No. 05-5015

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision below barring the Environmental Protection Agency and the states from establishing TMDLs on an annual, seasonal or other appropriate basis, which rests on the appearance of the word "daily" in the undefined term "total maximum daily load," contravenes basic principles of statutory interpretation as reflected in the decisions of this Court and those of other circuit courts.

2. Whether the decision below barring the Environmental Protection Agency and the states from expressing maximum pollution loads for impaired water bodies on an annual, seasonal or other appropriate basis leads to absurd and unjust results.

PARTIES TO THE PROCEEDINGS

Friends of the Earth, Inc. appeared as plaintiff in the proceedings below, the judgment in which review is sought. The United States Environmental Protection Agency appeared as defendant. The District of Columbia Water and Sewer Authority ("WASA") appeared as intervenor-defendant. National Association of Clean Water Agencies and the CSO Partnership appeared as *amici curiae*. All parties, intervenors and *amici* appearing before this Court are the same as those before the courts below.

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PETITION FOR A WRIT OF CERTIORARI

WASA petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006). WASA is an independent authority of the Government of the District of Columbia created in 1996 by the United States and the Government of the District of Columbia to distribute drinking water and provide wastewater collection and treatment to citizens and businesses in the metropolitan Washington, D.C. area. WASA operates the wastewater collection and treatment system for the District of Columbia, including the Blue Plains advanced wastewater treatment plant. Blue Plains serves portions of surrounding areas, including Fairfax County, Virginia, Loudoun County, Virginia, Montgomery County, Maryland, and Prince Georges County, Maryland, in addition to the District of Columbia. The service area for Blue Plains covers approximately 735 square miles.

OPINION BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 446 F.3d 140. WASA did not request panel and *en banc* rehearing. The court of appeals' mandate is included in the Appendix (App. 1c).

JURISDICTION

This case was filed in the district court pursuant to the Administrative Procedure Act. 5 U.S.C. §§ 551, *et seq.* The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . to judicial review thereof." *Id.* § 702. Under the APA, a reviewing court must set aside an agency

action only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Jurisdiction was under 28 U.S.C. § 1331.

Friends of the Earth appealed the district court's decision to the court of appeals, which entered its judgment on April 25, 2006.

This Court has jurisdiction to review the decision of the court of appeals by way of *certiorari* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED IN THE CASE

Article I, § 1, of the United States Constitution provides in pertinent part that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States...."

Clean Water Act § 303(d), 33 U.S.C. § 1313(d) provides:

> (d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.
>
> (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1313(b)(1)(A) and section 1313(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.
>
> (B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.
>
> (C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load 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.
>
> (D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the

identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate

them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314 (a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

STATEMENT OF THE CASE

This case involves the important question of the EPA's and the states' statutory authority to control the levels of pollutants that may be released into lakes, rivers and streams where Clean Water Act permit limitations and other controls imposed on localities and commercial activities do not bring those water bodies into attainment with the water quality standards.

Congress adopted the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* at § 1251 and, to that end, created two overarching, but complementary, strategies within the statute. The primary strategy focuses upon limiting the amounts of pollutants discharged from a pollution source through the issuance of permits containing technology-based effluent limitations. *Id.* at § 1342.

The other, secondary, strategy is the Act's focus on water quality standards. *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 279 (D.C. Cir. 1981) (noting that the Clean Water Act "assigned secondary priority to the standards and placed primary emphasis upon both a point source discharge permit program and federal technology-based effluent limitations"). Sections 303(a) through (c) of the Act direct the states, with federal approval and oversight, to adopt and maintain water quality standards for surface waters. 33 U.S.C. §§ 1313(a)-(c). States designate the use or uses for which each waterway is to be protected (*e.g.*, recreation, propagation of fish) and determine the levels of water quality need to support the designation. *Id.* at § 1313(c)(2)(A).

Section 303(d), the provision at issue in this case, requires each state to identify those waters that will not achieve water quality standards after application of technology-based controls and effluent limitations. *Id.* at § 1313(d). For such waters (known as "water quality limited segments" or "WQLS"), states must establish pollutant loadings - called "Total Maximum Daily Loads" ("TMDLs") – for each pollutant of concern at a level necessary to implement the applicable water quality standard. *Id.* at § 1313(d)(1)(A), (C).

Congress did not define the term TMDL but did recognize that it equals the maximum concentration of a pollutant in a waterbody and is calculated "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.* at § 1313(d)(1)(C). EPA's regulations define a TMDL for a pollutant as the sum of (1) the "wasteload

allocations" allocated to point sources;[1] (2) the "load allocations" allocated to nonpoint sources or natural background; and (3) a margin of safety. 40 C.F.R. § 130.2(i). EPA regulations allow TMDLs to be expressed "in terms of either mass per time, toxicity, or other appropriate measure," 40 C.F.R. § 130.2(i), including, for example, annual or seasonal measures. EPA's approval of TMDLs is based upon a detailed scientific analysis and modeling of the particular pollutants of concern and water bodies at issue.

In 1998, the District of Columbia determined that the Anacostia River was in violation of the District's water quality standards for dissolved oxygen and turbidity (muddy or cloudy conditions). After assessing the conditions of the river, the pollutants of concern - biochemical oxygen demand ("BOD") and total suspended solids ("TSS") - and after complex scientific modeling, the District adopted, and EPA approved, a BOD TMDL measured on an annual basis and EPA established a TSS TMDL measured on seasonal average daily concentrations.

In 2003, Friends of the Earth filed suit against the EPA in the D.C. Circuit, claiming that both the BOD and the TSS TMDLs were insufficient for achieving the District's water quality standards and that EPA acted arbitrarily in approving them. *Friends of the Earth, Inc. v. Environmental Protection Agency*, 333 F.3d 184 (D.C. Cir. 2003). The D.C. Circuit dismissed the action for lack of subject-matter jurisdiction. Friends of the Earth then filed suit in the district court for review pursuant to the APA. On consideration of that complaint and of the parties' cross-

[1] A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "Nonpoint sources" are sources of pollutants that are not "point sources," such as runoff from fields.

motions for summary judgment, the district court held the "TMDL locution ambiguous in the context of the Clean Water Act as a whole" and, "because sufficient evidence exists [in the Administrative Record] that the TMDLs [at issue] were reasonably calculated to achieve daily water quality standards," EPA and WASA's motions for summary judgment should be granted. *Friends of the Earth, Inc. v. Environmental Protection Agency*, 346 F. Supp. 2d 182, 185 (D.D.C. 2004).

On appeal of the district court's decision, the D.C. Circuit found that all TMDLs must be expressed only as a quantity of a pollutant over a 24-hour day, despite the recognition in the Act that some events are seasonal and despite EPA's and the States' longstanding and previously unchallenged interpretation of the TMDL requirement, reversing the district court. *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140, 148 (D.C. Cir. 2006).

As discussed below, the D.C. Circuit's decision is in direct conflict with basic principles of statutory construction as reflected in prior decisions of the Supreme Court. The decision is also is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). There, the Second Circuit held on virtually identical facts that the application of pollutant load on a strictly daily basis, based merely on the use of the word "daily" in the phrase "total maximum daily load," is "absurd." *Id.* at 99. The Second Circuit held that TMDLs may be "expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies." *Id.* Of course, any such alternative expression results in a

daily average even though that daily average is too blunt an instrument to itself serve as an effective regulatory standard.

The D.C. Circuit's decision creates an intercircuit conflict on an issue of substantial public importance – the ability of EPA and each State to regulate literally "hundreds of different pollutants in thousands of different waterbodies" in the United States. *Id.* at 97. The decision also places into irreconcilable dispute the ability of businesses and government agencies that treat and discharge wastewater to obtain consistent and reasonable regulation. In particular, requirements imposed upon dischargers in the District of Columbia could be different from those imposed by neighboring states for the very same water bodies.

WASA now seeks the review of this Court.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Decision Barring The Environmental Protection Agency And The States From Establishing TMDLs On An Annual, Seasonal Or Other Appropriate Basis Conflicts With Principles Of Statutory Interpretation Adopted By This Court And Is In Direct Conflict With A Decision of the Second Circuit.

The panel below found that the appearance of the word "daily" in the phrase "total maximum daily load" means that Congress expressly intended that all TMDLs be measured on a 24-hour basis. 446 F.3d at 146 (App. 2a). This semantic assessment violates basic principles of statutory construction espoused by the Court. When read in context, the circuit court's decision cannot be sustained.

This Court has held that "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). "In determining whether Congress has specifically addressed the question at issue, a reviewing court *should not confine itself to examining a particular statutory provision in isolation.* The meaning – or ambiguity – of certain words or phrases may only be evident when placed in context." *Id.* at 132 (emphasis added). For example, in *Brown & Williamson*, the Court looked at the "core objectives" of the Food, Drug & Cosmetic Act ("FDCA") before finding that the FDA did not have jurisdiction or authority to regulate tobacco as a "drug" under the FDCA. *Id.* at 133, 161. Both this Court and the D.C. Circuit have held that the complexity of the Clean Water Act militates in favor of judicial deference to EPA's statutory construction. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C. Cir. 1981) ("Courts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments.").

Contrary to these principles, the D.C. Circuit plucked a single word - "daily"- from its context as an undefined term in § 303(d) and elevated it to the definitive standard. When placed in context with the rest of § 303 as well as the entire Clean Water Act, and not reviewed in isolation, the word "daily" cannot have the seminal meaning and importance attached to it by the circuit court. As the district court correctly concluded, "the term 'daily' from 'total maximum daily load' should not be read in isolation as a sacred signifier and bring an end to judicial review." *Friends of the Earth, Inc. v. Environmental Protection Agency*, 346 F. Supp. 2d 182, 190 (D.D.C. 2004).

When read in context with of the rest of section 303(d)(1)(C), a TMDL must be established at a "level necessary to implement the applicable water quality standards" and must take "seasonal variations and a margin of safety" into account. 33 U.S.C. § 1313(d)(1)(C). Thus, the statute expressly provides that TMDLs must be expressed in terms that are appropriate for the characteristics of both the waterbody at issue and the particular pollutant(s) of concern. This simply does not ordain that "daily" is the exclusive measurement for all possible pollutants for all waterbodies throughout the United States.

The D.C. Circuit did not directly address this argument. Instead, it said only that this "cannot be right." *Friends of the Earth v. Environmental Protection Agency*, 446 F.3d 140, 145 (D.C. Cir. 2006) (App. 6a). On the contrary, when placed in context with the rest of the section, EPA's interpretation is reasonable. An agency's construction of its governing statute is given "controlling weight" not only where the agency attempts to "fill[] a gap" in the statute, but also where the agency "'defines a term in a way that is reasonable in light of the legislature's revealed design.'" *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (citations omitted). The *Haggar* Court observed that a statute may still "be ambiguous, for purposes of *Chevron* analysis, without being inartful or deficient," noting that "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." *Id.*

Also, when read in context with other sections of the Clean Water Act, the D.C. Circuit's new, judicially-created TMDL definition could preclude implementation of substantial portions of that Act. For example, Congress adopted section 402(q) of the Clean Water Act to regulate

discharges of pollutants from combined sewer systems[2] and directed that each permit, order or decree issued pursuant to the Clean Water Act for a discharge from a combined sewer must conform to the Combined Sewer Overflow Control Policy ("CSO Policy").[3] 33 U.S.C. § 1342(q)(1). The D.C. Circuit's decision, if sustained, is fundamentally inconsistent with Congress' approach to combined sewer overflow ("CSO") control, as reflected in the CSO Policy.

The CSO Policy provides that each local government with a combined storm and sanitary sewer system - like the District - must develop and implement a Long Term CSO Control Plan ("LTCP") that achieves compliance with applicable water quality standards. Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688, 18,691 (Apr. 19, 1994). 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

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[2] A combined sewer system ("CSS") carries both sewage, and during wet weather, storm water run off. Like many older cities in the United States, the District's sewer system consists of both separate and combined systems. Approximately one-third of the District (12,487 acres) is served by the CSS, which is located mostly in the older, central portion of the city.

[3] The Record before the lower courts showed there are nearly 800 CSO communities nationwide, including the District of Columbia. 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 substantial 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 Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994).

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.

The D.C. Circuit's decision requiring that TMDLs be expressed only on a daily basis directly conflicts with the CSO Policy. For example, a basic element of the CSO Policy's permit provisions is a requirement that permits issued after LTCP development include "numeric performance standards for the selected CSO controls, *based on average design conditions*." *Id.* at 18,696. (Emphasis added). Further, the CSO Policy's long term control planning process requires an 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 are consistent with the concept of a 24-hour load because they recognize that in the case of wet weather-driven discharges such as CSOs, water quality standards compliance is not dependent on the amount of pollutants discharged over a 24-hour period.

The D.C. Circuit discounted § 402(q) as "'post-enactment legislative history'" because it was not part of the original enactment of the Clean Water Act. *Friends of the Earth, Inc.*, 446 F.3d at 147 (citation omitted) (App. 11a). In fact, § 402(q) is not legislative history; rather, it is a part of the fabric of the Clean Water Act. Moreover, the court's interpretation runs directly contrary to this Court' analysis in *Brown & Williamson*, where the Court examined several statutes governing tobacco products enacted subsequent to the FDCA in order to determine whether the FDCA provided authority to regulate tobacco as a "drug." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 137-38.

The United States Court of Appeals for the Second Circuit has rejected the interpretation of the term "daily" adopted by the D.C. Circuit and the notion that TMDLs can only be expressed in terms of a 24-hour day. *Natural Resources Defense Council, Inc., v. Muszynksi*, 268 F.3d 91, 98 (2d Cir. 2001). There, the Second Circuit said:

We believe, however, that the term "total maximum daily load" is susceptible to a broader range of meanings. Indeed, NRDC's overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA. The CWA contemplates the establishment of TMDLs for an open-ended range of pollutants that are susceptible to effective regulation by such means. *See* 33 U.S.C. § 1313(d)(1)(c) (noting that states must establish TMDLs for all "pollutants which the Administrator identifies . . . as suitable for such calculation"). In the case of each pollutant, effective regulation requires agencies to determine how the pollutant enters, interacts with, and, at a certain level or under certain conditions, adversely impacts an affected waterbody. In the case of highly toxic pollutants that may work harmful effects upon a waterbody almost immediately when present at small levels, close regulation at a daily level may be most appropriate. In the case of other pollutants, like phosphorus, the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately. In short, the CWA's effective enforcement requires agency analysis and application of information concerning a broad range of pollutants. We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in

> application to regulation of pollutant loads on a strictly daily basis. Such a reading strikes us as absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one.

Id. at 98-99. WASA submits that the Second Circuit's analysis is correct and, unlike the D.C. Circuit's opinion below, is consistent with this Court's rules for statutory construction.

II. The D.C. Circuit's Decision Barring The Environmental Protection Agency And The States From Establishing TMDLs On An Annual, Seasonal Or Other Appropriate Basis Leads To Absurd Results As Concluded By The Second Circuit.

Another basic principle virtually ignored in the D.C. Circuit's opinion is 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 exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 74 U.S. 482, 486-87 (1869). *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") As explained above, the Second Circuit has already found that

a 24-hour interpretation is "absurd." *Muszynski*, 268 F.3d at 99.

Here, the D.C. Circuit's decision leads to the same absurd and unjust results described by the Second Circuit. In particular, the decision could result in drastically different water quality-based requirements for discharges in the District of Columbia (which is in the D.C. Circuit) from those originating in adjacent states (which are in the Fourth Circuit) for the very same water bodies.

Moreover, the decision could lead to dramatically increased costs for ratepayers, extended and widespread disruptions, and *poorer water quality* if it is applied to require daily load caps on CSO discharges. For example, the Administrative Record before the lower courts in the present case demonstrated that, in accordance with the CSO Policy, WASA identified a number of control alternatives during the development of its LTCP. Studies conducted in connection with preparation of the LTCP found that in order to totally eliminate CSO discharges and thereby achieve a BOD waste load allocation which imposed a daily load cap, the combined sewer system would have to be completely separated. WASA's LTCP also concluded that complete separation of the combined sewer system would not be economically or technically feasible as it would lead, in part, to the following.

- 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 that [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.

JA 529-530; pp. 8-23 to 8-24.

WASA's LTCP found also 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 storm water system. The 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.

JA 530; p. 8-24.

Thus, the D.C. Circuit's interpretation could result in increased pollutant loadings to the Nation's waters and contravene the basic purposes of the Clean Water Act, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §

1251. *See, e.g., Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (internal citation omitted) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

The D.C. Circuit ignored the Administrative Record, holding that its own prior decisions for demonstrating an absurdity apply an "exceptionally high burden." *Friends of the Earth, Inc.* , 446 F.3d at 146 (App. 9a). And, according to the court, EPA failed to meet that burden because it conceded that daily loads make sense in some circumstances. This analysis circumvents this Court's long-standing requirement that statutory interpretations should not result in an absurdity.

III. This Case Involves An Important Question of Federal Law Concerning the Breadth and Scope of the TMDL Requirement That Has Not Been, But Should Be, Settled by this Court.

This Court has determined that the Clean Water Act should be liberally construed in conformance with its remedial purposes to avoid harsh and incongruous results and that the complexity of the Clean Water Act militates in favor of judicial deference to EPA's statutory construction. *See Chem. Mfrg. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985); *United States v. Riverside Homes, Inc.*, 474 U.S. 121, 131-134 (1985).

The Court has yet to address the issue of what properly constitutes a valid TMDL. As such, the issue remains unsettled and the circuits have now created disparate interpretations in an effort to resolve the issue. The immediate case presents this Court with an opportunity to resolve the important federal question of what constitutes the appropriate measure for a TMDL, which will effect how each state and EPA will control literally "hundreds of different pollutants in thousands of different waterbodies" in the United States. 268 F.3d at 97.

CONCLUSION

The D.C. Circuit's decision that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day fails to apply basic principles of statutory construction required by this Court and is in direct conflict with the Clean Water Act. If allowed to stand, there will remain an intercircuit split that could undermine CSO control planning and implementation to the detriment of water quality. Therefore, WASA requests that this Court grant WASA's petition and resolve this conflict between the circuits.

Respectfully Submitted,

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