

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY,
Petitioner,

v.

FRIENDS OF THE EARTH, INC.,
Respondent.

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

SUPPLEMENTAL BRIEF OF AMICI CURIAE
THE NATIONAL ASSOCIATION OF CLEAN
WATER AGENCIES AND THE WET
WEATHER PARTNERSHIP

Alexandra Dapolito Dunn
General Counsel
National Association of
Clean Water Agencies
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505

John A. Sheehan*
F. Paul Calamita
AquaLaw PLC
801 East Main Street
Richmond, Virginia 23219
(804) 716-9021

**Counsel of Record*

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**SUPPLEMENTAL ARGUMENT IN RESPONSE TO
NEW ISSUE RAISED IN FEDERAL RESPONDENTS'
OPPOSITION BRIEF**

The National Association of Clean Water Agencies (“NACWA”) and the Wet Weather Partnership submit this supplemental brief pursuant to Supreme Court Rule 15.8 in response to the brief by the Federal Respondents in opposition to the petition for a writ of certiorari. A supplemental brief is necessary to address new issues raised by a guidance document recently issued by the Environmental Protection Agency (EPA) and primarily relied upon by the Federal Respondents as the reason that this Court should decline to review the decision of the United States Court of Appeals for the District of Columbia Circuit in Friends of the Earth v. Inc. v. Environmental Protection Agency, 446 F.3d 140 (D.C. Cir. 2006).

Federal Respondents acknowledge in their opposition that a clear conflict exists between the United States Courts of Appeals for the District of Columbia Circuit and Second Circuit on a fundamental element of the Clean Water Act. This intercircuit conflict involves EPA’s national program for cleaning up thousands of impaired waters – the Total Maximum Daily Load (TMDL) program under Clean Water Act section 303(d). 33 U.S.C. § 1313(d). Unless reviewed, the decision undermines thousands of existing clean-up plans nationwide for impaired waters and potentially undermines thousands of future clean-up plans that may be developed upon an uncertain legal basis due to the circuit conflict.¹

¹ The guidance memorandum states that EPA and its regions have established more than 20,000 TMDLs over the last five or six years and that approximately 65,000 causes of impairment still need to be addressed. Guidance at 3.

EPA's guidance – released just one week before the filing of the Federal Respondents' opposition brief – presents EPA's attempted resolution of the "significant legal uncertainty" the agency recognizes exists in light of the decision by the D.C. Circuit. That decision invalidated EPA's long-held statutory interpretation – that section 303(d) of the Clean Water Act does not mandate "daily" pollutant expressions in TMDLs in all circumstances. Guidance at 2. EPA's TMDL program and other Clean Water Act programs have relied upon EPA's now invalidated statutory interpretation for over two decades. EPA has maintained this position in prior federal cases raising this exact issue.² Those courts all agreed with EPA's statutory interpretation.

Rather than supporting review by this Court of the ruling invalidating EPA's long-held legal position, the agency has instead issued a guidance document that it contends resolves the uncertainty created by the D.C. Circuit's rejection of the Agency's statutory interpretation. Federal Respondents assert that this guidance obviates the need for this Court to review a clear circuit split on a fundamental Clean Water Act provision that applies to thousands of impaired waters nationwide.

As explained below, the guidance memorandum fails to resolve the significant legal uncertainty created by the circuit conflict and is contrary to EPA's existing regulations.

1. The guidance exacerbates the problems resulting from the intercircuit split because it conflicts with EPA's own regulations and the decision of the D.C. Circuit. EPA's guidance asserts that daily loads must be calculated for all TMDLs, even where the pollutants of concern are not suitable for daily load calculation. This approach directly

² See Amici Curiae Brief in Support of Petition, pages 3-5.

conflicts with a long-standing EPA regulation. That regulation states that daily loads only need to be calculated where the appropriate technical conditions exist to allow such calculation. 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978).³ This regulation allows EPA to make a case-by-case determination about the suitability of a pollutant for a daily load calculation.

The ability for EPA and the States to determine that particular pollutants in specific circumstances are not suitable for daily load calculation is consistent with Section 303(d) of the Clean Water Act and essential to the integrity of the national TMDL program. Moreover, by following this regulatory approach, the court could have made the statutory issue secondary if it had first determined that EPA properly found that the pollutants in the TMDLs at issue were not suitable for daily load calculation. If EPA was correct, then daily loads are not required under this regulation.

The guidance impermissibly modifies this regulation and removes EPA's and the State water agencies' case-specific authority to determine that daily loads are not appropriate. EPA can only make such a change through the public safeguards afforded by notice and comment rulemaking. It is unlawful for EPA to attempt to repeal this existing regulation by the guidance it proffers to this Court.⁴

³ This regulation was adopted pursuant to a court order issued by the U.S. District Court for the District of Columbia in Board of County Commissioners of Calvert County, et al. v. Costle, et al. (No. 78-0572). This regulation was relied on in part by the D.C. Circuit Court in its decision.

⁴ The guidance is also contrary to EPA's regulation, which provides that TMDLs may be expressed in non-daily terms because the guidance asserts that all TMDLs will now contain daily load limits. See, 50 Fed. Reg. 1774, 1780 (Jan. 11, 1985).

2. *The guidance fails to address existing TMDLs.* While EPA's guidance states that future TMDLs will have daily loads, it fails to address existing "non-daily" TMDLs. EPA cites to the fact that EPA and the states have established more than 20,000 TMDLs in the last several years. Guidance at 3. Many of these TMDLs establish non-daily loads and thus the status of these TMDLs, which conflict with the ruling of the D.C. Circuit, is uncertain. EPA only states that if these existing TMDLs need to be revised in the future, they should comply with the guidance. Guidance at 3. This statement demonstrates that EPA does not intend to go back and reopen existing non-daily TMDLs. This approach puts all such existing non-daily TMDLs, and the sources allocated pollutant loads within them, in legal jeopardy. Unless this Court resolves this issue, EPA would ignore other existing non-daily TMDLs even for District of Columbia waters despite EPA's admission that the D.C. Circuit's ruling is binding within the District. If the Court does not review this case, EPA's intent to ignore undisputedly controlling law within the D.C. Circuit will stand and EPA's guidance will cast doubt on all existing non-daily TMDLs nationwide.

3. *The guidance does not clarify the legal uncertainty triggered by the circuit conflict and EPA's speculation that future controversies will be limited is unwarranted.* By trying to reconcile two directly conflicting circuit court decisions and more than two decades of agency program implementation through this guidance memorandum, EPA has created even greater uncertainty about the legal requirements for future and current impaired waters clean-up plans and the obligations created for regulated entities. EPA's guidance only heightens the need for this Court to review the conflicting statutory interpretations by the Second Circuit and the D.C. Circuit. Because the two circuit court decisions are in direct conflict on an issue of plain statutory interpretation, an agency guidance memorandum seeking to

“clarify” the agency’s view is of little value to EPA regional offices, the States, the regulated community, and other stakeholders. Guidance at 1. What is needed is resolution of the fundamental issue in this case – the proper statutory construction of section 303(d) of the Clean Water Act and EPA’s regulations that implement this statutory provision. Only this Court can now resolve that issue.

Otherwise, hundreds of communities, like petitioner the District of Columbia Water and Sewer Authority (WASA), which are designing sewer infrastructure programs that will cost billions of dollars to comply with the EPA’s Combined Sewer Overflow Control Policy, will not have certainty over the ultimate performance goals (daily, weekly, monthly, etc.) for their system. Resolution of this fundamental issue is critical to communities nationwide with combined sewer systems. Additionally, this conflict will create situations where an interstate river or stream may run through jurisdictions with different regulatory requirements, thus creating a patchwork of conflicting regulatory requirements.

Finally, Federal Respondents’ projection that “as a result of [its] new guidance” the current conflict between circuits will have “only limited prospective effect” is not supported by any plausible reasoning. It is more likely that the interests that brought this litigation seeking the imposition of daily TMDL load allocations will not readily accept EPA’s approach of showing daily loads in the TMDL but then ignoring them in the discharge permitting stage. More, rather than less, litigation appears likely unless this Court reviews this critical provision of the Clean Water Act. EPA’s speculation and the attempted solution though guidance should not serve as the basis for this Court to decline this important case.

CONCLUSION

While Federal Respondents oppose this petition for writ of certiorari, they agree with petitioner and amici that the decision of the D.C. Circuit incorrectly interpreted a fundamental Clean Water Act provision. Federal Respondents concede that the decision has created great legal uncertainty for the EPA regional offices, State permitting agencies, the regulated community and other stakeholders regarding the national TMDL program. EPA's proposed last minute solution, the guidance memorandum, exacerbates rather than solves the controversy over the conflict between the circuits. Accordingly, there is an even greater need for this Court's review.

Respectfully submitted,

John A. Sheehan
F. Paul Calamita
AquaLaw, PLC
801 E. Main Street
Suite 1002
Richmond, Virginia 23219
804-716-9021

Alexandra Dapolito Dunn
General Counsel
National Association of Clean
Water Agencies
1816 Jefferson Place, N.W.
Washington, D.C.
20036-2505
202-533-1803

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