ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 05-5015

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH,

Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Appellees.

On Appeal from a Final Decision of the
United States District Court for the District of Columbia

INITIAL BRIEF OF AMICI CURIAE IN SUPPORT OF AFFIRMANCE OF DECISION OF THE DISTRICT COURT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and amici. – All parties and amici appearing before this Court are listed in Appellant's Opening Brief.

B. Rulings under review. – All references to the matters at issue appear in Appellant's Opening Brief.

C. Related Cases. – Aside from the cases set out in Appellant's Opening Brief, Federal appellees are not aware of any related cases within the meaning of Cir. Rule 28(a)(1)(C).

Respectfully submitted,

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STATEMENT OF CONCURRENCE

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici* concur generally with the jurisdictional statements, statements of issues, statements of the case, and statement of facts in the briefs of the Federal Appellees and the District of Columbia Water and Sewer Authority ("DC WASA").

INTEREST OF THE AMICI CURIAE

The National Association of Clean Water Agencies ("NACWA") has represented the interests of the nation's publicly-owned wastewater treatment agencies ("POTWs") since 1970.[1] NACWA is comprised of nearly 300 municipal clean water agency members, who serve the majority of the United States' sewered population and collectively treat and reclaim over 18 billion gallons of wastewater each day. As an organization, NACWA strives to maintain a leadership role in the development and implementation of scientifically based, technically sound, and cost-effective environmental and clean water programs to protect public and ecosystem health.

NACWA's clean water agency members operate municipal wastewater treatment plants under federal and state laws and regulations in cities and towns across the United States. DC WASA and nearly twenty

[1] The National Association of Clean Water Act Agencies ("NACWA") was formerly the Association of Metropolitan Sewerage Agencies ("AMSA"). On May 2, 2005, AMSA amended its Articles of Incorporation to change its name to the National Association of Clean Water Agencies.

other public agencies in Maryland and Virginia are NACWA members. Among NACWA's member agencies, eighty operate combined sewer overflow ("CSO") systems, serving an estimated population of 44.6 million. NACWA's members with combined sewer systems are located in nearly each of the thirty-two states with combined sewers and correspond directly to the national concentration of such systems in the northeastern, southeastern, and midwestern portions of the U.S., as well as west coast states.

If this Court were to accept FoE's arguments, the ramifications would extend far beyond the District of Columbia, and would significantly impact NACWA's CSO member communities nationwide and NACWA members that do not operate combined sewer systems but discharge to waters where TMDLs have been or will be implemented. A recent survey of 47 of NACWA's CSO member communities revealed that these cities collectively have spent $5.1 billion (ranging from expenditures of $100,000 to $2.4 billion) in capital dollars and $39.6 million (ranging from expenditures of $50,000 to $4.5 million) in operation and maintenance dollars toward the implementation of their Long Term Control Plans ("LTCPs"). FoE's position could undermine the implementation of these LTCPs, which are not consistent with the daily loading approach advocated by FoE. FoE's position also undermines important water quality programs being

administered by EPA and the states, and the significant efforts of communities nationwide to implement the combined sewer overflow policy contained in section 402(q) of the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* (hereinafter referred to as the "CWA"). As the district court recognized in its decision, "[i]f municipalities cannot calculate non-daily TMDLs for their sewage overflow programs, they cannot implement EPA's CSO Policy." Friends of the Earth v. EPA, 346 F.Supp.2d 182, 191; (JA).

The Combined Sewer Overflow Partnership ("the CSO Partnership") has been dedicated to representing the interests of the approximately 800 communities with combined sewer systems nationwide since 1988. The CSO Partnership's approximately 80 members are located on both coasts, throughout the mid-west, and from Maine to Virginia, including DC WASA. The CSO 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 CSO 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. States like Virginia and Maryland have provided CSO control grants as well as the federal government through EPA's budget and

direct earmarks by Congress for dozens of CSO control programs. DC WASA has received direct congressional grant funding for its treatment system, as well as significant funding toward implementation of its CSO long-term control plan.

These enormous investments of public resources have generally not been designed to meet regulatory requirements expressed in terms of daily pollutant loadings. Such a requirement would force almost every CSO community to redo much of its CSO control program planning and may well strand or severely limit the utility of hundreds of millions worth of CSO control infrastructure by CSO Partnership members.

SUMMARY OF ARGUMENT

Amici concur with the positions of EPA and DC WASA advanced in their opening briefs and make two additional arguments. First, *Amici* present an additional statutory argument which was relied upon by the district court, but not raised by either EPA or WASA in their opening briefs before this Court, to demonstrate that the Section 303(d)(1)(C) of the Clean Water Act is ambiguous in terms of Congress' intent with respect to how TMDLs should be expressed.[2] Specifically, *amici* explain how FoE's interpretation of the term "daily" in Section 303(d)(1)(C) is in direct conflict

[2] EPA's argument that the word "daily" in section 303(d)(1)(C) is ambiguous is based on the context supplied by Section 303(d)(1)(C). EPA Opening Br. at 23-34. WASA raises an additional statutory argument, showing how FoE's interpretation is in direct conflict with Section 402(q) of the Clean Water Act. WASA Opening Br. at 14-20.

with Section 402(p)(3) of the Clean Water Act governing municipal separate storm sewer systems (MS4s).

Second, *Amici* explain how FoE's contention that TMDLs must assign a specific daily pollutant load is fundamentally inconsistent with twenty years of program implementation by EPA and delegated states nationwide. We explain the far-reaching adverse consequences for our member agencies as well as the adverse impact on state and federal regulatory agencies in the process of issuing hundreds of similar TMDLs. Moreover, current federal consent decrees governing the schedule of TMDL development in over twenty states will be impacted and disrupted. Specifically, in addition to the significant adverse impacts identified by EPA and DC WASA, we explain how FoE's contention would:

(1) Invalidate several other TMDLs that were developed, approved, and even litigated (on other grounds) for waters of the District of Columbia;

(2) Question the validity of and invite challenge to hundreds of TMDLs nationwide that have similarly implemented a non-daily approach;

(3) Jeopardize EPA's and the States' compliance with dozens of federal consent decrees which impose TMDL development

deadlines and which were fulfilled – at least in part – with TMDLs that do not impose daily limits;

(4) Chill the development of new TMDLs, as EPA and states would be compelled to develop daily TMDL limits despite such limits being impracticable and, in many circumstances, impossible.

(5) Undermine major environmental restoration programs such as the Chesapeake Bay Restoration Program.

ARGUMENT

I. FoE's Statutory Interpretation is Incorrect and Conflicts With CWA Section 402(p)(3) Governing MS4s.[3]

As *Amici* argued in their district court brief and as the district court concluded, CWA Section 402(p)(3) creates ambiguity in the meaning of how the word "daily" should be construed in Section 303(d)(1)(C). Friends of the Earth v. EPA, 346 F.Supp.2d 182, 191; (JA). This section provides that permits for discharges from MS4s may be based on a system or jurisdiction-wide basis and "shall require controls to reduce pollutants to the

[3] NACWA and the CSO Partnership concur with the arguments advanced by EPA and WASA in their opening briefs regarding FoE's interpretation of the meaning of the term "daily" in Section 303(d)(1)(C) of the Clean Water Act. EPA correctly argues that in the context of Section 303(d) "it is plain that Congress has not, by the use of the term 'daily,' expressed an unambiguous intent that all TMDLs should be expressed as daily loads." EPA Opening Br. at 22, 29. WASA correctly points out an additional reason why FoE's reading of the statute is incorrect -- that section 402(q) of the Act is in direct conflict with FoE's position that daily limits are required for all pollutants.

maximum extent practicable, including practices, control techniques and system design and engineering methods." 33 U.S.C. § 1342(p)(3)(B).[4] In enacting CWA 402(p)(3) in 1987, Congress recognized that different control strategies are needed for different pollutant sources and recognized that storm sewer discharges are different from discharges from industrial or municipal treatment plants.[5] EPA elaborated on Congress' authorization in the preamble to its rulemaking establishing the regulations for MS4s, noting that the CWA authorizes a storm water pollutant control program in the form of a "management" control program rather than the "end-of-pipe numeric effluent limits." 64 Fed. Reg. 68,722, 68,765 (Dec. 8, 1999) (the "Phase II" stormwater regulations). Like Section 402(q), the stormwater management control program created by Congress in CWA Section 402(p) is also inconsistent with the daily loading arguments advanced by FoE. CWA Section 402(p)(3) recognizes that the best form of effluent limitation for these types of permits (due to the fact that the discharges are caused by

[4] Other CWA provisions also conflict with FoE's reading of the statute. *See, e.g.*, Subchapter II – Grants for Construction of Treatment Works – CWA Sections 1281 through 1301. These sections authorized federal grant funding to install secondary treatment technology at approximately 15,000 publicly-owned treatment works nationwide. Congress invested billions of federal taxpayer dollars on these installations. Secondary treatment is defined as "monthly" and "weekly" requirements for certain pollutants, including Total Suspended Solids (TSS) and Biochemical Oxygen Demand (BOD) – the pollutants at issue in this case. *See* 40 C.F.R. Part 133.102.

[5] Stormwater discharges are the result of periodic rain events, while discharges from industrial and municipal treatment plants (not associated with combined sewer systems) occur on a continuous, largely predictable and controlled basis.

intermittent rainfall events) are flexible, site-specific approaches. See 40 C.F.R. § 122.34(a) ("narrative effluent limitations requiring implementation of best management practices are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements including reductions of pollutants to the maximum extent practicable and to protect water quality."). These narrative effluent limitations cannot be expressed as daily pollutant loads.

Accordingly, FoE's argument that TMDLs for pollutants commonly found in stormwater must be expressed only as a quantity of pollutant over a 24-hour day runs counter to the express language of section 402(p)(3)(B). The language of section 402(p)(3), providing for best management practices-based control programs, cannot be squared with FoE's contention that daily effluent limits are required for all pollutants and all sources by section 303(d). Where different sections of the statute cannot be read together, an ambiguity exists and EPA's interpretation must be reviewed under a Chevron Step II analysis.[6]

The district court noted this conflict in the statutory scheme created by the different standards set forth in Section 303(d)(1)(C) and Section

[6] We concur with EPA's brief on the Step II analysis as well as the holding by the Court of Appeals for the Second Circuit in Natural Resources Defense Council v. Muszynski, 268 F.3d 91 (2d Cir. 2001).

402(p)(3). The court recognized the impact of accepting FoE's argument on the applicability of section 402(p)(3):

> [w]ere the court to side with the plaintiff, however, the court would in essence alter this congressional choice, mandating daily effluent limits instead of permitting more manageable practices such as non-daily loads.

Friends of the Earth, 346 F.Supp.2d at 191 (JA). The court also rejected two other arguments repeated again by FoE in its opening brief. FoE argued that consideration of the section 402 amendments are not ripe at this point because they apply at the permitting stage and that the 402 amendments cannot override Section 303(d). The court held that both of those arguments miss the point. Arguments of ripeness and the magnitude of statutory provisions cannot negate the fact that the 402 amendments "when evaluated together, reveal a statutory gap that complicates discernment of clear congressional intent under Chevron Step 1." Friends of the Earth, 346 F.Supp.2d at 191 (JA).

II. Accepting FoE's Argument Would Disrupt Many Established Programs by EPA and the States as well as Their Compliance with Numerous Federal Consent Decrees.

In addition to FoE's statutory arguments being incorrect, the Court should also be aware of the practical impact of overturning a longstanding agency interpretation upon which regulatory programs and judicial compliance have been established. NLRB v. Bell Aerospace Co. Div. of

Textron, Inc., 416 U.S. 267, 275 (1974) (a longstanding interpretation placed on a statute by an agency charged with its administration is entitled to "great weight"). EPA and WASA have described how EPA regulations since 1985 have been based upon the interpretation that TMDLs may be expressed in periods longer than a twenty-four hour period. EPA Br. at 28; WASA Br. at 6; see also 50 Fed. Reg. 1779, 1776 (Jan. 11, 1985); and 64 Fed. Reg. 46031 (Aug. 23, 1999). *Amici* present here some of the programs, decisions, and federal consent decrees which are based upon the understanding that TMDLs may be expressed in terms of periods different than (usually longer) than a twenty-four hour period.

A. If Accepted by This Court, FoE's Argument Would Invalidate or Undermine Similar TMDLs in the District of Columbia, EPA Region III, and Nationwide.

If all TMDLs were required to contain daily loads, the pace of TMDL development would be disrupted and numerous TMDLs based on an annual load approach already approved by EPA and the states could be invalidated. Within EPA Region III alone, EPA has approved many TMDLs basing limits on annual rather than daily loads. In the District of Columbia, EPA has approved other TMDLs that use annual loads.[7] EPA has also approved

[7] *See, e.g.,* District of Columbia TMDLs: (1) Rock Creek TMDL for Fecal Coliform (because of the episodic nature of rainfall and storm water runoff, developing a daily load is not an effective means of determining the assimilative capacity of the receiving waters, p. 11); (2) Upper, Middle and Lower Potomac River TMDL for Fecal Coliform. Available at: http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/index.htm.

numerous TMDLs in Maryland and Virginia that rely upon annual loads.[8] These TMDLs could be invalidated or subject to challenge if this Court rules in favor of the FoE. The impact of invalidating these TMDLs would not only have adverse regulatory consequences but would also have adverse environmental consequences. FoE concedes that "adverse environmental implications that would result from vacating the TMDLs" in this case. FoE Br. at 47. A decision requiring daily loads would stall – or completely undermine - implementation of numerous non-daily TMDLs.

Furthermore, hundreds of TMDLs nationwide are based on annual loads. A decision by this Court holding that section 303(d) requires TMDLs to be expressed in daily terms would have nationally disruptive effects and would slow the pace of TMDL development – slowing water quality improvement across the country. Enormous public and private resources have been invested in the development and implementation of these TMDLs. These investments will be diminished, disrupted, or wasted if these TMDLs have to be redone around daily loadings.

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[8] *See, e.g.*, Maryland TMDLs: (1) Manokin River TMDL for Nitrogen and BOD; (2) Lower Wicomico River TMDL for Nitrogen, Phosphorous and BOD; (3) Corsica River TMDL for Nitrogen and Phosphorous; (4) Sassafras River TMDL for Phosphorous; and (5) Chicamacomico River TMDL for Nitrogen and Phosphorous. Available at: http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/index.asp.

See also, Virginia TMDLs: (1) Mill Creek, and Pleasant Run; (2) Four Mile Run; and (3) Goose Creek Watershed. Available at: http://www.deq.virginia.gov/tmdl/apptmdl.

B. Federal Consent Decrees Dependent Upon Non-daily TMDLs Would Be Affected.

Not only would non-daily TMDLs be impacted, but the Consent Decrees under which many of the non-daily TMDLs are currently being produced would be impacted as well. Regionally, TMDLs in the District of Columbia, Virginia, Pennsylvania, West Virginia, and Delaware are being produced according to schedules set forth in federal consent decrees. These decrees set forth the number of TMDLs that must be produced each year along with specific due dates for TMDLs for certain waters. Currently, TMDLs containing annual loads are being counted as completed TMDLs. If the Court were to accept FoE's argument, the validity of these TMDLs would be questioned and they may no longer count as completed TMDLs. This could put EPA and the states in non-compliance with dozens of these decrees in nationwide,[9] despite the fact that these non-daily TMDLs have been accepted by the parties and courts in those other decrees as satisfying the federal Clean Water Act TMDL development requirements.

C. Impacts on the Chesapeake Bay Program

A recent decision by EPA, which affects District of Columbia waters and this TMDL, concerns the program to restore the Chesapeake Bay and provides another example of the potential harmful impact of adopting FoE's

[9] A listing of EPA's TMDL-related consent decrees by states is available at: http://www.epa.gov/owow/tmdl/lawsuit1.html.

position. An EPA memorandum dated March 3, 2004, considers the issue of whether EPA may express effluent limits for nitrogen and phosphorous for hundreds of permits designed to protect the Chesapeake Bay as an annual limit or whether EPA must express the limits as a daily maximum, weekly average, or monthly average effluent limitations.[10] In the memo, EPA considers the legal, scientific and policy rationales for deciding whether it may select annual limits instead of imposing limits on a daily, weekly, or monthly basis. EPA concludes that as a legal matter its regulations allow it to impose annual limits where the other limitations would be "impracticable." 40 C.F.R. 122.45(d). EPA then determines that the characteristics of nitrogen and phosphorous when combined with the unique characteristics of the Chesapeake Bay make the imposition of daily, weekly or monthly limits impracticable. March 4, 2004 memorandum at 3-5. EPA describes why daily, weekly or monthly limits would be virtually impossible to calculate because of how nutrients react differently than toxics and conventional pollutants in the Bay ecosystem. The treatment of nutrients is also highly sensitive to ambient temperature and is not effective at lower temperatures. Thus, effluent loading of nutrients is not constant due to seasonal temperature fluctuations. See also Sierra Club v. Leavitt, 2005 WL

[10] See http://www.epa.gov/npdes/pubs/memo_chesapeakebay.pdf.

1279218 (N.D. Fla. 2005) (recognizing the "varying natural interactions of the nutrient cycle in any given waterbody"). To establish appropriate daily, weekly or monthly limitations, due to the effect of temperature on treatment efficiency for nutrients, a permitting authority would have to be able to predict the temperature with great accuracy. Because of the normal variation in ambient temperature over short time periods, EPA concluded it is not practicable – or necessary – to develop daily, weekly or monthly limits for nutrients.

Significantly, the federal TMDL consent decree in Virginia requires that a TMDL be developed for the Chesapeake Bay by 2011. If this Court were to adopt FoE's argument that daily limits are mandated by the statute, the Chesapeake Bay TMDL would have to impose daily limits. This requirement would undermine several decades of Bay Program implementation and several billions of public dollars that are being invested toward compliance with the annual average loading approach for the Bay Program. Moreover, requiring that daily rather than annual loads be met would increase the Bay Program costs by billions of dollars on top of the tens of billions already estimated.[11]

[11] The same is true for other regional waterbodies such as the Long Island Sound program in which EPA Region II developed a TMDL for nitrogen that imposes annual loads as the compliance measure for regulated entities discharging to the Long Island Sound. See http://www.epa.gov/region01/eco/lis/assets/pdfs/Tmdl.pdf

E. Impacts on Maryland's Chesapeake Bay Restoration Fund.

Another example of a critical program which would be adversely impacted by FoE's construction of section 303(d) is the recently established Bay Restoration Fund in Maryland. See Chapter 428, Maryland Session Laws. This program will use State grant funding to provide 100 percent of the cost to upgrade wastewater treatment facilities across Maryland with enhanced nutrient removal technology. The technology is expressly required under the new State legislation to be designed to reduce nutrient (nitrogen and phosphorous) discharges to annual average levels specified in the legislation. Chapter 428, sections 9-1601 (A)(2) and 9-1601 (L)(1). This legislation is based upon EPA's Bay Program and the guidance mentioned above. FoE's argument for daily loadings, if applied to facilities in Maryland, would be directly inconsistent with the annual average requirements of this one billion dollar program. Again, the 2011 Chesapeake Bay TMDL required under the Virginia federal TMDL consent decree would directly affect all of Maryland's dischargers. Accordingly, a daily requirement in the Virginia TMDL would undermine over a billion dollars of public infrastructure invested in Maryland. In our view, a decision by this court requiring daily loadings for this and other TMDLs will cause Maryland's nutrient reduction program to come to an abrupt halt.

D. Impacts on the National CSO Program.

Finally, FoE's position regarding daily load expression also would have dramatic consequences on the regulations and policies governing combined sewer overflows. Section II.C.4.a of the *CSO Policy* lays out three "presumptive" levels of CSO control that are presumed to achieve water quality standards. 59 Fed. Reg. 18,688, 18,692 (April 19, 1994). The first option, for example, is "no more than an average of four overflow events per year, provided that the permitting authority may allow up to two additional overflow events per year." The other two options are 85 percent capture of wet weather flows for treatment either on a volume or mass basis.

These three options for CSO control, outlined in EPA's *CSO Policy*, and endorsed by Congress in CWA Section 402(q), are fundamentally inconsistent with FoEs' daily load position. For example, the four to six untreated annual average overflows approach is fundamentally inconsistent with a daily pollutant-loading requirement. Thus, any CSO community that has developed and is implementing its CSO program around one of the three "presumptive" criteria established in the *CSO Policy* could have to completely reevaluate their approach if this Court endorses FoE's approach. This could cost billions of dollars in stranded public infrastructure, as well as additional future control costs not intended by Congress.

CONCLUSION

The district court was correct in finding the term "daily" in CWA Section 303(d)(1) to be ambiguous and in conflict with the Section 402 amendments. Moreover, given the adverse impacts to existing non-daily TMDLs and programs and the investments and obligations dependent upon them, the decision of the district court should be upheld.

Respectfully submitted,

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Dated: October 26, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that pursuant to 32(a)(7)(C), Fed. R. Appellate P., the attached Initial Brief of Amici Curiae in Support of Affirmance of Decision of the District Court is proportionately spaced, contains 3,965 words as counted by Word software, and has a typeface of 14 point or more.

Dated: October 25, 2005

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John A. Sheehan

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2005, a true and accurate copy of the Initial Brief of Amici Curiae in Support of Affirmance of Decision of the District Court was sent by regular mail to:

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