

ORAL ARGUMENT OCCURRED ON MARCH 2, 2006

**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,

No. 05-5015

**INTERVENOR DISTRICT OF COLUMBIA WATER AND SEWER
AUTHORITY'S SUPPLEMENTAL BRIEF PERTAINING TO MOOTNESS**

The District of Columbia Water and Sewer Authority ("WASA") submits this brief on the question of whether this case continues to present a live case or controversy under Article III of the Constitution following changes in applicable water quality standards by the District of Columbia ("the District").

I. BACKGROUND

Appellant, Friends of the Earth ("FoE"), challenges EPA's December 14, 2001 approval of the District's "Total Maximum Daily Load" ("TMDL") for Biochemical Oxygen Demand ("BOD") for the Anacostia River and EPA's establishment on March 1, 2002 of a TMDL for Total Suspended Solids ("TSS").

FoE has asked this Court, in part, to ignore established standards of statutory construction and interpret the term “total maximum daily loads” in § 303(d) of the Clean Water Act (“CWA”), 33 U.S.C. § 1313(d), in isolation and find that TMDLs may be expressed only as a quantity of a pollutant over a 24-hour day. FoE also contests whether the administrative record supports EPA’s conclusion that the TMDLs provide for compliance with the District’s water quality standards.

Amendments to the District’s water quality standards for both dissolved oxygen (“DO”) and turbidity became effective on February 28, 2006 when the amendments were approved by EPA. Neither the District nor EPA has amended the TMDLs at issue, and they remain in effect. For the reasons that follow, WASA believes that this case is not moot by virtue of the amendments to the District’s standards.

II. ARGUMENT

This Court’s jurisdiction is limited by the United States Constitution to live “cases” and “controversies.” U.S. Const. art. III, § 2, cl. 1. Under the mootness doctrine, a party must show a direct injury that provides a continuing “personal stake” in the outcome of the litigation. Chemical Mfrs. Ass’n v. EPA, 859 F.2d 977, 982 (D.C. Cir. 1988). However, this Court has found a case or controversy continues when the challenged government activity “has not evaporated or disappeared” and continues to cast “a substantial adverse effect on the interests of

the petitioning parties,” Montgomery Env'tl. Coal. v. Costle, 646 F.2d 568, 578 (D.C. Cir. 1980) (quoting Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974)), and when petitioners are more broadly attacking the standards that EPA applies in its review, Motor & Equip. Mfrs. Ass'n, 142 F.3d 449, 459 (D.C. Cir. 1998) (holding that a challenge to a portion of the regulation that was unaffected by intervening amendments did not become moot by reason of those amendments). If some issue still remains to be decided under a rule that is usually enough to spare it from the “mootness ax.” Chemical Mfrs. Ass'n, 859 F.2d at 983; see also Environmental Defense Fund v. Costle, 636 F.2d 1229, 1248 (D.C. Cir. 1980) (finding a live controversy existed because the disagreement involved EPA’s interpretation of statutory criteria for listing substances as toxic pollutants and the 1977 Congressional amendments (the current CWA) did not change the criteria EPA used to make this listing decision).

Here, the District’s changes to its water quality standards do not moot the statutory construction issue raised by FoE in this case. A “live” controversy exists because the parties continue to disagree whether TMDLs can be expressed in an annual or seasonal load rather than a “daily” load. EPA’s TMDL obligation has not “evaporated or disappeared.” The fact that the District has made changes to the underlying water quality standards does not impact the argument of how the TMDL should be derived and the criteria EPA used to establish the TMDL. The

issue of whether EPA may express TMDLs as an annual or seasonal load remains notwithstanding changes by the District to the standards.

Moreover, this Court has recognized an exception to the mootness doctrine when government action is “capable of repetition, yet evading review” leaving a party without a remedy for his injury. Montgomery Env'tl. Coal., 646 F.2d at 579 (citation omitted). A case is not moot when 1) the challenged action was in duration “too short to be fully litigated prior to its cessation or expiration,” and 2) there is “a reasonable expectation that the same complaining party would be subjected to the same action again.” Id. (quotations and citation omitted). Here, EPA’s correct determination of maximum pollution loads is “capable of repetition, yet evading review.” The proposed revisions to the water quality standards began as early as March 2005. Almost a year later EPA took action to approve or disapprove the standards. The District is required to review its standards during its triennial reviews, CWA § 303(c), and could conceivably change the water quality standards yet again in the future while the litigation continues. Also, there is the reasonable expectation that FoE would continue to raise the same issues regarding EPA’s interpretation of its TMDL authority, and therefore, FoE would be unable to litigate these issues to conclusion if the case were dismissed after every change to the underlying water quality standards. Accordingly, whether EPA’s interpretation

of the TMDL statute is correct is certainly “capable of repetition, yet evading review.”

WASA also does not believe that FoE’s record-based arguments are moot. EPA’s approval of the amendments to the water quality standards has not altered the present validity and application of the TMDLs, and there is no indication that the amendments will necessarily require future modifications of the TMDLs at issue in this case. Moreover, even assuming that such changes were to occur, FoE’s arguments in their appeal pertaining to purported defects in EPA’s modeling and underlying assumptions thereto would remain, and there is no indication that the changes to the standards will alter the modeling or modeling assumptions challenged in this case. Thus, this challenge to EPA’s approval of the present TMDLs “has not evaporated or disappeared” and continues to cast “a substantial adverse effect on the interests of the petitioning parties.” Montgomery Env’tl. Coal., 646 F.2d at 578.

III. CONCLUSION

For the forgoing reasons, the amendments to the District’s water quality standards do not moot the underlying issues in this case so as to eliminate the case or controversy before this Court.

Respectfully Submitted,

DISTRICT OF COLUMBIA WATER AND
SEWER AUTHORITY

Handwritten signatures of David E. Evans and Stewart T. Leeth in black ink.

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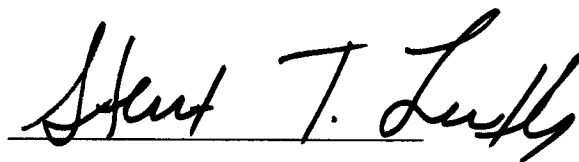
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed, first-class, postage prepaid, this 6th day of March, 2006 to the following:

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A handwritten signature in black ink, reading "Stuart T. Luby", is written over a horizontal line.