

No. A23A0857

In the
Court of Appeals of Georgia

COLUMBUS WATER WORKS,
Appellant,

v.

RICHARD DUNN, Director, Georgia Environmental Protection
Division,
Appellee,

CHATTAHOOCHEE RIVERKEEPER,
Intervenor-Appellee.

On Appeal from the Muscogee County Superior Court,
Superior Court Case No. SU-2021-CV-002023

**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CLEAN
WATER AGENCIES IN SUPPORT OF APPELLANT COLUMBUS WATER
WORKS**

Amanda Aspatore
NATIONAL
ASSOCIATION OF CLEAN
WATER AGENCIES
1130 Connecticut Ave.,
NW, Suite 1050
Washington, DC 20036

Marlee Santos
Ga. Bar No. 155779
CROWELL & MORING LLP
3 Park Plaza, 20th Floor
Irvine, CA 92614-8505
(949) 263-8400
msantos@crowell.com

David Y. Chung
Lynn T. Phan
CROWELL & MORING LLP
1001 Pennsylvania
Avenue, NW
Washington, DC 20004
(202) 624-2500
dchung@crowell.com
lphan@crowell.com

Counsel for National Association of Clean Water Agencies

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STATEMENT OF INTEREST

It has been said that the best laid plans of mice and men often go awry.¹ In Columbus, certain permitting actions are threatening to derail one specific type of plan: Clean Water Act (“CWA”) long-term control plans (“LTCPs”) designed to address combined sewer overflow (“CSO”) discharges in a strategic, affordable manner. Because cities and towns in Georgia and throughout the country that have invested billions of dollars in these critical plans cannot afford to have them go awry, *amicus curiae* the National Association of Clean Water Agencies (“NACWA”) is asking this Court to intervene.

NACWA is a nonprofit trade association representing the interests of over 350 municipal clean water agencies throughout the U.S., including nine in the State of Georgia, that own, operate, and manage publicly owned treatment works, wastewater and stormwater collection and treatment systems, and water reclamation districts. NACWA regularly files *amicus curiae* briefs in cases such as this one that raise issues of concern to the nation’s public clean water utilities.

Many of NACWA’s members, including Appellant Columbus Water Works (“Columbus”), own, manage, and operate combined sewer systems (“CSS”) that collect stormwater runoff and sanitary sewage in a single pipe. CSSs were

¹ Robert Burns, *To a Mouse* (1785) (“The best laid schemes o’ Mice an’ Men Gang aft agley”).

constructed in the United States until the first part of the 20th century. They serve approximately 860 communities with a total population of about 40 million people. When it rains or snows, the wastewater volume within a CSS can exceed the system's conveyance capacity. Such systems are therefore designed to overflow on occasion and discharge excess water directly to nearby surface waters. These overflow events are called "combined sewer overflows" or "CSOs."

For decades, municipalities and sewer districts nationwide have invested many billions of dollars upgrading and improving their systems to install CSO controls consistent with LTCPs developed pursuant to the U.S. Environmental Protection Agency's ("EPA") *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18,688 (Apr. 19, 1994) (the "CSO Policy"). These communities have implemented these major capital-intensive projects with the reasonable expectation that successful implementation of their LTCP will achieve the CSO Policy's overarching objective: compliance with water quality standards through implementation of cost-effective controls. When successful completion of an LTCP and operation of a system functioning in accordance with the LTCP's requirements is buttressed by many years' worth of monitoring data confirming attainment of all water quality standards, it is in fact antithetical to the CSO Policy's objectives to impose additional, unanticipated control requirements on a CSS community. Such communities must instead be free to invest their limited

funds on other pressing priorities that would have far greater environmental and community benefits. With cities and towns across the country facing a myriad of challenges including aging infrastructure, climate resiliency, cybersecurity, and emerging contaminants such as per- and polyfluoroalkyl substances (“PFAS”), to name but a few, the ability of communities to pivot to other needs after satisfactorily addressing their CSOs is more critical than ever.

NACWA has a strong interest in courts properly interpreting and applying the CSO Policy, which Congress fully adopted by incorporating into the CWA. *See* 33 U.S.C. § 1342(q). If left to stand, the Administrative Law Judge’s and lower court’s decisions upholding the new improper requirements in Columbus’s 2020 permit will set a dangerous precedent that could have enormous consequences for CSS communities in Georgia and beyond. This Court should reject these unsupported CSO controls, protect the substantial investments that Columbus and other CSS communities have made, and preserve both the letter and the spirit of the CSO Policy in the context of agency permitting actions.

SUMMARY OF ARGUMENT

The Georgia Environmental Protection Department (“EPD”) is seeking to impose new, costly requirements in Columbus’s 2020 CSO Permit. Yet years of monitoring data confirms that Columbus’s implementation of the CSO control measures set forth in its LTCP achieved the result that EPD, Columbus, and the

CWA envisioned: CSOs have not caused or contributed to an exceedance of any water quality standards in the Chattahoochee River in nearly thirty years. Despite this success story, EPD seeks to disregard that monitoring data and effectively reopen Columbus's LTCP decades after-the-fact to mandate compliance with a new discharge limit that it already determined—correctly, as the data have borne out—is unnecessary to meet water quality standards. Not only do EPD's new permit requirements openly flout Congress's command that permits for CSO discharges “shall conform” to EPA's CSO Policy, these requirements also stand in the way of Columbus's ability to use its resources on projects that will achieve far greater human health and environmental benefits. *See* 33 U.S.C. § 1342(q).

The CSO Policy—and thus, the CWA itself—requires CSS communities like Columbus to develop and implement LTCPs that will result in compliance with the CWA's requirements, including water quality-based requirements. *See* 59 Fed. Reg. at 18,691. LTCPs entail extensive coordination and planning by CSS communities and regulators resulting in the selection of CSO controls that, once fully implemented, will ensure CSO discharges do not cause or contribute to any exceedance of an applicable water quality standard. Because of the immense time and financial commitments required to develop and implement CSO controls, the cost of which is almost entirely borne by the local community, EPA and Congress envisioned that a CSS community should only have to revisit its LTCP in limited

circumstances. Specifically, the CSO Policy recognizes that CSS communities should not have to invest in additional controls after successful implementation of their LTCP unless post-construction monitoring data demonstrates such controls are needed to attain water quality standards. When, as here, post-construction monitoring data show that CSO discharges are not causing or contributing to any water quality standards excursions, under the CSO Policy permit writers cannot simply cast the LTCP aside decades (and millions or even billions of dollars) later, particularly under the guise of an unsubstantiated assumption that any CSO may cause or contribute to such excursions.

Not only is the challenged permit in this case at odds with the CSO Policy's limitations on imposing new CSO control measures in the absence of post-construction monitoring data demonstrating nonattainment of water quality standards, but it is also inconsistent with the policy's key principles. When crafting the CSO Policy, EPA recognized the difficult and enormously expensive task of controlling CSO discharges. To address these challenges, the CSO Policy, and therefore the CWA, sets a unique path towards water quality standards attainment for CSS communities. While ultimately mandating full CWA compliance, the CSO Policy allows LTCPs to account for affordability, engineering, legal, and technical considerations.

Moreover, given the expansive infrastructure projects required to control CSO discharges, implementation of which often spans decades, the CSO Policy recognizes that forcing CSS communities to invest in additional controls following completion of an LTCP may not be appropriate. Even when water quality standards are not met following LTCP implementation—which is *not* the case here—EPA recognizes that revising the standards themselves or exercising enforcement discretion may make more sense than imposing additional, costly CSO controls on communities.

The challenged permit terms in this case, however, make a mockery of this emphasis on flexibility, cost-effectiveness, and a community's financial capability. Instead, EPD has thrown the decades of careful (and successful) planning and implementation Columbus painstakingly completed pursuant to its LTCP out the proverbial window, along with both the letter and spirit of the CSO Policy and the critical policy objectives it was designed to achieve, at the expense of the communities Columbus serves.

The Court's ruling in this case could therefore have significant consequences for CSS communities in the State of Georgia and beyond. Upholding the new requirements in Columbus's 2020 permit risks setting a dangerous precedent for disregarding successful LTCPs—and the decades of planning and millions or more dollars in implementation they each represent—to the detriment of affordable

utility bills, non-CSO infrastructure improvements, critical human health and environmental initiatives, and, ultimately, the will of Congress. The ramifications for CSS communities would be significant, upending decades of careful coordination with regulators and billions of dollars in infrastructure investments.

ARGUMENT AND CITATION OF AUTHORITY

I. Long-Term Control Plans Are Designed to Ensure Compliance with Water Quality Standards; Permit Writers Should Not Impose New Requirements After Successful Plan Implementation Results in Attainment of All Applicable Standards.

Congress amended the CWA to mandate that NPDES permits for CSO discharges “shall conform to” EPA’s CSO Policy beginning on December 21, 2000. 33 U.S.C. § 1342(q)(1). By enshrining the CSO Policy in its entirety into the CWA, Congress acknowledged that CSO controls are different from other CWA requirements. They call for significant investments of public funds and can take years to develop. Once selected and approved, CSO controls can take decades to complete, as they often require CSS communities to dig up and retrofit infrastructure such as city streets that have been in place for decades if not over a century. The CSO Policy accordingly calls for actions to reduce or treat CSO discharges that are flexible and cost-effective. *See* 59 Fed. Reg. at 18,688.

The CSO Policy requires communities with CSO discharges to develop and implement LTCs “that will ultimately result in compliance with the requirements of the CWA.” 59 Fed. Reg. at 18,691. These plans are to “evaluate the cost

effectiveness of a range of control options/strategies.” *Id.* While CSS communities can utilize either a demonstration approach or a presumption approach during the development of CSO controls in their LTCPs, all plans entail extensive engineering, financial, technical, and legal planning.

A key component of the LTCP is a “post-construction water quality assessment program,” which requires the collection of data “to demonstrate compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of CSO controls.” *Id.* at 18,694.

To ensure that selected controls in an LTCP are sufficient to meet water quality standards while mitigating against exorbitantly costly post-construction retrofitting of a CSO control facility, the CSO Policy emphasizes that regulators and CSS communities “should meet early and frequently throughout the long-term CSO control planning process” and agree on, among other things, LTCP implementation procedures and water quality-based requirements for subsequent CSO permits. *Id.* at 18,694; *see also id.* at 18,696 (“Once the permittee has completed development of the long-term CSO control plan and the selection of the controls necessary to meet CWA requirements has been coordinated with the permitting and [water quality standards] authorities, the permitting authority should include . . . requirements for implementation of the long-term CSO control plan as soon as practicable.”). The need for such an extensive coordination and

planning process is unsurprising given the hundreds of millions of dollars—and in some CSS communities, billions of dollars—required to implement an LTCP.²

As EPA has made clear, the goal of all this coordination is to “ensure that the controls in the proposed LTCP will ensure that CSOs do not cause or contribute to any exceedance of [water quality standards], including any applicable revisions to [water quality standards].” U.S. EPA, “Water quality-based and technology-based CSO requirements,” at 2 (Jan., 14, 1999).³ In this sense, the LTCP process is, effectively, a decades-long “reasonable potential analysis” (“RPA”). The controls that are tried and tested throughout the LTCP process are selected and adopted precisely because they have been determined—and, with post-construction monitoring, ultimately proven—to ensure that CSO discharges will not cause or contribute to the violation of water quality standards.

Columbus’s case is particularly compelling in this regard. In accordance with the CSO Policy, Columbus coordinated closely with EPD to develop an LTCP that would ensure CSOs would not cause or contribute to any exceedance of water quality standards. Br. of Appellant at 10-15. As part of that process, EPD specifically agreed with expert analysis that water quality standards would be

² As noted above, the LTCP development phase alone can take years and require substantial investments.

³ Available at <https://www.epa.gov/sites/default/files/2015-10/documents/policymemos.pdf>.

protected *without* an end-of-pipe limit for fecal coliform, and it ultimately approved a performance objective that did not require the Control Facility to meet such a limit. *Id.* Columbus then spent \$100 million to implement the LTCP, (V3-371), relying on EPD’s express approval and the expectation that EPD would not three decades later unilaterally change the mutually agreed upon end goal; set aside the LTCP; and, in contradiction to mounds of data, declare that an end-of-pipe limit is suddenly necessary to ensure that Columbus’s CSO discharges are not causing or contributing any violations of water quality standards.

EPD’s about-face does not “conform” to the CSO Policy as Congress mandated. *See* 33 U.S.C. § 1342(q). Nor can it be reconciled with EPA’s admonition—to both CSS communities and permitting authorities—to “agree on [] fundamental issues early in the project to avoid costly misunderstandings later.” U.S. EPA, *Combined Sewer Overflows Guidance for Long-Term Control Plan*, at 3-3 (Aug. 31, 1995) (hereinafter “LTCP Guidance”). Given the significant time and financial investments required to develop and implement CSO controls, EPD and other permitting authorities have an obligation to honor the negotiated and agreed upon requirements established in the LTCP unless monitoring data shows that additional controls are warranted. Where water quality standards are being attained and designated uses protected following successful implementation of an LTCP, the CSO Policy simply does not allow EPD to subsequently require

additional costly control measures that it previously determined (and data proved) to be unnecessary.

Critically for CSS communities, once these controls have been proven effective by post-construction monitoring, the CSO Policy allows clean water utilities to pivot to other priorities if standards continue to be attained. This Court should protect this meticulously crafted framework for addressing a daunting environmental challenge which has produced undeniably impressive water quality standards results in Columbus and across the United States. Communities like Columbus should not have the benefits of successful LTCP implementation stripped away by permit writers who may be disinclined to accept either data or Congressional intent.

II. The Imposition of New Requirements in Columbus’s 2020 Permit is Inconsistent with the CSO Policy’s Data-Driven Approach to Post-Construction Permitting.

The CSO Policy’s post-construction monitoring requirements serve as the foundation for subsequent decisions to reopen CSO permits based on a determination that the agreed upon controls in an LTCP are failing to meet water quality standards or protect designated uses. *See* 59 Fed. Reg. at 18,694 & 18,696. The CSO Policy requires the implementation—on an established schedule—of a post-construction water quality assessment program “to monitor and collect sufficient information to demonstrate compliance with WQS and protection of

designated uses as well as to determine the effectiveness of CSO controls.” *Id.* at 18,696.⁴ EPA intended that “[i]f post-construction compliance monitoring indicates that existing [water quality standards] are not being met,” the data would be “used to identify the additional CSO controls necessary to achieve [water quality standards].” LTCP Guidance at 4-16.

EPA guidance on post-construction compliance monitoring reinforces the fact that the imposition of additional controls (beyond those set forth in an LTCP) depends on whether monitoring data show that LTCP implementation has resulted in water quality standards attainment:

As communities implement their LTCPs, they should conduct post construction compliance monitoring to determine whether the controls specified by the LTCP are meeting their objectives and to assess whether the water quality standards (WQSs) are being met. The post construction compliance monitoring is a continuous process to determine whether the CSO LTCP is meeting the regulatory requirements as planned. After reviewing their post construction compliance monitoring data, the permittee, in conjunction with the NPDES authority, should evaluate the need for additional controls that would meet WQS and then revise their LTCP and implement the appropriate additional controls.

⁴ The CSO Policy discusses post-construction monitoring in the context of “Phase II Permits,” which require implementation of the LTCP. *See* 59 Fed. Reg. at 18,696. Phase II Permits often extend through numerous five-year permit cycles. *See* U.S. EPA, *Combined Sewer Overflows: Guidance for Permit Writers*, at 5-1 (Aug. 31, 1995), available at https://www.epa.gov/sites/default/files/2015-10/documents/csopermitwriters_full.pdf. The requirement to implement a post-construction monitoring program extends through all Phase II permit cycles and into post-Phase II permitting, *i.e.*, after completion of an LTCP, which is where Columbus currently stands. *See id.*

U.S. EPA, *CSO Post Construction Compliance Monitoring Guidance*, at 5 (May 2012) (hereafter, “Post Construction Monitoring Guidance”).⁵

EPA guidance on integrating the development of LTCPs with water quality standards reviews likewise only contemplates that a permit writer will revisit CSO control measures outlined in an LTCP if, after implementing such controls, “the CSO community finds that it is still contributing to the non-attainment of the applicable water quality standards[.]” U.S. EPA, *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews*, at 47 (July 31, 2001) (hereinafter, “CSO Water Quality Standards Guidance”).⁶ Because CSS communities must collect and analyze system and receiving water data both during and after construction of the CSO controls in an LTCP, they amass voluminous data “to assess whether the controls function as planned” and whether they are contributing to non-attainment of applicable standards. *Id.*

Nothing in the aforementioned guidance contemplates that a CSS community would have to revisit its LTCP where monitoring data demonstrate attainment of water quality standards. *See id.* To the contrary, to protect CSS

⁵ Available at https://www.epa.gov/sites/default/files/2015-10/documents/final_cso_pccm_guidance.pdf.

⁶ Available at https://www.epa.gov/sites/default/files/2015-10/documents/wqs_guide_final.pdf.

communities' significant investments needed to develop and implement LTCPs and the ability of communities to invest limited funds on projects that will result in the greatest human health and environmental benefits, the CSO Policy contemplates that permit writers will exercise their reopener authority sparingly and only revisit the selection of CSO controls in an LTCP when there are substantial, data-driven reasons for doing so. *See* 59 Fed. Reg. at 18,688. Post-construction NPDES permits contain a reopener clause authorizing a permit writer to amend the permit to address any identified deficiencies if the data collected show that "the CSO controls fail to meet WQS or protect designated uses." *Id.* at 18,696; *accord* Post Construction Monitoring Guidance, at 14. The CSO Policy thus carefully cabins the narrow conditions under which EPD may revisit Columbus's LTCP in a post-construction permit to impose additional requirements. Those conditions have not been met here.

As Columbus explains (at 16), its sewer system has not caused or contributed to a single water quality excursion during the 27 years since construction of its Control Facility. Indeed, in 2016, EPD certified to U.S. EPA that the receiving waters of the Chattahoochee River meet or exceed all water quality standards. (V3-373). Given that extensive monitoring data collected after construction of the Control Facility has demonstrated compliance with applicable state water quality standards for fecal coliform bacteria, (V3-372; V6-375; V6-

334), EPD clearly lacks any water quality-based need to impose an end-of-pipe limit.

Consistent with the CSO Policy, other utilities have relied on post-construction compliance monitoring programs to inform whether additional CSO controls are necessary to meet water quality standards. For example, in late 2017, the Massachusetts Water Resources Authority (the “Authority”) began a multi-year post-construction performance assessment to evaluate system performance, water quality impacts of any CSOs that remained after implementation of over \$900 million in controls, and compliance with Massachusetts Water Quality Standards. *See* Mass. Water Res. Auth., *Semiannual CSO Discharge Report No. 6*, at 1-2 (Apr. 30, 2021).⁷ To inform this assessment, the Authority has conducted inspections to confirm or update the physical and hydraulic conditions throughout the sewer system; collected extensive rainfall and overflow-related data; and upgraded and improved calibration of its hydraulic model using the inspection findings and overflow data. *See id.* The Authority’s extensive monitoring data and subsequent performance assessment has enabled it to make system adjustments while simultaneously considering “whether further investments in CSO mitigation will result in meaningful water quality improvements and whether emphasis on non-CSO contributions of pollution would be more cost-effective.” *Id.* at 18-19.

⁷ Available at https://www.mwra.com/cso/pcmpa-reports/06_070120-123120.pdf.

Elsewhere, in Portland, Oregon, the city’s post-construction monitoring involves measurements of rainfall and CSO discharges and water quality sampling. See City of Portland, Bur. Of Env’tl. Servs., *City of Portland Post-2011 CSO Facilities Plan*, at 136 (Sept. 2010).⁸ Such monitoring data has allowed the city to confirm, as Columbus has here, that “CSO control performance standards are being achieved” and that “the completed LTCP program complies with the water quality standards established by the State of Oregon and the City’s NPDES permit requirements.” *Id.* at ES-4 to ES-5.

These examples demonstrate that post-construction monitoring generates ample data upon which to determine whether any water quality problem exists after the full implementation of the CSO controls mandated by an LTCP, and, more importantly, whether CSO controls or non-CSO investments would more efficiently address any identified water quality issues. The data-driven approaches followed by these and numerous other CSS communities adhere to both the letter and spirit of the CSO Policy by ensuring costly CSO controls are adopted only where monitoring data demonstrates a water quality-based need to do so.

By contrast, new post-construction permit requirements like those at issue here—imposed on the basis of questionable analysis divorced from demonstrated water quality standards attainment—threaten to upend billions in capital

⁸ Available at <https://semspub.epa.gov/work/02/206591.pdf>.

investments in major infrastructure projects and decades of coordination between CSS communities and regulators to implement the CSO Policy.

Where LTCP implementation has proven to be successful, CSS communities like Columbus should be able to rely on the CSO controls and the performance objectives established during the development of the LTCP. Columbus should not be required to expend considerable additional resources implementing controls that have been proven through the CSO Policy’s monitoring requirements to be unnecessary to meet water quality standards. Where a community has done its part and met the CWA’s stringent requirements, it must—as a matter of law, sound public policy, and plain old common sense—be allowed to move on to address other ever-emerging human health and environmental concerns.

III. The New Requirements in Columbus’s 2020 Permit Ignore the CSO Policy’s Focus on Flexibility and Cost-Effectiveness and Would Divert Limited Resources from Addressing Real Threats to Water Quality.

To ensure CSO controls are “cost-effective and meet the objectives of the CWA[,]” the CSO Policy espouses four “key principles”: (1) providing clear levels of control; (2) providing sufficient flexibility for municipalities, especially financially disadvantaged communities, to consider the site-specific nature of CSOs and determine the most cost-effective means of meeting CWA requirements; (3) allowing a phased approach to control considering a community’s financial

capability; and (4) review and revision of water quality standards, as needed, to reflect site-specific wet weather impacts of CSOs. *Id.* at 18,689.

These key principles reflect Congress's intent to integrate CSO controls with the requirements of the CWA in a flexible way, taking into account the technically challenging and enormously expensive effort of controlling overflows. As noted above, the costs paid by communities to implement LTCPs come not only in the form of increased utility bills, but also the disruptions stemming from major sewer infrastructure projects that can significantly impact neighborhoods and city streets. Maintaining a flexible, affordable approach to CSO controls is therefore critical, particularly where, as here, CSS communities have made the necessary investments and CSOs are no longer the underlying cause of any water quality issues.

Despite acknowledging the receiving waters of the Chattahoochee River have been meeting water quality standards since 2016, however, EPD now relies on a new RPA to justify the imposition of an end-of-pipe limit on fecal coliform. *Br. of Appellant* at 15-16. As *Columbus* details (at 28-32), there is a genuine dispute about whether EPD's RPA is supportable. NACWA does not repeat those arguments but instead focuses on demonstrating how EPD's RPA—itsself a rigid and overly conservative application of the CWA—is inconsistent with the CSO

Policy's command for flexibility and emphasis on cost-effectiveness in implementing CSO controls.

The CSO Policy does not categorically mandate that CSS communities eliminate any potential to ever contribute to an exceedance of water quality standards no matter the cost. Rather, EPA and Congress understood that flexibility may be needed to address residual overflows, as a limited number of CSOs may in fact be unavoidable in certain rainfall events given the engineering realities of CSSs.

While expressed differently depending on the situation, LTCPs are ultimately designed to determine the amount of capture necessary to attain water quality standards, and post-construction monitoring data is designed to confirm the accuracy of those determinations. A post-hoc proclamation that any CSO could violate water quality standards followed by the imposition of a requirement for full treatment of overflows would result in the exact scenario the CSO Policy was expressly designed to avoid: rigid application of the CWA in a manner that will force CSS communities to spend inordinate amounts of money on top of the millions or even billions already spent on CSO controls to achieve an outcome that will result in no tangible water quality benefit.

NACWA understands the superficial appeal of a blanket policy to eliminate all CSOs no matter the cost. But EPA and Congress crafted and adopted the CSO

Policy to provide a more nuanced solution to a highly complicated problem so that CSS communities across the country would not be subjected to the exact scenario Columbus finds itself in now.

Even in situations where post construction compliance monitoring data “indicates that a community could not meet [water quality standards] due to financial and/or technological infeasibility,” the CSO Policy notes that a CSS community should work closely with the permitting authority “to develop a schedule for incremental improvements and then revisit additional controls as financial conditions change or as new control technologies emerge.” *See* Post Construction Monitoring Guidance at 5. Alternatively, a CSS “community can also request that the NPDES permitting authority consider enforcement discretion” or seek other compliance flexibilities. *Id.*; *see also* LTCP Guidance at 3-22. In short, EPA—and later, Congress when it codified the CSO Policy—struck a careful balance between achieving water quality improvements and the significant cost burdens of those improvements.

When appropriate, the CSO Policy even calls for regulatory agencies to determine whether the underlying water quality standards themselves should be tailored to better reflect what is truly attainable. *See* 59 Fed. Reg. at 18,695 (discussing removal or changes of designated uses from water quality standards following use attainability analyses; adoption of partial uses such as recreation that

only occurs during certain times of the year; or grant of temporary variances that allow a CSO permittee to meet an adjusted standard as further analysis is undertaken). In 2001, EPA issued guidance stressing the need to “reconcil[e] water quality standards with well-designed and operated CSO LTCPs without causing substantial and widespread economic and social impacts.” CSO Water Quality Standards Guidance at 3. In that guidance, EPA identified ways to revise water quality standards to avoid such economic and social impact, such as segmenting a water body to preserve recreation where it actually occurs, applying the standard at the point of contact rather than at the end-of-pipe, or revising a designated use by creating subclasses to recognize intermittent exceedances of bacteriological criteria. *Id.* at 46.⁹

Yet another way in which EPA has acknowledged that additional controls are not always appropriate for achieving water quality goals is by directing permitting authorities to “consider and understand” “pollution sources other than CSOs [that] are likely to be contributing to the receiving water and affecting whether WQS are achieved.” U.S. EPA, *Combined Sewer Overflows: Guidance for Permit Writers*, at 2-5 (Aug. 31, 1995) (hereinafter “Guidance for Permit

⁹ EPD’s approach turns this particular guidance on its head. EPD imposed end-of-pipe limits for the first time in Columbus’s 2020 post-LTCP permit even though water quality standards are being attained.

Writers”).¹⁰ EPA cautioned that failure to consider the relative impacts of CSOs and non-CSO sources of pollution on water quality could lead to “large expenditure[s] on CSO control[s]” that “result in negligible improvement in water quality.” LTCP Guidance, at 1-18.

Accordingly, the CSO Policy does not contemplate that regulators will impose the most stringent permitting conditions to reduce and treat CSOs, but instead tailor them to the “permittee’s specific circumstances.” Guidance for Permit Writers at 4-10. This flexibility is vital to achieving the CSO Policy’s goal of implementing sound, cost-effective controls and ensuring that CSS communities are not striving to implement procedures that result in little to no meaningful water quality improvements at the expense of more critical water quality improvement projects.

Consistent with the CSO Policy and EPA guidance, some CSS communities have determined that additional CSO controls are inappropriate where water quality returns would be limited or non-existent. For example, the Louisville/Jefferson County Metropolitan Sewer District (“MSD”) found that implementing additional CSO reductions beyond those envisioned in its LTCP “would be beyond the point of diminishing returns” and would represent “an

¹⁰ Available at https://www.epa.gov/sites/default/files/2015-10/documents/csopermitwriters_full.pdf.

insignificant further reduction in public health risk.” Louisville MSD, *Integrated Overflow Abatement Plan, 2021 Modification (Vol. 1 of 3)*, at 5-10 to 5-11 (Apr. 30, 2021).¹¹ MSD is targeting completion of implementation of its LTCP by December 31, 2026, and expects to achieve 95% capture of the wet weather combined sewage generated in its service area. *Id.* at ES-5. The CSO controls cost approximately \$320 million, whereas “[t]he cost to achieve 100 percent capture would have cost an *additional* \$600 million.” *Id.* at 5-10. MSD’s analysis showed that “almost all the fecal coliform reduction benefits [in the Ohio River] come in the first \$320 million of CSO reduction projects, and virtually no fecal coliform reduction benefits come from additional expenditures beyond \$320 million.” *Id.* at 5-11.

The City of Indianapolis provides another instructive illustration of the financial concerns EPA and Congress intended permit writers to consider when determining whether to impose additional CSO controls. Indianapolis is on track to complete implementation of its LTCP in 2025 at a cost of approximately \$2 billion. U.S. EPA, *Review of Revisions to Indiana’s Water Quality Standards*, at 8 (July 29, 2020) (hereinafter, “EPA Indiana Decision”).¹² However, Indianapolis

¹¹ Available at <https://www.msprojectwin.org/library/#6-453-2021-modification-30-april-2021>.

¹² Available at https://www.nacwa.org/docs/default-source/resources---public/indiana-cso-use-change-analysis.pdf?sfvrsn=7c74c661_2.

recently demonstrated that post-LTCP CSOs will still prevent attainment of the primary contact recreation designated use. Rather than require Indianapolis to continue reducing CSOs, EPA authorized the State of Indiana to revise its water quality standards and emphasized that “[i]f Indianapolis continues investing its resources to reduce CSOs even further (at an estimated cost of \$280 million for each additional typical year CSO event eliminated . . .), that would almost certainly come at the expense of Indianapolis funding other projects or services to improve water quality” *Id.* at 17-18. EPA thus acknowledged that additional CSO controls would be inappropriate because they would cause *more* environmental damage by diverting limited resources from addressing more pressing water quality challenges. *See id.* at 16-19.

Like the CSS communities in Louisville and Indianapolis, imposing additional CSO controls in Columbus is inappropriate because the cost of such controls would significantly outweigh any negligible water quality improvement that may result from their implementation. Columbus has determined that it would cost millions of ratepayer dollars to redesign its Control Facility and implement the end-of-pipe limit now demanded by EPD. *See Br. of Appellant* at 2. At the same time, the impact on water quality would be inconsequential, as the flow of the receiving waters is significantly larger than the volume of any CSO. (V9-325-26). Indeed, EPD recognized this when it approved the performance objectives in the

LTCP, (V9-325-26), expressly rejected end-of-pipe limits before issuing the 1998 NPDES permit, (V3-467-70), and determined that no fecal coliform bacterial limit was needed before issuing Columbus's 2010 NPDES permit, (V3-506). NACWA is not endorsing all decisions made in 2010,¹³ but the ensuing data collected by Columbus have all supported the one made by EPD with respect to its rejection of the proffered limit.

Nothing in the CSO Policy or EPA guidance authorizes a permitting authority to impose additional controls where designated uses are protected and water quality standards are being attained as EPD has done here. For CSS communities such as those in Louisville, Indianapolis, and here, it would make little sense to impose additional controls where such controls would have no meaningful impact on water quality, or worse, divert limited resources from more serious water quality issues. These instances underscore the importance of the CSO Policy's built-in flexibilities, as well as the importance of basing additional CSO controls on data-driven analyses of water quality. Communities like Columbus that have followed the requirements of the CSO Policy and are achieving water quality standards as required by the CWA cannot afford to have this Court rule any other way.

¹³ See, e.g., the U.S. Men's National Team defense in its 2-1 loss against Ghana in the Round of 16 at the 2010 World Cup in South Africa.

CONCLUSION

For the foregoing reasons, NACWA respectfully requests that this Court reverse and remand the Superior Court order.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 16th day of February, 2023.

Amanda Aspatore NATIONAL
ASSOCIATION OF CLEAN WATER
AGENCIES
1130 Connecticut Ave., NW, Suite
1050
Washington, DC 20036

*Counsel for the National Association
of Clean Water Agencies*

/s/ Marlee Santos
Marlee Santos
Ga. Bar No. 155779
CROWELL & MORING LLP
3 Park Plaza, 20th Floor
Irvine, CA 92614-8505
(949) 263-8400
msantos@crowell.com

David Y. Chung
Lynn T. Phan
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
dchung@crowell.com
lphan@crowell.com

*Counsel for the National Association
of Clean Water Agencies*

CERTIFICATE OF SERVICE

I certify I have on this 16th day of February, 2023, caused a true and correct copy of the foregoing document to be served upon all parties by electronic mail to the following recipients:

Lewis B. Jones
John L. Fortuna
Jones Fortuna LP
111 New Street
Suite A
Decatur, GA 30030
ljones@jonesfortuna.com
jfortuna@jonesfortuna.com

James C. Clark, Jr.
Thomas F. Gristina
Page, Scrantom, Sprouse Tucker &
Ford, P.C.
1111 Bay Avenue, 3rd Floor
Columbus, GA 31901
Jcc@Psstf.com
Tfg@Psstf.com

Counsel for Appellant

Christopher R. Held
Stacy Shelton
Robin J. Leigh
Georgia Dept. of Law
40 Capitol Square SW
Atlanta, GA 30334
cheld@law.ga.gov
rleigh@law.ga.gov
sshelton@law.ga.gov

Counsel for Appellee

R. Hutton Brown
April S. Lipscomb
Southern Environmental Law Center
Ten 10th St., NW, Ste. 1050
Atlanta, GA 30309
hbrown@selcga.org
alipscomb@selcga.org

Counsel for Intervenor-Appellee

/s/ Marlee Santos
Ga. Bar No. 155779

*Counsel for National Association of Clean
Water Agencies*