 whether or not an additional 90 days, as has
11 been requested in the parties' seventh joint
12 motion for stay, is likely to lead to a
13 resolution of this matter.

14 As you know, the petitions in this
15 case were filed on April 12th and on April
16 17th of last year. The petitions here
17 challenge the District of Columbia's storm
18 water permit that was issued in the year
19 2004, which, of course, itself was an
20 amendment to the storm water permit issued in
21 2000. The petitions in this matter do raise
22 significant issues about the existing 2004

1 permit. And as the District has related in
2 its water quality reports, storm water is a
3 major contributing factor to water impairment
4 in the District.

5 Given that, it seems that we have
6 an important subject matter in the District
7 of Columbia permit and we've had significant
8 issues raised in the two petitions. And so I
9 am anxious to hear what path we're on for
10 resolution because we are now almost 14
11 months past the filing of the petitions. And
12 while I understand from the joint status
13 reports that there have been certain
14 submissions and proposals for settlement, it
15 isn't clear whether continuing the current
16 course is going to lead to a resolution of
17 this matter short of litigation, so I'm
18 anxious to hear from the parties about that.

19 The way I would like to proceed is
20 to simply hear from the parties in turn,
21 starting with the Petitioners, the District,
22 and then the representative from Friends of

1 the Earth and Defenders of Wildlife, and then
2 from Region III. In your remarks, if you
3 could also let the Board know whether or not
4 you oppose WASA's pending motion for
5 withdrawal.

6 So shall we begin, Mr. Evans?

7 Thank you.

8 MR. EVANS: Good morning, Your
9 Honor. David Evans representing the
10 Government of the District of Columbia,
11 District of Columbia Water and Sewer
12 Authority. I have with me four
13 representatives from the District of Columbia
14 Government. I have Caroline Burnett, who is
15 serving as co-counsel for the District of
16 Columbia Government. She's an assistant
17 attorney general representing the District
18 Department of the Environment. I have Mr.
19 George Hawkins, who is the acting director of
20 the Department of Environment pending
21 confirmation by the Council. I have Mr.
22 Hammid Karimi, who is deputy director of the

1 District Department of Environment, and
2 Nicoline Shildebrand, who is a water quality
3 specialist with the District Department of
4 Environment. And I think that certainly
5 exhibits the District's interest in these
6 proceedings before you.

7 In response to your request, from
8 the District's and WASA's perspective, there
9 has been a concerted effort on the part of
10 all parties to settle this case as we have
11 indicated in prior status reports. There
12 have been a number of exchanges. There have
13 been a number of telephone conferences to
14 discuss the issues. There have been a number
15 of face-to-face meetings.

16 Over the last seven or eight
17 months, there have been several exchanges.
18 The first involving a proposal, a written
19 settlement proposal from Earthjustice on
20 behalf of its clients, that (off mike) set
21 forth a number of specific commitments that
22 they wanted the District and WASA to make

1 with respect to the implementation of their
2 storm water program, very, very specific
3 detailed commitments having to do with a
4 variety of elements of the storm water
5 management program. And that was last fall.

6 Soon after that was submitted, the
7 District of Columbia Government and WASA
8 responded to that with a response and a
9 counterproposal. Although we did not in the
10 near term receive any response back from
11 Earthjustice to that proposal, it certainly
12 became clear to us in ensuing conferences
13 that we had with them, principally by
14 telephone, that they were disappointed in the
15 response. And at that point, frankly, we
16 felt that there appeared to be very, very dim
17 prospects of settling the case.

18 We understanding that -- I
19 certainly understand. I was not personally
20 involved in it, but following that, beginning
21 in the early part of this year, there were
22 some face-to-face meetings between

1 Earthjustice and representatives of its
2 clients and the mayor's office, the city
3 administrator's office with respect to these
4 issues to see if the new administration that
5 we had coming on board with the District
6 government might be interested in meeting
7 Earthjustice's demands. Again, there were a
8 number of verbal exchanges associated with
9 that.

10 That was followed in the spring of
11 this year with a fairly detailed proposal
12 from the Department of the Environment,
13 which, I might add, followed a subsequent
14 written communication from Earthjustice. We,
15 just in the last few days, have received
16 correspondence back from Earthjustice in
17 response to our earlier submission this
18 spring, indicating that they were pleased
19 with -- at least pleased with what they
20 believe to be progress and more specific
21 proposals coming forth from the District.
22 But, nevertheless, expressed continuing

1 unhappiness and dissatisfaction with where we
2 were, at least in terms of what the District
3 was willing to offer up in the way of
4 specific proposals.

5 So certainly from our perspective
6 there has been some progress made over the
7 last several months. I think that, again,
8 from our perspective, it largely reflects a
9 concerted effort on the part of the District
10 of Columbia to at least try to meet the
11 Earthjustice halfway if not more than
12 halfway. And, frankly, we're somewhat
13 encouraged by the fairly positive response
14 we've gotten back from them.

15 I would say to you, Your Honor,
16 that had we held this status conference two
17 months ago I would tell you that the
18 prospects for settlement were so small that
19 it probably would not be worth our time and
20 effort to continue with the negotiations. We
21 don't feel that way now. I would tell you
22 that we still have a long way to go. I think

1 that it's going to be very difficult to
2 resolve some of these issues. The level and
3 specificity of the commitments that the
4 Earthjustice on behalf of its clients is
5 seeking, frankly, certainly in our view, go
6 far beyond what could be reasonably expected
7 of the District and are not cost-effective
8 and not particularly productive. We
9 obviously agree with them on a number of
10 measures that they have proposed and we have
11 put forward.

12 I think right now, at least from
13 our perspective, the issues really involve
14 whether going beyond what the District of
15 Columbia Government's put on the table in the
16 way of specific proposals that would involve
17 enhancements to its storm water program are
18 cost-effective. Again, obviously Ms. Chavez
19 will give her perspective on this, but from
20 our perspective the approach that they would
21 want us to take to the storm water management
22 program involves, in essence, just throwing

1 money at projects and without knowing --
2 having any reasonable expectation that we're
3 necessarily going to get a water quality
4 benefit from that.

5 So there's a legitimate debate, I
6 believe, going on here at this point about --
7 not about some very what we believe to be
8 cost-effective enhancements to the program,
9 which the District is already committed to,
10 but how far beyond them we go.

11 And we essentially dealing with
12 three layers here. One is the program that
13 we now have in place that's a requirement of
14 the permit. Those are legal obligations that
15 the District is implementing those.

16 We then have a level of enhancement
17 above and beyond that that, in essence,
18 involves measures that the District and I
19 think the Petitioners and EPA all agree, yes,
20 we should do these things. These things will
21 enhance the program that will improve water
22 quality. They appear to be cost-effective.

1 We're going to do those things. So at this
2 point, there have already been things put on
3 the table and committed to by the District
4 that I think that all the parties are in
5 general agreement that, yes, these things
6 need to be added to the program.

7 Then there's a third layer and
8 that's really where the debate is, and that
9 is over whether you go even to that third
10 level and whether it makes sense, at least at
11 this point in time, before we have any data
12 or experience with the measures that we now
13 have and are additionally committed to,
14 whether those things make sense and whether
15 or not they're cost-effective.

16 In other words, the District's
17 approach to this permit is we need to take an
18 iterative approach to it. And we think that
19 iterative approach and adaptive management
20 approach is reflected in EPA policy and
21 guidance. And we believe that the approach
22 that we're putting forth as part of these

1 negotiations reflects the iterative, adaptive
2 management approach that EPA has encouraged
3 and fostered in its policy and guidance, and
4 that the Earthjustice on behalf of its
5 clients, in essence, is asking us to go
6 beyond that, in essence, to commit to
7 measures that really have no -- we have no
8 evidence or indication at this point would
9 necessarily be cost-effective or would
10 achieve a water quality benefit.

11 So, I mean, that's where we are.
12 We think they're going forward. We do think
13 that while certainly there's no assurance at
14 all that we'll be able to settle the case in
15 the next 60 to 90 days, I do think it would
16 be productive to focus on that third layer of
17 measures that Earthjustice has put forth and
18 see whether or not there's room to compromise
19 or to find ways to resolve our differences
20 around that. I would say it's going to be
21 very difficult to do that, but from the
22 District's standpoint we think it would

1 certainly be worth the effort and worth an
2 additional 90 days.

3 HEARING OFFICER WOLGAST: And are
4 there any issues that the parties have come
5 to closure on that are reflected in the
6 pending petitions?

7 MR. EVANS: It's interesting, Your
8 Honor, because these petitions really arose
9 out of really one condition in the permit.
10 There's a compliance demonstration piece,
11 which is for height, a technical piece. I
12 don't think -- that's really not at the heart
13 of these negotiations and I think that
14 issues, frankly, will work itself out.

15 But these two petitions, both our
16 petition and Earthjustice's petition, rose
17 out of language in the permit, which, in
18 essence, in our view, could be construed to
19 require immediate compliance of water quality
20 standards. And we challenged it. I think
21 Earthjustice challenged it because they
22 didn't feel it went quite far enough, so the

1 appeals really rose out of --

2 HEARING OFFICER WOLGAST: The
3 dispute over Amendment No. 1, right.

4 MR. EVANS: A fundamental dispute
5 about whether that permit has to contain
6 language requiring compliance of water
7 quality standards. And the parties agreed
8 early on in these negotiations that what we
9 would try to do is settle it and we would try
10 to settle it by substituting that language
11 for some very, very specific detailed
12 commitments for the District's program. And
13 Earthjustice told us early on, they said if
14 you will make commitments to do this, this,
15 this and this and this in the way of specific
16 requirements in your program, we would be
17 willing to give on our demand that there be
18 an absolute water quality standards
19 compliance obligation. So since the issue's
20 really framed around that, there's really not
21 been an opportunity to negotiate specific
22 language in the permit or to resolve

1 individual issues.

2 HEARING OFFICER WOLGAST: And do
3 you have a sense of what measures the parties
4 anticipate taking in the next 90 days to get
5 to resolution?

6 MR. EVANS: Well, in fact, Your
7 Honor, we have scheduled a meeting, a
8 conference, among the parties immediately
9 after this, assuming that the Appeals Board
10 gives us additional time to negotiate.

11 We've scheduled a meeting for the
12 purpose. And I don't know if we're going to
13 get into a detailed discussion of the merits
14 of the negotiations as they now stands, but
15 really to map out a plan of action, a meeting
16 schedule, for how we try to get this done in
17 whatever additional time the Board's willing
18 to give us.

19 HEARING OFFICER WOLGAST: The joint
20 status conference mentioned the possibility
21 of invoking a third-party mediator.

22 MR. EVANS: That's right, Your

1 Honor. We have retained a mediator, John
2 Bickerman, who has been involved in the
3 negotiations for the last 9 or 10 months.
4 And initially, all the parties agreed that
5 while we wanted John present and involved to
6 some extent in the negotiations, we really
7 wanted to see if we could resolve it without
8 him wading into it to a significant degree.
9 I think everybody's in agreement now that he
10 needs to become more actively involved in
11 this. And, in fact, I anticipate that what
12 we'll do going forward, if the Board agrees
13 to give us additional time to negotiate,
14 would be to set up face-to-face meetings and
15 telephone conferences around his availability
16 and have him actively involved in the
17 mediation process.

18 HEARING OFFICER WOLGAST: I would
19 just mention if, for any reason, that doesn't
20 come to fruition, the Board also has a
21 mediation service in the event the parties
22 had any interest in invoking that. And

1 obviously it's not important to the Board
2 whether you use the Board's mediation
3 service, another mediation service, or work
4 things out among the parties without a
5 mediator. I just mention that in the case,
6 for any reason, that Mr. Bickerman was not
7 available or you couldn't move the case
8 forward in that manner. The Board's service
9 essentially involves a Board judge and
10 potentially senior attorneys, all of whom are
11 trained in mediation, who would act as a
12 third-party neutral, a confidential
13 third-party neutral, and who would not be on
14 the panel who would have anything to do with
15 the decision in this matter. In this case I
16 think that judge is Judge Scott Fulton. And
17 I just mention that for your information.

18 MR. EVANS: Thank you, Your Honor.
19 That's very helpful to know.

20 HEARING OFFICER WOLGAST: Thank
21 you.

22 MS. CHAVEZ: I'm sorry, Your Honor,

1 I should have asked what order you'd like to
2 hear from us in.

3 HEARING OFFICER WOLGAST: Yes.

4 MS. CHAVEZ: My name is Jennifer
5 Chavez. I'm counsel for the Petitioners.

6 HEARING OFFICER WOLGAST: Yes,
7 thank you very much.

8 MS. CHAVEZ: Okay. As I said, my
9 name is Jennifer Chavez. I've recently
10 become involved in this case and so I'd like
11 to apologize in advance that I might not know
12 in as much detail as Mr. Evans the history of
13 the case, but Mr. David Baron has briefed me.
14 He wasn't able to come today because his son
15 is graduating from high school today.

16 As I understand the history of the
17 case, Mr. Evans has given a fairly complete
18 summary and I don't think there is much to
19 add except to clarify a few things. In our
20 most recent settlement communication, written
21 settlement communication, we did ask the
22 District to consider some very specific

1 proposals and we think that the level of
2 specificity is necessary in order to reach
3 agreement on a settlement that we would find
4 is satisfactory in exchange for dropping the
5 challenge of the permit language. In the
6 District's most recent response we are
7 encouraged that it is moving in the right
8 direction. However, much of the response
9 simply lacks the level of specificity for us
10 to really have a good understanding of the
11 District's position. And without going into
12 too much detail of the substance, we have,
13 for instance, received some assertions that
14 some of the requests that we have made are
15 not cost-effective, but have not seen any
16 counterproposals or any further information
17 about why it's not cost-effective or what
18 would be cost-effective.

19 And so we do think that it may be
20 productive in the next 60 days -- we've
21 stated that we will give the process another
22 60 days. We think that it may be productive

1 to get some more specific information from
2 the District. However, we don't think that
3 -- we think that by the end of 60 days, it
4 will become apparent whether we are close to
5 settling or whether it's time simply to
6 reactivate the appeal. And so, as Mr. Evans
7 explained, we have tentative plans to meet
8 with Mr. Bickerman and go through some of the
9 specific measures that we've proposed.

10 I think that's all that I have to
11 add. Of course, there is WASA's outstanding
12 motion. And I confess that I haven't been
13 able to confer with Mr. Baron on this, but I
14 don't think we have any objection to that
15 motion. Do you have any questions for us?

16 HEARING OFFICER WOLGAST: So your
17 sense is that the parties will, hopefully,
18 engage in mediation and that within 60 days
19 you would have -- either know whether you're
20 getting to an agreement in principle or
21 whether that's not going to be possible. Is
22 that your sense?

1 MS. CHAVEZ: Yes, yes. I think
2 that the problem -- the barriers right now
3 lie just in a lack of specific information,
4 which is available and which we can, you
5 know, all share and work out within 60 days
6 or not. And I don't think it's a matter of
7 -- you know, we haven't yet really gotten to
8 the point where we're disagreeing on specific
9 proposals because we've been talking past one
10 another to some degree. But I think that we
11 are both at a point where we agree on what
12 needs to happen within the next 60 days, and
13 we think that's enough time to determine
14 whether by the end of that time it's going to
15 be fruitful and we'll only need a few more
16 weeks to wrap things up and put things on
17 paper or whether it's time simply to move
18 forward with the appeal.

19 HEARING OFFICER WOLGAST: Thank
20 you.

21 MS. CHAVEZ: Thank you.

22 HEARING OFFICER WOLGAST: Ms. Kier?

1 MS. KIER: Good morning, Your
2 Honor. Lori Kier, EPA Region III, and I'd
3 like to identify -- I've brought with me two
4 client representatives from the Region III
5 Water Division. I have both Garrison Miller,
6 who is the permit writer, and David McGuigan,
7 who is the NPDES branch chief. I've also
8 brought with me Sylvia Horowitz from the
9 Office of General Counsel.

10 I wanted to share the sentiments
11 that both Mr. Evans and Ms. Chavez expressed,
12 and just to add that it is in EPA's interest
13 that permittees be involved in helping
14 establish what control measures they're going
15 to use for storm water. EPA has recognized
16 in a number of guidance documents, and most
17 recently through a General Accounting Office
18 report, that storm water requirements do
19 impose financial burdens and other resource
20 burdens on communities and that communities
21 are in the best position to know what
22 controls are appropriate. And that is why we

1 feel strongly that a negotiated result would
2 be better here than litigation. And that's
3 why we ask the Court's indulgence for
4 additional time to be able to do that.

5 And then as far as the motion for
6 WASA to be removed from the proceeding, we do
7 not oppose that. Do you have any other
8 questions?

9 HEARING OFFICER WOLGAST: And what
10 is your sense of the likelihood of
11 resolution, to come to an agreement in
12 principle, in the next 60 to 90 days?

13 MS. KIER: I think Mr. Evans was
14 correct when he said if you'd asked two
15 months ago I would have been very
16 pessimistic. But things have changed
17 recently and I am very, very optimistic that
18 with the help of our mediator we will get to
19 resolution in the next 60 to 90 days.

20 HEARING OFFICER WOLGAST: All
21 right, thank you. Well, the Board will take
22 the motion for stay under advisement and we

1 will be back to you shortly about that. We
2 will also be issuing an order responding to
3 WASA's request to withdraw from this
4 proceeding.

5 If in the event the parties wish to
6 invoke the mediation services of the Board, I
7 would just ask that you contact Ericka Durr,
8 the court clerk. And otherwise, please feel
9 free to stay and use these facilities if you
10 would like to continue your negotiations at
11 this time. Thank you very much.

12 (Whereupon, at 10:27 a.m., the
13 HEARING was adjourned.)

14 * * * * *

15

16

17

18

19

20

21

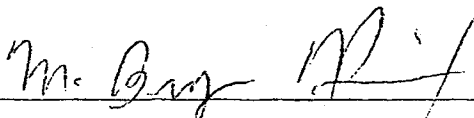
22

CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, M. BRYCE HIXSON, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the foregoing transcript is true and accurate record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and I am in no way interested in the outcome of this matter.



My Commission Expires:

January 1, 2010