ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

PETITION FOR REVIEW

Pursuant to 40 C.F.R. §124.19, Friends of the Earth (FOE) and Sierra Club (collectively, "Petitioners") hereby petition the Environmental Appeals Board to review the final decision of the Regional Administrator, U.S. Environmental Protection Agency Region III (the Region) to modify NPDES permit No. DC0021199 (the permit) to the District of Columbia Water and Sewer Authority (WASA). The permit, last issued January 24, 2003, governs the discharge of municipal wastewater from the Blue Plains Wastewater Treatment Plant (Blue Plains) and the discharge of wastewater and stormwater from WASA's combined sewer system (CSS), located within the District of Columbia. Petitioners, as well as WASA, petitioned this Board for review of the January 24, 2003 version of the permit. After negotiations among the parties, the Region withdrew certain provisions of that permit and proposed a draft permit modification on March 19, 2004. The final permit modification ("the permit" or "final permit") was

signed by the Regional Administrator's delegee on December 16, 2004 and served on Petitioners via Federal Express (air bill dated December 16, 2004, for delivery December 17, 2004).

I. Interests of Petitioners

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

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

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

including, but not limited to, boating, sightseeing, hiking, wildlife watching, aesthetic enjoyment, and other recreational pursuits.

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

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

On Petitioners' behalf, Earthjustice filed timely comments with EPA during the public comment period on the permit. The comments were made by letter dated March 18, 2004, and are a part of the administrative record in this matter. Exhibit 1. Petitioners incorporate those comments herein by reference, as well as all items referenced in those comments. The issues presented below were raised in Petitioners' March 18, 2004 comments, and other documents referenced therein, except for those issues arising as a result of changes in the final permit.

II. Grounds for Review

A. Background

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

Two types of collection systems deliver wastewater flows to Blue Plains: 1) separate sanitary sewer systems in Maryland, Virginia and portions of the District, which collect only sanitary sewage; 2) a combined sewer system (CSS) within older portions of the District that collects both sanitary sewage and stormwater runoff in the same pipes. During rain events, the combined sewer system is often unable to handle the combined flow of sewage and rainwater. When this happens, sewage from the combined system is discharged directly to waters of the District without being treated at Blue Plains. Such combined sewer overflows (CSOs) occur at

CSO outfalls located variously along the Anacostia River, Potomac River, Rock Creek, and tributaries of the foregoing. There are 57 CSO outfalls specified in the permit. Collectively, more than three billion gallons of sewage overflows are discharged through these outfalls in an average year. WASA, Combined Sewer System Long Term Control Plan (July 2002) (hereinafter "LTCP"), at 6-2. These overflows contain untreated human sewage, with bacteria levels routinely reaching hundreds (and sometimes thousands) of times over safe levels.[1] Compare LTCP at 4-9 (showing fecal coliform counts often in excess of 900,000 n/ML) with 21 DCMR 1104.7 (showing fecal coliform limit of 200 n/ML in D.C. water-quality standards).

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

B. Issues

Petitioners appeal on the following grounds:

Water Quality-Based Requirements for CSOs

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

> 1. Except as otherwise specified below, the permittee shall not discharge any pollutant at a level which will cause, have the reasonable potential to cause, or

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

contribute to an excursion above District of Columbia water quality standards, including numeric or narrative criteria for water quality.

Petitioners' comments expressly supported inclusion of this clause, although they objected to the introductory clause ("Except as otherwise specified below") on the ground that there was no possible basis, consistent with the Clean Water Act, for allowing discharges that cause or contribute to water quality standards violations.

In the final permit modification, the Region substantially changed the above-referenced provision to read as follows:

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

The Region gave no explanation for this substantial change in language, other than to state that the permit had been revised "to set forth the applicable narrative conditions of the DC WQS." Fact Sheet at 16. The above-quoted language of the final permit ("final language") is arbitrary, capricious, and contrary to law for the following reasons.

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

Petitioners were denied a fair and legally sufficient opportunity to comment on the permit because the final language deviated materially and substantially from the proposal in a way that was not reasonably foreseeable. While the proposal prohibited any discharges that will cause or have the reasonable potential to contribute to any excursion above any numeric or narrative DC water quality standard, the final language references only certain narrative DC water quality standards. No where in the proposed permit, the

fact sheet therefor, or the public notice did the Region state or suggest in any way that it was considering such a substantial change. Had petitioners known that the Region was considering a change in Part III.E.1 that would limit the prohibition therein to certain narrative standards, they would certainly have objected for a variety of reasons, including those further set forth below. Other members of the public may have done so as well. For all these reasons, the Region did not provide adequate notice and opportunity to comment on the proposed permit modification, as required by the Clean Water Act and EPA rules. 40 C.F.R. § 124.10; In re Government of the District of Columbia Municipal Separate Storm Sewer System, 10 E.A.D. 223 (EAB 2002)(holding that change in monitoring location required permit modification preceded by public notice and comment). For the same reasons, the Region unlawfully deprived petitioners and other members of the public of their right to adequate notice and opportunity to comment on the proposed permit modification. See National Mining Assn' v. Mine Safety & Health Admin., 116 F.3d 520, 530-32 (D.C. Cir. 1997)(vacating final agency action that was not a logical outgrowth of proposal: public notice and opportunity to comment inadequate where interested parties could not reasonably have anticipated final rulemaking from the draft).

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

the procedures in 40 C.F.R. §124.14(b), and either issue a new draft permit or reopen the comment period on the initial proposal. The Region failed to follow the procedures specified in 40 C.F.R. §124.14(b) here.

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

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

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

The most immediate previous permit for this discharger was the one issued effective February 25, 2003. The comparable effluent limit in that permit appeared in part III.C.1., and provided as follows:

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

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

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

As the Region acknowledges, CSO discharges covered by the permit cause or contribute to, or have the reasonable potential to cause or contribute to violations of D.C. water quality standards. EPA Region 3, Response to Comments, December 16, 2004, NPDES Permit Number DC0021199, at 20-21. Data cited in the WASA's Long Term Control Plan (LTCP) show that these CSO discharges repeatedly cause or contribute to violations of the District's numeric water quality standards for bacteria, dissolved oxygen, suspended solids, and other parameters. Moreover, the CSO discharges plainly violate the District's narrative standard in 21 DCMR 1104.3, which directs that "Class A waters shall be free of discharges of untreated sewage" and of litter.[2] They also violate the District's narrative standards in 21 DCMR 1104.4, which requires that the aesthetic qualities of Class B waters be maintained, and 21 DCMR 1104.5, which requires that Class C streams be maintained to support aquatic life.

Pursuant to 33 U.S.C. §1311(b)(1)(C), the permit must contain any effluent limitations necessary to meet D.C. water quality standards. Pursuant to 40 C.F.R. §122.4(d), permit conditions must "ensure" compliance with applicable water quality requirements. Pursuant to 40 C.F.R. §122.44(d), the permit must contain any requirements necessary to achieve state water quality standards, including narrative criteria. The final permit here fails to meet these requirements because it does not contain effluent limitations adequate to assure compliance with: a) the District's numeric water quality criteria for bacteria, dissolved oxygen, suspended solids, and other parameters; b) the District's narrative criteria in 21 DCMR 1104.3, 1104.4 and 1104.5;

c) the District's designated uses for its waters, and its related antidegradation rules, all of which are integral parts of the District's standards.

These deficiencies are not excused merely because the final language references one of the District's narrative standards (21 DCMR 1104.1) and requires the permittee to comply with certain effluent limits derived from various TMDLs. The Region made no finding or demonstration that these limited provisions would be sufficient to assure compliance with all of the District's numeric and narrative standards, nor would the record support such a finding or demonstration. As noted above, the District has several narrative standards in addition to 21 DCMR 1104.1, and the plain language of those standards as well as settled rules of statutory construction bar the Region from assuming that these additional narrative standards are merely duplicative. Likewise, there is no finding or demonstration in the record that compliance with the TMDLs referenced in the permit will assure compliance with all of the District's numeric and narrative standards. In addition, as further discussed below, the TMDL-related limitations are themselves so flawed as to not provide legally sufficient limits on the CSO discharges at issue here. Further, TMDLs have not yet even been adopted for the Potomac River.

4. The final language is arbitrary and capricious, and the Region failed to provide a rational or legally sufficient explanation therefor

The Region's action in adopting the final language was also arbitrary and capricious, because the Region has failed to articulate a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983). No where did the Region offer any

[2] Pursuant to 21 DCMR 1101.2, all of the D.C waters that receive CSO discharges are designated "Class A."

explanation, much less a rational one, as to why it picked only one of the District's narrative standards for protection under Part III.E.1 of the permit, or why a rollback was warranted from the broader water quality standards language in both the proposal and the previous permits. Nor did the Region explain why or how the limitations it did include in the permit would be sufficient to assure compliance with all of the District's numeric standards. For all these reasons, the Region's action does not withstand arbitrary and capricious review. Id. See also Professional Pilots Ass'n v. FAA, 118 F.3d 758, 763 (D.C. Cir. 1997) (the "agency must have offered a reasoned explanation for its chosen course of action"); Appalachian Power Co. v. FERC, 101 F.3d 1432, 1438 (D.C. Cir. 1996) (reversed based on "gap in the Commission's reasoning").

The Region's failure to explain why it changed the final language from the version in the proposed permit further violates 40 C.F.R. §124.17(a)(1). That provision requires the Region to "[s]pecify which provisions, if any, have been changed in the final permit decision, and the reasons for the change." Here, the Region gave no reasons whatsoever for changing the Part III.E.1 language in the final permit.

5. The TMDL-related effluent limits are legally insufficient, arbitrary and capricious

a. load per average year and determination of compliance:

As the permit and fact sheet acknowledge, the District and EPA have established TMDLs and associated CSO wasteload allocations (WLAs) for a variety of pollutants in the Anacostia River, Rock Creek, and tributaries thereto. EPA rules expressly require that the permit contain effluent limits that are consistent with the assumptions and requirements of EPA-approved or adopted WLAs. 40 C.F.R. §122.44(d)(1)(vii)(B).

Moreover, to comply with 33 U.S.C. §1311(b)(1)(C) and 40 C.F.R. §§122.4(d) & 122.44(d) – which require the permit to ensure compliance with water quality standards -- the permit must contain effluent limits that assure compliance with the WLAs, because compliance with the TMDLs and WLAs is necessary to assure compliance with water quality standards.

The permit here does not meet these requirements. Although the permit contains TMDL-related effluent limits, those limits are not expressed in a manner that ensures consistency with the WLAs or compliance with water quality standards. Almost all of the TMDL-related effluent limits are framed in terms of "lbs/average year." The permit, however, does not specify how the actual "lbs/average year" discharged from WASA's CSOs are to be calculated for purposes of determining compliance with the TMDL-related limits. For example, part III.E.2.of the permit limits Biochemical Oxygen Demand (BOD) from CSOs on the Anacostia to 152,906 pounds per average year from all of the CSO outfalls on the Anacostia collectively. However, the permit does not specify how the "pounds per average year" of BOD actually discharged by these CSOs is to be calculated, or how compliance is to be determined. The permit does not explain what constitutes an "average" year, or what the limit is in a non-average year.[3] Nor does it provide any guidance whatsoever as to how and where compliance with this load limit is to be measured. Part III.E.3 of the draft permit requires twice per year monitoring of BOD at two Anacostia outfalls "[i]n order to measure compliance with TMDL derived limits," but no where does the permit explain how the results of this limited monitoring

[3] The Region's response to Petitioners' comments shed no more light on this question. The Region states that the average annual load limits were based on simulations modeled for 1988, 1989 and 1990. Although this may be how the limits were developed, it provides no explanation as to how compliance with the limits will be determined in the real world.

can or will illustrate compliance, noncompliance, or consistency with the "lbs/average year" limits in the permit – which apply collectively to all of the CSO outfalls on the Anacostia. Without such details, the permit does not assure consistency with the WLAs or compliance with water quality standards as required by 33 U.S.C. §1311(b)(1)(C) and 40 C.F.R. §§122.4(d) and 122.44(d).

The TMDL-related effluent limits are also arbitrary and capricious because the Region failed to rationally explain how they assure consistency with the WLAs or compliance with water quality standards. In response to petitioners' comment that the permit failed to explain how compliance with the "pounds per average year" limits would be determined (given the lack of any explanation as to how compliance with an "average year" limit could be gauged in a "non-average" year, or how monitoring at only 2 outfalls would show the wasteload from all CSO outfalls) , the Region merely asserted that if CSO wasteloads exceeded the WLAs in a wetter-than-average year, the Region "would evaluate why," and "there may be a violation of the permit." Response to Comments at 10. The Region then asserted that it might use its enforcement discretion not to enforce the TMDL-related limits in a wetter-than-average year. Id. These statements are completely unresponsive to the concerns raised by petitioners, and fail to rationally support the effluent limitations. Instead, they show that the Region is wholly unable to explain how compliance with these WLAs will be determined in a non-average year.[4] Nor did the Region offer any explanation as to how data from only 2 CSO outfalls

[4] In the Response to Comments, the Region appears to have taken the position that, in a drier than average year, the permittee will be deemed in compliance with the WLAs as long as actual loadings are lower than the "pounds per average year" limits in the permit. That position is arbitrary and capricious, because no where do the TMDLs or WLAs themselves so state. Further, allowing the full "average year" load in a drier than average year plainly would not assure compliance with water quality standards because there would be less river flow to absorb the load. The Region fails to offer any explanation as to how the river can absorb the same load in a very dry year as it can in an average year and still meet standards.

per river can show compliance or noncompliance with the WLA for all outfalls on the river.[5]

The Region's failure to adequately explain or justify the TMDL-related limits, and its failure to provide meaningful responses to petitioners' comments render its action arbitrary, capricious, and violative of EPA rules. 40 C.F.R. §124.17(a)(2). See Professional Pilots Ass'n v. FAA, 118 F.3d 758, 763 (D.C. Cir. 1997) (the "agency must have offered a reasoned explanation for its chosen course of action, responded to 'relevant' and 'significant' public comments, and demonstrated that it afforded adequate consideration to every reasonable alternative presented for its consideration")(internal citations omitted); American Mining Congress v. United States E.P.A., 907 F.2d 1179, 1191 (D.C. Cir. 1990) (remanding to agency where agency did not "respond with sufficient clarity or specificity to the petitioners' admittedly significant challenges").

b. Failure to set outfall specific limits

Petitioners' comments on the proposed permit argued that the Region must set outfall specific loading limits to implement the WLAs. In response, the Region asserted that outfall-specific monitoring would be unnecessary because the 2 outfalls selected for monitoring on each river are "representative" and additional monitoring would impose "unnecessary costs." RTC at 12. This statement is not only unresponsive to petitioners' comment (which called for outfall specific effluent limits, not just monitoring), but also ignores EPA's own rules, which expressly mandate outfall-specific effluent limits:

[5] The Region stated that the 2 outfalls were "representative" and that total loads could be "estimated," but these bare assertions simply beg the question as to *how* the data from 2 outfalls can or will be translated into an accurate measure or estimate of the collective load discharged from all outfalls. The permit lists 17 CSO outfalls on the Anacostia, and 29 on Rock Creek.

> All permit effluent limitations, standards and prohibitions **shall be established for each outfall or discharge point** of the permitted facility, except as otherwise provided under Sec. 122.44(k)(BMPs where limitations are infeasible) and paragraph (i) of this section (limitations on internal waste streams).

40 C.F.R. § 122.45(a)(emphasis added). Neither of the exceptions applies here: Accordingly, the Region's failure to set outfall specific loading limits violates EPA rules. Further, outfall specific loading limits are necessary to assure compliance with water quality standards and consistency with the WLAs, as mandated by 33 U.S.C. §1311(b)(1)(C) and 40 C.F.R. §§122.4(d) & 122.44(d). By limiting the total loading allowed from each outfall, the permit would assure that the total WLA for all outfalls would be met at all times. In contrast, the Region has offered no rational explanation as to how compliance with such WLAs can be assured absent specific limits on loadings from each outfall.

Petitioners contend that the Act required EPA to set outfall specific WLAs when it first adopted the TMDLs at issue here. Under EPA rules, a TMDL is "[t]he sum of the *individual* WLAs for point sources and the LAs [load allocations] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i) (emphasis added). A wasteload allocation is "[t]he portion of a receiving water's loading capacity that is allocated to *one* of its existing or future point sources of pollution." Id. §130.2(h)(emphasis added). Under the Act, each CSO outfall is a "point source" – i.e., a "pipe," "conduit," or other "discernable, confined and discrete conveyance." CWA §502(14). Thus, EPA rules require that TMDLs assign a specific WLA to each CSO outfall. Petitioner Friends of the Earth (FOE) is so arguing in separate litigation challenging, among other things, EPA's failure to set outfall specific WLAs when it adopted the TMDLs at issue here. Friends of the Earth v. EPA, No. 04-92 (D.D.C. 11-29-04). Although the District Court issued a

decision in that case (*id.*) disagreeing with FOE on this point, FOE is currently appealing that decision. Friends of the Earth v. EPA, No. 05-500 (D.C. Cir).

In any event, the Region's refusal to set outfall specific limits in the permit here conflicts with EPA's stated position in the above-referenced court proceedings. There, in arguing that outfall specific WLAs were unnecessary, EPA represented to the court that the WLAs at issue here would be implemented by requiring outfall-specific percentage reductions in loadings. Exhibit 2. Indeed, in the draft permit here, the Region proposed to require percentage reductions in loads, but inexplicably dropped that requirement in the final permit. The inconsistency in Region's position, and its failure to offer a reasoned explanation therefor, are further grounds for finding the Region's final permit action here arbitrary and capricious. Missouri Pub. Svc. Commn. v. FERC, 337 F.3d 1066 (D.C. Cir. 2003) (unexplained change of position was arbitrary and capricious).

c. Failure to require sufficient monitoring

The permit must require monitoring that will "assure compliance with permit limitations." 40 C.F.R. §122.44(i)(1). EPA rules further require monitoring of "the volume of effluent discharged from *each* outfall." 40 C.F.R. §122.44(i)(1)(ii) (emphasis added); see also 40 C.F.R. §122.48. The permit does not meet these requirements with respect to the TMDL-derived limitations. As noted above, the permit requires only twice per year monitoring at 2 outfalls per river, and plainly does not require monitoring of the volume of effluent discharged from each outfall. Such limited monitoring provisions do not comply with 40 C.F.R. §122.44(i)(1)(ii) and are not sufficient to assure compliance with WLAs that are set as load limits for all CSO outfalls collectively on each river. The

Region has provided no rational explanation demonstrating otherwise, nor is there any evidence in the record to support such a demonstration.

The inadequacy of the permit's monitoring provisions is further apparent from the face of the permit itself. For example, the permit sets loading limits for lead and other parameters in the Upper Anacostia, but requires no compliance monitoring at all in the Upper Anacostia – only in the Lower Anacostia. The Region provides no basis for concluding that monitoring in the Lower Anacostia will or can be sufficient to determine compliance with a TMDL for the Upper Anacostia. Nor does the Region provide any basis for concluding that twice per year monitoring at only two outfalls will or can be sufficient to determine compliance with WLAs even in the Lower Anacostia, or in Rock Creek. In the absence of any showing that the monitoring required in the permit will indeed assure compliance with all of the TMDL-derived limits, the permit's monitoring provisions do not comply with EPA rules, and are arbitrary and capricious.

Petitioners' comments specifically challenged the adequacy of the permit's monitoring provisions, citing 40 C.F.R. §122.44(i)(1) and explaining why monitoring only 2 locations per river on a twice per year basis did not assure compliance with the WLAs. As noted above, the Region's only response was to assert that the chosen monitoring locations were representative, and that – through some unexplained and unidentified method – total loadings could be estimated. That response -- consisting of a bare, unsupported assertion - fails to adequately address petitioners' comments or supply the type of reasoned explanation required to withstand arbitrary and capricious review. See Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855 (D.C. Cir. 2001) (agency must demonstrate relevant point with substantial evidence -- not mere assertions);

Professional Pilots Ass'n v. FAA, 118 F.3d at 763; American Mining Congress v. United States E.P.A., 907 F.2d at 1191.

Conclusion

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

DATED this 18th day of January, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review were served on each of the following by first-class mail, postage prepaid, on January 18, 2005:

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Exhibit 1

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RE: Public Notice ML33 (03/19/2004) – Proposed modification of NPDES permit for Blue Plains Wastewater Treatment Plant

We have the following comments on the above-referenced proposal, and on the District of Columbia's proposed certification thereof under §402 of the Clean Water Act:

1. Long Term Control Plan: Part III.C.A.1. of the draft permit refers to the "LTCP" without referencing a specific version of the plan. To ensure clarity, the permit should provide such a specific reference (i.e., District of Columbia Water and Sewer Authority, Combined Sewer System Long Term Control Plan, Final Report, July 2002). Also, the same subparagraph states that the LTCP facilities are "principally" comprised of diversion structures, a system of underground storage tunnels, pumping stations and outfall structures. Although the proposed facilities do include these items, they also include targeted sewer separation, low impact development, outfall elimination, and other measures. Rather than attempting to characterize which plan components are the "principal" ones, the permit should simply reference the pages of the LTCP that set out the plan components: pps. 13-1 to 13-17. Alternatively, the relevant sentence should be revised to read as follows: The LTCP facilities for controlling discharges to the above named receiving waters ~~are principally comprised of~~ include, among other things, diversion structures, a system of underground storage tunnels, [etc.].

Footnote 4 of subparagraph III.C.A.7.b. requires clarification. Does the footnote mean that the diversion capacities from the referenced outfalls have previously been

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estimated based on computer modeling, or that compliance with these capacities after LTCP completion will be determined by computer modeling? If it is the latter, then we question the sufficiency of modeling alone to determine that the specified diversion levels are in fact being achieved.

Subparagraph III.D provides for Phase 2 monitoring "[f]ollowing the placement in operation of the Anacostia, Rock Creek and Potomac Storage tunnels," and for phase 3 monitoring "[f]ollowing the placement in operation of the complete CSO tunnels storage system." The apparent (and correct) intent of these provisions read together is to require phase 2 monitoring to begin as each of the tunnels comes on line, and phase 3 monitoring after all of the tunnels are on line. That is, phase 2 monitoring on the Anacostia must commence as soon as the Anacostia tunnels are operational – it cannot be deferred until the Rock Creek and Potomac tunnels are on line. Such an approach is appropriate because the LTCP proposes building these tunnels sequentially rather than all at the same time. There is no reason to defer phase 2 monitoring on the Anacostia until the Rock Creek and Potomac tunnels are done, and indeed such a deferral would only delay collection of crucial information on whether the Anacostia tunnels are performing as expected. We ask the Region to confirm that the above reading correctly reflects the intent of part III.D. of the permit. To further clarify the permit on this score, we urge EPA to amend the relevant language in the first paragraph of part III.D as follows:

Phase	Post Construction Condition
1	Following the placing in operation of the inflatable Dams and pumping stations Rehabilitation
2	Following the placement in operation of the Anacostia, Rock Creek and Potomac Storage tunnels respectively, as each tunnel is placed in operation.

2. Water Quality-Based Requirements for CSOs: We support the inclusion of Part III.E.1 in the draft permit, but the introductory clause ("Except as otherwise specified below") must be deleted. Nothing that is "specified below" Part III.E.1. could lawfully justify or authorize the discharge of any pollutant at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above DC water quality standards. The permit must prohibit all such discharges pursuant to 33 U.S.C. §1311(b)(1)(C) and 40 C.F.R. §122.4(d) and 122.44(d). Moreover, the addition of the "Except as otherwise provided clause" violates the antibacksliding provisions of the Clean Water Act and EPA's rules. Accordingly, Part III.E.1 must be revised as follows:

1. ~~Except as otherwise specified below, t~~ 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.

For the same reasons, we object to the introductory clause of the last sentence of part 10.C. of the Draft Fact Sheet, to the extent it is meant to imply that the prohibition on causing or contributing to excursions above D.C. water quality standards only applies "where TMDLS have not been established." The fact that TMDLs have been adopted does not somehow authorize the discharge of pollutants at a level which will cause, have the reasonable potential to cause, or contribute to an excursion. Nor do the TMDLs by themselves assure that such excursions will not occur, particularly where those TMDLs address only annual loadings (see part 2.b below).

We support the inclusion of TMDL-derived effluent limits in Part III.E.2, but these provisions require clarification and modification to comply with the Clean Water Act and EPA rules, as follows:

a. average annual load and determination of compliance: Almost all of the TMDL-related effluent limits are framed in terms of total "average annual" loads, and/or percentage reductions in "average annual" loads. The permit, however, does not specify how "average annual" loads are to be calculated. For example, part II.E.2.d. requires the anticipated average annual load of biochemical oxygen demand (BOD) from CSOs in the Anacostia to be reduced by 90.3%, to not greater than 152,906 pounds per year, but does not specify how the annual average load actually produced by CSOs is to be calculated, or how compliance is to be determined. Does" average annual" refer to the average of various loadings measured at different times over the year? How and where is compliance with this load limit (and/or with the 95% reduction requirement) to be measured? Part III.E.3 of the draft permit requires twice per year monitoring of BOD at two Anacostia outfalls "in order to measure compliance with the TMDLs," but no where does the permit explain how the results of this limited monitoring can or will illustrate compliance or noncompliance with the annual average TMDL, or with the percentage reduction requirement. Without such details, the permit does not assure compliance with water quality standards as required by 33 U.S.C. §1311(b)(1)(C) and 40 C.F.R. §§122.4(d) and 122.44(d).

We have the same concerns with respect to all of the other effluent limit provisions in Part III.E.2. of the permit. Virtually all of them set limits on annual average loadings of specified pollutants from CSOs without specifying how compliance will be determined: e.g., how the annual average of loadings actually discharged in a given year or percentage reductions in loadings will be measured for purposes of assessing compliance with the loading limits in the permit. As noted above, twice per year monitoring at 2 outfalls will not by itself provide information on average annual loads. If EPA is proposing to translate or extrapolate this monitoring data into estimated average annual loadings, the permit needs to explain how this will be done, and EPA needs to offer reasoned support for such an approach. The reasoned support must justify not only

the method for determining annual loads, but also the adequacy of the required monitoring to determine such loads. For example, the permit sets an annual average loading limits for total suspended solids in the Upper Anacostia, but requires no compliance monitoring at all in the upper Anacostia. EPA provides no basis for concluding that monitoring in the Lower Anacostia will or can be sufficient to determine compliance with a TMDL for the Upper Anacostia. The permit must require monitoring that will "assure compliance with permit limitations." 40 C.F.R. §122.44(i)(1). In the absence of any showing that the monitoring required in the draft will indeed assure compliance with annual average TMDLs, the draft permit's monitoring provisions do not comply with this requirement.

We contend that the permit must establish outfall-specific loading limits and require sufficient monitoring to determine whether such limits are being met. The permit provides neither, and therefore does not comply with 33 U.S.C. §1311(b)(1)(C), and 40 C.F.R. §§122.4(d), 122.44(d).

In addition, several of the TMDL-derived limits refer to reductions in the "anticipated" average annual load. This reference is unlawful to the extent it suggests that compliance can be determined by merely predicting the anticipated or expected annual load. Under the Clean Water Act and EPA rules, effluent limits must be expressed in a way that assures actual compliance with standards, not merely predicted or anticipated compliance. The word "anticipated" must therefore be deleted wherever it appears in part III.E.2.

b. Need for Daily Loads: As we have repeatedly stated in comments on proposed TMDLs for D.C. waters, annual and seasonal load limits are not sufficient to assure compliance with water quality standards. Our reasons for so contending are set forth in detail in those comments, which we incorporate herein by reference.[1] We also explained

[1] The comments incorporated herein by reference include the following: a) Memorandum dated 10/17/00 from Howard Fox, Earthjustice, to Christine Moss, District of Columbia Department of Health, re: Anacostia Watershed Society Comments on August 2000 Draft BOD TMDL for the Anacostia River (including memorandum attached thereto dated 10/16/00 from Jack Douglas Smith, Ph.D., to Howard Fox); b) Letter dated April 17, 2001, from Howard Fox, Earthjustice, to Mary Beck, EPA Region III, re: District of Columbia, Department of Health, Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River, District of Columbia, Biochemical Oxygen Demand, March 2001 (including memorandum attached thereto dated April 17, 2001 from Howard Fox to Christine Moss, D.C. Department of Health); c) Memorandum dated November 6, 2001 from Howard Fox, Earthjustice, to Mary Beck, EPA Region III, re: BOD TMDL for the Anacostia River (including memo attached thereto dated 11-6-01 from Jack Douglas Smith to Howard Fox); d) Letter dated November 26, 2001 from Howard Fox, Earthjustice, to Jerusalem Bekele, D.C. Department of Health, re: October 2001 Draft TSS TMDL for the Anacostia River (including memo attached thereto dated November 26, 2001 from Jack Douglas Smith to Howard Fox); e) Memo dated February 4, 2002 from Howard Fox, Earthjustice, to Lenka Berlin, EPA Office of Watersheds (EPA Region III), re: Comments on EPA January 4, 2002 TSS TMDL for the Anacostia River (including memo attached thereto dated Feb. 1, 2002 from Jack Douglas Smith to Howard Fox); f) Memo dated February 6, 2002 from Howard Fox, Earthjustice, to Mary Beck, EPA region III, re: Comments on D.C. January 4, 2002 TSS TMDL for the Anacostia River (including attached memo dated February 6, 2002 from Jack Douglas Smith to Howard Fox); g) Memorandum dated March 31, 2003 from Howard Fox, Earthjustice to Jerusalem Bekele, D.C. Dept of Health, re: 2003 D.C. TMDL Comments, addressing TMDLs announced at 50 D.C. Reg 1926,(February 28, 2003 (including 2 attached memos both dated

why daily loads are required in our opening and reply briefs in Friends of the Earth v. EPA, No. 02-1123 (D.C. Cir., final briefs filed 2-21-2003), also incorporated by reference. Because the draft permit does not include daily loading limits for the pollutants addressed in part III.E.2 of the draft, or monitoring requirements sufficient to ensure compliance with daily limits, it likewise fails to assure compliance with water quality standards, and therefore does not comply with 33 U.S.C. §1311(b)(1)(C), and 40 C.F.R. §§122.4(d), 122.44(d).

These comments are submitted on behalf of Sierra Club and Friends of the Earth.

Sincerely,

David S. Baron
Attorney

March 30, 2003 from Jack Douglas Smith to Howard Fox re: Draft TMDL for Fecal Coliform Bacteria in the Anacostia River and Tributary Streams, and re: draft TMDLs for Organics and Metals in the Anacostia River and Tributary Streams ; h) Memo date April 30, 2003 from Howard Fox, Earthjustice, to Jerusalem Bekele, D.C. Dept. of Health, re: 2003 D.C. TMDL Comments, addressing TMDLs announced at 50 D.C. Reg. 2398, March 21, 2003; i) Memo dated December 1, 2003, from Howard Fox and David Baron, Earthjustice, to Jerusalem Bekele, D.C. Dept. of Health, re: 2003 D.C. TMDL Comments, addressing TMDLs announced at 50 D.C. Reg. 9291, October 31, 2003 (including memos attached thereto dated November 21, November 23, and November 24, 2003 from Jack Douglas Smith to Howard Fox, re; (respectively) Draft TMDL for Fecal Coliform Bacteria in Rock Creek; Draft TMDL for Fecal Coliform Bacteria in the Potomac River; and Draft TMDLs for Organics and Metals in Rock Creek Tributaries; j) Memorandum dated February 23, 2004, from Howard Fox, Earthjustice, to Jerusalem Bekele, D.C. Dept. of Health, re: Rock Creek Toxics TMDL Comments, addressing TMDLs announced at 51 D.C. Reg. 1041 (January 23, 2004)(including attachments).

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and MICHAEL O. LEAVITT, Administrator United States Environmental Protection Agency Defendants.	Case No. 04-92 (RMU) Judge Ricardo M. Urbina

EPA'S COMBINED MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND INCORPORATED MEMORANDUM OF LAW

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June 17, 2004

turbidity in the Anacostia River and because any impact on turbidity that may be caused by nutrients would be adequately reduced through implementation of the nitrogen and phosphorus loads stated in the BOD TMDL. TSS TMDL Report (TSS-1), at 10 (JA 689); TSS Response to Comment # 17 (TSS-2), at 3 (JA 745). Plaintiff's objection to the TSS TMDL is premised on flaws it perceives in the BOD TMDL. Plaintiff's Br. at 34. As shown above, however, the BOD TMDL in fact allocates loads to nutrients; therefore, all of Plaintiff's arguments on this point are based on an inaccurate premise (see Plaintiff's Br. at 34-35), and thus fail to demonstrate error.

IV. EPA's Decision To Establish Or Approve TMDLs With Wasteload Allocations Expressed In The Form Of A Specific Percent Reduction For Each Category Of Sources Was Reasonable.

Plaintiff incorrectly argues that the TMDLs are unlawful and arbitrary because they fail to establish waste load allocations for individual sources. Plaintiff's Br. at 35-37. In fact, the TMDLs at issue here contain such individual wasteload allocations.

First, the TSS TMDL identifies the segment by segment allowable loads and individual wasteload allocations for each regulated point source. TSS TMDL Report (TSS-1), at 35, Table 8-1 (JA 714). Similarly, the BOD TMDL identifies the segment by segment allowable load and individual wasteload allocations. BOD Decision Rationale (BOD-1), at 22-23, Table 12 (JA 635-36).

Second, and moreover, both the BOD and TSS TMDLs express their wasteload allocations in the form of a percent reduction from calculated current loads. BOD TMDL Report (BOD-20), at 5, 12 (JA 388, 395); TSS TMDL Report (TSS-1), at 27, 29, 32-33, Appendix C (JA 706, 708, 711-12, 732-42). The TSS TMDL calls for 77% reduction from all sources and source categories. TSS Decision Rationale (TSS-1), at 7 (JA 669); TSS TMDL Report (TSS-1), at 32, 33, 36 (JA 711,

712, 715). The BOD TMDL calls for different percentage reductions from different source categories, as follows: 90% BOD reductions from combined sewer overflow sources and, from storm water sources, 50% reduction in BOD and 30% for nutrients (not including the margin of safety). BOD TMDL Report (BOD-20), at 9, 11-12 (JA 392, 394-95).[10/] Each individual source within these source categories is subject to the specified percent reduction for that source category. As EPA explained in the context of BOD, "As the source of all storm water loads [is] the same, i.e., wash off from land surfaces, it is appropriate to require the same percent reduction for BOD, nitrogen, and phosphorus loads." BOD Decision Rationale (BOD-1), at 22 (JA 635); see TSS TMDL Report (TSS-1), at 35 (JA 714) (noting reductions to "all sources"), 36 (JA 715) (noting that if "all source concentrations" achieve the 77% reduction, then EPA expects the water quality standard for TSS to be achieved). Moreover, the TSS TMDL includes a table (similarly applicable to the BOD TMDL) that identifies the precise location of 35 combined sewer overflow sources or storm water outfall points by segment and even stream bank orientation. TSS TMDL Report (TSS-1), Appendix B (JA 728-31). In order to translate the percent reduction allocations to source-specific pounds, one would only need to (a) determine the source's current discharge level, (b) determine what category that source is in (e.g., combined sewer overflow or storm water), (c) look up the percentage reduction for that category, and (d) do the math. The absence of this last ministerial step in the BOD and TSS TMDLs thus has no practical significance.

[10/] A percent reduction applied to each source is a reasonable way to express an individual waste load allocation under the circumstances we have here, where the data for individual NPDES-regulated sources is co-mingled with data for non-regulated storm water sources. TSS TMDL Report (TSS-1), at 32 (JA 711); BOD Decision Rationale (BOD-1), at 22 (JA 635).

EPA also considered the permitting implications of expressing wasteload allocations as a percent reduction per source: "For wet weather permitting purposes, an adequate measure of the allocated load would be to monitor individual pipes for flow and concentration to determine the event mean concentration to document conformance to this TMDL." BOD Decision Rationale (BOD-1), at 24 (emphasis added) (JA 637). Similarly, EPA said in the TSS TMDL: "Any DC NPDES permit reissued to discharge into the District's portion of the Anacostia River must be consistent with the [waste load allocations] set forth in this TMDL (expressed as percent reductions from 'existing' loads)." TSS TMDL Report (TSS-1), at 43 (emphasis added) (JA 722). In other words, neither TMDL deferred allocation issues to the permitting stage, as Plaintiff asserts. Plaintiff's Br. at 36-37.

For the foregoing reasons, EPA's decision to establish or approve TMDLs with wasteload allocations expressed in the form of a specific percent reduction applicable to each source within each category was reasonable and should be upheld.[11/]

[11/] Although the Court need not reach this issue, Plaintiff also incorrectly contends that EPA, as a matter of law, may not allocate waste loads to categories of sources, but must allocate loads to each individual point source. Plaintiff's Br. at 35-36. The regulatory language relied upon by Plaintiff for this point states that a TMDL is "[t]he sum of the individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and natural background." Plaintiff's Br. at 35 (quoting 40 C.F.R. § 130.2(i)). As previous courts have recognized, this regulation provides that EPA must set TMDLs based on the total discharges from all sources, but does not require the Agency to allocate a specific part of the total load to each individual point source. Dioxin/Organochlorine Center v. Rasmussen, No. C93-330, 1993 WL 484888, *5 (W.D. Wash. Aug.10, 1993) ("While a TMDL should consider all discharges of a pollutant, nothing in the relevant statute or regulations explicitly requires that a TMDL set waste load allocations for all point sources or load allocations for all nonpoint sources.").

Moreover, while a single "pipe" or other discrete conveyance may under certain circumstances constitute a relevant point source for regulatory purposes, in the municipal storm water context EPA

(continued...)

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

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

Regardless of which of the two above-reference permits is deemed to be the "previous" permit, the final language in the 2004 modification violates the anti-backsliding provisions of the Act and EPA rules. The previous permits broadly prohibited any discharges causing or contributing to violation of D.C. water quality standards, including both numeric and narrative standards. The final language requires compliance only with a limited set of narrative provisions in D.C. water quality standards, namely those set forth in 21 DCMR 1104.1. The final language makes no reference at all to the extensive numeric criteria set forth in the D.C. standards at 21 DCMR 1104.7, or to other narrative criteria in the D.C. standards, including 21 DCMR 1104.2, 1104.3, 1104.4, 1104.5 and 1104.6, to the District's antidegradation requirements at 21 DCMR 1102, or to the portions of the D.C. standards setting and requiring protection of designated uses.

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