IN RE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided March 19, 2008

Syllabus

Four petitions seek Board review of a final National Pollutant Discharge Elimination System ("NPDES") Permit (generally, the "Blue Plains Permit") Region 3 (the "Region") of the United States Environmental Protection Agency ("EPA") issued to the District of Columbia Water and Sewer Authority ("WASA") for the operation of its Blue Plains Wastewater Treatment Plant on April 5, 2007 (the "Final Permit"). WASA's first petition, which originally challenged a Blue Plains Permit issued in 2004, argued that the Region should have included in the Blue Plains Permit a compliance schedule for the implementation of selected controls in WASA's Combined Sewer Overflow ("CSO") Long Term Control Plan ("LTCP"). The Board previously dismissed the other issues raised in that petition and stayed consideration of the remaining issue while the Blue Plains Permit underwent further modification. The Board now applies WASA's remaining argument to the Final Permit. In the second petition, the Chesapeake Bay Foundation ("CBF") filed a petition arguing that the Region should have included in the Final Permit a compliance schedule for achieving the total nitrogen effluent limit. Third, WASA filed an additional petition challenging the total nitrogen effluent limit in the Final Permit and, mirroring CBF, arguing that the Region should have included in the Final Permit a schedule for compliance with that limit. Finally, Friends of the Earth and the Sierra Club (together, "FOE/SC") filed a petition contending that the Region improperly modified, without adequate notice and comment, a permit provision relating to compliance with the District of Columbia's (the "District's") water quality standards, and that this modification violates the antibacksliding provisions of the Clean Water Act ("CWA") and does not properly ensure compliance with the District's water quality standards. The Board has administratively consolidated these petitions for purposes of review.

These petitions for review involve three basic sets of issues: (1) whether, under the CWA and District regulations, compliance schedules for implementation of the LTCP and the nitrogen effluent limit must be included in the Final Permit; (2) whether modification of the Blue Plains Permit to replace a total nitrogen goal with the total nitrogen effluent limit was appropriate; and (3) whether the Region provided adequate notice and opportunity to comment on the language in the Final Permit that sets the water quality-based requirements for CSOs, and whether this language is consistent with the CWA and EPA regulations.

Held: The Board remands the Final Permit in part and denies review in part.

(1) By failing to include in the Final Permit compliance schedules for implementation of selected controls in WASA's LTCP and achievement of the nitrogen effluent limit, the Region violated District of Columbia Municipal Regulations § 1105.9, which on its face provides that when a new water quality standard-based effluent limitation is required in a permit, "[a] compliance schedule *must* be included in the permit." DCMR § 1105.9 (emphasis added). While EPA's CSO Policy states a preference for including such compliance schedules in judicial orders for major permittees, it does not require that such schedules be included only in judicial orders and does not give the Region discretion to ignore the plain meaning of the District's water quality standards regulation. The Board rejects the Region's argument that it has discretion in determining whether to include compliance schedules in the Final Permit because the District's regulation must be read as being consistent with 40 C.F.R. § 122.47, which makes inclusion of such schedules discretionary. Congress granted states the authority to adopt their own water quality standards and effluent limitations that may be more stringent than federal law, 33 U.S.C. § 1370, and the District was not required to mirror the language of § 122.47 in adopting DCMR § 1105.9.

On remand, the Region must modify the Final Permit so that it includes compliance schedules for implementation of selected controls in WASA's LTCP and achievement of the nitrogen effluent limit consistent with the District regulations and the CWA.

(2) With the exception of the compliance schedule for the nitrogen limit covered in holding (1) above, WASA's petition challenging the Region's decision to include the nitrogen effluent limit in the Final Permit is denied in all respects. WASA failed to demonstrate why the Region's response to comments was clearly erroneous, and it failed to convince the Board that the Region's Final Permit determination with respect to the nitrogen effluent limit was clearly erroneous or otherwise warranted review.

(3) In drafting the Final Permit, the Region removed from the draft permit, without providing notice or opportunity to comment, a general provision requiring that WASA comply with water quality standards during the twenty-year interim period before full implementation of its LTCP. In removing the general prohibition that applied during the interim period, the Region appears to have changed significantly its underlying interpretation of the CWA and CSO Policy. This change was not a "logical outgrowth" of the previous proposal, and the Region clearly erred by removing the provision without reopening the comment period. On remand, the Region must modify the Final Permit to include a general provision ensuring compliance with water quality standards during the interim period or reopen the comment period and provide opportunity to comment on this issue and then provide an adequate response to any such comments received.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

Four petitions filed under 40 C.F.R. § 124.19(a) seek Environmental Appeals Board ("Board") review of certain modifications to National Pollutant Discharge Elimination System ("NPDES") Permit No. DC0021199 (generally, the "Blue Plains Permit"), which U.S. Environmental Protection Agency ("EPA"), Region 3 (the "Region"), issued to the District of Columbia Water and Sewer Authority ("WASA") for operation of its Blue Plains Wastewater Treatment Plant ("Blue Plains").[1] WASA timely filed the first petition, NPDES Appeal Number 05-02 ("App. 05-02"), on January 18, 2005. We dismissed most issues in this appeal, but one remaining issue, which had been stayed, now is ripe for review; specifically, whether the Region should have included in the Blue Plains Permit a compliance schedule for implementation of selected controls in WASA's Combined Sewer Overflow Long Term Control Plan ("LTCP"). The remaining three petitions all were timely filed on May 7, 2007. The Chesapeake Bay Foundation ("CBF") filed NPDES Appeal Number 07-10 ("App. 07-10"), arguing that the Region should have included in the Blue Plains Permit a compliance schedule for achieving the permit's total nitrogen effluent limit.[2] WASA filed NPDES Appeal Number 07-11 ("App. 07-11"), challenging the total nitrogen effluent limit that the Region included in the Blue Plains Permit and, mirroring the challenge filed by CBF, arguing that the Region should have included a compliance schedule for achieving that limit. Friends of the Earth and the Sierra Club (together, "FOE/SC") filed NPDES Appeal Number 07-12 ("App. 07-12"), contending that the Region improperly added to the Blue Plains Permit, without adequate notice and comment, a permit condition relating to compliance with the District of Columbia's (the "District's") water quality standards, and further that this provision violates the antibacksliding provisions of the CWA and does not properly ensure compliance with the District's water quality standards. The Region filed timely responses to all of these petitions, arguing that they should be denied. We have administra-

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[1] Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The NPDES program is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342; *see also infra* Part II.C (describing statutory and regulatory background of NPDES program).

[2] "*Effluent limitation* means any restriction imposed by the [permit issuer] on quantities, discharge rates, and concentrations of 'pollutants' [that] are 'discharged' from 'point sources' into 'waters of the United States' * * *." 40 C.F.R. § 122.2.

tively consolidated these petitions for purposes of our analysis.[3]

As discussed below, based on our consideration of the issues presented, we remand the version of the Blue Plains Permit the Region issued on April 5, 2007 (referenced herein as the "Final Permit") in part and deny review of the Final Permit in part. Specifically, we: (1) remand the Final Permit to the Region because it failed to include a permit term containing a compliance schedule to implement the selected controls in WASA's LTCP; (2) remand the Final Permit to the Region because it failed to include a permit term containing a compliance schedule for achieving the total nitrogen effluent limit; (3) deny review of the Final Permit based on WASA's challenges to the total nitrogen limit; and (4) remand the Final Permit to the Region because the Region failed to provide adequate notice and opportunity to comment on the Final Permit language related to water quality-based effluent limitations.

II. *BACKGROUND*

A. *Factual and Procedural Background*

Blue Plains, located in the District, is the largest advanced wastewater treatment facility in the world. *See* Reg. Appeal 07 Exhibit 3 (April 5, 2007 Fact Sheet), at 7.[4] The collection system includes 1,800 miles of sanitary sewers along with combined sewers that convey both sanitary wastewater and storm water. *Id.* When the capacity of the combined sewer system is exceeded during storms, the combined excess flow is discharged to the receiving streams through combined sewer overflow ("CSO")[5] outfalls. There are fifty-three active CSO outfalls listed

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[3] WASA's petition in App. 05-02 sought Board review under 40 C.F.R. § 124.19(a) of the Blue Plains Permit the Region issued in December 2004. As we explain *infra* in Part II.A, the Region subsequently modified the Blue Plains Permit on April 5, 2007 (the "Final Permit"), after proposing a series of draft permits. The Region did not include a compliance schedule for implementing the LTCP controls in this Final Permit. Accordingly, the arguments that WASA raised with respect to the lack of compliance schedule in the December 2004 Permit apply equally to the Final Permit. In this decision we apply WASA's arguments in App. 05-02, which originally challenged the December 2004 Permit, to the current Final Permit.

[4] This citation refers to Exhibit 3 of the set of exhibits that the Region filed with its response to Apps. 07-10, 07-11, and 07-12. Hereinafter, "Reg. 07 Ex." will refer to an exhibit that the Region filed in response to these appeals. Similarly, "Reg. 05 Ex." will refer to an exhibit filed with the Region's response to App. 05-02. Citations to the Region's other filings and citations to WASA's exhibits and filings will follow a similar format.

[5] A CSO is a discharge from a combined sewer system to a point other than the wastewater treatment facility input pipeline, where the combined sewer system should normally discharge. *See* Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688, 18,689 (Apr. 19, 1994) ("CSO Policy").

in the Final Permit. *See* Reg. 07 Ex. 2 (Final Permit), at 2-12. These CSO outfalls discharge to the Anacostia River, the Potomac River, and Rock Creek. *See* Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 7. Blue Plains is designed to provide advanced wastewater treatment and excess flow treatment during wet weather conditions. Flow receiving advanced treatment is discharged from Outfall 002, and flow receiving excess flow treatment is discharged from Outfall 001. *See* Reg. 07 Ex. 2 (Final Permit), at 2-12.

The Blue Plains Permit has had a long and tortured procedural history. The Region issued WASA's most recent fully effective Blue Plains Permit on January 22, 1997 (the "1997 Permit"). In July 2002, WASA completed its LTCP and submitted it to the Region and the District's Department of Health for their review and approval.[6] Reg. 05 Ex. 4 (Dec. 16, 2004 Fact Sheet). WASA's LTCP provides for the construction and operation of an underground tunnel system to capture combined excess flow during and after rainfall events. The LTCP also provides for the use of wet weather capacity at Blue Plains to treat excess flow not captured in the tunnels. According to WASA, when fully implemented, the selected controls in the LTCP will reduce CSO discharges by approximately 96% over uncontrolled levels, based on average annual wet weather conditions. WASA 07 Petition at 6.

The Region issued WASA a modified Blue Plains Permit on January 24, 2003 (the "January 2003 Permit"). Among other things, the January 2003 Permit established a nitrogen effluent "goal" of not greater than 8,467,200 pounds per year. *See* Reg. 05 Ex. 4 (Dec. 16, 2004 Fact Sheet). Both WASA and FOE/SC filed petitions for review of the January 2003 Permit in February and March, respectively, of that year. After a period of negotiations, the Region withdrew the contested permit terms, including the provision establishing the nitrogen goal, and proposed a draft modified permit for public comment on March 13, 2004 (the "March 2004 Draft Permit").

After receiving public comments on the March 2004 Draft Permit, the Region issued another modified Blue Plains Permit on December 16, 2004 (the "December 2004 Permit"). By this time, both the District and the Region had approved the LTCP. *See* Reg. 05 Ex. 4 (Dec. 16, 2004 Fact Sheet), at 15. In addition to addressing the previously challenged January 2003 Permit conditions, this permit modification added "Phase II" permitting conditions, requiring implementa-

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[6] LTCPs are plans that set forth control options and strategies that, once implemented, enable combined sewer systems to achieve compliance with the CWA. 59 Fed. Reg. at 18,691. LTCPs are required by EPA's CSO Policy, explained *infra* Part II.C.

tion of the LTCP, pursuant to EPA's CSO Policy.[7] *See* Reg. 05 Ex. 4 (Dec. 14, 2006 Fact Sheet). On December 15, 2004, the District's Department of Health had certified, without conditions, that the December 2004 Permit would not violate the District's water quality standards.[8] *See* Reg. 05 Ex. 6 (Dec. 15, 2004 § 401 certification). The December 2004 Permit required WASA to comply immediately with the performance standards in the LTCP.[9]

Because the parties understood that, notwithstanding the terms of the December 2004 Permit, WASA would not be able to comply with the performance standards in the LTCP until the LTCP was fully implemented, on December 16, 2004, the parties lodged a consent decree in federal district court setting forth schedules for implementing the selected CSO controls in the LTCP.[10] *See* Reg. 05 Ex. 7 *(Anacostia Watershed Soc'y v. D.C. Water & Sewer Auth.*, Consol. Civ. Action No. 1:00-cv-00183-TFH (D.D.C. filed Dec. 16, 2004)) (the "Consent Decree"); Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 4. The Consent Decree calls for implementation of WASA's LTCP according to a schedule that spans twenty years and may be extended under certain circumstances. Reg. 05 Ex. 7 (Consent Decree), at 11-23. Significantly for purposes of this case, the Region did not in-

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[7] The CWA requires permits to conform to the CSO Policy, which is published in the Federal Register at 59 Fed. Reg. 18,688 (Apr. 19, 1994). *See* CWA § 402(q)(1), 33 U.S.C. § 1342(q)(1); *infra* Part II.C (explanation of CSO Policy). The CSO Policy explains that a permit is considered a "Phase I" permit during the development of the LTCP. Once the LTCP is approved, a permit is considered a "Phase II" permit, requiring implementation of the LTCP. *See* 59 Fed. Reg. at 18,695-96; *see also infra* Part II.C.

[8] CWA § 401 requires all NPDES permit applicants to obtain a certificate from the appropriate state agency validating the permit's compliance with the pertinent federal and state water pollution control standards. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Any conditions that the state places on the certification must be included in the permit. *See* CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2).

[9] The Region stated that "[c]onsistent with the CSO Policy, the [December 2004 Permit] requires implementation of the LTCP immediately upon issuance of this permit." Reg. 05 Ex. 4 (Dec. 16, 2004 Fact Sheet), at 14.

[10] The enforcement history of this Consent Decree is as follows. On December 6, 2002, the United States filed a complaint against WASA alleging that WASA violated the CWA and WASA's 1997 Permit by failing to comply with certain requirements set forth in the permit and the CSO Policy, and by violating the District's water quality standards. *See United States v. D.C. Water & Sewer Auth.*, Civ. Action No. 1:02-cv-12511-TGH (D.D.C.). The United States also named the District as a defendant. Several environmental groups had filed a similar complaint against WASA in January 2000, *see Anacostia Watershed Soc'y v. D.C. Water & Sewer Auth.*, Civ. Action No. 1:00-cv-00183-TFH (D.D.C.), and these actions eventually were consolidated. A partial consent decree among the parties, resolving a portion of the case, was entered on October 10, 2003. The Consent Decree was lodged on December 16, 2004, in coordination with the issuance of the December 2004 Permit, resolved all remaining allegations, including the water quality standards violations. This Consent Decree was entered on March 25, 2005. The Consent Decree describes the requirements for WASA's implementation of its LTCP. *See* Reg. 05 Ex. 7 (Consent Decree).

clude any compliance schedule in the December 2004 Permit for implementing the selected CSO controls in the LTCP.

Both FOE/SC and WASA filed timely petitions for review of the December 2004 Permit, which were designated NPDES Appeal Numbers 05-01 and 05-02, respectively. Both petitions sought review of the water-quality based requirements for CSOs, although for different reasons. In addition, WASA sought review of the Region's decision not to include in the December 2004 Permit a compliance schedule for implementation of its LTCP. After another period of negotiations among the parties, the Region withdrew the contested permit terms and stated that it would propose modifications to them. Subsequently, the parties filed, and the Board granted, a Motion on Consent to Dismiss FOE/SC's petition in its entirety and WASA's petition as to all issues save one – whether a compliance schedule for the LTCP is required in the Blue Plains Permit. The Board stayed the latter issue, pending issuance of an additional permit modification.

On August 18, 2006, the Region published for public comment another draft permit modification (the "August 2006 Draft Permit"), proposing: (1) to replace the existing water quality-based requirements for CSOs with a provision stating that the performance standards for the LTCP would be the water quality-based effluent limits for CSO discharges, and that until the LTCP is fully implemented a general water quality standards provision similar to that set forth in the 1997 Permit would apply;[11] (2) to delete the Total Maximum Daily Load ("TMDL")-derived effluent limits;[12] and (3) to replace the existing nitrogen goal with an interim nitrogen effluent limit for Outfall 002 and include an interim compliance schedule in the Blue Plains Permit for achieving that limit.[13] *See* Reg. 07 Ex. 9 (Aug. 2006 Draft Permit), at 13, 56; *id.* Ex. 10 (Aug. 18, 2006 Draft Fact

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[11] We set forth the history of this permit provision at Part III.D.1, *infra*.

[12] A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. *See* CWA § 303(d), 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7. The Region explained that the United States Court of Appeals for the District of Columbia Circuit remanded the Anacostia River TMDLs for total suspended solids ("TSS") and biochemical oxygen demand ("BOD") on April 25, 2006. *See* Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 5 n.1 (citing *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006)).

[13] In the accompanying draft fact sheet, the Region stated that:

> Meeting the final [Chesapeake] Bay allocation for nitrogen will require the expenditure of significant funds, planning and public involvement. Accordingly, a schedule for compliance will be needed. This permit incorporates an interim schedule which is intended to move the process forward so that when the Blue Plains permit is reissued in 2008, a more comprehensive schedule may be included in that permit.

Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet), at 5.

Sheet), at 4-5. WASA, FOE/SC, and CBF, along with others, submitted comments on the August 2006 Draft Permit.

After the close of the comment period, on December 14, 2006, the Region published for public comment yet another proposed modification to the Blue Plains Permit (the "December 2006 Draft Permit"). In a departure from the August 2006 Draft Permit, the December 2006 Draft Permit proposed to include a final nitrogen limit,[14] without a schedule for compliance with that limit.[15] On January 29, 2007, the District's Department of the Environment certified, pursuant to CWA § 401, that the December 2006 Draft Permit would comply with the District's water quality standards.[16] *See* Reg. 07 Ex. 5 (Jan. 29, 2007 § 401 certification). WASA, FOE/SC, and CBF again were among the organizations to comment on this draft permit.

On April 5, 2007, the Region issued the Final Permit modification.[17] In it, the Region purported to address the challenges to the December 2004 Permit and, as it had proposed in the December 2006 Draft Permit, added a nitrogen limit to the Final Permit. Rather than including a schedule for compliance with the new nitrogen limit in the Final Permit, the Region stated that a schedule would "be part of a separate compliance agreement," Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 9, potentially the Consent Decree, Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 6. In addition, the Region eliminated in its entirety the general water quality standards provision, which had appeared in the August 2006 Draft Permit, requiring WASA to comply with the District's water quality standards provision until the LTCP is fully implemented. As discussed more fully below, the Final Permit instead stated that the LTCP performance standards would operate as the water quality-based effluent limits for CSO discharges.

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[14] An effluent "limit" is enforceable, whereas an effluent "goal" is not. The new total nitrogen effluent limit for the entire Blue Plains facility is 4,689,000 pounds per year. *See* Reg. 07 Ex. 2 (Final Permit), at 52. WASA states that it will not be able to comply with the new final total nitrogen limit efficiently and cost-effectively without changes to its current LTCP and the Consent Decree. *See* WASA 07 Petition at 6. The Region understands that Blue Plains is not currently capable of achieving the new limit. *See* Reg. 07 Ex. 12 (Dec. 14, 2006 Fact Sheet).

[15] The Region instead stated that it intended to establish a schedule for compliance with the nitrogen limit in a separate enforceable document, potentially the Consent Decree. Reg. 07 Ex. 12 (Dec. 14, 2006 Draft Fact Sheet), at 5. To date, such a compliance schedule has not been established. At oral argument before the Board, the Region agreed that it had an "aspiration" to have such a compliance schedule and stated that "we have ongoing discussions with WASA with respect to that." Tr. at 91.

[16] *See supra* note 8 and accompanying text.

[17] Because the Region considered this permit modification final, it did not subject it to further public notice and comment.

B. *Petitions for Review*

As explained above, the Board received three petitions for review of this Final Permit: App. 07-10, from CBF; App. 07-11, from WASA; and App. 07-12, from FOE/SC. On July 26, 2007, the Board administratively consolidated App. 05-02[18] and Apps. 07-10, 07-11, and 07-12.

1. *Appeal No. 05-02, Petitioner – WASA*

WASA filed App. 05-02 on January 18, 2005. As explained previously, only one issue remains in this appeal: WASA's argument that the Region should have included, in the Blue Plains Permit, a compliance schedule for implementation of the selected controls in its LTCP. According to WASA, without a compliance schedule, the Blue Plains Permit violates District of Columbia Municipal Regulations title 21, section 1105.9 ("DCMR § 1105.9"), which states that when a new water quality-based effluent limitation is included in an NPDES permit, "[a] compliance schedule shall be included in the permit." WASA also argues that, without a compliance schedule, the Blue Plains Permit fails to conform to the CSO Policy. On April 30, 2007, after the Board lifted the stay on this appeal, the Region filed its response to the remaining issue in App. 05-02. In its response, the Region argues that its decision to include a compliance schedule for implementation of the LTCP in the Consent Decree, rather than in the Blue Plains Permit, was an appropriate exercise of its discretion.

On July 26, 2007, the Board issued an order granting the National Association of Clean Water Agencies and the Wet Weather Partnership (together, "NACWA/WWP") leave to file a non-party brief in this appeal. According to their brief, these organizations represent the interests of wastewater treatment agencies and communities with combined sewer systems. NACWA/WWP argue in favor of the inclusion in the Blue Plains Permit of a compliance schedule for the implementation of the LTCP. *See* Joint Non-Party Brief of NACWA/WWP on the Remaining Issue in Appeal No. 05-02 (Aug. 22, 2007). The Region filed a reply to this brief on September 28, 2007.

2. *Appeal No. 07-10, Petitioner – Chesapeake Bay Foundation*

CBF filed App. 07-10 on May 7, 2007. The sole issue in CBF's petition is whether the Region should have included, in the Final Permit, a compliance schedule for achieving the total nitrogen effluent limit established for Outfall 002. In support of its argument, CBF, mirroring WASA's challenge in App. 05-02, contends that without a compliance schedule, the Final Permit violates DCMR

[18] As explained previously, one component of this WASA petition had been stayed, pursuant to a Board order, and now is ripe for review.

§ 1105.9. CBF also argues that not including a compliance schedule in the Final Permit, even if one eventually may be included elsewhere, ignores EPA's obligation to provide notice and opportunity to comment on a compliance schedule. The Region filed a response to this petition, as well as to the petitions in Apps. 07-11 and 07-12, on July 6, 2007. The Region argues that we should uphold the Final Permit because placing a compliance schedule for achieving the nitrogen limit in the Final Permit was discretionary on the Region's part.

On October 17, 2007, the Board issued an order granting NACWA/WWP leave to file a non-party brief in Apps. 07-10 and 07-11. Their brief is limited to the issue of whether a compliance schedule for the implementation of the nitrogen effluent limit should be included in the Final Permit. Similar to their position in App. 05-02, NACWA/WWP argue in favor of the inclusion of such a schedule.

3. *Appeal No. 07-11, Petitioner – WASA*

WASA filed App. 07-11 on May 7, 2007. The issues raised in this appeal relate to the Region's decision to replace the total nitrogen effluent goal with a final total nitrogen effluent limit for Outfall 002. The Region assigned WASA its nitrogen effluent limit based on analysis conducted by the Chesapeake Bay Program, which allocated effluent caps to the three jurisdictions served by the Blue Plains facility: the District of Columbia, Maryland, and Virginia. WASA argues that: (1) the allocation itself was erroneous and unlawful because it was developed outside of the rulemaking and permit modification processes; (2) the Region failed to acknowledge deficiencies in the allocation process; (3) the Region failed to respond to WASA's comments with respect to the relative contributions of the three jurisdictions; and (4) the imposition of a nitrogen limit was premature given that WASA currently is in the process of developing a Total Nitrogen/Wet Weather Plan that will address nitrogen discharges. Paralleling CBF in App. 07-10, WASA additionally argues that the Region should have included in the Final Permit a compliance schedule for achieving the total nitrogen effluent limit. WASA argues that without a compliance schedule the permit violates DCMR § 1105.9, and also argues, as a procedural matter, that the Region erred because it did not provide a rational basis for not including a compliance schedule in the permit. In a response filed on July 6, 2007, the Region argues that it did not commit clear error because all of the terms relating to the nitrogen limit constituted a reasonable exercise of its discretion, and its responses to comments pertaining to these matters were reasonable and appropriate.[19]

[19] As noted *supra* Part II.B.1, NACWA/WWP have filed a non-party brief in this appeal.

4. *Appeal No. 07-12, Petitioner – FOE/SC*

FOE/SC filed App. 07-12 on May 7, 2007. FOE/SC object to the elimination in the Final Permit of the general language requiring compliance with the District's water quality standards. FOE/SC argue that this change is procedurally flawed because it was not subject to notice and comment and is substantively flawed because it violates the CWA's antibacksliding provisions and does not ensure compliance with the District's water quality standards. WASA has intervened in this appeal, and on July 6, 2007, filed a brief, pursuant to a Board order,[20] generally agreeing with the Region's position in the case. The Region's July 6, 2007 response argues that the Final Permit need not have been subject to further notice and comment because its terms and conditions were a logical outgrowth of the December 2006 Draft Permit. The Region further denies that the Final Permit violates the antibacksliding provisions or that it fails to ensure compliance with water quality standards. FOE/SC filed a reply to the Region's and WASA's responses on July 23, 2007, and the Region filed a surreply on August 3, 2007.

5. *Oral Argument and Subsequent Filings*

The Board heard oral argument with respect to these consolidated cases on November 15, 2007.[21] On December 13, 2007, the Region filed a Supplemental Response, purportedly in response to Board questions raised during oral argument. WASA, CBF, and FOE/SC each replied to this Supplemental Response on January 4, 2008, pursuant to a December 20, 2007 Board order.[22]

C. *Statutory and Regulatory Background*

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 202(a), 33 U.S.C. § 1251(a). The CWA prohibits discharges from point sources[23] to waters of the United States, unless authorized by a permit or an applicable statutory provision. CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the EPA Administrator (or his or her delegate) to issue permits for the discharge of pollutants, provided that certain statutory requirements are satisfied.

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[20] *See* Order Granting Motion for Leave to Intervene (EAB June 15, 2007).

[21] The transcript to this oral argument will hereinafter be cited as "Tr."

[22] *See* Order Setting Deadline for Replies to Region's Supplemental Response to Board Questions (EAB Dec. 20, 2007).

[23] A "point source" is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

CWA § 402(a), 33 U.S.C. § 1342(a). The NPDES permit program, set forth in CWA § 402, 33 U.S.C. § 1342, and 40 C.F.R. part 122, is the primary means through which EPA implements this regulatory regime. Under section 402 of the CWA, permitted discharges must, among other things, comply with sections 301 and 306 of the CWA.[24] CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1). CSOs occurring within combined sewer systems are considered point sources subject to NPDES permitting requirements. 59 Fed. Reg. 18,868, 18,869 (Apr. 19, 1994). NPDES permits issued to point source dischargers must include technology-based effluent limitations and, when these limitations are insufficient to attain or maintain applicable state water quality standards, additional water quality-based effluent limitations.[25] *See* CWA § 302, 33 U.S.C. § 1312; *see also* 40 C.F.R. § 122.44(d). Pursuant to 40 C.F.R. § 122.4(d), permits must "ensure" compliance with state water quality requirements. Moreover, the CWA prohibits (with limited exceptions) modification of an NPDES permit to contain water quality-based limits that are less stringent than the comparable effluent limits in the previous permit. CWA § 402(o), 33 U.S.C. § 1342(o); *see also* 40 C.F.R. § 122.44(*l*). These provisions generally are referred to as the "antibacksliding" provisions.

EPA issued its CSO Policy in 1994, in recognition that CSOs can cause exceedances of state water quality standards and in an effort to expedite compliance with the CWA for CSOs. 59 Fed. Reg. 18,688, 18,689 (Apr. 11, 1994). This policy "establish[ed] a consistent national approach for controlling discharges from CSOs to the Nation's waters through the [NPDES] program." *Id.* at 18,688. Congress incorporated the CSO Policy into the CWA, at section 402(q), on December 15, 2000, as part of the Wet Weather Water Quality Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified at 33 U.S.C. § 1342(q)). Specifically, the CWA provides that "[e]ach permit, order, or decree 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 Control Policy * * * ." CWA § 402(q)(1), 33 U.S.C. § 1342(q)(1). The CSO Policy has three primary goals: (1) to bring wet weather discharge points into compliance with technology-based and water quality-based requirements of the CWA; (2) to minimize water quality, aquatic biota, and human health impacts from CSOs; and (3) to ensure that if CSOs occur, they occur only as a result of wet weather. 59 Fed. Reg. at 18,689.

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[24] CWA § 301 requires compliance with effluent limitations. 33 U.S.C. § 1311. CWA § 306 requires EPA to set federal standards of performance for sources of pollutants, including point sources, and allows states to develop procedures for enforcing these standards. 33 U.S.C. § 1316.

[25] Water quality standards are "[s]tate adopted, or [f]ederally promulgated rules [that] serve as the goals for the water body and the legal basis for the water quality-based NPDES permit requirements under the CWA. [Water quality standards] consist of uses which [s]tates designate for their water bodies, criteria to protect the uses, an antidegradation policy to protect the water quality improvements gained and other policies affecting the implementation of the standards." 59 Fed. Reg. 18,694; *see also* CWA § 303(c), 33 U.S.C. § 1313(c).

The CSO Policy sets forth a two-phased approach to achieve compliance, focused on the attainment of water quality standards. A permittee's "Phase I" permit must set forth nine minimum controls that the permittee is required to implement,[26] and the permit also must include a requirement for the permittee to develop an LTCP to achieve discharges that would meet the applicable water quality standards. In addition, Phase I permits must include a requirement to comply with the state's applicable water quality standards, no later than the date allowed under those standards, expressed in the form of a narrative limitation. *Id.* at 18,696. A "Phase II" permit follows the permittee's development of its LTCP and requires LTCP implementation. The CSO Policy states that Phase II permits must include, *inter alia*, water quality-based effluent limits under 40 C.F.R. § 122.44(d)(1) and 122.44(k), requiring compliance with the numeric performance standards for the selected CSO controls in the LTCP. *See* 59 Fed. Reg. at 18,696. Permittees may choose either the "presumption" or the "demonstration" approach when devising a LTCP.[27] Permittees such as WASA that choose the "demonstration" approach must demonstrate, *inter alia*, that "the planned control program is adequate to meet [water quality standards] and protect designated uses * * * [and] [t]he CSO discharges remaining after implementation of the planned control program will not preclude the attainment of water quality standards or the receiving waters' designated uses or contribute to their impairment." *Id.* at 18,693, 18,696.

III. *DISCUSSION*

These appeals involve three basic sets of issues: (1) whether, under the CWA and District regulations, compliance schedules for implementation of the selected controls in WASA's LTCP and the new nitrogen effluent limit must be included in the Final Permit; (2) whether the modification of the Blue Plains Permit to replace the total nitrogen goal with the total nitrogen effluent limit was appropriate in light of the CWA and EPA regulations, and whether the Region

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[26] The "nine minimum controls" articulated in the CSO Policy are: "(1) Proper operation and regular maintenance programs for the sewer system and the CSOs; (2) Maximum use of the collection system for storage; (3) Review and modification of pretreatment requirements to assure CSO impacts are minimized; (4) Maximization of flow to the POTW for treatment; (5) Prohibition of CSOs during dry weather; (6) Control of all solid and floatable materials in CSOs; (7) Pollution prevention; (8) Public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts; and (9) Monitoring to effectively characterize CSO impacts and the efficacy of CSO controls." 50 Fed. Reg. at 18,691.

[27] Under the "presumption" approach, a program that meets certain criteria, listed in the CSO Policy, would be presumed to provide an adequate level of control to meet the CWA's water quality-based requirements. Permittees that do not meet the criteria for the "presumption" approach may opt to follow the "demonstration" approach, which allows permittees to demonstrate that their selected control programs are adequate to meet the CWA's water quality-based requirements. *See* 59 Fed. Reg. at 18,692-93.

provided adequate notice and opportunity to comment on this modification; and (3) whether the Region provided adequate notice and opportunity to comment on the language in the Final Permit that sets the water quality-based requirements for CSOs, and whether this language is consistent with the CWA and EPA regulations. We will address each set of issues in turn.

A. *Standard of Review*

Under 40 C.F.R. § 124.19(a), the Board generally will not grant review of NPDES permit decisions unless the permit conditions at issue are based on clearly erroneous findings of fact or conclusions of law or involve important policy considerations that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *see also In re Hecla Mining Co.*, 13 E.A.D. 216, 223 (EAB 2006); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002); *In re City of Irving Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 122 (EAB 2001). The Board's analysis of NPDES permit petitions is guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 472 (EAB 2004). In addition, EPA policy favors final adjudication of most permits at the permit issuer's level. 45 Fed. Reg. at 33,412; *Teck Cominco*, 11 E.A.D. at 472. The petitioners bear the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2); *see also Hecla Mining*, 13 E.A.D. at 223.

In addition, to preserve an issue for appeal, petitioners must first raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [the petitioner's] position" during the public comment period on the draft permit. 40 C.F.R. §§ 124.13, .19; *Hecla Mining*, 13 E.A.D. at 223; *In re Town of Westborough*, 10 E.A.D. 297, 304 (EAB 2002). The petitioner must also explain with sufficient specificity why a permit issuer's previous responses to its objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. 40 C.F.R. § 124.19(a); *Hecla Mining*, 13 E.A.D. at 223.

B. *Compliance Schedules*

As explained above, three of the petitions in this matter contain arguments that a compliance schedule of some sort should have been included in the Final Permit. In App. 05-02, WASA argues that the Region should have included, in the Blue Plains Permit, a compliance schedule for implementation of the selected controls in WASA's LTCP. NACWA/WWP's non-party brief generally supports WASA's position. In Apps. 07-10 and 07-11, CBF and WASA, respectively, argue that the Region should have included, in the Final Permit, a compliance schedule to achieve the new total nitrogen effluent limit for Outfall 002. NACWA/WWP's non-party brief generally supports CBF's and WASA's posi-

tions in those appeals. We explain below the specific arguments each party raises to support its position.

1. *Appeal No. 05-02*

In App. 05-02, WASA argues that the Region should have included in the Final Permit a compliance schedule for implementation of the selected controls in the LTCP, pursuant to the CSO Policy and DCMR § 1105.9. As WASA explains, the CSO Policy provides that Phase II permits (such as the permit at issue) should include water quality-based effluent limits requiring compliance with, "no later than the date allowed under the [s]tate's [water quality standards]," the numeric performance standards for the selected CSO controls. 59 Fed. Reg. at 18,696. The District's water quality standards, in turn, contain the following provision:

> 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.

DCMR § 1105.9 (emphasis added). Based on the plain language of this regulation, and WASA's assertion 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 argues that the Region is required to include a compliance schedule for implementation of the selected LTCP controls in the Final Permit, and that the Region's failure to do so constitutes a clear error of law. WASA 05 Petition at 23. WASA also argues that inclusion of a compliance schedule only in the Consent Decree, as the Region has done, does not address WASA's continued noncompliance with the Phase II water quality-based effluent limits in the Final Permit or insulate WASA from enforcement action based on noncompliance with those limits.[28] *See id*. at 24; Tr. at 18-19.

For their parts, NACWA/WWP agree that because the District has the authority to set its own water quality standards and to set an implementation strategy to achieve them, *see* 33 U.S.C. § 1313, and because the District's implementing regulations state that a compliance schedule *shall* be included in the permit, the Region has no choice but to include one. NACWA/WWP's 05 Brief at 4-5.

[28] In Section XVII of the Consent Decree, the United States expressly reserves the right to commence an enforcement action against WASA based on violations of the permit. Reg. 05 Ex. 7 (Consent Decree), at 45.

NACWA/WWP acknowledge, however, that the CSO Policy supports the use of compliance schedules in consent decrees for major permittees, as the Region argues (see discussion of Region's arguments below). NACWA/WWP observe that because inclusion of a compliance schedule in a permit does not preclude inclusion in a consent decree, the District rules and the federal rules are not in conflict. Accordingly, NACWA/WWP suggest that the best approach in the present case would be to include a compliance schedule in both documents. *Id.* at 7-8. They state that "[t]his approach provides the permittee with the protection it is entitled to in the permit and allows for amendments to the schedule to be considered in the context of the consent decree where procedures for amending schedules and resolving disputes which may occur in the lengthy LTCP context are more appropriately addressed." *Id.* at 9.

In response to WASA's petition and NACWA/WWP's non-party brief, the Region asserts that its decision to include the compliance schedule for the implementation of the LTCP controls in the Consent Decree, rather than in the Blue Plains Permit, constituted an appropriate exercise of its discretion. Reg. 05 Response at 11; Reg. 05 Reply to NACWA/WWP at 3-4. In support of its position, the Region cites to the CSO Policy, which provides that once the LTCP controls have been selected, the permitting authority should include a schedule for implementation of the plan in "an appropriate enforceable mechanism." Reg. 05 Response at 11 (citing 59 Fed. Reg. at 18,696). According to the Region, it was appropriate to include the compliance schedule in the Consent Decree because the CSO Policy states that, with respect to "major permittee[s]" such as WASA, "the compliance schedule should be placed in a judicial order." *Id.* at 13 (citing 59 Fed. Reg. at 18,696). According to the Region, "at the very least, the CSO Policy expresses a clear preference under these facts for any schedule of compliance to be placed into a companion enforcement action." Tr. at 85-86. The District's water quality standards regulation states, however, that compliance schedules "shall" be included in permits, and the Region does not dispute the applicability of this regulation. Yet, the Region insists that this provision merely authorizes, and does not require, the Region to include a compliance schedule for implementation of the LTCP controls in the Final Permit. *See* Reg. 05 Response at 14 (characterizing the District's water quality standards as "authorizing" compliance schedules in permits); Reg. 05 Reply to NACWA/WWP at 3; Tr. at 92 ("we don't think that the D.C. regulations can be read to alter the Clean Water Act and the regulations at 122.47[29] that gives [*sic*] EPA the discretion as to whether or not to place a compliance schedule in the permit"). The Region further argues that because the District's Department of Health certified the December 2004 Permit, without conditions, pursuant to CWA § 401, the Board should accept the Final Permit as complying with the District's water quality standards. Reg. 05 Response at 15

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[29] The regulations at 40 C.F.R. § 122.47 generally allow compliance schedules to be included in permits.

(citing Reg. 05 Ex. 6); Tr. at 96-97; *see also* Reg. 05 Ex. 6 (Dec. 15, 2004 § 401 certification).

2. *Appeal Nos. 07-10 and 07-11*

In Apps. 07-10 and 07-11, CBF and WASA, respectively, argue that the Region should have included, in the Final Permit, a schedule for achieving compliance with the total nitrogen limit for Outfall 002 that the Region imposed in that permit. CBF and WASA both have the same primary argument in these appeals. They argue that because, as explained above, the CWA grants the District authority to set its own water quality standards and implementation strategies, and because the District's water quality standards regulation states that compliance schedules "shall" be included in permits, the Region committed clear error by not including a compliance schedule for achievement of the water quality-based effluent limit for nitrogen in the Final Permit. *See* CBF's Petition at 7-8; WASA's 07 Petition at 25; Tr. at 7, 53-54, 61.

CBF additionally argues that, by not including a compliance schedule in the Final Permit, the Region "ignores the obligation to provide public notice and a comment period for a permit – including a proposed compliance schedule * * * [and] ignores the publics' [*sic*] right to bring a citizen suit against the permittee." CBF Petition at 11; Tr. at 59. CBF also complains that by not including a compliance schedule in the Final Permit, the Region contradicted EPA's own statements regarding the regulation of nutrient discharges in the Chesapeake Bay watershed. CBF points to a document entitled "*NPDES Permitting Approach for Discharges of Nutrients in the Chesapeake Bay Watershed*," which EPA issued in December 2004, along with the Chesapeake Bay partner jurisdictions. That document states, "[w]hen issuing permits with nutrient-based requirements, EPA and the state NPDES permitting authorities * * * agree to: * * * [i]ncorporate compliance schedules, as needed and appropriate, into permits or other enforceable mechanisms, consistent with the state tributary strategies, where the state [water quality standards] and CWA NPDES requirements allow for such schedules." CBF Ex. F (*NPDES Permitting Approach*), at 2. According to CBF, given the amount of work that WASA would need to do to come into compliance with the new limit,[30] a compliance schedule is necessary to ensure that WASA meets the water quality standard. Tr. at 58-60.

[30] The effluent limit for total nitrogen is 4,689,000 pounds per year. Reg. 07 Ex. 2 (Final Permit), at 13. The annual nitrogen discharge goal, which was contained in the January 2003 Permit, was 8.467 million pounds per year. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 9. The Region recognizes that Blue Plains "is not currently designed to achieve the [new nitrogen] limit on a consistent basis. In order to do so, it is anticipated that the new and/or retrofitted treatment technologies must be installed." Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 6.

WASA, on the other hand, complains that, without a compliance schedule, it is arbitrarily at risk of noncompliance with the Final Permit until it is able to install the technology that would enable Blue Plains to achieve the new total nitrogen limit. WASA 07 Petition at 23. WASA also asserts that equity requires that a compliance schedule be included in the Final Permit because neighboring states have or will include compliance schedules for their new nitrogen limits in their permits. *Id.* at 26. In the alternative, WASA argues that the Region abused its discretion by not including a compliance schedule in the Final Permit. *Id.*

Similar to their position in App. 05-02, NACWA/WWP contend that the Region was required to include a compliance schedule for achieving the nitrogen limit in the Final Permit, simply because the plain language of DCMR § 1105.9 required the Region to do so. NACWA/WWP argue that because the District has the authority to set its own water quality standards and to set an implementation strategy to achieve them, and the District's water quality standards regulations clearly require that a compliance schedule be included in a permit when a new water quality-based effluent limitation is established, the Region has no discretion not to include a compliance schedule, or to include one in another instrument instead. NACWA/WWP 07 Brief at 5.

In response to these arguments, the Region asserts, as it did in its response to WASA's App. 05-02 petition, that despite the plain language of DCMR § 1105.9, the Region does in fact have the discretion to determine whether and where to include a compliance schedule. The Region argues that the District affirmed that the Region had this discretion when the District certified on January 29, 2007, under CWA § 401, that the December 2006 Draft Permit, which did not contain a compliance schedule, complied with the CWA.[31] Reg. 07 Response at 25. Although this certification document stated that "EPA should establish a schedule for compliance with the nitrogen limit," Reg. 07 Ex. 5 (Jan. 29, 2007 § 401 Certification), at 2, the Region argues that this statement is a "consideration," not a "condition," for approval and furthermore that the District did not specify that the schedule be contained in the Final Permit.[32] *See* Reg. 07 Response at 25; Tr. at 100. The Region explains its view that including the compliance schedule in the Consent Decree instead would allow the Region to be more flexible with respect to interim requirements.[33] Reg. 07 Response at 23. The Re-

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[31] At oral argument, the Region affirmed that this § 401 certification letter is the "clearest" statement it could find that the District agrees with the Region's interpretation of the District's water quality standards regulations; in other words, that the District agrees that the EPA has discretion not to include the compliance schedule in the Final Permit. Tr. at 97.

[32] As explained in Part II.A above, if the District had imposed a "condition," this condition would have been required to have been included in the Final Permit.

[33] As explained above, *see supra* notes 15-17 and accompanying text, the Region has not yet included a compliance schedule for achieving the nitrogen limit in the Consent Decree or elsewhere.

gion also states that because the LTCP will likely need to be modified as a result of the new nitrogen limit, it would make sense to use the existing Consent Decree as the vehicle for establishing both the compliance actions and the compliance schedule for meeting the nitrogen limit. *Id.* at 23-24. Moreover, the Region argues that because there is a provision in the Consent Decree requiring public participation prior to modification of the LTCP, as well as Department of Justice requirements for public comment prior to entry of any Consent Decree modification, there would be ample opportunity for public comment on a proposed compliance schedule. *Id.* at 24.

3. *Analysis*

We begin our analysis of whether the Region was required to include, in the Final Permit, compliance schedules for the implementation of selected controls in the LTCP and for achieving the new total nitrogen limit by examining the CWA and the language of DCMR § 1105.9. Then, we put the issue of compliance schedules into a broader context by reviewing prior Board case law on compliance schedules under the CWA. Ultimately, we conclude, based on the meaning of DCMR § 1105.9, that the Region has a legally binding obligation to include such compliance schedules in the Final Permit.

The CWA charges states with developing their own water quality standards and setting an implementation strategies to achieve those standards. CWA § 303, 33 U.S.C. § 1313. Once developed, the states must submit proposed water quality standards for EPA approval. CWA § 303(c), 33 U.S.C. § 1313(c). As stated previously, DCMR § 1105.9, which is part of the District's EPA-approved water quality standards, reads:

> 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.

DCMR § 1105.9 (emphasis added).[34] As EPA conceded at oral argument, the Agency has approved this water quality standard. *See* Tr. at 93.

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[34] Although the parties' interpretations of this regulation differ, all agree that the regulation is central to our analysis of these issues. *See* WASA 05 Petition at 22; Reg. 05 Response at 10; CBF Petition at 8; WASA 07 Petition at 24; Reg. 07 Response at 24-25. We have no reason to believe, and the Region has not argued, that the District's water quality standard regulations would not apply or are in any way invalid.

We have previously stated that use of the word "shall" generally imposes a mandatory obligation, while use of the word "may" generally grants discretion. *See Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 513 (EAB 2004) (citing *Farmer's & Merchants' Bank v. Fed. Reserve Bank*, 262 U.S. 649, 662-63 (1923)).[35] Accordingly, DCMR § 1105.9, on its face, directs the permit issuer to include a compliance schedule in the permit, and not in another enforceable document. We must nonetheless evaluate the language of DCMR § 1105.9 in the context of prior Board case law with respect to compliance schedules under the CWA. The Board's primary cases regarding compliance schedules, *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (Adm'r 1990) ("*Star-Kist I*"), *modification denied*, 4 E.A.D. 33 (EAB 1992) ("*Star-Kist II*"), further strengthen our view that we cannot ignore the plain language of the regulation, which directs that compliance schedules must be placed in permits.

The *Star-Kist* cases held that EPA may include a compliance schedule in a federally issued NPDES permit *only* when the state water quality standards or implementing regulations contain a provision authorizing such a compliance schedule. *Star-Kist I* at 175; *Star-Kist II* at 34. In the *Star-Kist* cases, the state's water quality standards did not authorize schedules of compliance. At issue was whether EPA could lawfully include a compliance schedule in Star-Kists's NPDES permit, despite the absence of an authorizing provision. In concluding that EPA did not have the authority to establish a compliance schedule absent an authorizing provision, the Administrator explained:

> Congress intended the [s]tates, not EPA, to become the proper authorities to define appropriate deadlines for complying with their *own* [s]tate law requirements. Just how stringent such limitations are, or whether limited forms of relief such as variances, mixing zones, and *compliance schedules* should be granted *are purely matters of [s]tate law, which EPA has no authority to override.*

Star-Kist I, 3 E.A.D. at 182 (second and third emphases added).

Although the factual context of *Star Kist* differs from that of the present case, in that it involved a scenario in which compliance schedules were not au-

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[35] As we have explained in previous cases, "'[w]hen construing an administrative regulation, the normal tenets of statutory construction are generally applied.'" *In re Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007) (quoting *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001)); *see also Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993). Accordingly, the plain meaning of words is ordinarily the guide to the definition of a regulatory term. *See Howmet*, 13 E.A.D. at 282; *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993).

thorized, *Star-Kist I* and *II* nonetheless are instructive because they emphasize that it is the role of the states, not EPA, to determine whether and under what circumstances compliance schedules may be incorporated in NPDES permits. *See Star-Kist II*, 4 E.A.D. at 36 ("[t]he responsibility of [s]tates under the law to make specific provision for schedules of compliance * * * is unequivocal"). The *Star-Kist* cases held that when state regulations do not authorize compliance schedules in permits, EPA cannot include them, but when state regulations do authorize such compliance schedules, EPA may include them. It logically follows that when a state regulation, such as DCMR § 1105.9, mandates the inclusion of a compliance schedule, EPA must include one.

Effectively, the Region suggests that we draw a fine line between a state's authority to establish compliance schedules, which, under *Star-Kist I* and *II*, is authority that the state, not the Region, possesses, and a state's authority to insist that any such compliance schedules be included in permits, which the Region suggests it can disregard. We find it difficult to understand how the Region possesses the latter prerogative when it does not possess the former. The Region nonetheless contends that, under *Star-Kist I* and *II*, state regulations can authorize, but may not require, the establishment of compliance schedules in NPDES permits. *See* Reg. 07 Petition at 23; *see also* Reg. 05 Petition at 9. In our view, however, simply because the *Star-Kist* cases contemplated only discretionary provisions does not mean that regulatory provisions mandating compliance schedules may not lawfully exist in some states, as they do in the District. The Region's argument to the contrary fails because it refuses to recognize that the District's EPA-approved water quality standards regulation, on its face, requires, rather than merely allows, the inclusion of a compliance schedule in an NPDES permit when new water quality-based effluent standards are established. In other words, in the instance in which the permitting authority believes a compliance schedule is appropriate, it must be in the permit.

At oral argument, the Region relied on 40 C.F.R. § 122.47 to support its argument that it has discretion to decide whether to include a compliance schedule in the Blue Plains Permit. Specifically, the Region contends that DCMR § 1105.9 gives it discretion to include or not include compliance schedules in the Final Permit because the District's regulation must be read as being consistent with 40 C.F.R. § 122.47, which makes inclusion of such schedules discretionary. Tr. at 92-93. That regulation, titled "Schedules of compliance," provides in part that "[t]he permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations." 40 C.F.R. § 122.47(a).

The fundamental problem with the Region's argument is that it ascribes no meaning whatsoever to that part of DCMR § 1105.9 that makes the inclusion of a compliance schedule in the permit *mandatory*, not discretionary. The Region's argument thus fails to acknowledge that state programs may be more stringent than EPA programs. Indeed, section 122.47 applies to state programs through

40 C.F.R. § 123.25, and section 123.25 expressly provides that "[s]tates are not precluded from omitting or modifying any provisions to impose more stringent requirements." 40 C.F.R. § 123.25(a). This regulation comports with CWA §§ 301(b)(1)(C) and 510, which explicitly authorize states to adopt their own water quality standards, effluent limitations, and compliance schedules that may be more stringent than federal law. 33 U.S.C. §§ 1311(b)(1)(C), 1370. Thus, the District was not legally required to mirror the language of 40 C.F.R § 122.47 in adopting DCMR § 1105.9.

In attempting to convince the Board that DCMR § 1105.9 merely grants the Region the discretion to include compliance schedules in permits, as opposed to requiring them, the Region contends that the District's section 401 certifications permitted the Region to issue the Final Permit to WASA without the compliance schedules. According to the Region, the District's section 401 certifications provide the "clearest statement of the District's own interpretation" of DCMR § 1105.9. *See* Reg. 05 Petition at 15; Reg. 07 Petition at 25-26; Tr. at 97-99. As explained previously, the Region refers to two such certifications: (1) a December 15, 2004 letter from the District's Department of Health, which approved the incorporation of the LTCP into the December 2004 Permit without including a compliance schedule for the implementation of the selected LTCP controls, Reg. 05 Ex. 6; and (2) a January 20, 2007 letter from the District's Department of the Environment ("DDOE"), which, *inter alia*, approved the total nitrogen effluent limit in the December 2006 Draft Permit and did not include a schedule for compliance with that limit.[36] Reg. 07 Ex. 5. The fact sheet accompanying the December 2004 Permit explained that a compliance schedule would be included in the Consent Decree, rather than in the Blue Plains Permit. *See* Reg. 05 Ex. 6; *id*. Ex. 4 (Dec. 16, 2004 Fact Sheet), at 15. In the 2007 certification, the District stated:

> This certification is based on relevant water quality considerations, as follows: (1) DDOE finds that WASA has demonstrated that it is not currently capable of achieving the new limit without new technologies being installed at the Blue Plains facility[; and] (2) DDOE concurs with EPA, that EPA should establish a schedule for compliance with the nitrogen limit.

Reg. 07 Ex. 5 (Jan. 20, 2007 § 401 Certification). At the time of the certification, the relevant draft fact sheet stated that the Region intended to include a compliance schedule in an enforceable order. *See* Reg. 07 Ex. 12 (Dec. 14, 2006 Draft

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[36] As explained previously in Part II.A, the Final Permit included the same nitrogen limit that appeared in the December 2004 Draft Permit.

Fact Sheet), at 5.[37]

We find these certifications are far from clear or definitive statements of the District's interpretation of DCMR § 1105.9. While it is possible to infer that, by its silence in not mentioning that the Blue Plains Permit lacked the appropriate compliance schedules, the District believed that a schedule of compliance was not required in the permit to comply with its water quality standards, we do not take these certifications to be clear statements of the District's interpretation of its regulations. Rather, we are instructed by our prior holding that a permit issuer "cannot rely exclusively on [a] section 401 certification, at least in a circumstance * * * in which there is a body of information drawing the certification into question." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D 323, 343 (EAB 2002). In this case, we will not allow the section 401 certifications to trump the plain meaning of the District's water quality standards regulation, which clearly requires compliance schedules for water quality-based effluent limits to be included in NPDES permits.

Finally, with respect to the compliance schedule for implementation of the selected controls in the LTCP, the Region argues that it correctly included that schedule in the Consent Decree, rather than in the Blue Plains Permit, because doing so "fully conform[ed] to the CSO Policy" and thus was "an appropriate exercise of discretion." Reg. 05 Petition at 11. As we just made clear, DCMR § 1105.9 does not grant the Region "discretion" to include a compliance schedule in NPDES permits; rather, it mandates that the Region do so wherever a compliance schedule is appropriate.[38] Nonetheless, because the CSO Policy has been incorporated into the CWA, we will examine it next to determine whether the Region's decision to include the LTCP implementation compliance schedule in the Consent Decree in fact conforms with the CSO Policy and, if so, whether the CSO Policy then is in conflict with DCMR § 1105.9.

As the Region explains, the Phase II permitting provisions of the CSO Policy provide that once the LTCP controls have been selected, unless the permittee can comply with all the requirements of the Phase II permit, the permitting authority should include a schedule for implementation of the plan in "an appropriate enforceable mechanism." 59 Fed. Reg. 18,588, 18,686 (Apr. 19, 1994). The Region then explains that the Consent Decree is an appropriate enforceable mechanism, in this case, because there is no dispute that WASA cannot immediately comply, and "[an] enforcement action was underway prior to issuance of the mod-

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[37] As the Region explained at oral argument, it previously had proposed including the compliance schedule in the August 2006 Draft Permit. Tr. at 98; *see also* Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet), at 5.

[38] *See infra* note 42 (explaining circumstances where incorporation of a compliance schedule into a permit may not be lawful).

ified permit and the compliance schedule for LTCP implementation was negotiated by the parties and embodied in a Consent Decree signed by the permittee and lodged with the Court on the same day the permit was issued." Reg. 05 Petition at 11. Moreover, with respect to "major permittees" that cannot comply, the CSO Policy states that the "compliance schedules should be placed in a judicial order." 59 Fed. Reg. at 18,696.

We agree with the Region that its decision to include a compliance schedule in the Consent Decree conforms with the CSO Policy. On the other hand, the CSO Policy does not prohibit the inclusion of compliance schedules in permits. As NACWA/WWP observe in their non-party briefs, the fact that the CSO Policy states that, for major permittees, "the compliance schedule should be placed in a judicial order," 59 Fed. Reg. at 18,696, does not preclude contemporaneous deployment of a compliance schedule in a permit, especially when a schedule is required under the state water quality regulations. NACWA/WWP 05 Brief at 7. We thus continue to find fault with the Region's decision not to include a compliance schedule for implementation of Blue Plains's LTCP controls in the Final Permit.[39] Additionally, as the Region's advocate eventually conceded at oral argument when asked if it would be possible to include a compliance schedule in both places, "I suppose it's possible * * * ." Tr. at 89. The CSO Policy's, and indeed the Region's, stated preference for placing a compliance schedule in a judicial order cannot take precedence over the District's authority to define appropriate deadlines and mechanisms for complying with its own state law requirements.[40]

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[39] We base this finding solely upon the text of the District's water quality standards regulation, which requires the inclusion of compliance schedules in permits for new water quality-based effluent limitations. The Region observed at oral argument that it "would be very surprised" if EPA approved regulations in other states that contain mandatory compliance schedule provisions. Tr. at 93-93.

[40] In its Supplemental Response, the Region appears to back away from the concession it made at oral argument and now contends that a compliance schedule could not have been placed in both the Consent Decree and the Blue Plains Permit because compliance schedules are components of effluent limits. As such, the Region claims that if a compliance schedule were placed in the Blue Plains Permit, WASA would no longer be in violation of any effluent limitations. *See* Reg. Supplemental Response at 3. We first note that although we asked the Region, at oral argument, to provide additional information with respect to whether the LTCP meets the requirements of 40 C.F.R. § 122.4(d), we did not at any point ask for a "clarification" of the Region's position with respect to whether a compliance schedule could be included both in the Consent Decree and in the permit. Moreover, neither EPA regulations nor the Board's Practice Manual provide for post-argument briefing of the sort offered here by the Region. Therefore, the Region's "clarification" in this regard was unsolicited and we need not consider the Region's Supplemental Response to the extent it presents this additional "clarification." We further observe that the Region provided little support for its newly minted position in its Supplemental Response, and that CBF challenged both the filing of the Supplemental Response as well as the substance of the Region's argument on this point. *See* CBF's Objection to Supplemental Response (Jan. 4, 2008). In any event, whatever the implications of including a compliance schedule in the Final Permit, the state regulation must be followed; there is no conflict with the CSO Policy, which simply states a preference, not a requirement, for placing schedules of compliance in a judicial order.

See CWA §§ 301(b)(1)(C), 510, 33 U.S.C. §§ 1311(b)(1)(C), 1370; 40 C.F.R. § 123.25.

In light of the above, we find that the Region's failures to include in the Final Permit compliance schedules for the implementation of the selected controls in the LTCP and the achievement of the total nitrogen effluent limit are clear errors of law.[41] Accordingly, we remand the Final Permit's conditions related to these requirements to allow the Region to develop such compliance schedules and include them in the Final Permit.[42] As a practical matter, we note that the Region does maintain some discretion in the exact manner in which it establishes compliance schedules. As explained previously, the Region has expressed concerns that incorporating compliance schedules into the Blue Plains Permit may not give it the flexibility it needs for making future modifications to the LTCP, for example. In remanding the Final Permit for inclusion of the compliance schedules, we do not intend to diminish these practical concerns, and encourage the Region to bear these concerns in mind as it crafts the specific language of the modified Blue Plains Permit.

C. *Total Nitrogen Effluent Limitation*

In App. 07-11, WASA seeks Board review of the Region's decision to modify the Blue Plains Permit to include a total nitrogen effluent limitation of 4,689,000 pounds per year. WASA argues that: (1) the nitrogen limit is based on an erroneous allocation developed outside the rulemaking and permit modification processes; (2) the Region failed to acknowledge deficiencies in the allocation

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[41] Because we have found that DCMR § 1105.9 applies in this case and the plain language of that regulation controls, we decline to address the other arguments raised by the petitioners, namely: (1) whether the CSO Policy alone (absent DCMR § 1105.9) would require the inclusion of a compliance schedule in the permit under this set of facts; (2) whether there is an obligation to provide public notice and a comment period for compliance schedules; and (3) what the effect of having compliance schedules only in the Consent Decree would have on WASA's CWA compliance status or future enforcement actions.

[42] We note that schedules for compliance with water quality standards that were promulgated prior to July 1, 1977, are not appropriate. *See* Office of Water, U.S. EPA, *NPDES Permit Writers' Manual* ch. 8.1.4 (Dec. 1996) ("The determination of whether a compliance schedule to meet water quality-based effluent limits is permissible depends on when the applicable [s]tate water quality standards were initially promulgated. Because [s]tates were required to have water quality standards promulgated by July 1, 1977, and because facilities were supposed to have had the opportunity to comply with the standards, compliance schedules are not allowed if the [s]tate water quality standards were promulgated before July 1, 1977."). The Region left open at oral argument whether any of the District water quality standards were promulgated prior to July 1, 1977. Tr. at 87 ("I don't know, frankly, whether all of these standards would have been pre-July 1, 1977."). To the extent that any of the relevant water quality standards were promulgated prior to July 1, 1977, the Region should not include in the compliance schedule in the Final Permit the related LTCP requirements. However, the Region should clearly document its decisionmaking so that there is a clear record of any circumstances in which compliance schedules are not placed in the Final Permit on this basis.

process that formed the basis for the limit; (3) the Region failed to respond adequately to WASA's "significant comment" on this issue; and (4) the imposition of a nitrogen limit is premature. For the reasons explained below, we decline to grant review of the Final Permit on these bases and, as such, dismiss WASA's petition in App. 07-11 with respect to these issues.

1. *Background*

a. *Chesapeake Bay Agreements*

To understand WASA's arguments in App. 07-11, it first is helpful to provide some background about the various agreements relating to discharges into the Chesapeake Bay. These agreements directly influenced the Region's decision to include the 4,689,000 pounds-per-year nitrogen limit in the Final Permit.

In 1983, with the intent of coordinating efforts to improve water quality in the Chesapeake Bay watershed, EPA, the District, Maryland, Pennsylvania, and the Chesapeake Bay Commission (collectively, the "Chesapeake Executive Council"[43]) signed what is known as the Chesapeake Bay Agreement ("Bay Agreement"). Compliance with the Bay Agreement is enforceable under section 117(g) of the CWA.[44] The Bay Agreement was revised in 1987, 1992, and again in 2000. In accordance with the 2000 revision (the "Chesapeake 2000 Agreement"), EPA developed ambient water quality criteria for the Chesapeake Bay and its tidal tributaries to achieve and maintain the water quality conditions necessary to pro-

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[43] The CWA refers to the signatories to the Chesapeake Bay Agreement as the "Chesapeake Executive Council." CWA § 117(a)(5), 33 U.S.C. § 1267(a)(5).

[44] CWA § 117(g) provides that EPA shall, in coordination with the Chesapeake Executive Council "ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain:

> (A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorous entering the Chesapeake Bay and its watershed;
>
> (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem;
>
> (C) the Chesapeake Bay Basinwide Toxins Reduction and Prevention Strategy goal * * * ;
>
> (D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories * * * ; and
>
> (E) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem.

CWA § 117(g)(1), 33 U.S.C. § 1267(g)(1).

tect the Bay. *See* Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 5; U.S. EPA, EPA-903-R-03-002, *Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll* a *for the Chesapeake Bay and Its Tidal Tributaries* (Apr. 2003) (the "Bay Criteria"). The Bay Criteria serve as the regional nutrient guidance applicable to the Chesapeake Bay and its tidal tributaries.

The District, along with Maryland, Delaware, and Virginia, subsequently adopted changes to their state water quality standards and refined aquatic life uses for tidal Chesapeake Bay waters, which EPA approved as consistent with the Bay Criteria and the CWA. *See* Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 1 (stating that the Bay Criteria have been incorporated into the District's water quality standards); *id.* Exs. 21-23 (letters from Region approving revised water quality standards for Virginia, the District, and Maryland). Based on the Bay Criteria and state water quality standards, EPA and the Bay states (Virginia, Maryland, Delaware, New York, Pennsylvania, and the District) then established cap load allocations[45] for nitrogen, phosphorus, and sediment. Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 5. The process used to develop these allocations is set forth in a document prepared by the Region's Chesapeake Bay Program Office. *See* Reg. 07 Ex. 15 (Chesapeake Bay Program Office, U.S. EPA Region 3, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads* (Dec. 2003) ("Allocation Document"). The states were charged with developing their own tributary strategies to achieve the agreed-upon allocations.[46] The District, Maryland, and Virginia each allocated some of their nitrogen cap loading to Blue Plains. Together, they allocated 4,689,000 pounds per year of total nitrogen.[47] *See* Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 6.

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[45] Cap load allocations are allocations that the Bay states established for the pollutants nitrogen, phosphorus, and sediment for each of the major Chesapeake Bay basins, with those allocations subdivided for each state with jurisdiction over that basin. *See* Reg. 07 Ex. 16 (Region's Memo to File re: Basis of Proposed Nitrogen Limits for Blue Plains), at 1.

[46] Maryland and Virginia adopted strategies for Blue Plains that, once fully implemented, EPA has deemed sufficient to achieve the nitrogen cap loads described in the Allocation Document. *Id.* EPA determined that the District's strategy was not sufficient to achieve the nitrogen cap loading allocation, however, and therefore recalculated the appropriate allocation for the District's contribution to Blue Plains, consistent with the nitrogen cap loading to the District. *Id.* at 2. In the summer of 2006, Maryland adjusted its tributary strategies by making small reductions to its nitrogen allocation for Blue Plains, and designating these allocated loadings to another wastewater treatment plant. *Id.* Subsequently, EPA recalculated the appropriate effluent limits for Blue Plains based on the allocations from the modified Maryland tributary strategy, the Virginia tributary strategy, and the recalculated allowable nitrogen loading for the District portion of Blue Plains. This combined allowable loading adds up to the total allowable nitrogen loading for the entire Blue Plains facility. *Id.*

[47] The District's portion of the Blue Plains allocation is 2,115,000 pounds per year. Maryland's portion is 1,993,000 pounds per year. The Virginia portion is 581,000 pounds per year. *See* Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 6.

b. *The Permit Provision at Issue*

The nitrogen limit appears in Part IV.E of the Final Permit.[48] As explained in Part II.A above, prior to the Region's proposal of the August 2006 Draft Permit, the Blue Plains Permit contained a voluntary nitrogen goal, rather than a nitrogen limit. With the August 2006 Draft Permit, the Region proposed an interim nitrogen limit of 8,600,000 pounds per year. At that time, the Region explained that in order to reach the target allocation of 4,689,000 pounds per year set forth in the Allocation Document, new process equipment would need to be installed at Blue Plains. The Region explained that because the target allocation was not immediately achievable, the higher interim limit would apply until the needed equipment became operational. *See* Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet), at 5. In addition to the interim limit, the August 2006 Draft Permit contained an interim total nitrogen goal of 5,800,000 pounds per year. *Id.* During the notice-and-comment period on the August 2006 Draft Permit, the Region received several objections to the proposed interim nitrogen limit. WASA argued that the interim limit was flawed and generally too stringent. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments) at 3-6. Other commenters held an opposing view and argued that, to comply with the CWA, the Region should have required immediate compliance with the 4,689,000 pounds-per-year allocation for nitrogen at Blue Plains. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 12-13.

After considering these comments, the Region proposed the December 2006 Draft Permit, which eliminated the interim limit and goal and instead included only a total nitrogen effluent limit of 4,689,000 pounds per year, reflecting the Blue Plains allocation. Reg. 07 Ex. 12 (Dec. 14, 2006 Draft Fact Sheet), at 5; Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 13. In doing so, the Region stated:

> In addition to meeting the EPA Bay [C]riteria, the proposed modification to the total nitrogen limit complies

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[48] Part IV.E of the Final Permit states:

> 1. The District of Columbia, as a signatory to the 1987 Chesapeake Bay Agreement, the 1992 Amendments to the Chesapeake Bay Agreement and the Chesapeake 2000 Agreement, supports the goal of reducing the discharge of nutrients to the Chesapeake Bay. Since 1997, WASA has employed nitrogen removal at its Blue Plains WWTP. Under the permit issued January 24, 2003, WASA has been operating under the voluntary goal of meeting an annual total nitrogen mass load of 8,467,2000 [*sic*] pounds per year.
>
> 2. Effective upon permit issuance, the total nitrogen discharge limit from the facility shall be 4,689,000 pounds per year.

Reg. 07 Ex. 2 (Final Permit), at 52.

> with 40 CFR Section 122.4(d)[, requiring] compliance with water quality standards for all the affected states. It also meets the requirements of 40 CFR Section 122.44(d) Water Quality Standards. It can be concluded that an annual nitrogen load at Blue Plains which exceeds the 4.689 million pounds per year mass load has a reasonable potential to cause or contribute to an exceedance of the state water quality standards.

Reg. 07 Ex. 12 (Dec. 14, 2006 Draft Fact Sheet), at 5. During the comment period for the December 2006 Draft Permit, WASA again objected to the nitrogen limit, raising arguments similar to the ones it now raises before the Board in App. 07-11. The Region acknowledged these comments, yet determined that, despite WASA's comments, the 4,689,000 pounds-per-year total nitrogen limit was appropriate, and thus the Region included it in the Final Permit. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 14-22; Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 6.

2. *Discussion*

WASA continues to object to the nitrogen limit that the Region decided to include in the Final Permit and seeks Board review of that decision. Establishment of a nitrogen effluent limit in a permit is inherently a technical issue. The Board assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *In re City of Moscow*, 10 E.A.D. 135, 124 (EAB 2001). It is well established that:

> "[W]hen presented with technical issues, we look to determine whether the record demonstrates that the [permit issuer] duly considered the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational in light of all of the information in the record. If we are satisfied that the [permit issuer] gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the [permit issuer's] position. Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated."

In re Scituate Wastewater Treatment Plant, 12 E.A.D. 708, 718 (EAB) (quoting *In re MCN Oil & Gas Co.*, UIC Appeal No. 02-03, at 25-26 n.21 (EAB Sept. 4, 2002) (Order Denying Review)), *appeal dismissed per stipulation of parties*, No.

06-1817 (1st Cir. 2006); *see also In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 334 (EAB 2002); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

In addition, petitioners seeking Board review of a permit provision must not only demonstrate that they raised the issue during the public notice and comment period, *see* 40 C.F.R. § 124.13, but they must also explain, in their petitions, why the permit issuer's response was clearly erroneous. We previously have explained:

> [M]ere repetition on appeal of comments already addressed by the permit issuer does not meet [the Board's] standard of review. Instead, to obtain review of a permit decision, petitioners must include specific information in support of their allegations to demonstrate why the permit issuer's response to the petitioner's comments below (i.e., the permit issuer's basis for its permit decision) is clearly erroneous, an abuse of permitting discretion, or otherwise warrants review.

Scituate, 12 E.A.D. at 733 (citing *In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 470-72, 487-88 (EAB 2005)); *In re City of Marlborough*, 12 E.A.D. 235, 240 (EAB 2005), *appeal dismissed for lack of jurisdiction*, No. 05-2022 (1st Cir. 2005); *In re Phelps Dodge Corp.*, 10 E.A.D 460, 508-09, 518-19 (EAB 2002).[49] With these procedural requirements in mind, we turn to WASA's arguments.

a. *Challenges to Nitrogen Limit Based on Allegedly Erroneous Nitrogen Allocation*

First, WASA argues that the nitrogen limit "is based upon an erroneous allocation developed by third parties outside the rulemaking and permit modification process[es]."[50] WASA Petition 07-11, at 12. In support of this argument, WASA

[49] WASA did not acknowledge this obligation for obtaining Board review of the Final Permit decision. Instead, in its petition, WASA largely reiterated the comments that it submitted during the notice-and-comment period on the December 2006 Draft Permit, without further explanation.

[50] Although WASA uses this statement for its subheading introducing its first argument on this topic, the text that follows does not at all address why it would have been incorrect to base the nitrogen limit on the Allocation Document. WASA merely argues why it believes that the allocation is incorrect.

criticizes the Allocation Document as misapplying its stated goals.[51] To illustrate, WASA states that a correct application of the Allocation Document's goals would have led to a larger percent nitrogen reduction requirement for Pennsylvania's Susquehanna River basin than the percent nitrogen reduction requirement for the District. *Id.* at 13. The preliminary nitrogen allocation for Pennsylvania's Susquehanna River called for dischargers to that basin to achieve nitrogen reductions totaling 55.4% over the baseline, while the District's nitrogen load reduction requirement was set at 61.6%.[52] According to WASA, these allocations were based on the incorrect assumption that the District would benefit equally with Maryland and Virginia from the Bay's recovery, whereas WASA asserts that the District receives no more benefit from improved water quality in the main stem of the Bay than does Pennsylvania. Further, WASA argues that the decision to reduce the District's nitrogen allocation to bring the allocations in line with the Bay-wide cap load, without explanation or justification for the reductions, compounded the erroneous application of the Allocation Document's goals. *Id.* at 14-15.

In response to these same comments submitted during the public comment period, the Region stated:

> Nutrient reductions are driven largely by water quality in the tidal portions of the bay watershed. The allocation of the allowable loadings is driven by a complex set of facts which include, but are not limited to, geography, land use and proximity to the Bay. The process for allocating these loadings is described above and in the Bay Allocation Document. The Bay Parties agree that jurisdictions that have tidal waters in the Bay watershed will benefit more from the reduction of nutrients. The waters of the Potomac River under the jurisdiction of the District of Columbia are tidal. Furthermore, the nutrient reductions prescribed for the Bay not only benefit the Chesapeake Bay but also benefit the tidal Potomac River which has experienced historical and at times very significant algal problems from excessive nutrients.

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[51] WASA cites the goals listed in the Allocation Document. According to the Allocation Document, the following three "guiding principles" (i.e., what WASA refers to as "goals") were used in allocating the cap loads to the individual states and tributaries: (1) basins that contribute the most to the problem must do the most to solve the problem; (2) states that benefit the most from the Chesapeake Bay must do more; and (3) all reductions in nutrient loads are credited toward achieving final assigned loads. Allocation Document at 93.

[52] The baseline was calculated based on the projected nitrogen load from human activity in 2010 without any point or nonpoint source controls in place. Allocation Document at 94-95.

Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 20. The Region further stated:

> [T]he Bay program did not arbitrarily reduce the District's nitrogen allocation * * *. The District voluntarily agreed to the lower cap as did each of the tidal jurisdictions. As explained above, EPA disagrees with WASA's assertion that equity can be expressed simply as a matter of percent reduction. It is much more complex. For example, the allocated loading for the District portion of the Blue Plains facility is a concentration equivalent of 4.6 [milligrams per liter] total nitrogen. The allocated loading to Blue Plains from Maryland and Virginia is a concentration equivalent of 4 [milligrams per liter] total nitrogen. Therefore, on a concentration basis, Maryland and Virginia have allocated less to Blue Plains than the [District]. Based on this analysis, one could argue that the District was allocated too much loading with respect to Maryland and Virginia.

Id. at 20-21. As previously explained, to prevail on its claims, WASA must do more than merely reiterate the comments it submitted during the public notice-and-comment period. WASA must specifically demonstrate why the Region's response to its comments warrants review. WASA's arguments with respect to the fairness of the allocation merely repeat the comments it provided to the Region on January 18, 2007. *Compare* WASA 07 Petition at 12-15 *with* WASA 07 Ex. B (WASA comments), at 7-8. WASA fails to address, or even acknowledge, the Region's response in its petition. *See* WASA 07 Petition at 12-15. Because WASA has done no more than reiterate the comments it made in this regard during the public comment process, we deny review of the permit based on WASA's first argument.[53]

b. *Challenges Based on Alleged Deficiencies in Allocation Process*

WASA's second argument is that the Region "failed to acknowledge or address deficiencies in the allocation process that are the basis for the nitrogen limit in the Blue Plains Permit." WASA 07 Petition at 15. WASA argues that, in setting the nitrogen limit in the Final Permit, the Region erred by "simply assum[ing]" that the Allocation Document was a valid basis for establishing and imposing a

[53] In addition, to the extent that WASA argues that the allocation process, rather than the nitrogen limit itself, was erroneous, we also reject that argument as outside of our jurisdiction, as explained in Part III.C.2.b below.

nitrogen limit in the Final Permit. *Id.* at 15-16. WASA contends that the Region had an obligation to consider the following additional factors in setting the nitrogen limit, but failed to do so: (1) the water quality benefit and fairness of the allocations; (2) the financial burden of WASA's CSO control obligations on District ratepayers; (3) the complexities involved in controlling nitrogen levels and the technological limits faced by the District; (4) the fact that federal grant funding for nitrogen control is available in Virginia and Maryland but not in the District; and (5) WASA's inability to trade for nitrogen credits to comply with the limit.[54] *Id.* at 16. The Region claims in response that none of these factors is relevant to setting effluent limits. Reg. 07 Response at 30.

As a preliminary matter, WASA did not provide any legal authority for its assertion that the Region was "obligated" to consider any of these factors.[55] With respect to the first factor, WASA does not explain what it means by a failure to consider "water quality benefit." It continues to assert, however, that it was treated unfairly during the allocation process. Reg. 07 Petition at 17-18. To the extent that WASA is challenging the Allocation Document as the basis for establishing the nitrogen effluent limitation, rather than the effluent limitation itself, we reject that challenge as outside our jurisdiction.[56] *See* 40 C.F.R. § 124.19 ("any person * * * may petition the [Board] to review a *condition of the permit decision*") (emphasis added). As we have explained previously:

> [Waste load allocations in TMDLs][57] are not permit limits *per se*; rather they still require translation into permit limits * * * . Of note here is that while section 122.44(d)(1)(vii) prescribes minimum requirements for developing [water quality-based effluent limits], it does not prescribe detailed procedures for their development. The lack of a detailed procedure for establishing permit limits from available [waste load allocations] was intended to give "the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits." 54 Fed. Reg. 23,868, 23,879 (June 2, 1989).

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[54] WASA also raised these issues during the comment period. *See* WASA 07 Ex. B.

[55] As we explained above, a petitioner's claims must be substantiated. *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 718 (EAB), *appeal dismissed per stipulation of parties*, No. 06-1817 (1st Cir. 2006).

[56] As explained previously, the Allocation Document is based on the Bay Criteria and state water quality standards.

[57] A waste load allocation is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h).

In re City of Moscow, 10 E.A.D. 135, 146-47 (EAB 2001); *see also In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 484 (EAB 2004) ("'[o]ur jurisdiction is limited to reviewing whether the Region, as permit issuer, included a condition in the permit that properly implements the [water quality] standard'") (quoting *In re City of Hollywood*, 5 E.A.D. 157, 176 (EAB 1994)).

WASA additionally argues that "the Region exceeded its authority by adopting these allocations without notice and comment [and] without public participation * * * ." WASA 07 Petition at 19. This statement is incorrect. As explained previously, the December 2006 Draft Permit, containing the allocation-based nitrogen limit at issue, was indeed subject to notice and comment, even if the allocation process itself was not.[58] WASA has provided no basis, factual or legal, for us to find that the Region committed clear error with respect to any issue within the scope of our review relating to the adoption of a total nitrogen effluent limitation based on the Allocation Document. We therefore decline to review the Final Permit on these grounds.

The remaining four factors cited by WASA relate to cost or technology concerns. The Region, in both its Response to Comments and its Response Brief, correctly cited a body of case law that holds that cost and technological considerations are not appropriate factors to consider under the CWA when setting water quality-based effluent limits. *See* Reg. 07 Response at 31-32; Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 15 (citing *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 733-35 (EAB) (finding that EPA did not commit clear error by not considering cost of compliance when establishing effluent limits), *appeal dismissed per stipulation of parties*, No. 06-1817 (1st Cir. 2006)); *see also In re City of Moscow*, 10 E.A.D. 135, 168 (EAB 2001); *In re New England Plating Co.*, 9 E.A.D. 726, 738 (EAB 2001) (finding that CWA does not make exceptions for cost or technological feasibility); *In re Town of Hopedale*, NPDES Appeal No. 00-04, at 24 (EAB Feb. 13, 2001) (Order Denying Review); *accord Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (holding that EPA is obligated to set water quality standards without regard to practicability); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) (finding "states are free to force technology" and "[i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations")).

WASA's petition fails to acknowledge any of these cases or provide any legal basis whatsoever for its argument that the Region should have considered these factors when developing the nitrogen limit. As a procedural matter, we decline review because WASA failed to address the cases cited in the Region's response. *See Scituate*, 12 E.A.D. at 718. As a substantive matter, in accordance

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[58] We reiterate that we have no authority to review the permit on the ground that the allocation process itself was not subject to notice and comment.

with the cases cited by the Region, we also find that WASA has not met its burden of demonstrating that the Region committed clear error by not considering the cost and technology factors described in its petition. We therefore deny review of the Final Permit on these grounds.

c. *Challenges to Region's Response to Comments*

WASA's third argument is that "the Region failed to respond to WASA's significant comment" and, more generally, that "the Region never intended to consider WASA's comments on the proposed nitrogen limit." WASA 07 Petition at 20-21. While it is not entirely clear which "significant comment" WASA is referencing, it appears that WASA has three basic complaints in this regard: (1) the Region did not respond to WASA's comments regarding the alleged unfairness of the relative contributions of the Susquehanna River basin and the Potomac River basin; (2) in response to WASA's comment that, in the Allocation Document, the District was erroneously treated as a tidal jurisdiction, the Region suggests that the limit is intended to protect both the Bay and the Potomac, contrary to what is set forth in the Allocation Document; and (3) WASA disagrees with the Region's response that, if anything, the District's allocation may have been too large in relation to the allocations given to Virginia and Maryland. WASA 07 Petition at 20-21.

To the extent that WASA asserts that the Region committed clear error because it did not respond to WASA's comments, we find this statement to be incorrect. The Region dedicated ten pages of its Response to Comments document to WASA's comments. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 14-23. Specifically, the Region addressed WASA's first two complaints on page 20 of its Response to Comments document.[59] To the extent that WASA argues the Region's response is inadequate because it disagrees with the Region's position, we note that "clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter." *Scituate*, 12 E.A.D. at 718. Here, we defer to the Region's technical judgment. Although WASA has shown that it disagrees with the Region's position, it has failed to show a clear error of law or fact, or an important policy consideration, that would warrant the Board's review of the nitrogen limit.

d. *Challenges to Timing of Imposition of Nitrogen Limit*

WASA's fourth and final argument is that the Region's imposition of the nitrogen limit was premature. WASA 07 Petition at 21. According to WASA, it is

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[59] *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 20 (quoted in Part III.C.2.a above).

currently in the process of developing a Total Nitrogen/Wet Weather Plan, which will "address critical issues related to WASA's ability to cost-effectively comply with the proposed nitrogen limit while meeting its existing wet weather CSO control obligations." *Id.* WASA asserts that the "Region's response to WASA's comments offers no rational justification or explanation for proceeding to include the limit in the Final Permit before WASA completed and submitted its Plan," and again complains of the costs to ratepayers attributable to adding the nitrogen limit. *Id.* at 22. According to WASA, the Region has known that WASA is in the process of developing a Total Nitrogen/Wet Weather Plan and, until certain issues related to the plan are resolved, that complying with the nitrogen limit would be too costly. *Id.* at 21-22.

In its Response to Comments, the Region explained that "EPA has been working with WASA, and will continue to do so to identify and resolve the issues related to the development and implementation of a plan, including a schedule to achieve compliance with the nitrogen limit. In the meantime, EPA is committed to moving forward with the goals of the Bay Agreement, and is responding to the EPA-approved revisions to the [water quality standards] of the affected states which reflect the Bay [C]riteria." Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 22. Again, we note that "clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter." *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 718 (EAB), *appeal dismissed per stipulation of parties*, No. 06-1817 (1st Cir. 2006). Moreover, as we previously explained, the Region need not consider cost concerns when developing an effluent limit. WASA has neither demonstrated that the Region's response was inadequate, nor has it provided any legal basis for us to find that the Region must postpone setting the nitrogen limit before WASA's development of its Total Nitrogen/Wet Weather Plan reaches completion. We therefore find that WASA has failed to establish clear error in this regard and decline to review the Final Permit on this basis.

In light of the foregoing, we dismiss WASA's App. 07-11 with respect to the issues set forth above. [60]

D. *Water Quality-Based Effluent Requirements for CSOs*

In App. 07-12, FOE/SC challenge Part III.E of the Final Permit, which sets forth "Water Quality-Based Requirements for CSOs." The Region changed this provision when it issued the Final Permit, so that, unlike the August 2006 Draft

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[60] This Part III.C covers all issues raised in Appeal No. 07-11, except for the compliance schedule issue, which we discussed previously in Part III.B, *supra*.

Permit,[61] the Final Permit no longer included a general provision ensuring compliance with the District's water quality standards. FOE/SC argue that this modification constituted a clear error of law because: (1) the Region did not provide adequate notice and opportunity to comment on the final language, FOE/SC Petition at 9-10; (2) the final language violates the antibacksliding provisions of the CWA and EPA rules, *id.* at 11-12; and (3) the final language does not contain effluent limitations necessary to meet and "ensure" compliance with the District's water quality standards, as required by CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. § 122.4(d). FOE/SC Petition at 12-15. The Region opposes FOE/SC's appeal, and WASA, as an intervener in this appeal, generally supports the Region's opposition. We agree with FOE/SC that the Region did not provide adequate notice and opportunity to comment on the final language relating to compliance with water quality standards for CSOs, and we therefore remand the permit to the Region on this basis.

Because of our decision remanding the Final Permit on procedural grounds, we need not decide FOE/SC's other two arguments, which are substantive. Nonetheless, in the interests of expediting the resolution of this long overdue permit, we offer some observations on these two issues in the hopes that the Region can address our concerns on remand.

1. *The Permit Provision at Issue*

To understand FOE/SC's arguments, we first must examine in some detail the Final Permit provision at issue, as well as its many previous iterations. As previously explained, NPDES permits must include effluent limitations necessary to meet water quality standards established under state law. *See* CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Further, EPA regulations prohibit issuing a permit "when imposition of conditions cannot ensure compliance with the applicable water quality requirements." 40 C.F.R. § 122.4(d).

a. *The 1997 Permit*

The 1997 Permit contained the following language limiting discharges from CSOs:

> Consistent with the Clean Water Act, section 301(b)(1)(C), the permittee must not discharge in excess

[61] As explained in Part II.A above, the Region proposed a subsequent draft permit on December 14, 2006. This draft dealt solely with the final nitrogen limit, however. The Region responded to comments on the August 2006 Draft Permit and the December 2006 Draft Permit at the same time, in the same document. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments).

> of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law.

1997 Permit Part III.2(c)(2).[62]

b. *The January 2003 Modified Permit*

In issuing the January 2003 Permit, the Region changed the provision specifying "water quality-based requirements for CSOs" by supplementing the narrative effluent limit from the 1997 Permit, set forth in the first paragraph, and by adding a second paragraph, as follows:

> 1. Consistent with the Clean Water Act, section 301(b)(1)(C), the permittee must not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law. The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion above narrative criteria developed or adopted as part of the [District's] water quality standards or otherwise prevents existing designated uses.
>
> 2. Permittee shall not discharge pollutants in amounts exceeding Waste Load Allocations (WLAs) set forth in the [TMDLs] for BOD (approved by the District of Columbia on December 14, 2001) and TSS (issued by EPA on March 1, 2002).

January 2003 Permit Part III.C.[63] The Region explained that it included language about the TMDLs in the January 2003 Permit because by that time the relevant TMDLs had been issued. Reg. 07 Response at 36; *see supra* note 12 (discussing TMDLs).

c. *The March 2004 Draft Permit*

The March 2004 Draft Permit contained several modifications to reflect that WASA had completed its LTCP, and the permit thus had become a "Phase II

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[62] At the time of the issuance of the 1997 Permit, the permit was a "Phase I" permit under the CSO Policy because WASA had not yet developed a LTCP. *See* Reg. 05 Ex. 4 (Dec. 16, 2004 Fact Sheet), at 14-15; 59 Fed. Reg. 18,688, 18,696 (Apr. 19, 1994) (explaining difference between Phase I and Phase II permits). Under the CSO Policy, Phase I permits must require, *inter alia*, compliance with applicable state water quality standards, "expressed in the form of a narrative limitation." 59 Fed. Reg. at 18,696. The Region sent a copy of the 1997 Permit to the Board on December 20, 2007, and it now is part of the record of this case.

[63] The Region sent a copy of the January 2003 Permit to the Board on December 20, 2007, and it now is part of the record of this case.

permit" under the CSO Policy. In this iteration, the Region proposed to change the relevant water quality provision to read as follows:

> Except as otherwise specified below, the permittee shall not discharge any pollutant at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above District of Columbia water quality standards, including numeric or narrative criteria for water quality.

Reg. 05 Ex. 5 (Dec. 16, 2004 Response to Comments), at 8 (referencing March 2004 Draft Permit pt. III.E.1).

FOE/SC's comments on the March 2004 Draft Permit stated that they supported the new version, with the exception of the introductory clause ("Except as otherwise specified below"). FOE/SC asserted that there would be no possible basis, consistent with the CWA, for ever allowing discharges that would cause or contribute to violations of water quality standards. *See id.* at 8. WASA, on the other hand, objected to the inclusion of this provision altogether, arguing that its inclusion was inconsistent with the CSO Policy.[64] *See id.* at 20.

In responding to FOE/SC's comments, the Region appeared to agree with the arguments contained therein. The Region agreed that it should delete the introductory clause and explained that "the permit must contain requirements necessary to achieve [water quality standards], including state narrative criteria, pursuant to 33 U.S.C. § 1311(b)(1)(C) and 40 C.F.R. § 122.4(d) and 122.44(d). * * * As in all NPDES permits, the discharge is required to achieve any more stringent limits to meet D.C. water quality standards." Reg. 05 Ex. 5 (Dec. 16, 2004 Response to Comments), at 8. The Region additionally stated:

> EPA has enumerated DC's narrative [water quality standards] as narrative [water quality-based effluent limits] because EPA finds that, at the time of permit issuance [prior to full implementation of the LTCP], the CSO discharges are likely to cause, have the reasonable potential to cause, or contribute to non-attainment of these narrative [water quality standards]. This finding conforms to the CSO Policy for Phase 2 permits because the finding is

[64] WASA's comment was "[t]he draft permit fails to conform to CWA § 402(q) [the section incorporating the CSO Policy into the CWA] because it contains the general water quality standards compliance requirement in Section III.E.1." WASA did not elaborate further on this statement. Based on its arguments in this appeal, we presume WASA believed that, under the CSO Policy, once a permit becomes a Phase II permit, it no longer should contain a general water quality standards compliance requirement such as the one proposed by the Region.

> the one required by 40 C.F.R. 122.44(d)(1). The CSO Policy cites to this regulation at 59 FR 18688, at page 18696.

Id. at 20.[65] The Region explained further that, in its view, the requirements for Phase II permits set forth in the CSO Policy "do[] not appear to supplant the provisions of CWA Section 301(b)(1)(C)," noting the use of the CSO Policy's characterization of its requirements as "minimum" requirements. *Id.* at 21.

d. *The December 2004 Permit*

When the Region issued the December 2004 Permit, it changed the "Water Quality-Based Requirements for CSOs" provision significantly to read as follows:

> 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 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.

Reg. 05 Ex. 3 (Dec. 2004 Permit), at 49. The Region also included numeric effluent limits "derived from and consistent with" the applicable TMDLs. *Id.* at 49-51.

Both FOE/SC and WASA objected to this new language and filed petitions for review with the Board. The petitions were stayed for a number of months while the parties attempted to negotiate a settlement of their disputes. When the negotiations failed, the Region filed a Notice of Partial Withdrawal of the Modified Permit, withdrawing the above-quoted provision and stating its intent to prepare a new draft permit addressing the withdrawn permit terms. *See* Respondent's Notice of Partial Withdrawal of Modified Permit, NPDES App. Nos. 05-01 &

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[65] The part of the CSO Policy to which the Region referred here is the part that lists the requirements for Phase II permits. It states, in part, "The Phase II permit should contain: * * * Water quality-based effluent limits under 40 CFR. 122.44(d)(1) and 122.44(k), requiring, at a minimum, compliance with, no later than the date allowed under the [s]tate's [water quality standards], the numeric performance standards for the selected CSO controls, based on average design conditions specifying at least one of the following: * * * performance standards and requirements that are consistent with II.C.4.b of the Policy." 59 Fed. Reg. 18,688, 18,696 (Apr. 19, 1994). CSO Policy § II.C.4.b allows permittees to demonstrate that their selected control programs are adequate to meet the water quality-based requirements of the CWA. *Id.* at 18,693.

05-02 (Aug. 10, 2006).[66]

e. *The August 2006 Draft Permit*

The August 2006 Draft Permit contained the following language relating to water quality-based requirements for CSO discharges (at Part III.E.1):

> The [LTCP] performance standards contained in Part III Section C.2.A.3 through .9 [of the Draft Permit] are the water quality-based effluent limits for CSO discharges. In addition, until such time as all of the selected CSO controls set forth in the LTCP have been placed into operation, and the Permittee so certifies to EPA, in writing, consistent with [CWA §] 301(b)(1)(C), the permittee must not discharge in excess of any limitation necessary to meet the water quality standards established pursuant to District of Columbia law.

Reg. 07 Ex. 9 (Aug. 2006 Draft Permit), at 49. The Region explained its rationale for this modification as follows:

> While [the] performance standards are immediately effective, EPA recognizes that the Permittee is not likely to achieve the performance standards until the LTCP is fully implemented in accordance with the schedule contained in the Consent Decree * * * . Therefore, EPA is proposing to add language similar to that which appeared in the previously effective permit (issued January 22, 1997) * * * . In the interim period before the LTCP is fully implemented, this *general provision* is included because the CSO controls that are the LTCP performance standards will not have been constructed and placed in operation until the LTCP is fully implemented. The Permittee's obligations under this general language would lapse when the permittee fully implements the LTCP according to the referenced performance standards, and the CSO controls are placed into operation * * * .

Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet), at 3 (emphasis added).

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[66] By this time, the United States Court of Appeals for the District of Columbia Circuit had remanded the TMDLs for TSS and BOD. *See supra* note 12.

FOE/SC objected to the portion of the proposed provision that would terminate the prohibition on violating water quality standards when the selected controls in the LTCP have been placed into operation. They argued that this additional language did not ensure compliance with the District's water quality standards and thus created nitrogen requirements that were less stringent than those in the previous permit, in violation of the antibacksliding provisions of the CWA. Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 10.

The Region responded to FOE/SC's comment as follows:

> EPA believes that the specific performance standards expressed as water quality-based effluent limits do not constitute backsliding. On the contrary, these provisions, as opposed to the very general prohibition against discharging in excess of water quality standards, are more proscriptive and stringent. EPA has concluded that implementation of the LTCP will not preclude compliance with [water quality standards]. Therefore, use of the LTCP performance standards as [water quality-based effluent limits] does not violate 122.4(d), which precludes issuance of a permit that cannot ensure compliance with [water quality standards] of all affected states. Moreover, the use of the performance standards is consistent with and conforms to the requirements of the 1994 CSO Policy as it pertains to [water quality standards] in Phase II CSO permits. If it is determined, based upon post-construction monitoring, that the LTCP controls fail to achieve [water quality standards], then EPA intends, consistent with the CSO Policy, to require the permittee to take additional steps to achieve [water quality standards] and shall modify or reissue the permit accordingly and use an additional enforceable mechanism as necessary.

Id. at 10-11.

WASA also objected to the new permit language, but for different reasons. WASA commented as follows:

> WASA continues its objection to [this part of the permit] * * * . WASA believes that this provision should be removed in its entirety, as both the existing and proposed water quality standards compliance requirements fail to conform with Section IV.B.2.c of EPA's CSO Control Policy, and therefore, violate Section 402(q) of the Clean Water Act because they are water quality-based require-

> ments that are not authorized by the Act. It is not necessary to include Section III.E.1 [the provision at issue] in the permit because the permit includes the performance standards specifically called for in Section IV.B.2.c of the CSO Policy. Part III.E.1 unfairly exposes WASA to permit non-compliance.

Id. at 6 (quoting WASA's comments).[67]

The Region responded to WASA's comment as follows:

> The use of the LTCP performance standards as the water quality-based effluent limits * * * is consistent with the CSO Policy. * * * In addition to setting forth the performance standards in the permit * * * , it is appropriate for EPA to indicate that these are the new water quality-based effluent limits that apply to the discharges. Given that there are now specific [water quality-based effluent limits], EPA believes that a general requirement to comply with water quality standards is unnecessary and redundant. Therefore, that portion of the provision has been deleted. * * * The LTCP is anticipated to result in compliance with water quality standards.

Id at 6-7.

f. *The Final Permit*

In issuing the Final Permit on April 5, 2007, the Region, without first submitting the change for public notice and comment, modified Part III.E.1 to read: "The [LTCP] performance standards contained in Part III Section C.2.A.3 through .9 [of the Final Permit] are the water quality-based effluent limits for CSO discharges." Reg. 07 Ex. 2 (Final Permit), at 45. Essentially, the Region summarily removed the second sentence of the permit condition as it had appeared in the August 2006 Draft Permit (the general provision), such that the LTCP would provide the sole water quality-based effluent limits for CSO discharges from Blue Plains. The fact sheet accompanying the Final Permit reflected the Region's response to WASA's comments in this regard:

> Upon review of the comments as well as applicable law and policy, EPA has determined that the LTCP perform-

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[67] CSO Policy § IV.B.2.c specifies the water quality-based effluent limits that Phase II permits must contain.

> ance standards are the appropriate [water quality-based effluent limits] for these discharges. The use of the LTCP performance standards as the [water quality-based effluent limits] for CSO discharges is consistent with the CSO Policy * * * . In addition to setting forth the performance standards in the permit * * * , it is appropriate for EPA to indicate that these are the water quality-based effluent limits that apply to the discharges. Given that there are now specific [water quality-based effluent limits], EPA believes that a general requirement to comply with water quality standards is unnecessary, redundant and would not as clearly specify the permittee's obligations. Therefore, that portion of the proposed provision has been deleted.

Reg. 07 Ex. 3 (April 5, 2007 Fact Sheet), at 3-4. The Region further stated that it understood that WASA "may" not be able to comply with the performance standards until the LTCP is fully implemented and noted that the Consent Decree places WASA on a schedule to achieve compliance. *Id.* at 4. The Region also explained that if it is determined, based upon post-construction monitoring, that the LTCP controls, once implemented, fail to achieve water quality standards, then it intends to require WASA to take additional steps to achieve those standards, modify or reissue the Blue Plains Permit, and use an additional enforceable mechanism as necessary. *Id.*

2. *Failure to Provide Adequate Notice and Comment*

As mentioned above, FOE/SC's first argument is procedural. They argue that the Region committed clear error by failing to provide adequate notice and opportunity to comment on the changes to the Final Permit provision relating to compliance with water quality standards for CSO discharges. As explained below, we agree with FOE/SC and remand the Final Permit on this basis.

a. *The Parties*' *Arguments*

FOE/SC argue that the Region's deletion of the general requirement to comply with water quality standards prior to full implementation of the LTCP and certification thereof, without providing the public an opportunity to comment on the change, was unlawful because the language in the Final Permit deviated materially and substantially from the language in the August 2006 Draft Permit, in a way that was not reasonably foreseeable. FOE/SC Petition at 9-10. FOE/SC observe:

> Since 1997, the NPDES permit * * * has contained a narrative prohibition protecting waters from "discharge in excess of any limitation necessary to meet the water qual-

> ity standards established pursuant to District of Columbia law." In its August 16, [*sic*] 2006 proposal to modify the existing permit, the Region proposed to add language modifying the water quality standards provision so that its applicability would terminate some time in the future, after WASA has certified to the Region that it completed specific actions relating to [its LTCP] for [CSOs]. However, in a sharp departure from its proposal, the Region instead *deleted* the existing water quality-based protections, effective immediately.

FOE/SC Reply Brief at 3 (citations omitted). FOE/SC added that "a proposal to terminate standards protection immediately is radically different than one to terminate such protection [twenty] years or more in the future (the expected implementation time frame for the LTCP)." *Id.* at 6. FOE/SC assert that had they known the Region was considering such a change, they would have objected to it, but, because the Region neither issued a new draft permit nor reopened the comment period, they and the rest of the public were deprived of such an opportunity. FOE/SC Petition at 9-10. FOE/SC characterize the modification to the permit term as an unlawful "surprise switcheroo" that FOE/SC could not have reasonably anticipated. FOE/SC Reply Brief at 2, 6-7.

The Region and WASA disagree with this characterization of events. They respond that FOE/SC did, in fact, have ample opportunity to comment on the Final Permit provision and assert that because this provision has been "on the table" throughout rounds of comment periods, FOE/SC have been able to make their views heard throughout this process. *See* Reg. 07 Response at 41; WASA's 07 Response at 13. According to both the Region and WASA, the new language was foreseeable. *See* Reg. 07 Response at 40; WASA's 07 Response at 12-13. According to the Region, FOE/SC have "advanced the same basic objections to all the other proposed language: (1) that the language violates antibacksliding; and (2) that it will not be known whether the LTCP controls will ensure [water quality standards] compliance until after post-construction monitoring." Reg. 07 Response at 41; *see also* WASA Response at 13-14. Accordingly, they argue FOE/SC had ample opportunity to comment. Reg. 07 Response at 41; WASA Response at 13.

b. *Discussion*

Under the Administrative Procedure Act, EPA must provide the public with notice and opportunity to comment before it issues NPDES permits. 5 U.S.C. § 553(b)-(c); *see* 40 C.F.R.§§ 124.6(d), .10(a)(1)(ii); *see also NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) (applying the notice and comment requirement to NPDES permitting procedures); *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (same). A final permit need not be identical to the corresponding draft per-

mit and, indeed "[t]hat would be antithetical to the whole concept of notice and comment." *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). It is, in fact, "'the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.'" *Id.* (quoting *Trans-Pac. Freight Conference v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980)); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 145 (EAB 2006); *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993); *In re Chem-Sec. Sys., Inc.*, 2 E.A.D. 804, 807 n.11 (Adm'r 1989). Thus, the "'law does not require that every alteration in a proposed rule be reissued for notice and comment.'" *NRDC*, 279 F.3d at 1186 (quoting *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000)).

However, a final permit that differs from a proposed permit and is not subject to public notice and comment must be a "logical outgrowth" of the proposed permit. *See NRDC*, 279 F.3d at 1186; *see also In re Old Dominion Elec. Corp.*, 3 E.A.D., 779, 797 (Adm'r 1992) ("[t]he revised permit by all accounts is a logical outgrowth of the notice and comment process"). To determine whether a final permit is a "logical outgrowth" of a draft permit:

> The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft permit. In determining this, one of the most salient questions is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.

NRDC, 279 F.3d at 1186 (internal quotation marks and citations omitted).

EPA rules and previous Board decisions reflect this standard. The regulations advise that when comments submitted during the comment period raise "substantial new questions" about a permit, it may be appropriate for the permit issuer to reopen the comment period. *See* 40 C.F.R. § 124.14(b).[68] Although the reopening of the comment period is discretionary, and the Board often defers to

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[68] Specifically, 40 C.F.R. § 124.14(b) states:

> If any data[,] information[,] or arguments submitted during the public comment period * * * appear to raise substantial new questions concerning a permit, the Regional Administrator may take one or more of the following actions:
>
> (1)Prepare a new draft permit, appropriately modified * * * ;
>
> (2)Prepare a revised statement of basis * * * , a fact sheet or revised fact sheet * * * and reopen the comment period * * * ; or

Continued

the permit issuer's discretion in deciding not to reopen a comment period, we nonetheless consider changes to draft permits on a case-by-case basis and, depending on the significance of the change, may determine that reopening the comment period is warranted. *See, e.g.*, *Indeck*, 13 E.A.D. at 145-47 (remanding when the permit issuer did not provide an opportunity for public comment on a significant addition to the permit); *In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993) (remanding permit and directing Region to reopen public comment period when Region failed to provide public with opportunity to prepare an adequately informed challenge to a permit change); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 467 (EAB 1992) (remanding and directing Region to reopen public comment period when public was not given opportunity to comment on significant permit changes); see also *Old Dominion*, 3 E.A.D. at 797 (explaining that despite the discretionary wording of the regulations, "there may be times when a revised permit differs so greatly from the draft version that additional public comment is required").

To determine whether the changes that appear in the Final Permit raise "substantial new questions" or fail to meet the "logical outgrowth" standard, which are fact-based inquiries, we must consider the evolution of the permit condition at issue, and the Region's corresponding explanatory statements. As explained previously, the 1997 Permit, which was drafted before the development of WASA's LTCP, set forth a general prohibition requiring CSO discharges to meet the District's water quality standards. 1997 Permit pt. III.2(c)(2). By the time the August 2006 Draft Permit was published for comment, the Region had been through a number of rounds of notice and comment, particularly with respect to the provision at issue. Throughout that time period, the Region consistently held the position that, under the CWA, the permit must ensure compliance with water quality standards at all times. After the LTCP was approved, the Region determined that the CSO controls set forth in the LTCP would be adequate to ensure attainment of the District's water quality standards. *See* Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet), at 3; Reg. 07 Response at 37-38. Accordingly, the August 2006 Draft Permit stated that the LTCP performance standards would become the water quality-based effluent limits for CSO charges after full LTCP implementation and certification that it is consistent with CWA § 301(b)(1)(C). The Region also recognized that the CSO controls set forth in the LTCP would not be operational immediately and therefore included a general prohibition against discharging in excess of limitations necessary to meet the District's water quality standards until

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(continued)

> (3)Reopen or extend the comment period * * * to give interested persons an opportunity to comment on the information or arguments submitted.

the requisite CSO controls were operational.[69] *See* Reg. 07 Ex. 9 (Aug. 2006 Draft Permit) at 49; Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet).

In drafting the water quality-based requirements provision in this manner, the Region appeared to hold the view that, because of the length of time required to implement the LTCP, the permit would need to cover two time periods: (1) the time period leading up to full implementation of the LTCP (the so-called "interim period"), during which the general prohibition would apply;[70] and (2) the time period after full LTCP implementation. By including the general prohibition for the interim period, the Region explained that it was intending to ensure that the Blue Plains Permit contained requirements necessary to achieve water quality standards both before and after implementation of the LTCP, in compliance with CWA § 301(b)(1)(C). Reg. 07 Ex. 10 (Aug. 18, 2006 Draft Fact Sheet), at 3. This explanation is consistent with the Region's previous statements that "the permit must contain requirements necessary to achieve [water quality standards]," Reg. 05 Ex. 5 (Dec. 16, 2004 Response to Comments), at 8, and "at the time of permit issuance [prior to full implementation of the LTCP], the CSO discharges are likely to cause, have the reasonable potential to cause, or contribute to non-attainment of * * * narrative [water quality standards]," *id.* at 20. It also is consistent with the Region's prior statement, in its Response to Comments, that including a general provision relating to the interim period conforms to the CSO Policy and to 40 C.F.R. § 122.44(d)(1), which requires permits to contain effluent limitations to achieve water quality standards.[71] *See id.*

In removing the general prohibition that applied during the interim period, the Region appears to have changed significantly its underlying interpretation of the CWA and CSO Policy. As explained above, the Region previously appeared to hold the position that both CWA § 301(b)(1)(C) and the CSO Policy compelled the inclusion of a general provision requiring compliance with water quality standards during the interim period. But in the fact sheet for the Final Permit, the Region stated that "[u]pon review of the comments as well as applicable law and policy," it had determined that the LTCP performance standards in the permit[72] were sufficient to serve as the only water quality-based effluent limits in the per-

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[69] This general prohibition was worded similarly to the prohibition set forth in the pre-LTCP 1997 Permit.

[70] As explained in Part II.A above, this "interim period" could last up to twenty years, the amount of time that the Consent Decree allows for full implementation of the LTCP.

[71] The CSO Policy refers to 40 C.F.R. § 122.44(d)(1). *See* 59 Fed. Reg. at 18,696 ("[t]he Phase II permit should contain * * * water quality-based effluent limits under 40 C.F.R. § 122.44(d)(1)").

[72] These LTCP performance standards are located at Final Permit Part III.C.2.A.3-.9.

mit.[73] Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 4. The Region asserted that making such a change to the Blue Plains Permit is appropriate because it is consistent with the CSO Policy, and that the previous language covering the interim period was "unnecessary, redundant, and would not clearly specify the permittee's obligations."[74] *Id.*

We find that, based on the Region's previous statements interpreting the CWA, the CSO Policy, and the District's water quality standards, FOE/SC could not have reasonably anticipated that the Region would delete from the Final Permit the general prohibition covering the interim period. We hold that the new language in the Final Permit was not a logical outgrowth of the language in the previous draft and, accordingly, FOE/SC were denied the opportunity to provide meaningful comments on the issue. The Region's previous statements indicated it believed that the LTCP, when fully implemented, would be adequate to achieve water quality standards,[75] but those statements never indicated a belief that the LTCP would ensure such achievement during the interim period. In fact, in response to WASA's comments that the CSO Policy did not call for any water quality standards provision besides the LTCP, the Region explained that both the CWA and the CSO Policy required such a provision. In removing the general provision covering the interim period and calling it "redundant" and "duplicative," the Region appears to have done a complete about-face with respect to its interpretation of the requirements of the CWA and the CSO Policy.[76] Such an about-face is not a logical outgrowth of the original proposal. *Cf. Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (explaining that federal courts "have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities").

The Region and WASA argue that the omission of the language covering the interim period in the Final Permit was foreseeable by FOE/SC, and, even

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[73] In eliminating the provision requiring compliance with water quality standards during the interim period, however, the Region continues to recognize that WASA will not achieve water quality standards until the LTCP is complete, based on the twenty-year schedule provided in the Consent Decree. Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 4.

[74] WASA, for its part, notes that it does not believe the language is duplicative. It believes including the general prohibition covering the interim period would be fundamentally inconsistent with the CSO Policy. *See* Tr. at 124-25.

[75] FOE/SC historically have disputed the Region's position that the LTCP, even when fully implemented, would ensure compliance with water quality standards, but nonetheless appeared satisfied with the general provision covering the interim period. *See* Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments), at 10. At this time we need not determine whether the LTCP is adequate to ensure achievement with water quality standards.

[76] We note that we are not deciding, at this time, which of the Region's interpretations is correct under the CWA.

given the opportunity to comment, they would have advanced the same objections that they had advanced with respect to the other proposed language, namely that the language constitutes backsliding and that the LTCP does not properly ensure compliance with the District's water quality control standards. Reg. 07 Response at 41; WASA Response at 13-14. The Region and WASA fail to acknowledge, however, that FOE/SC's previous comments in that regard applied only to the post-LTCP period, not to the interim period. FOE/SC have not had the opportunity to comment on the effect that removing the general prohibition would have on water quality standards compliance during the interim period. It is true that the Region's revision to the permit provision is consistent with past public comments that WASA had made, yet it is the history of the Region's thinking, not WASA's, that is important here. It is well settled that "EPA 'cannot bootstrap notice from a comment,'" *Envtl. Integrity Project*, 425 F.3d at 996 (quoting *Int'l Union v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005)), and FOE/SC should not be expected to "divine [the agency's] unspoken thoughts." *Id.*

At oral argument the Board asked the parties several questions about the effect of this provision – specifically, what, if any, ramifications the deletion of the general prohibition during the interim period would have. *See, e.g.*, Tr. at 33, 42, 69, 131, 133. None of the parties agreed on the effect that removal of the provision might or might not have, and the Region was unable to point us to any written analysis in the record that examined the effect of deleting this provision. Tr. at 131-32. It strikes us as odd that something so fundamental as the effect of removing the general provision during the interim period was subject to such confusion at the time of oral argument. We thus find ourselves agreeing with FOE/SC's comment that "all of these questions about the water quality standards provision [raised during oral argument], most of which EPA did not address below, shows [*sic*] very graphically why we need notice and comment on this issue." Tr. at 141.

WASA additionally argues that, to prevail on its notice-and-comment argument, FOE/SC would have to show prejudice from the claimed procedural violation, and they have not done so.[77] *See* WASA's 07 Petition at 13-14. In support of this position, WASA cites *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). This case, however, specifically states that "where the agency has entirely failed to comply with notice-and-comment requirements, and the agency has offered no persuasive evidence that possible objections to its final rules have been given sufficient consideration," a petitioner need *not* show prejudice to prevail. *Shell Oil*, 950 F.2d at 752. Moreover, courts have found that when an agency fails to comply with notice-and-comment procedures, it is inappropriate to place the burden of demonstrating prejudice on the challenger (here, the petitioner). *See, e.g., McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323-24 (D.C. Cir. 1988);

[77] The Region has not advanced this argument.

see also U.S. Steel Corp v. EPA, 595 F.2d 207, 214 (5th Cir. 1979) (holding that when an agency fails to comply with notice-and-comment rules, courts cannot apply the harmless error doctrine unless absence of prejudice is clear). Because we find that the Region failed to provide adequate public notice and opportunity to comment on the proposed permit terms, we will not place the burden on FOE/SC to demonstrate prejudice in this case. Further, we do not find that the Region's failure to comply with notice-and-comment requirements was harmless error that would render FOE/SC's procedural argument moot.

In sum, we find that the Region's legal rationale for excluding the general prohibition from the Final Permit differs greatly from its stated rationale for including such a provision in previous drafts of the Blue Plains Permit. Accordingly, we hold that it was clear error for the Region to have made the modification to the water quality standards provision without reopening the comment period. On this basis, we remand the Final Permit on this issue. The Region must either include the general provision covering the interim period in the Final Permit[78] or reopen the comment period and provide the public the opportunity to comment on this issue and then provide a response to any such comments received.[79]

3. *Antibacksliding and Compliance with Water Quality Standards*

Despite our remand of the Final Permit on procedural grounds, we offer, in an effort to assist the parties in moving this long-overdue permit to resolution, the following observations on the two substantive water quality standards issues we have not reached. FOE/SC's two substantive arguments, which pertain to an-

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[78] If the general prohibition covering the interim period is merely "redundant," as the Region asserts, there appears to be no legal reason why it could not continue to be included in the Final Permit. At oral argument, the only rationale that the Region could provide for not including a provision it deems redundant was that "it could create confusion about what the permittee's obligations exactly are." Tr. at 114. We are unpersuaded that this rationale warrants our taking a different approach here.

[79] If, following appropriate notice and comment, the Region decides to retain the deletion of the general prohibition during the interim period, it must provide, in its response to comments, an adequate rationale for the deletion that comports with the CWA, particularly § 301(b)(1)(C), § 402(o), and EPA rules. As we explained in *Amoco Oil Company*, "[b]y so doing, the Region ensures that interested parties have an opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review on the merits under 40 C.F.R. § 124.19." *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993). The Board has, in the past, remanded permits because they have not provided such an adequate rationale. *See, e.g.*, *In re City of Marlborough*, 12 E.A.D. 235, 245 (EAB 2005); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *Amoco Oil*, 4 E.A.D. at 980. While, as previously explained, we need not at this time decide FOE/SC's substantive claims that the Final Permit violates the CWA's antibacksliding provision under § 402(o), and does not properly ensure achievement of the District's water quality standards under CWA § 301(b)(1)(C) and 40 C.F.R. § 122.4(d), we note that we have questions, based upon the parties' briefs and presentations at oral argument, as to whether the record currently provides an adequate explanation of the Final Permit's compliance with these provisions.

tibacksliding and failure to "ensure" compliance with water quality standards, are related. The 1997 Permit contained a prohibition against discharging in violation of the District's water quality standards, but the Final Permit contains only a requirement to implement and comply with the controls specified in the LTCP. Because FOE/SC do not believe that the LTCP ensures achievement of water quality standards, they believe that the Final Permit violates both CWA § 301(b)(1)(C), which requires permits to ensure compliance with water quality standards, and CWA § 402(o), which prohibits permits from containing effluent limits that are less stringent than those contained in a source's previous permit.

The Region's arguments in response to FOE/SC's concerns seem to rely heavily on its current interpretation of the CSO Policy, which it asserts does, in fact, allow for the replacement of a general narrative prohibition against discharges in violation of water quality standards with a requirement to implement an LTCP. *See* Reg. 07 Response at 45-46; Tr. at 122-24. WASA takes this counterargument one step further and asserts that "[w]e don't believe that you can persuasively argue that the deletion [of the general prohibition] * * * is consistent with section 402(q) of the Clean Water Act, while at the same time asserting that it violates the antibacksliding provisions of section 402(o)." Tr. at 40. Neither the Region nor WASA, however, have adequately explained how this interpretation of the CSO Policy squares with the antibacksliding provisions in § 401(o).

In addition, one long-standing principle is that permits must "ensure" compliance with water quality requirements. *See* 40 C.F.R. § 122.4(d); *In re City of Marlborough*, 12 E.A.D. 235, 250 (EAB 2005) (finding that "possible" compliance is not the same as "ensuring" compliance); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002) (finding that "reasonably capable" does not comport with the "ensure" standard). This principle would control our approach to FOE/SC's two substantive issues, and it should direct the Region on remand.

The fact sheet accompanying the Final Permit states merely that "[i]mplementation of the LTCP is *anticipated to result in* compliance with water quality standards." Reg. 07 Ex. 3 (Apr. 5, 2007 Fact Sheet), at 4 (emphasis added). The Region has identified documents drafted by it and the District that, in its view, reach the conclusion that the LTCP will, in fact, ensure compliance. *See* Reg. 07 Petition at 46; Tr. at 132; Reg. 07 Exs. 6-8, 17. However, Exhibit 17, a letter from the District to the Region, dates back to 2003, and focuses, at least in part, on TMDLs that were remanded by the United States Court of Appeals for the District of Columbia Circuit in 2004. Exhibit 8 is a November 29, 2004 memorandum to file by an unidentified individual, written long before the modifications in question were made, which also relies at least in part on the now-remanded TMDLs. That memorandum further states, in part, that "EPA has * * * concluded that implementation of the LTCP is *likely to protect* [water quality standards] based on current available information," Reg. 07 Ex. 8, at 2 (empha-

sis added), and that "EPA concludes that for Rock Creek and the Potomac River, the studies and modeling in the LTCP demonstrate that the remaining [CSOs] after implementation of the LTCP will not preclude attainment of the District's water quality standards in accordance with the CSO Policy," *id*. at 5 (emphasis added), thus calling into question other parts of the memorandum that seem to suggest unequivocally that LTCP implementation will meet water quality standards. *See id*. at 4 ("The above analysis, combined with EPA's review of the studies and modeling in the LTCP and TMDLs demonstrate that for the CSO load portion to the receiving waters, the overflows remaining after implementation of the LTCP will meet the DC [water quality standards].") In any event, we have not located any record evidence that the Region adopted this document as part of its decisionmaking rationale or explained how this analysis is valid despite the remand of the TMDLs. We need not, at this time, determine whether these documents provide sufficient evidence that the LTCP, once fully implemented, will ensure compliance with water quality standards. We do note, however, that, at a minimum, these documents do not explain how the Final Permit will ensure compliance during the interim period, and the Region must explain, on the record, how the Blue Plains Permit will comply with CWA § 301(b)(1)(C) and EPA rules.

IV. *CONCLUSION*

For the foregoing reasons, we remand the Final Permit in part and deny review of the Final Permit in part. On remand, the Region must modify the Final Permit so that it provides compliance schedules, consistent with DCMR § 1105.9, for implementation of the selected controls in WASA's LTCP[80] and achievement of the total nitrogen effluent limit. The Region also must modify the Final Permit to include a general provision ensuring compliance with District water quality standards during the interim period or reopen the comment period and provide opportunity for public comment on this issue and then provide an adequate response to any such comments received.[81] WASA's petition for review in App. 07-11 is denied in all respects not related to the establishment of a compliance

[80] As explained in note 43 above, remand in this respect is limited to LTCP requirements related to water quality standards promulgated after July 1, 1977.

[81] An administrative appeal of the Region's determination on remand is required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1). Any such appeal shall be limited to the issues considered on remand and any modifications made to the Blue Plains Permit as a result of the remand. With respect to the two substantive arguments raised by FOE/SC at pages 11-15 of their Petition for Review, of which we did not reach the merits here, we specifically preserve FOE/SC's right to raise these arguments again in an appeal of the determination on remand.

schedule for achieving the nitrogen limit.[82]

So ordered.

[82] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues. *See, e.g.*, *In re Amerada Hess*, 12 E.A.D. 1, 21 n.39 (EAB 2005).