

ORAL ARGUMENT SCHEDULED FOR APRIL 21, 2003

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

---

No. 02-1123 (consolidated with No. 02-1124)

---

FRIENDS OF THE EARTH, INC.

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

---

ON PETITION FOR REVIEW OF ACTION OF THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

---

**AMICUS CURIAE BRIEF OF DISTRICT OF COLUMBIA WATER  
AND SEWER AUTHORITY AND ASSOCIATION OF  
METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF  
RESPONDENT UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY**

---

Stewart T. Leeth (DC Circuit #46079)  
David E. Evans  
McGuireWoods LLP  
One James Center  
901 East Cary Street  
Richmond, VA 23235  
(804) 775-4719

Alexandra Dapolito Dunn  
(DC Circuit #428526)  
Association of Metropolitan  
Sewerage Agencies  
1816 Jefferson Place, NW  
Washington, DC 20036  
(202) 533-1803



**A. Parties and Amici.**

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

This case is a petition for review of agency action, not an appeal from a district court.

**2. Persons who are parties, intervenors, and amici in this Court.**

Except for amici who are filing this brief, all parties, intervenors and amici appearing before this Court are listed in the Brief of Petitioner, Friends of the Earth (“FoE”) and in the Brief of Respondent, United States Environmental Protection Agency (“EPA”). The amici filing this brief are WASA and AMSA. WASA is an independent authority of the Government of the District of Columbia. WASA was created in 1996 by the United States and the Government of the District of Columbia to provide drinking water to the residents of the District of Columbia and regional wastewater collection and treatment to citizens and businesses in the metropolitan Washington, D.C. area. AMSA is an association of publicly owned wastewater treatment agencies which collectively serve the majority of the sewered population in the United States.

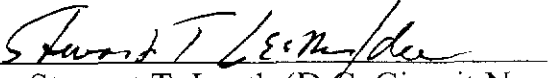
**B. Rulings under review.** References to the rulings at issue appear in FoE’s and EPA’s briefs.

**C. Related Cases.** References to any related cases also appear in FoE’s and EPA’s briefs.

Dated: January 15, 2003

DISTRICT OF COLUMBIA WATER  
AND SEWER AUTHORITY  
By Counsel

McGuireWoods LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

By   
Stewart T. Leeth (D.C. Circuit No. 46079)

Of Counsel:  
David E. Evans  
McGuireWoods LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

Henderson Brown IV, General Counsel  
Wendy Hartmann, Assistant General Counsel  
District of Columbia Water and Sewer Authority  
5000 Overlook Avenue, S.W.  
Washington D.C. 20032-5397  
(202) 787-2240

ASSOCIATION OF METROPOLITAN  
SEWERAGE AGENCIES  
By Counsel

*Alexandra Dapolito Dunn/Dea*

Alexandra Dapolito Dunn (D.C. Bar 428526)  
Association of Metropolitan Sewerage Agencies  
1816 Jefferson Place, NW  
Washington, DC 20036  
(202) 533-1803

JUN 11 2002

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

FRIENDS OF THE EARTH,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and  
CHRISTINE TODD WHITMAN,  
Administrator,  
United States Environmental  
Protection Agency

Respondents.

No. 02-1124

No. 02-1123

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the District of Columbia Water and Sewer Authority ("WASA") submits this disclosure statement. WASA is a semiautonomous regional authority 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. WASA presently provides retail water and wastewater collection and treatment services to over 500,000 residential and commercial customers in the District of Columbia. WASA also

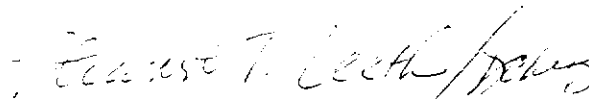
provides wholesale wastewater treatment service to over 1.6 million customers of municipal wastewater utilities serving portions of Maryland and Northern Virginia.

There is no parent company or publicly-held company that has a 10% or greater ownership interest in WASA.

DISTRICT OF COLUMBIA WATER AND  
SEWER AUTHORITY

McGuireWoods LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

By

  
Stewart T. Leeth (D.C. Circuit No. 46079)

Of Counsel:

David E. Evans (Va. Bar No. 12609)  
Cristin K. Bauby (Va. Bar No. 45169)  
McGuireWoods LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

Henderson Brown IV, General Counsel  
Wendy Hartmann, Assistant General Counsel  
District of Columbia Water and Sewer Authority  
5000 Overlook Avenue, S.W.  
Washington D.C. 20032-5397  
(202) 787-2240

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

**FRIENDS OF THE EARTH,**

**Petitioner,**

**v.**

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and  
CHRISTINE TODD WHITMAN,  
Administrator,  
United States Environmental  
Protection Agency**

**Respondents.**

**No. 02-1124**

**No. 02-1123**


**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Association of Metropolitan Sewerage Agencies (“AMSA”) submits this disclosure statement. AMSA is a non-profit trade association comprised of over 270 publicly-owned treatment works members who serve the majority of this country’s sewered population and treat 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, Maryland, and Virginia.

AMSA has no outstanding shares or debt securities and has no parent companies, subsidiaries or affiliates which have any outstanding shares or debt securities in the hands of the public.

Respectfully submitted,

ASSOCIATION OF METROPOLITAN SEWERAGE  
AGENCIES



Alexandra Dapolito Dunn (D.C. Bar. No. 428526)  
General Counsel  
Association of Metropolitan Sewerage Agencies  
1816 Jefferson Place, N.W.  
Washington, D.C. 20036-2505  
(202) 533-1803

Counsel for *Amicus Curiae*-Applicant Association of  
Metropolitan Sewerage Agencies

Dated: June 11, 2002

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

GLOSSARY ..... iii

INTEREST OF THE AMICUS CURIAE ..... 1

STATEMENT OF JURISDICTION ..... 4

STATEMENT OF ISSUES ..... 4

STATUTORY AND REGULATORY PROVISIONS INVOLVED ..... 4

STATEMENT OF THE CASE ..... 4

SUMMARY OF THE ARGUMENT ..... 5

ARGUMENT ..... 5

    1.    EPA May Approve or Establish TMDLs That are Expressed in  
        Annual or Seasonal Terms ..... 5

        A.    FoE’s Interpretation Conflicts With Clean Water Act Section  
            402(q) ..... 6

        B.    FoE’s 24-hour Interpretation Undermines WASA’s Long-Term  
            CSO Control Plan ..... 10

CONCLUSION ..... 14

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS ..... 16

CERTIFICATE OF SERVICE ..... 17

## TABLE OF AUTHORITIES

### STATUTES

*33 U.S.C. § 1342(q) .....	1, 6
*Wet Weather Water Quality Act, Pub. L. 106-554, § 112(a), 114 Stat. 2763 (2000).....	6

### FEDERAL REGISTER

*59 Fed. Reg. 18,688 (Apr. 19, 1994) .....	7, 8, 9
--	---------

### MISCELLANEOUS

LCRA, <i>Water Glossary</i> , available at <a href="http://www.lcra.org/water/glossary.html">http://www.lcra.org/water/glossary.html</a> .....	2
Office of Energy and Renewable Energy, U.S. Department of Energy, <i>Consumer Energy Information Energy Glossary &amp; Fact Sheets</i> , available at <a href="http://www.eren.doe.gov/consumerinfo/glossary.html">http://www.eren.doe.gov/consumerinfo/glossary.html</a> .....	2
*U.S. Environmental Protection Agency, EPA 833-R-01-003, Report to Congress, Implementation and Enforcement of the Combined Sewer Overflow Control Policy (2001) .....	7, 9, 13

Authorities upon which we chiefly rely are marked with asterisks.

## GLOSSARY

BOD	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

## **INTEREST OF THE AMICUS CURIAE**

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 Northern Virginia.

Approximately one-third of the wastewater collection system in the District of Columbia consists of combined sewers, which convey both sanitary wastewater and stormwater. When the capacity of the combined sewer system is exceeded during storms, the excess flow, which is a mixture of wastewater and stormwater, is discharged to the receiving streams, including the Anacostia River, which receives flow from 17 combined sewer overflow (“CSO”) outfalls. During and following certain rainfall events, CSO, stormwater, and non-point source discharges contribute to exceedances of the District of Columbia’s water quality standards for dissolved oxygen (“DO”) and water clarity for the Anacostia River.

In response to these exceedances, WASA developed, and in August, 2002 submitted to EPA, pursuant to section 402(q) of the Clean Water Act, 33 U.S.C. § 1342(q), a Long Term Control Plan (“LTCP”), which, when implemented, will reduce the average volume of CSO discharges to the Anacostia River by 97.5 percent. WASA invested millions of dollars in the development of its LTCP. The

total estimated capital cost of implementing the LTCP in 2001 dollars is \$1.265 billion, and the estimated annual operating and maintenance costs are \$13.36 million.

During the time that WASA was developing its LTCP, the District of Columbia's Department of Health ("DOH") and EPA were preparing the TMDLs challenged in these appeals. Data and other scientific and technical information produced by WASA during development of its LTCP were used by DOH and EPA in establishing their TMDLs. These TMDLs establish wasteload allocations for BOD and TSS based upon DOH's water quality standards for DO and water clarity in the Anacostia River.<sup>1</sup> Therefore, WASA's LTCP provides for reductions in BOD and TSS from the combined sewer system sufficient to meet the wasteload allocations established in the TMDLs. Accordingly, any change to the TMDLs for BOD and TSS will have a direct impact on the implementation of WASA's LTCP.

---

<sup>1</sup> BOD and TSS are among the most common parameters monitored and controlled in NPDES permits issued to municipal dischargers such as WASA and AMSA's members. The BOD TMDL was established to meet the DO standards. BOD is a standard means of estimating the degree of contamination of water. It is the weight of oxygen taken up mainly as a result of the oxidation of the constituents of a sample of water by biological action. Office of Energy and Renewable Energy, U.S. Department of Energy, *Consumer Energy Information Energy Glossary & Fact Sheets*, available at <http://www.eren.doe.gov/consumerinfo/glossary.html>. The TSS TMDL was established to meet the water clarity standard. TSS is a measure of particles of solid matter remaining in wastewater after treatment. LCRA, *Water Glossary*, available at <http://www.lcra.org/water/glossary.html>.

In particular, the relief requested by FoE, if granted, would effectively preclude WASA from implementing its LTCP.

AMSA has represented the interests of the Nation's publicly-owned wastewater treatment agencies ("POTWs") since 1970. AMSA is comprised of over 270 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, 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. Among AMSA's member agencies, 81 operate combined sewer systems, serving an estimated population of 49.7 million. AMSA's membership with combined sewer systems spans all but two 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 several 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 LTCPs.

Accordingly, if this Court were to accept FoE's arguments, the ramifications would extend far beyond the District of Columbia, and 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 Clean Water Act.

### **STATEMENT OF JURISDICTION**

The amici incorporate by reference and adopt the statement of jurisdiction set forth in EPA's brief.

### **STATEMENT OF ISSUES**

The amici incorporate by reference and adopt the statement of issues set forth in EPA's brief.

### **STATUTORY AND REGULATORY PROVISIONS INVOLVED**

Pertinent statutes and regulations are set forth in EPA's brief as an addendum. WASA and AMSA adopt such statutes and regulations as if fully set forth herein.

### **STATEMENT OF THE CASE**

The amici incorporate by reference and adopt the statement of the case set forth in EPA's brief.

## SUMMARY OF THE ARGUMENT

FoE's contention that TMDLs must be expressed in the form of a 24-hour load is in direct conflict with Section 402(q) of the Clean Water Act, which incorporates EPA's 1994 Combined Sewer Overflow Control Policy, and would effectively preclude implementation of the CSO Policy if adopted by this Court.

FoE's position, if adopted by this Court, would undermine CSO control planning and implementation under WASA's LTCP. TMDL's expressed as 24-hour loads would require complete separation of the District's combined sewer system, which is not economically or technically feasible and would provide less water quality benefit to the Anacostia River. Finally, if adopted, FoE's position could disrupt the efforts of the nearly 800 cities nationwide to comply with the Clean Water Act's CSO provisions.

## ARGUMENT

### **I. EPA MAY APPROVE OR ESTABLISH TMDLS THAT ARE EXPRESSED IN ANNUAL OR SEASONAL TERMS**

FoE contends that the Clean Water Act requires TMDLs to be expressed only as a quantity of a pollutant over a 24-hour day. EPA demonstrates that expressing TMDLs in time periods other than 24-hours is fully consistent with the Clean Water Act. EPA Br. at 35. The Clean Water Act does not specify how a TMDL should be expressed, leaving it to EPA (and the states, where appropriate)

to make that determination so long as compliance with applicable water quality standards is assured. EPA Br. at 34-35.

WASA and AMSA support and adopt the arguments advanced and authorities cited in the EPA's brief.<sup>2</sup> In addition, WASA and AMSA submit that FoE's strained interpretation of EPA's TMDL obligations is in direct conflict with section 402(q) of the Clean Water Act, and would undermine sound CSO control planning and implementation to the detriment of the water quality of the Anacostia River and other water bodies nationwide that receive discharges from CSOs.

**A. FoE's Interpretation Conflicts With Clean Water Act Section 402(q)**

Section 402(q) was added to the Clean Water Act in 2000 by the Wet Weather Water Quality Act. Pub. L. 106-554, § 112(a), 114 Stat. 2763. Section 402(q) incorporates EPA's April 11, 1994, Combined Sewer Overflow Control Policy ("CSO Policy") into the Clean Water Act by providing that after the date of enactment of the Wet Weather Water Quality Act each permit, order or decree issued pursuant to the Clean Water Act for a discharge from a combined storm or sanitary sewer must conform to the CSO Policy. Section 402(q)(1), 33 U.S.C. § 1342(q)(1).

---

<sup>2</sup> WASA and AMSA adopt all arguments made by the EPA in its Brief of Respondent, including the EPA's jurisdictional argument.

There are nearly 800 CSO communities nationwide. U.S. Environmental Protection Agency, EPA 833-R-01-003, Report to Congress, Implementation and Enforcement of the Combined Sewer Overflow Control Policy at ES-5 (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 on local waterbodies, and the financial challenges facing cities to cost-effectively control CSOs. Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994).

FoE’s assertion that the Clean Water Act requires TMDLs to be expressed only as a quantity of pollutant over a 24-hour day is fundamentally inconsistent with Congress’ approach to CSO control, as reflected in 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 have the end result of diminishing water quality in certain cases.

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 (“LTCP”) 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 18,692. FoE’s 24-hour interpretation of EPA’s TMDL requirements conflicts with the 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.* 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 Congress' intent, contemplate some continued CSO discharges after LTCP implementation. *CSO Report to Congress* at 6-20.

Again, it is important to recognize that the control alternatives and options in the CSO Policy authorize continued CSO discharges following LTCP implementation provided water quality standards are attained. However, as demonstrated below, none of these alternatives (except zero CSOs) could even be considered, much less implemented, under the 24-hour interpretation advanced by FoE.

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 annual 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.

**B. FoE's 24-hour Interpretation Undermines WASA's Long Term CSO Control Plan**

In addition to conflicting with section 402(q) of the Clean Water Act, FoE's 24-hour interpretation has serious and wide-ranging practical ramifications for CSO programs nationwide. WASA's specific situation, described below, demonstrates that FoE's argument should be rejected.

WASA operates combined sewers in the Anacostia watershed, which, without any controls, discharge to the River an average of 82 times per year through 17 outfalls. District of Columbia Water and Sewer Authority, Combined Sewer System Long Term Control Plan Final Report at 13-17 (2002) ("WASA LTCP Report") (JA XX). WASA's LTCP calls for the installation of CSO controls that will reduce CSO discharges to the Anacostia River from an average of 82 per year to an average of two per year and CSO volume from an average of 2,142 million gallons per year ("mgy") to an average of 54 mgy, which is a 97.5 percent reduction in the average volume of CSO discharged to the Anacostia without any controls. WASA LTCP Report at 13-17 (JA XX).<sup>3</sup>

---

<sup>3</sup> 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. WASA LTCP Report at 13-17 (JA XX).

In accordance with the CSO Policy, WASA identified and evaluated a number of control alternatives during the development of its LTCP. Among these alternatives, complete separation of the combined sewer system was identified as the only alternative that would totally eliminate CSO discharges. WASA LTCP Report at 8-29 (JA XX.) The following analysis from WASA's evaluation of the complete separation alternative against the control plan adopted in the LTCP demonstrates both the legal and practical consequences of adopting FoE's position that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day.

First, the BOD TMDL allocates an annual load of 152,906 pounds of BOD to the CSOs discharging to the Anacostia River. This allocation can be achieved with the control plan adopted in the LTCP because it projects an average of two overflows per year discharging a total of 18,391 pounds of BOD on an annual average basis. WASA LTCP Report at 9-23 (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.* It is apparent from the LTCP that this daily load allocation could not be achieved with the recommended plan because the entire projected annual BOD load of 18,391 pounds would be discharged during the two overflows remaining after implementation of the LTCP. *Id.* at 9-23 and 9-24 (JA XX). Accordingly, the LTCP concludes that only complete separation of WASA's combined sewer system would achieve a BOD

allocation expressed as a daily load. *Id.* As discussed earlier, separation is not mandated by the CSO Policy.

Second, in concluding that complete separation of the combined sewer system is not economically or technically feasible, the LTCP makes 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 than [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.

WASA LTCP Report at 8-23 to 8-24 (JA XX).

Finally, WASA's LTCP concludes 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 stormwater 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.

WASA LTCP Report at 8-24 (JA XX).

Again, it is essential to recognize that an endorsement of FoE's position could have a devastating adverse impact not only on WASA, but on the hundreds of cities nationwide that are in the midst of developing and implementing costly LTCPs to comply with the Clean Water Act and that do not involve complete separation of their combined sewer systems. CSO Report to Congress at 6-20.

## CONCLUSION

For the foregoing reasons, 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 Clean Water Act, and, if adopted, would undermine CSO control planning and implementation to the detriment of water quality in the Anacostia River and nationwide. If adopted, FoE's interpretation of EPA's TMDL obligation also could disrupt the efforts of EPA and the states, as well as hundreds of communities nationwide to implement the Clean Water Act's CSO provisions. Therefore, WASA and AMSA request that this Court deny the petitions and affirm EPA's approval and establishment of BOD and TSS TMDLs for the Anacostia River.

Respectfully Submitted,

DISTRICT OF COLUMBIA WATER AND  
SEWER AUTHORITY


McGuireWoods LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

By Stewart T. Leeth  
Stewart T. Leeth (D.C. Circuit No. 46079)

Of Counsel:  
David E. Evans  
McGuireWoods LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

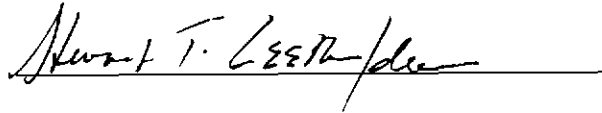
Henderson Brown IV, General Counsel  
Wendy Hartmann, Assistant General Counsel  
District of Columbia Water and Sewer Authority  
5000 Overlook Avenue, S.W.  
Washington D.C. 20032-5397  
(202) 787-2240

ASSOCIATION OF METROPOLITAN  
SEWERAGE AGENCIES

  
Alexandra Dapolito Dunn (D.C. Bar 428526)  
Association of Metropolitan Sewerage Agencies  
1816 Jefferson Place, NW  
Washington, DC 20036  
(202) 533-1803

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

1. This brief complies with the type-volume limitation in Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 2,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This is less than the 7,000 words allowed under the applicable rules.
  
2. This brief complies with the typeface requirements in Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 97 with Times New Roman and 14-point type.



Stewart T. Leeth

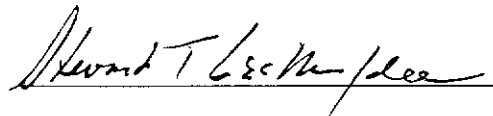
January 15, 2003

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Amici was mailed, first-class, postage prepaid, this 15th day of January, 2003 to the following:

Keri Powell  
Howard I. Fox  
Earthjustice Legal Defense Fund  
1625 Massachusetts Avenue, NW  
Suite 702  
Washington, DC 20036-2212

Scott J. Jordan  
United States Department of Justice  
Environment and Natural Resources Division  
P.O. Box 23986  
Washington, DC 20026-3986

A handwritten signature in cursive script, reading "Howard T. Leachman". The signature is written in black ink and is positioned to the right of the typed addresses.