ORAL ARGUMENT NOT YET SCHEDULED

Case No. 05-5015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH,

Appellant,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Appellees.

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

INITIAL OPENING BRIEF OF APPELLEE
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

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Dated: October 11, 2005 (Initial)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Appellees, And DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Appellee-Intervenor.	No. 05-5015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES OF APPELLEE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

Pursuant to Circuit Court Rule 28(a)(1), the undersigned counsel of record for the District of Columbia Water and Sewer Authority ("WASA") submits the following certificate as to parties, rulings, and related cases.

A. Parties and Amici.

1. Parties, intervenors, and amici who appeared in the district court.

Friends of the Earth ("FoE") appeared as plaintiff. The United States

Environmental Protection Agency ("EPA") appeared as defendant. WASA appeared as intervenor-defendant.

2. Persons who are parties, intervenors, and amici in this Court. All parties, intervenors and amici appearing before this Court are the same as those before the district court. FoE is appellant, EPA is appellee and WASA is intervenor-appellee. WASA is an independent authority of the Government of the District of Columbia. It was created in 1996 by the United States and the Government of the District of Columbia to provide drinking water and wastewater collection and treatment to citizens and businesses in the metropolitan Washington, D.C. area. National Association of Clean Water Agencies ("NACWA") and the CSO Partnership are amici curiae.

B. Rulings under review. The rulings at issue relate to the district court's November 29, 2004 memorandum opinion and order denying FoE's motion for summary judgment and granting summary judgment in EPA's and WASA's favor.

C. Related Cases. Related cases include Petitions for Review in the cases styled Friends of the Earth v. United States Environmental Protection Agency, et al., Record Nos. 02-1123 and 02-1124, which were dismissed by this Court on August 15, 2003.

Dated: October 11, 2005

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY
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GLOSSARY

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

JURISDICTIONAL STATEMENT

WASA agrees with and adopts the jurisdictional statement contained in the opening brief of Appellee, United States Environmental Protection Agency ("EPA Brief").

STATEMENT OF ISSUES

WASA agrees with and adopts the statement of issues contained in the EPA Brief.

STATUTES AND REGULATIONS

All applicable statutes and regulations are attached to the EPA Brief and are adopted here by reference.

STATEMENT OF THE CASE

Appellant, 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") (collectively, the "Anacostia TMDLs").

A TMDL expresses the total amount of a given pollutant that a particular water body may receive and still achieve water quality standards. FoE's case is based on its contention that (1) all TMDLs must be expressed only as a quantity of

a pollutant over a 24-hour day, and (2) EPA's establishment and approval of the Anacostia TMDLs was arbitrary and capricious.

By order dated November 29, 2004, the district court denied FoE's motion for summary judgment and granted the appellees' motions for summary judgment. FoE appeals the district court's order.

STATEMENT OF FACTS

WASA agrees with and adopts the statement of facts set forth in the EPA Brief and provides the following additional factual background.

I. 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 Virginia. 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 suburban Virginia and Maryland in addition to the District of Columbia. The service area for Blue Plains covers approximately 735 square miles. Approximately one-third of the wastewater collection and treatment system in the

District of Columbia consists of combined sewers, which convey both sanitary wastewater and storm water in one pipe.

II. The Combined Sewer System

Pollutants discharged to the Anacostia are from three sources, all of which are related to wet weather events. JA XX. Unchanneled run off from land in the District and Maryland carries with it a variety of pollutants that are discharged to the Anacostia throughout the watershed. JA XX. Storm water containing dissolved and suspended pollutants washed from roads, the roofs of buildings, and other impervious areas in the watershed in the District and Maryland is channeled and discharged through numerous constructed outfalls. JA XX.

The third source of pollutants to the Anacostia is the combined sewer system ("CSS"), which, unlike the other sources, is located entirely within the District of Columbia. Like many older cities in the United States, the District's sewer system consists of both separate and combined systems. JA XX. 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. The CSS carries both sewage, and during wet weather, storm water run off. During and following wet weather, much of the combined sewage and storm water is conveyed to and treated at Blue Plains and at a satellite treatment facility located near Kennedy Stadium; however, when the volume of flow in the CSS exceeds the capacity of the system, the excess flow or

combined sewer overflow ("CSO"), is discharged through outfalls to the Anacostia, the Potomac, and Rock Creek. The CSS has a total of 60 CSO outfalls, 17 of which are in the Anacostia watershed. JA XX. The CSS is subject to EPA's April 19, 1994 Combined Sewer Overflow Control Policy ("CSO Policy"), which Congress incorporated into amendments to the Clean Water Act entitled the Wet Weather Water Quality Act of 2000. Pub. L. 106-554, § 112(a), 114 Stat. 2763; 33 U.S.C. § 1342(q).

III. WASA's Long Term CSO Control Plan

Following extensive analysis and public participation, WASA developed and in June, 2001, submitted to EPA, pursuant to the CSO Policy, which provided for significant reductions in the average volume of CSO discharged to District waters, including a 95.5 percent reduction in CSO volume discharged to the Anacostia. Draft Long Term Control Plan ("Draft LTCP"), JA XX.[1] Following receipt of EPA's comments and after additional analysis and public comment, WASA revised and finalized the LTCP in July 2002 ("Final LTCP or "LTCP"). The Final LTCP, which was incorporated into a consent decree entered on March 23, 2005 by the United States District Court for the District of Columbia, increased the

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[1] 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.

reduction in CSO discharges to the Anacostia to 97.5 percent.[2] United States v. District of Columbia Water and Sewer Authority, Civil Action No. 1:CV000183(TFH) (D.D.C. Mar. 23, 2005) ("Consent Decree"). Both the Draft LTCP and Final LTCP were developed in strict accordance with the CSO Policy.

The Draft LTCP and Final LTCP were the culmination of a multiyear, multiparty, and multimillion dollar process, beginning in 1998, to develop a plan to dramatically reduce CSO discharges so that they no longer caused or contributed to a violation of water quality standards. Draft LTCP, JA XX. The total estimated capital cost of implementing the Draft LTCP (in 2001 dollars) is over one billion dollars, and the estimated annual operating and maintenance costs are $12.85 million. JA XX. With the additional controls in the Final LTCP, these cost increased to over $1.265 billion (2001 dollars) in capital costs and $13.36 million in annual operating and maintenance costs. JA XX.

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[2] Although not part of the administrative record because it was not completed at the time the Anacostia TMDLs were finalized, this Court can take judicial notice of the Final LTCP as part of the official district court records. "It is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties." Veg-Mix, Inc v. U.S. Dep't of Ag., 832 F.2d 601, 607 (D.C. Cir. 1987) (citations omitted). See Dupree v. Jefferson, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981) (judicially noticing the entire record in a related proceeding in the district court). WASA submits the Final LTCP to this Court on this basis and will submit relevant provisions of the Final LTCP.

While WASA was developing the LTCP, the District of Columbia's Department of Health ("DOH") and EPA were preparing the Anacostia TMDLs. See JA XX. Data and other scientific and technical information produced by WASA during development of the LTCP were used by DOH and EPA in establishing the Anacostia TMDLs. Therefore, WASA's LTCP provides for reductions in BOD and TSS from the CSS sufficient to meet the waste load allocations established in the Anacostia TMDLs. Accordingly, any change to the Anacostia TMDLs will have a direct impact on the court-approved LTCP.

SUMMARY OF ARGUMENT

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 EPA's establishment and approval of the Anacostia TMDLs was arbitrary and capricious. These contentions are incorrect.

WASA supports and adopts the arguments advanced and authorities cited in the EPA Brief and will not repeat those arguments here.

WASA submits additional arguments in opposition to FoE's appeal. First, FoE mischaracterizes the wet weather pollutant loads authorized by the Anacostia

TMDLs and their water quality impacts. The Anacostia TMDLs will not result in the "huge short term loadings" alleged by FoE, and, contrary FoE's assertions, are projected to lead to compliance with the applicable water quality standards.

Second, 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 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.

Third, FoE's position, if sustained, would also preclude implementation of the CSO controls in WASA's LTCP. As noted above, the LTCP has been incorporated into a consent decree entered by the United States District for the District of Columbia. WASA is now in the process of planning for and designing over $1 billion in CSO controls pursuant to a LTCP implementation schedule established in that consent decree. TMDLs expressed as 24-hour loads would require complete separation of the District's CSS, or about one-third of the entire wastewater collection system in the District. This, in turn, would force WASA to seek termination or modification of the consent decree so that it could stop work on LTCP implementation and return to the CSO control planning process. This renewed planning process would have to address serious issues regarding the technical and economic feasibility of complete separation which, at the very least,

would result in years of delay in the implementation of CSO controls for the District's waters, including the Anacostia.[3]

The record demonstrates and supports the reasonableness of the Anacostia TMDLs, and the Court should sustain EPA's decisions.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. Cruz v. American Airlines, Inc., 356 F.3d 320, 328 (D.C. Cir. 2004). Because the material facts are not in dispute, this Court's "task is to ensure that the District Court correctly applied the relevant law to the undisputed facts." Beckett v. Air Line Pilots Ass'n, 995 F.2d 280, 284 (D.C. Cir. 1993).

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 agency action. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir.) (en banc), cert. denied, 426

[3] Both the Draft LTCP and the Final LTCP concluded that complete separation of the District's CSS would not be technically or economically feasible. E.g., Final LTCP, p. 8-23 to 8-24.

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, wellsettled [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

I. FoE MISCONSTRUES THE WET WEATHER POLLUTANT IMPACTS AUTHORIZED BY THE ANACOSTIA TMDLS.

In an effort to shore up its contention that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day, FoE goes to considerable effort in its brief to describe the present conditions in the Anacostia and the wet weather (storm water, non-point, and CSO) discharges that have contributed to the river's degraded water quality. Unfortunately, it does so in ways that do not accurately reflect projected water quality in the Anacostia or these discharges after the load and waste load allocations in the Anacostia TMDLs have been attained.

No one could seriously contend that the Anacostia has not suffered from serious water quality problems or that significant reductions in the existing wet weather discharges are not needed. If that were the case, the TMDLs would not be necessary. However, FoE uses the Anacostia's present water quality and the existing wet weather discharges as the basis for incorrectly asserting that the Anacostia TMDLs will result in "huge short term loadings." FoE Brief, p. 31. This may be a fair description of the wet weather discharges to the Anacostia before implementation of the TMDLs, but as discussed below, they are gross exaggerations of the discharges that will exist after the load reductions required by the Anacostia TMDLs and the LTCP are achieved.

For example, average pre-TMDL BOD loadings to the Anacostia from all wet weather sources in both the District and Maryland is estimated at 3,964,830 pounds per year. JA XX. Of that total, 274,630 pounds per year is attributed to District storm water (or 6.9 % of the total) and 1,574,132 pounds per year to CSOs (39.7% of the total).[4] JA XX.

After considering thirteen different scenarios, EPA approved the scenario which reduced storm water loads by 50% and CSO loads by 90% (plus a margin of safety) – resulting in reductions in total allowable loads to 132,807 pounds per year

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[4] The remainder comes from Maryland sources.

for storm water in the District and 152,906 pounds per year for the CSOs. JA XX. Contrary to the false impression created by FoE, the BOD remaining after these dramatic reductions will not be discharged at one time or from a single point. Instead, the reduced storm water loads will be distributed across a 14,830 acre watershed, some 30 storm water outfalls, and during an average 121 days of precipitation.[5] JA XX. This equates to an average of about 36.6 pounds of BOD per outfall for each storm event. CSO discharges will be further reduced to an average of three (3) discharges per year from two outfalls located along on the Anacostia, which equates to an average of approximately 50,000 pounds of BOD per outfall for each discharge event.[6] JA XX. These BOD discharges over a 14,830 acre watershed belie FoE's "huge" loadings claim.[7]

Moreover, although the Anacostia TMDLs establish CSS waste load allocations for BOD and TSS of 152,906 and 103.4 pounds per CSO outfall, respectively, the Consent Decree requires WASA to implement a LTCP with projects that are projected to reduce average BOD and TSS loads even further – to 18,391 and 78 pounds per year, respectively. These loads would be dispersed from

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[5] The total drainage area for the Anacostia is 117,353 acres. JA XX.

[6] As part of the Final LTCP, 3 CSO outfalls will be moved and consolidated. JA XX. Consent Decree, p. 16.

[7] The same is true for the TSS TMDL, in which EPA approved a scenario based on a reduction of approximately 77% in existing loads. JA XX.

two CSO outfalls discharging an average of three times per year, which equates to an average of about 6100 pounds of BOD per outfall for each discharge event. Consent Decree, p. 16. By comparison, WASA's Blue Plains advanced wastewater treatment plant is authorized by permit to discharge to the Potomac River over 23,000 pounds of CBOD each day on an average weekly basis from one outfall.[8] NPDES Permit No. DC00221199, p.5, JA XX.

The TMDL-authorized and projected actual CSO loads together with the TMDL authorized non-point and storm water loads totally undermine FoE's attempt to portray the Anacostia TMDLs as authorizing large short term discharges that will prevent attainment of water quality standards.[9]

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[8] BOD is made up of both carbonaceous and nitrogenous biochemical oxygen demand. CBOD measures only the carbonaceous component of BOD.

[9] FoE erroneously concludes from Table 9-6, JA XX, in the Draft LTCP that WASA predicted that the annual load of BOD authorized by the TMDL would allow violations of the daily dissolved oxygen standard of 5.0 mg/l. FoE Brief, p. 30. What FoE failed to understand is that table 9-6 does not show the other pollutant sources with their loads reduced in accordance with the TMDLs. The table simply shows what water quality would be like if certain load reduction were assumed for the other load sources. The Final TMDLs did not exist yet, and, therefore, assumed BOD and TSS allocations for non-point sources and storm water that were far larger than the allocation ultimately established for these sources. Modeling performed by WASA after the TMDLs were adopted show compliance with both the BOD and TSS standards. Final LTCP, pp. 11-32 to 11-34.

II. FoE'S INTERPRETATION CONFLICTS WITH CWA SECTION 402(q).

As noted above, 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) incorporates the 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. 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' directive that permits issued for combined sewer systems conform to 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 to local waterbodies, and the financial challenges facing cities to 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 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 directly conflicts with this 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 adopted, under the 24-hour interpretation advanced by FoE. CWA §402(q) requires that permits issued for combined sewer systems conform to the CSO Policy, yet the position advanced by FoE, if adopted, would prevent EPA from issuing a permit which conformed to the CSO Policy unless it required complete separation of the combined sewer system.

FoE also suggests that annual or seasonal loads are fundamentally inconsistent with standards compliance when applied to wet weather discharges such as CSOs. 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.

In its opening brief, FoE seeks to dismiss the significance of the fundamental inconsistencies between its position and Section 402(q), asserting that (1) EPA bears the burden of justifying divergence from the plain meaning of Section 303(d)(1)(C), 33 USC § 1313(d)(1)(c) and that no such justification has been advanced by EPA, FoE Brief, p. 14; (2) Section 402(q) is a subsequently enacted provision that can not overcome the presumption against amendment by implication, FoE Brief, p. 21; (3) Section 402(q) addresses discharge permits, orders, and decrees, not TMDLs, FoE Brief, p. 24; and (4) there is no inconsistency because the CSO Policy requires compliance with water quality standards, including TMDLs, FoE Brief, p. 24.

FoE's first assertion assumes, of course, that Section 303(d)(1)(C) has the plain meaning advanced by FoE. As demonstrated here and in the EPA Brief, the meaning is not clear and the term "daily" is subject to interpretation when considered in the context of other provisions of the CWA, one of which is Section 402(q). Accordingly, FoE's assertion is based on the erroneous assumption that the meaning of the term "daily" in Section 303(d)(1)(C) is plain and not subject to interpretation.

FoE's second contention mistakenly assumes that WASA is asserting that Congress by implication intended to amend Section 303(d)(1)(C) when it adopted Section 402(q). WASA makes no such assertion; rather it is WASA's position, affirmed by the district court, that when Section 303(d)(1)(C) and Section 402(q) are read together, it is apparent that the term "daily" in Section 303(d)(1)(C) does not have the plain meaning attributed to it by FoE. FoE asserts that Congress knew the difference between "daily" and other time periods. Congress also knew that a significant portion of the loads allocated in TMDLs would be from wet weather discharges, and since it does not rain every day, that these loads would not be discharged on a daily basis. Therefore, it is difficult to imagine that after adopting Section 303(d)(1)(C) and knowing of EPA's long-standing interpretation of the term "daily" in that section, that Congress would have adopted amendments to the CWA establishing a water quality-based program specifically for CSOs based on

average conditions and expressly providing for continued CSO discharges in LTCPs if Congress intended the term “daily” in Section 303(d)(1)(C) to have the meaning advanced by FoE.

Foe’s argument that there is no conflict between Section 303(d)(1)(C) and Section 402(q) because the latter addresses permits, orders, and decrees, and not TMDLs, misses the point. Section 402(q) says that all permits issued for combined sewer systems after the effective date of the section must conform to the CSO Policy. As explained above, the CSO Policy requires that all CSO communities develop LTCPs after evaluating a range of alternatives, including continued CSO discharges as well as complete separation. LTCPs which provide for continued CSO discharges conform to the CSO Policy so long as they comply with water quality standards. A permit which did not incorporate an LTCP developed in accordance with the CSO Policy would not conform to the CSO Policy. The “plain meaning” attached to the term “daily” by FoE would prevent EPA or the states from issuing permits for combined sewer systems based on LTCPs that provided for continued CSO discharges even if they conformed to the CSO Policy. Therefore, FoE’s position would prevent the issuance of permits that confirm to the CSO Policy, in direct conflict with Section 402(q).

Finally, there is absolutely no merit to FoE’s contention that there is no inconsistency between the CSO Policy and position that it advances because the

CSO Policy requires compliance with water quality standards, including TMDLs. The inconsistency is that the CSO Policy expressly recognizes that in appropriate cases, combined sewer systems can comply with water quality standards without complete separation while FoE's position, if sustained, would effectively require every CSO community to completely separate its system even if its LTCP was developed in strict accordance with the CSO Policy and called for controls other than complete separation.

III. FoE'S 24-HOUR INTERPRETATION, IF ADOPTED, WOULD EFFECTIVELY PREVENT WASA FROM IMPLEMENTING ITS COURT-APPROVED LONG TERM CSO CONTROL PLAN.

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 exceptions 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." Natural Resources Defense Council v. Muszynski, 268 F.3d 91, 99 (2d Cir. 2001).

In the present case, WASA operates a combined sewer system in the Anacostia watershed, which, without any controls, discharge to the River an average of 75 times per year through 17 outfalls. Draft LTCP, JA XX. 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, JA XX.[10]

In accordance with the CSO Policy, WASA identified and evaluated a number of control alternatives during the development of its Draft LTCP and Final LTCP. Among these alternatives, <u>complete separation</u> of the combined sewer system was identified as the only alternative that would totally eliminate CSO discharges. Draft LTCP, JA XX; Final LTCP, p. 8-29. The following analysis from WASA's evaluation of the complete separation alternative against the control plan adopted in the Draft LTCP and Final LTCP demonstrates both the legal and

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[10] Under the Final LTCP, the reductions are even greater and increase to 97.5% reduction in volume discharged. Final LTCP, p. 13-17. Moreover, 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, JA XX.

absurd consequences of adopting FoE's position that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day.

First, the EPA-approved BOD TMDL allocates an annual load of 152,906 pounds of BOD to the CSOs discharging to the Anacostia River (which is a 90% reduction from pre-TMDL levels). 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, JA XX. 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.; Final LTCP, pp 9-23 to 9-24. It is apparent from the Draft LTCP and Final LTCP that this daily load allocation could not be achieved with the recommended plan because the entire projected annual BOD load could be discharged during the few overflows remaining after implementation. Id. 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.

Second, in concluding that complete separation of the combined sewer system is not economically or technically feasible, both the Draft LTCP and the Final LTCP make 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 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.

Draft LTCP, JA XX; Final LTCP, pp. 8-23 to 8-24.

Third, both the Draft LTCP and the Final LTCP conclude that complete separation of the combined sewer system would provide <u>less</u> water quality benefit to the Anacostia than the continued CSO discharges in the final plan because

separation diverts more water to the storm water system. The Draft LTCP and Final LTCP explain 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.

Draft LTCP, JA XX; Final LTCP, p. 8-24.

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.[11] Well settled principles of statutory interpretation compel the Court to avoid these consequences. Kirby, 74 U.S. at 486-87.

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[11] 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.

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 affirm the district court's summary judgment in favor of the appellees.

Respectfully Submitted,

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Initial Opening Brief of the District of Columbia Water and Sewer Authority (1) contains _______ words, as counted by counsel's word processing system, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) using proportionally spaced Word typefacing with Times New Roman and 14-point type.

Dated: October 11, 2005

____
Stewart T. Leeth

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed, first-class, postage prepaid, this 11th day of October, 2005 to the following:

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