

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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<b>FRIENDS OF THE EARTH,</b>	)	
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<b>Plaintiff,</b>	)	<b>Case No. 04-92 (RMU)</b>
	)	
<b>v.</b>	)	<b>Judge Richardo M. Urbina</b>
	)	
<b>UNITED STATES ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY, and</b>	)	
<b>MICHAEL O. LEAVITT, Administrator,</b>	)	
<b>United States Environmental Protection Agency</b>	)	
	)	
<b>Defendants.</b>	)	
	)	
	)	

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**BRIEF BY *AMICI* THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AND THE COMBINED SEWER OVERFLOW PARTNERSHIP IN SUPPORT OF EPA’S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

The Association of Metropolitan Sewerage Agencies (“AMSA”) and the Combined Sewer Overflow Partnership (“CSO Partnership”) submit this brief in support of EPA’s motion for summary judgment and in opposition to the motion for summary judgment filed by Plaintiff. AMSA and the CSO Partnership incorporate by reference and adopt the statutory background section and the argument section contained in EPA’s brief.

**INTEREST OF THE *AMICUS CURIAE***

AMSA has represented the interests of the nation’s publicly-owned wastewater treatment agencies (“POTWs”) since 1970. AMSA is comprised of nearly 300 POTW members, who serve the majority of the United States’ sewered population and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA’s

members operate municipal wastewater treatment plants under federal and state laws and regulations in cities and towns across the United States, including the District of Columbia Water and Sewer Authority (“DC WASA”) and nearly 20 other public agencies in Maryland and Virginia.

As an organization, AMSA strives to maintain a leadership role in the development and implementation of a scientifically-based, technically-sound, and cost-effective environmental and clean water programs to protect public and ecosystem health. AMSA member agencies are subject to the requirements of the federal Clean Water Act (CWA) and related state requirements. Among AMSA’s member agencies, 81 operate combined sewer systems, serving an estimated population of 49.7 million. AMSA’s members with combined sewer systems are located in nearly each of the 32 states with combined sewers and corresponds directly to the national concentration of such systems in the northeastern, southeastern, and midwestern portions of the U.S., as well as west coast states. A 2002 survey which drew responses from 47 of AMSA’s CSO member communities revealed that these cities collectively have spent \$5.1 billion (ranging from expenditures of \$100,000 to \$2.4 billion) in capital dollars and \$39.6 million (ranging from expenditures of \$50,000 to \$4.5 million) in operation and maintenance dollars toward the implementation of their Long Term Control Plans (“LTCPs”). If this Court were to accept Plaintiff’s arguments, the ramifications would extend far beyond the District of Columbia, and would significantly impact AMSA’s CSO member communities nationwide. Moreover, Plaintiff’s position could undermine both an important water quality program being administered by EPA and the states, and the significant efforts of communities nationwide to implement section 402(q) of the federal

Clean Water Act, 33 U.S.C. § 1251 *et seq.* (hereinafter referred to as the “CWA”).

Since 1988, the CSO Partnership has been dedicated to representing the interests of the approximately 800 communities with combined sewer systems nationwide. The CSO Partnership’s approximately 80 members are located on both coasts, throughout the mid-west and from Maine to Virginia, including the DC WASA. The CSO Partnership’s members strive to protect public health and the environment in an affordable and cost-effective manner. They are regulated under federal and state laws regarding water pollution control. The CSO Partnership’s members have invested hundreds of millions of dollars in the planning, design, permitting and construction of CSO control facilities in accordance with their long-term CSO control programs. The funding for these controls has come from local resources, along with federal and state grants and loans. States like Virginia and Maryland have provided CSO control grants as well as the federal government through EPA’s budget and direct earmarks by Congress for dozens of CSO control programs. DC WASA has received direct congressional grant funding for its treatment system as well as significant funding toward implementation of its CSO long-term control plan.

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

## SUMMARY OF ARGUMENT

*Amici* address the two primary arguments advanced by Plaintiff in this important case. First, Plaintiff argues that all TMDLs must be expressed as daily loads. *Amici* show that such an interpretation would read CWA section 303(d) in a way that is fundamentally inconsistent with twenty years of program implementation by EPA and delegated states nationwide. Significantly, Plaintiff's argument was rejected as "absurd" by the United States Court of Appeals for the Second Circuit in a case raising the same substantive question. Natural Resources Defense Council v. Muszynksi, 289 F.3d 91, 99 (2d Cir. 2001). *Amici* also provide additional perspective on the practical effects of accepting Plaintiff's arguments. Specifically, *amici* show that Plaintiff's position conflicts with two other key CWA provisions applicable to combined sewer overflows and municipal stormwater -- sections 402(p) and (q). *Amici* show why CWA section 303(d)'s use of the word daily must be read in light of the statute as a whole and not in isolation.

Second, Plaintiff's argue that TMDLs must assign a specific daily pollutant load to each outfall. *Amici* show how this argument, if taken to its logical conclusion, also would significantly and adversely impact a number of fundamental EPA regulatory programs. *Amici* demonstrate that Plaintiff's position regarding individual outfalls would lead to the very nonsensical requirements that the Second Circuit Court of Appeals sought to avoid in Muszynksi.

In sum, *amici* urge this Court -- like the Second Circuit -- to reject Plaintiff's arguments. *Amici* explain the far-reaching adverse consequences for our member agencies and other combined sewer communities nationwide were this Court to adopt

Plaintiff's arguments. Literally hundreds of TMDLs nationwide, including other TMDLs in the District of Columbia and in nearby states would be invalidated or subject to challenge if this Court finds that daily pollutant expressions or individual outfall limitations are required in TMDLs. Such a ruling would chill the development of new TMDLs, as EPA and states would be compelled to implement an approach to TMDL limits that is impracticable and, in many circumstances, impossible.

### ARGUMENT

#### I. **TMDLs Do Not Have to be Expressed in 24-hour Terms.**

AMSA and the CSO Partnership support and adopt the arguments advanced and authorities cited by EPA in its brief filed on June 17, 2004.<sup>1</sup> EPA correctly points out that “given the complexities of the Clean Water Act, the word “daily” in Section 303(d) simply cannot sustain the weight of Plaintiff’s interpretation, and this Court should review EPA’s interpretation under a Chevron Step II analysis.” EPA Br. at 12.

Plaintiff’s contention that CWA section 303(d) requires TMDLs to be expressed only as the allowable quantity of a pollutant in a 24-hour period is inconsistent with the context of the entire CWA. As the Supreme Court has instructed, “the words of the statute must be read in their context and with a view to their place in the overall statutory scheme.” Davis v. Michigan Dep’t of Treasury, 489 U.S. 803, 809 (1989); *see also* Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d 936, 944 (D.C. Cir. 2004) (petitioners’ argument that the rule could not survive the first step of the Chevron inquiry rejected because argument required that one sentence be considered in isolation). Here, Plaintiff’s argue that the term “daily” is clear on its face. However, when read in

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<sup>1</sup> See EPA’s Combined Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Summary Judgment, and Incorporated Memorandum of Law.

context of the entire statute and other provisions, it becomes evident that not all pollutant limits can or should be expressed in daily terms. As the Second Circuit reasoned in rejecting this same argument, Plaintiff's position is based on an "overly narrow reading of the statute" which loses sight of the overall structure and purpose of the CWA. Muszynski, 289 F.3d at 98. The Second Circuit also found the reading was "absurd" given that "for some pollutants effective regulation may best occur by some other measure than a diurnal one." 289 F.3d at 99.

**A. Plaintiffs' Position Conflicts with CWA Section 402(q).**

AMSA and the CSO Partnership support and adopt the arguments advanced and the authorities cited in Intervenor-Defendant DC WASA's brief in support of its motion for summary judgment and in opposition to Plaintiff's motion for summary judgment. DC WASA correctly points out an additional reason why Plaintiff's reading of the statute is incorrect. DC WASA explains that section 402(q) of the Act is also in direct conflict with Plaintiff's position that daily limits are required for all pollutants. DC WASA demonstrates that a daily approach to TMDLs is fundamentally inconsistent with section 402(q) and the average year annual performance standard approach embodied therein.

**B. Plaintiffs' Position Conflicts with CWA Section 402(p).**

CSO discharges are the combination of sewerage and storm water runoff. Accordingly, it not only is important to review the CWA provision for CSO control -- Section 402(q) -- but it also is important to explore the CWA provision for municipal separate storm sewers (MS4s) -- CWA Section 402(p)(3). CWA Section 402(p)(3) also supports the rejection of Plaintiff's arguments. This section states that permits for discharges from municipal storm sewers may be based on a system or jurisdiction-wide

basis and “shall require controls to reduce pollutants to the *maximum extent practicable*, including practices, control techniques and system design and engineering methods.” 33 U.S.C. § 1342(p)(3)(B). In enacting CWA 402(p)(3), Congress recognized that different control strategies are needed for different pollutant sources. EPA elaborated on Congress’ authorization in the preamble to its rulemaking establishing the regulations for MS4s, noting that the CWA authorizes a storm water pollutant control program in the form of a “management” control program rather than the “end-of-pipe numeric effluent limits.” 64 Fed. Reg. 68,722, 68,765 (Dec. 8, 1999) (the “Phase II” stormwater regulations). The stormwater management control program created by Congress in CWA Section 402(p) is inconsistent with the daily loading arguments advanced by Plaintiffs. CWA Section 402(p) recognizes that the best form of effluent limitation for these types of permits due to the fact that the discharges are caused by intermittent rainfall events and that flexible, site specific approaches are the most appropriate and effective. See 40 C.F.R. § 122.34(a) (“narrative effluent limitations requiring implementation of best management practices are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements including reductions of pollutants to the maximum extent practicable and to protect water quality.”).

Accordingly, Plaintiff’s argument that TMDLs for pollutants commonly found in stormwater must be expressed only as a quantity of pollutant over a 24-hour day (and that the TMDLs assign a specific pollutant load to each such outfall) runs counter to the express language of section 402(p)(3)(B).<sup>2</sup> The language of section 402(p), providing for best management practices-based control programs, cannot be squared with Plaintiff’s

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<sup>2</sup> *See* Plaintiff’s brief at 35-37.

contention that daily effluent limits are required for all sources by section 303(d). Where different sections of the statute cannot be read together, an ambiguity exists and EPA's interpretation must be reviewed under a Chevron Step II analysis.<sup>3</sup> We concur with EPA's brief on the Step II analysis as well as the holding by the Court of Appeals for the Second Circuit in Muszynksi.

### **C. Practical Impacts of Daily Load Requirements.**

#### **1. Impacts on TMDLs In EPA Region III and Nationwide.**

Plaintiff's assertion that TMDLs should contain daily loads would adversely impact the pace of TMDL development and could undo numerous TMDLs already approved, where for example, annual loads are used. Within EPA Region III alone, EPA has approved many TMDLs basing limits on annual rather than daily loads. For example, in the District of Columbia, EPA has approved at least three other TMDLs that use annual loads. EPA has also approved numerous TMDLs in Maryland and Virginia that rely upon annual loads.<sup>4</sup> All such TMDLs, especially for District of Columbia waters or

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<sup>3</sup> Other CWA provisions also conflict with Plaintiff's reading of the statute. *See, e.g.*, Subchapter II – Grants for Construction of Treatment Works – CWA Sections 1281 through 1301. These sections authorized federal grant funding to install secondary treatment technology at approximately 15,000 publicly-owned treatment works nationwide. Congress invested billions of federal taxpayer dollars on these installations. Secondary treatment is defined as “monthly” and “weekly” requirements for certain pollutants, including Total Suspended Solids (TSS) and Biochemical Oxygen Demand (BOD) – the pollutants at issue in this case. *See* 40 C.F.R. Part 133.102.

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

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



for surrounding states that affect District of Columbia waters could be invalidated or subject to challenge if this Court rules in favor of the Plaintiffs.

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

## **2. Impacts on the National CSO Program.**

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

These three options for CSO control, outlined in EPA's *CSO Policy*, and endorsed by Congress in CWA Section 402(q), are fundamentally inconsistent with Plaintiffs' daily load position. For example, the four to six untreated annual average overflows approach is fundamentally inconsistent with a daily pollutant loading requirement. Thus, any CSO community that has developed and is implementing its CSO program around

one of the three “presumptive” criteria established in the *CSO Policy* could have to completely reevaluate their approach if this Court endorses Plaintiff’s approach. This could cost billions of dollars in stranded public infrastructure as well as for additional future control costs.

Interestingly, the *CSO Policy* states in Section II.C.4.b that where a CSO community cannot meet one of the three presumptive criteria, it can follow a demonstration approach, which by definition could involve a lesser level of control than meeting the presumptive criteria. Again, any CSO community that chose to follow the demonstration approach would also have to completely revisit their programs around meeting daily loading requirements. Such a requirement may be impossible both technically and financially, as communities would essentially have to provide treatment for every drop of stormwater entering CSO systems during even the largest storm events.

### **3. Impacts on the Chesapeake Bay Program**

A recent decision by EPA, which affects District of Columbia waters and this TMDL, concerns the program to restore the Chesapeake Bay and provides another example of the potential harmful impact of adopting Plaintiff’s position. An EPA memorandum dated March 3, 2004, considers the issue of whether EPA may express effluent limits for nitrogen and phosphorous for hundreds of permits designed to protect the Chesapeake Bay as an annual limit or whether EPA must express the limits as a daily maximum, weekly average, or monthly average effluent limitations.<sup>5</sup> In the memo, EPA considers the legal, scientific and policy rationales for deciding whether it may select annual limits instead of imposing limits on a daily, weekly, or monthly basis. EPA

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<sup>5</sup> See [http://www.epa.gov/npdes/pubs/memo\\_chesapeakebay.pdf](http://www.epa.gov/npdes/pubs/memo_chesapeakebay.pdf).

concludes that as a legal matter its regulations allow it to impose annual limits where the other limitations would be “impracticable.” 40 C.F.R. 122.45(d). EPA then determined that the characteristics of nitrogen and phosphorous when combined with the unique characteristics of the Chesapeake Bay make the imposition of daily, weekly or monthly limits impracticable. March 4, 2004 memorandum at 3-5. EPA describes why daily, weekly or monthly limits would be virtually impossible to calculate because of how nutrients react differently than toxics and conventional pollutants in the Bay ecosystem. The treatment of nutrients is also highly sensitive to ambient temperature and is not effective at lower temperatures. Thus, effluent loading of nutrients is not constant due to seasonal temperature fluctuations. To establish appropriate daily, weekly or monthly limitations, due to the effect of temperature on treatment efficiency for nutrients, a permitting authority would have to be able to predict the temperature with great accuracy. Because of the normal variation in ambient temperature over short time periods, EPA concluded it is not practicable to develop daily, weekly or monthly limits for nutrients.

If this Court were to adopt Plaintiff’s argument that daily limits are mandated by the statute, decisions such as this one by EPA might also be challenged, especially as they are applied to District of Columbia waters. EPA could lose its ability to make the determination that daily, weekly, or monthly limits were impracticable and could be forced to construct a regulatory scheme and impose daily limits where they simply would be arbitrary because of the impossibility of setting accurate limits given the unique characteristics and fluctuations of the Chesapeake Bay ecosystem.<sup>6</sup>

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<sup>6</sup> The same is true for other regional waterbodies such as the Long Island Sound program in which EPA Region II developed a TMDL for nitrogen that imposes annual loads as the

#### **4. Impacts on Maryland's Chesapeake Bay Restoration Fund.**

Another example of a critical program which would be adversely impacted by Plaintiff's construction of section 303(d) is the recently established Bay Restoration Fund in Maryland. See Chapter 428, Maryland Session Laws. This program will use State grant funding to provide 100 percent of the cost to upgrade wastewater treatment facilities across Maryland with enhanced nutrient removal technology. The technology is expressly required under the new State legislation to be designed to reduce nutrient (nitrogen and phosphorous) discharges to annual average levels specified in the legislation. *See* Sections 9-1601 (A)(2) and 9-1601 (L)(1). This legislation is based upon EPA's Bay Program and the guidance mentioned above. Plaintiff's argument for daily loadings, if applied to facilities in Maryland, would be directly inconsistent with more than one billion dollars that is proposed to be spent by Maryland to meet the annual average requirements of this program.

#### **5. Impacts on Washington State's CSO Legislation.**

Plaintiff's position also would disrupt a variety of important CSO control activities ongoing in states as far west as Washington. For example, Washington State legislation requires all CSO communities in that state to implement control programs that will result in one overflow in an average year.<sup>7</sup> This is an enormously high control requirement for CSO discharges. Nevertheless, even this extraordinary requirement by

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compliance measure for regulated entities discharging to the Long Island Sound. *See* <http://www.epa.gov/region01/eco/lis/assets/pdfs/Tmdl.pdf>

<sup>7</sup> *See* WAC Ch. 173.245 (requiring the greatest CSO reduction possible); and WAC 173-245-020(22) (which defined the "greatest reasonable reduction" as an average of one untreated discharge per year).

the State may not satisfy Plaintiff's daily load requirement on the day that the CSOs discharge during an average year. Thus, Plaintiff's argument could jeopardize or diminish the State of Washington's CSO program and all the significant public resources that have gone into it.

## **II. TMDLs Do Not Require Outfall Specific Limitations.**

Plaintiffs also argue in this case that TMDLs must assign a specific daily pollutant load to each outfall. This argument, if taken to its logical conclusion, also would significantly and adversely impact a number of fundamental EPA regulatory programs. This argument also could also lead to the very nonsensical requirements which the Second Circuit sought to avoid in Muszynski.

*Amici* endorse EPA's arguments made by EPA that rebutting Plaintiff's assertion that TMDLs must contain individual allocations of pollutants for each outfall.<sup>8</sup> While Plaintiff's arguments are legally untenable on these two points, we also want to share with this Court the potential consequences were it to disagree with the Second Circuit and EPA on these issues.

Not only is Plaintiff's position legally incorrect, but it also leads to an impractical and/or impossible result in many cases. For example, consider a TMDL for a major urban river segment. There could be dozens if not hundreds of storm water discharge points. It is likely impossible to identify each one. Moreover, it serves no purpose to segregate loads among numerous adjacent storm water pipes to the same river segment.

If the Court were to require a specific loading for each point source, rather than "bundling" loads among source categories, the pace of TMDL development would come

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<sup>8</sup> See EPA's brief at 30, n.11.


to a halt as the agencies were forced to do detailed and comprehensive physical inspections of the lands surrounding a water for which a TMDL is being prepared. Moreover, the specification of individual loads for such individual sources could prevent cost-effective pollutant reductions (such as where one storm water outfall receives a higher level of control than required in exchange for lesser control at another).

Requiring an individual load may also prove impossible in circumstances where a pollutant can be detected in a river segment but not at individual discharge points due to limitations in analytical technology. EPA's recent TMDL for PCBs in the Delaware River is an example where EPA's imposed loadings to source categories on a river segment basis.<sup>9</sup>

### CONCLUSION

For the reasons set forth in this brief, as well as the briefs in this matter filed by EPA and DC WASA in support of their motions for summary judgment and opposition to Plaintiff's motion for summary judgment, *amici* respectfully urge this Court to grant EPA and DC WASA's motions while denying Plaintiff's motion for summary judgment.

Respectfully submitted,




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<sup>9</sup> [http://www.epa.gov/reg3wapd/tmdl/pdf/delaware\\_tmdl/TMDLreport.pdf](http://www.epa.gov/reg3wapd/tmdl/pdf/delaware_tmdl/TMDLreport.pdf).

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