

EXHIBIT 2

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD**

**DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY,**

Petitioner

In re: NPDES Permit No. DC0021199

NPDES Permit Appeal No. _____

PETITION FOR REVIEW

Pursuant to 40 C.F.R. § 124.19, the District of Columbia Water and Sewer Authority ("WASA") submits this Petition for Review ("Petition") to contest certain conditions in the December 16, 2004 modification to the above referenced NPDES Permit issued to WASA for the Blue Plains Advanced Wastewater Treatment Plant ("Blue Plains") and the District of Columbia's separate and combined sanitary sewer systems ("Permit").

WASA seeks review of a final determination by the United States Environmental Protection Agency, Region III ("EPA"), to modify the Permit to incorporate certain conditions governing WASA's combined sewer system. As explained below, the contested conditions are part of WASA's combined sewer overflow "Phase II" permit. WASA respectfully submits that the issues raised in this appeal present important policy considerations that the Board should review.

Copies of the modified Permit, the Fact Sheet, and EPA's Response to Comments accompanying the permit modification are attached to and incorporated in this Petition as Exhibit A. EPA issued the draft permit modification for public notice on March 19, 2004, and WASA submitted written comments on the draft permit modification on April 16, 2004. A copy of WASA's comments is attached to and incorporated in this Petition as Exhibit B.

INTRODUCTION AND BACKGROUND

A. Applicable Provisions of EPA's CSO Policy

The issues raised in this appeal call for an analysis of whether certain conditions included the combined sewer overflow "Phase II" portion of the December 16, 2004 permit modification conform to EPA's 1994 Combined Sewer Overflow Control Policy ("CSO Policy" or "Policy")¹.

The CSO Policy, which was incorporated into the Clean Water Act in 2000,²

represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives.

56 Fed. Reg. 18,688.

The Policy generally provides that communities with combined sewer overflows ("CSOs") must comply with the technology-based and water quality-based requirements of the Clean Water Act ("CWA"). The technology-based requirements for combined sewer systems ("CSS") are known as the Nine Minimum Controls ("NMCs"). The NMCs

¹U.S. EPA Office of Water, CSO Policy. EPA 830-B-94-001 (April 1994), 59 Fed. Reg. 18688 (Apr. 19, 1994)

²Clean Water Act § 402(q), 33 U.S.C. § 1342(q). Wet Weather Water Quality Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000).

consist of a wide variety of best management practices tailored to the site-specific characteristics of individual combined sewer systems, and are intended to reduce, to the extent possible, CSO pollutant loads pending development and implementation of Long Term CSO Control Plans ("LTCPs") that provide for compliance with the water quality-based requirements of the CWA. CSO Policy at II.B.

The Policy provides for compliance with the water quality-based requirements of the CWA through the development and implementation of LTCPs. CSO Policy at II.C. LTCPs consist of a number of elements, but their ultimate purpose is to identify the controls needed to prevent CSS discharges from causing or contributing to violations of applicable water quality standards. The CSO Policy allows communities to develop their LTCPs using either a "presumption" approach or a "demonstration" approach. CSO Policy at II.C.4. Communities selecting the presumption approach can choose from among three control alternatives which are "presumed" to meet water quality standards so long as the presumption is reasonable in light of the available data. CSO Policy at II.C.4.a. Communities selecting the demonstration approach must show through data collection and modeling performed during LTCP development that the selected controls are projected to meet water quality standards following LTCP implementation. CSO Policy at II.C.4.b. Under either approach, CSO communities must ultimately show through post-construction water quality monitoring and assessment that the CSO discharges remaining after LTCP implementation are not causing or contributing to violations of applicable water quality standards.

The Policy also establishes a two-phased permitting approach. CSO Policy at IV.B. Phase I permits are issued to CSO communities in the initial stages of their CSO

programs, and generally contain (1) requirements to implement the NMCs, and (2) schedules to develop and submit LTCPs to the permitting authorities. CSO Policy at IV.B.1. Phase II permits are issued to CSO communities following completion of their LTCPs and the permitting authority's determination that the LTCP meets the requirements of the selected approach. The CSO Policy calls for Phase II permits to contain the water quality-based requirements for the CSS based on the selected controls in the LTCP. CSO Policy at IV.B.2. These requirements and their specific application to WASA's CSS and LTCP are discussed in detail below.

B. WASA's Wastewater Collection and Treatment System

WASA is an independent authority of the Government of the District of Columbia. It was created in 1996 by the United States and the Government of the District of Columbia to provide drinking water to the residents of the District of Columbia and regional wastewater collection and treatment to citizens and businesses in the metropolitan Washington, D.C. area. Prior to 1996, both Blue Plains and the District's wastewater collection system were operated by the District of Columbia government.

WASA operates the wastewater collection and treatment system for the District of Columbia. Blue Plains serves portions of surrounding areas including suburban Virginia and Maryland in addition to the District of Columbia.³ The service area for Blue Plains covers approximately 735 square miles. Approximately one-third of the wastewater collection system in the District of Columbia consists of combined sewers, which convey both sanitary wastewater and storm water. The combined sewer system serves the central,

³ Blue Plains treats all of the wastewater generated in the District of Columbia, approximately 90 percent of the wastewater generated in Montgomery County, Maryland, approximately 50 percent of the wastewater generated in Prince George's County, Maryland, and approximately 15 percent of the wastewater generated in Fairfax County, Virginia.

older portions of the District and covers about 20 square miles. Approximately 66 percent of this area drains to the lower Anacostia River, with the remainder to the Potomac River and Rock Creek. There are 53 active CSO outfalls listed in the Permit. When the capacity of the combined sewer system is exceeded during storms, the combined excess flow, which is a mixture of wastewater and storm water, is discharged to the receiving streams through the CSO outfalls.

Blue Plains is designed to provide advanced wastewater treatment (complete treatment) and excess flow treatment during CSS flow (wet weather) conditions. Flow receiving complete treatment is discharged from Outfall 002 and flow receiving excess flow treatment is discharged from Outfall 001. The complete treatment facilities have capacity for an annual average flow of 370 million gallons per day ("mgd") and a four-hour peak rate of 740 mgd during wet weather conditions. After four hours of wet weather event peak flow, the complete treatment facilities have capacity for 511 mgd. The excess flow treatment facilities comprise primary treatment and chlorination and dechlorination with a capacity of 336 mgd that is discharged from Outfall 001. Outfall 001 is a wet weather outfall and discharges only when wet weather conditions exist.

C. WASA's Long Term CSO Control Plan

With financial assistance from EPA, and after implementation of an extensive monitoring and modeling program that was endorsed by EPA, local regulators and representatives of the environmental community, WASA completed its LTCP Final Report in July 2002 and submitted it to EPA and the District of Columbia Department of Health ("DOH") in early August 2002 for these agencies' review and approval.

WASA's LTCP was developed in strict accordance with the CSO Policy. During development of its LTCP, WASA characterized, monitored, and modeled its combined sewer system, considered sensitive areas, evaluated a wide range of control alternatives, and ultimately selected as its control program a separation, storage, conveyance, and treatment system under the "demonstration" approach discussed above.

The LTCP calls for the construction and operation of an extensive underground tunnel system that will capture combined excess flow during and following rainfall events. The LTCP also calls for use of wet weather capacity at Blue Plains to treat excess flow not captured by the tunnels. As wet weather flows to Blue Plains begin to recede following rainfall, capacity at the plant will be used to empty the tunnels. Approximately \$860 million in treatment plant and system upgrades are currently under design or construction, and when these upgrades are completed in 2008, Blue Plains is projected to have the capacity to treat a four-hour peak rate of 1076 mgd during wet weather events. When fully implemented, the selected controls in WASA's LTCP will reduce CSO discharges by approximately 96 percent over uncontrolled levels based on the average wet weather condition at an estimated cost of \$1.265 billion in 2001 dollars. CSO discharges will continue following LTCP implementation, but they will be few and far between.

As provided in the CSO Policy and its implementing guidances, WASA developed its LTCP and designed the selected CSO controls around average rainfall conditions. *See, e.g.*, CSO Policy at IV.B.2.c. CSO discharge and instream data collected during an extensive monitoring program were used with mathematical models of the CSS and CSO receiving waters to characterize the discharges from the CSS and their impacts

on the receiving waters. The models provide dynamic and continuous simulation of the CSO discharges and their water quality impacts. Based on review of 50 years of rainfall data, the years 1988, 1989, and 1990 were selected as representative of the climatic conditions for the wet weather events causing CSO discharges and their impacts on the receiving waters. Average design conditions were developed from these representative climatic conditions. The models and the average design conditions were then used by WASA for the LTCP.

As reflected in the fact sheet accompanying the permit modification, both EPA and DOH have found that following implementation of the selected controls in the LTCP, the remaining CSO discharges from WASA's CSS are not expected to cause or contribute to violations of the applicable District of Columbia water quality standards or contribute to impairment of the designated uses of the receiving waters. Fact Sheet at 15 (Exhibit A). As provided in the CSO Policy, however, this standards compliance determination must be confirmed through post-construction monitoring. CSO Policy at IV.B.2.d.

D. Total Maximum Daily Loads

Together, DOH and EPA have approved a number of total maximum daily loads ("TMDLs") which establish waste load allocations ("WLAs") for the CSO discharges from WASA's CSS. These include TMDLs for BOD, TSS, bacteria, oil and grease, and organics for the Anacostia River, TMDLs for organics and metals for Piney Branch, and TMDLs for organics, bacteria, and metals for Rock Creek. For purposes of this Petition, it is important to note that all of these TMDLs, with the exception of the Piney Branch TMDLs, were developed using the same data, models and average design conditions used

to develop WASA's LTCP. EPA and DOH have also determined that the selected controls in the LTCP will comply with the CSS WLAs in these TMDLs. Exhibit A to WASA Comments (Exhibit B); Fact Sheet at 15 (Exhibit A).

THE PHASE II PERMIT CONDITIONS

The CSO Policy lists seven requirements that should be included in Phase II permits. Policy at IV.B.2. Of these requirements, only the requirement at IV.B.2.c. is relevant to the issues raised in this appeal. This requirement states, in relevant part, that Phase II permits providing for implementation of the selected controls in LTCPs employing the demonstration approach should include

[w]ater quality-based effluent limits under 40 CFR 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 ...iv. performance standards that are consistent with II.C.4.b. of the Policy.

CSO Policy at IV.B.2.c. CSO Policy § II.C.4.b., which is referenced in IV.B.2.c., sets out four criteria that must be satisfied by permittees seeking to use the demonstration approach. Of these criteria, only the criterion at II.C.4.b.ii. is relevant to the issues raised in this appeal. This criterion states that permittees wishing to employ the demonstration approach should demonstrate that:

[t]he CSO discharges remaining after implementation of the planned control program will not preclude the attainment of WQS or the receiving waters' designated uses or contribute to their impairment. Where WQS and designated uses are not met in part because of natural background conditions or pollution sources other than CSOs, a total maximum daily load, including a wasteload allocation and a load allocation, or other means should be used to apportion pollutant loads.

Policy at II.C.4.b.ii.

Taken together, these two CSO Policy sections establish a two-step process for developing and including water quality-based effluent limits in Phase II permits where the permittee employs the demonstration approach in its LTCP. The first step is for the permitting authority to find that the planned control program meets the demonstration approach criteria at CSO Policy § II.C.4.b, including a finding that the CSO discharges remaining after implementation of planned control program will not preclude the attainment of water quality standards or the receiving waters' designated uses or contribute to their impairment. Once the permitting authority has determined that the selected controls will meet the criteria at CSO Policy § II.C.4.b. (including the standards compliance determination required by that section), pursuant to CSO Policy § IV.B.2.c., the permitting authority must then develop and include in the permit, numeric performance standards for the selected controls, based on average design conditions that are consistent with CSO Policy § II.C.4.b.

EPA followed this two-step process in modifying WASA's permit to include the Phase II permit conditions. First, it found that WASA's planned control program and selected controls satisfied the criteria at CSO Policy § II.C.4.b., including a specific finding by EPA that "WASA has demonstrated, pursuant to Section II.C.4.b. of the 1994 CSO Policy, that the CSO control program will not preclude attainment of WQS or the receiving waters designated uses or contribute to their impairment." Fact Sheet at 15 (Exhibit A). Then, pursuant to CSO Policy § IV.B.2.c., EPA developed performance standards for the selected CSO controls, based on average design conditions, that were consistent with its standards compliance determination under CSO Policy § II.C.4.b., and

included these performance standards at Sections III.C.A.3.- 9., of the Permit.⁴ These performance standards, therefore, constitute the water quality-based effluent limits under 40 CFR 122.44(d)(1) and 122.44(k) that are called for in CSO Policy § IV.B.2.c.

Having concluded that WASA's selected CSO controls will comply with the District's water quality standards, and then established performance standards in Section III.C. of the Permit based on the selected controls, EPA has necessarily concluded that if WASA complies with the performance standards, the discharges from WASA's CSS will not cause or contribute to violations of water quality standards.

With the exception of EPA's failure to include an implementation schedule in the Permit, WASA believes that the performance standards in Sections III.C.A.3.-9. of the Permit conform to the CSO Policy's directive that permitting authorities should include water quality-based effluent limits in Phase II permits. Unfortunately, however, EPA did not stop with these performance standards, but went on to add Section III.E. to the Permit, entitled "Water Quality-Based Requirements for CSOs." In doing so, EPA added requirements to the Permit that do not conform to the CSO Policy, that conflict with the performance standards in the Permit, and that unfairly expose WASA to multiple liabilities for the same acts even if WASA meets the performance standards in the Permit.

When it incorporated the CSO Policy into the Clean Water Act at section 402(q), Congress gave EPA clear direction with respect to its CSO permitting responsibilities. Section 402(q)(1) provides, in relevant part, that "[e]ach permit ... issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Policy signed by the

⁴ Sections III.C.A.3, 5, 6, 7, and 9 are numeric performance standards under 40 CFR 122.44 (d)(1), while Section III.C.A.4. is a best management practices performance standard under 40 CFR 122.44 (k). Section III.C.A.8. is the reporting requirement for the performance standards.

Administrator on April 11, 1994.” 33 U.S.C. § 1342 (q)(1). Therefore, permit conditions that do not conform to the CSO Policy, violate Section 402(q) of the Clean Water Act and reflect clearly erroneous conclusions of law.

CHALLENGED PERMIT CONDITIONS AND GROUNDS FOR REVIEW

A. The Water Quality Standards Compliance Requirement in Section III.E.1. Does Not Conform to the CSO Policy, and, Therefore, Violates Section 402(q) of the Clean Water Act and is a Clearly Erroneous Conclusion of Law.

Section III.E.1. of the Permit requires that WASA’s CSO 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.

Section III.E.1. is a recital of the narrative water quality standard in Section 1104.1 of the District’s water quality standards, and therefore, incorporates this standard as a requirement of the permit.

As discussed above, CSO Policy § IV.B.2.c. specifies the water quality-based requirements that should be included in Phase II permits. Section III.E.1. is, without question, a water quality-based requirement. Therefore, in order to conform to the CSO Policy, Section III.E.1. must be authorized by and consistent with CSO Policy § IV.B.2.c..

The only kind of water quality-based effluent limits specifically mentioned in CSO Policy § IV.B.2.c. are “numeric performance standards for the selected CSO

controls.” Section IV.B.2.c. does state that the performance standards are the “minimum” water quality-based effluent limits that must be included in Phase II permits. Therefore, EPA can include water quality-based effluent limits in addition to the numeric performance standards specifically mentioned in IV.B.2.c. as long as they conform to the CSO Policy.⁵ However, where not expressly authorized by the Policy, such additional limits can conform to the Policy only where they are shown to be necessary to achieve the goals and purposes of the Policy; namely, to meet the water quality-based requirements of the Clean Water Act. CSO Policy at I.A.

In this case, as discussed above, EPA found that the selected controls in WASA’s LTCP will meet the District’s water quality standards and designated uses and has included in the Permit performance standards for the selected controls that, when achieved, will provide for compliance with the standards and designated uses. Therefore, it was not necessary for EPA to include Section III.E.1. in the Permit in order to meet the water quality-based requirements of the Clean Water Act because the Permit includes the performance standards specifically called for in CSO Policy § IV.B.2.c.. Section III.E.1. serves no purpose other than to unfairly expose WASA to permit non-compliance, and, therefore, does not conform to the Policy and violates CWA § 402(q).

Section III.E. exposes WASA to enforcement and potential liability for violations of the District’s narrative standard after implementation of the selected CSO controls even if WASA meets the performance standards in the Permit and even though EPA has determined that the these same performance standards provide for compliance with this

⁵ For example, EPA included an additional water quality-based effluent limit in the Permit in the form of the best management practices performance standard in Section III.C. A.4. Such a limit is authorized by the Policy because it imposes controls not covered by the numeric performance standards, and, therefore, supplements the numeric performance standards.

very same water quality standard. Thus, by including Section III.E.1 in the Permit, EPA is, in effect, taking the position that "although it ('EPA') has concluded that the performance standards derived from the selected controls in WASA's LTCP will provide for compliance with the District's narrative standard, if it ('EPA') is wrong, WASA will be held liable for any resulting non-compliance with the Permit." Surely, Congress did not intend such a result when it incorporated the Policy into the Clean Water Act.

In its comments on the draft permit modification, WASA voiced the same objections to the same Section III.E.1, which at that time, included a different standards compliance requirement that incorporated both the narrative and numeric standards into the Permit. *See* WASA Comments, Attachment 3 at 9 (Exhibit B). In the final permit modification, EPA changed the requirement in Section III.E.1. to include only the narrative standard. In its response to WASA's comments, EPA states that it disagrees with WASA's assertion that a general standards incorporation fails to conform to the CSO Policy, and cites the reference to 40 CFR 122.44(d)(1) in Section IV.B.2.c. as the basis for the requirement. Section 122.44(d)(1) provides that EPA must include any requirement in a permit necessary to achieve water quality standards including State narrative criteria for water quality. EPA asserts that 40 CFR 122.44(d)(1) gives it the authority to include the narrative standards requirement in Section III.E.1 because it has determined that WASA's CSO discharges have the reasonable potential to cause or contribute to non-attainment of the narrative standard at the time of permit issuance. Response to Comments at 20 (Exhibit A).

There are several flaws in EPA's position. First, as specifically directed by Section IV.B.2.c. of the CSO Policy, Sections III.C.A.3.-9 of the Permit already include

water-based effluent limits under 40 CFR 122.44(d)(1) in the form of performance standards which EPA has determined will both attain both the narrative and numeric standards. Accordingly, there is no basis or need for the standards compliance requirement in Section III.E.1. other than to unfairly expose WASA to potential liability not only for actions beyond its control, but also for no less than two permit violations for the same act should EPA fail to comply with the performance standards in the permit. Moreover, even if 40 CFR 122.44(d)(1) did give it the authority to include a narrative requirement such as that in Section III.E.1., as EPA asserts, this authority would exist only where EPA has shown that such a requirement is necessary to comply with water quality standards. EPA has offered absolutely no explanation for the need to include Section III.E.1. in the Permit other than its baseless assertion that it is required by 40 CFR 122.44 (d)(1).

Second, contrary to EPA's assertion, Section IV.B.2.c.'s reference to 40 CFR 122.44(d)(1) does not authorize or direct it to simply engage in a wholesale incorporation of the District's narrative standard. It is clear from the overall structure of the Policy that EPA, and later, Congress, intended, among other things, that permitting authorities use the LTCP process to first require the development of a planned control program that is projected to meet water quality standards and then fashion water quality-based performance standards derived from the planned control program that gave CSO communities clearly defined targets and a reasonable opportunity to meet their standards compliance obligations before investing hundreds of millions of dollars on LTCP implementation.⁶ Further, there is nothing in the Policy to suggest that EPA and Congress

⁶ The Policy draws a clear distinction between the water quality-based requirements to be included in Phase I permits and the water quality-based requirements to be included in Phase II permits. CSO Policy

intended to needlessly punish CSO communities by holding them liable for failing to meet a general standards obligation even if they comply with the CSO performance standards in their permits.

Third, EPA's position, if sustained, would effectively write Section IV.B.2.c. out of the CSO Policy because EPA already had the authority to include water quality-based effluent limits necessary to meet narrative criteria at the time the CSO Policy was adopted. It must be remembered that the CSO Policy did not constitute independent legal authority at the time it was adopted. Consequently, the reference to 40 CFR 122.44(d)(1) in the first sentence of Section IV.B.2.c. simply cites EPA's legal authority to include water quality-based effluent limits in permits. The remainder of Section IV.B.2.c. sets forth how those limits are to be expressed; namely, as performance standards derived from the selected controls, not as a wholesale incorporation of the narrative standard.⁷

Fourth, 40 CFR 122.44 does not authorize simply incorporating the narrative standard into permits as EPA did in Section III.E.1. Section 122.44(d)(1)(vi) lists three options available to EPA for establishing effluent limits where the State has not established water quality criteria for the specific chemical pollutant that is found to be causing or contributing to an excursion above a narrative criterion. Incorporation of the

§IV.B.1.c. provides that Phase I permits should contain a "narrative limitation" providing for compliance with applicable water quality standards. The Policy's Phase II permit provisions at IV.B.2.c. contain no such provision, reflecting the fact that such a narrative limitation is not needed following LTCP development and selection of the control program.

⁷ As discussed above, the reference in Section IV.B.2.c. to requiring "at a minimum" compliance with the performance standards does appear to authorize water quality-based effluent limits in addition to the performance standards. At the very least, however, any additional limitations would have to be consistent with the performance standards. In this case, there is a basic conflict between Permit Sections III.C.A.3.-9. (performance standards) and III.E.1. (narrative standards) because, as explained above, WASA could comply with the performance standards, but still violate the narrative standard following implementation of the selected controls if post-construction monitoring does not confirm the modeled compliance in the LTCP.

narrative criterion into the permit as EPA did in this case is not among the options listed in 40 CFR 122.44(d)(1)(vi).

Fifth, CSO Policy § IV.B.2.c. refers to “effluent limits” under 40 CFR 122.44 (d)(1), but Section III.E.1. is not an effluent limit or effluent limitation for purposes of 40 CFR 122. “Effluent Limitation” is defined at 40 CFR 122.2 to mean “any restriction imposed ... on quantities, discharge rates, and concentrations” of pollutants discharged from point sources. Although Section III.E.1. is a requirement governing the “quality” of CSO discharges, it is not an effluent limit or limitation because it imposes no restriction on the “quantities, discharge rates, and concentrations” of the pollutants discharged. Rather, it expresses the instream water quality conditions that must be maintained or avoided by the CSO discharges without specifying a limitation of any kind on the discharge. In effect, Section III.E.1. makes WASA responsible for maintaining the prescribed instream water quality conditions, leaving it to WASA to figure out the effluent “quantities, discharge rates, and concentrations” it must maintain in order not to violate the condition.

Finally, the requirement imposed on WASA by Section III.E.1. is so vague and undefined that it fails to give WASA fair notice of its legal obligations and, therefore, violates fundamental principles of due process, and, therefore, is unconstitutional.

[A] regulation[] which allow[s] monetary penalties against those who violate [it], ... must give ... fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

See First American Bank v. Dole, 763 F.2d 644, 651 n.6 (4th Cir. 1985) (quoting Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976)). See also United

States v. Hoechst Celanese Corp., 128 F.3d 216, 224 (4th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998).

Section III.E.1. fails to meet this standard by any measure.

B. The TMDL-derived Effluent Limits in Section III.E.2. Do Not Conform to the CSO Policy, and, Therefore, Violate Section 402(q) of the Clean Water Act and is a Clearly Erroneous Conclusion of Law.

Section III.E.2. requires the discharges from WASA's CSS to comply with the specified CSO waste load allocations ("WLAs") derived from TMDLs that have been developed for the Anacostia River, Piney Branch, and Lower Rock Creek. WASA objected to this condition in its comments on the draft permit modification, asserting that it does not conform to the CSO Policy. WASA Comments at 9 and 10 (Exhibit B). The Fact Sheet accompanying the permit modification reveals that EPA included the WLAs as effluent limits based on its erroneous conclusion that the reference to CSO Policy § II.C.4.b. in Policy § IV.B.2.c.iv. "provides for the use of ...[TMDLs] ... and wasteload allocations in establishing performance standards" under the demonstration approach. Fact Sheet at 16 (Exhibit A). These CSO Policy sections make no such provision. Section IV.B.2.iv. provides that where the demonstration approach is employed, Phase II permits should contain performance standards and requirements that are "consistent" with Section II.C.4.b. of the Policy. Section II.C.4.b., in turn, sets out the criteria that CSO communities using the demonstration approach must satisfy in order to make a successful demonstration.

Reference to the specific wording in Section II.C.4.b.ii. (quoted above) reveals that it has two parts. The first part requires permittees to demonstrate that the "CSO discharges remaining after implementation of the planned control program will not

preclude the attainment of WQS or the receiving waters' designated uses or contribute to their impairment." The second part provides that "[w]here WQS and designated uses are not [being] met in part because of natural background conditions or pollution sources other than CSOs, a total maximum daily load, including a wasteload allocation and a load allocation or other means should be used to apportion pollutant loads." It is clear from the plain language of Section II.C.4.b.ii. that the criterion that the permittee must satisfy is in the first part of the section, and that the second part simply describes how the demonstration can be made where natural background or other pollution sources are contributing to the impairment. In this case, the record shows that WASA was able to make the water quality standards demonstration required by Section II.C.4.b.ii., in part, through the use of the CSO WLAs in the TMDLs. WASA Comments, Ex. A to Attachment 3 (Exhibit B). That demonstration, in turn, was the basis for the performance standards now in the Permit, which means that EPA has concluded that WASA will comply with the WLAs if it complies with the performance standards.

Based on the above, it is clear that the TMDL-derived effluent limits in Section III.E.2. also suffer from many of the same flaws as Section III.E.1., and therefore, fail to conform to CWA § 402(q) and are unlawful and clearly erroneous. First, since the performance standards required by CSO Policy § IV.B.2.c. already provide for compliance with the water quality standards, the limits in Section III.E.2. of the Permit are not needed, and therefore, are not authorized by either CSO Policy § IV.B.2.c. or 40 CFR 122.44(d)(1). Second, the standards compliance determination is based on modeled projections and so it is possible that WASA could comply with the performance standards, but fail to comply with the effluent limits in Section III.E.2. based on the

results of post-construction monitoring. The Policy clearly contemplates that should this occur, the appropriate remedy is a requirement to design and install whatever additional controls are needed to comply with water quality standards, not an enforcement action for non-compliance with the permit. CSO Policy § IV.B.2.g.

C. The TMDL-derived Effluent Limit Monitoring Requirements in Section III.E.3. are Clearly Erroneous and Arbitrary and Capricious Because They Provide for Measuring Compliance with the Effluent Limits Under All Rainfall Conditions.

The final permit modification contains the same erroneous method for measuring compliance with the TMDL-derived effluent limits that WASA objected to in the draft permit modification. WASA Comments, Attachment 3 at 11 & 12 (Exhibit B). As discussed above, the mathematical models that were used to develop both the TMDLs and WASA's LTCP are based on the climatic conditions for the average of 1988, 1989, and 1990, which represent wet, dry, and average rainfall years. The documentation supporting the TMDLs identify the average of these years as the critical environmental condition for establishing a WLA for the CSOs. The WLAs allocated to the CSO discharges that will remain following implementation of the selected controls in WASA's LTCP are the average annual values of the three-year periods. It is these WLAs that EPA uses as effluent limits in Section III.E.2. of the Permit.

Following LTCP implementation, actual loads discharged from the remaining CSOs will vary from year-to-year depending on rainfall volume, duration and frequency, with the expectation that the actual loads discharged will exceed the TMDL-derived effluent limits in those years when rainfall produces loads that exceed the average annual loads for the 1988, 1989, and 1990 period that is the basis for both the TMDLs and WASA's LTCP.

The monitoring requirements for the TMDL-derived effluent limits in Section III.E.3. of the Permit appear to incorrectly assume that compliance with the effluent limits can be calculated directly from the monitoring data. As discussed above, compliance with the effluent limits has to be measured against the average annual loads for the three-year period that is the basis for the effluent limits, not the actual loads in the year in which the monitoring is performed. Therefore, the only way to accurately measure compliance with the effluent limits derived from the TMDLs is to use the same sampling protocols and data analysis that were used to develop the TMDLs themselves. This would involve periodic monitoring of the CSO discharges and the water quality conditions in the receiving waters. This information would then be used to make a modeling evaluation to determine whether the selected controls in the LTCP are providing the degree of control required by the TMDLs, again, based on the average annual loads for the three-year period that is the basis for both the TMDLs and WASA's LTCP.

Section III.E.3. fails to set forth the correct procedure for determining compliance with the TMDL-derived effluent limits in Section III.E.2., and, therefore, is clearly erroneous and arbitrary and capricious. In fact, as noted by both WASA and the Sierra Club and Friends of the Earth in their comments on the draft permit modification, Section III.E.2. fails to set forth any procedure for determining compliance with the limits. Response to Comments at 9 (Exhibit A). Section III.E.3. contains monitoring and reporting requirements and states that the results are to be used to measure compliance with the limits, but does not contain any explanation of how the results are to be used to determine compliance. Based on the foregoing, WASA can only assume that EPA intends

that compliance with the TMDL-derived effluent limits be calculated directly from the monitored data.

EPA's response to comments on this point fails to offer any rational explanation of how compliance with the TMDL-derived effluent limits is to be determined. At one point, EPA does appear to acknowledge that the limits are based on average conditions (Response to Comments at 9 (Exhibit A)), but then goes on to state that WASA could be in violation of the limits in the event of an "anomalous rainfall event" (Response to Comments at 10), which suggests that EPA has no intention of modeling the monitoring data against average rainfall conditions to determine compliance with the limits.

Elsewhere in its response to comments, EPA appears to say that it does not intend to use the data generated by the monitoring requirements in Section III.E.3., but instead will wait until construction is complete and use the data generated during the post-construction monitoring for this period. Response to Comments at 11.

Based on the above, at the very least, Section III.E.3. should be set aside and remanded to EPA with direction to offer a rational explanation of the purpose of these monitoring requirements, whether they will be used to calculate compliance with the limits in Section III.E.2., and if so, how compliance will be determined.

D. The Permit Fails to Conform to the CSO Policy, and, Therefore, Violates Section 402(q) of the Clean Water Act and is a Clearly Erroneous Conclusion of law Because it Does Not Include a Compliance Schedule for Implementation of the Selected Controls in WASA's LTCP Based on the Erroneous Conclusion That WASA is not Legally Entitled to a Schedule in the Permit.

Section IV.B.2.c. of the CSO Policy expressly provides that Phase II permits should include water quality-based effluent limits requiring compliance with, "no later than the date allowed under the State's WQS," the numeric performance standards for

the selected CSO controls.⁸ The District's water quality standards, in turn, contain the following schedule authorization:

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.

D.C. Mun. Regs. tit. 21 § 1105.9.⁹

The draft permit modification failed to include a CSO compliance schedule in the permit and required immediate compliance with the water quality-based CSO requirements based on the erroneous conclusion that the CSO Policy "requires implementation of the LTCP immediately upon issuance of the permit." Draft Permit Fact Sheet at 12-13 (Exhibit C). In response to EPA's stated basis for failing to include an implementation schedule in the draft permit, WASA asserted its right to a schedule in

⁸ DOH modified the wording of this section between the time WASA submitted its comments and the present.

⁹ Clarifying language included in EPA's FY 2005 budget strongly suggests that Congress intends that EPA not require compliance with water quality standards immediately upon issuance of a Phase II permit. The clarifying language states as follows:

The Committee clarifies that 'shall conform' in Clean Water Act (CWA) § 402(q) means that National Pollutant Discharge Elimination System (NPDES) permitting authorities should evaluate the facts and circumstances of each CSO community's program against the CSO Control Policy's themes of flexibility, site specificity, cost effectiveness, and water quality standards achievement after long-term control plan implementation (LTCP). NPDES permits should be used to impose LTCP obligations whenever possible. In authorized states, state administrative orders or state judicial orders should be the primary alternative implementation mechanism to NPDES permits for imposing LTCP obligations. This clarification does not preclude state and/or federal enforcement actions where appropriate.

H.R. Conf. Rep. No. 108-674 (to accompany H.R. 5041), at 100 (emphasis added). Copies of relevant pages from the reports are attached to and incorporated herein as Exhibit E.

its comments on the draft permit based on the above-cited authorities, arguing that “[t]he obligation to implement the LTCP is unquestionably ‘a new water quality standard based effluent limitation’ within the meaning of the [District’s water quality standards].”

WASA Comments, Attachment 3 at 13 (Exhibit B).

In its response to comments accompanying the final permit modification, EPA elected not to respond directly to the basis for WASA’s position by incorrectly stating that WASA was asserting “that the LTCP is itself a water quality-based effluent limitation.” Response to Comments at 23 (Exhibit A). WASA made no such assertion. Rather, WASA was responding to EPA’s stated basis¹⁰ for requiring immediate compliance with the water quality-based CSO requirements in the draft permit modification. From the Fact Sheet accompanying the final permit modification, it is clear that the Permit would not have required immediate compliance with any of its CSO-related water quality-based effluent limitations but for EPA’s position that the Policy requires immediate LTCP implementation.¹¹

EPA also relies on the fact that shortly before the permit modification was finalized, WASA and the United States signed a consent decree establishing a LTCP

¹⁰ The draft Permit Fact Sheet stated as follows:

The 1994 CSO Policy provides, since implementation schedules for compliance deadlines which have passed may not generally be included in permits, that the Phase II permit reflecting the requirements of the LTCP will be accompanied by a separate enforceable mechanism - in the case of a major facility, a judicial order...

Draft Permit Fact Sheet dated March 18, 2004 at 13 (Exhibit C).

¹¹ “Consistent with the 1994 CSO Policy, the modified permit requires implementation of the LTCP immediately upon issuance of this permit.” Fact Sheet at 14 (Exhibit A).

implementation schedule, suggesting that this question is now moot. WASA's right to a schedule remains a live issue for two reasons. First, as of this date, the consent decree has only been lodged with court, and neither EPA nor WASA can state without qualification that it will be entered, or entered as lodged. Second, EPA misunderstands the purpose that a permit schedule would serve if the consent decree is entered as lodged. True, the consent decree establishes a schedule for implementation of the selected controls in WASA's LTCP, but it does not address WASA's continued non-compliance with the Phase II water quality-based effluent limits in its permit or insulate WASA from enforcement action by the United States based on non-compliance with these limits.¹² Like most permittees, WASA takes pride in and places great value on maintaining full compliance with its legal obligations. EPA's failure to include a schedule in the permit deprives WASA of the compliance status to which it is legally entitled. WASA did not waive its right to a permit schedule when it signed the consent decree, and in the absence of a waiver, it would be grossly unfair and contrary to the public interest to effectively declare that parties who sign consent decrees give up their right to resolve their compliance status through the permit process. That would be the result if WASA's right to a permit schedule were declared moot now that it has signed a consent decree.

In conclusion, EPA's response to comments failed to address the question presented by WASA, and, at the very least, the Phase II water quality-based effluent

¹² At Section XVIII of the consent decree, the United States expressly reserves its right to commence an enforcement action against WASA in the future based on violations of WASA's permit subsequent to the date the consent decree was lodged with the court. A copy of the consent decree is attached to and incorporated in these comments as Exhibit D.

limits should be set aside and remanded with direction to EPA to either include an appropriate schedule in the Permit or explain why WASA is not entitled to a schedule pursuant to CSO Policy § IV.B.2.c. and 21 DCMR 1105.9 of the District's water quality standards.

E. The Effluent Limits for Chlordane in Section III.E.2. Do Not Conform to the Waste Load Allocations for Chlordane in the Final Anacostia TMDL for Organics and Metals and are Clearly Erroneous.

As explained above, Section III.E.2. of the Permit contains TMDL-derived effluent limits for WASA's CSS. The limits in the draft permit correctly reflected the waste load allocations for chlordane for the upper and lower Anacostia River in the Anacostia TMDLs for organics and metals. However, when EPA finalized the permit modification, it reduced the limits for chlordane without explanation and contrary to the waste load allocations in the final TMDL.¹³ By reducing, without explanation, the TMDL-derived limits for chlordane to levels that are more stringent than the levels in the TMDLs, EPA acted arbitrarily and capriciously and contrary to the law. Therefore the effluent limits for chlordane are clearly erroneous.

¹³ The draft permit modification contained the following effluent limits for chlordane:

Upper Anacostia - 0.0058 lbs per average year.
Lower Anacostia - 0.0048 lbs per average year.

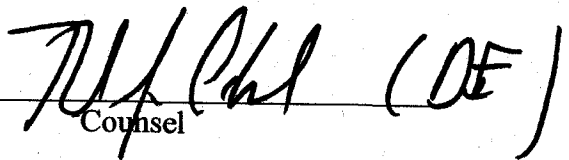
The final permit modification contains the following effluent limits for chlordane:

Upper Anacostia - 0.001 lbs per average year.
Lower Anacostia - 0.0008 lbs per average year.

Dated: January 18, 2005

Respectfully submitted,

DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY

By  (DE)
Counsel

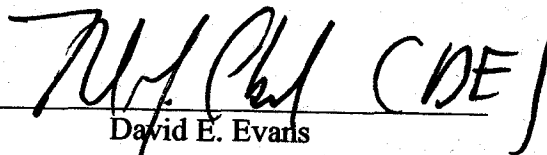
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Review before the Environmental Appeals Board was mailed, first-class, postage pre-paid, this 18th day of January, 2005 to the following:

Donald S. Welsh
Regional Administrator
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029


David E. Evans



108TH CONGRESS }
2d Session

HOUSE OF REPRESENTATIVES

{ REPORT
108-792

**MAKING APPROPRIATIONS FOR FOREIGN
OPERATIONS, EXPORT FINANCING, AND
RELATED PROGRAMS FOR THE FISCAL
YEAR ENDING SEPTEMBER 30, 2005, AND
FOR OTHER PURPOSES**

CONFERENCE REPORT

TO ACCOMPANY

H.R. 4818



NOVEMBER 20 (legislative day, NOVEMBER 19), 2004.—Ordered to be
printed

RECEIVED

JAN 19 2005

EPA, REGION III
OFFICE OF REGIONAL ADMINISTRATOR

**MAKING APPROPRIATIONS FOR FOREIGN OPERATIONS,
EXPORT FINANCING, AND RELATED PROGRAMS FOR
THE FISCAL YEAR ENDING SEPTEMBER 30, 2005, AND
FOR OTHER PURPOSES**

NOVEMBER 20 (legislative day of NOVEMBER 19), 2004.—Ordered to be printed

Mr. YOUNG of Florida, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 4818]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4818) "making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2005, and for other purposes", having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and inserted by said amendment, insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2005".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short Title

Sec. 2. Table of Contents

Sec. 3. References

Sec. 4. Statement of Appropriations

**DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG
ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2005**

Title I—Agricultural Programs

Title II—Conservation Programs

Title III—Rural Development Programs

CONFERENCE TOTAL—WITH COMPARISONS

The total new budget (obligational) authority for the fiscal year 2005 recommended by the Committee of Conference, with comparisons to the fiscal year 2004 amount, the 2005 budget estimates, and the House and Senate bills for 2005 follow:

[In thousands of dollars]	
New budget (obligational) authority, fiscal year 2004	\$46,141,907
Budget estimates of new (obligational) authority, fiscal year 2005	43,748,430
House bill, fiscal year 2005	43,540,159
Senate bill, fiscal year 2005	44,052,003
Conference agreement, fiscal year 2005	43,993,116
Conference agreement compared with:	
New budget (obligational) authority, fiscal year 2004	-2,148,791
Budget estimates of new (obligational) authority, fiscal year 2005	+244,686
House bill, fiscal year 2005	+452,957
Senate bill, fiscal year 2005	-58,887

DIVISION I—DEPARTMENTS OF VETERANS AFFAIRS AND HOUSING AND URBAN DEVELOPMENT, AND INDEPENDENT AGENCIES APPROPRIATIONS ACT, 2005

The language and allocations set forth in House Report 108-674 and Senate Report 108-353 should be complied with unless specifically addressed to the contrary in the conference report and statement of the managers. Report language included by the House which is not changed by the report of the Senate or the conference and Senate report language which is not changed by the conference is approved by the committee of the conference. The statement of the managers, while repeating some report language for emphasis, does not intend to negate the language referred to above unless expressly provided herein. In cases where the House or Senate have directed the submission of a report, such report is to be submitted to both House and Senate Committees on Appropriations.

OPERATING PLAN REPROGRAMMING PROCEDURES

The conferees continue to have a particular interest in being informed of reprogrammings which, although they may not change either the total amount available in an account or any of the purposes for which the appropriation is legally available, represent a significant departure from budget plans presented to the Committees in an agency's budget justifications, the basis of this appropriations Act.

Consequently, the conferees direct the departments, agencies, boards, commissions, corporations and offices funded at or in excess of \$100,000,000 in this Act, to consult with the Committee on Appropriations in both the House and Senate prior to each change from the approved budget levels in excess of \$500,000 between programs, activities, object classifications or elements unless otherwise provided for in the statement of the managers accompanying this Act. For agencies, boards, commissions, corporations and offices funded at less than \$100,000,000 in this Act, the reprogramming threshold shall be \$250,000 between programs, activities, object classifications or elements unless otherwise provided for in the statement of the managers accompanying this Act. Additionally,



95-744

108TH CONGRESS*Report***HOUSE OF REPRESENTATIVES**

2d Session

108-674

**--DEPARTMENTS OF VETERANS AFFAIRS AND HOUSING AND URBAN DEVELOPMENT,
AND INDEPENDENT AGENCIES APPROPRIATIONS BILL, 2005**

September 9, 2004- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WALSH, from the Committee on Appropriations, submitted the following

REPORT*together with***MINORITY VIEWS**

[To accompany H.R. 5041]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the Departments of Veterans Affairs and Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 2005, and for other purposes.

	INDEX TO BILL AND REPORT	Page number
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Selective Service System	102	145
White House Commission on the National Moment of Remembrance	103	146
Title IV--General Provisions	103	146
Summary of the Bill		

The Committee recommends \$128,037,084,000 in new budget (obligational) authority for the Departments of Veterans Affairs and Housing and Urban Development, and 21 independent agencies and offices.

The following table summarizes the amounts recommended in the bill in comparison with the appropriations for fiscal year 2004 and budget estimates for fiscal year 2005.

ENVIRONMENTAL PROGRAMS AND MANAGEMENT

Fiscal year 2005 recommendation	\$2,241,476,000
Fiscal year 2004 appropriation	2,280,046,000
Fiscal year 2005 budget request	2,316,959,000
Comparison with fiscal year 2004 appropriation	-38,570,000
Comparison with fiscal year 2005 budget request	-75,483,000

The Environmental Programs and Management account encompasses a broad range of abatement, prevention, and compliance activities, and personnel compensation, benefits, travel, and expenses for all programs of the Agency except Science and Technology, Hazardous Substance Superfund, Leaking Underground Storage Tank Trust Fund, Oil Spill Response, and the Office of Inspector General.

Abatement, prevention, and compliance activities include setting environmental standards, issuing permits, monitoring emissions and ambient conditions and providing technical and legal assistance toward enforcement, compliance, and oversight. In most cases, the states are directly responsible for actual operation of the various environmental programs. In this regard, the Agency's activities include oversight and assistance in the facilitation of the environmental statutes.

In addition to program costs, this account funds administrative costs associated with the operating programs of the Agency, including support for executive direction, policy oversight, resources management, general office and building services for program operations, and direct implementation of all Agency environmental programs--except those previously mentioned--for Headquarters, the ten EPA Regional offices, and all non-research field operations.

For fiscal year 2005, the Committee has recommended \$2,241,476,000 for Environmental Programs and Management, a decrease of \$38,570,000 below the budget request and a decrease of \$75,483,000 below the fiscal year 2004 funding level. For this account only, the Agency may transfer funds of not more than \$500,000 between programs and activities without prior notice to the Committee, and of not more than \$1,000,000 without prior approval of the Committee. All other reprogramming procedures as outlined earlier shall apply.

The Committee's recommendation includes the following:

FY 2004 enacted FY 2005 r

Great Lakes Legacy Act	\$9,941,000	\$45,0
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IT / Data Management	103,077,700	133,1
Facilities Infrastructure and Operations	307,035,400	326,7
Surface Water Protection	184,222,700	191,7
Federal Support for Air Quality Management	86,631,800	93,2
Pesticides: Review / Reregistration of Existing Pesticides	51,714,400	58,0
Pollution Prevention Program	16,822,800	22,4
Human Resources Management	39,109,000	44,1
Drinking Water Programs	93,186,900	97,9
Regulatory Innovation	17,338,300	21,9
Exchange Network	21,801,400	25,4
RCRA: Waste Minimization & Recycling	10,828,400	14,3
Financial Assistance Grants / IAG Management	17,179,000	20,3
Brownfields	24,938,500	28,0
Stratospheric Ozone: Multilateral Fund	10,935,100	13,5
Geographic Program: Great Lakes	18,837,400	21,1
National Estuary Program / Coastal Waterways	24,348,100	19,2
Environmental Justice	5,810,600	4,2
Environmental Education	9,109,400	
Toxic Substances: Lead Risk Reduction Program	14,821,100	11,0
Geographic Program: Long Island Sound	2,286,300	4

The Committee's recommended appropriation also includes the following increases to the budget request:

1. +\$1,000,000 for the Lake Pontchartrain Basin Restoration Program;
2. +\$17,640,000 for rural water technical assistance activities and groundwater protection with distribution as follows: \$9,800,000 for the NRWA; \$4,165,000 for RCAP, to be divided equally between assistance for water programs and assistance for wastewater programs; \$735,000 for GWPC; \$1,960,000 for Small Flows Clearinghouse; \$980,000 for the NETC;

3. +\$1,470,000 for the Water Systems Council Wellcare Program;
4. +\$980,000 for implementation of the National Biosolids Partnership Program;
5. +\$2,000,000 for source water protection programs;
6. +\$2,000,000 for the Water Information Sharing and Analysis Center (Water ISAC) to gather, analyze, and disseminate sensitive security information to water and wastewater systems;
7. +\$2,940,000 for EPA's National Computing Center to provide for the remote mirroring of all critical information and related systems to achieve a Continuity of Operations (COOP)/Disaster Recovery capability;
8. +\$5,000,000 to support a demonstration project for deployment of idle reduction technology including advanced truck stop electrification, as part of the Agency's Smartway Transport Program.
9. \$1,000,000 to the Environmental Monitoring and Assessment Program within the State of Alaska;
10. \$100,000 to the Salton Sea Authority in Salton Sea, California for air quality mitigation projects;
11. \$75,000 for Operation Clean Air for the Hot Spot Pilot Program in the Town of Malaga, California;
12. \$250,000 to Calleguas Municipal Water for the Calleguas Creek Watershed Management Plan Implementation in Ventura County, California;
13. \$100,000 to the University of Redlands in California for the Salton Sea Database;
14. \$300,000 for the City of Highland, California for the City of Highland Environmental Learning Center;
15. \$200,000 for the Operation Clean Air Advocates, Inc. in San Joaquin Valley, California for Operation Clean Air;
16. \$100,000 for the California State University--Fullerton, California for the National Center for Water Hazard Mitigation;
17. \$100,000 to the University of Connecticut Health Center to implement a model asthma intervention program for the State of Connecticut;
18. \$250,000 to the University of North Florida for the Real-Time Regional Environmental Modeling in Jacksonville, Florida;
19. \$900,000 to Osceola County, Florida for abatement and prevention of hydrilla and hygophila;

20. \$400,000 to the Georgia Water Conservation Team for the development and implementation of the Georgia Water Planning and Policy Center, Offset Banking Water Quality Improvement program;
21. \$150,000 to the Spokane Region Chamber of Commerce for the Rathdrum Prairie/Spokane Valley Aquifer Study in Spokane County, Idaho;
22. \$1,700,000 to Boise State University for research projects aimed at developing and demonstrating multi-purpose sensors to detect and analyze contaminants and time-lapse imaging of shallow subsurface fluid flow;
23. \$300,000 for the Selenium Information System Project at the Idaho National Engineering and Environmental Laboratory;
24. \$100,000 to the City of Rexburg, Idaho for the Teton River Mill Site Redevelopment and Learning Project;
25. \$150,000 to the City of Chicago, Illinois for the Beach Contamination Identification/Elimination Study;
26. \$200,000 to the Ohio River Valley Water Sanitation Commission for the Ohio River Watershed Pollutant Reduction Program;
27. \$100,000 for PRIDE in the 2nd District of Kentucky for PRIDE in the Heartland of Kentucky;
28. \$500,000 to the Olmsted Parks Conservancy in Louisville, Kentucky to remove invasive species and correct erosion in Cherokee and Seneca Parks;
29. \$1,000,000 to the Olmsted Parks Conservancy in Louisville, Kentucky to correct riverbank erosion in Chickasaw Park;
30. \$550,000 to the Olmsted Parks Conservancy in Louisville, Kentucky to correct erosion in Iroquois Park;
31. \$850,000 to the Louisville Waterfront Development Corporation, Kentucky for anti-erosion strategies;
32. \$200,000 to the Louisiana State University in Shreveport, Louisiana for the Red River Watershed Management Institute;
33. \$100,000 to Prince George's County, Maryland for the Low Impact Development demonstration project in the Anacostia River Watershed;
34. \$100,000 to Wayne County, Michigan for the Lead Prevention Initiative;
35. \$100,000 to Wayne County, Michigan for the lead prevention initiative;
36. \$200,000 for the Michigan Biotechnology Institute in East Lansing, Michigan for the Michigan Biotechnology Institute International's Nanocomposite Surfaces;

37. \$850,000 for the North Carolina Central University for research initiative to assess environmental exposure and impact in communities of color and economically disadvantaged communities in Durham, North Carolina;
38. \$100,000 to the New Hampshire Department of Environmental Services to develop a statewide water resources management plan;
39. \$250,000 to the Ten Towns Great Swamp Watershed Management Committee in New Jersey for a water quality monitoring program in the Great Swamp National Refuge;
40. \$100,000 to Monmouth University for the Coastal Watershed Program in West Long Branch, New Jersey;
41. \$150,000 for Monmouth University for the Center for Coastal Watershed Management in West Long Beach, New Jersey;
42. \$200,000 to Madison County, New York for the Landfill Gas to Electricity Project;
43. \$250,000 for the New York University in Bronx, New York for health disparity studies;
44. \$1,500,000 for continued work on water management plans for the Central New York Watersheds in Onondaga and Cayuga counties;
45. \$750,000 to Cortland County, New York for continued work on the aquifer protection plan, of which \$350,000 is for continued implementation of the comprehensive water quality management program in the Upper Susquehanna Watershed;
46. \$250,000 to Wayne County, New York for continued work on a county-wide lakeshore embankments resource preservation and watershed enhancement plan;
47. \$250,000 to the Central New York Regional Planning and Development Board for continued research and planning for the Oneida Lake Watershed Management Program;
48. \$200,000 for the NADO (National Association of Development Organizations) Research Foundation for environmental training and information dissemination related to rural brownfields, air quality standards and water infrastructure;
49. \$250,000 to Lake Erie Coastal Ohio for planning, research, and analysis of coastal Lake Erie community, environmental, and educational efforts;
50. \$200,000 to the Oklahoma State University, the University of Oklahoma, the University of Tulsa, and the University of Arkansas for the Integrated Petroleum Environmental Consortium in Tulsa, Oklahoma;
51. \$1,500,000 to the American Cities Foundation (ACF) for the Neighborhood Environmental Action Team program and other community environmental efforts;
52. \$700,000 to Caribbean American Mission for Education Research and Action, Inc. (CAMERA), to support a youth environmental stewardship program in Bala Cynwyd, Pennsylvania;

53. \$700,000 to the Environment and Sports Inc., of Philadelphia to continue support of an environmental awareness program in Philadelphia, Pennsylvania;
54. \$350,000 for the Concurrent Technologies Corp for the Small Partner Environmental Information Exchange Network;
55. \$100,000 to Cabrini College in Radnor, Pennsylvania for the Center for Science Education and Technology;
56. \$100,000 to the University of Memphis for Environmental Programs Hazard Management in Memphis, Tennessee;
57. \$250,000 to the Tarrant County Watershed District in Tarrant County, Texas to develop and implement an integrated watershed protection plan;
58. \$750,000 to the University of Texas at Austin for environmental resource management and technical assistance activities for the Rio Bravo-Rio Grande Physical Assessment Program;
59. \$250,000 to the University of North Texas for the Texas Institute for Environmental Assessment and Management;
60. \$200,000 to the City of Lubbock, Texas for a comprehensive study to address regional water and wastewater concerns;
61. \$75,000 to the Brazos River Authority for the Brazos/Navasota Watershed Management Project in Texas;
62. \$200,000 to the Puget Sound Action Team of Hood Canal, Washington for the Hood Canal Depleted Oxygen Study;
63. \$100,000 for the Spokane Regional Chamber of Commerce for the Spokane Valley/Rathdrum Prairie Aquifer Study;
64. \$200,000 to the Upper Kanawha Valley Enterprise Community for the Shrewsbury Riverbank Erosion Project in Shewsbury, West Virginia;
65. \$2,000,000 for on-going activities at the Canaan Valley Institute, including activities relating to community sustainability;
66. \$1,500,000 to support and implement the Highlands Action Program (HAP) of the Agency, including, but not limited to, federal personnel and related costs;
67. \$150,000 for Marshall University, Center for Environmental, Geotechnical and Applied Sciences for Environmental Management Incubator in Huntington, West Virginia.

The Committee has recommended a general reduction of \$20,859,000 in this account.

The Agency has been provided \$9,200,000 for Environmental Education programs. The Agency is directed to distribute funds under the Environmental Education program proportionally in a manner

consistent with the provisions of the National Environmental Education Act.

The Committee has provided \$2,000,000 for source water protection programs. The Committee intends that these funds be used to continue and to expand the statewide grassroots sourcewater protection programs being carried out by state rural water associations.

EPA Brownfields funding is the same as FY 2004; while this account's portion is reduced by \$2,000,000 additional resources are available for the Brownfields revolving loan fund in the State and Tribal Assistance Grants.

The Committee commends the Agency for resolving a large number of pending Title VI environmental justice cases and has restored funds so that the program can continue to address the backlog of cases.

The Committee clarifies that 'shall conform' in Clean Water Act (CWA) Sec. 402(q) means that National Pollutant Discharge Elimination System (NPDES) permitting authorities should evaluate the facts and circumstances of each CSO community's program against the CSO Control Policy's themes of flexibility, site specificity, cost effectiveness, and water quality standards achievement after long-term control plan implementation (LTCP). NPDES permits should be used to impose LTCP obligations whenever possible. In authorized states, state administrative orders or state judicial orders should be the primary alternative implementation mechanism to NPDES permits for imposing LTCP obligations. This clarification does not preclude state and/or federal enforcement actions where appropriate.

According to recent data



Consolidated Civil Action No. 1:00CV00183TFH
Final and executed version of Consent Decree

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ANACOSTIA WATERSHED SOCIETY, et al.,)
Plaintiffs)**

v.)

**DISTRICT OF COLUMBIA WATER AND)
SEWER AUTHORITY, et al.,)
Defendants.)**

and)

**THE UNITED STATES,)
Plaintiff)**

v.)

**DISTRICT OF COLUMBIA WATER AND)
SEWER AUTHORITY)**

**) Consolidated
) Civil Action No. 1:00CV00183TFH**

and)

**THE DISTRICT OF COLUMBIA,)
Defendants.)**

CONSENT DECREE

WHEREAS, on February 2, 2000, the Plaintiffs, Anacostia Watershed Society, Kingman Park Civic Association, American Canoe Association, Friends of the Earth, Sierra Club, and Mary Stuart Bick Ferguson ("Citizen Plaintiffs") filed an action, Civil Action No. 1:00CV00183TFH, against the District of Columbia Water and Sewer Authority (hereinafter "WASA") and its General Manager, Jerry Johnson, pursuant to Sections 309(b) and (d), and 505 of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 ("Clean Water Act" or "the Act"), 33 U.S.C. §§ 1319(b) and (d), and

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**EPA, REGION III
OFFICE OF REGIONAL ADMINISTRATOR**

1365;

WHEREAS, on December 20, 2002, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint against WASA and the District of Columbia, which case has been consolidated with the pending matter against WASA for the alleged violations of the Clean Water Act;

WHEREAS, the Complaints allege that WASA violated the Clean Water Act, 33 U.S.C. §§ 1251 et seq. (the "Act"), by failing to comply with the District of Columbia Water Quality Standards, effluent limitations and other conditions established in the National Pollutant Discharge Elimination System ("NPDES") Permit No. DC0021199 issued to WASA by the Environmental Protection Agency ("EPA") under Section 402 of the Act, 33 U.S.C. § 1342, and by failing to properly manage, operate and maintain all collection, pumping facilities, treatment and/or combined sewer overflow (CSO) control facilities or combined sewer systems ("CSS") owned and/or operated by WASA;

WHEREAS, the United States further asserts inter alia a claim against the District of Columbia pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e) and Fed. R. Civ. P. 19(a);

WHEREAS, the United States, the Citizen Plaintiffs, and WASA have resolved the claims for alleged violations of the Nine Minimum Controls and for the performance of certain projects in a partial consent decree, entered by the Court on October 10, 2003;

WHEREAS, in that partial consent decree, WASA agreed to pay a civil penalty and to perform Supplemental Environmental Projects and a Citizen Community Project;

WHEREAS, on April 26, 2004, Plaintiffs and Defendants entered into a stipulation which provided in essence that Defendants would not contest their liability for certain claims; that Plaintiff United States waived its claims for any additional civil penalties and dismissed with prejudice its claims under Count Three of its Complaint; and that Citizen Plaintiffs also waived their claims for civil penalties;

WHEREAS, WASA submitted a draft Long Term Control Plan to EPA in June, 2001. Thereafter, WASA finalized the Long Term Control Plan in July 2002 ("LTCP") and submitted it to EPA in August, 2002;

WHEREAS, WASA has provided for public participation in development of the Long Term Control Plan through public hearings at various locations throughout the District of Columbia, stakeholder meetings, and other means;

WHEREAS, the recommended control plan in Section 13 of the LTCP provides for, inter alia, three or more underground storage tunnels to hold up to 193 million gallons of the combined wastewater and storm water during wet weather and to thereby reduce CSOs significantly;

WHEREAS, the Parties and the Citizen Plaintiffs have stipulated and agreed, and on September 22, 2004, the Court ordered that issues pertaining to the scope of Section 402(q) of the Clean Water Act, including whether the measures proposed in WASA's August, 2002 LTCP conform to the water quality standards of the District of Columbia, would not be addressed in this consolidated action, but rather EPA agreed to address such issues outside the context of this lawsuit, in, inter alia, the modification of WASA's NPDES permit that was pending at that time;

WHEREAS, EPA is the permitting agency and noticed an NPDES Permit containing Phase II conditions for public comment on March 18, 2004. EPA has issued, or is anticipated to issue shortly, the final version of the Permit. The Fact Sheet to the final permit states that "EPA has determined that, based upon current information, including but not limited to documentation in the LTCP and the District of Columbia Department of Health's analysis and interpretation of its water quality standards, WASA has demonstrated, pursuant to Section II.C.4.b of the 1994 CSO Policy, that the CSO control program will not preclude the attainment of water quality standards or the receiving waters' designated uses or contribute to their impairment." The Fact Sheet further provides that this determination is subject to post-construction monitoring adequate to verify compliance with water quality standards, in accordance with Section II.C.4.b and II.C.9 of the CSO Policy;

WHEREAS, since WASA is unable to comply with the water quality based CSO effluent limits in the Phase II conditions of its NPDES Permit until such time as it has completed implementation of the CSO controls in its LTCP, the Parties have agreed to enter into this Consent Decree to establish a judicially enforceable schedule for implementation of the CSO controls in the LTCP;

WHEREAS, WASA contends that, pursuant to Section 202 of its enabling legislation, which provides, with certain exceptions not applicable here, that WASA is subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District government, WASA is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. §§1341 et seq., to the same extent as other agencies of the District of Columbia;

WHEREAS, the Parties agree, without adjudication of facts or law, that settlement of this matter in accordance with the terms of this Consent Decree is in the public interest and have agreed to entry of this Consent Decree without trial of any issues, and the Parties hereby stipulate that, in order to resolve the claims for alleged violations of water quality standards stated in the Complaint of the United States, and to provide for compliance with the water quality-based effluent CSO limits in WASA's modified NPDES permit, this Consent Decree should be entered;

WHEREAS, the Court, upon consideration of the judicial record before it and review of this Consent Decree, also finds that settlement of this matter and entry of this Consent Decree is fair and in the public interest and will address the underlying causes of the violations. The Court also finds that it should exercise continuing jurisdiction over this matter to resolve disputes and, should the need arise, to modify the obligations in this Consent Decree;

AND WHEREAS, settlement and entry of this Consent Decree does not constitute an admission of liability by WASA or the District of Columbia;

NOW THEREFORE, before taking any testimony, and without any adjudication of any fact or law, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, and over the Parties hereto, pursuant to Sections 309 and 505 of the Clean Water Act, 33 U.S.C. §§ 1319, 1365 and 28 U.S.C. §§ 1331, 1345, 1355, and 1367. Venue is proper in the District of Columbia pursuant to Section 309 of the Clean Water Act, 33 U.S.C. § 1319, and 28 U.S.C. §§ 1391 and

1395(a).

II. APPLICATION AND SCOPE

2. The provisions of this Consent Decree shall apply to and be binding upon the Parties to this action, and their agents, employees, successors and assigns, as well as to all persons acting under the direction and/or control of WASA, including firms, corporations, and third parties such as contractors.

3. WASA shall provide a copy of this Consent Decree to any consultant and contractor selected or retained to perform any activity required by this Consent Decree.

4. No later than thirty (30) days prior to transfer of any ownership interest, operation, management, or other control of the CSS, WASA shall give written notice and provide a copy of this Consent Decree to any such transferee or successor in interest. WASA shall require, as a condition of any such sale or transfer, that the purchaser or transferee agree in writing to be bound by this Consent Decree and submit to the jurisdiction of this Court for its enforcement. WASA shall also notify, in writing, EPA Region III, the United States Attorney for the District of Columbia, and the United States Department of Justice, in accordance with Section XXI (Form of Notice) of this Consent Decree, of any such planned transfer at least thirty (30) days prior to the transfer.

III. OBJECTIVES

5. It is the express purpose of the Parties in entering this Consent Decree to further the objectives of the Act, as enunciated at Section 101 of the Act, 33 U.S.C. §§ 1251 et seq. All plans, reports, construction, and other obligations in this Consent Decree or resulting from the

activities required by this Consent Decree shall have the objective of achieving full compliance with the Clean Water Act, all applicable Federal and local regulations, and the terms and conditions of WASA's NPDES Permit, and to meet the objectives of U.S. EPA's April 19, 1994 CSO Policy.

IV. DEFINITIONS

6. Unless otherwise defined herein, the terms used in this Consent Decree shall have the meaning given to those terms in the Clean Water Act, 33 U.S.C. §§ 1251 et seq., the regulations promulgated thereunder, and EPA's 1994 CSO Policy.

7. The following terms used in this Consent Decree shall be defined as follows:

"Blue Plains" means the District of Columbia advanced wastewater treatment plant at Blue Plains.

"Collection System" means both the separate sanitary sewer and combined sewer systems within the District of Columbia.

"Combined Sewer Collection System" or "CSS" means the pipelines, pumping stations, treatment facilities and appurtenances in the District of Columbia which are designed to convey wastewaters and stormwater through a single pipe system to combined sewer overflow outfalls and/or treatment works. It includes the CSS and CSO facilities described in the NMC Report, as well as any future additions or modifications required by this Consent Decree and the Partial Consent Decree.

"Combined Sewer Overflow" or "CSO" means a discharge from the CSS at a CSO outfall designated in the Permit.

“Consolidation” or “Outfall Consolidation” means elimination of a CSO permitted outfall by routing the discharge so that it is joined with one or more other outfalls, or by connecting it with a storage/conveyance tunnel. Consolidation of outfalls does not reduce the volume of the overflow but does allow its location to be changed.

“Contract Award” or “Award Contract” means the date on which a contract is signed by both WASA and the other party to the contract.

“Construction” means the act of building a facility.

“1994 CSO Policy” means EPA’s April 19, 1994 CSO Control Policy, published at 59 Fed. Reg. 18,688, and incorporated into the Clean Water Act pursuant to the Wet Weather Water Quality Act, Section 402(q) of the Clean Water Act, 33 U.S.C. § 1342(q).

“Detailed Design” means the final stage of preparing contract documents to be used to receive bids for construction of a facility.

“Excess Flow Treatment Facilities” means those facilities at Blue Plains providing treatment to influent flows in the east primary treatment facilities followed by chlorination and dechlorination with discharge from Outfall 001. Influent flows receive screening and grit removal prior to receiving excess flow treatment.

“Facility Plan” or “Facility Planning” means preparing an engineering study to develop additional definition of the Selected CSO Controls as may be necessary for preliminary design. Examples of Facility Planning activities include, but are not limited to, planning level geotechnical investigations, developing proposed alignments for the tunnels, identifying land acquisition and required approvals, establishing bases for design, establishing system hydraulics,

siting shafts, regulators and pumping stations, and other elements needed to define the function and interaction of the Selected CSO Controls in the LTCP.

“Long Term Control Plan” or “LTCP” means the plan for controlling CSOs from WASA’s CSS that was prepared by WASA pursuant to the 1994 CSO Policy and submitted to EPA as a final report in August, 2002, and all supplements thereto.

“Low Impact Development” or “LID” means design and techniques that store, infiltrate, evaporate and detain runoff, to mimic predevelopment site hydrology. LID has the potential to reduce both the volume of storm water generated by a site and its peak overflow rate, thereby improving the quality of the storm water. Low Impact Development Retrofit refers to the modification of an existing site to accomplish LID goals. In this Decree, LIDR will refer to both techniques or technologies.

“MGD” means million gallons per day.

“NMC Report” means the report entitled District of Columbia Water and Sewer Authority, EPMC III-Sewer System, “Combined Sewer System Nine Minimum Controls Summary Report”, Draft, July 1999 (Engineering Program Management Consultant III, Greeley and Hansen – Program Manager).

“NPDES Permit” means National Pollutant Discharge Elimination System (NPDES) permit number DC0021199 issued to WASA pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342, and any future, extended, modified or reissued permit.

“Partial Consent Decree” means the Consent Decree in this consolidated action entered by this Court on October 10, 2003, resolving, inter alia, Plaintiffs’ claim for failure to

implement Nine Minimum Controls.

“Parties” means the United States, WASA and the District of Columbia.

“Person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

“Place in Operation” means to achieve steady state operation and to operate consistently in such a way as to accomplish the intended function, even though all construction close-out activities (such as completion of a punchlist and resolution of contract disputes or close-outs) may not yet be completed.

“Required Approvals” means approvals and/or permits required from agencies of the District of Columbia government (other than WASA itself), the federal government or any other governmental or private entity or person.

“Selected CSO Controls” or “Selected Controls” means the controls and projects that comprise the recommended control plan in Section 13 of the LTCP and are enumerated in Section VI of this Decree.

“Separation” or “Sewer Separation” means separation of sewers carrying storm water and sanitary wastes, so that storm water and sanitary wastewater each are conveyed through a separate system of pipes. For those CSO outfalls that are separated in this Decree, the permitted CSO outfall may remain as a discharge point but shall discharge only storm water after its separation.

“Settling Defendants” means WASA and the District of Columbia.

“WASA” means the District of Columbia Water and Sewer Authority and any

successors thereto.

V. OVERVIEW

8. The LTCP provides for control of CSO discharges to the Anacostia River, the Potomac River, and to Rock Creek and its Piney Branch tributary. The Selected CSO Controls are comprised of a system of underground storage tunnels and pumping stations designed to reduce the discharge of CSO to the receiving waters and to convey stored combined flow to Blue Plains for treatment. Other elements of the LTCP include LIDR, Sewer Separation, Outfall Consolidation, CSO monitoring, public notification, intercepting sewers, regulator improvements and improvements to Excess Flow Treatment Facilities at Blue Plains.

VI. SELECTED CSO CONTROLS AND SCHEDULES

WASA agrees to and is ordered to implement the following Selected CSO Controls, which shall be operated in accordance with the NPDES Permit and shall have the minimum elements and capacities set forth below. Nothing herein shall be deemed to be inconsistent with the NPDES Permit and, in the event of a conflict, the NPDES Permit shall control.

A. Anacostia River Projects

WASA shall plan, design, and Place in Operation the following projects to control CSO discharges to the Anacostia River, at any time up to but no later than the schedules set forth below, and thereafter to operate them.

9. WASA shall start the Facility Plan for the Anacostia River Projects no later than six (6) months from entry of this Consent Decree. No later than three years and six months from

entry, WASA shall submit to EPA pursuant to Section X of this Consent Decree a summary report and detailed implementation schedule for the Anacostia River Projects. That detailed implementation schedule shall set forth anticipated completion dates for stages of work and shall include appropriate deadlines for filing all applications for all permits that WASA knows will be necessary, and dates for notices to proceed with work and construction starts. Except for the milestones in this Section, the deadlines in the detailed implementation schedule shall serve to track and report progress and shall not be enforceable obligations of this Consent Decree.

10. **Rehabilitation of Main, "O" Street, and Eastside Pumping Stations.** These projects are being implemented pursuant to the requirements of the Partial Consent Decree.

11. **Separate Fort Stanton Drainage Area (Outfall 006).** WASA shall separate the combined sewer area tributary to CSO Outfall 006 on the east side of the Anacostia River, eliminating it as a CSO outfall at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: one (1) year from entry
- 2) Award Contract for Construction: three (3) years from entry
- 3) Place in Operation: five (5) years from entry

12. **Fort Stanton Interceptor.** WASA shall design and construct an interceptor pipeline to carry flows from CSO Outfalls 005 and 007 on the east side of the Anacostia to the Storage/Conveyance Tunnel at Poplar Point. The interceptor shall have sufficient capacity to provide the degree of control specified in the LTCP. WASA shall design, construct and Place in Operation this interceptor at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: eight (8) years from entry

2) Award Contract for Construction: eleven (11) years from entry

3) Place in Operation: thirteen (13) years from entry

13. Storage/Conveyance Tunnel From Poplar Point to Northeast Boundary.

WASA shall construct a Storage/Conveyance Tunnel from Poplar Point to Northeast Boundary which shall store combined sewer flow from the Main and O Street Pumping Station site, the CSOs along the Navy Yard and M Street, and the Northeast Boundary CSO, in accordance with WASA's NPDES Permit. This tunnel will be designed and operated to provide CSO storage and conveyance for CSO Outfalls 004, 009, 010, 011, 011a, 012, 013, 014, 015, 016, 017, 018, and 019 on the west side of the Anacostia River. The storage capacity of the tunnel shall be at least forty nine (49) million gallons. The location of the tunnel shall be finalized during Facility Planning and design but its approximate location is depicted in Page ES-9 of Appendix A. After the tunnel is Placed in Operation, in the event of wet weather causing the tunnels to be used for storage, WASA shall dewater the tunnel to the CSS as soon as practicable, but in no event longer than 59 hours, and shall convey the contents of the tunnel to Blue Plains for treatment in accordance with its NPDES permit. WASA shall plan, design, construct, and Place in Operation the tunnel at any time up to, but no later than the following schedule:

1) Award Contract for Detailed Design: four (4) years from entry

2) Award Contract for Construction: seven (7) years from entry

3) Place in Operation: thirteen (13) years from entry

14. Poplar Point Pumping Station. Under the Partial Consent Decree, WASA is required to make certain interim improvements to the existing Poplar Point Pumping Station. In

addition, WASA shall replace the existing Poplar Point Pumping Station with a new facility which shall include a low lift pumping station and a tunnel dewatering pumping station. The firm wastewater pumping capacity of the low lift pumping station shall be not less than 45 MGD and the tunnel dewatering pumping station shall be capable of dewatering the contents of the Storage/ Conveyance Tunnel at Poplar Point when full within 59 hours. WASA shall design, construct and Place in Operation both the new low lift and dewatering portions of the new pumping station at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: seven (7) years from entry
- 2) Award Contract for Construction: ten (10) years from entry
- 3) Place in Operation: thirteen (13) years from entry

15. **Storage/Conveyance Tunnel Parallel to Northeast Boundary Sewer.** WASA shall construct a Storage/Conveyance Tunnel generally parallel to Northeast Boundary Sewer to provide additional storage and conveyance for combined sewer flow and to relieve street and basement flooding in the Northeast Boundary area. The tunnel shall capture and store the combined sewer flow, in accordance with WASA's NPDES permit. After the tunnel is Placed in Operation, in the event of wet weather causing the tunnel to be used for storage, WASA shall dewater the tunnel to the CSS as soon as practicable, but in no event longer than 59 hours, and shall convey the contents of the tunnel to Blue Plains for treatment in accordance with WASA's NPDES permit. The storage capacity of the tunnel shall be at least seventy-seven (77) million gallons. The location of the tunnel will be finalized during Facility Planning and design but its approximate location is depicted in Page ES-9 of Appendix A. Once the tunnel and its

appurtenances are Placed in Operation, discharges to the Northeast Boundary Swirl Facility shall be directed to the tunnel and the Swirl Facility shall be abandoned. WASA shall design, construct and Place in Operation the tunnel at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: ten (10) years from entry
- 2) Award Contract for Construction: thirteen (13) years from entry
- 3) Place in Operation: twenty (20) years from entry

16. **Northeast Boundary Side Tunnels.** WASA shall construct side tunnels from the Storage/Conveyance Tunnel in the foregoing paragraph, along West Virginia and Mt. Olivet Avenues, NE and along Rhode Island and 4th St., NE to eliminate basement and street flooding. The location of the tunnels will be finalized during Facility Planning and design but their approximate locations are depicted on Page ES-9 of Appendix A. WASA shall design, construct, and Place into Operation the side tunnels at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: fourteen (14) years from entry
- 2) Award Contract for Construction: seventeen (17) years from entry
- 3) Place in Operation: twenty (20) years from entry

17. **Anacostia Outfall Consolidation.** WASA shall consolidate and direct all combined sewer flow from Outfalls 016, 017 and 018 in the vicinity of the Anacostia Marina to the Storage/Conveyance Tunnel from Poplar Point to Northeast Boundary, thus eliminating Outfalls 016, 017 and 018. WASA shall consolidate these outfalls at any time up to, but no later

than the following schedule:

- 1) Award Contract for Detailed Design: eight (8) years from entry
- 2) Award Contract for Construction: eleven (11) years from entry
- 3) Place in Operation: thirteen (13) years from entry

B. Potomac River Projects

WASA shall plan, design, construct, and Place in Operation the following projects on the Potomac River to control CSO discharges to that river, at any time up to but no later than the schedules set forth below, and thereafter to operate them.

18. **WASA shall start the Facility Plan for the Potomac River Projects no later than ten years after entry of the Consent Decree. No later than thirteen years from entry, WASA shall submit to EPA pursuant to Section X of this Consent Decree a summary report and detailed implementation schedule for the Potomac River Projects. That detailed implementation schedule shall set forth anticipated completion dates for stages of work and shall include appropriate deadlines for filing all applications for all permits that WASA knows will be necessary, and dates for notices to proceed with work and construction starts. Except for the milestones in this Section VI, the deadlines in the detailed implementation schedule shall serve to track and report progress and shall not be enforceable obligations of this Consent Decree.**

19. **Rehabilitation of the existing Potomac Pumping Station.** The existing Potomac Pumping Station is being rehabilitated pursuant to the Partial Consent Decree in this consolidated action.

20. **Potomac Tunnel Dewatering Pumping Station.** WASA shall construct a new

tunnel dewatering pump station that will be capable of dewatering the contents of the Potomac Storage/Conveyance Tunnel when full within 59 hours. WASA shall design, construct and Place into Operation the new dewatering pump capability at any time up to, but no later than the following schedule.

- 1) Award Contract for Detailed Design: fifteen (15) years from entry
- 2) Award Contract for Construction: eighteen (18) years from entry
- 3) Place in Operation: twenty (20) years from entry

21. **Potomac Storage Tunnel.** WASA shall construct a Potomac Storage/Conveyance Tunnel which shall store combined sewer flow from the Georgetown CSOs and the large CSOs downstream of Rock Creek [CSO Outfalls 020, 021, 022, 024, 025, 026, 027, 028, and 029] in accordance with WASA's NPDES Permit. The storage capacity of the tunnel will be at least fifty-eight (58) million gallons, unless the tunnel capacity is adjusted to take into account the effects of LIDR as set forth in Section IX. The location of the tunnel will be finalized during facility planning and design but its approximate location is depicted on Page ES-9 of Appendix A. After the tunnel is Placed in Operation, in the event of wet weather causing the tunnel to be used for storage, WASA shall dewater the tunnel to the CSS as soon as practicable, but in no event longer than 59 hours, and will convey the contents of the tunnel to Blue Plains for treatment in accordance with WASA's NPDES permit. WASA will design, construct and Place into Operation the tunnel at any time up to, but no later than the following schedule:

- 1) Award Contract for Design: thirteen (13) years from entry

2) Award Contract for Construction: sixteen (16) years from entry

3) Place in Operation: twenty (20) years from entry

22. **Outfall Consolidation.** WASA shall consolidate and direct all combined sewer flow from CSO Outfalls 024, 025, 026, 027 and 028 in the Georgetown waterfront area to the Potomac Storage/Conveyance Tunnel, thus eliminating CSO Outfalls 024, 025, 026, 027 and 028, at any time up to, but no later than the following schedule:

1) Award Contract for Detailed Design: thirteen (13) years from entry

2) Award Contract for Construction: sixteen (16) years from entry

3) Complete Consolidation and Eliminate Outfalls: twenty (20) years from entry

C. **Rock Creek Projects**

WASA shall plan, design, construct, Place in Operation and operate the following projects on Rock Creek to control CSO discharges, at any time up to but no later than the schedules set forth below, and thereafter to operate them.

23. WASA shall start the Facility Plan for the Rock Creek Projects no later than eleven years after entry of the Consent Decree. On or before fourteen years from entry, WASA shall submit to EPA pursuant to Section X of this Consent Decree a summary report and detailed implementation schedule for the Rock Creek Projects. That detailed implementation schedule shall set forth anticipated completion dates for stages of work and shall include appropriate deadlines for filing all applications for all permits that WASA knows will be necessary, and dates for notices to proceed with work and construction starts. Except for the milestones in this Section VI, the deadlines in the detailed implementation schedule shall serve to track and report

progress and shall not be enforceable obligations of this Consent Decree.

24. **CSO Outfall Separation.** WASA has certified pursuant to the Partial Consent Decree that it has separated the Luzon Valley CSS tributary to CSO Outfall 059. WASA shall separate the combined sewer areas tributary to CSO outfalls 031, 037, 053 and 058. The separation shall eliminate them as CSO outfalls, at any time up to, but no later than the following schedule:

- 1) Award of Contract for Detailed Design: two (2) years from entry
- 2) Award of Contract for Construction: four (4) years from entry
- 3) Complete Separation: six (6) years from entry

25. **Monitoring at CSO Outfalls 033, 036, 047 and 057.** WASA represents that it has conducted hydraulic monitoring at CSO Outfalls 033, 036, 047 and 057 to obtain data to further characterize the overflows on Rock Creek, including their frequency and volume. On or before thirty (30) days from entry of this Decree, WASA shall provide the monitoring data to EPA. EPA will review such data and determine whether it is sufficient for the characterization. If EPA concludes the monitoring data is sufficient, it will so advise WASA in writing. If EPA requires additional data or information, it will advise WASA in writing as to what further sampling or information is required. Within sixty (60) days of receipt of such written notification, WASA shall proceed to perform the additional monitoring to provide such additional information to EPA.

26. If the monitoring confirms the predictions of WASA's model for the LTCP – i.e., that overflows occur relatively infrequently in a range of one to six times per year and in

relatively small amounts – regulator improvements shall be implemented to control overflows to Rock Creek and relief of the Rock Creek Main Interceptor shall be obtained by connecting the interceptor to the Potomac Storage Tunnel. If the monitoring shows that the regulator modifications required will cause surcharging in the Rock Creek Interceptor, WASA shall design a relief interceptor parallel to the Rock Creek Interceptor, or other project to provide relief to the interceptor or to provide control of overflows to the degree specified in WASA's NDPES Permit.

27. Within six (6) months of EPA's written notice that the monitoring already performed by WASA is sufficient, or upon completion of any additional monitoring or provision of additional information, WASA shall submit to EPA for approval a report identifying the results of the monitoring and justifying which of the foregoing alternatives it selects, including a schedule for award of contract for design, award of contract for construction and placing the projects into operation that shall be no longer than six years following EPA approval. That schedule shall be incorporated into this Decree by reference and WASA shall commence to implement the plan within 90 days of EPA approval. WASA shall place into operation the alternative that it selected in no more than six (6) years.

28. **Piney Branch Storage Tunnel.** WASA shall construct a Rock Creek Storage/Conveyance Tunnel which shall store the combined sewer flow from the Piney Branch CSO, Outfall 049, in accordance with WASA's NPDES Permit. The storage capacity of the tunnel will be at least nine and one-half (9.5) million gallons, unless the tunnel capacity is adjusted to take into account the effects of LIDR as set forth below. WASA shall design the tunnel to fill and dewater by gravity in 59 hours or less when full. After the tunnel is Placed in

Operation, in the event of wet weather causing the tunnel to be used for storage, WASA shall dewater the tunnel to the CSS as soon as practicable, but in no event longer than 59 hours, and shall convey the contents of the tunnel to Blue Plains for treatment in accordance with WASA's NPDES permit. The location of the tunnel will be finalized during Facility Planning and design but it will be between CSO 049 and Rock Creek and its approximate location is depicted in Page ES-9 of Appendix A. WASA shall plan, design, construct and Place in Operation the tunnel at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: fourteen (14) years from entry
- 2) Award Contract for Construction: seventeen (17) years from entry
- 3) Place in Operation: twenty (20) years from entry

D. Blue Plains Wastewater Treatment Plant Projects

WASA shall plan, design, construct, Place in Operation and operate the following projects at Blue Plains, at any time up to but no later than the schedules set forth below.

29. **Excess Flow Improvements.** WASA shall make the following improvements to the existing Excess Flow Treatment Facilities at Blue Plains in order to insure availability and improve the reliability of the full 336 MGD excess flow treatment capacity (Outfall 001) at all times: 1) Construct four additional primary clarifiers on the east side of the plant to decrease loadings on the existing clarifiers and to improve reliability by providing redundancy; 2) lengthen the weir on the Excess Flow Chlorine Contact Tank to reduce head loss through the system; 3) replace the influent sluice gates on the Excess Flow Chlorine Contact Tank with motor operated butterfly valves to improve system control; 4) incorporate a control system (and

possibly variable speed drives) into the rehabilitation of Raw Wastewater Pump Station No. 2 to improve control of wet well levels at the plant; and 5) install automated controls to facilitate record keeping, time keeping and communications during excess flow events. WASA shall make and Place in Operation said improvements at any time up to, but no later than the following schedule:

- 1) Award Contract for Detailed Design: four (4) years from entry
- 2) Award Contract for Construction: seven (7) years from entry
- 3) Place in Operation: eleven (11) years from entry

E. Public Notification:

30. A visual notification system shall be installed as part of the construction of the tunnel storage projects for the Anacostia River, the Potomac River and for Rock Creek. The system shall be installed at a minimum of three locations on each receiving water at public access locations. The system shall be designed to notify the public of the occurrence of overflows based on flow monitoring at representative CSO outfalls on each receiving water. The system shall comprise a series of colored lights, flags or pendants that shall operate as follows:

- a. Color A shall be displayed as long as flow is detected from the representative outfall;
- b. Other colors shall be displayed based on the overflow volume from the representative outfall. There shall be two levels of notification: one for an event with a probable impact of less than 24 hours, and another for a longer event;
- c. For an event with a probable impact of less than 24 hours, Color B shall

be displayed for 24 hours after flow is no longer detected from the representative outfall;

d. For an event with a probable impact of more than 24 hours, Color C shall be displayed for 72 hours after flow is no longer detected from the representative outfall;

e. When operational, the visual notification system shall be described and explained on WASA's web site.

31. WASA shall finalize the details of the public notification system (e.g., selection of representative outfalls, locations, warning devices, and colors) during Facility Planning for each receiving water. WASA shall submit its plan with the final details to EPA for approval pursuant to Section X.

32. The foregoing visual notification Section shall be in addition to the obligations imposed regarding public notification in the Partial Consent Decree.

VII. MODIFICATIONS TO SELECTED CSO CONTROLS AND SCHEDULES

33. Defendants agree that the 20 year implementation schedule and the work set forth in Section VI are feasible and equitable, based on current information, assumptions and financial and other projections. Some of the information currently available to WASA and its current assumptions and projections are set forth in, inter alia, the LTCP appended at Appendix A. WASA's current financial assumptions and projections for the 20 year implementation schedule are set forth in, inter alia, Appendix B.

34. The Parties recognize that the information currently available to WASA as well as WASA's current assumptions and projections may change during implementation of the Selected CSO Controls. The schedule and/or the Selected CSO Controls in Section VI may be modified

based on a significant change in the information currently available to WASA or WASA's current assumptions or projections, whether or not such change is anticipated, that renders the Consent Decree no longer feasible and equitable. Unless the Parties otherwise agree, a request for modification shall not relieve WASA of its obligations pursuant to Section VI and WASA shall continue with implementation of the Selected CSO Controls until the request for modification is either agreed to by the Parties, approved by the Court, or ruled on by the Court under Section XXII of this Decree. Any dispute as to whether or not implementation of the Selected CSO Controls should continue during the pendency of the modification request shall not be subject to judicial review or to dispute resolution.

35. The United States on behalf of EPA has accepted the Selected CSO Controls and the 20 year schedule. Appendices A and B are not stipulations, however, and the United States reserves its right to disagree or to contest particular statements or facts contained therein. In the event that WASA seeks a modification to extend the schedule based upon a significant increase in costs or other changes in financial circumstances, WASA shall provide to EPA an update of the information contained in Appendix B and, at EPA's request, an update of the key financial variables listed at Appendix C.

36. The failure of WASA and/or the District to seek, approve, or enact timely and adequate rate changes or to obtain bond or other financing to implement the work according to the schedule contained herein based on current information, assumptions and projections shall not constitute a significant change in circumstances under this Section nor shall such failure by itself justify any change in or reassessment of the interim milestones or the 20 year schedule in

this Decree.

37. **Grant Funding.** The schedules contained herein assume no federal appropriations, grants, or funding from sources other than WASA, for performance of the work described in Section VI. In the event that WASA receives grant funding from federal or other sources for such work, it shall report to EPA in writing the source, amount, and timing of any such grant funding when it learns that it will be appropriated or otherwise received. WASA has the option but is not required to accelerate the schedule contained in Section VI based on grant funding.

38. Modifications made pursuant to this Section shall follow the procedures set forth in Section XXII (Modification) of this Decree.

39. In the event that WASA, after consultation with the District, requests a modification to the schedule or to the Selected CSO Controls, and the United States does not agree to the proposed modification, WASA and/or the District may invoke the dispute resolution procedures of Section XIV of the Decree.

40. If WASA, after consultation with the District, requests a modification because it has decided that it needs to rebid a contract to construct a project, and if WASA has made best efforts to communicate with the appropriate personnel at EPA Region 3 to obtain a response to a request for modification, and has promptly responded to any requests for information from EPA Region 3 related to the requested modification, but EPA does not act on the request for modification within sixty (60) days after receiving the modification request, WASA may initiate informal dispute resolution and issue a notice of the dispute under the dispute resolution

procedures. For all other requests for modification, if WASA has made best efforts to communicate with the appropriate personnel at EPA Region 3 to obtain a response to a request for modification, and has promptly responded to any requests for information from EPA Region 3 related to the requested modification, but EPA does not act on the request for modification within one hundred twenty (120) days after receiving the modification request, WASA may initiate informal dispute resolution and issue a notice of the dispute under the dispute resolution procedures.

41. Compliance with the terms of this Decree is not conditioned upon the receipt of federal or state grant funds and WASA's failure to comply is not excused by the lack of federal or state grant funds, or by the processing of any applications for the same, subject solely to a force majeure event due to the Anti-Deficiency Act provisions in Section XIII (Force Majeure).

VIII. CONTROL SYSTEM COMPLIANCE AND POST-CONSTRUCTION MONITORING

A. **Individual Construction Project Certification.** Within sixty (60) days of Placing in Operation each project required under Section VI, WASA shall certify under Section XX (Certification) that such project has been designed, constructed and will be operated in accordance with the terms of this Consent Decree and its NPDES permit.

B. **Post-construction monitoring.**

42. When the Selected Controls set forth in Section VI have been Placed in Operation, WASA shall comply with the post-construction monitoring program set forth in its NPDES permit.

IX. LOW IMPACT DEVELOPMENT RETROFIT

43. WASA shall promote LIDR in the District of Columbia by performing projects as set forth in this Section. Such projects shall constitute additional work which WASA agrees to perform in addition to the injunctive relief set forth in Section VI.

44. As set forth in the LTCP, WASA shall incorporate LIDR techniques into new construction or reconstruction on WASA facilities for demonstration projects up to a total expenditure of \$3 million and shall maintain the LIDR projects for at least five (5) years after each project is Placed into Operation. WASA shall monitor such projects to obtain data regarding the effectiveness of LIDR in reducing run-off reaching combined sewers and surface waters. These LIDR projects shall be in addition to those constructed as a Supplemental Environmental Project or financed as a Citizen Environmental Project pursuant to the Partial Consent Decree.

45. WASA shall submit a plan to EPA for approval and a schedule for implementing and monitoring LIDR on its own property within two (2) years from entry of this Decree. WASA shall Place in Operation all LIDR projects within six (6) years from approval of that plan by EPA. WASA shall monitor the LIDR projects for twelve (12) months after Placing in Operation all LIDR facilities.

46. WASA shall review the results of demonstration projects on its own property, other current LID and LIDR information and data from other projects in the District and elsewhere as part of its design of the Storage/Conveyance Tunnels for Rock Creek and for the Potomac River set forth in Section VI of this Consent Decree. Its design of those tunnels must

take such data into account and address whether the data permit it to reduce the capacity of those tunnels from that set forth in Section VI. It shall submit its review and analysis of the data concerning LIDR and, upon request by EPA, the proposed design for the Storage/Conveyance Tunnels for Rock Creek and for the Potomac River to EPA for approval pursuant to Section X of this Consent Decree.

X. EPA APPROVAL OF PLANS AND SUBMISSIONS

47. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree (with the exception of requests for modification pursuant to Section VII above), EPA shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

48. If the submission is approved, WASA shall take all actions required by the plan, report, or other item, as approved. If the submission is conditionally approved or approved only in part, WASA shall, upon written direction of EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to WASA's right to dispute only the specified conditions or the disapproved portions, under Section XIV of this Decree (Dispute Resolution).

49. If the submission is disapproved in whole or in part, WASA shall, within 45 days or such other time as the Parties agree in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval. Any Stipulated Penalties applicable to the original submission, as provided in Section XII (Stipulated Penalties) of this

Decree, shall accrue during the 45-day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of WASA's obligations under this Decree, the Stipulated Penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

50. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require WASA to correct any deficiencies, in accordance with the preceding Paragraphs, subject to WASA's right to invoke Dispute Resolution and the right of EPA to seek Stipulated Penalties, as provided in the preceding Paragraphs.

XI. REPORTING

51. Progress reports are to be provided at quarterly intervals for all milestone events one year or longer in duration. Each progress report shall summarize the status and progress of work required for completion of the next milestone and the impact of any delays on completion of said milestone, and shall be submitted on the 28th day of the month following each calendar quarter.

52. Beginning with the first CSO Quarterly Report due after entry of this Consent Decree, and for every calendar quarter thereafter until this Consent Decree terminates in accordance with Section XXVI, (Termination), below, WASA shall submit written status reports to U.S. EPA, certified pursuant to Section XX, and post them on the WASA website. In each report, WASA shall provide the following:

- a. a statement setting forth the deadlines and other terms that WASA is required by

this Consent Decree to meet since the date of the last quarterly statement, whether and to what extent WASA has met these requirements, and the reasons for any noncompliance;

b. a statement tracking WASA's progress against the detailed implementation schedules required to be submitted under Section VI upon the completion of Facility Planning for each receiving water, whether there have been any delays, the reasons for the delays, and the actions WASA is taking or intends to take to overcome the delays.

c. a general description of the work completed within the three-month period, and a projection of work to be performed pursuant to this Consent Decree during the next three-month period. Notification to U.S. EPA of any anticipated delay shall not, by itself, excuse the delay.

XII. STIPULATED PENALTIES

53. WASA shall be liable for stipulated penalties for the failure to satisfactorily achieve the deadline for the start of Facility Planning, submission of a detailed implementation schedule and summary report on Facility Planning, Award of Contract for Detailed Design and the Award of Contract for Construction in Section VI, as follows:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
1 st to 30 th Day	\$ 500
31 st to 59 th Day	\$ 1,000
60 th day until submitted	\$ 1,500

54. WASA shall be liable for stipulated penalties for the failure to satisfactorily Place in Operation any of the required projects by the final deadline set forth for that project in the schedules in Section VI, as follows:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
1 st to 30 th Day	\$ 1,000
31 st to 59 th Day	\$ 2,000
After 60 Days	\$ 5,000

55. WASA shall be liable for stipulated penalties for each failure to properly perform the CSO monitoring required in its NPDES Permit after the Selected Controls are Placed in Operation, as follows:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
1 st to 30 th Day	\$ 1,000
31 st to 59 th Day	\$ 2,000
60 th day until submitted	\$ 2,500

56. WASA shall be liable for stipulated penalties for failure to timely submit any progress or completion report required in Section XI (Reporting) , as follows:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
1 st to 30 th Day	\$ 500
31 st to 59 th Day	\$ 1,000
60 th day until submitted	\$ 2,000

57. Other Violations: If WASA fails to comply with a requirement or provision of this Decree not expressly listed above, it shall be liable for stipulated penalties as follows:

<u>Period of Noncompliance</u>	<u>Penalty Per Day Per Violation</u>
1 st to 30 th Day	\$ 500

31 st to 59 th Day	\$ 1,000
60 th day until submitted	\$ 2,000

58. General Provisions. Stipulated civil penalties shall automatically begin to accrue on the first day WASA fails to meet any of the schedules required by this Consent Decree or to satisfy any obligation or requirement of this Consent Decree and shall continue to accrue each day until WASA achieves compliance with such schedule, obligation or requirement; provided, however, that if WASA submits an appropriately documented request for modification under Section XXII (Modification) of this Decree 180 days prior to an affected deadline or compliance date, and EPA does not act on such request for modification prior to the deadline or compliance date, stipulated penalties shall not accrue for WASA's failure to satisfy the deadline or compliance date until EPA's approval or disapproval. This provision shall not apply if WASA does not have a reasonable basis to make the request for modification or if the request is made for purposes of delay. In the event EPA approves or disapproves WASA's request for modification after passage of the affected deadline or compliance date, stipulated penalties shall begin to accrue from the time EPA acts on the request for modification.

59. Failure to Meet Award of Construction Contract Deadlines Due to Rebidding. If WASA elects to rebid a construction contract for a project described in Section VI, it may request a modification under Section VII. In the alternative, WASA may rebid and elect to have any stipulated penalties for failure to meet the Award of Construction Contract deadline due and owing but to defer their payment. If WASA meets its deadline for Placing in Operation the specific project for which penalties were deferred, stipulated penalties for failure to meet the

deadline for Award of Construction Contract will be excused. If WASA fails to meet the deadline for Placing in Operation the specific project for which penalties were deferred, stipulated penalties for the failure to meet both the Award of Construction Contract and the Placing in Operation deadlines will be due and payable on demand by the United States. When WASA elects a deferral of stipulated penalties for failure to meet an Award of Construction deadline due to rebidding a project, it shall give written notice to EPA that it intends to rebid the project and to defer stipulated penalties. When it awards the contract for construction of that project, WASA shall so notify EPA and advise it in writing of the amount of stipulated penalties accrued pursuant to Section XII that are due and owing but deferred.

60. Stipulated civil penalties shall be paid within thirty (30) days of the date of a demand for payment of stipulated civil penalties for any non-compliance with any of the schedules of performance or requirements set forth in this Consent Decree.

61. In the event that a stipulated penalty is not paid according to the instructions in a written demand from the United States, the stipulated civil penalty shall be payable with interest from the original due date to the date of payment, at the statutory judgment rate set forth at 28 U.S.C. § 1961(a).

62. Stipulated civil penalties shall be paid electronically or by submitting a certified or cashier's check payable to "Treasurer, the United States of America," and tendered to the United States Attorney for the District of Columbia. Simultaneously, WASA shall send copies of the certified or cashier's check, together with a letter describing the basis for the penalties, to Chief, Environmental Enforcement Section, United States Department of Justice, Post Office

Box 7611, Ben Franklin Station, Washington, D.C. 20044, and to Section Chief, Compliance and Enforcement Branch, Water Protection Division, US EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103. The transmittal letter shall reference the caption, the civil action number, and DOJ Number 90-5-1-1-07137.

63. Payment of stipulated civil penalties as set forth above shall be in addition to any other rights or remedies which may be available to the United States or its agencies by reason of WASA's failure to comply with the requirements of this Consent Decree and all applicable Federal, state or local laws, regulations, wastewater discharge permit(s) and all other applicable permits. Where a violation of this Consent Decree is also a violation of such laws, regulations, or permits, WASA shall be allowed a credit, in the amount of any Stipulated Penalties paid, as a set-off against any statutory penalties imposed for such violation.

64. If WASA invokes dispute resolution and the Court resolves the dispute against WASA, stipulated penalties which have accrued during the pendency of the dispute shall be payable, as set forth herein, upon resolution of the dispute; provided, however, that in the event that the Director of the Water Protection Division requires more than sixty (60) days to issue a final agency decision concerning the dispute, WASA shall be liable only for sixty (60) days of stipulated penalties for the period from submission of the Statements of Position until issuance of the final agency decision, as set forth in Section XIV (Dispute Resolution). Stipulated penalties shall begin to accrue again upon issuance of the final agency decision.

XIII. FORCE MAJEURE

65. "Force Majeure" for the purposes of this Consent Decree is defined as an event

arising from causes beyond the control of WASA or the control of any entity controlled by WASA, including its consultants and contractors, which delays or prevents the performance of any obligation under this Consent Decree. Nothing in this Section is intended to relieve WASA of its duty to use due diligence to complete the requirements of this Consent Decree in a timely manner or of WASA's obligation to meet all discharge limitations and other obligations contained in WASA's NPDES Permit. Unanticipated or increased costs or changed financial circumstances are not Force Majeure events, except as provided in Paragraph 67 (Anti-Deficiency Act) below, although in certain instances they may constitute the basis for a request for modification pursuant to Section VII.

66. **Permitting**: Failure to apply for a required permit or approval, or to provide in a timely manner all information required to obtain a permit or approval necessary to meet the requirements of this Consent Decree, are not Force Majeure events. However, failure of a permitting authority to issue a necessary permit in a timely fashion is an event of Force Majeure where the failure of the permitting authority to act is beyond the control of WASA and WASA demonstrates that it has taken all steps available to it to obtain the necessary permit, including but not limited to:

- a. Promptly providing reasonably known permitting authorities with copies of this Consent Decree, when lodged, as well as briefing each such authority, both orally and with written materials if necessary, on the projects and schedules contained therein in order to coordinate permitting submittals and approvals;
- b. submitting a complete permit application within two (2) months of the

date identified in the detailed implementation schedule to apply for permits that are known to be required, and in a prompt fashion for those permits not known to be required or previously identified in the schedule;

- c. responding to requests for additional information by the permitting authority in a timely fashion;
- d. making regular inquiry, approximately every 45 days, both verbally and in writing, with the permitting authority after initial or supplemental permit filings, to determine the status of the permit application;
- e. seeking relief from higher management officials within the permitting authority where permit processing delays threaten to cause noncompliance with any deadline in this decree;
- f. accepting lawful permit terms and conditions; and
- g. prosecuting appeals of any unlawful terms and conditions imposed by the permitting authority in an expeditious fashion.

67. **Anti-Deficiency Act Events:** Nothing in this Decree shall be construed to require an expenditure, obligation or contract in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq. Where an expenditure, obligation or contract is subject to the Anti-Deficiency Act, WASA's obligations shall be subject to the availability of appropriated funds as follows:

- (a) WASA must initially identify the portion of its budget that is comprised of appropriated funds, identify the other components of its funding, and demonstrate why the unavailability of the appropriated funds will delay specific obligations;

(b) To the extent made necessary by lack of appropriated funds, WASA may obtain deferral of compliance with an obligation of this Consent Decree until its next annual budget cycle if, within sixty (60) days after WASA knew or should have known of the event described in Paragraph 68 below, it provides in writing to EPA Region III a statement which shows the following:

(i) That it included in its annual budget, which accompanies the District of Columbia budget submitted to the President for transmission to the Congress pursuant to Section 466 of the D.C. Self-Government and Governmental Reorganization Act, D.C. Code Sec. 47-304 (1990), sufficient money to carry out such objective;

(ii) That it made diligent efforts to obtain Congressional enactment of that part of the budget act;

(iii) That it expressly identified in the annual fiscal year adopted budget prepared for Congressional use such obligation (not necessarily to include reference to this Decree as such) together with the amount of money tied to performing such obligation; and

(iv) That Congress acted expressly to eliminate such amount of money or to reduce it below the level necessary to perform the obligation, or that Congress made an across the board reduction in WASA's appropriation as shown in WASA's adopted budget without expressly saving such obligation and the across the board reduction, as applied proportionately to the amount of money shown in the adopted budget for such obligation, left an insufficient amount to carry out that obligation.

68. **General Requirements:** When circumstances are occurring or have occurred

which may delay the completion of any requirement of this Consent Decree, whether or not due to a Force Majeure event, WASA shall so notify EPA, in writing, within fifteen (15) days after WASA knew, or should have known, of the delay or anticipated delay. The notice shall describe in detail the bases for WASA's contention that it experienced a Force Majeure delay, the anticipated length of the delay, the precise cause or causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. Failure to so notify the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

69. If the United States finds that a delay in performance is, or was, caused by a Force Majeure event, it shall extend the time for performance, in writing, for a period to compensate for the delay resulting from such event and stipulated penalties shall not be due for such period. In proceedings on any dispute regarding a delay in performance, the dispute resolution provisions of Section XIV shall apply and WASA shall have the burden of proving that the delay is, or was, caused by a Force Majeure event, and that the amount of additional time requested is necessary to compensate for that event.

70. Compliance with a requirement of this Consent Decree shall not by itself constitute compliance with any other requirement. An extension of one compliance date based on a particular event shall not automatically extend another compliance date or dates. WASA shall make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought. WASA may petition for the extension of more than one compliance date in a single request.

XIV. DISPUTE RESOLUTION

71. This Court shall retain jurisdiction for the purpose of adjudicating, in the manner provided by this Section, all disputes between WASA and the United States that may arise under the provisions of this Consent Decree. Unless otherwise expressly provided in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of WASA that have not been disputed in accordance with this Section.

72. Permit actions pursuant to 40 C.F.R. Part 124, including issuance, denials, and modifications, shall not be subject to this Consent Decree, but rather shall continue to be handled through the administrative and judicial procedures set forth in those regulations.

73. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between WASA and the United States. Notice of the dispute shall be provided no later than fourteen (14) days from the date of the circumstances giving rise to the dispute. The period for informal negotiations shall not exceed twenty (20) days from the date of the original notice of the dispute, unless WASA and the United States otherwise agree in writing to extend that period.

74. If the informal negotiations are unsuccessful, the position of the United States shall control unless, within twenty (20) days after the conclusion of the informal negotiation period, WASA invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, which shall set forth the

nature of the dispute with a proposal for its resolution as well as any factual data, analysis or opinion supporting that position and any supporting documentation (including the Long Term Control Plan or portions thereof) relied upon.

75. Within thirty (30) days of the receipt of a Statement of Position, pursuant to this Section, the United States may serve on WASA its own Statement of Position, which may include an alternate proposal for resolution of the dispute as well as any factual data, analysis, or opinion supporting that position and all supporting documentation (including the Long Term Control Plan or portions thereof) relied upon by the United States. Within 15 days after receipt of such Statements, WASA may serve on the United States a Reply.

76. Matters Accorded Record Review: With the exception of modification requests pursuant to Section VII, this Paragraph shall pertain to disputes subject to the procedures of this Section that concerns the adequacy or nature of the work to be performed under Section VI of this Decree, or other matters that are accorded review on the administrative record under applicable principles of administrative law. For matters subject to this Paragraph, WASA shall have the burden of showing that the position of the United States is arbitrary and capricious or otherwise not in accordance with applicable law or this Consent Decree. Plaintiff shall compile an administrative record, which shall consist of the Statements of Position and supporting documentation relied upon (including the LTCP or portions thereof that the parties incorporated into their Statements) and other documents considered and relied upon by EPA in arriving at its final administrative decision. Where appropriate, EPA may allow WASA, the District of Columbia, Citizen Plaintiffs, and/or other members of the public to make supplemental

submissions. The Director of the Water Protection Division shall issue a final administrative decision resolving the dispute based on the administrative record. Stipulated penalties for the period from submission of Statements of Position until issuance of the final administrative decision shall accrue for no more than sixty (60) days, even if EPA issues the final administrative decision after more than 60 days. The final administrative decision shall be effective in ten (10) days, unless WASA may move for judicial review within ten (10) days of its receipt of the final agency decision.

77. Modification Requests: In the case of requests for modification of the Selected CSO Controls and/or schedules pursuant to Section VII, WASA shall bear the burden of demonstrating that the requested modification should be approved in accordance with Section VII of this Consent Decree. EPA's final decision shall be binding on WASA, unless within twenty (20) days of its receipt WASA submits a modification request to the Court. If the Director of the Water Protection Division does not issue a final decision on a request for modification within one hundred twenty (120) days from the date that WASA submits its Reply to the United States' Statement of Position, WASA may elect to move in Court to modify the Consent Decree.

78. Other Matters: In the case of other matters not subject to Paragraphs 76 and 77 above, WASA shall have the burden to demonstrate that its actions or positions were taken in accordance with the terms, conditions, requirements and objectives of this Consent Decree and the Clean Water Act. The Director of the Water Protection Division will issue a final decision resolving the dispute which will be binding on WASA, unless within twenty (20) days of its

receipt WASA serves on the United States a motion for judicial review of the decision setting forth the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. Stipulated penalties for the period from submission of Statements of Position until issuance of the final administrative decision shall accrue for no more than sixty (60) days, even if EPA issues the final administrative decision after more than 60 days.

79. Where the dispute arises from WASA's request for modification of the Selected CSO Controls and/or schedules pursuant to Section VII, the matter shall not be subject to the principles of record review in Paragraph 76. For other matters, If WASA and the United States disagree as to whether the dispute should proceed under the principles of record review or not, WASA shall follow the procedures determined by EPA to be applicable. Upon appeal, the Court shall determine which procedures are applicable in accordance with the standards set forth in this Section.

80. Submission of any matter to the Court for resolution shall not extend or stay any of the deadlines set forth in this Consent Decree unless the Parties agree to such extension in writing or the Court grants an order extending such deadline(s). Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in this Section. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that WASA does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XII (Stipulated Penalties).

XV. RIGHT OF ENTRY

81. Commencing upon the date of lodging of this Consent Decree, U.S. EPA and its representatives, contractors, consultants, and attorneys shall have the right of entry into and upon the premises of WASA at all reasonable times, upon proper presentation of credentials, for the purposes of:

- (a) Monitoring the progress of activities required by this Consent Decree;
- (b) Verifying any data or information required to be submitted pursuant to this Consent Decree;
- (c) Obtaining samples and, upon request, splits of any samples taken by WASA or its consultants. Upon request, WASA will be provided with splits of all samples taken by the United States;
- (d) Inspecting and evaluating the CSO System;
- (e) Inspecting and reviewing any record required to be kept under the provisions of this Consent Decree or any NPDES Permit and the Clean Water Act; and
- (f) Otherwise assessing WASA's compliance with this Consent Decree.

82. This Section XV, Right of Entry, in no way limits or affects any right of entry and inspection, or any other right otherwise held by the United States, U.S. EPA and any other governmental entity, pursuant to applicable federal or state laws, regulations.

83. WASA reserves the right to request the laboratory analytical results of samples taken from the CSS by the United States during the term of this Consent Decree, and any non-privileged reports prepared using such results.

XVI. NOT A PERMIT/COMPLIANCE WITH OTHER STATUTES/REGULATIONS

84. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342, nor shall it be interpreted to be such. This Consent Decree does not relieve WASA of any obligation to apply for, obtain and comply with the requirements of any new or existing NPDES permit or to comply with any federal, state or local laws or regulations, including, but not limited to its obligations to obtain a permit for its wastewater treatment and collection system or facilities and to comply with the requirements of any NPDES permit or with any other applicable federal or state law or regulation. Any new permit, or modification of existing permits, must be complied with in accordance with federal and state laws and regulations.

XVII. FAILURE OF COMPLIANCE

85. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that WASA's complete compliance with this Consent Decree will result in compliance with the provisions of the Clean Water Act, 33 U.S.C. §§1251 et seq., or with WASA's NPDES permit. Notwithstanding EPA's review or approval of any Scope of Work, report, or plans and specifications, pursuant to this Consent Decree, WASA shall remain solely responsible for any non-compliance with the terms of this Consent Decree, all applicable permits, the Clean Water Act, and regulations promulgated thereunder. The pendency or outcome of any proceeding concerning issuance, reissuance, or modification of any permit shall neither affect nor postpone WASA's duties and obligations as set forth in this Consent Decree.

XVIII. EFFECT OF DECREE AND NON-WAIVER PROVISIONS

86. The Parties agree that this Consent Decree resolves the civil claims for violation of water quality standards and for long-term injunctive relief (Claim One) alleged in the Complaint filed by the United States through the date of lodging of this Decree.

87. The Consent Decree in no way affects or relieves Settling Defendants of any responsibility to comply with any federal, state, or local law or regulation.

88. The Parties agree that WASA is responsible for achieving and maintaining complete compliance with all applicable federal and state laws, regulations, and permits, and that compliance with this Consent Decree shall be no defense to any actions commenced pursuant to said laws, regulations, or permits.

89. The United States reserves the right to file a civil action for statutory penalties or injunctive relief against WASA for any violations of the Clean Water Act by WASA which occur after the date of lodging of this Consent Decree and any such violations occurring prior to that date that are not specifically alleged as Claims for Relief in the Complaints.

90. This Consent Decree does not limit or affect the rights of WASA, the District of Columbia, or the United States as against any third parties which are not parties to this Consent Decree.

91. The Parties reserve any and all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not limit any authority of EPA under any applicable statute, including the authority to seek information from WASA or to seek access to the property of WASA, nor shall anything in this Consent Decree be construed to limit the authority of the United States to undertake any action against any person, including WASA,

in response to conditions that may present an imminent and substantial endangerment to the environment or the public health or welfare.

92. Obligations of WASA under the provisions of this Consent Decree to perform duties scheduled to occur after the date of lodging, but prior to the date of entry, shall be legally enforceable from the date of lodging of this Consent Decree. Liability for stipulated penalties, if applicable, shall accrue for violation of such obligations as of the date of violation and payment of such stipulated penalties may be demanded by the United States upon or after entry of this Consent Decree.

93. The United States reserves the right to file a criminal action for statutory penalties or other criminal relief against WASA for any violations by WASA of the Clean Water Act or other applicable federal statutes.

94. It is the intent of the Parties hereto that the clauses hereof are severable, and should any clause(s) be declared by a court of competent jurisdiction to be invalid and unenforceable, the remaining clauses shall remain in full force and effect.

95. The United States reserves all remedies available to it for violations of Federal, State and local law.

XIX. COSTS OF SUIT

96. The Parties shall bear their own costs and attorney's fees with respect to this action and to matters related to this Consent Decree.

XX. CERTIFICATION OF SUBMISSIONS

97. WASA shall maintain copies of any underlying research and data in its

possession, custody or control for any and all documents, scope of work, reports, plans and specifications, or permits submitted to EPA pursuant to this Consent Decree for a period of five (5) years, except that WASA shall not be required to maintain copies of drafts of documents, scope of work, reports, plans and specifications, reports or permits. WASA shall require any independent contractor implementing this Consent Decree to also retain such materials for a period of five (5) years. WASA shall submit such supporting documents to EPA upon request. WASA shall also submit to EPA upon request any other documents that relate to or discuss the operation, maintenance, repair, or construction of the CSO system (or any portion thereof), or that relate to or discuss the number, frequency, volume, quality or environmental impact of CSO discharges. In all notices, documents or reports submitted to EPA pursuant to this Consent Decree, a senior management official of WASA shall sign and certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

XXI. FORM OF NOTICE

98. Unless otherwise specified within the terms of this Consent Decree, all reports, notices, or any other written communications required to be submitted under this Consent Decree

shall be sent to the respective parties at the following addresses:

As to the United States:

Department of Justice

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611, Ben Franklin Station
Washington, DC 20044
Reference DOJ Case No. 90-5-1-1-07137

United States Attorney
District of Columbia
Judiciary Center
555 Fifth Street NW
Washington, DC 20530

EPA

Director
Water Enforcement Division
Office of Regulatory Enforcement
U.S. Environmental Protection Agency
OECA-ORE-WED
Ariel Rios Building
12th and Pennsylvania Ave, NW
Mail Code 2243A
Washington, DC 20004

Chief
NPDES Branch (3WP31)
Water Protection Division
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Yvette Roundtree (3RC20)
Office of Regional Counsel

U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

As to WASA:

Jerry N. Johnson or his successor
General Manager
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, SW
Washington, D.C. 20032

Deputy General Manager/Chief Engineer
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, SW
Washington, D.C. 20032

As to the District:

The Attorney General of District of Columbia
One Judiciary Square
441 Fourth Street NW
Suite 600 South
Washington, DC 20001

XXII. MODIFICATION

99. This Consent Decree contains the entire agreement of the Parties and shall not be modified by any prior oral or written agreement, representation or understanding. Prior drafts of this Consent Decree shall not be used in any action involving the interpretation or enforcement of this Consent Decree.

100. The non-material terms of this Consent Decree may be modified by a subsequent written agreement signed by all the Parties. If all the Parties agree to a material modification in writing, they may apply to the Court for approval thereof. If the Parties do not reach agreement

on such material modification, the request for modification shall be subject to the dispute resolution procedures of this Decree. All material modifications shall be in writing and approved by the Court before they will be deemed effective.

101. In the event WASA requests a material modification to the Selected CSO Controls and/or the schedule set forth in Section VI of the Consent Decree, WASA shall arrange for additional public participation prior to submitting the modification request to the United States. WASA shall initially consult with EPA concerning the modification and the scope of public participation to be obtained by WASA prior to submission of a formal request for modification from WASA to EPA.

(a) The proposed modification package shall be submitted to EPA and shall contain the following:

(i) the basis for the modification and the supporting technical and regulatory justification (including if applicable the LTCP or pertinent portions thereof);

(ii) any changes to the Selected CSO Controls and/or to the schedule in Section VI of this Consent Decree, along with any supporting data;

(iii) a demonstration of material compliance with any applicable requirements of the 1994 CSO Policy; and

(iv) a demonstration that public participation has occurred.

(b) If the United States, after consultation with the District of Columbia, agrees to the modification, the proposed changes to the Selected CSO Controls and/or the schedules shall be executed by appropriate officials on behalf of the United States, the District of Columbia, and

WASA and lodged with the Court for a period of public comment prior to entry. If the United States does not agree to the proposed modification, the matter shall be subject to the procedures of Section XIV of this Decree (Dispute Resolution).

XXIII. PUBLIC COMMENT

102. The parties agree and acknowledge that final approval by the United States and entry of this Consent Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and consideration by the United States of any comments. This paragraph does not create any rights exercisable by the Settling Defendants, and Settling Defendants shall not withdraw their consent to this Consent Decree between lodging and entry of this Consent Decree and hereby consents to entry of this Decree without further notice.

103. All information and documents submitted by Settling Defendants to U.S. EPA pursuant to this Consent shall be subject to public inspection, unless identified and supported as confidential by WASA in accordance with 40 C.F.R. Part 2.

XXIV. CONTINUING JURISDICTION OF THE COURT

104. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, modification or execution of this Consent Decree.

XXV. APPENDICES

105. Appendix A is the Long Term Control Plan and its Appendices.

106. Appendix B contains WASA's financial assumptions and projections that it sets

forth as its basis for the 20 year implementation schedule in this Consent Decree.

107. Appendix C contains a list of key financial variables to be updated in the event of a request for modification due to changed financial circumstances pursuant to Section VII of this Decree.

XXVI. TERMINATION

108. This Consent Decree shall terminate upon motion of the United States to the Court after each of the following has occurred:

- (a) WASA has Placed in Operation all of the construction projects required under Section VI;
- (b) WASA has demonstrated that it has achieved and maintained compliance with the water quality based CSO numerical effluent limitations and the performance standards requiring that the Selected CSO Controls be implemented, operated and maintained as described in WASA's NPDES Permit for two years after the Selected CSO Controls are Placed in Operation;
- (c) WASA has satisfactorily implemented its LIDR projects and programs as required by Section IX;
- (d) WASA has paid all stipulated penalties and any other monetary obligations due hereunder, and no penalties or other monetary obligations due hereunder are outstanding or owed to the United States; and
- (e) WASA has certified completion to the United States, and the United States has not contested WASA's completion or compliance.

109. The Consent Decree shall not terminate if, within 90 days of certification by WASA to the United States of compliance pursuant to this Section, the United States asserts in writing that full compliance has not been achieved, or seeks further specific information in order to evaluate WASA's certification. If the United States disputes WASA's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the parties or the Court.

110. Notwithstanding Paragraph 109 above, if WASA submits a certification to the United States that it has completed all the requirements in Paragraph 108 above, and the United States does not respond on or before 90 days, WASA may file a motion to the Court seeking termination of this Consent Decree.

XXVII. SIGNATORIES

111. The Assistant Attorney General on behalf of the United States and the undersigned representatives of the Settling Defendants certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

**Consolidated Civil Action No. 1:00CV00183TFH
Final and executed version of Consent Decree**

Entered this _____ day of _____, 2004

Chief Judge, United States District Court

FOR THE UNITED STATES OF AMERICA

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

JOHN C. CRUDEN
Deputy Assistant Attorney General
Environment and Natural Resources Division

NANCY FLICKINGER
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

FOR THE UNITED STATES OF AMERICA

KENNETH L. WAINSTEIN, D.C. BAR # 451058
United States Attorney

R. CRAIG LAWRENCE, D.C. BAR # 171538
Assistant United States Attorney

BRIAN SONFIELD, D.C. BAR # 449098
Assistant United States Attorney
District of Columbia
Judiciary Center
555 Fifth Street N.W.
Washington, D.C. 20530

**FOR THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

DONALD S. WELSH
Regional Administrator

WILLIAM C. EARLY
Regional Counsel

JON CAPACASA
Director, Water Protection Division

YVETTE ROUNDTREE
Senior Assistant Regional Counsel

**U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103**

Consolidated Civil Action No. 1:00CV00183TFH
Final and executed version of Consent Decree

THOMAS V. SKINNER
Acting Assistant Administrator
Office of Enforcement and Compliance
Assurance
United States Environmental Protection Agency
Washington, D.C. 20460

**FOR THE DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY**

JERRY N. JOHNSON
General Manager

AVIS M. RUSSELL
General Counsel
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, S.W.
Washington, D.C. 20032

DAVID E. EVANS
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219

Consolidated Civil Action No. 1:00CV00183TFH
Final and executed version of Consent Decree

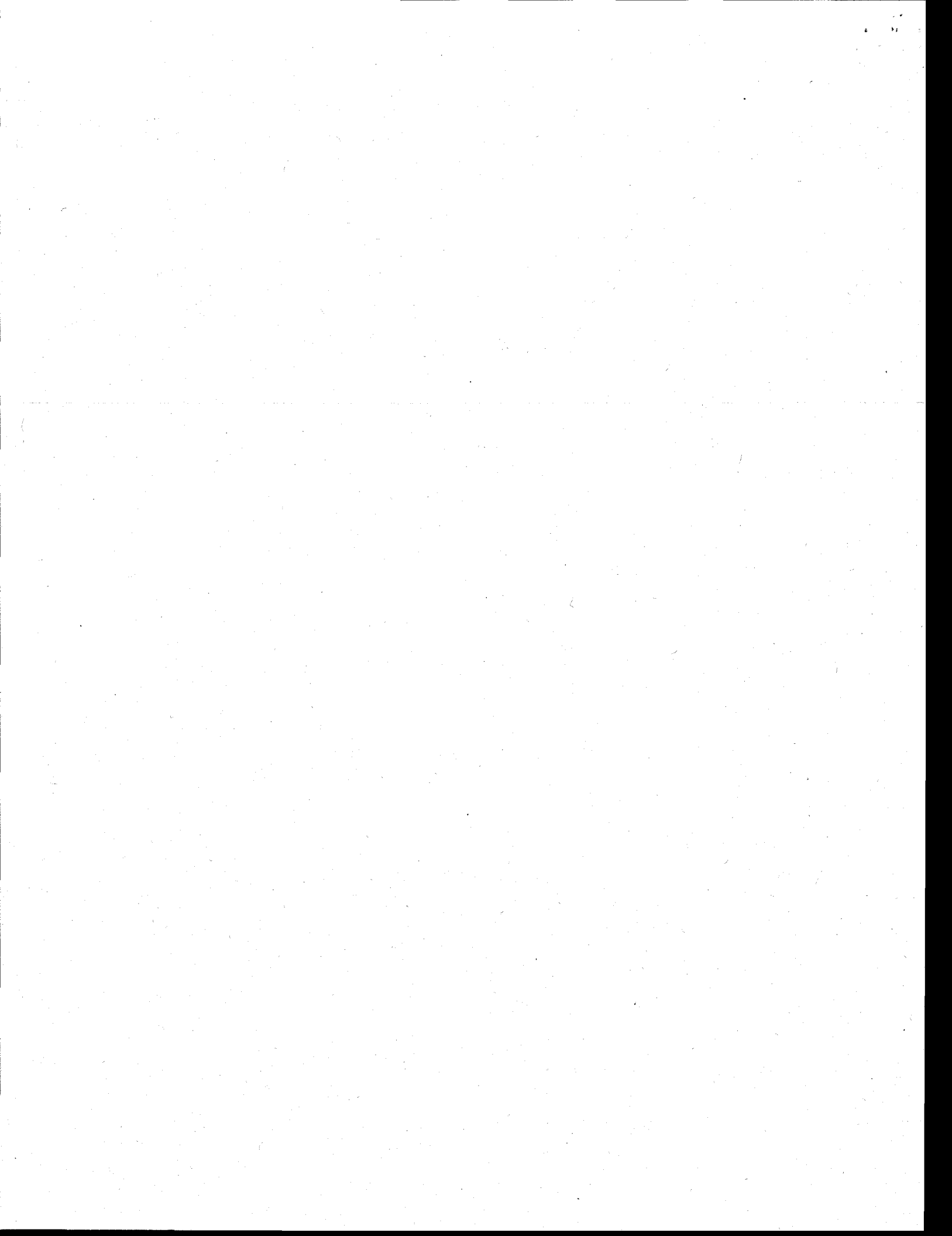
FOR THE DISTRICT OF COLUMBIA

[INSERT DISTRICT SIGNATURE BLOCKS HERE]

Appendix A

The August, 2002 Long Term Control Plan and its Appendices A through G will be filed in hard copy in lieu of electronic filing, since the Plan exceeds 500 pages and contains numerous graphs, maps, and charts that must be reproduced in color.

APPENDIX B



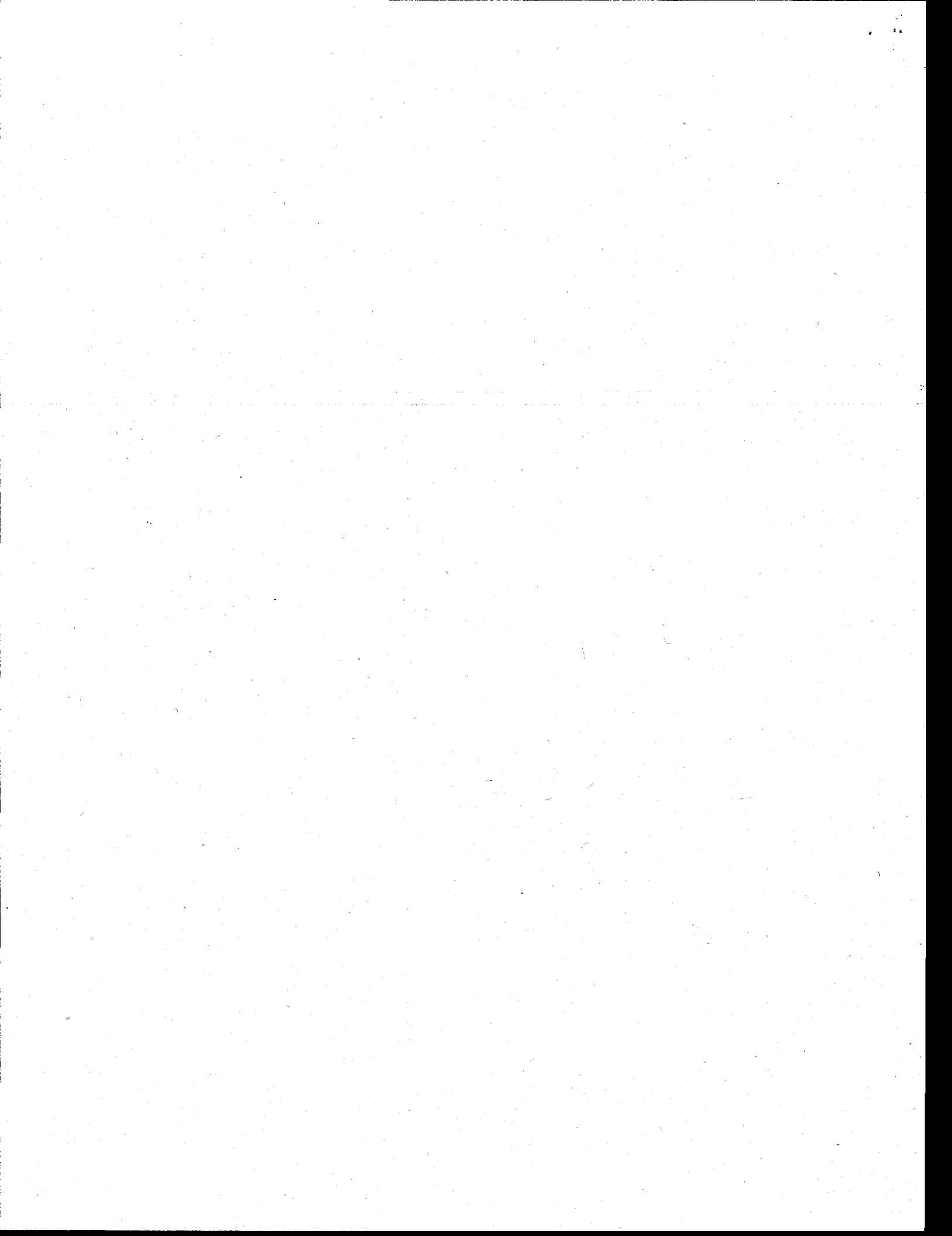
APPENDIX B

Table 1, attached, presents WASA's financial projections for the impact on sewer rates of the 20-year LTCP implementation schedule as specified in the consent decree. Descriptions of the heading columns in Table 1 are presented below:

Column No.	Heading	Description
1	Year No.	Sequential count of number of years starting in 2004
2	Calendar year	Calendar year starting in 2004
3	Capital 2001 Dollars (\$M)	Estimated capital costs for the CSO LTCP expressed in constant year 2001 dollars
4	Capital Actual Dollars (\$M)	The estimated capital costs for the CSO LTCP expressed in the year of expenditure dollars using 3% per year to escalate the 2001 value estimate.
5	OM 2001 Dollars (\$M)	Estimated operating and maintenance costs for the CSO LTCP expressed in constant year 2001 dollars.
6	OM Actual Dollars (\$M)	The estimated operating and maintenance costs for the CSO LTCP expressed in the year of expenditure dollars using 3% per year to escalate the 2001 value estimate.
7	Total 2001 Dollars (\$M)	The addition of CSO Costs/OM/2001 Dollars (\$M) and CSO Costs/Capital/2001 Dollars (\$M).
8	Total Actual Dollars (\$M)	The addition of CSO Costs/OM/Actual Dollars (\$M) and CSO Costs/Capital/Actual Dollars (\$M).
9	Capital Costs Financed (\$M)	The amount of actual capital costs that are debt financed.
10	Capital Costs PAYGO (\$M)	The amount of actual capital costs that are paid from current year revenues on a pay-as-you-go-basis.
11	Debt Service (\$M)	Estimated annual debt service on capital costs that are financed using 30 year term and borrowing costs of 7%.
12	O&M (\$M)	Same as Column 6, OM Actual Dollars (\$M)
13	Total Rate Requirements	The addition of PAYGO, Debt Service, O&M costs.
14	Other WASA Wastewater Costs Paid by DC Ratepayers	Operating and capital costs for wastewater services that are funded by retail ratepayers before the addition of CSO LTCP costs.
15	Typical Residential Bill Without CSO LTCP	Estimated annual residential wastewater bill before addition of the CSO LTCP costs.
16	Bill Increase Without CSO LTCP	Estimated annual change in residential wastewater bill before addition of CSO LTCP costs.
17	Typical Residential Bill With CSO LTCP	Estimated annual residential wastewater bill after addition of the CSO LTCP costs.
18	Bill Increase With CSO LTCP	Estimated annual change in residential wastewater bill after addition of CSO LTCP costs.
19	MHI	Estimated median household income (MHI) using 3% annual growth rate
20	% of MHI	Estimated residential bill as a percent of MHI
21	Lower 20%	Household income of the most affluent household of the lower 20 th percentile of households in the District.
22	% of Lower 20%	Estimated residential bill as a percent of the household income for the most affluent household of the lower 20 th percentile of households in the District.

The financial projections are based on certain assumptions, which include, but are not limited to the following:

1. Billed water use is projected to decrease at 1% per year. Residential bill estimates are based on average consumption of 100 ccf per year.
2. Customers are assessed a charge for water and wastewater services based on water consumption. With the exception of certain federal government customers located outside of the District, all customers pay the same rate, regardless of account class, meter size, or size of service connection. The analysis assumes this practice will continue.
3. The analysis assumes a revenue collection rate of 97.7% of billed amounts.
4. Median Household Income in the District of Columbia is projected to increase at 3% per year. The most affluent of the lower 20th percentile of households in the District have a household income in 2004 dollars of \$19,669 and this is projected to increase at the rate of inflation, which is assumed to be 3% per year.
5. Projections take into account discounts to low-income customers under the Authority's customer assistance program. The Authority's program covers 6,000 low-income customers and provides discounts of approximately \$500,000 each year. Each eligible participant receives an exemption for water service charges in the amount of 4 ccf per month.
6. The financial analysis assumes an all-in borrowing cost assumption of 7 percent including cost of issuance (including bond insurance premiums, premiums for debt service reserve facility and fees and expenses related to bond issuance; approximately 2% on the Authority's 2003 revenue bond issue). The analysis assumes a debt coverage ratio of 1.40 x Term of Debt. The financial analysis utilizes fixed rate financing with a term of 30 years.
7. CSO operating and maintenance and capital costs are escalated at a rate of 3% per year from 2001 cost estimates to the year of expenditure. Non CSO-related wastewater operating and capital costs are projected to increase at approximately 5 percent per year reflecting impacts of inflation and reinvestment in capital facilities.



APPENDIX C



APPENDIX C
Certain Financial Information to Perform Financial Analysis
Pursuant to Section VII

In the event that WASA seeks a modification of the Schedule pursuant to Section VII of the Consent Decree due to cost overruns or changed financial circumstances, WASA shall update its financial information. Information that may be relevant includes the following list or categories of information, and WASA agrees to provide such information in the event the United States requests it. Nothing in this Appendix in any way limits or narrows the United States' right to obtain or request other information in order to review and respond to WASA's request for a modification.

1. DC population, current and projected
 2. Number of households, current and projected
 - Single-family residence
 - Multi-family buildings
 3. Median household income
 4. Wastewater billings and volume billed for past three years, broken out for all user classes
 5. Wastewater revenues and expenditures for past three years.
 6. WASA financial statements for past three years.
 7. Prospectuses issued within the past three years.
 8. Rate studies prepared within the past three years related to wastewater or stormwater programs.
 9. Per household wastewater metering fee and ROW fee
 10. Average per household volume billed for
 - Single-family residence
 - Multi-family residence
 11. Current baseline revenues and expenditures.
 12. LTCP costs
 - Capital costs incurred to date
 - Capital costs projected by year
 - Additional operations and maintenance costs projected by year
 - Costs to date financed with grants (amount and interest rate by year)
 - Costs to date financed with low interest, non-market loans (amount and interest rate by
-

year)

13. Projected costs other than those required by this consent decree that should be considered in addition to baseline costs. Identify and project by year.
 - Costs necessary to comply with regulations or other legal requirements.
 - Projected sewer system assessment and rehabilitation costs
 - Other increases that would cause total annual expenditures to rise at a rate greater than inflation
 14. Debt coverage ratio
 15. Bond interest rate and term
 16. Rate of inflation
 17. PAYGO assumption
 18. Current wastewater rate per ccf for single-family residential customers.
 19. History of rate adjustments or rate recovery approach during the past five years. Identify the current basis for recovery of LTCP costs and any expected changes in the basis for the recovery of these costs. If rates are recovered through other than the wastewater rate, identify the mechanism, and the amount of costs born by each user class.
 20. Projection over twenty years estimating per household impact of LTCP.
 21. Current programs to provide relief to low-income residents.
 22. Other documentation or analysis that EPA and/or WASA deems relevant for the particular circumstances.
-