No. 06-119

In The Supreme Court of the United States

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND THE WET WEATHER PARTNERSHIP IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Clean Water Agencies ("NACWA") represents the interests of the nation's publicly owned wastewater treatment agencies.[2] NACWA is comprised of nearly 300 municipal clean water agency members that provide services to the majority of the United States' population served by sewer systems. NACWA members operate municipal publicly owned treatment works ("POTWs") under federal and state laws and regulations in cities and towns across the United States, and collectively treat and reclaim over 18 billion gallons of wastewater each day. In addition to operating POTWs, eighty of NACWA's member agencies, including the District of Columbia Water and Sewer Authority ("WASA"), also operate combined sewer overflow ("CSO") collection systems that serve approximately 44.6 million people. Thirty-two states have communities with combined sewer systems.

NACWA supports WASA's petition for a writ of certiorari seeking review of the decision by the D.C. Circuit due to its broad and immediate impact on all NACWA members, particularly those like WASA that operate combined sewer collection systems. The ramifications of the D.C. Circuit decision extend far beyond the Anacostia River in the District of Columbia and will significantly impact NACWA's CSO member communities nationwide. A recent survey of forty-seven of NACWA's CSO member communities revealed

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[1] Written consent for the filing of this brief was granted by all of the parties pursuant to Supreme Court Rule 37. The signed consent letters are being sent to the Court under separate cover letter along with the brief.

[2] The National Association of Clean Water Agencies ("NACWA") was formerly the Association of Metropolitan Sewerage Agencies ("AMSA"). On May 2, 2005, AMSA, established in 1970, amended its Articles of Incorporation to change its name to the National Association of Clean Water Agencies.

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") to comply with CSO requirements. The D.C. Circuit decision undermines the implementation of these LTCPs because these LTCPs have generally been developed to meet seasonal or annual pollutant loads, not the daily loads required by the D.C. Circuit decision. The decision will undercut the 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.* ("CWA"). Additionally, other NACWA members that do not operate combined sewer systems but discharge to impaired waters that require TMDLs (which ultimately are incorporated in enforceable National Pollutant Discharge Elimination System ("NPDES") permits) are impacted because the status of existing and future TMDLs is now uncertain.

The Wet Weather Partnership ("the Partnership"), until recently named the Combined Sewer Overflow Partnership, is dedicated to representing the interests of the approximately 800 communities with combined sewer systems nationwide. The Partnership's approximately 80 members have invested hundreds of millions of dollars in the planning, design, permitting and construction of CSO control facilities in accordance with EPA's CSO Policy, incorporated by reference into CWA section 402(q). 33 U.S.C. §1342(q). As the district court in this case recognized, CSO communities cannot comply with the CSO Policy or CWA section 402(q) if TMDLs must be based on a daily approach. Friends of the Earth, Inc. v. Environmental Protection Agency, 346 F. Supp. 2d 182, 191, n. 4 (D.D.C. 2004).

These enormous public investments were not designed to meet the new "daily" pollutant loading

regulatory requirement announced by the D.C. Circuit. Such a daily loading requirement is likely to trigger a reevaluation of most CSO control programs and may well strand or limit the utility of CSO control investments by Partnership members.

SUMMARY OF ARGUMENT

This case presents a direct conflict between two decisions by circuit courts of appeals on the interpretation of a fundamental Clean Water Act provision that will affect cleanup plans for thousands of impaired surface waters across the nation. Decisions by the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Second Circuit are in direct conflict over the proper construction of section 303(d) of the CWA. Construing the same statutory language (in particular, the word "daily), the D.C. Circuit said " [w]e cannot imagine a clearer expression of intent" while the Second Circuit found such an interpretation of the statute to be "absurd." Friends of the Earth, Inc. v. Environmental Protection Agency, 446 F. 3d 140, 144 (D.C. Cir. 2006); Natural Resources Defense Council, Inc. v. Muszynski, 268 F. 3d 91, 99 (2d Cir. 2001). This intercircuit conflict puts in doubt cleanup plans currently in existence and those under development for up to 40,000 impaired rivers, lakes, and streams nationwide.

Beyond the intercircuit conflict, the D.C. Circuit's decision requires review because it (1) reverses a long-standing agency interpretation that has served as the basis for several national water quality programs; (2) is based on a faulty statutory analysis which led the circuit court to incorrectly dismisses key substantive amendments to the Clean Water Act as being merely "subsequent legislative

history" that the court held to have no "relevance;" [3] (3) creates regulatory uncertainty for a number of important national water quality programs; and (4) might trigger further litigation over the cleanup plans at issue as well as for similar cleanup plans for waters nationwide.

Review by this Court is warranted because the D.C. Circuit's ruling undermines the legal validity and implementation of cleanup plans for waters nationwide and the associated years of program implementation by EPA and the states. The D.C. Circuit Court acknowledged the immediate and substantial impacts of its decision by suggesting in its opinion ways to delay the loss of protection for the Anacostia River that would result from an immediate exercise of the court's invalidation of the two challenged cleanup plans before it. Friends of the Earth, 446 F. 3d at 148. However, the court left in legal limbo all other non-daily cleanup plans for District of Columbia waters as well as other impaired waters nationwide. This immediate and highly significant adverse impact on impaired water cleanup plans nationwide warrants a prompt review by this Court.

Finally, review by this Court is necessary to prevent long-standing and substantial EPA and state water quality programs from being plunged into uncertainty over the proper standards to use in establishing cleanup plans.[4] These programs were

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[3] Conversely, the District Court correctly construed the effect of these amendments, recognizing "It needs hardly be said that when Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." Friends of the Earth, Inc. v. Environmental Protection Agency, 346 F. Supp. 2d 182, 191 n.4 (D.D.C. 2004), citing Stone v. INS, 514 U.S. 386, 397 (1995).

[4] In the nearly four months since the decision, EPA has not indicated an intention to follow the suggestion by the D.C. Circuit to amend its regulation that declared all pollutants suitable for daily loads. 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978). In its

established on the basis that in many cases cleanup plans and TMDLs are properly expressed in measures other than daily parameters. That foundation, which has been in place for decades, is now called into question nationwide. Only review by the Court will resolve this dispute and prevent the disruptions, regulatory uncertainty and the loss of cleanup plan protections for impaired waters that will otherwise follow.

ARGUMENT

I. An Intercircuit Conflict Exists Over the Interpretation of a Fundamental Provision of the Federal Clean Water Act That Affects Cleanup Plans for Thousands of Impaired Waters Nationwide.

A. The Circuit Split Creates Uncertainty Regarding the Correct Requirements for Establishing Allowable Pollutant Loads to Impaired Waters.

The conflicting decisions by the D.C. Circuit and the Second Circuit create uncertainty about whether cleanup plans for impaired waters must be expressed in daily terms or whether non-daily expressions are permissible. This uncertainty will likely result in conflicting regulatory requirements as EPA, states, regulated entities and communities, and various interest groups disagree as to which interpretation of the Act to follow. This conflict will create situations where a river or steam that runs

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recent pleading after remand to the district court, EPA stated that it is not the agency's plan "at this time" to revise the 1978 regulation. EPA Motion to Stay Order of Vacatur, filed Aug. 8, 2006 at p. 4, n.2.

through different jurisdictions could subject dischargers to conflicting regulatory requirements. The Anacostia River is a prime example of this situation as it begins in Maryland (Fourth Circuit) and runs through the District of Columbia (D.C. Circuit). Annual pollutant loadings could be permissible in one part of the river, while daily loading could be required in another part. Notably, numerous non-daily TMDLs have been developed within the Fourth Circuit, including several accepted by district courts pursuant to federal TMDL consent decrees.[5]

A patchwork of conflicting approaches, rules and methods is likely to emerge as states outside the D.C. Circuit and Second Circuit develop cleanup plans and TMDLs and decide which approach to adopt.[6] This confusion and uncertainty will increase costs for the regulated community and ratepayers and make the mission of maintaining and improving water quality in our nations' waters more difficult. In addition to the regulatory uncertainty, this situation potentially strands billions of dollars in investments in CSO programs and other water quality programs in communities nationwide, as communities must decide whether to continue to fund programs where the requirements and standards are not certain. These impacts and costs are discussed below.

B. After Decades of Implementation by EPA Based Upon the Interpretation of the CWA Supported by the Second Circuit Decision,

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

[6] EPA has added to this uncertainty in the months since the D.C. Circuit decision by circulating a draft "policy" in response to the D. C. Circuit decision to some stakeholders for comments. This policy acknowledges the impact of the D.C. Circuit ruling by stating that TMDLs must be written in daily terms, but does not require that permits implementing those TMDLs have daily limits. BNA Daily Environment Report, July 27, 2006, p. A-12.

the D.C. Circuit's Ruling Now Undermines Numerous Existing Water Quality Programs.

The D.C. Circuit's decision undermines the longstanding EPA interpretation that maximum pollutant loads may be expressed in non-daily terms, and casts doubt on many regulatory programs premised upon this interpretation.[7] EPA regulations since 1985 have been based upon the interpretation that TMDLs may be expressed in periods longer than a twenty-four hour period. 50 Fed. Reg. 1779, 1776 (Jan. 11, 1985); 64 Fed. Reg. 46031 (Aug. 23, 1999). The decision by the D.C. Circuit invalidating this interpretation could undermine this progress and chill the development of future TMDLs. The following are some of the programs and actions premised upon the validity of cleanup plans expressed in non-daily terms.

1. EPA and State Impaired Waters Programs.

Section 303(d) of the CWA requires states to identify impaired waters and then prepare cleanup plans (TMDLs) for those waters. States must then submit the TMDLs to EPA for approval. 33 U.S.C. §§ 1311(b)(1)(C); 1313(e)(3)(A).

If EPA follows the D.C. Circuit view that all cleanup plans must impose daily loads (in spite of the fact that EPA's current regulations state otherwise), the pace of TMDL development will be disrupted and numerous existing plans based on non-daily approaches already approved by EPA and the states may be invalidated.[8] In the District of Columbia, EPA

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[7] The D.C. Circuit Court ignored the argument that a longstanding interpretation placed on a statute by an agency charged with its administration is entitled to "great weight." NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 275 (1974).

[8] As noted in footnote 6, EPA has circulated a draft policy memorandum stating its view that all TMDLs now should be

has approved other TMDLs beyond those at issue in this case which use non-daily loads.[9] EPA Region III has also approved numerous TMDLs in Maryland and Virginia that rely upon annual loads.[10] These TMDLs are subject to challenge based upon the D.C. Circuit's decision. The impact of invalidating these TMDLs would not only have adverse regulatory consequences but would also have adverse environmental consequences. As Friends of the Earth conceded in its brief to the D.C. Circuit, "adverse environmental implications would result from vacating the TMDLs" in this case. FoE Br. at 47. Requiring daily loads for all TMDLs would stall – or completely undermine - implementation of numerous non-daily TMDLs.

Enormous public and private resources have already been invested in the development and implementation of these TMDLs. These investments will be diminished, disrupted, or wasted if these TMDLs must be redone based on daily loadings.

2. The Combined Sewer Overflow Program Established in Section 402(q).

Communities across the country with combined sewer collection systems have been designing and constructing sewer system improvements to implement the Combined Sewer Overflow Policy (the "CSO Policy") adopted by EPA in 1994 and incorporated into Section 402(q) CWA in 2000.

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expressed in daily terms in light of the D.C. Circuit's decision. BNA Daily Environment Report, July 27, 2006, p. A-12.

9 *See, e.g.,* District of Columbia TMDLs available at: http://www.epa.gov/reg3wapd/tmdl/D.C._tmdl/index.htm.

10 *See, e.g.,* Maryland TMDLs available at: http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/index.asp.

See also, Virginia TMDLs available at: http://www.deq.virginia.gov/tmdl/apptmdl.

Numerous communities have signed federal consent decrees committing to massive public works projects, often costing billions of dollars in the larger systems, in order to comply with the CSO Policy.[11]

The CSO Policy, however, is at odds with the D.C. Circuit's decision mandating daily loads in TMDLs, as WASA explained in its petition for certiorari. DC WASA Pet. for Certiorari, at 12-15. The CSO Policy promotes a flexible, site-specific approach to CSO control, which is contrary to the daily loading approach required in the D.C. Circuit decision. 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 the D.C. Circuit's daily load position. For example, the four to six untreated annual average overflows approach is fundamentally inconsistent with a daily pollutant-loading requirement for bacteria, for example. 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 a daily loading approach is required. This could cause significant disruption and cost billions of dollars in stranded public infrastructure as well as additional future control costs not intended by Congress.

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[11] U.S. Environmental Protection Agency, Report to Congress on Implementation and Enforcement of the Combined Sewer Overflow Control Policy, (Dec. 2001).

The district court recognized this problem, stating that "if municipalities cannot calculate non-daily TMDLs for their sewage overflow programs, they cannot implement EPA's CSO Policy." Friends of the Earth, 346 F. Supp. 2d at 191, n 4. Thus, the intercircuit conflict casts doubt on the validity of much of EPA's CSO Policy and the investments made in reliance on it.

3. The Chesapeake Bay Program

The cleanup plan for the Chesapeake Bay, which involves billions of dollars in investments by governments, utilities, and private companies in Maryland, Virginia, the District of Columbia, Delaware, Pennsylvania, West Virginia and New York, is premised upon an EPA decision concluding that annual permits limits are legal, necessary and appropriate in permits in the Chesapeake Bay watershed. EPA memorandum dated March 3, 2004.[12] The EPA memorandum considered 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 due to the language in section 303(d). In the memo, EPA considered 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 concluded that as a legal matter its regulations allow it to impose annual limits where the other limitations such as daily limitation would be "impracticable." 40 C.F.R. § 122.45(d). EPA then determined that the characteristics of nitrogen and phosphorous, when combined with the unique characteristics of the

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

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; nutrients react differently than toxics and conventional pollutants in the Bay ecosystem.

The entire cleanup of the Chesapeake Bay is premised upon the approach in this EPA memorandum. All of the commitments to date by EPA, the states (including extensive legislative funding and regulatory enactments), public utilities and private companies, are founded upon this non-daily approach. Requiring daily loads will undermine the fundamental approach of the Bay Program restoration effort and several billions of public dollars being invested toward compliance with the annual average loading approach for the Bay Program. Moreover, requiring a daily loading approach rather than an annual loads approach would increase the Bay Program costs by billions of dollars on top of the tens of billions already estimated.[13]

C. The D.C. Circuit Decision Invites EPA to Exempt Numerous Impaired Waters from the Cleanup Plan Program, a Result Contrary to the Primary Purpose of the Clean Water Act.

The fundamental purpose of the CWA is to restore impaired waters and prevent the future degradation of existing water quality. 33 U.S.C. § 1251. The D.C. Circuit decision construes the statute to require cleanup plans for impaired waters where

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[13] 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 dozens of regulated entities discharging to the Long Island Sound. See http://www.epa.gov/region01/eco/lis/assets/pdfs/Tmdl.pdf

daily load allocations are possible but where the pollutant in question is not suitable for daily load allocations, the court says EPA can simply exclude such pollutants from the program and no cleanup plan would be developed for waters receiving such pollutants. This construction effectively abandons the goal of restoring the water in question.

The D.C. Circuit's interpretation that all TMDLs must be expressed in terms of daily loads will result in only certain impaired waters being restored while other waters will be abandoned. This is nonsensical when cleanup plans expressing non-daily loads can be readily developed and would fulfill the primary purpose of the statute in restoring rather than abandoning these impaired waters. Thus, the D.C. Circuit's holding would absurdly and impermissibly conflict with the overall purpose of the Act. See, Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (interpretation of statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available).

Because of this statutory conflict, the Second Circuit found the Act to be ambiguous and deferred to EPA's interpretation that it could specify non-daily cleanup plans for such waters. This Court should follow the Second Circuit's ruling which provides a consistent and integrated reading to the Act rather than the internally conflicting interpretation necessarily resulting from the D.C. Circuit's ruling.

The Chesapeake Bay presents a potential example of how the D.C. Circuit's decision could be applied to create a situation clearly not intended by Congress. The Bay is impaired by nitrogen and phosphorous discharges from hundreds of point sources and thousands of non-point sources from six states. EPA has found that nutrient loadings to the Bay are not suitable for daily load calculation and, instead, has taken an annual approach. See fn.12

infra. The D.C. Circuit's decision would preclude that annual approach and because nutrient discharges to the Bay are not suitable for daily load limits, require no cleanup plan be developed for the Bay. This is the very absurd statutory dead end that the Second Circuit and several district courts have avoided by an interpretation of the Act viewing its provisions together rather than isolating the word "daily" in section 303(d).

Moreover, the D.C. Circuit's decision is practically unworkable because in the example of the Chesapeake Bay, EPA and the states must allocate nitrogen and phosphorous discharges to the Bay among hundreds of point sources and thousands of non-point sources across six states in order to ensure that water quality standards will be met in the Bay. If EPA and the states cannot do this using a non-daily TMDL/cleanup plan (for example through the proposed annual average approach) they can never ensure all of these discharges collectively will result in the attainment of water quality standards. There is no other way other than through a comprehensive allocation/cleanup plan. The D.C. Circuit's holding that TMDLs must impose "daily" loadings impermissibly conflicts with the structure and purpose of the CWA.

II. The D.C. Circuit Decision Improperly Construed the CWA.

A. The D.C. Circuit Decision Failed to Properly Consider Other Provisions of the CWA That Demonstrate Congress Did Not Mandate a Daily Approach in All Contexts.

The statutory analysis of the Clean Water Act by the D.C. Circuit failed to properly consider the context of section 303(d) in the CWA and too narrowly focused on only one word in the statute. The court essentially stopped its analysis at the word "daily" in

the undefined term "total maximum daily load," saying that it saw "nothing ambiguous about this command," citing to Webster's Dictionary and the Bible as its authority for its simple conclusion that "daily connotes every day." Friends of the Earth, 446 F. 3d at 144. The court then brushed aside all other arguments, including the contention that when considering the context of the word "daily" in the Clean Water Act, its meaning becomes less certain. The D.C. Circuit reached its conclusion that the statute is clear on its face even though three previous courts, the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Columbia, all concluded that section 303(d) was ambiguous in light of the overall CWA structure. Accordingly, those courts deferred to EPA's interpretation that it can develop non-daily TMDLs.

As the D.C. Circuit correctly noted, "the question for the court is not whether Congress understood the meaning of the word 'daily' when it inserted it into the CWA, but whether Congress had an intent regarding the applicability of the daily load concept to the CWA." Friends of the Earth, 346 F. Supp. 2d at 189. The district court then held that the text of the CWA does not reveal clear congressional intent to require EPA to calculate only daily TMDLs and exclude all other possible calculations. Id. In reaching its conclusion that the meaning of section 303(d) was ambiguous in some contexts, the district court correctly relied on the context supplied by both sections 402(p) and 402(q) of the CWA.

The D.C. Circuit, by contrast, only considered the argument that the meaning of 303(d) is ambiguous when viewed in the context of 402(q), and failed to consider the whether section 402(p) demonstrated Congressional intent on the meaning of section 303(d). The D.C. Circuit oddly and incorrectly dismissed 402(q) as being "subsequent legislative history" with

no "relevance" to Congress' intent and incorrectly overlooked 402(p). The D.C. Circuit should have considered what these sections reveal about the intent of Congress because, as the district court found, the 402 sections "reveal an ambiguity in the intent of Congress." Friends of the Earth, 346 F. Supp. 2d at 191. Sections 402(q) and 402(p) are part of the fabric of the Clean Water Act and should have been given their place in the statutory scheme by the court. The CWA should be interpreted as it is now written, not as it existed in 1972.

B. Section 402(p) of the CWA Demonstrates Congress' Intent Not to Require Daily Loads in all Contexts.

While neither EPA nor WASA argued in their briefs before the D.C. Circuit that section 402(p) of the CWA demonstrates that Congress did not intend to impose a strict daily approach in all contexts, the provision, dealing with industrial and municipal discharges of storm water, does show that Congress understood the difference between daily and non-daily approaches and did not require daily approaches in all contexts. Section 402(p)(3)(A) – industrial discharges – requires permits to meet the stricter often daily permitting requirements while in the very next section, 402(p)(3)(B) dealing with permits for discharges from municipal separate storm sewer systems ("MS4s"), Congress chose a different approach based on a system or jurisdiction-wide basis requiring controls to reduce pollutants to the *maximum extent practicable*, including practices, control techniques and system design and engineering methods." 33 U.S.C. § 1342(p)(3)(B).[14] Thus, in enacting CWA 402(p)(3) in

[14] Other CWA provisions also conflict with the D.C. Circuit's interpretation 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

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.[15] 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" storm water regulations). Like Section 402(q), the storm water 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 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.

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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. § 133.102.

[15] Storm water 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.

Accordingly, the D.C. Circuit's conclusion that daily loads must be developed for and imposed on the District's storm water discharges of BOD and TSS to the Anacostia River runs counter to the express language of section 402(p)(3)(B). 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.

C. The D.C. Circuit Incorrectly Dismissed A Key Substantive CWA Amendment as Subsequent Legislative History with No Relevance to the Meaning of the Statute.

In dismissing the argument that the CWA amendments in 2000 adding section 402(q) to the Act shed light on the meaning of section 303(d), the court mistakenly called the addition of 402(q) to the Act "post-enactment legislative history" and said it had no "relevance" in determining the meaning of other provisions in the Act. Friends of the Earth, 446 F. 3d at 147. A key substantive amendment to the Act, however, is not legislative history, but rather is a part of the Act and its provisions must be given considered when interpreting other parts of the Act.

The court incorrectly dismissed section 402(q) as subsequently legislative history. The court's reliance on Cobell v. Norton for the proposition that amendments to an act are only "post-enactment legislative history" was misplaced. Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005). In Cobell, the court considered whether appropriation bills in 1994 and 2004 and the legislative history of the bills (referring to a quotation from one Senator) shed light on the government's obligation to account for funds held in trust for American Indians based on the trust relationship first established in the General Allotment Act of 1887. The facts and statutory issues in Cobell have no bearing on the issues in this case, where subsequent Congressional amendments to the CWA

added important substantive provisions which are clearly pertinent to understanding Congressional intent.

Another case cited by the D.C. Circuit on this issue, but not followed, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000), is directly on point and the D.C. Circuit should have followed the approach to statutory construction set forth by the Supreme Court in that case. This Court, in construing the Food, Drug, and Cosmetic Act (FDCA) of 1914 and subsequent legislation on tobacco products, set forth the applicable principles for statutory construction, stating that "a reviewing court should not confine itself to examining a particular statutory provision in isolation" and "ambiguity is a creature not of definitional possibilities but of statutory context." FDA at 132-133, citing Brown v. Gardner, 513 U.S. 115, 118 (1994). The Court closely examined Congressional legislation after the passage of the FDCA in 1914 to determine the intent of Congress on the issue of whether Congress intended the FDA to regulate tobacco products. Subsequent legislation was relied on heavily by this Court in determining Congressional intent. FDA, 513 U.S. at 161. Thus, the D.C. Circuit was incorrect to dismiss subsequent CWA amendments as having no relevance to whether TMDLs can only impose daily loads. Had the court construed section 303(d) in light of Congress' intent in enacting section 402(q) rather than simply dismissing 402(q) as having no relevance, it would have concluded that 303(d) did not evidence a clear Congressional intent.

III. The Court of Appeals Ignored a Critical Element of EPA's Governing Regulations to Avoid Reviewing EPA's Determination Regarding the TMDLs at Issue in this Case and Instead Decided the Case Based on a Statutory Analysis that was Not Required.

The CWA requires EPA to identify all pollutants suitable for the development of Total Maximum Daily Loads ("TMDLs") and then develop TMDLs for waters impaired by those pollutants. 33 U.S.C. § 1313(d). Congress explicitly gave EPA the discretion to decide for which pollutants TMDLs must be developed. In the exercise of that discretion, EPA determined in 1978 that "all pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. At 60,665 (emphasis added). Thus, EPA properly reserved the ability to determine, on a case-by-case basis, that the proper technical conditions do not exist to support development of a TMDL imposing daily loads for a particular pollutant discharged to a particular water or segment thereof.

EPA applied this discretion in this case by finding that the proper technical conditions did not exist to support the development of TMDLs expressing daily loadings for BOD and TSS for the Anacostia River. The district court properly deferred to EPA's discretion and upheld EPA's determination that daily loadings were not technically appropriate for BOD and TSS discharges to the Anacostia River. The district court concluded that a TMDL with daily loadings was not mandated under these circumstances under Section 303(d) of the Act. While not required to do so, the district court then held that EPA had the discretion to develop a TMDL imposing non-daily loadings.

The D.C. Circuit committed error by misstating EPA's determination that the proper technical conditions do not exist to make daily loadings suitable for BOD and TSS discharges to the Anacostia River. The court cited in its decision to EPA's regulation in question but omitted the key language "under the proper technical conditions." 446 F. 3d at 144. The court then incorrectly attributed to EPA an unqualified regulatory determination that all pollutants are suitable for daily TMDL loads.

Having attributed to EPA a finding that all pollutants are suitable for daily loads, a finding that is flatly contradicted by the full regulatory citation and in direct contrast to the actual EPA and district court positions in this case, the court of appeals then conducted a statutory analysis which it should never have reached. The court then compounded the error by reaching a different conclusion from the Second Circuit, creating a direct intercircuit conflict that should have been avoided.

This Court should remand this case to the D.C. Circuit with instructions for the D.C. Circuit to decide whether EPA's determination that the pollutants at issue are not suitable for daily load limits in this case is valid. If valid, the case should be dismissed, as no TMDL is required under CWA Section 303(d) for these pollutants being discharged to the Anacostia.

IV. Conclusion

The intercircuit conflict ("absurd" versus "clear") creates untenable uncertainty over CWA programs and cleanup plans for thousands of impaired rivers, lakes and streams nationwide. This conflict undermines the validity of these programs and many existing and prospective cleanup plans. Review by this Court now is necessary to resolve this circuit split and, thereby, facilitate continued progress toward restoring impaired waters nationwide – the fundamental goal of the Clean Water Act.

Respectfully submitted,

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