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

In the Matter of:	
Chesapeake Bay Foundation, Petitioner	NPDES Appeal No. 07-10
and	
District of Columbia Water and Sewer Authority, Petitioner	NPDES Appeal No. 07-11
and	
Friends of the Earth and Sierra Club, Petitioners	NPDES Appeal No. 07-12
NPDES Permit No. DC 0021199	
U.S. Environmental Protection Agency, Region III, Respondent.	

REGION III RESPONSE TO PETITIONS FOR REVIEW

Pursuant to the May 10, 2007 letter from the Environmental Appeals Board (Board) the United States Environmental Protection Agency, Region III (Region or Respondent) hereby files this Response to the above-captioned petitions for review of the Region's April 5, 2007 issuance of modified NPDES Permit No. DC 0021199 to the District of Columbia Water and Sewer Authority (WASA). As the Board forwarded the petitions together and

directed the Region to file a single response, the Region is treating these petitions as administratively consolidated. Attached to this response is a certified index of the administrative record for the challenged permitting decision (Exhibit 1), as well as several other exhibits, consisting of copies of certain of those parts of the record which pertain to the specific permitting decisions currently before the Board.

As set forth below, each of the Petitioners has failed to meet its burden to obtain review by the Board, and therefore each of the petitions for review should be denied and dismissed in its entirety.

I. BACKGROUND

A. Factual and Procedural

The District of Columbia (District) is not approved to administer the National Pollutant Discharge Elimination System (NPDES) permitting authority pursuant to Section 402(b) of the Clean Water Act (CWA), 33 U.S.C. §1342(b). Therefore, the Region is the permitting authority for wastewater discharges in the District.

1. Original Permit and First Permit Modification

On January 24, 2003, the Region reissued NPDES Permit No. DC0021199 to the WASA for its Blue Plains wastewater treatment facility (Permit). The Permit expires on February 28, 2008. Petitions for review were filed by both WASA and Friends of the Earth and the Sierra Club (jointly) (FoE/SC). After a period of negotiations, EPA withdrew the contested permit provisions, proposed a draft modified permit for public comment, and, on December 16, 2004, EPA issued a final permit modification.

In addition to addressing the previously challenged permit conditions, the December 16, 2004 permit modification added Phase II permitting conditions pursuant to EPA's Combined Sewer Overflow Control Policy, April 19, 1994, 59 FR 18688 (CSO Policy). Exhibit 14, hereto. The Region included the Phase II permit conditions because, following the issuance of the Permit in January 2003, WASA had completed its long term combined sewer overflow control plan (LTCP) identifying the controls designed to control WASA's combined sewer overflow (CSO) discharges in a manner that would be as stringent as necessary to meet applicable water quality standards (WQS), as required by the Clean Water Act 33 U.S.C. §§1251 et. seq. (CWA).[1] See, Exhibit 8, November 29, 2004 Region III Memorandum to the file: WASA LTCP Water Quality Standards and Exhibit 18, August 28, 2003 LTCP Certification letter from the DCDOH to EPA Region III. Exhibit 6, November 3, 2003 Memorandum from James R. Collier, Chief, Environmental Health Administration to Doreen E. Thompson, Esq., Interim Senior Deputy Director, Re: CSO LTCP, Exhibit 7, November 4, 2003 Memorandum to Bruce Brennan, Assistant Attorney General, DC Department of Health, Environmental Health Administration, Office of Enforcement, Compliance and Environmental Justice, from Caroline Burnett, Attorney-Advisor, Watershed Protection Division, Water Quality Division, Re: DOH Legal Sufficiency Review of the District of Columbia Certification of the Long Term Control Plan Submitted by WASA

[1]Briefly, the CSO controls in the LTCP include construction and operation of extensive underground tunnels to capture wet weather flows, pump station rehabilitation, upgrading of wet weather treatment at Blue Plains, and some sewer separation and outfall consolidation. The estimated cost for the LTCP is in excess of $1.2 billion and the schedule extends for 20 years.

Pursuant to the 1994 CSO Policy. The DCDOH provided certification of the Permit's compliance with the District's WQS pursuant to Section 401 of the CWA, 33 U.S.C. §1341.[2]

2. Petitions for Review of First Permit Modification

Petitions for review of the December 16, 2004 permit modification were filed by FoE/SC and WASA, designated Appeal No. 05-01 and 05-02, respectively. Each of the petitions sought review of the water-quality based requirements for CSOs in the Permit modification, although for different reasons. In addition, WASA sought Board review of the Region's decision not to include a schedule of compliance for implementation of its LTCP, the primary objective of which is to achieve WQS, in the modified Permit.

Again, following a period of negotiations among the Region, WASA and FoE/SC, having determined that it would not be possible to reach a negotiated resolution of the contested permit terms, on August 11, 2006 EPA withdrew the contested permit terms and stated its intention to propose modifications to those terms. Subsequently, the parties filed a Motion on Consent to Dismiss FoE/SC's petition in its entirety and WASA's Petition as to all issues save one. That motion was granted by the Board's Order of August 23, 2006, which dismissed both the FoE/SC and the WASA petitions in their entireties, except for WASA's sole outstanding issue, which was stayed. EPA submitted its brief in response to that issue - WASA's request for Board review of the Region's decision not to include a compliance schedule for implementation of WASA's LTCP in the Permit - on April 27, 2007

[2] On July 14, 2006, District of Columbia Mayor's Order 2006-61 (D.C. Register, pages 5684-5693) authorized the functions of the Department of Health, Environmental Health Administration to be transferred to the District Department of the Environment (DDOE).

and that matter is currenlty pending before the Board in Appeal No. 05-02.

3. Second Permit Modification

On August 18, 2006 the Region published for public comment a draft permit modification proposing to modify the Permit to: 1) replace the existing water quality-based requirements for CSO at Part III. Section E. 1. with a provision indicating that the performance standards for the LTCP will be the water quality-based effluent limits for CSO discharges and that until the LTCP is fully implemented a general WQS provision similar to that set forth in the January 1997 permit would apply; 2) deleting the TMDL derived limits in Part III. Section E. 2; and 3) replacing the existing nitrogen discharge goal with an interim nitrogen limit and a schedule to submit a plan, by the end of the Permit term, to reduce nitrogen discharges in accordance with the Chesapeake Bay Agreement. Exhibit 9, August 18, 2007 Draft Permit Modification, Exhibit 10, August 18, 2007 Draft Permit Modification Fact Sheet. Comments on this proposal were received from WASA, the Chesapeake Bay Foundation (CBF), EarthJustice on behalf of the Friends of the Earth (FoE) and the Sierra Club (SC), the Blue Plains Regional Committee of the District of Columbia Council of Governments, the State of Maryland and the Commonwealth of Virginia. Exhibit 4, Response to Comments.

Several commenters objected to the proposed interim nitrogen limit, stating that the Region should require the nitrogen limit from the Chesapeake Bay allocation for the Blue Plains facility, in order to comply with the CWA. After considering those comments, on December 14, 2006, the Region published for public comment a proposed modification to the

Permit, this time proposing to modify the Permit to include a final nitrogen limit reflecting the Chesapeake Bay allocation for Blue Plains and consistent with the WQS of the District and the downstream States of Maryland and Virginia. Exhibit 11, December 14, 2006 Draft Permit Modification and Exhibit 12, December 14, 2006 Draft Fact Sheet. Comments on the December 14, 2006 draft proposed Permit modification were received from the same entities which commented on the August 18, 2006 proposal, as well as the U. S. Fish and Wildlife Service and the U. S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. See Exhibit 4, Response to Comments.

On April 5, 2007, EPA issued a final modification of WASA's Permit addressing the challenges to the provisions of the December 16, 2004 Permit modification, in particular Part III. Section E. 1 and 2. The April 5, 2007 Permit modification also added a nitrogen discharge limit to the Permit consistent with the Chesapeake Bay allocation and the applicable state WQS.

On May 7, three parties filed petitions for review of the Region's permitting decision. The Chesapeake Bay Foundation (CBF) challenged EPA's decision not to include a schedule for compliance with the new total nitrogen discharge limit in the Permit, Appeal No. 07-10. WASA challenged: 1) the total nitrogen limit in the Permit; and 2) the Region's decision not to include a compliance schedule for the limit in the Permit, Appeal No 07-11. FoE/SC jointly challenged the provision in Part III. Section E. 1. Water Quality Based Requirements for CSOs, Appeal No. 07-12.

B. Relevant Enforcement Background

The Blue Plains NPDES Permit has also been the focus of an enforcement action, which is relevant to this appeal. On December 6, 2002, the United States Department of Justice (United States), on behalf of EPA, filed a judicial complaint pursuant to Section 309 of the CWA against WASA alleging that WASA violated the CWA and its January 1997 final NPDES permit by failing to comply with the Nine Minimum Controls (NMC) set forth in the Permit and the CSO Policy and by violating the District's WQS. U.S. v. District of Columbia Water and Sewer Authority, C.V. Action No. 1:02-12511(TGH)(D.D.C.). The District was also named in the judicial complaint as a statutory defendant pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e). Previously, in January 2000, a similar judicial complaint had been filed against WASA by several environmental organizations - including FoE/SC - alleging violations of the CWA and WASA's NPDES permit. Anacostia Watershed Society et al. v. District of Columbia Water and Sewer Authority, C.V. Action No. 1:00CV00183TFH (D.D.C.) (These actions were consolidated as Consolidated Civil Action No 1:CV00183TFH.) A partial Consent Decree among the United States, WASA and the environmental group plaintiffs resolving the NMC portion of the case was entered by the United States District Court for the District of Columbia on October 10, 2003.

On December 16, 2004, in coordination with issuance of the December 16, 2004 modified Permit, a judicial Consent Decree resolving all remaining allegations, including the WQS violations, was lodged with the United States District Court for the District of Columbia (hereafter the LTCP Consent Decree). Exhibit 13, LTCP Consent Decree. The

Decree was subsequently entered on March 25, 2005. The majority of the LTCP Consent Decree describes the requirements for WASA's implementation of its LTCP, including the specific controls required, according to a compliance schedule, specified therein, that spans twenty (20) years and which may be extended under certain circumstances set forth in the Consent Decree.

The LTCP Consent Decree also includes a provision on modification of the LTCP. This provision requires public participation prior to any formal request to EPA for LTCP modification, including schedule modification. Exhibit 13, LTCP Consent Decree, pages 49-50.

This enforcement background is relevant because the LTCP and, potentially, the compliance schedule for implementing the LTCP, both reflected in the LTCP Consent Decree, are affected by the modified Permit. The modified Permit includes a water quality-based effluent limitation (WQBEL) for nitrogen that WASA cannot comply with immediately. WASA now has to marry the requirements for CSO discharges with reduction of its nitrogen discharges; some of the measures WASA proposes to implement to achieve compliance with the nitrogen limit are anticipated to result in modifications to the LTCP and therefore to the LTCP Consent Decree. Since these two issues are tied together technically, the Region intends to use the existing Consent Decree as the vehicle both to establish the compliance schedule for compliance with the nitrogen limit and to modify the LTCP and any necessary changes to the compliance schedule for implementing the LTCP to reflect the changes to the LTCP occasioned by the need to comply with the nitrogen limit.

C. Blue Plains

WASA operates the wastewater collection and treatment system for the District of Columbia. The Blue Plains Wastewater Treatment Plant (Blue Plains) serves portions of the surrounding areas including suburban Virginia and Maryland.[3] Blue Plains is the largest advanced wastewater treatment plant in the world. Blue Plains is the largest single point source of nutrients into the Chesapeake Bay watershed.

D. Statutory and Regulatory Background

1. NPDES Permits and Combined Sewer Overflow Discharges.

Discharges of pollutants to waters of the United States from point sources are prohibited unless authorized by a permit or an applicable statutory provision. 33 U.S.C. § 1311(a). The primary means through which EPA implements this regulatory regime is the NPDES permit program. NPDES permits issued to point source dischargers must include technology-based effluent limitations and, where these technology-based effluent limitations prove insufficient to attain or maintain applicable water quality standards, additional WQBELs. See Weinberger v. Romero Barcelo, 456 U.S. 305, 319 (1982). The CWA provides that by July 1, 1977, all discharges from publicly-owned treatment works (POTWs) were to meet effluent limitations based upon secondary treatment. CWA Section 301(b)(1)(B), 42 U.S.C. § 1311(b)(1)(B). In addition, Section 301(b)(1)(C) of the CWA provides a

[3] See footnote 4 on page 4 of the WASA Petition for the extent of the wastewater treatment it provides for the surrounding Virginia and Maryland counties.

statutory deadline of July 1, 1977 for effluent limitations based on water quality standards[4] established prior to July 1, 1977. In the Matter of Star-Kist Caribe, Inc., 3 E.A.B. 172, 174 (1990).

A POTW is defined to include the collection system which carries wastewater to the treatment facility. 40 C.F.R. § 403.3(o). A combined sewer system (CSS) is a wastewater collection system that conveys sanitary wastewaters (domestic, commercial and industrial wastewaters) and storm water through a single-pipe system to a POTW. CSOs occurring within a CSS are point sources subject to NPDES permit requirements, including both technology-based and water quality-based requirements of the CWA. See Section 301(a) of the CWA, 42 U. S. C. § 1311 and Montgomery Environmental Coalition v. Costle, 646 F. 2d 568 (D.C. Cir. 1980).

In 1994, EPA issued a Combined Sewer Overflow Control Policy (CSO Policy) (April 11, 1994, 59 FR 18688-18698). The main purposes of EPA's CSO Policy are "to elaborate on EPA's National CSO Control Strategy published on September 8, 1989, at 54 FR 37370[5] and to expedite compliance with the requirements of the Clean Water Act."

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[4] WQS are provisions of state or federal law which consist of a designated use or uses for the waters of the United States, water quality criteria to protect the most sensitive uses for such waters, and an antidegradation policy. P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 704 (1994).

[5] In 1989, in recognition of the fact that there was no uniform, nationally-consistent strategy for developing and issuing permits for the estimated 15,000 - 20,000 CSO discharge points in operation, yet not in compliance with the CWA, EPA issued the National Combined Sewer Overflow Control Strategy Document ("CSO Strategy"). The CSO Strategy stated that "Compliance dates for water-quality based and technology-based limitations are governed by the statutory deadlines in Section 301 of the CWA." Further, the CSO Strategy specifically noted "To the extent technology and water quality-based limitations cannot be met by the applicable dates, the permit should contain the statutory dates and public notice should be given simultaneously with an administrative enforcement order or other appropriate enforcement action requiring compliance within the shortest reasonable time." 54 FR at 37372.

Exhibit 14, 59 FR 18688, col 1. The CSO Policy reiterated the three primary goals of the 1989 Strategy:

> 1. To bring all wet weather CSO discharge points into compliance with technology-based and water quality-based requirements of the CWA;
> 2. To minimize water quality, aquatic biota, and human health impacts from CSOs; and
> 3. To ensure that if CSOs occur, they are only as a result of wet weather.

Id. Section I.A., 59 FR 18689, col 2.

The CSO Policy establishes a two-phased approach through which compliance with existing requirements must be met, combining permitting and enforcement strategies. The CSO Policy sets forth short-term and long-term implementation objectives, focused on the attainment of WQS. Initially, no later than January 1997, permittees were to have implemented and documented implementation of the nine minimum CSO controls identified in the CSO Policy. These nine minimum controls were to be set forth in a "Phase I" permit, along with the requirement to develop a CSO LTCP designed to achieve discharges that would meet applicable WQS.[6] See Exhibit 14, CSO Policy, 59 FR 18695-6. Phase I permits are required to include applicable narrative effluent limits necessary to meet applicable WQS.

[6]An LTCP evaluates and recommends alternatives for attaining compliance with the CWA, including meeting applicable WQS. A POTW may follow one of two approaches in developing its LTCP: 1) the "presumption" or 2) the "demonstration" approach. Under the presumption approach, an LTCP would be "presumed" to provide an adequate level of control to meet the water quality-based requirements of the CWA if it meets one of these criteria: 1) no more than an average of four overflow events per year; 2) the elimination or capture for treatment of at least 85 percent of CSOs; or 3) the elimination or removal of no less than the mass of the pollutants identified as causing water quality impairment. Under the demonstration approach, the permittee should demonstrate: 1) the planned control program is adequate to meet WQS and protect designated uses, unless WQS or uses cannot be met as a result of natural background conditions or pollution sources other than CSOs; 2) the CSOs remaining after LTCP implementation will not preclude the attainment of WQS or the receiving waters designated uses or contribute to their impairment; 3) the control program will provide the maximum pollution reductions reasonably attainable; and 4) the control program is designed to allow cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS or designated uses. CSO Policy, 59 FR 18692-3.

Following development of the LTCP, the Policy provides for issuance of a "Phase II" permit requiring LTCP implementation, including water quality-based limits necessary to achieve WQS. Id., 59 FR 19696, Sections IV. B.1. and B. 2.

The CSO Policy provides that once the permittee has completed the development of the LTCP and the selection of the controls necessary to meet the WQS requirements a Phase II permit should be issued. With respect to WQS the CSO Policy provides:

> The Phase II permit should contain:
> a. Requirements to implement the technology-based controls including the nine minimum controls determined on a BPJ basis;
> b. Narrative requirements which insure that the selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan;
> c. Water quality-based effluent limits under 40 C.F.R. Sections 122.44(d)(1) and 122.44(k), requiring, at a minimum, compliance with, no later than the date allowed under the State's WQS, the numeric performance standards for the selected CSO controls based on average design conditions specifying at least one of the following:
> I. Maximum number of overflow events per year for specified design conditions consistent with II.C. 4.a.i.; or
> ii. A minimum percentage capture of combined sewage by volume for treatment under specified design conditions consistent with II. C. 4. a. ii.; or
> iii. A minimum removal of the mass of pollutants discharged for specified design conditions consistent with II. C. 4. a. iii.; or
> iv. Performance standards and requirements that are consistent with II. C. 4. b. of the Policy.[7]

Exhibit 14, 59 FR 18696, col. 2.

On December 15, 2000, Congress enacted the Wet Weather Water Quality Control Act ("WWWQA"), which *inter alia* added Section 402(q) to the CWA, providing in pertinent part that after December 21, 2000, all permits issued for a discharge from a municipal

[7]This relates to the "demonstration" approach to the LTCP.

combined storm and sanitary sewer *shall conform* to the CSO Policy. 42 U.S.C. § 1342(q)(1). Emphasis added. Nothing in the WWWQA alters any provision of the CSO Policy or the deadlines contained in Section 301 of the CWA.

Nothing in the CWA or regulations mandates the use of compliance schedules. Compliance schedules may be used as part of an enforcement order or under certain circumstances, as an effluent limitation in a particular permit. Under the CWA, EPA may include a compliance schedule in a NPDES permit to provide time for the discharger to meet a WQBEL where the state WQS or implementing regulations contain a provision authorizing a compliance schedule. In re Starkist Caribe, Inc. 3 E.A.D. 172, 175 (Adm'r 1990), modification denied, 4 E.A.D. 33, 34 (EAB 1992). EPA often refers to these types of provisions as compliance schedule authorizing provisions.[8] If a state has adopted a compliance schedule authorizing provision in its regulations that is in effect for CWA purposes, the permitting authority may grant a compliance schedule as provided in 40 C.F.R. § 122.47. Under the regulation at 40 C.F.R. § 122.47, the permitting authority has discretion to determine whether granting a compliance schedule is "appropriate." 40 C.F.R. § 122.47(a). See *e.g.*, New England Plating Co., 9 E.A.D. 726, 736-739 (compliance schedules are allowed as an exception to this general rule requiring immediate compliance upon the effective date of the permit when deemed 'appropriate' by the permit issuer).

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[8] See In re City of Ames, Iowa, 6 E.A.D. 374, 381 (1996) (E.A.B. distinguishes between a "schedule of compliance" in a particular permit (see definition at 40 C.F.R. § 122.2) from the type of statute or regulation *authorizing* the inclusion by the Region of a compliance schedule in a particular permit under the Star-Kist decision.). CWA Section 309(a)(5)(A) also uses the term compliance schedule in the context of an enforcement order. 33 U.S.C. § 1319 (a)(5)(A) .

The District has a compliance schedule authorizing provision in its regulations. See Title 21 - District of Columbia Municipal Regulations, Chapter 5, Water Quality and Pollution. The District WQS include the following provision:

> 1105.9 When the Director requires a new water-quality standard-based effluent limitation in a discharge permit, the permittee shall have no more than three (3) years to achieve compliance with the limitation, unless the permittee can demonstrate that a longer compliance period is warranted. A compliance schedule shall be included in the permit.

21 DCMR 1105.9.

2. The Chesapeake Bay

Section 117(g) of the CWA provides that EPA shall, in coordination with the other signatories of the Chesapeake Bay Agreement:

[e]nsure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain - (A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorous entering the Chesapeake Bay and its watershed; (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem; (C) the Chesapeake Bay Basin wide toxins Reduction and Prevention Strategy goal...; (D) habitat restoration protection, creation and enhancement goals established by Bay Agreement signatories...; and (E) the restoration, protection, creation and enhancement goals established by the Bay Agreement signatories for living resources associated with the Bay ecosystem.

33 U.S.C. § 1267(g)(1).

Due to water quality impairment in the Chesapeake Bay, the Administrator of EPA, the Mayor of the District of Columbia, the governors of Maryland, Pennsylvania and Virginia, and the chair of the Chesapeake Bay Commission signed the Chesapeake Bay Agreement (Bay Agreement) in 1983 (revised in 1987, 1992 and most recently in 2000) to coordinate efforts to improve the water quality in the Bay, the largest estuary in the United

States. Subsequently, through a six-state memorandum of understanding, the headwater states of New York, Delaware and West Virginia joined EPA, the Chesapeake Bay Commission and the other jurisdictions (collectively the Bay Partners) in committing to restore the water quality of the Chesapeake Bay and its tributaries through the adoption of new cap load allocations for nitrogen, phosphorous and sediment.

In April 2003, consistent with Section 117(g) of the CWA, EPA published "Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll *a* for the Chesapeake Bay and its Tidal Tributaries" (EPA Bay Criteria Guidance).[9] This guidance document recommends refined aquatic life uses appropriate for the Bay tidal waters and numeric criteria for dissolved oxygen and water clarity, and narrative criteria for chlorophyll *a*, sufficiently protective to restore and maintain each refined tidal aquatic life use. The EPA Bay Criteria Guidance also served as the regional nutrient guidance applicable to the Chesapeake Bay and its tidal tributaries.[10] The States of Maryland and Delaware, the Commonwealth of Virginia and the District of Columbia subsequently adopted changes to their state water quality criteria and refined aquatic life uses for tidal Chesapeake Bay waters that EPA has approved as consistent with the EPA Bay Criteria Guidance and the CWA. Exhibit 21, Letter dated June 27, 2005 from Jon M. Capacasa, Director, Water Protection

[9] This report is available at: http://www.epa.gov/region03/chesapeake/baycriteria.htm.

[10] Nutrients- nitrogen and phosphorous - along with sediments, are the major cause of water quality impairments in the Bay. Excessive nutrients lead to low dissolved oxygen, fish kills, algal blooms and imbalances in the aquatic food web. Thus, in order to meet the EPA Bay Criteria for dissolved oxygen, clarity and chlorophyl *a*, the amount of nutrients entering the Bay must be reduced and controlled.

Division, US EPA Region 3, to Robert G. Burnley, Director, VA DEQ, regarding EPA's approval of the revised Virginia Water Quality Standards, Exhibit 22, Letter dated February 15, 2006 from Donald S. Welsh, Regional Administrator, US EPA Region 3, to Gregg Payne, MD., Director, DC DOH regarding EPA's approval of the revised District of Columbia Water Quality Standards, and Exhibit 23, Letter dated August 29, 2005 from Jon M. Capacasa, Director, Water Protection Division, US EPA Region 3, to Kendl P. Philbrick, Secretary, MDE regarding EPA's approval of the revised Maryland Water Quality Standards.

Based upon the EPA Bay criteria, and in order to restore the refined aquatic life uses of the Bay, EPA and the Bay Partners established allocations of the pollutants nitrogen, phosphorus and sediment for each of the major basins, with those allocations subdivided for each state with jurisdiction over that basin. Those allocations are known as "cap loadings." The process for developing the cap loadings is set forth in the EPA Chesapeake Bay Program document "Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads: The Collaborative Process Technical Tools and Innovative Approaches," December 2003 (Allocation Document). Exhibit 15. The Bay Partners established the cap loadings as described in the April 28, 2003 memorandum from Tayloe Murphy to the Bay Principals' Staff Committee. Exhibit 15, Allocation Document, Appendix A., p A2-A11. Each state was then charged with the development of tributary strategies to achieve their respective cap loading allocations.

Since the Blue Plains facility provides wastewater treatment for a service area including the District of Columbia, Maryland, and Virginia, each of these jurisdictions

provides a proportional share of its respective nitrogen cap loading to the Blue Plains facility. Both Maryland and Virginia adopted tributary strategies that, once fully implemented, are sufficient to achieve their nitrogen cap loads based on EPA's evaluation using the Chesapeake Bay Program Water Quality Model.[11]

However, the District of Columbia adopted a tributary strategy that EPA determined, through use of the Chesapeake Bay Program Water Quality Model, was not sufficient to achieve the nitrogen cap loading allocation for the District. Exhibit 16, February 15, 2007 Memorandum to the File from Robert Koroncai: "Basis of Proposed Nitrogen Limits for the Blue Plains WWTP." EPA further determined that the allocation for Blue Plains set forth in the District's tributary strategy was inappropriate and insufficient for establishing the nitrogen cap loading for the District. Id. Since the District's tributary strategy was not sufficient to achieve the assigned nitrogen allocation for the District, it was necessary for EPA to recalculate the appropriate allocation for the District's contribution to Blue Plains, consistent with the Bay Program nitrogen cap loading to the District. Id.

In the summer of 2006, Maryland further refined its tributary strategies by making small reductions to the nitrogen allocation for Blue Plains, and providing those allocated loads to another wastewater treatment plant. Id. Consequently, in June 2006 EPA determined the appropriate effluent limits for the Blue Plains facility, based on the total of the allocated

[11]The Chesapeake Bay Water Quality model is described in detail in the Allocation Document, at pages 29-42. The Allocation Document also describes the other and technical and modeling considerations used in setting the cap load allocations. Exhibit 15. The Chesapeake Bay Program maintains the modeling input deck results.

nitrogen loadings for the Blue Plains facility from: the allocation for Blue Plains facility from the Maryland tributary strategy (modified as discussed above in 2006); the allocation for Blue Plains from the Virginia tributary strategies; and the EPA-recalculated allowable nitrogen loading for the District portion of the Blue Plains wastewater treatment plant. Exhibit 16, Koroncai Memorandum. This combined allowable loading from the three jurisdictions yields the total allowable nitrogen loading for the entire Blue Plains facility that, along with controls for other sources, is necessary to achieve the relative cap loading for each Bay jurisdiction, and once fully implemented, to restore and maintain the Bay's aquatic living resources.

II. PETITIONER'S BURDEN IN SEEKING REVIEW

There is no appeal as of right from a final Agency permit decision. In re Miner's Advocacy Council, 4 E.A.D. 40, 42 (EAB, May 29, 1992). Only those persons who participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in any public hearing held on the proposed permit may appeal a permit decision. 40 C.F.R. §124.19(a).[12] Further, as set forth in 40 C.F.R. § 124.19(a) and as explained below, on appeal to the Board the Petitioner has the burden to show that the Permit condition in question is based on either:

(1) a finding of fact or conclusion of law which is clearly erroneous, or

(2) an exercise of discretion or an important policy consideration which the Board should, in

[12] A person who has not filed comments or participated in a hearing may, however, petition for review with respect to the "changes from the draft to the final permit decision." 40 C.F.R. §124.19(a).

its discretion review.[13]

As set forth below, the Permit provisions in question meet the requirements of and advance the goals of the CWA. Moreover, they are consistent with existing regulatory requirements, conform to the 1994 CSO Policy and are rational in light of all of the information in the record. In this matter, each Petitioner has failed to meet its burden in establishing that review is appropriate. The Respondent's permitting decision was not clearly erroneous, nor does it otherwise present an important policy issue that warrants discretionary review by the Board.

III. ARGUMENT

A. The Region's Decision Not to Place a Compliance Schedule for the Nitrogen Limit in the Permit Is Reasonable and Consistent With Applicable Law

The Region reasonably exercised its discretion in not placing a compliance schedule for the nitrogen limit in the Permit because it instead intends to address the compliance schedule issue in a modification to the LTCP Consent Decree. Nothing in the CWA or EPA regulations mandates where a schedule of compliance must be placed. A compliance schedule may be part of an administrative order, a judicial order, or, in certain circumstances, part of a permit. Where the Agency decides to address the need for or length of a compliance schedule, it is a case-by-case determination based on the totality of the circumstances. The Region's

[13] The Board has broad authority to review important policy issues in NPDES permits, however, "the Agency intended this power to be exercised "only sparingly." 45 FR 33,290, 33,412 (May 19, 1980), In re Jett Black, Inc., 8 E.A.D. 353, 358 (EAB 1999). Agency policy favors final adjudication of most permits at the Regional level. 45 .FR at 33, 412.

decision to use the existing Consent Decree for establishing a schedule of compliance for meeting the nitrogen limit was reasonable, based upon the circumstances of this case, for several reasons.

First, it is appropriate to place the compliance schedule for the nitrogen limit in the existing LTCP consent decree because some of the measures to be implemented to comply with the nitrogen limit will affect the measures to be taken pursuant to the LTCP. WASA will have to marry the requirements of the LTCP with measures necessary to achieve the nitrogen limit. WASA's preferred option for achievement of the nitrogen limit - its Total Nitrogen/Wet Weather Plan (TN/WW Plan) - involves changes to the existing LTCP, the requirements and schedule for which are set forth in the LTCP Consent Decree. Any material modifications to the LTCP will require modification of the Consent Decree. Exhibit 13, LTCP Consent Decree, page 49-50. Therefore, the LTCP Consent Decree will need to be modified in any case.

Second, based upon EPA's discussions with WASA, the plant upgrades necessary to achieve the nitrogen limit could take several years, involving substantial retrofitting of existing plant processes intended ultimately to achieve the nitrogen limit. There is more flexibility in terms of interim dates in a compliance schedule that is part of an enforcement instrument because EPA's permit regulations require compliance schedules to establish interim requirements and dates for their achievement on at least an annual basis. See 40 C.F.R. § 122.47(a)(3). Placing the compliance schedule in a separate enforceable document gives the permittee and the Agency more flexibility in establishing interim requirements.

Finally, addressing the compliance schedule issue in a modification to the Consent Decree will provide ample opportunity for public participation. The LTCP Consent Decree by its terms requires the permittee to provide for public participation prior to proposing a change to the LTCP to the Region. Exhibit 13, LTCP Consent Decree, pages 49-50. The subsequent LTCP Consent Decree modification would be subject to public comment prior to entry by the Court, in accordance with United States Department of Justice policy. Therefore, the public will have an opportunity to comment on both the substance of the plan to achieve compliance with the nitrogen limit and the schedule for compliance.

1. CBF's claim that the public will not have the opportunity to comment on the compliance schedule is erroneous.

CBF argues that there would be insufficient opportunity for the public to comment on the compliance schedule for meeting the nitrogen limit in its January 19, 2007 comments on the December 14, 2006 draft modified Permit. CBF argued that the opportunity for the public to comment on the compliance schedule is the primary reason that it wants the compliance schedule to be placed in the Permit. In response to the concerns expressed by CBF with regard to public input into the schedule, the Region stated that there will be public input into the compliance schedule incorporated into the Consent Decree because any modification to the LTCP or LTCP Consent Decree requires public notice. Exhibit 4, Response to Comments, page 25. The LTCP Consent Decree provision relating to material modification of the LTCP provides for additional public participation in the development of any such proposal ultimately submitted to EPA. Id., and Exhibit 13, LTCP Consent Decree, pages 49-50. This, along with

public notice of any LTCP Consent Decree modification would provide a meaningful opportunity for public comment on the proposed compliance schedule.[14] Exhibit 4, Response to Comments, pages 23 and 25.

Informal public participation on the proposed modification to the LTCP Consent Decree has already begun. On May 4, 2007 WASA hosted a meeting, attended by CBF, Earthjustice (counsel for FoE/SC), representatives from other environmental groups, representatives from the Maryland Department of the Environment, the District, EPA and others where WASA presented its draft TN/WW Plan and answered questions regarding the Plan, including WASA's proposed schedule for compliance with the nitrogen limit. WASA has now scheduled a public meeting for August 2, 2007 to present its proposed TN/WW Plan.[15] In its notice of the scheduled public meeting, WASA notes that modification of the LTCP Consent Decree is required in order to move forward with the TN/WW Plan.

2. The Region Reasonably Exercised its Discretion Not to Include a Compliance Schedule in the Permit, Because in This Instance, it Makes Sense to Address the Need for and Timing of a Compliance Schedule as Part of the Existing LTCP Consent Decree.

CBF and WASA assert that the Region lacks discretion whether to include a compliance schedule in the Permit. In the alternative, WASA asserts that the Region has

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[14] It is the policy of the Department of Justice (DOJ) to consent to entry of a judicial consent decree only on condition that an opportunity for public comment be afforded prior to entry of any such agreement and DOJ reserves its right to withdraw or withhold its consent if comments disclose facts or considerations which indicate that the proposed judgement is inappropriate, improper or inadequate. 28 C.F.R. § 50.7.

[15] See Washington Post, Sunday, July 1, 2007, page J2.

abused its discretion. The Region does have discretion, in this instance, which has been exercised reasonably, based upon the facts of this matter.

The Starkist decision simply stands for the proposition that, when EPA is the permitting authority, the Agency **may,** under certain conditions, include a compliance schedule in a NPDES permit where applicable state WQS or implementing regulations contain a compliance schedule authorizing provision. Agency regulations at 40 C.F.R. § 122.47 still apply. These regulations do not mandate that the permitting authority must give a discharger a compliance schedule, but instead provide that "a permit **may**, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations." 40 C.F.R. §122.47(a). Emphasis added.

In the December 14, 2006 Draft Fact Sheet, the Region noted its intention to place the nitrogen compliance schedule in a separate enforcement document. Exhibit 12, page 5. In responding to comments by both CBF and WASA on the lack of a compliance schedule in the Permit, the Region explained that providing the compliance schedule in an order would allow the Agency to be more flexible with respect to interim requirements than it could be if it put the compliance schedule in the Permit under the applicable permit regulations at 40 C.F.R. § 122.47(a)(3). Exhibit 4, Response to Comments, page 23.

The Region further explained that, since the options WASA has presented for its TN/WW Plan would require modification of the LTCP, the requirements and compliance schedule for which are contained in the existing LTCP Consent Decree, it would make sense to use the existing Consent Decree as the vehicle for establishing both the compliance actions

and the compliance schedule for meeting the nitrogen limit. It would be far more efficient and practical for the Region, then, to address the need for and timing of the compliance schedule for the nitrogen limit in the existing enforcement proceeding. Id. It would also be easier for EPA to monitor compliance with requirements contained in one document, the Consent Decree, than it would be to monitor compliance with requirements in two separate documents (a permit and a consent Decree).[16] In addition, the Region noted that because of the LTCP Consent Decree provision requiring public participation prior to modification of the LTCP, as well as Department of Justice requirements for public comment prior to entry of the LTCP Consent Decree modification with the Court, there would be opportunity for public comment. Id.

Both CBF and WASA argue that the District's authorizing provision gives the permitting authority no discretion as to whether to provide a compliance schedule and that the permitting authority must include a compliance schedule in a permit.[17] Neither has provided any evidence that this is how the District interprets its provision, or that this is how EPA

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[16]While in its comments CBF noted only concerns regarding the ability to comment upon or challenge a compliance schedule, its petition also seems to raise the issue of its ability to enforce the schedule. CBF Petition, page 11. This issue was not reasonably ascertainable from CBF's comments, therefore, it should not be addressed by the Board. In any event, as the underlying Complaint on which the LTCP Consent Decree is based does not include an alleged violation of the nitrogen limit, the United States would have to seek to amend its Complaint in order to amend the LTCP Consent Decree to add provisions relating to the nitrogen limit. CBF could move to intervene in the action to amend the Complaint and, if approved by the Court, obtain certain rights to participate in the development or enforcement of any nitrogen compliance schedule ultimately included in the LTCP Consent Decree.

[17] That provision states: When the Director requires a new water-quality standard-based effluent limitation in a discharge permit, the permittee shall have no more than three (3) years to achieve compliance with the limitation, unless the permittee can demonstrate that a longer compliance period is warranted. A compliance schedule shall be included in the permit. 21 DCMR 1105.9.

interpreted the provision when EPA approved it. To the contrary, the Region's Response to Comments document indicates that EPA interpreted the authorizing provision to be read in light of Star-Kist and EPA's requirements for compliance schedules at 40 C.F.R. § 122.47:

> ...EPA believes that this provision must be read in light of Star Kist, and, as EPA is the permitting authority, with EPA regulations. Therefore, EPA as the permitting authority, has discretion in determining whether inclusion of a compliance schedule in a permit is appropriate.

Exhibit 4, page 23, footnote 3.

Moreover, the District itself affirmed that the Region's decision to include the compliance schedule in a separate enforceable document is allowable under the District's compliance schedule authorizing provision, as reflected in its CWA Section 401 certification. Section 401 provides that EPA may not issue an NPDES permit unless the affected state has granted or waived certification that the discharge authorized by the permit will comply with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. See Section 401(a)(1) and 40 C.F.R. §§ 124.53 and 124.55. As part of the District's 401 certification process, the District reviewed the Permit, which contained no compliance schedule, and with the understanding that the compliance schedule would not be in the permit, but instead in an enforcement order. See Exhibit 10, December 14, 2006 Draft Fact Sheet, page 5. In its 401 certification, the District indicated that it agreed with EPA's approach and that the certification was without conditions. Exhibit 5, January 29, 2007 CWA DDOE Section 401 Certification Letter.

Thus, the District has concluded that issuance of the Permit, without including a compliance schedule for the nitrogen limit, is consistent with the District's WQS regulation.

If the District interpreted its regulation otherwise, it could have so advised the Region and conditioned its certification on inclusion of a compliance schedule in the Permit. In fact, the District stated that it concurs with the Region's approach. Therefore, the assertion by WASA and CBF that the District's WQS Regulation requires the compliance schedule to be placed in the Permit is not supported by the District's reading of its own regulation. Indeed, neither WASA nor CBF have offered any support for an interpretation of the District's compliance schedule authorizing provision to compel the Region to put the schedule in the Permit.

CBF posits several other arguments that also fail to raise issues worthy of review. First, CBF asserts that EPA's action, in deciding to place the compliance schedule in an enforcement document is contrary to the Agency's NPDES Permitting Approach for Discharges for Nutrients in the Chesapeake Bay Watershed (Bay Permitting Approach). Exhibit F., CBF Petition. In making this assertion, CBF ignores the flexibility set forth in that document, which clearly contemplates the use of enforcement documents, in addition to the use of compliance schedules in permits to effect the Bay nutrient limits. The Region's action is entirely consistent with the Bay Permitting Approach, which provides that EPA and the state NPDES permitting authorities agree to: "...Incorporate compliance schedules, as needed and **appropriate**, into permits **or other enforceable mechanisms**.... Generally, these compliance schedules should require the facility to come into compliance with the nutrient based requirements of the permit or order as soon as possible in keeping with the 2010 time line and objective of the Chesapeake Bay Agreement." See Exhibit 4, page 26 and Exhibit F, CBF Petition, page 2. Nothing in EPA's proposal to include a compliance schedule in a

separate enforceable document is inconsistent with this. [18]

Finally, WASA argues that the Region's failure to include a compliance schedule for the nitrogen limit in the Permit puts WASA at significant risk of non-compliance with the Permit. WASA's assertion that the lack of a compliance schedule in the Permit will place it at risk of Permit non-compliance may well be correct. However, given that the new nitrogen limit will likely result in the Region having to consider whether to modify the LTCP in the existing LTCP Consent Decree, the Region reasonably determined that it would be far more efficient and practical in this instance for the Region to address the need for and timing of the compliance schedule for meeting the nitrogen limit in the ongoing enforcement proceeding. Further, when the Consent Decree is appropriately modified, it would provide WASA with insulation from liability for violations of the nitrogen limit.

As set forth above, Petitioners have failed to show that the Region's decision not to include a compliance schedule for attainment of the nitrogen limit imposed in the April 5, 2007 Permit modification was based on either a clearly erroneous finding of fact or conclusion of law or an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. Therefore, the petitions for review of this issue should be dismissed.

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[18] The Bay Permitting Approach itself, in any event, contains no legally binding requirements, but rather states that each permitting decision will be made on a case-by-case basis. See Permitting Strategy, Exhibit F to CBF Petition, final paragraph on page 3.

B. The Nitrogen Limitation in the Permit is Consistent with the Requirements of the CWA and its Regulations

WASA alleges that the nitrogen limit is more stringent than is reasonably necessary to meet the applicable water quality standards. WASA alleges that if another discharger was given a more stringent allocation, WASA would have received a larger allocation and therefore a less stringent effluent limitation for nitrogen in its permit. WASA's challenge to the nitrogen limit is essentially a challenge to the allocation of nitrogen developed for Blue Plains by the Bay Partners. The Region submits that the allocation is not properly before the Board. What is at issue is the nitrogen limitation that the Region has included in the Permit.

The Region based the nitrogen limit upon the WQS of the District and WQS of the downstream affected State of Maryland and Commonwealth of Virginia. The WQS of all three jurisdictions were recently revised to adopt the recommendations in the EPA Bay Criteria Guidance.[19] See Exhibits 21, 22, and 23 - EPA letters approving the WQS revisions submitted by Virginia, the District and Maryland.

The EPA Bay Criteria Guidance was used as the underpinning for the cap loadings for nitrogen for the various water bodies reflected in the Allocation Document and the resultant tributary strategies. The cap loadings were developed in conformance with the anticipated WQS revisions. The question then, is whether the nitrogen limitation is rational in light of all the information in the record. In re Government of the District of Columbia Municipal

[19]In recognition of the fact that state water quality standards had not yet been revised, the Allocation Document recognizes that the allocations may need to be adjusted to reflect final state water quality standards. Exhibit 15, Allocation Document, page xiii. None of these WQS revisions resulted in the need for revisions to the allocations.

Separate Storm Sewer System, 10 E.A.D. 323, 334, citing In re NE Hub Partners, L.P., 7 E.A.D. 561 at 568. The record fully supports the Region's decision.

The Region's determination of the nitrogen effluent limit in the Permit was well reasoned, taking numerous factors into consideration. As stated above, the Region took into account the cap loadings of nitrogen developed by the Bay Partners. As detailed in the Allocation Document, the allocation decisions were based on the best available scientific and technical information - including extensive modeling. See Exhibit 15, in particular, Chapter II: Overview of the Technical Tools, Chapter III.: Technical and Modeling Considerations in Setting the Allocations, and Chapter IV.: Setting the Nutrient and Sediment Allocations.

In addition, the Region took into account the individual state strategies for allocation of cap loadings by point and non-point sources, which were developed on the basis of the data in the Allocation Document. In the meantime, the Bay Partners began revising their water quality standards as necessary to reflect the recommendations in the EPA Bay Criteria Guidance and, ultimately, subsequent to development of the allocations, the District, the State of Maryland and the Commonwealth of Virginia all revised their water quality standards to incorporate the Bay criteria.

In setting the nitrogen limit, the Region was ultimately placing a limit in the Permit designed to meet the applicable water quality criteria of all affected states (in this case, not just the District, but also the downstream States of Maryland and Virginia). See 40 C.F.R. § 122.44(d)(4) and Exhibit 12, December 14, 2006 Draft Fact Sheet, page 4 and Exhibit 3, April 5, 2007 Final Fact Sheet, pages 1, 5 and 6. Thus, the total nitrogen limit complies with

40 C.F.R. § 122.4(d) which requires limits that achieve compliance with water quality standards for all the affected states. EPA found that an annual nitrogen load at Blue Plains that exceeds the 4.689 million pounds per year mass load has a reasonable potential to cause or contribute to an exceedance of the downstream state WQS. December 14, 2006 Fact Sheet, page 5.

The process of developing the allocation, and thus the nitrogen limit was discussed in detail in the Response to Comments. There, EPA explained the scientific basis for the total load reductions that would be necessary for the Bay to attain the revised water quality standards, and the allocation process for determining what each jurisdiction's load reduction would be. These principles and process in the Allocation Document and the allocations derived from them resulted in a basin wide total of 187.15 million pounds/year (mpy). This was a shortfall of 12 million pounds from the Bay-wide cap load of 175 mpy which had been determined by modeling to be the assimilative capacity of the Chesapeake Bay. In order to reduce this shortfall, a meeting of the Bay Partners was held. Each state evaluated its ability to contribute to reducing the remaining 4 mpy total nitrogen. The District of Columbia agreed to reduce its allocation from 2.80 mpy to 2.40 mpy. That agreement is the basis of the District's final allocation. Exhibit 4, Response to Comments, pages 17-19.

WASA also alleges that the Region failed to consider several factors that, as set forth in the Response to Comments, are not relevant to the Region's determination of a limit necessary to meet applicable WQS. All of these are cost and technological considerations not appropriate for consideration when setting WQBELs. They are characterized by WASA as: 1)

the financial burden of WASA's CSO control obligations on District ratepayers; 2) the difficulties inherent in controlling nitrogen to levels approaching the limit of technology while treating wet weather flow from the District's combined sewer system; 3) grant funding for nitrogen control available to ratepayers in Virginia and Maryland but not to ratepayers in the District; and 4) WASA's inability to trade for nitrogen credits to comply with the Permit.

As the Region noted in its Response to Comments, the courts have consistently held that cost and technological considerations are not appropriate factors to consider under the CWA when setting WQBELs. See, e.g., In re City of Scituate Wastewater Treatment Plant, 10 E.A.D. ___, (EAB April 19, 2006) (EPA did not commit clear error by not considering cost of compliance when establishing WQBELs) Scituate Wastewater Treatment Plant v. EPA, No. 06-1817 (1st Cir. 2006) (appeal dismissed upon stipulation of the parties), In re Westborough and Westborough Treatment Plant Board, 10 E.A.D. 297 (EAB 2002) (permit-writing authorities are required under CWA §§ 301 (b)(1)(C) and 402(a) to set permit limitations necessary to meet water quality standards set by states and approved by EPA, even if more stringent than those required under technology-based limits), In re City of Moscow, 10 E.A.D. 135, 168 (EAB 2001), In re New England Plating Co., 9 E.A.D. 726, 738 (EAB 2001) (finding that CWA does not make exceptions for cost or technological feasibility), In re Town of Hopedale, NPDES Appeal No. 00-04, at 24 (EAB Feb. 13, 2001) (Order Denying Review). See also, e.g., Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999) (holding that EPA is obligated to set water quality standards without regard to practicability), United States Steel Corp. v Train, 556 F. 2d 822, 838 (7th Cir. 1977) (finding "states are free

to force technology and [i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations ***."). Exhibit 4, Response to Comments, page 15. Thus, the Region did not err in not considering these issues when setting the nitrogen limit in the Permit.

Moreover, WASA's arguments in this regard - for which it has offered little support - are specious, in light of its acknowledgment that it "plans to upgrade the Blue Plains facility to control nitrogen to the limit of technology, which equates to about three milligrams per liter (mg/l) of nitrogen discharged on an annual average basis." WASA Petition, page 16. This is significantly below the nitrogen limit in the Permit.

WASA also suggests that the Region did not address its comments on the December 14, 2006 draft Permit modification. That is simply not accurate. See the above response and Exhibit 4, Response to Comments, pages 14 -22. As examples, WASA asserts that the Region did not respond to WASA's comment regarding the relative contribution of Pennsylvania's Susquehanna River basin and the Potomac River basin to the Bay's nitrogen loads and resulting water quality impacts.[20] The Region specifically addressed this point, stating that the allocation for the District of Columbia was reasonable, given the effects of its waters on the Bay and the effects nutrients have had on the tidal Potomac. See Exhibit 4, Response to Comments, page 20.

WASA also asserts that the Region suggests that it was appropriate to reduce the

[20]WASA asserts that decreasing the allocation to the Susquehanna River in order to increase the Blue plains allocation would have no impact on WQSs - but offers no support for this. WASA Petition, page 17.

District's allocation simply because it was agreed to by the District government. This fails to adequately represent the Region's Response, which reflects that this is a much more complex decision. Exhibit 4, Response to Comments, pages 20-21.

In addition, WASA argues that the nitrogen limit is premature, and should not be required until it has completed its TN/WW Plan. WASA offers no support for this assertion other than its preference for the delay. The Region had no legal basis for not including a nitrogen limit in the permit, given that there was reasonable potential for the discharges to cause or contribute to an excursion of the applicable numeric criteria for nitrogen in the Potomac and in downstream waters. 40 C.F.R. 122.44(d)(1)(I). Pursuant to CWA Section 301(b)(1)(C) and its implementing regulations at 40 C.F.R. §§ 122.44(d)(1) and 122.44(d)(1)(vii)(A), the Region was required to impose a WQBEL to meet the applicable water quality criteria.

WASA further makes an unsupported assertion about the financial consequences of its action; again, the Region was not required to consider this in setting the nitrogen limit. Regardless, WASA fails to point out that the Region has been working and continues to work with WASA to negotiate a modification to the LTCP Consent Decree that would provide for an appropriate schedule for compliance with the nitrogen limit.

Interestingly, WASA complains that "the Region has known for some time that WASA' is developing a Total Nitrogen/Wet Weather Plan" to support that imposition of the limit is premature. This contrasts with WASA's suggestion, in footnote 26 of its Petition, that it had no opportunity, except in response to the draft Permit modification, to have input on the

limit, and suggesting WASA was unaware of the allocation number for Blue Plains. WASA has been well aware of the Bay Agreement and the plan to reduce WASA's nitrogen discharges to protect the Bay; indeed, this began with WASA's January 1997 Permit, which required pilot testing of a biological nutrient reduction process at Blue Plains, followed by a nitrogen reduction goal in the January 2003 Permit. The allocation Document is a public document which has been available since December 2003. The Region put WASA on notice, nearly two years ago, in July 2005, that it intended to place the Bay allocation limit for nitrogen in the Blue Plains Permit at the earliest opportunity, which WASA was advised could be before the Permit expiration date of February 28, 2008. Exhibit 19, July 28, 2005 letter from Jon Capacasa, Director, Region III Water Protection Division, to Jerry Johnson, WASA General Manager, page 3. Knowing that a nitrogen limit that would be more stringent than the existing goal in the permit would be forthcoming, since at least 2004 WASA has been engaged in a strategic planning process - involving meetings with regulatory agencies, including the District, EPA and others to develop its plan to meet the upcoming stricter nitrogen limits. See Attachments to WASA Petition (not specifically numbered, but grouped together and referenced as "Attachments to WASA's January 18, 2007 Comments on the December 14, 2006 Proposed Permit Amendment). This includes correspondence between the Region and WASA regarding upcoming nitrogen limits as well as PowerPoint presentations developed by WASA for strategic planning meetings with Blue Plains users and regulators.

As set forth above, Petitioner has failed to show that the Region's decision on the nitrogen limit imposed in the April 5, 2007 Permit modification was based on either a clearly

erroneous finding of fact or conclusion of law or an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. Therefore, the petition for review of this issue should be dismissed.

C. The Permit Provision Setting Water Quality-Based Requirements for CSO Discharges is Entirely Consistent with Applicable Law.

The petition for review filed by FoE/SC seeks Board review of Part III. Section E.1 Water Quality Based Limits for CSO Discharges of the April 5, 2007 final modified Permit. FoE/SC makes three arguments in support of its challenge: 1) the Region did not provide adequate notice and opportunity to comment on the final language; 2) the final provision violates the antibacksliding provisions of the CWA and NPDES regulations; and 3) the Permit violates CWA Section 301(b)(1)(C). As set forth below, FoE/SC has failed to meet its burden to show that the Region's decision as to Part III. Section E.1 was based on either a clearly erroneous finding of fact or conclusion of law, or that the Region's action was an abuse of discretion or reflects an important policy consideration which the Board, in its discretion, should review.

1. EPA Provided Adequate Notice and Opportunity to Comment on the WQBELs for CSO Discharges.

As noted in the petition, this particular provision - water quality-based requirements for CSOs - has been under challenge and has evolved since the Permit was reissued in January 2003. The following sets forth a chronology of the evolution of this Permit provision.

The last fully effective permit, issued in January 1997, contained this narrative effluent

limit:

> 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 met the water quality standards established pursuant to District of Columbia law.

Emphasis added. (Hereinafter 1997 Narrative WQBEL).

At that time, there were in fact no numeric water quality based limits in the Permit for CSO discharges. The Permit simply contained requirements for implementation of the technology-based CSO controls - the nine-minimum controls and a requirement to develop an LTCP and submit it to the Region.

When the Permit was reissued on January 24, 2003, the Region included the following narrative WQBELs:

> Section C. Water-Quality Based Requirements for CSOs
> 1. Consistent with the Clean Water Act 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).

The Region included language about the TMDLs in the January 2003 Permit because subsequent to issuance of the 1997 permit, the TMDLs for BOD (biochemical oxygen demand) and TSS (total suspended solids) had been issued. Again, the January 2003 Permit did not contain numeric WQBELs for CSO discharges, as WASA had not yet completed its LTCP. It

only contained requirements for the nine minimum technology-based controls and noting that on August 2, 2002 WASA had submitted a revised LTCP to the Region, required WASA to, within 30 days of the effective date of the Permit, submit an LTCP implementation schedule that complies with the CSO Policy and EPA LTCP guidance. WASA challenged this provision in a petition for review by the Board. FoE/SC challenged other provisions of the January 2003 Permit.

On March 13, 2004, the Region proposed a modification of the January 2003 Permit, which contained the following 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.

The Region next attempted to provide more specific requirements for the permittee's obligations with respect to WQBELs for CSO discharges when it issued a final Permit modification in December 2004, which included this narrative WQBEL:

> 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.

Prior to issuance of the final December 2004 Permit modification, WASA had completed its LTCP and it had been accepted by the Region. Both DCDOH and the Region

had determined, based upon an evaluation of the District's WQS, that the CSO controls set forth in the LTCP are adequate to ensure attainment of the District's WQS.[21] In addition, the LTCP Consent Decree, requiring WASA to implement the LTCP and including the schedule for implementation had been executed and was lodged at about the same time that the final Permit was issued.

The December 2004 Permit modification included Phase II CSO permit provisions, in Part III. Section C. and D. (pages 41-49). These provisions included a requirement to implement the LTCP and set forth the specific performance standards of the LTCP, and included requirements for post-construction monitoring of the CSO controls and, as part of the water quality-based limits, TMDL-derived effluent limits. WASA and FoE/SC both challenged this provision of the modified Permit, as well as other provisions of the final modified Permit.

The petitions for review were stayed and the parties engaged in negotiations spanning more than two years, largely related to the WQBELs for the CSO discharges. Ultimately, the parties were unsuccessful in achieving a negotiated resolution of the contested Permit

[21]Exhibit 6, November 3, 2204 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, 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, Exhibit 8, November 29, 2004 Region III Memo to File: WASA LTCP Water Quality Standards (detailed review of LTCP compliance with District WQS) and Exhibit 18, August 28, 2003 letter from James Collier, Bureau Chief, Bureau of Environmental Quality, Environmental Health Administration, District Department of Health to Jon Capacasa, Director, Water Protection Division, USEPA Region III.

provisions.

After withdrawing the contested permit provision and announcing its intention to propose a modification of the Permit, on August 16, 2006 the Region published a proposed Permit modification for public comment, which, *inter alia,* included a proposal to modify the water quality-based requirements for CSO discharges 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.

After considering the provision further, and in light of WASA's comments that the second protion of the draft provision is unnecessary, when the Region issued the final permit, the Region eliminated the second sentence of the proposed provision, having concluded that it was inconsistent with the CSO Policy requirements for Phase II permits. The CSO Policy states that a Phase II permit should contain WQBELS under 40 C.F.R. §§ 122.44(d)(1) and 122.44(k), requiring, at a minimum, the numeric performance standards for the selected CSO controls, based on average design conditions specifying, in the case of an LTCP based on the "demonstration" approach, performance standards and requirements that are consistent with Section II.C.4. b. of the Policy. Exhibit 14, CSO Policy, page 18693. The Region had determined that in developing its LTCP, the permittee had made the demonstrations set forth in Section II.C. 4. b. of the CSO Policy. See Exhibit 8, Memorandum to File on WASA LTCP Water Quality Standards.

In its comments on the August 16, 2006 proposal, FoE/SC objected to the termination of the general narrative prohibition of discharges in excess of District WQS at the time that the permittee certifies to EPA that the CSO Controls have been placed into operation on the grounds of 1) anti-backsliding and 2) that it violates the statutory and regulatory requirements that permits contain limitations sufficient to ensure compliance with WQS. Exhibit 4, Response to Comments, page 10. FoE/SC commented that elimination of that provision upon LTCP implementation would be premature, because it should remain in the Permit until after post-construction monitoring and any additional measures that may need to be taken to actually attain compliance with WQS.

FoE/SC now argues that the final language was not a "logical outgrowth" of the proposed language. However, as the Region had already indicated that the performance standards of the LTCP are the WQBELs for CSO discharges, it was foreseeable that the Region could have decided to issue the final language, eliminating altogether the general narrative WQS compliance language. This was reasonably foreseeable, and, given the history of the development of this provision, FoE/SC has had actual notice that the final language was a possibility.

While only WASA appealed the version of Part III. Section E. in the December 2004 Permit modification [22], both WASA and FoE/SC participated in the lengthy negotiations

[22] 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

attempting to resolve that appeal - as the goal was to develop a WQBELs for CSO discharges that would satisfy all parties. Therefore, FoE/SC had ample notice of the Region's thinking on this issue.

At bottom, there was logical outgrowth because the final language, was, in fact, part of the proposal. The Region simply eliminated the second sentence of the proposed provision, having concluded that it was inconsistent with the CSO Policy requirements for Phase II permits.

Over the last several years FoE/SC has had several opportunities to provide comments reflecting its position on what it believes to be the appropriate WQBELs for CSO discharges at Blue Plains. All along, it has advocated for a continuation of the language, or language similar to, the general narrative provision contained in the January 1997 permit. It has advanced the same basic objections to all the other proposed language: 1) that the language violates anti-backsliding; and 2) that it will not be known whether the LTCP controls will ensure WQS compliance until after post-construction monitoring. There is nothing in the FoE/SC Petition to suggest that these arguments would have been different had there been another opportunity to comment.[23] A final rule will be determined to be the logical outgrowth of the proposed rule if a

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survival and propagation.

[23]FoE/SC also asserts that other members of the public were deprived of an opportunity to comment. In response, the Region notes that the FoE/SC are the **only** environmental groups or members of the public to have commented on the water quality-based requirements for CSO discharges in the proposed Permit reissuance (public noticed on August 7, 2002), the first proposed Permit modification (public noticed March 19, 2004) and the second proposed Permit modification (public noticed August 16, 2006 and December 14, 2006). Thus, it appears highly unlikely that there are other members of the public who would have commented had another opportunity for public notice been provided.

new round of notice and comment would not provide commenters with the first occasion to offer new and different criticisms which the agency might find convincing. See, Fertilizer Institute v. EPA, 935 F. 2d 1303, 1311(D.C.Cir. 1991).

The essential inquiry here is that "Parties are entitled to be fairly notified of the subjects and issues before an agency in the permitting process." See NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 1988). FoE/SC was more than fairly apprised that the Region had, for some time, been working on the development of the appropriate provisions, and that the Region was considering the performance standards of the LTCP to be the applicable WQBELs for the Permit.

Finally, the assertion by FoE/SC that the Region should have reopened or extended the public comment period under 40 C.F.R. § 124.14(b) is wrong. First, that provision is discretionary. More importantly, it relates to a situation where "any data information or arguments submitted during the public comment period" appear to raise substantial new questions concerning a permit." No new data or arguments were submitted here that would raise substantial new questions related to this permit language, nor was the Region's final decision based on such. The Region based its decision on its reading of the CSO Policy requirements for Phase II permit WQBELs, as applied to this Permit.

2. The Final WQBELS Do Not Violate The CWA's Anti-backsliding Provisions Because They Are Not Less Stringent Than the Previous Limitations; and Even If They Were Less Stringent, They Would Meet The Applicable Exception Under CWA Section 303(d)(4)(A).

The assertion by FoE/SC that the final provision for WQBELs for CSO discharges in Part III. Section E. 1 violates anti-backsliding provisions of the CWA is plainly wrong. On the contrary, this provision is no less stringent than the previously effective WQBEL language and therefore does not trigger the anti-backsliding prohibition under CWA Section 402(o)(1). Even if the final WQBEL were to be found to be less stringent, which it is not, the provision meets one of the exceptions to anti-backsliding, provided in CWA Section 303(d)(4)(A).

With certain significant exceptions, Section 402(o) of the CWA prohibits modification of an NPDES permit to contain effluent limits based on Section 301(b)(1)(C) of the CWA (water quality based limits) that are less stringent than the comparable effluent limits in the previous permit. As noted above, the January 1997 permit - the last fully effective permit - did not in fact include any specific numeric water quality based limits for CSO discharges. Rather, it contained a narrative WQBEL that generally prohibited discharges in violation of any limitation necessary to meet the water quality standards of the District. This was based on a determination under the CSO Policy that no numeric WQBEL would be required until the LTCP controls are selected, because, until that time, it would be difficult to calculate the discharge levels that would be as stringent as necessary to meet water quality standards.

The new numeric WQBELs are simply a more specific articulation of what the permittee must do to meet the same requirement that was in the previous permit: to control its

discharges as stringently as necessary to meet WQS. The new WQBEL specifies what that level is - based on the information now available through the LTCP. In fact, the new WQBELs are more specific and proscriptive, and, if anything, more stringent than the previous general prohibition against discharging in excess of any limitation necessary to meet the District WQS. Exhibit 4, Response to Comments, pages 10-11. Therefore, EPA believes that the new numeric WQBELs do not trigger the anti-backsliding prohibition under the CWA.

Even if this limit is less stringent than the previous one, which it is not, it meets the exception for backsliding under Section 303(d)(4)(A). That Section of the CWA provides that in waters not meeting applicable standards, an effluent limitation based on a total maximum daily load (TMDL) or other waste load allocation (WLA) may be revised if the cumulative effect of all such TMDLs or WLA will assure the attainment of such WQS. 33 U.S.C. §1313(d)(4)(A). The record indicates that the more specific limits in the revised Permit are consistent with the applicable TMDLs. See Exhibit 3, April 5, 2007 Fact Sheet, page 4; Exhibit 4, April 5, 2007 Response to Comments, pages 11-12; Exhibit 8, Region III Memorandum to the File on WASA LTCP Water Quality Standards (discussion of the consistency between the modeling for the LTCP and the applicable TMDLs); Exhibit 17, August 28, 2003 Letter from District DOH to Region III (finding that overall the remaining overflows after implementation of the LTCP will meet the District WQS in all receiving waters and finding that the LTCP is consistent with the relevant TMDLs); Exhibit 6, November 3, 2004 DOH Memorandum (including analysis of LTCP compliance with TMDLs and concluding that the volume of CSO remaining after implementation of the LTCP will not

cause or contribute to a water quality standard violation), see pages 4-5; and Exhibit 7, November 4, 2004 DOH Legal Memorandum (also finding that the August 28, 2003 certification of the LTCP is legally sufficient).

3. The Water-Quality Based Requirements for CSO Discharges Fully Comply with CWA Section 301 (b)(1)(C) and Applicable Regulations.

FoE/SC argues that the Permit does not contain effluent limitations as stringent as necessary to meet applicable WQS. On the contrary, the record reflects that it does.

The permit contains WQBELs that are as stringent as necessary to meet applicable WQS, as required by CWA Section 301(b)(1)(C) and EPA's implementing regulations at 40 C.F.R. § 122.4(d) (providing that no NPDES permit may be issued "when the imposition of conditions cannot ensure compliance with the applicable water quality standards of all affected states") and 40 C.F.R. § 122.44(d)(1)(providing that NPDES permits must contain conditions necessary to achieve water quality standards).

There is no dispute that the water body is not currently attaining the District's WQS. The purpose of the LTCP is to provide a mechanism for achievement of WQS. As noted above, the Permit establishes WQBELs consistent with the numeric performance standards for the selected CSO controls in the LTCP.[24]

The Region has, in fact, based upon its own technical review of the LTCP, determined

[24]FoE/SC argues that the LTCP performance standards are not WQBELS, but a form of technology based limits, as, their derivation involved a balancing of cost technology and timing concerns. This is a new argument and therefore should be disregarded. In any event, this assertion is inconsistent with the CSO Policy, which identifies the Nine Minimum Controls as the technology-based limits and the LTCP as the measures needed to achieve compliance with the CWA. Exhibit 14, page 18691, col 2.

that implementation of the CSO controls set forth in the LTCP are adequate to achieve WQS. That information is set forth in detail in the record. See e.g. Exhibit 8, Region III Memorandum to the File on WASA LTCP Water Quality Standards discussion in preceding section, infra, and Exhibits 6, 7, 8, and 18. The Region made its determination based on its own evaluation of the technical information in the LTCP, as well as the conclusion by the DCDOH that the LTCP CSO controls are adequate to achieve District WQS - based upon DCDOH's evaluation of the technical information in the LTCP.

Recognizing that to some extent, decisions regarding the adequacy of CSO controls selected in an LTCP will be based upon predicted outcomes (e.g. estimates and modeling), the CSO Policy requires post-construction monitoring to verify the performance of the CSO Controls. CSO Policy, Section IV.2.d., 59 FR at 18696, col 2. The LTCP contains post-construction monitoring, which is reflected in requirements in the Permit. Moreover, the CSO Policy states that a Phase II permit should include a reopener clause, authorizing the NPDES permitting authority to reopen and modify the permit upon determining that the CSO controls fail to meet WQS or protect designated uses. Id. at Section V.2.g. The Permit contains such a reopener provision. See Exhibit 2, April 5, 2007 Final Modified Permit, page 20.

As anticipated by the CSO Policy, post construction monitoring and the reopener clause provide a backstop for agency action, should the LTCP CSO controls fail to perform as expected and should EPA determine that additional controls are necessary to achieve WQS.

As set forth above, Petitioner has failed to show that the Region's decision with regard to WQBELs for CSO discharges was based on either a clearly erroneous finding of fact or

conclusion of law or an exercise of discretion or an important policy consideration which the Board should, in its discretion review. Therefore, the petition for review of this issue should be dismissed.

IV. CONCLUSION

None of the three Petitioners has met its burden to show that any of the specific challenged portions of the Region's April 5, 2007 Permit decision was based upon a finding of fact or conclusion of law which is clearly erroneous. Nor have they shown that the Region's actions involve an exercise of discretion or an important policy consideration which the Board in its discretion should review. Accordingly, each of the Petitions for Review should be denied.

Respectfully submitted this 5th day of July 2007,

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Senior Assistant Regional Counsel
EPA, Region III

OF COUNSEL
Sylvia Horwitz
Office of General Counsel

EXHIBIT LIST FOR
REGION III's RESPONSE TO PETITION FOR REVIEW

1. Certified Index of the Administrative Record for District of Columbia Water and Sewer Authority Permit No. DC0021199, Final Permit Modification Issued April 5, 2007.

2. Permit No. DC0021199 issued April 5, 2007.

3. Fact Sheet, Permit No. DC0021199 issued April 5, 2007.

4. Regional Response to Comments (RTC) on August 18, 2006 and December 14, 2008 proposed permit modifications, issued on April 5, 2007.

5. District of Columbia Department of the Environment, Water Quality Division certification, pursuant to Section 401 of the CWA dated January 29, 2007, finding that the draft permit will not violate the District's water quality standards.

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.

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.

8. November 29, 2004 Region III Memo to File: WASA LTCP Water Quality Standards.

9. August 18, 2006 Draft Blue Plains Permit Modification.

10. August 18, 2006, Draft Fact sheet for Blue Plains Permit Modification.

11. December 14, 2006 Draft Blue Plains Permit Modification.

12. December 14, 2006 Draft Fact sheet for Blue Plains Permit Modification.

13. LTCP Consent Decree in Anacostia Watershed Society, et. al. v. District of Columbia

Water and Sewer Authority, et al, consolidated Civil Action No. 1:CV00183TFH (entered on March 25, 2005).

14. Combined Sewer Overflow Control Policy, April 19, 1994.

15. Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads. the collaborative process, Technical Tools and Innovative Approaches, December 2003 (Allocation Document).

16. Memorandum to the File: Basis of Proposed Nitrogen Limit for the Blue Plains WWTP, Robert Koroncai, Associate Division Director, Office of standards, Assessment and Information Management, Water Protection Division, February 15, 2007.

17. August 28, 2003 letter from James Collier, Bureau chief, Bureau of Environmental Quality, Environmental Health Administration, District Department of Health to Jon Capacasa, Director, Water Protection Division, USEPA Region III.

18. July 28, 2005 letter from Jon Capacasa, Director, Region III Water Protection Division, to Jerry Johnson, WASA General Manager.

19. Final Blue Plains permit Modification, December 16, 2004.

20. Final Fact Sheet December 16, 2004 Blue Plains Permit Modification.

21. Letter dated June 27, 2005 from Jon M. Capacasa, Director, Water Protection Division, US EPA Region 3, to Robert G. Burnley, Director, VA DEQ, regarding EPA's approval of the revised Virginia Water Quality Standards.

22. Letter dated February 15, 2006 from Donald S. Welsh, Regional Administrator, US EPA Region 3, to Gregg Payne, MD., Director, DC DOH regarding EPA's approval of the revised District of Columbia Water Quality Standards.

23. Letter dated August 29, 2005 from Jon M. Capacasa, Director, Water Protection Division, US EPA Region 3, to Kendl P. Philbrick, Secretary, MDE regarding EPA's approval of the revised Maryland Water Quality Standards.

CERTIFICATE OF SERVICE

I hereby certify that Respondent's July 5, 2007 Response to Petitions For Review of the April 5, 2007 Final Modified Permit No. DC0021199, Appeal Nos. 07-10, 07-11 and 07-12, was served on this date as set forth below:

The original and five copies were mailed by Federal Express to:

Ms. Eurika 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:

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