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August 22, 2007

Via Overnight Mail and Facsimile

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

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

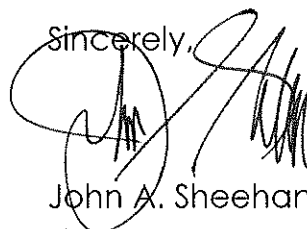
Dear Ms. Durr:

Enclosed please find the original of the Joint Non-Party Brief of the National Association of Clean Water Agencies and the Wet Weather Partnership on the Remaining Issue in Appeal No. 05-02.

Please contact me at 804-716-9021 or by e-mail at john@aqualaw.com if you have any questions about this filing.

Thank you for your assistance.

Sincerely,



John A. Sheehan

Enclosure

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

In re:

DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY

NPDES Permit No. DC0021199

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) NPDES Permit Appeal Nos. 05-02,
) 07-10, 07-11, 07-12
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**JOINT NON-PARTY BRIEF OF NACWA AND THE WET WEATHER
PARTNERSHIP ON THE REMAINING ISSUE IN APPEAL NO. 05-02**

The National Association of Clean Water Agencies (“NACWA”) and the Wet Weather Partnership (“WWP”) submit this non-party brief in Appeal No. 05-02 pursuant to the Order by Environmental Appeals Board (EAB) dated July 26, 2007.¹ The EAB Order permitted the filing of this brief on the one remaining legal issue in the 2005 appeal that was not resolved by the settlement between the parties. That issue is whether the Region correctly decided not to include a compliance schedule in the District of Columbia Water and Sewer Authority’s (DC WASA) discharge permit for the implementation of DC WASA’s Long Term Control Plan (“LTCP”) to control its combined sewer overflow discharges.

For the reasons set forth below, EPA’s decision not to include a compliance schedule in WASA’s discharge permit must be set aside. A compliance schedule was

¹ The EAB Order of July 26, 2007 granted NACWA’s motion filed on May 13, 2005 to file a non-party brief in this case. NACWA’s motion sought to file a joint non-party brief with the CSO Partnership, now the Wet Weather Partnership. The Board’s Order of August 9, 2007 permitted the filing a joint non-party brief.

required to be included in the WASA permit as a matter of law and EPA did not have the discretion, as it argues, not to include a compliance schedule in the permit.

THE INTEREST OF NACWA AND THE WET WEATHER PARTNERSHIP

NACWA represents the interests of nearly 300 of the nation's wastewater treatment agencies including DC WASA. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. Numerous NACWA members have combined sewer collection systems and are subject to the Clean Water Act's combined sewer overflow ("CSO") control requirements. 33 U.S.C. § 1342(q). NACWA members have invested hundreds of millions of dollars in the planning, design, permitting and construction of CSO LTCPs in accordance with EPA's Combined Sewer Overflow Policy issued on April 11, 1994. NACWA members hold permits for CSO discharges in each State within EPA Region III.

The Wet Weather Partnership has been dedicated to representing the interests of the communities with combined sewer systems nationwide since 1988. The Wet Weather Partnership's approximately 80 members are located on both coasts, throughout the mid-west and from Maine to Virginia, including DC WASA. The Wet Weather Partnership's members strive to protect public health and the environment in an affordable and cost-effective manner. They are regulated under federal and state laws regarding water pollution control. The Wet Weather Partnership's members have invested hundreds of millions of dollars in the planning, design, permitting and construction of CSO control facilities in accordance with their long-term CSO control programs. The funding for

these controls has come from local resources, along with federal and state grants and loans.

This case is of great importance to NACWA and WWP members because an adverse ruling could jeopardize the investments NACWA and WWP members have made toward complying with the CSO-related requirements in their NPDES permits. The incorporation of compliance schedules in permits rather than in administrative enforcement orders is of critical importance to communities. Generally, a community's LTCP specifies the performance standards that must be met in order for CSO discharges to comply with the state's water quality standards as translated into NPDES permits. A provision such as the one contained in DC WASA's permit, which requires a permittee to comply with the state's water quality standards through implementation of the LTCP controls but does not contain a compliance schedule, poses serious compliance issues for communities, and exposes communities to enforcement actions that could disrupt implementation of their approved LTCPs. Even though a community may be in full compliance with a LTCP approved by a state or EPA, a suit could be brought arguing that the entity is not in compliance with the general water quality standards compliance language in its permit. Moreover, even though CSO communities with consent decree compliance schedules may be protected against suits alleging non-compliance with their CSO-related permit conditions, consent decree schedules do not resolve their compliance status. Without compliance schedules in their permits, CSO communities remain in significant non-compliance with their permits over an extended period of time even though they have complied with the CSO Policy in every respect. For these reasons, NACWA and the WWP members have a significant interest in the outcome of this case.

ARGUMENT

I. A Compliance Schedule was Legally Required in WASA's Permit and EPA Committed Error by Failing to Include One.

A. The District's Regulations Setting Water Quality Standards Require that a Compliance Schedule be Included in the DC WASA Permit.

In the Clean Water Act, Congress established a permitting structure whereby individual states play a leading role in formulating their own water quality policies and EPA's authority is derivative of the states. See, 33. U.S.C. § 1342(a)(3). Congress gave certain permitting authority to EPA but did not want EPA to preempt the State's rights to impose and enforce water quality requirements. 33. U.S.C. § 1251. With regard to establishing timetables and schedules and, specifically, schedules of compliance, "the Act keeps them in the hands of the States, not EPA" and Congress intended the States to become the proper authorities to define appropriate deadlines for complying with their own state law requirements. In the Matter of Star-Kist Caribe, Inc., 3. E.A.D. 172 (Adm'r 1990), modification denied, 4 E.A.D. 33 (EAB 1992). Schedules of compliance are "purely matters of state law, which EPA has no authority to override." Star-Kist, 3. E.A.D. 172 (1990).

In the District of Columbia, because the District is not an authorized state, EPA administers the NPDES Program. The District, however, has the authority to set its own water quality standards and to set an implementation strategy to achieve the water quality standards. See, 33 U.S.C. § 1313. The District's water quality standards regulations contain an implementation strategy that requires a compliance schedule be included in a

permit when a new water quality standard-based effluent limitation is included in the discharge permit, as is the case here.² The District's implementing regulations state:

“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 period is warranted. A compliance schedule shall be included in the permit.”

D.C. Mun. Regs. Tit. 21 § 1105.9 (emphasis added).

Thus, because the District's water quality standards require a compliance schedule in these circumstances, EPA was required to follow the District's regulations and place such a schedule in DC WASA's Blue Plains permit.³ EPA was required to implement the state's water quality standards and had no authority or discretion to override the District's clear directive to place a compliance schedule in the permit.

B. EPA Does Not Have the Discretion to Ignore the District's Water
Quality Standards Regulations.

EPA argues in its brief that it has the discretion not to place a water compliance schedule in a permit “in consideration of the facts and circumstances of this matter” and in light of its own regulations. EPA Br. at 9, 14. This argument, however, is contrary to the Clean Water Act's federal-state permitting scheme giving states the leading role on permitting requirements, and is also contrary the leading case on compliance schedules, In the Matter of Star-Kist Caribe, Inc., 3 E.A.D. 172 (Adm's 1990). In the Star-Kist case, the question raised was whether EPA could include a compliance schedule in a federally issued permit in the Commonwealth of Puerto Rico when Puerto Rico's water quality

² Section III.E of the permit contains the new CSO water quality based effluent limitations.

³ There is no dispute that more than three years are needed to achieve compliance with the limitation. See EPA brief, p. 13 (“There is no dispute that WASA cannot immediately comply.”)

standards did not authorize schedules of compliance. EPA Region II argued that it had the authority to establish schedules of compliance when state water quality standards did not provide the authorization for them.

While the context for the issue was slightly different in Star-Kist, the decision reviewed what authority EPA has and what authority the States have in issuing permits with compliance schedules. That discussion explains the EPA's role and the State's role and provides the legal framework for the question here -- whether EPA had the discretion to decide not to include a compliance schedule in DC WASA's permit. EPA Administrator Reilly's 1990 opinion in Star-Kist reviewed the "language structure, and objectives" of the Clean Water Act as set forth in sections 101(a) and (b), 402 (a)(3) and 510, and concluded that all of these sections support an interpretation that "Congress intended the States, not EPA, to become the proper authorities to define appropriate deadlines for complying with the own state law requirements." Star-Kist Caribe, Inc., 3 E.A.D. 172 (Adm's 1990).⁴ The Administrator concluded that the decision whether or not to allow schedules for delaying compliance with state water quality standards was up to the states that established those standards and explained as follows:

Congress intended states, not EPA, to become the proper authorities to define the appropriate deadlines for complying with their own state 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 state law, which EPA has no authority to override.

Star-Kist, 3 E.A.D. 172 (emphasis added).

⁴ EPA Region II petitioned the Environmental Appeals Board to modify Administrator Reilly's April, 1990 decision. The EAB denied the petition on May 26, 1992, and upheld the decision and the analysis in the Administrator's April, 1990 decision.

Thus, because the District's water quality standards require that a compliance schedule be included in the permit when the Director of the Department of Health requires a new water quality standard, this is purely a matter of state law, and EPA was obligated to include a compliance schedule with the permit and did not have the discretion to ignore or overrule the District's water quality standards.

C. The CSO Policy Does Not Require that the Compliance Schedule Must Only be Contained in a Consent Decree.

EPA also argues that the Combined Sewer Overflow Policy (April 19, 1994, 59 Fed. Reg. 18688) supports its decision to place the compliance schedule in its consent decree with DC WASA rather than putting the compliance schedule in DC WASA's discharge permit. EPA Br. at 11 - 14. EPA argues based on the CSO Policy that it "reasonably determined that it was not appropriate to include a compliance schedule in the permit; but rather to proceed with an enforcement order containing a compliance schedule." EPA Br. at 14.

While EPA is correct that the CSO Policy supports the use of compliance schedules in consent decrees and EPA correctly included a compliance schedule in DC WASA's consent decree, the CSO Policy does not mandate that a compliance schedule be placed only in an enforceable mechanism and not in a permit. The fact that the CSO Policy finds it appropriate that, for major permittees, "the compliance schedule should be placed in a judicial order" does not prohibit the use of a compliance schedule contemporaneously in a permit, especially where one is required under the state water quality standards regulations. 59 FR 18696 col. 3. The CSO Policy's preference for placing a compliance schedule in a judicial order

does not take precedence over the state's authority to define appropriate deadlines for complying with their own state law requirements.

Finally, the argument that the CSO Policy does not override the state water quality standards and gives EPA the authority to place compliance schedules in permits is also supported by language included in EPA's FY 2005 budget clarifying the meaning of Clean Water Act Section 402(q). The budget language states that "NPDES permits should be used to impose LTCP obligations whenever possible." This Congressional language supports the position that permits should contain obligations such as compliance schedules.

II. EPA Does Have the Discretion to Determine the Appropriate Terms and Scope of the Compliance Schedules in the Permit and Consent Decree.

EPA suggests that it had a choice before it in this matter, whether to include a compliance schedule in the permit or in the consent decree, and argues that it reasonably used its discretion to choose the best option. EPA Br. at 14. However, EPA was not required to choose one approach or the other. There is no reason EPA could not place a compliance schedule in both the permit and the consent decree. In fact, because EPA was required by the District's water quality standards to include a compliance schedule in the permit and because the CSO Policy expresses a preference for including a compliance schedule in an enforcement mechanism (the consent decree), the agency's best approach is to include a compliance schedule in both documents.

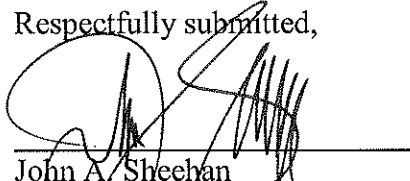
EPA does maintain some discretion, though, in the exact manner in which it establishes the compliance schedules. NACWA and the Wet Weather Partnership suggest that the best approach in the context of water quality based CSO requirements and the implementation of a LTCP is for EPA to include a compliance provision in the

permit setting forth the general schedule and the length of time within which the permittee must come into compliance. The permit provision should then reference a more detailed schedule provided in the consent decree. Because consent decrees generally provide detailed reporting and implementation schedules, it is appropriate that the full schedule and the procedures for complying with the schedule be set forth in the consent decree. This 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.

CONCLUSION

For the reasons set forth above, DC WASA's Petition for Review should be granted and EPA should be instructed to re-issue DC WASA's discharge permit with an appropriate compliance schedule contained in it.

Respectfully submitted,



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CERTIFICATE OF SERVICE

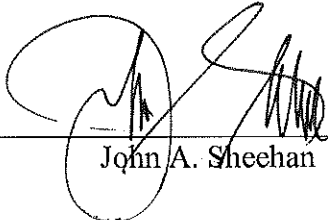
I hereby certify that a copy of the foregoing Joint Non-Party Brief of the National Association of Clean Water Agencies ("NACWA") and the Wet Weather Partnership on the Remaining Issue in Appeal No. 05-02 was filed electronically with the Environmental Appeals Board and was served by regular first class U.S. Mail, postage prepaid, this 22nd day of August, 2007, upon the following:

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