

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH,

Petitioner,

v.

Case No.: 1:04-CV-92 (RMU)

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and  
MICHAEL O. LEAVITT, Administrator,  
United States Environmental  
Protection Agency,

Respondents,

And

DISTRICT OF COLUMBIA WATER  
AND SEWER AUTHORITY,

Intervenor-Respondent.

**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S COMBINED  
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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## GLOSSARY

<b>BOD</b>	<b>Biochemical Oxygen Demand</b>
<b>CSO</b>	<b>Combined Sewer Overflow</b>
<b>CWA</b>	<b>Clean Water Act</b>
<b>District</b>	<b>District of Columbia</b>
<b>DO</b>	<b>Dissolved Oxygen</b>
<b>EPA</b>	<b>United States Environmental Protection Agency</b>
<b>JA</b>	<b>Joint Appendix</b>
<b>NPDES</b>	<b>National Pollutant Discharge Elimination System</b>
<b>TMDL</b>	<b>Total Maximum Daily Load</b>
<b>TSS</b>	<b>Total Suspended Solids</b>

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UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY and	)	
MICHAEL O. LEAVITT, Administrator,	)	
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Protection Agency,	)	
Respondents,	)	
And	)	
	)	
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AND SEWER AUTHORITY,	)	
	)	
Intervenor-Respondents.	)	
	)	

**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY’S COMBINED  
MEMORANDUM IN SUPPORT OF SUMMARY  
JUDGMENT AND IN OPPOSITION TO PLAINTIFF’S  
MOTION FOR SUMMARY JUDGMENT**

Intervenor-Respondent, District of Columbia Water and Sewer Authority (“WASA”) has moved for summary judgment in favor of the United States Environmental Protection Agency (“EPA”) and opposes Plaintiff’s motion for summary judgment for the following reasons:

**INTRODUCTION**

Plaintiff, Friends of the Earth (“FoE”), challenges (1) EPA’s December 14, 2001 approval of the District of Columbia’s “Total Maximum Daily Load” (“TMDL”) for Biochemical Oxygen

Demand (“BOD”) for the Anacostia River; and (2) EPA’s establishment on March 1, 2002 of another TMDL for Total Suspended Solids (“TSS”). A TMDL is the total amount of a specified pollutant - or load - that an “impaired water” may receive in order to meet water quality standards. The gravamen of FoE’s case is its contention that a TMDL cannot be expressed in weekly, monthly, seasonal or annual loads, despite the fact that EPA has authorized approval of TMDLs on that basis by regulation for nearly 20 years. Instead, FoE claims that all TMDLs must be expressed only as a quantity of a pollutant over a 24-hour day. FoE further argues that the TMDLs are arbitrary and capricious. These contentions are incorrect.

WASA supports and adopts the arguments advanced and authorities cited in EPA’s Combined Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Summary Judgment and Incorporated Memorandum of Law (“EPA Mem.”) and will not repeat those arguments here. WASA submits additional arguments supporting summary judgment in EPA’s favor. First, FoE’s strained interpretation of EPA’s TMDL obligations as requiring a 24-hour load is in direct conflict with Section 402(q) of the Clean Water Act (“CWA”), and, if adopted by this Court, would undermine combined sewer overflow (“CSO”) control planning and implementation to the detriment of the water quality of the Anacostia River (as well as other water bodies nationwide that receive discharges from CSOs).

Second, FoE’s position would also undermine CSO control planning and implementation under WASA’s Draft Long Term Control Plan (“Draft LTCP”), which will cost over \$1 billion. TMDL’s expressed 24-hour loads would require complete separation of the District’s combined sewer system, which comprises one-third of the entire wastewater collection system in the District, and is not economically or technically feasible.

The record demonstrates and supports the reasonableness of the TMDLs at issue in this case, and the court should sustain EPA's decisions.

## **FACTUAL BACKGROUND**<sup>1</sup>

### **I. THE TMDL FRAMEWORK**

TMDLs are but one component of an integrated and complex statutory regime established through multiple Congressional enactments “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA, as amended by the Federal Water Pollution Control Act of 1972, controls water pollution through two different overarching strategies. The first is a “technology-based” approach, introduced in the 1972 Amendments, which relies on technology-based regulation of the quantities of pollutants discharged from point sources. Under this approach, EPA strictly regulates the discharges of pollutants into surface waters through the issuance of permits, which contain effluent limitations, to point-source dischargers. See 33 U.S.C. § 1311(b)(2)(A). A point source is any “confined and discrete conveyance,” such as a pipe or ditch, from which pollutants may be discharged to a water body. Id. § 1362(14).

The second is a “water-quality” based approach, which is based on water quality standards establishing the level of pollution that may be present in a water body, irrespective of the source of pollution. Under this approach, the CWA requires states to adopt water quality standards for their water bodies based upon their uses (such as drinking water, recreation or navigation, for example). Id. § 1313(a) and (c). In addition, the State adopts criteria specifying the amounts of various

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<sup>1</sup> As explained in the Parties’ Statements of Material Facts accompanying their summary judgment motions, review of this case is on the administrative record; there are no material facts in dispute. The factual information contained in WASA’s memorandum is derived from EPA’s administrative record.

pollutants that may be present in its waters without impairing the designated uses. 33 U.S.C. § 1313(c)(2)(A).

Where technology-based controls are not “stringent enough to implement any water quality standard applicable” to a water body, the CWA requires that the “State shall establish a priority ranking for such waters.” *Id.* § 1313(d)(1)(A). For such water bodies, the state is required to establish a “total maximum daily load for those pollutants which the [EPA] Administrator identifies.” *Id.* § 1313(d)(1)(C). Each TMDL “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” *Id.*

The CWA does not define the term TMDL. EPA proposed implementing regulations defining the term in 1982, 47 Fed. Reg. 46,668, 46,671 (Oct. 19, 1982) and published them in final form in 1985. 50 Fed. Reg. 1774 (Jan. 11, 1985). A TMDL for a pollutant is the sum of; (1) the “[wasteload allocations]” allocated to point sources; (2) the “[load allocations]” allocated to nonpoint sources, which consist of, for example, runoff from agricultural lands or streets, or natural background levels of pollutants; and (3) a margin of safety. 40 C.F.R. §130.2(h)-(i). Thus, a TMDL establishes the maximum amount of a pollutant that can be added to a water body (“its loading capacity”) without exceeding water quality standards. See Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 1520 (9<sup>th</sup> Cir. 1995).

EPA’s regulations further state that a TMDL establishes a limit on the total amount of a given pollutant a water body may receive over a period of time. See 40 C.F.R. 130.2(i). A TMDL may be “expressed in terms of either mass per time, toxicity, or other appropriate measure.” *Id.* (emphasis supplied).

TMDLs are not self-executing. Limitations in loadings identified for point sources – “waste load allocations” – are enforced through permit issued pursuant to section 402 of the CWA. Limitations in loadings for non-point sources, on the other hand, may only be required under state law. See Natural Resources Defense Council v. United States EPA, 915 F.2d, 314, 1316 (9<sup>th</sup> Cir. 1990) (noting that the CWA does not “directly prohibit” release of pollutants from non-point sources).

## II. THE ANACOSTIA RIVER

The Anacostia River drainage area covers 176 square miles in the District and Maryland. JA 664. Most of this drainage area is located in Maryland. Id.

The District of Columbia identified the Anacostia River as “impaired” pursuant to CWA section 303(d)(1)(A). See Joint Appendix (“JA”) 36; JA 384.<sup>2</sup> This is due in part to violations of the Dissolved Oxygen (“DO”) water quality standard for the River. JA 385. DO depends, in part, on the quantity of BOD in the water body. BOD is the weight of oxygen taken up mainly as a result of the oxidation of the constituents of a sample of water by biological action. Office of Energy and Renewable Energy, U.S. Department of Energy, *Information for Consumers – Information Resources Glossary* at <http://www.eere.energy.gov/consumerinfo/energyglossary.html> (last visited June 29, 2004). In other words, it measures oxygen consumed – through, for example, decomposition of organic matter. When BOD increases in a water body, DO decreases. JA 387.

The River is also listed as impaired by TSS. JA 385. TSS is a measure of suspended particles of solid matter in wastewater or a stream. TSS reduces the amount of light available for

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<sup>2</sup> The parties have utilized the Joint Appendix first filed in Friends of the Earth v. United States EPA, No. 02-1123 (D.C. Cir.).



submerged aquatic vegetation to grow and causes other problems associated with establishment of a healthy benthic aquatic habitat. JA 385.

The cause of BOD and TSS problems is multifaceted. For example, the River developed sedimentation and nutrient problems by 1850 due to deforestation and improper farming techniques. JA 385. “Channel volumes were greatly decreased and stream flow patterns were altered.” Id. Stormwater runoff and discharges from drainage areas located in the District and from upstream in Maryland contribute. JA 387, 706. Periodic discharges from the District’s CSOs also contribute. Id. Approximately one-third of the wastewater collection system in the District of Columbia consists of combined sewers, which convey both sanitary wastewater and stormwater. When the capacity of the combined sewer system is exceeded during storms, the excess flow, which is a mixture of wastewater and stormwater, is discharged to the receiving streams, including the River, which receives flow from 17 CSO outfalls. See JA 387.

In short, during and following certain rainfall events, stormwater, and non-point source discharges, and CSOs contribute to exceedances of the water quality standards for DO and TSS. See JA 387, 695, 706.

### **III. THE CHALLENGED ANACOSTIA TMDLs**

#### **A. BOD**

In December 2001, EPA approved TMDLs for the Upper Anacostia River and Lower Anacostia River for BOD. JA 611. EPA agreed that expressing the BOD TMDL in terms of an annual average would achieve the water quality standard for DO. JA 384-85.

EPA’s establishment of an annual BOD TMDL takes into consideration the unique causes of the BOD problem in the Anacostia River. JA 392. Unlike many rivers with continuous point source discharges where the worst case scenario is having too little water to create turbulence to

introduce oxygen, the Anacostia River DO problem arises from a combination of factors. JA 392. For example, there are no continuous permitted point source load that contribute to the DO problem. Instead, the problem is due to periodic rainfall events. JA 389-90. Thus, BOD discharges will vary depending upon rainfall.

Another factor arises from EPA's finding that the bottom sediment in the River accumulates BOD throughout the year. During storms, additional BOD is released and resuspended from the sediment. JA 392. "Thus, there is a memory in the sediment of BOD loads from two to three years in the past." JA 392.

In addition to considering such unique factors, EPA utilized modeling – "Tidal Anacostia Model/Water Quality Analysis Simulation Program" – to determine how the discharge of BOD impacts water quality of the River over time. JA 208. As a result of this modeling, EPA found that the allocations expressed as an annual average for the proposed TMDL would achieve daily DO criteria. JA 633-34 and 639.

## **B. TSS**

In March, 2002, EPA established TMDLs for TSS for the same waterbodies. JA 672. As part of this process, EPA examined long-term water quality data collected at various sites in order to focus on achieving the minimum light levels required for submerged aquatic life growth. JA 688. EPA concluded that a numerical endpoint of less than 15mg/l of TSS would protect aquatic vegetation. JA 687-89. The established TMDL will require a 77 percent reduction in loads from all sources from the current estimated loading. JA 673.

Like the BOD problem, TSS loading is caused by a variety of factors. TSS is precipitation driven. JA 715. The primary sources of TSS include upstream sources in Maryland, Lower

Beaverdam Creek, Watts Branch, minor tributaries and stormwater discharges, and CSOs. JA 673, 712. Upstream sources in Maryland provide the greatest TSS loadings. JA 706.

However, TSS impacts vary by season. EPA's data indicated that TSS concentrations only impacted submerged aquatic life during the growing season (i.e., April 1 to October 31). JA 715.

To determine how the discharge of TSS impacts water quality of the River over time, EPA utilized an updated version of the "Tidal Anacostia Model/Water Quality Analysis Simulation Program" modeling used for the BOD TMDL. JA 697-705. EPA studied varying scenarios in order to establish the a TSS load and selected the level resulting in a 77 percent reduction in order to achieve the 15 mg/l endpoint. JA 715-17.

#### IV. WASA

WASA provides retail water and wastewater collection and treatment services to over 500,000 residential and commercial customers in the District of Columbia. WASA also provides wholesale wastewater treatment service to over 1.6 million customers of municipal wastewater utilities serving portions of Maryland and Northern Virginia.

WASA developed and in June, 2001, submitted to EPA, pursuant to Section 402(q) of the CWA, 33 U.S.C. § 1342(q), a Draft Long Term Control Plan ("Draft LTCP"), JA 489, which, when implemented, will reduce the average volume of CSO discharges to the Anacostia River by 95.5 percent<sup>3</sup>. Draft LTCP at ES-10, 12-8, Exhibit A.<sup>4</sup> The Draft LTCP was the culmination of a multiyear, multiparty process, beginning in 1998, to evaluation and recommend a plan to reduce

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<sup>3</sup> Since the TMDLs have become final, WASA submitted a Final LTCP to EPA in August 2002, which provides that the average CSO volume will be reduced by 97.5 percent.

<sup>4</sup> The entire Draft LTCP is part of the agency record in this case, but only portions of the Draft LTCP are contained in the Joint Appendix. Where WASA cites portions not included in the Joint Appendix, WASA attaches those pages hereto as Exhibit A.

CSO discharges. Draft LTCP at 1-6 to 1-8, Exhibit A. The total estimated capital cost of implementing the Draft LTCP in 2001 dollars is over \$1 billion, and the estimated annual operating and maintenance costs are \$12.85 million. Draft LTCP at ES 6 to ES 7, Exhibit A.<sup>5</sup>

During the time that WASA was developing its Draft LTCP, the District of Columbia's Department of Health ("DOH") and EPA were preparing the TMDLs challenged in these appeals. See JA 382, 662. Data and other scientific and technical information produced by WASA during development of its Draft LTCP were used by DOH and EPA in establishing their TMDLs. Therefore, WASA's Draft LTCP provides for reductions in BOD and TSS from the combined sewer system sufficient to meet the wasteload allocations established in the TMDLs. Accordingly, any change to the TMDLs for BOD and TSS will have a direct impact on the implementation of WASA's Draft LTCP. In particular, the relief requested by FoE, if granted, would effectively preclude WASA from implementing its Draft LTCP under the current District water quality standards.

### **STANDARD OF REVIEW**

FoE broadly challenges EPA's authority to establish or approve TMDLs for timeframes other than a 24-hour period and claim also that TMDLs are arbitrary and capricious.

Judicial review is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, which establishes a highly deferential standard of review for agency action. Such action is valid unless, inter alia, it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review presumes the validity of

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<sup>5</sup> Under the Final LTCP, the implementation costs are estimated to be even more - \$1.265 billion and annual operating costs of \$13.36 million.

agency action. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 944 (1976). The court is not “to substitute its judgment for that of the agency.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). If the agency’s reasons and policy choices conform to “certain minimal standards of rationality,” the action is reasonable and must be upheld. Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 521 (D.C. Cir. 1983)(quoting Ethyl Corp., 541 F.2d at 36).

As to statutory interpretation, it is a “dominant, well settled [sic] principle of federal law” that reviewing courts must accord deference to federal agencies’ interpretations of statutes Congress has charged them with administering. National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417 (1992) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). This principle mandates that:

if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. Chevron U.S.A., supra, at 843. If the agency interpretation is not in conflict with the plain language of the statute, deference is due.

National R.R. Passenger Corp., 503 U.S. at 417-18. Also, the words of a statute much be read in the context of the overall statutory scheme. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

The rule of deference is based on institutional fundamentals concerning the relationship between Congress, Executive agencies, and the Courts. See Chevron, 467 U.S. at 843-44. “To sustain [an agency’s] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.” Udall v. Tallman, 380 U.S. 1, 16 (1965) (quotation and citation omitted).

Also, 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).

## ARGUMENT

FoE contends that the CWA requires TMDLs to be expressed only as a quantity of a pollutant over a 24-hour day. Memorandum in Support of Motion of Plaintiff Friends of the Earth for Summary Judgment (“FoE Mem.”) at 13-14. EPA demonstrates that expressing TMDLs in time periods other than 24-hours is fully consistent with the CWA. EPA Mem. at 11-15. The CWA does not specify how a TMDL should be expressed, leaving it to EPA (and the states, where appropriate) to make that determination so long as compliance with applicable water quality standards is assured. Id. at 12. Moreover, the Court of Appeals for the Second Circuit considered and rejected the precise argument raised here by FoE. Natural Resources Defense Council, Inc. v. Muszynski, 268 F.3d 91 (2d Cir. 2001).

In addition to EPA’s arguments, as well as the reasoning of the Second Circuit, WASA submits that FoE’s interpretation (1) directly conflicts with Section 402(q) of the CWA; and (2) contravenes well-settled principles of statutory construction.

### **I. FoE’S INTERPRETATION CONFLICTS WITH CWA SECTION 402(q)**

The Weather Water Quality Act of 2000, Pub. L. 106-554, § 112(a), 114 Stat. 2763, added Section 402(q) to the CWA. Section 402(q) specifically references EPA’s April 11, 1994, Combined Sewer Overflow Control Policy (“CSO Policy”), and provides that after December 21, 2000, (the date of enactment of the Wet Weather Water Quality Act) each permit, order or decree issued pursuant to the CWA for a discharge from a combined storm or sanitary sewer must conform to the CSO Policy. Section 402(q)(1), 33 U.S.C. § 1342(q)(1). FoE’s assertion that the CWA

requires TMDLs to be expressed only as a quantity of pollutant over a 24-hour day is fundamentally inconsistent with Congress' approach to CSO control, as reflected in the CSO Policy. In fact, as demonstrated below, FoE's contention, if sustained, would effectively preclude implementation of the CSO Policy by requiring that all CSO discharges be eliminated - which is not only impossible, but also could result in diminished water quality in many cases.

There are nearly 800 CSO communities nationwide. U.S. Environmental Protection Agency, Report to Congress -- Implementation and Enforcement of the Combined Sewer Overflow Control Policy at ES-5, EPA 833-R-01-003, (Dec. 2001) ("CSO Report to Congress"). When EPA developed the CSO Policy, it acknowledged that CSOs were a water quality challenge which had been in existence for well over a century in most older, urban areas in the United States. The CSO Policy established for the first time a consistent national framework that recognized the site-specific controls needed to address CSO impacts on local waterbodies, and the financial challenges facing cities to cost-effectively control CSOs. Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994).

The CSO Policy provides that each local government with a combined storm and sanitary sewer system must develop and implement a Long Term CSO Control Plan ("LTCP") that achieves compliance with applicable water quality standards. *Id.* at 18,691. The CSO Policy recognizes that CSO discharges are intermittent, rainfall-driven events, and, therefore, the CSO Policy promotes and encourages a flexible, site-specific approach to CSO control. *Id.* This approach is designed to take into account site-specific conditions such as individual sewer system characteristics, topography, geology, and rainfall that affect CSO discharge volume, frequency, duration, intensity, and pollutant loads. *See e.g., Id.* at 18,691-92.

FoE's contention that TMDLs must be expressed on a daily basis conflicts with the CSO Policy. For example, a basic element of the CSO Policy's long term control planning process is the evaluation of control alternatives leading up to the selection of a final control plan.

[T]he long-term CSO control plan [should] consider a reasonable range of alternatives. The plan should, for example, evaluate controls that would be necessary to achieve zero overflow events per year, an average of one to three, four to seven, and eight to twelve overflow events per year. Alternatively, the long-term plan could evaluate controls that achieve 100% capture, 90% capture, 85% capture, 80% capture, and 75% capture for treatment.

Id. at 18,692. Also, the CSO Policy gives CSO communities the option of developing a LTCP that, when implemented, provides for (1) no more than an average of four overflow events per year; (2) elimination or capture for treatment of no less than 85 percent by volume of the combined sewage; or (3) elimination or removal of no less than 85 percent of the mass of pollutants in the combined discharge. Id. at 18,692-93. Nationwide, only one half of the documented LTCPs identify sewer separation as one of the anticipated CSO control measures to be implemented. More than 200 CSO communities will employ CSO control measures that, consistent with Congressional intent, contemplate some continued CSO discharges after LTCP implementation. See CSO Report to Congress at 6-19 and 6-20.

Thus, the control alternatives and options in the CSO Policy authorize continued CSO discharges following LTCP implementation provided water quality standards are attained. None of these alternatives (except zero CSOs) could even be considered, much less implemented, under the 24-hour interpretation advanced by FoE.

FoE also suggests that annual or seasonal loads are fundamentally inconsistent with standards compliance when applied to wet weather discharges such as CSOs. See FoE Mem. at 20-22. To the contrary, the CSO Policy expressly provides for establishment of numeric performance



standards for the selected CSO controls based on average design conditions. *Id.* at 18,696. The CSO Policy, therefore, not only recognizes the appropriateness of using annual loads as the basis for establishing CSO control performance standards to achieve compliance with water quality standards, it directs that the performance standards be based on average design conditions. FoE's assertions are fundamentally inconsistent with this aspect of the CSO Policy.

## **II. FoE'S 24-HOUR INTERPRETATION, IF ADOPTED, WOULD UNDERMINE WASA'S LONG TERM CSO CONTROL PLAN**

In addition to conflicting with Section 402(q) of the CWA, FoE's 24-hour interpretation, if adopted, would have serious and wide-ranging practical ramifications for WASA's CSO program, which further demonstrates that FoE's argument should be rejected. The Supreme Court has long held that a court must avoid statutory interpretations that lead to absurdities or unjust results, if alternate, reasonable interpretations may be found. See Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended to its language, which would avoid results of this character." United States v. Kirby, 74 U.S. 482, 486-87 (1869). Indeed, the Second Circuit has already found that FoE's 24-hour interpretation is "absurd." Muszynski, 268 F.3d at 99.

In the present case, WASA operates combined sewers in the Anacostia watershed, which, without any controls, discharge to the River an average of 75 times per year through 17 outfalls. Draft LTCP at 3-1, 12-8. WASA's Draft LTCP calls for the installation of CSO controls that will reduce CSO discharges to the Anacostia River from an average of 75 per year to an average of four per year and CSO volume from an average of 2,142 million gallons per year ("mgy") to an average

of 96 mgy, which is a 95.5 percent reduction in the average volume of CSO discharged to the Anacostia without any controls. Draft LTCP at 12-8, Exhibit A.<sup>6</sup>

In accordance with the CSO Policy, WASA identified and evaluated a number of control alternatives during the development of its Draft LTCP. Among these alternatives, complete separation of the combined sewer system was identified as the only alternative that would totally eliminate CSO discharges. Draft LTCP at 8-29, Exhibit A. The following analysis from WASA's evaluation of the complete separation alternative against the control plan adopted in the Draft LTCP demonstrates both the legal and practical consequences of adopting FoE's position that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day.

First, the BOD TMDL allocates an annual load of 152,906 pounds of BOD to the CSOs discharging to the Anacostia River. This allocation can be achieved with the control plan adopted in the Draft LTCP because it projects an average of two overflows per year discharging a total of 10,253 pounds of BOD on an annual average basis. Draft LTCP at 9-23, JA 520. However, if the 152,906 pound annual load was converted to a daily load, the authorized daily loading from the CSOs would be only 418.9 pounds per day of BOD. Id. It is apparent from the Draft LTCP that this daily load allocation could not be achieved with the recommended plan because the entire projected annual BOD load of 10,253 pounds would be discharged during the few overflows remaining after implementation of the Draft LTCP. Id. at 9-23 and 9-24, JA 520 and JA 521. Accordingly, the Draft LTCP concludes that only complete separation of WASA's combined sewer system would achieve a BOD allocation expressed as a daily load. Id. As discussed earlier, separation is only one of several control alternatives recognized by the CSO Policy.

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<sup>6</sup> WASA's LTCP encompasses more than control of CSO discharges to the Anacostia River. It also provides for the control of CSO discharges to the Potomac River and Rock Creek. Draft LTCP at 12-8, Exhibit A.

Second, in concluding that complete separation of the combined sewer system is not economically or technically feasible, the Draft LTCP makes the following observations.

- **Disruption** – Separation essentially involves constructing a duplicate sewer system for the central one third of the District. Sewer construction would be necessary in every neighborhood and in the vast majority of streets in each neighborhood. Disruption associated with construction would be significant, widespread, and long lasting....
- **Impacts to Private Property** – the majority of buildings in the combined sewer area have roof drains and gutters discharging to the building sanitary system, which in turn discharges to the combined sewer system. Separation on private property would thus be required. Past separation experience in the District and in other cities has shown that obtaining access and permission from private property owners can be difficult, time consuming, and, in some cases, not achievable....
- **Technical Difficulty** – Other cities have discovered some separation projects to be much more difficult to construct than [sic] originally anticipated. In some cases, the efforts to separate sewer systems have been abandoned. Part of the reason for this is that there are many unknowns involved in working with sewer systems which have been constructed over a long period of time. Records showing the location and nature of existing facilities may not exist. Costs and difficulties of construction can be much greater than originally anticipated depending on what is actually discovered. Public opposition to such a program may increase as actual construction proceeds.

WASA Draft LTCP at 8-23 to 8-24, Exhibit A.

Finally, WASA's Draft LTCP concludes that complete separation of the combined sewer system would provide less water quality benefit to the Anacostia than the final plan because separation diverts more water to the stormwater system. The Draft LTCP explains how this, in turn, can adversely affect water quality.

[T]he separate storm water system delivers pollutants to the receiving waters practically every time it rains, thereby adversely impacting water quality a great many times per year. With a high degree of CSO control, the loads is [sic] only delivered to the receiving water between 2 and 12 times per year

(depending on the degree of control selected). Even though the overall load may be somewhat higher, CSO discharges have a more limited impact because they are occurring far less frequently than storm water discharges which occur more than 70 times per average year.

WASA Draft LTCP Report at 8-24, Exhibit A.

In short, FoE's position, if sustained, could lead to absurd and unjust results; namely, dramatically increased costs for WASA ratepayers, extended and widespread disruption throughout much of the District, and poorer water quality.<sup>7</sup> Well settled principles of statutory interpretation compel the Court to avoid these consequences. Kirby, 74 U.S. at 486-87.

### CONCLUSION

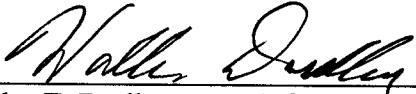
FoE's contention that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day is in direct conflict with Section 402(q) of the CWA, and, if adopted, would undermine CSO control planning and implementation to the detriment of water quality in the Anacostia River. If adopted, FoE's interpretation of EPA's TMDL obligation also could disrupt the efforts of EPA and the states, as well as WASA to implement the CWA's CSO provisions. Therefore, WASA requests that this Court deny the FoE's Motion for Summary Judgment and grant summary judgment in favor of EPA.

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<sup>7</sup> This is true not only for WASA but also for the hundreds of cities nationwide that are developing and implementing costly LTCPs to comply with the CWA and that do not involve complete separation of their combined sewer systems. CSO Report to Congress at 6-20.

Respectfully submitted,

**DISTRICT OF COLUMBIA WATER  
AND SEWER AUTHORITY**  
*by Counsel*



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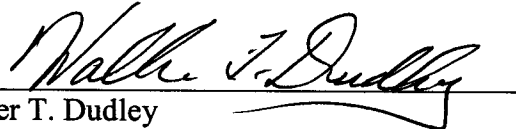
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing District of Columbia Water and Sewer Authority's Combined Memorandum in Support of Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment was filed electronically and was sent via first-class, postage prepaid, the 1st day of July, 2004 to:

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