

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Water and Sewer Authority,	)	
	)	
Petitioner,	)	
v.	)	No. 08-1251
	)	
Stephen L. Johnson, Administrator, EPA, et al.,	)	
	)	
Respondents.	)	
	)	

**FRIENDS OF THE EARTH AND SIERRA CLUB’S  
MOTION TO INTERVENE AS PARTIES RESPONDENT**

Pursuant to Fed. R. App. P. 15, Friends of the Earth (“FOE”) and Sierra Club (collectively, “Movants”) hereby move for leave to intervene as respondents in the District of Columbia Water and Sewer Authority’s (“WASA”) petition for review in the above-captioned matter. WASA’s petition seeks review of the April 5, 2007 issuance of National Pollutant Discharge Elimination System (“NPDES”) Permit No. DC0021199 for WASA’s Blue Plains Wastewater Treatment Plant and combined sewer system, an Order dated March 19, 2008 of the Environmental Appeals Board Denying Review in part of the issuance of the April 5, 2007 permit, and the Board’s April 23, 2008 Order denying WASA’s Motion for Reconsideration of its March 19, 2008 Order. In support of their motion, the Movants submit the following.

FOE and Sierra Club have a substantial interest in WASA’s petition for review. They have members who use and enjoy the water resources impacted by wastewater discharges governed by the permit. The Movants have long been committed to ensuring the permit is fully protective of water quality, have been involved in multiple appeals of previous versions of the Blue Plains NPDES permit, have commented on every draft version of the permit, and have

litigated to ensure that the permit meets all requirements of the CWA and the District's water quality standards.

## **I. Introduction**

### **A. Regulation of Discharges From Blue Plains Under The Clean Water Act**

The Blue Plains Wastewater Treatment Plant ("Blue Plains") is the largest advanced wastewater treatment plant in the U.S., serving the District of Columbia, Montgomery and Prince Georges counties in Maryland, and Fairfax and Loudoun counties in Virginia. Ex. 1, Permit Fact Sheet, 5. It has a design capacity of 370 million gallons per day, and a peak capacity of 1.076 billion gallons per day. *Id.* Blue Plains is also the largest single point source<sup>1</sup> of nutrient pollution (including nitrogen and phosphorous) in the Chesapeake Bay. Permit Fact Sheet, 4. Nutrient pollution leads to oxygen depletion and is a leading cause of water quality impairment in the Bay. *See* Ex. 2, Chesapeake 2000 Agreement, 5-6.

The Clean Water Act ("CWA" or "Act") requires point sources of water pollution like Blue Plains to obtain a National Pollution Discharge Elimination System ("NPDES") permit, which must specify effluent limits necessary to protect water quality. *See* 33 U.S.C. § 1342(a)(b)(1) and (2). This case concerns EPA Region 3's April 5, 2007 modification of the Blue Plains NPDES permit No. DC0021199 ("the permit" or "final permit").

The Blue Plains permit covers two different types of collection systems that deliver wastewater flows to Blue Plains: 1) separate sanitary sewer systems in Maryland, Virginia and portions of the District, which collect only sanitary sewage; and 2) a combined sewer system (CSS) within older portions of the District that collects both sanitary sewage and stormwater runoff in the same pipes. Fact Sheet, 5. During rain events, the combined sewer system is often

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<sup>1</sup> 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." 33 U.S.C. § 1362(14).

unable to handle the combined flow of sewage and rainwater. When this happens, sewage from the combined system is discharged directly to waters of the District without being treated at Blue Plains. *Id.* Such combined sewer overflows (“CSOs”) occur at CSO outfalls located at intervals along the Anacostia River, Potomac River, Rock Creek, and their tributaries. There are more than fifty CSO outfalls specified in the permit. Permit, 39-41. Collectively, more than three billion gallons of sewage overflows are discharged through these outfalls in an average year. WASA, Combined Sewer System Long Term Control Plan (July 2002) (“LTCP”) at 6-2.<sup>2</sup> These overflows contain bacteria levels that are unsafe for humans and aquatic species, and nutrients including nitrogen and phosphorous which further impair water quality. LTCP at 2-18.

The final modified permit includes a total nitrogen effluent limit<sup>3</sup> of 4.689 million pounds per year. This limit “reflect[s] the final nitrogen allocation given to the facility as a result of the Chesapeake Bay Agreement.” Permit Fact Sheet, 2. Through the Chesapeake Bay Agreement process, EPA and the Bay states (Virginia, Maryland, Delaware, New York, Pennsylvania and the District of Columbia) established “cap load allocations” necessary to achieve EPA’s water quality criteria for the Bay for nitrogen, phosphorous and sediment. *Id.*, 4.

## **B. Issues Raised and Decision Below**

Friends of the Earth (“FOE”) and Sierra Club supported the final nitrogen limit, but appealed the permit modification to EPA’s Environmental Appeals Board (“EAB”) on other grounds: the Region’s deletion from the permit of a pre-existing provision that prohibited combined sewer overflows from violating water quality standards. *See* March 19, 2008 Order at 1. FOE and Sierra Club argued that deletion of this provision was unlawful because the deletion

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<sup>2</sup> Available at: <http://www.dcwasa.com/education/css/longtermcontrolplan.cfm> (current as of August 14, 2008).

<sup>3</sup> An effluent limitation is any restriction imposed on quantities, discharge rates, and concentrations of pollutants that are discharged from the “point sources” into waters covered by the CWA. 40 C.F.R. § 122.2.

occurred without prior notice or opportunity for public comment and without demonstrating that the resulting permit ensured compliance with water quality standards. *Id.*, 59-60. The Chesapeake Bay Foundation (separately represented) supported the nitrogen limit, but appealed on the ground that the permit did not specify a compliance schedule. March 19, 2000 Order at 1. WASA appealed the permit, contending that the nitrogen limit was unduly stringent and arguing that the permit must specify a compliance schedule for WASA's achievement of the nitrogen limit. March 19, 2008 Order at 1

In its March 19, 2008 Order, the EAB upheld the nitrogen limit, and agreed that a compliance schedule for the nitrogen limit must be specified in the permit. *Id.*, 48. Further, the EAB agreed with FOE and Sierra Club that "it was clear error for the Region to have made the modification to the water quality standards provision without reopening the comment period." *Id.*, 68. The Board remanded the permit modification, stating that the Region must either reinstate the deleted provision or, if EPA retained the deletion, it must reopen the public comment period and explain how the deletion both comports with the CWA's anti-backsliding provision and properly ensures achievement of the District's water quality standards. *Id.*

## **II. Interests of Friends of the Earth and Sierra Club**

Movants are nonprofit conservation organizations with members residing throughout the United States, including the District of Columbia, Maryland, and Virginia. They are dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land. Actions by Movants to protect and enhance the environment include administrative advocacy and litigation to enforce environmental laws. Both organizations have a long history of involvement in water-quality-related activities, and their members are greatly concerned about water quality.

Movants have an interest in this action because they have members whose health and welfare is threatened by the pollutant discharges that are limited by the Blue Plains NPDES permit. Members of FOE and Sierra Club use, enjoy, and otherwise benefit from waters and riparian areas that are adversely impacted by discharges from Blue Plains and the CSS, including the Potomac River, the Anacostia River, and Chesapeake Bay. Members of both organizations use and enjoy such waters and riparian areas for a variety of purposes, including, but not limited to, boating, sightseeing, hiking, wildlife watching, aesthetic enjoyment, and other recreational pursuits. Discharges governed by the permit at issue here cause or contribute to pollution levels in waters used by Movants' members that are injurious to human health, wildlife, the aesthetic qualities of those waters, and to uses pursued and enjoyed by such members. Such discharges, and EPA's failure to adequately limit them in the permit as further described below, threaten the health and welfare of the Movants' members, impair and threaten their use and enjoyment of the above-mentioned waters, and deny them the level of water quality to which they are entitled under the CWA. Accordingly, their interest in the issues raised in WASA's appeal meets the standards for intervention.

### **III. Grounds for Intervention**

Absent their participation, the Movants' ability to protect their interests may be impaired. The Movants' interests are adverse to WASA's, as WASA will likely seek to weaken the permit. Although WASA has not identified the specific issues it intends to raise, WASA argued below that the nitrogen limit is unduly stringent because it was based on the 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. March 19, 2008 Order, 41. WASA also argued before the EAB

in support of removal of permit language requiring protection of water quality standards from combined sewer discharges – a step that Movants contend would illegally weaken the permit.

The Movants' interests are not adequately represented by EPA Region 3. As noted above, Movants opposed EPA's deletion of water quality standards language from the permit, and EPA cannot be counted on to vigorously defend the Board's decision overturning that deletion. Moreover, as it stands, the Court will only hear EPA Region 3's arguments defending inclusion of the nitrogen limit in the permit. Movants cannot count on the Region to adequately defend that limit, as the Region originally proposed a permit lacking it, and reconsidered only after critical comment by Movants and others. Moreover, Movants have longstanding disagreements with EPA's Region 3 over legal requirements for the permit, and for implementation of the Clean Water Act. *See Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006); *In re Govt. of the District of Columbia Municipal Separate Storm Sewer System*, 10 EAB 323 (February 20, 2002). The Movants represent individuals who seek greater reduction of the discharges from WASA's sewage system that impact the waters they use and enjoy and are concerned about, and have repeatedly challenged the Region's permits and other actions as not being protective enough of water quality in the District and downstream. *Id.* *See also Kingman Park Civic Assn v. EPA*, 84 F.Supp.2d 1, (D.D.C. 1999)(suit by FOE and others over EPA failure to adopt pollution caps for Anacostia, Potomac, and other D.C. waters).

In short, Movants cannot rely on the Region to adequately defend the EAB's decision on the water quality standards issue, or to present the full range of legitimate arguments available to oppose weakening the nitrogen limit. For these reasons, the Petitioners' interests are not adequately represented by either WASA or EPA.

The Movants' motion is timely. No substantive proceedings have occurred. If the Court grants this motion, the Movants will file briefs and other papers within the time specified by the Court for the EPA to respond. Further, the Movants' participation in this matter will not delay this proceeding.

### **Conclusion**

For all the foregoing reasons, the Movants ask the Court to grant leave to intervene in the above-captioned matter.

DATED this 14th day of August, 2008



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