

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH,

Petitioner,

v.

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

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

Respondents,

And

DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY,

Intervenor-Respondent.

**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Intervenor-Respondent, District of Columbia Water and Sewer Authority ("WASA") submits its reply memorandum in support of its motion for summary judgment in favor of the United States Environmental Protection Agency ("EPA").

INTRODUCTION

Friends of the Earth ("FoE") ask this Court to ignore established standards of statutory construction and interpret the term "total maximum daily loads" in § 303(d) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1313(d), in isolation, as if it were the only section in the Act. When placed in proper context of the Act as a whole, FoE's construction - one that limits EPA to expressing a total maximum daily load ("TMDL") only as a quantity of a pollutant over a 24-hour day - is demonstrably absurd. This is the conclusion reached both by Judge Leisure in NRDC, Inc. v. Fox, 93 F. Supp. 2d 531, 555 (S.D.N.Y. 2000), and the United States Court of Appeals for the Second Circuit in NRDC, Inc. v. Muszynski, 268 F.3d 91, 94 (2d Cir. 2001). FoE presents the same arguments that were rejected in these cases, and they should be rejected here as well.

In its combined memorandum of July 30, 2004 ("FoE Opp. Mem."), FoE rehashes the same arguments raised in its initial Motion and Memorandum for Summary Judgment filed on May 20, 2004. The arguments already presented by EPA, WASA and amici Association of Metropolitan Sewerage Agencies and the CSO Partnership, in their earlier briefs supporting summary judgment in EPA's favor, fully address each of the arguments raised by FoE. However, two erroneous points raised by FoE relating to statutory interpretation, merit reply.

ARGUMENT

I. FoE'S ASSERTIONS DO NOT CHANGE THE FACT THAT FoE'S INTERPRETATION CONFLICTS WITH CWA SECTION 402(q)

In its opening brief, WASA demonstrated that 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' comprehensive approach to combined sewer overflow ("CSO") control, as reflected in section 402(q)(1), 33 U.S.C. § 1342(q)(1), which incorporates the CSO Policy by reference. The CSO Policy establishes a consistent national framework for the development and implementation of site-specific controls to address CSOs, which impact approximately 800 localities and their attendant waterbodies. FoE's contention, if sustained, would effectively preclude implementation of the CSO Policy because it would make it virtually impossible for cities with combined sewers systems to comply with TMDLs based on existing water quality standards without completely separating their combined systems and totally eliminating their CSOs.

FoE responds to the foregoing by asserting that Congress did not "amend" the TMDL statute when it enacted § 402(q). But the issue is the proper interpretation of § 303(d) in the context of the overall scheme of that Act, not whether Congress "amended" § 303(d). The Supreme Court has stated that "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). Here, FoE asks this Court to read the term "daily" in a way that ignores the rest of the Clean Water Act, including § 402(q). As explained fully in WASA's opening brief, there are numerous control alternatives provided for in the CSO Policy, which are designed to "tailor [CSO] controls to local situations." CSO Control Policy, 59 Fed. Reg. 18,688 (Ap. 19, 1994) ("CSO Policy"). All but one of these control alternatives provide for continued CSO discharges following long term control plan ("LTCP") implementation as long as water quality standards are attained. Only the complete

separation alternative could even be considered under the 24-hour interpretation advanced by FoE unless the applicable water quality standards were revised.¹

FoE's only other response to WASA's § 402(q) argument is a citation to a single line in a 1994 Federal Register notice stating that CSOs are subject "to water-quality based requirements of the CWA." FoE Mem. at 10-11. FoE's conclusory statement that this supports its argument, coupled with its failure to cite any regulatory or judicial authority in support, speaks for itself. In fact, annual or seasonal loads are fully consistent with standards compliance when applied to wet weather discharges such as CSOs. As explained in WASA's opening brief, when viewed in its entirety, the CSO Policy 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. See CSO Policy, 59 Fed. Reg. at 18,696.

II. FoE'S 24-HOUR INTERPRETATION LEADS TO ABSURD RESULTS

WASA demonstrated also in its opening brief that FoE's 24-hour interpretation, if adopted, could lead to absurd results. In short, it would effectively do away with the alternatives analysis called for in the CSO Policy and could result in dramatically increased costs for WASA ratepayers, extended and widespread disruption throughout much of the District, and poorer water quality. Such an interpretation flouts the principle that statutes should be interpreted in a way that avoids absurd and unjust results. See United States v. Turkette, 452 U.S. 576, 580 (1981); United States v. Kirby, 74 U.S. 482, 486-87 (1869).

¹ Responding elsewhere in its brief to arguments raised by EPA, FoE claims that EPA's interpretation of TMDLs renders the term "daily" "superfluous." FoE Opp. Mem. at 6. In fact, FoE's argument, if sustained, would render much of Congress' CSO Policy, as adopted under § 402(q), superfluous. Therefore, FoE's interpretation should not be accepted.

In response, FoE avoids WASA's argument by mischaracterizing it, arguing that it simply invokes "compliance costs." FoE Opp. Mem. at 13. FoE's fails to confront the facts on the administrative record before this Court that based on existing water quality standards, only complete separation of WASA's combined sewer system, and the attendant consequences, would achieve a TMDL allocation expressed as a daily load. See Draft LTCP at 9-23 and 9-24, JA 520 and JA 521. As explained in WASA's opening brief, well settled principles of statutory interpretation compel a different result. Kirby, 74 U.S. at 486-87.

CONCLUSION

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

Respectfully Submitted,

DISTRICT OF COLUMBIA WATER AND SEWER
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/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was filed electronically and was mailed, first-class, postage prepaid, this 27th day of August, 2004 to the following:

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