WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

CLARKSBURG SANITARY BOARD

Appellant,

v. **Appeal No. 25-06-EQB**

DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellee.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Appellee West Virginia Department of Environmental Protection's ("Appellee" or "WVDEP") Response in Opposition ("Response") to Appellant Clarksburg Sanitary Board's ("Appellant") Motion for Summary Judgment ("Motion") fails to raise any genuine issue of material fact to refute the granting of Appellant's Motion in this matter. In fact, Appellee's Response fails to even address the only issue that is before this Board, which is whether the language in § F.3.a is illegal and unlawful for inclusion within NPDES permits issued pursuant to the federal Clean Water Act ("CWA") and State Water Pollution Control Act ("WPCA"). For these reasons, this Board must grant summary judgment in favor of Appellant and ORDER Appellee to remove the language in § F.3.a of Appellant's Permit.

While Appellee has failed to set forth *any* argument in opposition to Appellant's Motion, Appellant offers the following three points in Reply to Appellee's alleged Response.

1. **Appellee's alleged Response is nothing more than an exercise in deflection**. Appellee attempts to deflect from the only issue currently before this Board, which is whether the language in § F.3.a of Appellant's Permit is illegal pursuant to the CWA and WPCA. Appellee deflects

because there is no valid response in opposition to the position presented by Appellant in this matter – the language in § F.3.a of Appellant's Permit is an illegal end-result requirement that must be removed from Appellant's Permit.

As Appellant has made clear, the Supreme Court of the United States, our Nation's highest Court, has ruled that end-result requirements, such as the one in § F.3.a of Appellant's Permit, are unlawful. *City and County of San Francisco, California, v. Environmental Protection Agency*, 145 S. Ct. 704, 720 (2025) ("In sum, we hold that § 1311(b)(1)(C) does not authorize EPA to include "end result" provisions in NPDES permits. Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer.").

As a reminder, the Court in *San Francisco* held the following permit language to be an unlawful end-result requirement:

> For many years, the Oceanside facility's NPDES permit was renewed without controversy, but in 2019, the two end-result requirements that San Francisco now challenges were added. The first of these prohibits the facility from making any discharge that ***"contribute[s] to a violation of any applicable water quality standard" for receiving waters.***

San Francisco at 713 (emphasis added). The unlawful end-result requirement in Appellant's Permit states:

> 3.a. To the extent provided by law, the discharges from the permittee's CSOs ***shall not cause or contribute to an in-stream excursion above any numeric or narrative criteria developed and adopted as part of the WV water quality standards.***

Certified Record at 000062 (emphasis added). The language in Appellant's Permit factually mirrors the language deemed unlawful by the Court in *San Francisco*. This language is illegal and cannot stand in Appellant's Permit.

2. **Change is inevitable, even in the law.** Permittees such as Appellant are constantly adjusting to the changing regulatory landscape. As this Board is aware, the political atmosphere surrounding the environmental regulations wastewater utilities operate under has been a revolving door and these permittees have no choice but to adapt to the changes as they are implemented. The same is true for WVDEP. When the law changes it is WVDEP's statutory duty to adapt.

Appellee's response spends all its efforts in attempting to justify the inclusion of this unlawful language based on negotiations surrounding permit language that was developed in 2006. Simply put, while Appellee's rationale in 2006 may have been appropriate, the Court's *San Francisco* decision in 2025 changed the regulatory landscape under which permittees and regulatory agencies operate. While Appellant takes issue with the alleged justification provided by Appellee, the simple fact is that Appellee's 2006 rationale for inclusion of the unlawful language in § F.3.a is not the issue currently before the Board. Instead, the issue before this Board is the actual language included in Appellant's Permit, and this language has been deemed unlawful. Appellee's 2006 rationale for drafting this language is completely irrelevant to the case before the Board, as the language it has selected for incorporation in Appellant's Permit in 2025 is illegal and must be removed.

Appellee accuses Appellant of trying to oversimply this matter for the Board. *See* Appellant's Response at 2. To this, Appellant agrees. The matter before this Board ***is*** simple. The language in § F.3.a of the Permit, which is the only issue on appeal, is unlawful and therefore must be removed.

3. **Appellee's Response is full of red herrings that attempt to distract this Board from the issue on appeal.** Appellee attempts to assert that this Board cannot order the removal of the language in § F.3.a without requiring the implementation of alternative numeric or narrative

permitting provisions. Although Appellant has many issues with WVDEP's strained and inaccurate interpretation of these requirements, this entire discussion is completely irrelevant and is a poorly drafted attempt to distract this Board. The only issue on appeal is the lawfulness of the language in § F.3.a. This is the final agency action for which Appellant seeks administrative review. Thus, the only action before this Board is to: (1) deem the language in § F.3.a lawful or (2) deem the language in § F.3.a unlawful. If this Board deems the language in § F.3.a unlawful, as it must, Appellee must remove this language. Any action to replace or modify the language in § F.3.a to conform to Appellee's statutory duties falls within Appellee's statutory purview and would only be subject to review by this Board upon the issuance of a final Permit containing modified language. At that point, the revised language would be subject to a new appeal period wherein interested parties, including Appellant, could appeal any revised language should such party deem it inappropriate.

As noted above, WVDEP's rationale for why it must include certain language for CSO dischargers is not on appeal, and despite Appellant taking issue with the rationale provided in Appellee's Response, this is the not the matter that is on appeal before this Board. Instead, the only matter before this Board is whether the language WVDEP is currently utilizing to implement its alleged rationale is lawful. It is not, and that language must be removed.

While Appellant would hope that WVDEP would engage it and the rest of West Virginia's CSO community in discussions on any attempts to replace this unlawful language with something else, that future language is not on appeal and will not be on appeal until WVDEP has issued a final agency action. As the Court in *San Francisco* opined, "[d]etermining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands,

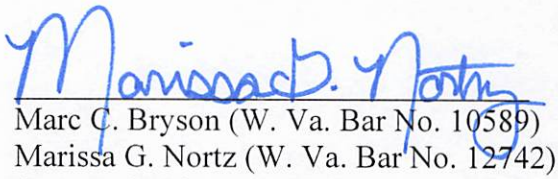
water quality will not suffer." *Id.* at 720. The same is true of WVDEP. It is WVDEP's duty to determine lawful steps to implement the CWA and WPCA and those steps will be subject to separate administrative review. While Appellant is hopeful that WVDEP's next step, whatever that may be, does not again run afoul of the CWA and WPCA, that action is yet to be determined and will be subject to separate review by this Board.

WHEREFORE, for the reasons set forth above and more fully within Appellant's Motion for Summary Judgment, Appellant respectfully requests that this Board GRANT Summary Judgment in favor of Appellant and ORDER Appellee to remove § F.3.a from Appellant's Permit.

Respectfully submitted,

Clarksburg Sanitary Board

By Counsel:



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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2025, I served the foregoing "APPELLANT'S REPLY TO APPELLEE'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT" upon the following parties by depositing a true copy thereof via United States Mail, and/or electronic service, postage prepaid, in envelopes addressed to the following:

Kenna M. DeRaimo, Clerk — *Via U.S. and Electronic Mail*
WV Environmental Quality Board
601 57th Street
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Jonathan C. Frame, Esq. — *Via U.S. and Electronic Mail*
Isaac L. Tincher, Esq.
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