BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

COLUMBUS WATER WORKS,
Petitioner,
v.

RICHARD DUNN, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES,
Respondent,
and

CHATTAHOOCHEE RIVERKEEPER, INC.,
Intervenor-Respondent.

Docket No.: 2114835
2114835-OSAH-BNR-WQC-106-Walker

Agency Reference No.: GA0036838

MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS AND MOTIONS FOR SUMMARY DETERMINATION

On April 28, 2021, Petitioner, Columbus Water Works ("Columbus"), filed an Amended Petition for Hearing ("Amended Petition") challenging three provisions of National Pollutant Discharge Elimination System Permit No. GA0036838 ("2020 Permit" or "Permit") issued to Columbus by Richard Dunn, Director of the Georgia Environmental Protection Division ("EPD"), on November 10, 2020.[1] EPD issued the 2020 Permit to Columbus for its Combined Sewer System, including two treatment facilities and ten minor outfalls. Exhibit 1 attached to Petitioner's Amended Motion for Summary Judgment (filed May 21, 2021), Exhibit 1 attached to EPD's Motion to Dismiss in Part and for Summary Judgment in Part (filed May 21, 2021) [hereinafter, "Ex. 1"].

[1] Columbus filed an initial Petition for Hearing on December 10, 2020. The Chattahoochee Riverkeeper intervened as Respondent-Intervenor on January 20, 2021. On February 2, 2021, the undersigned granted Columbus's request to refer the case to mediation, but the case was not resolved. After the parties submitted dispositive motions, Columbus filed its Amended Petition for Hearing on April 28, 2021. The parties jointly moved to withdraw the previously filed dispositive motions and for a new briefing schedule; the Court granted this motion on May 11, 2021.

Columbus sought review of three requirements imposed by the 2020 Permit. In Count I of the Amended Petition, Columbus challenged the Permit's effluent limitation for fecal coliform bacteria that can be discharged into the Chattahoochee River. Count II challenged the effluent limitation for total residual chlorine that can be discharged into the Chattahoochee River. In Count III, Columbus contested the Permit's requirement that it monitor the flow of discharges from one minor outfall into the Chattahoochee River.[2] Columbus maintains that these Permit conditions are unlawful and that EPD must reissue the 2020 Permit.

PROCEDURAL HISTORY

On May 21, 2021, Columbus filed for Summary Determination as to Count I of the Amended Petition ("Columbus's Motion"),[3] and Respondent EPD moved to dismiss the Petition in part and for Summary Determination as to Counts I, II and III (EPD's Motion).[4] On June 2, 2021, Columbus and EPD submitted Responses to the initial motions. Respondent-Intervenor Chattahoochee Riverkeeper also filed a Response to Columbus's Motion ("Riverkeeper's Response").

On June 11, 2021, Columbus submitted a Reply Brief in support of its Motion, EPD submitted a Reply Brief in Support of its Motion, and Intervenor Chattahoochee Riverkeeper also

[2] Columbus has since withdrawn this claim. Transcript of July 14, 2021, Oral Argument at 95.

[3] Columbus maintains that, if this tribunal grants its Motion for Summary Determination as to Count I, such an outcome would resolve Count II.

[4] In the Motion to Dismiss, EPD moved to dismiss Columbus's challenge to EPD's reliance on the Revised Total Maximum Daily Load Evaluation for Seventy-Nine Stream Segments in the Chattahoochee River Basin for Fecal Coliform ("2008 TMDL") as untimely.

filed a Reply in support of EPD's Motion for Summary Determination.[5] Oral argument took place on July 14, 2021, and the record closed after the transcript of the oral argument was submitted into the record.

SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part: "A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination." Ga. Comp. R. & Regs. 616-1-2-.15(1).[6] On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div. Dep't of Natural Res., No. OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (Oct. 21, 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see also Piedmont Healthcare. Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary determination). The party challenging a permit has the burden to show that the permit was issued contrary to law. See,

[5] On June 2, 2021, Chattahoochee Riverkeeper filed a Motion to Strike Testimony or, in the Alternative, to Compel Production of Documents and Allow for Supplemental Briefing. This motion was withdrawn, however, on June 7, 2021.

[6] The parties argue that there are no issues of material fact in dispute. See, e.g., Transcript of July 14, 2021, Oral Argument at 80; Columbus's Response to EPD's Statement of Undisputed Material Facts (filed April 28, 2021) at 1 ("Columbus has sought summary determination on purely legal grounds. As a result, any disputes of fact do not otherwise impact the relief sought by Columbus in its Motion.").

e.g., N. Lamar Cty. Citizens Ass'n v. Dep't of Natural Res., OSAH-BNR-SM-0816098-75, 2008 Ga. ENV. LEXIS 8, at *25 (May 21, 2008) (party challenging NPDES permit has burden of proving "that the issuance of the NPDES permit . . . violates the Georgia Water Quality Act"); Altamaha Riverkeeper v. Dir., Ga. Dep't of Natural Res., OSAH-BNR-WQC-1633136-11 at 50 (2016) (Petitioner bears burden of proving that issuance of permit "was unlawful"), rev'd in part on other grounds, 346 Ga. App. 269 (2018).

BACKGROUND

The Clean Water Act (also "CWA"), 33 U.S.C.S. § 1251 et seq., establishes a comprehensive regulatory program to "maintain the chemical, physical, and biological integrity of the Nation's waters" by reducing and eliminating the discharge of pollutants. 33 U.S.C. § 1251(a). Under the CWA, the states have the primary responsibility "to prevent, reduce, and eliminate pollution" in their waters and must establish water quality standards (also "WQS") for each body of water within their borders. 33 U.S.C. § 1251(b); 33 U.S.C. § 1313(a); 40 C.F.R. § 131.2. To comply with this mandate, a state first establishes a designated use for the body of water. 33 U.S.C. § 1313(c)(2)(A) (designated use may be as public water supply, propagation of fish and wildlife, recreational, agricultural, industrial, or for other purposes). Once a state has determined the designated use, it adopts water quality criteria specifying the chemical, physical, and biological conditions necessary to protect designated uses. See id.; 40 C.F.R. § 131.6.

A "point source" includes "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Federal law prohibits point sources from discharging any pollutant into the waters of the United States unless that discharge meets specific requirements. 33 U.S.C. §§ 1311(a), 1362(14). To safeguard water quality standards, point sources must apply for permits issued pursuant to the National Pollutant Discharge

Elimination System ("NPDES"). 33 U.S.C. §§ 1341, 1342. NPDES permits include "effluent limitations" which are restrictions on pollutants "discharged from point sources" and other requirements as may be necessary to achieve the applicable WQS. 33 U.S.C. § 1362(11); see 40 C.F.R. § 122.44(d); Ga. Comp. Rules & Regs. 391-3-6-.06(4)(a)(10).

Under the authority provided by Georgia's Water Quality Control Act, EPD implements Georgia's obligations under the CWA, including establishing the State's water quality standards and administering the NPDES program for point sources. See, e.g., O.C.G.A. §§ 12-2-24; 12-5-23 (a)(1)(C) & (R); 12-5-23(c)(1) & (15). When issuing NPDES permits, EPD must comply with the CWA, and its "[c]alculations and specification of effluent limitations" must "be made in accordance with the provisions of Federal Regulations, 40 C.F.R. § 122.44 and § 122.45." Ga. Comp. R. & Regs. 391-3-6-.06(4)(b).

Columbus is an executive department of the Consolidated Government of Columbus-Muscogee County, which is overseen by the Columbus Board of Water Commissioners. Amended Petition at ¶ 2. Columbus supplies drinking water and provides wastewater treatment using a Combined Sewer System, one in which stormwater and sewage are conveyed to a wastewater treatment plant through a single pipe. Amended Petition at ¶¶ 2-3. During wet weather storm events, Columbus's Combined Sewer Systems treatment facilities treat the combined flow. See Ex. 1, Fact Sheet, p. 4 of 27. Combined Sewer Systems are designed to overflow occasionally, and to discharge the excess flow directly to nearby bodies of water. Amended Petition at ¶ 4. Most Combined Sewer Systems include relief outlets called Combined Sewer Overflows (or "CSOs"). See O.C.G.A. § 12-5-29.1(a)(1). Columbus's CSO system consists of 10 minor diversion structures, which also operate as minor outfalls, that direct the combined stormwater and raw sewage to two CSO control facilities. Ex. 1, Fact Sheet, p. 4 of 27. Columbus's CSOs

discharge into the Chattahoochee River and are considered point sources under the Clean Water Act's NPDES Permit program. Id., 33 U.S.C. § 1251 et seq. and O.C.G.A. § 12-5-20 et seq.

In the early 1990s, Columbus overhauled its Combined Sewer System as part of the Federal Environmental Protection Agency's ("EPA") national effort to upgrade Combined Sewer Systems across the country. Affidavit of John Peebles, attached as Exhibit 2 to Columbus's Motion [hereinafter, Peebles Affidavit] at ¶ 8. The CSO Control Facilities were constructed according to a design approved by EPD and made part of the facility's Long-Term Control Plan. Peebles Affidavit at ¶ 10; see also Columbus' Long-Term Control Plan, attached as Exhibit 10 to Columbus's Motion. Pursuant to EPA's published CSO Control Policy, the Long-Term Control Plan put in place an initial assessment and monitoring scheme designed to gather data to guide the permitting of the facility going forward. Id.; 59 Fed. Reg. 18,691 (Apr. 19, 1994).

Since the Long-Term Control Plan was implemented and construction of the CSO Control Facilities completed, EPD has issued two NPDES permits authorizing discharges from the CSOs – the first in 1998 and the second in 2010. See Columbus NPDES Permit No. GA0036838 (July 28, 1998); Columbus NPDES Permit No. GA0036838 (April 6, 2010). The 2010 Permit expired in April 2015 but has been administratively extended by EPD.[7] Affidavit of Audra Dickson, attached to EPD's Motion [hereinafter, Dickson Affidavit] ¶ 16. On November 10, 2020, EPD issued the Permit challenged in this proceeding.

[7] Under 40 C.F.R. § 122.46(a)-(b), National Pollutant Discharge Elimination System permits shall be effective for a fixed term not to exceed 5 years; except as provided in 40 C.F.R. § 122.6, the term of a permit shall not be extended by modification beyond the maximum duration specified in this section. Under § 122.6(a), the conditions of an expired permit continue in force under 5 U.S.C. § 558(c) until the effective date of a new permit.

COUNT I

In Count I of the Amended Petition, Columbus challenges the Permit's effluent limitation for fecal coliform bacteria that can be discharged into the Chattahoochee River. Columbus argues that the effluent limitation is unlawful because there is no reasonable potential that any discharge from the CSOs will ever cause an excursion above the applicable water quality standard, EPD improperly relied on the Total Maximum Daily Load pertaining to discharges of fecal coliform into the relevant segment of the Chattahoochee River, and the effluent limitation is inconsistent with the design of Columbus's CSO Control Facility.

A. Reasonable Potential Analysis

A reasonable potential analysis (or "RPA") considers "whether a discharge . . . has the reasonable potential to cause, or [to] contribute[] to an in-stream excursion" above an applicable water quality standard. 40 C.F.R. 122.44(d)(1)(ii). When conducting an RPA, the permitting authority "shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, . . . and where appropriate, the dilution of the effluent in the receiving water." 40 C.F.R. § 122.44(d)(1)(ii). If after conducting an RPA the permitting authority finds that the point source has the reasonable potential to cause or contribute to an instream excursion above the applicable water quality standard, the NPDES permit must contain effluent limitations to protect water quality. 40 C.F.R. 122.44(d)(1)(iii).

The 2020 Permit authorized the CSOs to discharge partially treated domestic sanitary wastewater containing fecal coliform bacteria into the Chattahoochee River. Ex. 1, Fact Sheet, p. 14 of 27. Before issuing the 2020 Permit, EPD conducted an RPA and determined that the discharges from the CSOs had the reasonable potential to violate the water quality standard for

fecal coliform. See Ex. 1, Fact Sheet, pp. 13-14 of 27; Dickson Affidavit ¶¶ 43-48; 40 C.F.R § 401.16(4) (identifying fecal coliform as a conventional pollutant). Accordingly, Parts I.B.1 and I.B.2 of the Permit impose a new "end-of-pipe" effluent limitation on fecal coliform bacteria for the CSOs allowing no more than 200 "counts" – or "colony forming units" – per 100 ml based on six effluent samples taken during two separate overflow events. Ex. 1, Permit, p. 11 of 32.

Columbus maintains EPD's reasonable potential analysis was, in fact, unreasonable. First, Columbus argues that EPD solely relied on the categorical assumption that all CSOs discharge fecal coliform. Based only on this categorical assumption, Columbus charges that EPD unfairly concluded that all CSOs, including Columbus's, have the reasonable potential to cause an excursion. Moreover, Columbus maintains that EPD's analysis was defective because the RPA failed to examine whether the CSO discharges had the potential to violate instream water quality.

A permit must provide an explanation for any effluent limitations imposed by the permitting authority. 40 C.F.R. § 124.56(b)(1). EPD's RPA analysis is detailed in the Permit's Fact Sheet. Ex. 1, Fact Sheet, pp. 13-15 of 27; see 40 C.F.R. § 124.56(b) (EPD required to include in the Fact Sheet explanation of reasons conditions are applicable); see also Dickson Affidavit ¶¶ 41-48. First, as Columbus notes, EPD recognized that fecal coliform bacteria was "a pollutant of concern because it is considered by US EPA to be a conventional pollutant found in all sources of domestic or sanitary wastewater." Dickson Affidavit ¶ 45. However, Columbus ignores EPD's additional analysis. The Permit's Fact Sheet makes clear that EPD did more than just make categorical assumptions, it also "reviewed and analyzed effluent discharge data from both of [Columbus's] outfalls and determined that those discharges ha[d] the reasonable potential for fecal coliform bacteria to be present at levels that may cause or contribute to instream water quality standard violations . . . ." Ex. 1, Fact Sheet, pp. 14 of 27; see also Dickson Affidavit ¶¶ 47, 52. The Permit's

Fact Sheet further notes that EPD included this discharge data "in the permit file." Ex. 1, Fact Sheet, p. 14 of 27.

As required under 40 C.F.R. § 122.44(d)(1)(ii), EPD evaluated the variability of the pollutant or pollutant parameter in the effluent, finding that "fecal coliform bacteria are highly variable in the receiving waterbody" with the potential to cause harm to people if ingested. Dickson Affidavit ¶¶ 45, 52; Ex. 1, Fact Sheet Revisions, p. 3-4 of 5. Federal regulations also require that an RPA account for a point source's existing controls. 40 C.F.R. § 122.44(d)(1)(ii). Ms. Dickson testified that EPD accounted for the CSOs' "existing controls as required under 40 C.F.R. § 122.44(d)(1)(ii), through a review and analysis of effluent discharge data showing those controls' effects." Dickson Affidavit ¶ 46. After reviewing the CSOs' existing controls, including the use of chlorine to treat fecal coliform, EPD concluded that notwithstanding the controls the CSOs' discharge had the reasonable potential to cause or contribute to violations of instream water quality standards for fecal coliform. See Ex. 1, Fact Sheet p. 14 of 27; Fact Sheet Revisions at 3-4 of 5; see also Dickson Affidavit ¶¶ 47, 52.

Columbus emphasizes that water quality monitoring confirms that it has not caused or contributed to a single excursion at any time since the Long-Term Control Plan was completed in 1995. Affidavit of Mark Boner, attached as Exhibit 15 to Columbus's Motion [hereinafter, Boner Affidavit] ¶ 10; Peebles Affidavit ¶ 15. Because there has never been a documented excursion, Columbus reasons that its existing controls negate any reasonable potential for an excursion as contemplated under 40 C.F.R. § 122.44(d)(1)(ii). Despite Columbus's commendable record, EPD concluded otherwise. The law obligates EPD to do more than examine a point source's past performance; while EPD may consider a facility's record, ultimately it must determine the reasonable potential for an excursion in the future.

Finally, as mandated by 40 C.F.R. § 122.44(d)(1)(ii), EPD must consider dilution of the effluent ("where appropriate" permitting authority may account for "the dilution of the effluent in the receiving water"). Before issuing the 1998 and 2010 permits, EPD had considered the effluent's dilution in the receiving waters. In conducting the RPA for the 2020 Permit EPD changed course, finding that it was inappropriate to account for the effluent's dilution in the receiving water because fecal coliform bacteria have the unique capacity to reproduce in the receiving waters. Ex. 1, Fact Sheet Revisions, at 3-5 of 5; Fact Sheet, p. 13 of 27; Dickson Affidavit ¶¶ 46, 52; see also Affidavit of Elizabeth Booth ¶ 47. Columbus complains that EPD's refusal to consider dilution in its most recent analysis is an "unexplained reversal" of its policy; however, under 40 C.F.R. § 122.44(d)(1)(ii) EPD retains the discretion to include – or not include – dilution as a factor in its RPA.

Although Columbus submitted an analysis disputing EPD's conclusions, it did not prove that EPD's reasonable potential analysis was unlawful. See Columbus Water Work's 8/28/2020 Reasonable Potential Analysis Report attached as Exhibit 14 to Columbus's Motion.[8] To the contrary, EPD's RPA was lawful because it considered the relevant factors as established by 40 C.F.R § 122.44(d)(1)(ii). See Kennecott v. EPA, 780 F.2d 445, 449 (4th Cir. 1985) ("Once the [EPA] has been found to follow the prescribed course of procedure, its 'choice of scientific data and statistical methodology' is entitled to respect.") (citation omitted); Spokane Cty. v. Sierra Club, 2016 Wash. App. LEXIS 1941 at *27-28 (Wash. Ct. App. Aug. 16, 2016) (holding "federal regulations required [state agency] to conduct a reasonable potential analysis before issuing the Facility a permit but [agency] has discretion in how to perform the analysis").

[8] EPD acknowledges that Columbus tendered a document entitled "Reasonable Potential Analysis Report" for EPD's consideration; however, it notes that under 40 C.F.R. § 122.44(d)(1)(iii) only permitting authorities may conduct an RPA.

Further, albeit succinct, the Permit's Fact Sheet provided what federal law requires: an "explanation of the reasons that [the fecal coliform limit was] applicable." 40 C.F.R § 124.56(b)(1)(iii); see 40 C.F.R § 124.8. By contrast, when a permitting authority issues a permit for sewage sludge, per 40 C.F.R. § 124.56(a) the Fact Sheet must supply not just an explanation but also "calculations or other necessary explanation of the derivation of specific effluent limitations and conditions or standards for sewage sludge use including a citation to the applicable effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by § 122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed." As both the Permit's Fact Sheet and EPD's RPA analysis regarding fecal coliform complied with federal law, the Clean Water Act mandated that EPD calculate an appropriate effluent limitation. 40 C.F.R. § 122.44(d)(1)(iii); 40 C.F.R. 122.44(d)(1)(i).

B. Total Maximum Daily Load for Fecal Coliform

1. Water Quality Standards

The Clean Water Act mandates that states formulate water quality standards. 33 U.S.C. § 1313(a). Water quality standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). Under the statute, designated uses may include the water's use for recreational, industrial or agricultural purposes. Id. Water quality criteria define the amount of pollutants that a waterbody can contain without impairment of the designated use, and may be "expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). The two components work in tandem:

when water quality criteria are met, the designated use will generally be protected. 40 C.F.R. § 131.3(b).

Georgia has six designated uses for its navigable waters, and the designated use of the portion of the Chattahoochee River receiving discharge from the Columbus CSOs is "fishing." Booth Affidavit ¶11; see Ga. Comp. R. & Regs. 391-3-6-.03(14). This designation protects fishing and secondary contact recreation. Ga. Comp. R and Regs. 391-3-6-.03(6)(c); Booth Affidavit ¶ 11. In waters designated for fishing, the bacteria criteria for fecal coliform varies seasonally. From May through October, fecal coliform cannot exceed a geometric mean[9] of 200 counts/100 ml of water, and from November through April fecal coliform may not exceed a geometric mean of 1,000 counts/100 ml of water.[10] Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1); Booth Affidavit ¶¶ 12, 13.

An "effluent limitation" is any restriction on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C.S. § 1362(11). If EPD determines that a point source's discharge of fecal coliform into the Chattahoochee River has the reasonable potential to cause or contribute to an

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[9] The geometric mean is calculated using at least four samples collected over a 30-day period at intervals of not less than 24 hours. Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1).

[10] The standard for bacteria in waters designated for "fishing" is:

> For the months of May through October, when water contact recreation activities are expected to occur, fecal coliform not to exceed a geometric mean of 200 counts per 100 ml based on at least four samples collected from a given sampling site over a 30-day period at intervals not less than 24 hours. Should water quality and sanitary studies show fecal coliform levels from non-human sources exceed 200 counts per 100 ml (geometric mean) occasionally, then the allowable geometric mean fecal coliform shall not exceed 300 counts per 100 ml in lakes and reservoirs and 500 counts per 100 ml in free flowing freshwater streams. For the months of November through April, fecal coliform not to exceed a geometric mean of 1,000 counts per 100 ml based on at least four samples collected from a given sampling site over a 30-day period at intervals not less than 24 hours and not to exceed a maximum of 4,000 counts per 100 ml for any sample.

Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1).

excursion above a water quality standard, the NPDES Permit must include appropriate effluent limitations to safeguard the receiving waters. 40 C.F.R. 122.44(d)(1)(iii); 40 C.F.R. § 122.2 (effluent limitations apply to point source discharges). If the permit's conditions cannot ensure compliance with the applicable water quality standards, EPD may not issue the permit. 40 C.F.R. § 122.4(a),(d).

To comply with the applicable WQS, the Permit's effluent limitation for fecal coliform consists of a 30-day geometric mean of 200 counts per 100 milliliters of water. See Ex. 1, Fact Sheet, pp. 11-14 of 27. The Permit limit of 200 counts per 100 milliliters was based on the more stringent of the seasonal water quality standards for fecal coliform; as set forth in the Fact Sheet this standard would assure year-round compliance. Ex. 1, Fact Sheet, p. 15 of 27; see Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1).

2. 2008 Total Maximum Daily Load

If a body of water does not meet water quality standards for its designated use, it is identified as "impaired" and added to a list of impaired waters known as the "303(d) list." 33 U.S.C. §1313(d); see also Booth Affidavit ¶ 17. States must identify all impaired intrastate waters not satisfying water quality standards and establish the "total maximum daily load" ("TMDL") of a pollutant that may be discharged into receiving waters while supporting its designated uses. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i); Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002) (TMDL "serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies").

Each TMDL includes the sum of two different loads: load allocation, which is the portion of the receiving water's loading capacity attributed to nonpoint sources, and wasteload allocation (or "WLA"), the portion of the receiving water's loading capacity that is allocated to point sources of

pollution. 40 C.F.R. 130.2 (g),(h). In addition to the load and wasteload allocation, when formulating a TMDL the Clean Water Act requires EPD to consider seasonal variations and include a safety margin for pollutant levels. 33 U.S.C. § 1313(d)(1)(C) (TMDL must "be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality"); 40 C.F.R. § 130.7. Effluent limitations must not only comply with water quality standards, but they must also be "consistent with the assumptions and requirements of any available wasteload allocation [included in a TMDL] for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." 40 C.F.R. § 122.44(d)(1)(vii)(B).

Georgia has more than 1,800 TMDLs. Booth Affidavit ¶ 29. In 2003, EPD developed a TMDL for fecal coliform for 79 impaired segments of the Chattahoochee River Basin, including the body of water receiving Columbus's CSO overflows. Booth Affidavit ¶ 37. The TMDL was revised in 2008. Booth Affidavit ¶ 46. In 2016, EPD delisted the Columbus segment of the Chattahoochee River from North Highland Dam to Bull Creek, where the CSOs are located. Peebles Affidavit ¶ 17. However, the TMDL ("2008 TMDL") continues to be utilized to ensure compliance with water quality standards. Booth Affidavit ¶¶ 27-28.

Discharges from CSO facilities like Columbus's are intermittent and variable in nature and dependent on rainfall or wet-weather conditions. Booth Affidavit ¶ 43; Dickson Affidavit ¶ 51; Ex. 1, Fact Sheet Revisions, p. 4 of 5, Fact Sheet, p. 14 of 27. Given the flow variability, EPD determined fixed, single-day maximum loads for the WLA would not account for the variable nature of bacteria from the discharges and that a variable, rather than fixed, WLA was appropriate. Ex. 1, Fact Sheet Revisions, p. 4 of 5; Ex. 4 attached to EPD's Motion at 45; Ex. 8 attached to

Columbus's Motion at 45; see also Dickson Affidavit ¶ 51. Accordingly, the 2008 TMDL provides each of Columbus's CSO facilities with a WLA of Q*200 as a 30-day geometric mean, with Q representing the flow at any given time. Dickson Affidavit ¶ 51; Exhibit 4 attached to EPD's Motion at 45; Ex. 8 attached to Columbus's Motion at 45. The EPA approved the 2008 TMDL and WLA equation in November 2008 and reaffirmed it on September 12, 2019. Ex. 10 attached to EPD's Motion; Ex. 3 attached to Chattahoochee Riverkeeper's Response.

EPD maintains that the Permit's effluent limitation for fecal coliform at 200 counts/100 ml ensures that the instream WQS will be met and also is consistent with the assumptions and requirements of the applicable wasteload allocation in the 2008 TMDL. Ex. 1, Fact Sheet Revisions, p. 4 of 5; Fact Sheet, pp. 11-14 of 27; see 40 C.F.R. § 122.44(d)(1)(vii)(B). In opposition, Columbus argues that the 2008 TMDL is invalid and thus EPD's reliance on the 2008 TMDL's WLA renders the effluent limitations unlawful.

3. EPD's Motion to Dismiss

As an initial matter, EPD's Motion to Dismiss asserts that Columbus's challenge to the 2008 TMDL is untimely. As background, after calculating a TMDL, EPD submits the proposed TMDL to the EPA for review. 33 U.S.C. 1313(d)(2); 40 C.F.R. 130.7(a). EPA must approve a state's TMDL within 30 days of submission. 33 U.S.C. 1313(d)(2). If it disapproves of the TMDL, EPA has 30 days from the date of disapproval to establish a new TMDL. Id. In the instant case, the EPA approved the 2008 TMDL and equation in November 2008 and reaffirmed the TMDL calculation on September 12, 2019. Ex. 10 attached to EPD's Motion; Ex. 3 attached to Chattahoochee Riverkeeper's Response. EPD argues that Columbus should have sought timely review of the 2008 TMDL when it won EPA approval in 2008.

The EPA's approval or disapproval of a TMDL is subject to judicial review under the federal Administrative Procedure Act, which requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[.]" Anacostia Riverkeeper, Inc. v. Wheeler, 404 F. Supp. 3d 160, 169 (D.D.C. 2019) (quoting 5 U.S.C. § 706(2)(A)). EPD maintains that Columbus has waived its opportunity to challenge the 2008 TMDL because it failed to contest EPA's approval of the TMDL via the federal Administrative Procedure Act.[11]

When a party challenging an NPDES permit by contesting the legitimacy of the applicable TMDL could have sought judicial review of the EPA's action approving the TMDL, the party is barred from later seeking judicial review. Md. Dep't of the Env't v. Cty. Comm'rs, 214 A.3d 61, 85 (Md. Ct. App. 2019), cert. denied, Cty. Comm'rs v. Md. Dep't of the Env't, 140 S. Ct. 1265 (Mar. 2, 2020) (citing Anacostia Riverkeeper, Inc. v. Jackson, 798 F. Supp. 2d 210, 222 (D.D.C. 2011)). Although the court's conclusion in Maryland Department of the Environment addresses the scope of judicial – rather than administrative – review, the underlying premise remains the same: parties seeking review of a TMDL must do so in federal court. Id. at 84 ("as this Court has previously indicated, an action for judicial review of a discharge permit in State court is not the forum for raising belated challenges to a TMDL that the challenger could have raised elsewhere") (citation omitted); but see Asarco Inc. v. State, 138 Idaho 719, 722 (2003) (mining companies sought declaratory judgment from state regarding validity of TMDL); Rio Hondo Land & Cattle

[11] EPD also maintains that Columbus can no longer challenge the TMDL for a second reason. In July 2020, Columbus filed a petition for rulemaking pursuant to O.C.G.A. § 50-13-9 with the Board of Natural Resources, asserting that TMDLs must be promulgated as rules. See Ex. 2 attached to EPD's Motion; O.C.G.A. § 50-13-9. On August 10, 2020, the Board denied the Petition; however, Columbus did not appeal this decision within thirty days. Ex. 3 attached to EPD's Motion; see O.C.G.A. § 50-13-19(b). EPD asserts that Columbus could have sought review but did not; thus, it has waived its opportunity to challenge the 2008 TMDL.

Co. v. N.M. Water Quality Control Comm'n, 2019 WL 6728255, *1 (N.M. Ct. App. Nov. 6, 2019) (directly appealing order adopting TMDL).

In response, Columbus maintains that the Petition only contests the Permit's effluent limitation for fecal coliform bacteria, and not the 2008 TMDL.[12] Columbus's argument is not persuasive. Columbus challenges the legitimacy of the TMDL by disputing the TMDL's expression as a variable equation. Columbus also maintains that the WLA formula is "unsolvable." Thus, in essence the Petition challenges the legitimacy of the 2008 TMDL – a challenge that should have been raised under the Federal Administrative Procedure Act.

4. Wasteload Allocation

Pretermitting whether Columbus has challenged the TMDL in the appropriate forum, the undersigned will address its argument that the 2008 TMDL's wasteload allocation cannot be used to determine the Permit's effluent limitation for fecal coliform. The 2008 TMDL provided Columbus's facilities with a wasteload allocation of Q*200 with Q representing the variable water flow. Ex. 4 attached to EPD's Motion at 45. EPD acknowledges "[t]he equation is not meant to be 'solved' to determine a single-number wasteload allocation, but rather is meant to represent the **concentration** of bacteria applied at any and all discharge flows resulting from storm events that occur within a 30-day period." Booth Affidavit ¶ 44 (emphasis added). Columbus maintains a TMDL cannot be expressed as a variable equation because it runs afoul of the CWA's language that agencies set total maximum *daily* loads. Notwithstanding the flow variations, Columbus

[12] Columbus argues that the WLA formula is "unsolvable," because the EPD has conceded that "a specific load could not be established for the CSOs." Ex. 4 attached to EPD's Motion at 45. In full, the TMDL states: "A specific load cannot be assigned to the CSOs, since flow volumes were dependent on the nature of individual storm events. However, the WLA for the CSOs can be calculated using the following equation: WLACSOs = ∑ (200 counts (as 30-day geometric mean)/100ml *QCSOs) *Conversion Factor." Ex. 4 attached to EPD's Motion at 45.

asserts that "wasteload allocation" means "a fixed number expressed as a quantity of matter per unit of time" that "cannot be expressed as [a] formula[]." Columbus's Motion at 13.

The federal Circuits have taken contrary positions as to whether the term "total maximum daily load" prescribes a specific method as to how a TMDL may be expressed. In Friends of the Earth, Inc. v. E.P.A., 446 F.3d 140, 142-48 (D.C. Cir. 2006), the Court of Appeals for the D.C. Circuit concluded that total maximum daily loads expressed in annual or seasonal terms violated the plain language of CWA, holding: "[d]aily means daily, [and] nothing else." 446 F.3d at 142. More recently, a D.C. District Court struck down a TMDL for E. coli calculated, similarly to the instant case, using a formula that set a variable daily maximum expressed as a 30-day geometric mean. Anacostia Riverkeeper, Inc., 404 F. Supp. 3d at 169. The Anacostia Riverkeeper Court found that the EPA violated the plain text of the CWA when it approved "total maximum daily loads" that did not establish daily maximum discharge limitations. Id. at 164.

Turning to cases from the Second and Third Circuit, EPD argues that 33 U.S.C. § 1313(d)(1)(C) does not preclude the use of a variable equation to establish a TMDL. In Natural Resources Defense Council, Inc. v. Muszynski, 268 F.3d 91, 98-99 (2001), the Second Circuit concluded that while the individual words "total maximum daily load" might be unambiguous, the phrase as a whole "is susceptible to a broader range of meanings." Id. at 98. Given that Congress had directed EPA to review "TMDLs for hundreds of different pollutants in thousands of different waterbodies," the Court found it "excessively formalistic to suggest that EPA may not express these standards in different ways, as appropriate to each unique circumstance." Id. at 97. The Court further reasoned that it would be "absurd" to require single-day limitations in TMDLs because for some pollutants "effective regulation may best occur by some other periodic measure than a diurnal one." Id. at 99. The Third Circuit agreed that the term "total maximum daily load"

was ambiguous because the words "are not defined in the statute, and 'total' is susceptible to multiple interpretations." Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281, 298 (3d Cir. 2015) (although statute requires agency "to establish 'total maximum daily loads,' it nowhere prescribed *how* the EPA is to do so.") (citations and punctation omitted).[13]

Federal courts differ as to whether the words "total maximum daily load" should be considered individually or, in the context of the CWA, read collectively. 33 U.S.C. § 1313(d)(1)(C). If a statute or regulation's text is unclear, Georgia courts must employ the rules of statutory construction. Johnson v. State, 308 Ga. 141, 144-45 (2020); City of Guyton v. Barrow, 305 Ga. 799, 802-03 (2019) (only after applying all the canons of statutory construction may a court find a regulation ambiguous and holding deference unwarranted because regulation was not ambiguous). Although "[t]he common and customary usages of the words are important," they are not the sole consideration. 308 Ga. at 144 (citation omitted). Instead, words must be considered within the greater legal context or statutory scheme. City of Guyton, 305 Ga. at 805 (directing that courts should endeavor to "[understand] the legal context in which the rule was created").

In Guyton, the Court taught that "[t]he primary determinant of a text's meaning is its context," concluding that a regulation was "unambiguous given the legal context from which the rule developed." 305 Ga. at 805; Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2448 (2021) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omitted). To determine context, a court "may look to other provisions of the same statute, the structure and history of the whole statute, and the other law – constitutional, statutory, and

[13] The Supreme Court has declined to review the Circuit split denying certiorari to the most recent appellate decision considering the phrase "total maximum daily load." See Am. Farm Bureau Fed. v. EPA, 136 S. Ct. 1246 (2016).

common law alike – that forms the legal background of the statutory provision in question." 308 Ga. at 144-45 (citation and punctuation omitted).

The Clean Water Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); see also Fla. Wildlife Fed'n., Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1299 (11th Cir. 2011). It describes the total maximum daily load as the "level" of a pollutant that a water body can tolerate without violating applicable water quality standards, 33 U.S.C. § 1313(d)(1)(C), and further defines it as "constitut[ing] a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(h). When fashioning a TMDL, the CWA authorizes a permitting authority to "take into account critical conditions for stream flow, loading, and water quality parameters." 40 C.F.R. § 130.7(c)(1). To that end, the law explicitly permits TMDLs to be "expressed in terms of either mass per time, toxicity, or other appropriate measures . . . ." 40 C.F.R. § 130.2(i).

Considering the term "Total Maximum Daily Load" in light of the Clean Water Act's direction that a TMDL should be calculated taking "into account critical conditions for stream flow" and can be expressed in terms of either "mass per time, toxicity, or other appropriate measures," the 2008 TMDL's use of a variable equation to calculate wasteload allocation does not render the TMDL invalid. See King v. St. Vincent's Hospital, 502 U.S. 215, 221 n.10 (1991) (when construing statute, court should read statute as a whole and harmonize its provisions). Additionally, 40 C.F.R. § 130.2(h) specifies that WLAs constitute a type of water quality-based effluent limitation; effluent limitations are not restricted to numeric limitations where such limits are infeasible. Citizens Coal Council v. United States EPA, 447 F.3d 879, 895 (6th Cir. 2006) (citing Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 502 (2d Cir. 2005)).

Moreover, consideration of the individual words in the phrase "total maximum daily load" would support EPD's use of a variable equation. "[A]bsent clear evidence to the contrary, words should be assigned their ordinary, logical, and common meaning." State v. Hammonds, 325 Ga. App. 815, 817 (2014) (citation and punctuation omitted). The Merriam-Webster online dictionary defines "total" as "entire." Total, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/total (last visited Sept. 7, 2021). Per the online dictionary, "maximum" means "the greatest quantity or value attainable and "daily" as "occurring, made, or acted upon every day." Maximum, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/maximum (last visited Sept. 7, 2021); Daily, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/daily (last visited Sept. 7, 2021). Further, the CWA defines the word "load" to mean "[a]n amount of matter . . . that is introduced into a receiving water." 40 C.F.R. § 130.2(e). Thus, considering the meaning of each word individually, total maximum daily load means the entire amount of the greatest quantity of matter that can be introduced into receiving waters every day. Nothing in that definition would require a wasteload allocation to be a fixed number or precludes the use of an equation to establish the wasteload allocation.

Columbus urges this tribunal to reject EPD's use of a variable and relies on Anacostia Riverkeeper's conclusion that a total maximum daily load must be fixed. Although the CWA defines the term "load" in 40 C.F.R. § 130.2(e), the Anacostia Riverkeeper Court disregarded the regulation's definition. Instead, the Court turned to the Webster's Third New International Dictionary 1325 (2002), which defined "load" as "'the quantity that can be . . . carried **at one time** by an often specified means of conveyance' or **'a measured quantity of a commodity fixed for** each type of carrier[.]'" 404 F. Supp. 3d at 171 (emphasis added). In contrast, the CWA defines

"load" as an amount of matter – but, unlike the dictionary definition, not as a fixed amount. "When the Congress enacts a definition of a term, the statutory definition controls over definitions in general dictionaries." Robinson v. Comm'r , 119 T.C. 44, 56 (2002).

Given that the WLA is "meant to represent the concentration of bacteria applied at any and all discharge flows," and the flow is an ascertainable number, the 2008 TMDL's expression as a variable equation establishes a total maximum daily load in compliance with 33 U.S.C. § 1313(d)(1)(C). See Booth Affidavit ¶ 44. As mandated by the Clean Water Act, the Permit's effluent limitations for fecal coliform are consistent with the 2008 TMDL's wasteload allocation. 40 C.F.R. § 122.44(d)(1)(vii)(B) (requiring that permit levels be consistent with, but not identical to, assumptions and requirements of any available wasteload allocation); see Anacostia Riverkeeper, Inc. 404 F. Supp. 3d at 181 (TMDLs and permits need not be "mirror images of one another").

5. Georgia's Administrative Procedure Act

Columbus offers a second challenge to the 2008 TMDL, arguing that the Permit's effluent limitation for fecal coliform is invalid because the 2008 TMDL was not promulgated as a rule under Georgia's Administrative Procedure Act ("APA"). The APA defines a rule as an "agency regulation, standard, or statement of general applicability that implements, interprets, or describes law or policy or describes the organization, procedure, or practice requirements of any agency." O.C.G.A. § 50-13-2(6). Generally, before promulgating a rule the APA requires the agency to give 30 days' notice to interested persons, allow input, notify the General Assembly, and file the final rule with the Secretary of State. O.C.G.A. §§ 50-13-4, 50-13-6.[14]

[14] Pursuant to O.C.G.A. § 12-5-23(a), the Board of Natural Resources is authorized to "[a]dopt, promulgate, modify, amend, and repeal rules and regulations . . . as the board may deem necessary to provide for the control and management of water pollution," including rules for:

The TMDL at issue was developed in 2002 and revised in 2008. To comply with the CWA, EPD provided a thirty-day public notice and invited public comment. Ex. 4 attached to EPD's Motion, at 54; see 40 C.F.R. § 130.7(c)(1)(ii), (d). EPD submitted the 2008 TMDL to EPA's Regional Administrator for review, and the Regional Administrator approved the TMDL. Ex. 10 attached to EPD's Motion; Ex. 3 attached to Chattahoochee Riverkeeper's Response; see 40 C.F.R. § 130.7(c)(1)(ii), (d).

State courts have concluded that because a TMDL "prescribes a legal standard that did not previously exist," it must be promulgated as a rule before submission to EPA for approval. Fairfield Cty. Bd. of Comm'rs v. Nally, 34 N.E.3d 873, 880-81 (Ohio 2015) (agency must engage in rulemaking before the TMDL may be used as the basis for an NPDES permit limit); see also Asarco, 69 P.3d 139; Rio Hondo Land & Cattle, 2019 WL 6728255 at *6-7 (TMDL qualifies as regulation because it "broadly applies to anyone seeking to discharge [a pollutant]" into a body of water); Comm'rs of Pub. Works v. S. C. Dep't of Health & Entl. Control, 641 S.E.2d 763 (Ct. App. 2007) (affirming ALJ's ruling to this effect). Additionally, should EPA reject a state's proposed TMDL, then it must follow notice and comment rulemaking provisions of the federal APA before promulgating its own TMDL. See Fairfield Cty. Bd. of Comm'rs., 34 N.E.3d at 881 (citing 33 U.S.C. § 1313(d)(2)) (supporting citation omitted); Sierra Club v. E.P.A., 162 F. Supp.

> (A) Prescribing the procedure to be followed in applying for permits and requiring the submission of such plans, specifications, verifications, and other pertinent information deemed relevant in connection with the issuance of such permits;
> (B) Establishing or revising standards of water purity for any of the waters of the state, specifying the maximum degree of pollution permissible in accordance with the public interest in water supply; the conservation of fish, game, and aquatic life; and agricultural, industrial, and recreational uses;
> (C) Governing water use classifications and water quality standards . . . .

2d 406, 420 (D. Md. 2001) ("approval or disapproval of state submissions under the Clean Water Act is not rule making; it is only the actual development of the list or load that is rule making").[15]

Columbus maintains that the Permit and its supporting documentation demonstrate that EPD treated the 2008 TMDL as a legal standard applicable to the Permit. As one of several examples, Columbus points to the Fact Sheet which states that the new limit is "required" to "implement the requirements of the TMDL." Ex. 1, Fact Sheet, p. 15 of 27. Consequently, Columbus argues that the TMDL must undergo the APA's rulemaking procedures before EPD can rely on it to issue effluent limitations.

EPD counters that the 2008 TMDL is not a new "standard" because it neither imposes burdens upon the public nor does it have an independent enforcement mechanism. See 40 C.F.R. §§ 130.3, 130.7; Anacostia Riverkeeper, 404 F. Supp. 3d at 175 (function of TMDL is "to assist stakeholders in planning and monitoring" and noting TMDLs "do not have regulatory force of their own"). Instead, when a permitting authority devises effluent limitations, it uses a TMDL as an informational tool. See Appalachian Voices v. State Water Control Bd., 912 F.3d 746, 755 (4th Cir. 2019) (TMDLs are "primarily informational tools" used for planning that have no "independent legal obligation.") (citation and punctuation omitted); see also Am. Farm Bureau Fed., 792 F.3d at 291 (holding TMDLs are "informational tools that allow the states to proceed from the identification of water requiring additional planning to the required plans"); Md. Dep't of the Env't v. Cty. Comm'rs, 214 A.3d at 75 (TMDL neither self-implementing nor directly

[15] Under 40 C.F.R. § 130.7(d)(2), if EPA's Regional Administrator disapproves the proposed TMDL, no later than 30 days after the date of disapproval the Regional Administrator must establish a proposed TMDL and "promptly issue a public notice seeking comment on such listing and loadings." Thereupon, "[a]fter considering public comment and making any revisions [the Regional Administrator] deems appropriate, the Regional Administrator shall transmit the listing and loads to the State, which shall incorporate them into its current WQM plan." Id.

enforceable but serves as informational tool used in permitting designed to achieve applicable water quality standards).

EPD has developed over 1,800 TMDLs for Georgia's rivers and streams. Booth Affidavit ¶ 29. Each TMDL is geographically and pollutant specific. Id. Point sources subject to a TMDL are assigned a specific wasteload allocation, further individualizing the TMDL's application. In contrast, Georgia only has six designated uses for its navigable waters. Booth Affidavit ¶ 11. Consequently, water quality standards are promulgated as rules because water quality standards are generally applicable in setting a safe pollutant level for all waters sharing a designated use.

The General Assembly has not expressly required a TMDL to be promulgated as an administrative rule. See O.C.G.A. § 12-5-23(a). Thus, a decision whether to initiate rulemaking, like the exercise of enforcement discretion, typically involves a complex balancing of factors, such as the agency's priorities and the availability of resources, that the agency is better equipped than courts to undertake. Conservancy of SW. Fla. v. U. S. Fish & Wildlife Serv., 677 F.3d 1073, 1084 (11th Cir. 2012) (citation omitted). In weighing the adequacy of a given agency's rulemaking, Georgia courts will defer to the agency's "presumed expertise" and consider whether the agency's rulemaking decision was reasonable. Hill v. Owens, 292 Ga. 380, 385 (2013) (citing Georgia Oilmen's Assn. v. Georgia Dept. of Revenue, 261 Ga. App. 393, 398 (2003) ("Because of agencies' presumed expertise in dealing with complex issues, we defer to [a given agency] on the issue of reasonableness unless there is evidence the regulation is arbitrary and capricious.").

Given that the TMDL provides information regarding water quality standards for a single pollutant as it relates to a specified segment of a river, it lacks the general and uniform operation required to characterize it as an administrative rule. Unlike water quality standards, which are uniform for Georgia's six designated uses, EPD retains the flexibility to modify TMDLs in

response to rapidly changing environmental circumstances. Moreover, even without formal rulemaking, EPD's calculations to establish TMDLs are subject to public review and further reviewed by the EPA. 40 C.F.R. § 130.7(c)(1)(ii), (d). Accordingly, EPD's decision to forego rulemaking for TMDLs is reasonable.

6. Unavailable WLA

Even if Columbus were to prevail in its challenge to the 2008 TMDL's WLA, EPD may rely upon its reasonable potential analysis as an independent basis for the Permit's effluent limitation. Effluent limitations must be "consistent with the assumptions and requirements of **any available** [wasteload allocation included in a TMDL] for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." 40 C.F.R § 122.44(d)(1)(vii) (B) (emphasis added). If EPD determines that a discharge has the reasonable potential to cause or contribute to a violation, and the TMDL, and correspondingly the wasteload allocation, is not "available," the permit still must contain effluent limitations that will protect the applicable water quality standards.[16] See 40 C.F.R § 122.44(d)(1)(i), (ii) 40 C.F.R. § 122.4(a),(d).

According to the Permit's Fact Sheet, the effluent limitations in the Permit are based upon "the reasonable potential analysis **and** [the] wasteload allocation in the TMDL." Ex. 1, Fact Sheet p. 15 of 27 (emphasis added). Columbus does not dispute that EPD can rely on a reasonable potential analysis in formulating an effluent limitation for fecal coliform; however, it argues that the RPA, as performed by EPD, provides no information that could be used to demonstrate that the specific limit included in the 2020 Permit is necessary to protect water quality.

[16] As Columbus acknowledges in its pleadings, "If there is no specific Load, there is no specific Wasteload Allocation. And the TMDL is of no further relevance." Columbus's Motion at 12-13.

As noted, in performing the reasonable potential analysis, "EPD reviewed and analyzed effluent discharge data from both of the outfalls and determined that those discharges have the reasonable potential for fecal coliform bacteria to be present at levels that may cause or contribute to instream water quality standard violations, hence numeric effluent limits are appropriate and included in this permit." See Ex. 1, Fact Sheet Revisions at 4-5 of 5. EPD included the effluent data evaluated in the permit file. Id.

After considering the variable nature of CSO discharges, EPD calculated the Permit's effluent limitation for fecal coliform based on the more stringent of the seasonal water quality standards for fecal coliform, thereby assuring year-round compliance. See Ex. 1, Fact Sheet, pp. 11-14 of 27; Dickson Affidavit at ¶¶ 53-55; Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1). According to the Permit's Fact Sheet, the effluent limitations are based on these water quality standards, which would protect the water's designated use and human health. Ex. 1, Fact Sheet at 15 of 27.

Even if Columbus is correct that EPD is barred from relying on the TMDL's WLA when formulating effluent limitations for fecal coliform, the Permit's effluent limitations still comply with the Clean Water Act. As part of the RPA, EPD reviewed discharge data, and considered the water quality standard for the water's designated use. Accordingly, even without consideration of the 2008 TMDL's WLA, EPD's reasonable potential analysis provides sufficient information demonstrating that the effluent limitations are both "derived from, and compl[y] with all applicable water quality standards." 40 C.F.R § 122.44(d)(1)(vii) (A).

C. CSO Control Policy

In 1994 the EPA published the CSO Control Policy (also "Control Policy" or "Policy") with the goal of "establish[ing] a consistent national approach for controlling discharges from CSOs to the Nation's waters through the [NPDES] permit program." 59 Fed. Reg. 18,688 (Apr. 19, 1994). To that end, the Control Policy required CSOs to develop and execute long-term control plans (also "LTCP") that would provide for cost effective ways to ensure overflow discharges met water quality standards. 59 Fed. Reg. 18,688, 18,691-94 (Apr. 19, 1994). Although the Control Policy allowed CSOs flexibility in formulating cost-effective controls, CSOs remained obligated to comply with the Clean Water Act. 59 Fed. Reg. 18,688 (Apr. 19, 1994). In 2000 Congress amended the CWA to provide that NPDES permits issued to CSOs conform to the Control Policy. 33 U.S.C. § 1342(q).

According to the Control Policy, CSOs were to collaborate with the applicable permitting authority while developing an LTCP. 59 Fed. Reg. 18,688 (Apr. 19, 1994). Columbus's LTCP was formulated in conjunction with the EPD and fully implemented in 1997 at a cost of $100 million dollars. Affidavit of Susan C. Paulsen [hereinafter, Paulsen Affidavit] Ex. 9 attached to Columbus's Motion, ¶¶ 11-13; Peebles Affidavit ¶¶ 8-14. Even though CSOs developed an LTCP with approval from permitting authorities, the Control Policy placed the burden firmly on a Permittee to design an LTCP that would "ultimately result in compliance with the requirements of the CWA," cautioning Permittees to design controls so that "cost effective expansion or cost effective retrofitting" would be possible. 59 Fed. Reg. 18688, 18694 (Apr. 19, 1994).

Columbus argues that the Permit's effluent limitation for fecal coliform is unlawful because it is incompatible with the facility's LTCP. The LTCP did not include effluent limitations; instead, it relied on treatment "goals." Ex. 10 attached to Columbus's Motion, tab 8, at 3-1 to 3-6. Even

without the use of effluent limitations, the LTCP considered two options to ensure water quality standards for fecal coliform were met. The first, which Columbus incorporated into the LTCP, provided for the water quality standard to be met instream, after dilution in the receiving water, and imposed a "target treatment objective" or goal of 600 counts /100 ml. Id. at 3-6. The second option is identical to the Permit's effluent limitation, providing for the goal of 200 counts per 100 ml to be met end-of pipe. Id. at 3-6. While the second option would "offer[] the Water Works the most certainty of not causing violations of water quality standards in the Chattahoochee River," Columbus's LTCP, weighing the cost effectiveness of the additional controls, concluded that it would require "a significantly more expensive treatment facility." Ex. 10 tab 8 at 3-6. Thus, Columbus relied on the target objective of 600 counts /100 ml to develop cost effective controls that would ensure compliance with water quality standards. Id.

Maintaining that it is the LTCP that "drives the effluent limitations," Columbus argues that 33 U.S.C. § 1342(q)(1) compels EPD to issue effluent limitations derived from the LTCP's specifications. (Transcript of July 14, 2021, Oral Argument at 17). Prior to the instant Permit, EPD has issued two NPDES permits authorizing discharges from the CSOs: the first in 1998 and the second in 2010. See Columbus NPDES Permit No. GA0036838 (July 28, 1998); Columbus NPDES Permit No. GA0036838 (April 6, 2010). In approving the LTCP and issuing the two earlier permits, EPD considered the impact of dilution, concluding that water quality standards would be met at the higher target treatment objective of 600 counts /100 ml. Consequently, EPD did not impose an effluent limitation in either of the two prior NPDES permits.

As noted, the Permit's Fact Sheet explains that "EPD does not consider dilution" in its RPA for fecal coliform "as we don't believe it's appropriate for bacteria due to its inherent ability to reproduce in the receiving stream." Ex. 1, Fact Sheet, p. 13 of 27. Thus, the Permit's effluent

limitation would require Columbus to fundamentally change the design criteria EPD previously agreed to under the LTCP, alter how Columbus operates, and cost millions of dollars. Peebles Affidavit, ¶¶ 24-25. Columbus reasons the Permit's effluent limitation is unlawful because it cannot be reconciled with the LTCP.[17]

The end goal of the LTCP is to ensure that CSO discharges meet water quality standards. By its terms, the Control Policy anticipated that conditions affecting water quality standards might necessitate changes in the future, mandating that LTCPs be designed "to allow cost effective expansion or cost effective retrofitting if additional controls are determined to be necessary to meet [water quality standards], including existing and designated uses." 59 Fed. Reg. at 18691 (Apr. 19, 1994); cf. 59 Fed. Reg. at 18,688 (Apr. 19, 1994) (authorizing permitting authority to reopen and modify permit if it is determined that the CSO controls fail to meet water quality standards or protect designated uses). While the Control Plan indicated that an LTCP would become the "basis for NPDES permit limits and requirements," the LTCP's facility design, approved approximately twenty-four years ago, does not permanently shield Columbus from instituting modifications as required to comply with the CWA. 59 Fed. Reg. at 18692 (Apr. 19, 1994). The CWA's instruction is clear and unequivocal; EPD may not issue a permit that does not ensure compliance with the Clean Water Act. 40 C.F.R. § 122.4(a); cf. 59 Fed. Reg. at 18,696 (Apr. 19, 1994) (if CSO controls fail to meet WQS or protect designated uses permit must be modified).

[17] While Columbus correctly observes that the CSO Control Policy was designed to ensure a comprehensive and coordinated planning effort to achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives, see Columbus Motion at 24,"it fails to explain why negotiating the permit for 2,266 days (longer than the actual 5-year term of the permit) including three pre-draft permits being provided (above and beyond what is required by law) and meeting on numerous occasions fell short of being a "comprehensive and coordinated planning effort." Dickson Affidavit at ¶¶ 17–18.

Columbus offers a second reason that the effluent limitation is incompatible with the LTCP. The Control Policy mandated that a CSO establish a water quality monitoring program to ensure that the LTCP was effective. 59 Fed. Reg. 18,696 (Apr. 19, 1994). As with its challenge to the RPA, Columbus maintains that EPD simply relied on the categorical assumption that all CSOs have the reasonable potential to cause an excursion above instream water quality standards for fecal coliform, ignoring the monitoring program's data demonstrating that Columbus has not caused or contributed to an excursion above the applicable instream water quality standard. Paulsen Affidavit ¶¶ 14-27; Boner Affidavit ¶¶ 9-10; Peebles Affidavit ¶ 15.[18] In failing to consider the monitoring program's data, Columbus argues, the Permit's effluent limitation for fecal coliform will result in unjustified and expensive modifications to the facility. See Columbus's Motion at 23-25; Peebles Affidavit ¶¶ 24-26; Boner Affidavit ¶¶ 7, 10.

As noted previously, the Fact Sheet explicitly states that "EPD reviewed and analyzed effluent discharge data from both of the outfalls and determined that those discharges have the reasonable potential for fecal coliform bacteria to be present at levels that may cause or contribute to instream water quality standard violations." See Ex. 1, Fact Sheet, p. 14 of 27; see also Booth Affidavit ¶¶ 22–27; Dickson Affidavit at ¶¶ 40, 46, 52. And although Columbus decries EPD's failure to point to an actual violation before instituting the effluent limitation for fecal coliform, the Clean Water Act mandates that the permitting authority conduct a reasonable potential analysis that considers whether there is the potential for violation. 40 C.F.R. 122.44(d)(1)(i)-(ii). If there is a

[18] Columbus maintains that it is also unlawful for EPD to require changes to the LTCP without first giving the permittee an opportunity to review and revise the LTCP. See Columbus's Response to EPD's Motion at p. 16. However, the Control Policy is clear that only after a permitting authority modifies or reissues a permit will a permittee be "required to develop, submit and implement, as soon as practicable, a revised CSO control plan which contains additional controls to meet WQS and designated uses." 59 Fed. Reg. at 18696 (Apr. 19, 1994).

reasonable potential for an excursion, EPD must impose effluent limitations. 40 C.F.R. § 122.44(d)(1)(iii); 40 C.F.R. 122.44(d)(1)(i).

It is the Clean Water Act – rather than the LTCP – that must drive a permit's effluent limitations. EPD's reasonable potential analysis was lawful. After finding that the CSOs had the reasonable potential to cause or contribute to an excursion, effluent limitations were not only necessary but required under the CWA. 40 C.F.R. § 122.44(d)(1)(iii); 40 C.F.R. 122.44(d)(1)(i). Further, EPD has shown that the effluent limitation is "derived from and complies with all applicable water quality standards." 40 C.F.R § 122.44(d)(1)(vii)(A). Accordingly, the undersigned **GRANTS** EPD's Motion for Summary Determination as to Count I and **DENIES** Columbus's Motion for Summary Determination as to Count I.[19]

COUNT II

Count II of the Amended Petition challenges the Permit's effluent limitation of 0.5 mg/L for total residual chlorine ("TRC") that can be discharged into the Chattahoochee River. Columbus argues that it will be forced to increase the discharge of total residual chlorine to comply with the Permit's effluent limitation for fecal coliform and that the effluent limitation is inconsistent with the design of Columbus' CSO Control Facility.

Both of Columbus's CSO facilities use chlorine as a disinfectant for fecal coliform. Ex. 1, Fact Sheet, p. 15 of 27; Booth Affidavit ¶ 48; Dickson Affidavit ¶¶ 60, 65. This chlorine must be neutralized before it is released into receiving waters so that it does not harm aquatic life. Ex. 1, Fact Sheet, p. 15 of 27; Dickson Affidavit ¶ 65. On March 15, 2010, EPD issued a TRC Strategy memo calculating the concentrations of TRC that would protect aquatic life. Booth Affidavit ¶ 48. The TRC Strategy incorporates numbers that EPA has determined, based on scientific

[19] Because EPD's Motion for Summary Determination as to Count I has been granted, EPD's Motion to Dismiss is moot.

studies, to be the concentrations at which aquatic life is protected. Booth Affidavit ¶ 48; Dickson Affidavit ¶ 64. Concluding that "where there is reasonable potential [of the effluent] to exceed 11 ug/L TRC in the receiving stream," to protect water quality standards NPDES permits should include a TRC limit of 0.5/mg/L. Dickson Affidavit ¶ 66; Ex. 6 attached to EPD's Motion.

As it did with fecal coliform, to determine whether the TRC released by the CSOs had the reasonable potential to cause or contribute to an instream WQS violation, EPD conducted a reasonable potential analysis. Dickson ¶ 65; see 40 C.F.R. 122.44(d)(1)(i)-(ii). The reasonable potential analysis accounted for the CSOs' existing controls, the variability of TRC in the water, toxicity and dilution. 40 C.F.R. § 122.44(d)(1)(ii). After conducting the RPA, EPD determined that the TRC released had the reasonable potential to cause or contribute to an instream WQC violation for toxics and an effluent limitation was required. See 40 C.F.R. § 122.44(d)(1)(iii); Dickson Affidavit ¶¶ 65-67; Ex. 1, Fact Sheet, Permit, p. 15 of 32; Ex. 6 attached to EPD's Motion.

EPD then relied on the findings in the TRC Strategy memo to designate the Permit's effluent limitation as 0.5 mg/L applicable to each of the CSO Control Facilities. Dickson Affidavit ¶¶ 65, 67; 40 C.F.R. § 122.44(d)(1)(vi). The limit was based on EPD's reasonable potential analysis and calculated to ensure that an instream level of 0.011 mg/L or less is maintained when the Chattahoochee River is at critical low flow to protect fish and other aquatic organisms from chronic and acute toxicity. Ex. 6 attached to EPD's Motion; Booth Affidavit ¶ 48.

Columbus argues that it only has a reasonable potential to violate TRC water quality standards because it will have to use more chlorine to comply with the Permit's effluent limitation for fecal coliform. The LTCP included a treatment goal, rather than an effluent limitation, for TRC, and did not include a dechlorination chamber. Dickson Affidavit ¶ 37; Amended Petition at ¶ 75. Because it cannot comply with the Permit's effluent limitations for both fecal coliform and TRC

without modifying the current LTCP, Columbus maintains the TRC effluent limitation is unlawful. Peebles Affidavit ¶¶ 24-25.

As with the effluent limitations for fecal coliform, the LTCP's facility design, approved approximately twenty-four years ago, does not permanently shield Columbus from instituting modifications as required to comply with the CWA. See 59 Fed. Reg. at 18692 (Apr. 19, 1994). If EPD determines that there is a reasonable potential for a facility to contribute to an excursion above a water quality standard as it is currently designed, EPD is required to impose an effluent limit; the LTCP must yield to 40 C.F.R. § 122.44(d)(1)(iii).[20]

The undisputed facts show that EPD conducted a reasonable potential analysis, determined that Columbus had the reasonable potential to violate the water quality standard based on its TRC discharges, and imposed an effluent limit as required by law. The undersigned **GRANTS** EPD's Motion for Summary Determination as to Count II of the Amended Petition.

CONCLUSION

For the aforementioned reasons, EPD has demonstrated that the Permit was lawfully issued and EPD's Motion for Summary Determination as to Counts I and II of the Petition is **GRANTED.** Columbus's Motion for Summary Determination as to Count I of the Petition is **DENIED.** Accordingly, EPD's issuance of National Pollutant Discharge Elimination System Permit No. GA0036838 is hereby **AFFIRMED**.

SO ORDERED THIS 14th day of September, 2021.

Ronit Walker
Administrative Law Judge

[20] The Permit includes a compliance schedule to provide Columbus with time to implement any necessary additional TRC controls into its design. (See Ex. 1, Permit, p. 21 of 32).