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ENVIR. APPEALS BOARD

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January 4, 2007

BY HAND

Eurika Durr
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

Re: *In re District of Columbia Water and Sewer Authority,*
NPDES Permit No. DC0021199
NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12

Dear Ms. Durr:

Enclosed for filing are the original and five copies of the District of Columbia Water and Sewer Authority's Reply to the Region's Supplemental Response to Board Questions. We ask that a copy of the Reply be date-stamped and returned with the courier.

Thank you for your assistance.

Sincerely,


David E. Evans

Enclosures

cc: Avis Marie Russell, D.C. Water and Sewer Authority
Counsel of Record

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

ENVIR. APPEALS BOARD

In re:

District of Columbia Water and Sewer Authority

NPDES Permit No. DC00021199

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) NPDES Appeal Nos. 05-02, 07-10,
) 07-11, 07-12
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**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S REPLY TO
THE REGION'S SUPPLEMENTAL RESPONSE TO BOARD QUESTIONS**

Pursuant to the Board's December 20, 2007 Order, the District of Columbia Water and Sewer Authority (WASA) hereby files this reply to the Supplemental Response to Board Questions (Supplemental Response) filed by Region III of the U. S. Environmental Protection Agency (Region) on December 13, 2007.

The Region's Supplemental Response provided additional information in response to the following three questions from the Environmental Appeals Board (Board) during oral argument on November 15, 2007:

- Where in the record did EPA make a finding or determination that implementation of WASA's Long Term Control Plan (LTCP) would meet the requirements of 40 C.F.R. § 122.4(d) which prohibits issuance of a permit without conditions which ensure compliance with applicable state water quality standards?
- Could a compliance schedule have been placed in both WASA's LTCP consent decree and its permit?
- Does the District of Columbia's compliance schedule authorizing provision require that some form of compliance schedule be included in WASA's permit?

WASA replies to the Region's Supplemental Response to the questions in the order listed above.

A. The Record Documents EPA's Finding That Implementation of WASA's LTCP Would Meet the Requirements of 40 CFR § 122.4(d)

WASA agrees with the Region's response that Exhibits 6, 7, and 8 to the Region's July 5, 2007 brief together with the August 28, 2003 Collier to Capacasa letter fully document the Region's finding that implementation of WASA's LTCP would meet the requirements of 40 C.F.R. § 122.4(d). WASA adds that the Region's finding is also documented in the fact sheet accompanying the December 16, 2004 permit modification. The fact sheet is Exhibit 20 to the Region's July 5, 2007 brief.

WASA also agrees with the Region's response which contrasts the record before the Board in In re Government of the District of Columbia Municipal Separate Storm Sewer System, 10 E.A.D. 323 (2002) with the record before the Board in this matter.

B. EPA Could Have Placed a Compliance Schedule in Both WASA's LTCP Consent Decree and Permit

WASA disagrees with the Region's response and submits that there are circumstances where a schedule can be included in a permit and a consent decree.

In this matter, EPA commenced a judicial enforcement action against WASA in 2000 alleging that WASA was in violation of the narrative limitation included in WASA's January 22, 1997 Phase I CSO permit. The absence of a compliance schedule for the narrative limitation in the permit provided EPA with the basis for the enforcement action.¹ In

¹ Given the permit schedule mandate in 21 D.C.M.R. § 1105.9, the 1997 permit should have contained a compliance schedule for the narrative limitation. Although it is not clear why a schedule was not included when the narrative limitation was added in 1997, the absence of a schedule in the 1997 permit has no

the fall of 2004, WASA and EPA settled the enforcement action by agreeing to a consent decree containing CSO controls selected from WASA's LTCP and a schedule for implementation of the selected CSO controls. On December 16, 2004, EPA modified WASA's permit to add the Phase II CSO permit conditions which included, among other conditions, performance standards derived from the selected CSO controls. WASA objected to the permit modification because it did not include a compliance schedule for the performance standards.

Based on the foregoing circumstances, it is apparent that EPA could have included a compliance schedule in both the consent decree and the permit by first establishing the interim and final compliance dates in the consent decree and then including the final compliance date from the consent decree in the permit.

The circumstances described above contrast with those involving the total nitrogen limit. Here, there is no pending enforcement action and no basis upon which EPA could commence an enforcement action. Without an enforcement action, there is no basis for a consent decree. Consequently, EPA can include the compliance schedule for the nitrogen limit only in the permit unless at some point in the future WASA were to violate a requirement of the schedule, in which case there would be a basis for an enforcement action and a consent decree schedule.

bearing on EPA's obligation today to include schedules in the permit for the LTCP performance standards and the nitrogen limit.

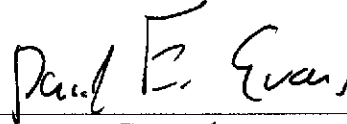
C. The District of Columbia Compliance Schedule Authorizing Provision Requires That a Schedule be Included in WASA's Permit

WASA also disagrees with the Region's response which takes the position that the District's compliance schedule authorizing provision does not require that a compliance schedule be included in WASA's permit. 21 D.C.M.R. § 1105.9 (the authorizing provision in question) directs that a "schedule shall be included in the permit" when a new water quality standard based effluent limitation is established in a discharge permit, but gives the Director the discretion to establish the length of the schedule. The Region's position is plainly wrong because it ignores the clear directive in the authorizing provision to establish a schedule in the permit. Instead, the Region relies on the Director's discretionary authority with respect to the length of the schedule to assert that it also confers the discretion not to include a schedule in the permit. Even if 21 D.C.M.R. § 1105.9 was subject to interpretation (which it is not), the Region's attempt to use the Director's discretionary authority to determine the length of the schedule to override the clear directive to include the schedule in the permit violates the very rule of statutory construction.

Respectfully submitted,

**DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY**

By



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CERTIFICATE OF SERVICE

I hereby certify that the District of Columbia Water and Sewer Authority's Reply to the Region's Supplemental Response to Board Questions in NPDES Appeal Nos. 05-02, 07-10, 07-11 and 07-12, was served on this date as set forth below:

The original and five copies were was hand-delivered to:

Eurika Durr
Clerk of the Board
Environmental Appeals Board 1103(B)
U.S. Environmental Protection Agency
1341 G. Street, N.W., Suite 600
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One copy was mailed by first class mail, postage prepaid to counsel for each of the Petitioners, as well as to counsel for the Chesapeake Bay Foundation, NACWA and the Wet Weather Partnership:


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