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May 7, 2007

VIA HAND DELIVERY

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

RE: *District of Columbia Water and Sewer Authority Permit No. DC0021199*

Dear Sir or Madame:

Pursuant to the procedure set forth in the EPA's Environmental Appeals Board Practice Manual, enclosed for filing are an original and five copies of a petition for review of the issuance of the above referenced permit.

Please contact me with any questions or concerns at (443) 482-2153.

Sincerely,

Amy McDonnell
Litigation Counsel

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

MAY -7 PM 3:34
ENVIR. APPEALS BOARD

In re:

**District of Columbia Water and Sewer Authority
Permit No. DC0021199**

PETITION FOR REVIEW

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), The Chesapeake Bay Foundation (“Petitioner” or “CBF”) petitions for review of the provisions of National Pollutant Discharge Elimination System (“NPDES”) Permit No. DC0021199, which was issued to the District of Columbia Water and Sewer Authority (“Permittee” or “WASA”) on April 5, 2007, by the United States Environmental Protection Agency (“EPA”) Region III. The permit at issue authorizes WASA to operate its Blue Plains Wastewater Treatment Plant and sets an annual total mass load of 4.689 million pounds per year for total nitrogen from Outfall 002 as a new permit limit. EPA admits that the Blue Plains facility cannot meet this standard as it is currently designed but does not include a compliance schedule in the permit. CBF contends that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically, CBF challenges the following permit condition:

- (1) EPA’s failure to include a compliance schedule within the permit to achieve the new total nitrogen permit limit for Outfall 002.

FACTUAL AND STATUTORY BACKGROUND

The Blue Plains Wastewater Treatment Plant is the largest advanced wastewater treatment plant in the world. It covers 150 acres, has a design capacity of 370 million gallons per day, and a peak capacity of 1.076 billion gallons per day. It includes 1,800 miles of sanitary and combined sewers, 22 flow-metering stations, nine off-site wastewater pumping stations and 16 storm water pumping stations within the District of Columbia. The permittee, WASA, also operates a Combined Sewer Overflow system ("CSO") with a total of 62 outfalls. The Blue Plains facility serves the District of Columbia as well as parts of Maryland and Virginia. Outfall 002, the primary discharge point for the treatment plant, discharges into the Potomac River, just south of the confluence with the Anacostia River.

The Chesapeake Bay is the largest estuary in the United States and the watershed is 64,000 square miles including all of the District of Columbia, and parts of Maryland, Virginia, Delaware, Pennsylvania, New York and West Virginia. Because of water quality impairments within the Chesapeake Bay, EPA, Pennsylvania, Maryland, Virginia and the District of Columbia signed the *Chesapeake Bay Agreement* ("Agreement") to coordinate efforts to improve the Bay. The initial *Chesapeake Bay Agreement* was signed in 1983 and the Chesapeake Bay Program was formed. The Agreement was revised in 1987, 1992 and most recently in 2000. In 2003, the EPA Chesapeake Bay Program Office published Ambient Water Quality Criteria for the Chesapeake Bay and its tidal tributaries that described water quality conditions of dissolved oxygen, water clarity and chlorophyll that would be protective of the aquatic resources of the Bay. The signatory states, including the District, revised their respective water quality standards to include these criteria and the associated designated uses. In addition, EPA and the signatory states, including the District, determined the nitrogen, phosphorus and sediment pollution cap

load reductions that were necessary to achieve these water quality criteria. Each Chesapeake Bay watershed jurisdiction then established tributary strategies to achieve the necessary pollution reductions. Because the Blue Plains facility receives flow from both Virginia and Maryland, in addition to flow from the District, EPA calculated a total nitrogen load for the Blue Plains facility based on the combined load allocations for each of the three contributors.

The NPDES program in the District of Columbia is administered by the EPA, Region III, because the District of Columbia is not an authorized jurisdiction. Therefore, permits are issued by EPA. The permit at issue is a NPDES permit issued to WASA for the operation of the Blue Plains Wastewater Treatment Plant in the District of Columbia. The permit regulates the discharge of treated municipal wastewater from the Blue Plains facility as well as treated and untreated storm water through the District's combined sewer system. The initial NPDES permit, issued on January 24, 2003, had an effective date of February 25, 2003, and was modified on December 16, 2004. This permit did not have a nitrogen limit. Based on EPA's review of the permit conditions and issues raised by Friends of the Earth and Sierra Club in their petitions filed with this Environmental Appeals Board requesting review, a permit modification was proposed.

On August 18, 2006, the EPA, Region III offered for public comment a modification of the NPDES permit for the Blue Plains Wastewater Treatment Plant in the District of Columbia. This proposed modification included an interim effluent limit for total nitrogen of 8.6 million pounds per year for Outfall 002, an interim total nitrogen goal of 5.8 million pounds per year, and a schedule for submitting a plan to reduce nitrogen to achieve the final Chesapeake Bay Program goal for the Blue Plains facility of 4.689 million pounds per year. It also included replacing the existing water quality-based requirement for CSOs with a provision indicating that the performance standards for the Long Term Control Plan ("LTCP") would be the water

quality-based effluent limits for CSO discharges and removing the water quality-based numeric effluent limits derived from specific District of Columbia total maximum daily loads (“TMDLs”) for total suspended solids and biochemical oxygen demand. This LTCP was the result of a consent decree in a consolidated case – one brought by the EPA against WASA and one brought by environmental groups against WASA - for violations by WASA of its CSO policy.¹ There was a 30 day public comment period which was extended by 15 days at the request of WASA. EPA, after considering the comments from the public, issued a revised proposed permit modification for review and comment on December 14, 2006.

The proposed modification in the December 14, 2006, draft was to replace the nitrogen discharge goal with a final nitrogen limit of 4.689 million pounds per year for Outfall 002, effective upon permit issuance, rather than an interim limit and modified goal, reflecting the Ambient Water Quality Criteria for the Chesapeake Bay and its Tidal Tributaries, which have been incorporated into the District of Columbia, Maryland, and Virginia Water Quality Standards.

During the public comment periods for both proposed permit modifications, several groups commented to the EPA, including CBF. The CBF submitted comments during the first comment period regarding the August 18, 2006, draft permit. *See* Exhibit A. The CBF commented, *inter alia*, that the permit limit for total nitrogen was contrary to existing commitments to restore the Chesapeake Bay, as well as statutory and regulatory requirements of the Clean Water Act, that the permit did not contain a schedule to submit plans and conduct preliminary tests to evaluate different nitrogen removal technologies and that the permit needed to contain daily limits for ammonia that are protective of aquatic life. *Id.* The CBF also

¹ *See Anacostia Watershed Society, et al. v. District of Columbia Water and Sewer Authority*, 1:00cv00183 (Dist. Ct. D.C.) and *United States v. District of Columbia Water and Sewer Authority and The District of Columbia*, 1:02cv 02511(Dist. Ct. D.C.).

submitted comments regarding the December 14, 2006, draft permit. *See* Exhibit B. In those comments, CBF noted that while it was pleased that EPA had modified the permit to include the effluent limit of 4.689 million pounds of total nitrogen annually for Outfall 002 to be consistent with the goals of the *Chesapeake 2000 Agreement*, and the loads necessary to achieve water quality criteria, the failure of the EPA to include a compliance schedule with the new limit completely negated this improvement and failed to provide sufficient public notice and comment. *Id.*

On April 5, 2007, EPA, Region III issued NPDES Permit No. DC0021199 to WASA for the Blue Plains facility, effective June 4, 2007, and expiring February 28, 2008. This permit does not include a compliance schedule for WASA to comply with the annual total nitrogen limits at Outfall 002. *See* Exhibit C.

The CBF is a nonstock Maryland corporation with offices in Richmond and Norfolk, Virginia, Annapolis, Maryland, and Harrisburg, Pennsylvania. The CBF is the largest conservation organization dedicated to protecting the Chesapeake Bay watershed and its tributaries, including the Potomac and Anacostia Rivers. The CBF is comprised of approximately 177,000 total members. The CBF operates fifteen (15) educational programs, which include projects in and around the Potomac and Anacostia Rivers impacted by the nutrient discharge authorized by the challenged Permit. The CBF has and continues to fund and operate environmental programs specifically designed to improve the water quality of the Bay and its tributaries in and downstream from the point source authorized by the Permit discharging pollutants into the water quality impaired Potomac and Anacostia Rivers.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner, CBF, satisfies the threshold requirements for filing a petition for review under 40 C.F.R. § 124.19, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment periods on the permit, pursuant to 40 C.F.R. § 124.19(a). *See* Exhibits A and B.

2. The issues raised by Petitioner in this petition for review were raised during the public comment period and therefore were preserved for review. *See* Exhibits A and B.

ARGUMENT

The NPDES permit at issue for the Blue Plains facility does not contain a compliance schedule for meeting the new total nitrogen annual limit of 4.689 million pounds. The failure to include such a schedule in the permit is contrary to the District's water quality standards. The final permit includes a total nitrogen annual limit of 4.689 million pounds. This limit is consistent with the load allocation necessary to achieve the water quality goals of the *Chesapeake 2000 Agreement* and ambient water quality criteria in the Chesapeake Bay and tidal tributaries.² The permit states that the total nitrogen limit shall be "effective upon permit issuance." However, the accompanying fact sheet notes that the facility cannot achieve this limit absent installation of new treatment technologies. *See* Exhibit D. The permit fails to include a construction or implementation schedule that would bring the Blue Plains facility into compliance with this new limit. The fact sheet states that the EPA intends to establish a compliance schedule "in a separate enforceable document that will be issued simultaneously with the final permit." *Id.* EPA's fact sheet also states that "one means of achieving this is through a

² *Chesapeake 2000 Agreement* most recently viewed at:
http://www.epa.gov/region3/federal_facilities/documents/CB_Watershed_Focused_EMS-August2006.pdf

modification to the Consent Decree between EPA and the permittee in *U.S. v District of Columbia Water and Sewer Authority, et al.*, 1:02cv02511, which would incorporate a schedule and criteria for compliance with the nitrogen limit.” *Id.* at p. 6.

By failing to include the compliance schedule in the final permit, the public has no opportunity to comment on the schedule and no ability to ensure that it is enforced. A vague reference to the possibility that a compliance schedule could be incorporated in a modification to an existing consent decree does not ensure that a schedule, much less an appropriate schedule, is established. Further, such a process provides the public with an extremely limited ability to comment on the schedule and no means to administratively or judicially challenge the schedule or enforce its terms. While EPA has stated that it will set up a stakeholder process to allow the public to review and comment on the compliance plan in the consent decree, this does not give the public the right to seek review of the schedule if it is not adequate or the right to enforce the terms of the compliance schedule as the CWA allows. This is in clear violation of the Clean Water Act and the District of Columbia’s water quality standards.

A. Not Including a Compliance Schedule Violates D.C. Law and the Clean Water Act.

The NPDES permit program, authorized by the Federal Water Pollution Control Act (Clean Water Act) in 1972, controls water pollution by regulating point sources that discharge pollutants into waters of the United States. Most NPDES permit programs are administered by authorized states. However, the District of Columbia is not an authorized jurisdiction so the program is administered by the EPA, Region III. The Clean Water Act states that the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, upon condition that the permit meets all applicable conditions of the Clean Water Act. 33 U.S.C. § 1342(a)(1). It further states that the

Administrator shall prescribe conditions for permits to assure compliance with the requirements of the Act. 33 U.S.C. § 1342(a)(1)(B). The implementing regulations state that “the Director, shall establish conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of CWA and regulations.” 40 C.F.R. § 122.43(a). These shall include conditions under section 122.47(a) (schedules of compliance). *Id.* Section 122.47(a) states that the permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.

Although the EPA administers the NPDES permit program within the District, the District has authority to set its own water quality standards and implementation strategy. *See* 33 U.S.C. § 1313. These regulations were amended in October 2005 to incorporate the new standards set out in the *Chesapeake 2000 Agreement*. *See* 52 DCR 9621. The District’s implementation regulations state that,

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

21 DCMR § 1105.9 (emphasis added). While EPA issues NPDES permits within the District, EPA must obtain certification from the District that all aspects of a NPDES permit are in compliance with effluent limits, the District’s water quality standards, and any other appropriate requirement of District law under section 401(a) of the CWA. *See* 33 U.S.C. § 1341(a) and 40 C.F.R. §§ 124.53 and 122.44(d). The Blue Plains permit fails to comply with these laws and regulations.

B. The Environmental Appeals Board has Previously Resolved this Issue.

This Board had held that the EPA “does not have the authority to establish schedules of compliance in NPDES permits that will postpone compliance with state water quality standards beyond the July 1, 1977 statutory deadline, unless the schedule is added pursuant to authorization contained in the state water quality standards or the State’s regulations implementing the standards.” *In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (EAB 1990) and *In the Matter of Star-Kist Caribe, Inc.*, 4 E.A.D. 33 (EAB 1992). Here, the District of Columbia water quality standards and the implementing regulations require that a compliance schedule be included in the permit when the Director requires a new water quality standard-based effluent limitation in a discharge permit. The new water quality standard-based effluent limitation for total nitrogen is required in order to help achieve water quality standards for dissolved oxygen that are currently not attained in the Potomac River and the main stem of the Chesapeake Bay (U.S. EPA 2003).³ In particular, the tidal Potomac, middle and lower Chesapeake Bay segments are listed on Maryland’s section 303(d) list as being impaired by nutrients (MDE 2006)⁴ and the Chesapeake Bay is impaired for dissolved oxygen on Virginia’s section 303(d) list (VA DEQ)⁵. EPA determined that in order for water quality standards to be achieved in these waters, loads from point sources and nonpoint sources in the watershed had to be reduced. The allocation given to Blue Plains, reflecting contributions for Virginia, Maryland and the District of Columbia was 4.689 million pounds of total nitrogen annually. Thus, the new standard is required in the

³ *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*, EPA 903-R-03-007. Chesapeake Bay Program Office, Annapolis, Maryland. December 2003.

⁴ 2006 List of Impaired Surface Waters [303(d)] List] and Integrated Assessment of Water Quality in Maryland. Maryland Department of the Environment, September 2006. http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/Maryland%20303%20dlist/2006_303d_list_final.asp

⁵ Final 2006 305(b)/303(d) Water Quality Assessment Integrated Report. Virginia Department of Environmental Quality. October 2006. <http://www.deq.state.va.us/wqa/ir2006.html>

District. Because the total nitrogen limit is a new standard, EPA has no choice but to include a compliance schedule within the new permit for the Blue Plains facility. Moreover, EPA may not permit a compliance schedule that exceeds the life of the permit. *See* 40 C.F.R. § 122.46 (NPDES permit shall be effective for no more than 5 years) and 40 C.F.R. § 122.47 (compliance schedules shall be achieved as soon as possible but not later than the applicable statutory deadline.)

In its response to comments on the December 14, 2006, permit modification, EPA responded to a comment by WASA stating that EPA believed that in light of the *Star-Kist* opinion by this Board, EPA has discretion in determining whether the inclusion of a compliance schedule in a permit is appropriate. *See* EPA's Response to Comments (Exhibit E), pg. 23. EPA has misinterpreted this case. Because of the decision in *Star-Kist* and the requirements of state certification in section 401(a) of the Clean Water Act, EPA is obligated to include a compliance schedule within the permit due to the District's water quality standards. 21 DCMR § 1105.9. EPA does not have discretion to ignore or overrule a State's or the District's water quality standards. *See* 33 U.S.C. § 1341(a) and 40 C.F.R. § 124.53.

C. EPA Attempts to Sidestep D.C. Law and the CWA's Citizen Suit Provision.

In EPA's responses to CBF's comments on the earlier permit modifications, EPA brushes aside concerns of the lack of the compliance schedule in the Blue Plains permit. In response to CBF's comments to the August 18, 2006, permit modification EPA simply says that the compliance schedule has been removed from the permit and will be placed in a separate compliance agreement. *Id.* at 9. In response to CBF's comments to the December 14, 2006, permit modification, EPA stated that there would be "meaningful opportunity for public

comment on the proposed compliance schedule” once it is part of the consent decree. *Id.* at 25.

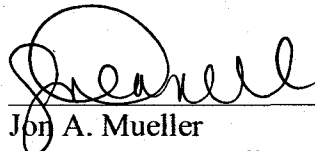
EPA completely misses the point.

Not including a compliance schedule within the permit ignores the obligation to provide public notice and a comment period for a permit – including a proposed compliance schedule. EPA also ignores the public’s right to bring a citizen suit against the permittee for any compliance schedule violations should EPA choose not to act. By failing to include a compliance schedule in the permit, EPA has also contradicted their own statements regarding the regulation of nutrient discharges from point sources in the Chesapeake Bay Watershed. In December 2004, the EPA issued *NPDES Permitting Approach for Discharges of Nutrients in the Chesapeake Bay Watershed*. See Exhibit F. This guidance document stated that EPA’s goal was to issue NPDES permits for significant point source discharges of nutrients to the Chesapeake Bay watershed that would both meet the requirements of the CWA and the goals of the *Chesapeake 2000 Agreement*. This guidance document highlights the process by which appropriate nutrient limits would be established and that NPDES permits would be consistent with applicable state tributary strategies. *Id.* The guidance document states that EPA and state NPDES permitting authorities agree to “incorporate compliance schedules, as needed and appropriate, into permits or other enforceable mechanisms, consistent with the state tributary strategies, where the state WQS and CWA NPDES requirements allow for such schedules.” *Id.* It further states that “when issuing permits with nutrient – based requirements, EPA and the state NPDES permitting authorities also agree to: ... [i]ncorporate compliance schedules ... into permits....” *Id.* “Generally, these compliance schedules should require the facility to come into compliance with the nutrient-based requirements of the permit or order as soon as possible in keeping with the 2010 timeline and objective of the *Chesapeake 2000 Agreement*.” *Id.*

Here, the DC water quality standards and implementation regulations require that a compliance schedule be contained in the permit when the Director requires a new water quality-based effluent limitation in a discharge permit. 21 DCMR § 1105.9. Because EPA is obligated to seek certification from the District, and all states, before it issues a NPDES permit ensuring that all District water quality standards are met, under District law a compliance schedule is mandatory in the Blue Plains permit. By placing a compliance schedule in a consent decree instead of in the NPDES permit, EPA violates the District's water quality standards, the Clean Water Act, the *Chesapeake 2000 Agreement*, and its own guidance documents.

CONCLUSION

Because EPA has violated the Clean Water Act and the District of Columbia's water quality standards by failing to include a compliance schedule within the NPDES permit for the Blue Plains facility, the permit should be modified to include such a compliance schedule. Appellant, CBF, respectfully requests an oral argument on this petition for review.



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Date: May 7, 2007