

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH)
1717 Massachusetts Avenue, NW)
Suite 600)
Washington, DC 20036-2002)

PLAINTIFF,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, and)

MICHAEL O. LEAVITT,)
Administrator,)
United States Environmental)
Protection Agency,)

DEFENDANTS.)
_____)

CASE NUMBER 1:04CV00092

JUDGE: Colleen Kollar-Kotelly

DECK TYPE: Administrative Agency Review

DATE STAMP: 01/21/2004

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This complaint addresses final actions of the United States Environmental Protection Agency and its Administrator (collectively, "EPA") pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. The Anacostia river suffers from serious pollution that violates applicable water quality standards. EPA has approved and established pollution caps ("total maximum daily loads" or "TMDLs") that fail to provide for compliance with these water quality standards.

PARTIES

2. Plaintiff Friends of the Earth ("FOE") is a not-for-profit corporation existing under the laws of the District of Columbia, with its principal place of business in Washington, D.C. FOE is dedicated to the protection and enhancement of the natural resources of this country, including

air, water, and land. FOE has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia, including the Anacostia River.

3. FOE is a membership organization with members residing in the District of Columbia, Maryland, Virginia, and other states, including members who use the Anacostia river in the District of Columbia for boating, observation from its banks, and other uses. Members of FOE suffer recreational, professional, and aesthetic injury from the water quality impairments afflicting that river. The acts and omissions of EPA alleged herein cause injury to FOE's members by prolonging the unsuitability of the District's waters for some or all of these uses. The physical well-being as well as recreational, aesthetic, and environmental interests of FOE's members have been and continue to be adversely affected by the actions of EPA described herein. Granting the requested relief would redress the injuries described above.

4. a. The acts and omissions alleged herein have deprived FOE and its members of information to which they would otherwise have access, specifically, information about what are the pollution loadings compatible with attainment of water quality standards.

b. If FOE had access to such information, FOE would use it to educate the public about the state of the District's waters and the maximum pollutant loadings compatible with attainment of water quality standards, and to advocate promulgation or enactment of measures to reduce pollutant discharges sufficiently to comply with water quality standards. Promoting and protecting water quality in the District is a high priority for FOE, which has staff members in its D.C. office who spend a substantial portion of their time on those issues. The effectiveness of their efforts depends on access to accurate information concerning the District's water quality.

problems and the steps needed to correct them. EPA's approval and promulgation of inadequate -
- and inaccurate -- TMDLs deprives FOE and its members of the informational benefits that
accurate, adequate TMDLs would provide. This deprivation increases the difficulty of, and
diminishes the effectiveness of, FOE's and FOE members' D.C. water quality advocacy, and thus
causes FOE injury.

5. Defendant United States Environmental Protection Agency is the United States agency
primarily responsible for the implementation of the Clean Water Act in the District of Columbia,
including the requirements of section 303 of the Act.

6. Defendant Michael O. Leavitt is the Administrator of the United States Environmental
Protection Agency. He is charged with the supervision and management of all decisions and
actions of that agency, including those taken pursuant to the Clean Water Act in the District of
Columbia. Mr. Leavitt is being sued in his official capacity only.

JURISDICTION AND RIGHT OF ACTION

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
§§ 1331 and 1361, and may issue a declaratory judgment and grant further relief pursuant to 5
U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 2201 and 2202. Plaintiffs have a right to bring this
action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 through 706.

8. Plaintiff previously challenged the actions addressed herein via direct petition for review to the United States Court of Appeals for the District of Columbia Circuit under 33 U.S.C. § 1369(b)(1), the Clean Water Act's judicial review provision. *Friends of the Earth v. USEPA*, D.C. Cir. Nos. 02-1123 and 02-1124. EPA argued for dismissal, claiming that the cases were outside the Court of Appeals' § 1369(b)(1) jurisdiction. In so arguing, however, EPA also stated:

Dismissal of these petitions will not leave Petitioner without a means to obtain judicial review of these agency actions. Persons seeking to challenge EPA's approval or establishment of a TMDL under section 1313(d)(2) may bring their claims under the Administrative Procedure Act in a federal district court. United States Steel Corp. v. Train, 556 F.2d 822, 836 (7th Cir. 1977) (EPA approvals or disapprovals of TMDLs "are reviewable in an action in the district court under the judicial review provisions of the APA."). This has been EPA's stated position for over 25 years. See, e.g., Longview Fibre [Co. v. Rasmussen], 980 F.2d [1307], 1313 [(9th Cir. 1992)]; Bethlehem Steel [Corp. v. EPA], 538 F.2d [513], 517 n.10 [(2d Cir. 1976)].

Brief for Respondents USEPA and Christine Todd Whitman in *Friends of the Earth v. USEPA*, D.C. Cir. Nos. 02-1123 and 02-1124 (February 20, 2003), at 19. The D.C. Circuit held: "We agree with our sister circuits: original jurisdiction over EPA actions not expressly listed in section 1369(b)(1) lies not with us, but with the district court." *Friends of the Earth v. USEPA*, 333 F.3d 184, 189 (D.C. Cir. 2003). Accordingly, the D.C. Circuit ruled: "we dismiss the petitions for review for lack of jurisdiction and transfer the case to the district court for consideration under the judicial review provisions of the APA." *Id.* 193.

GENERAL ALLEGATIONS

I. THE CLEAN WATER ACT AND THE TMDL PROGRAM

9. Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The goal of the Clean Water Act is to eliminate "the discharge of pollutants into the navigable waters," and in the interim, to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1) and (2).

10. To achieve these ends, section 303 of the Clean Water Act requires each state, including the District of Columbia, to establish and implement water quality standards ("WQs"), subject to review and approval by EPA. 33 U.S.C. §§ 1313(a) to (c), 1362(3).

11. WQs consist of the "designated uses" of a state's waters and "the water quality criteria for such waters based upon such uses," and "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of" the Clean Water Act. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 130.2(d).

12. Although the Act provides for technology-based effluent limitations, 33 U.S.C. § 1311(b)(1)(A) and (B), Congress recognized that such limitations would not suffice to ensure attainment of water quality standards. Accordingly, Congress enacted § 303(d), which provides *inter alia*: "Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." § 1313(d)(1)(A).

13. For the waters thus identified, "[e]ach State shall establish ... the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." § 1313(d)(1)(C). EPA has identified "[a]ll pollutants" as being suitable for TMDL calculation. 43 Fed. Reg. 60665 (Dec. 28, 1978).

14. Section 303(d) further provides that each TMDL "shall 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." 33 U.S.C. § 1313(d)(1)(C). EPA implementing regulations provide that "TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS 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. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters." 40 C.F.R. § 130.7(c)(1).

15. Under those regulations, moreover, a TMDL is "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). A WLA, or wasteload allocation, is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(h) (emphasis added). An LA, or load allocation, is "[t]he portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." 40 C.F.R. § 130.2(g) (emphasis added).

16. States' identifications of waters and TMDLs for those waters are to be prepared by

states and submitted to EPA, which "shall either approve or disapprove such identification and load not later than thirty days after the date of submission." 33 U.S.C. § 1313(d)(2). If EPA's Administrator approves the identification and load, the State must incorporate them into its current water quality management plan under Clean Water Act § 303(e). *Id.* "If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section." *Id.*

17. TMDLs are implemented *inter alia* through point source discharge permits issued under Clean Water Act § 402, 33 U.S.C. § 1342. Such permits must include not only technology-based effluent limitations, but also "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter." 33 U.S.C. § 1311(b)(1)(C) (emphasis added). Such water-quality-based effluent limitations must be consistent with the assumptions and requirements of any available wasteload allocations in applicable TMDLs. *See, e.g.*, 40 C.F.R. 122.44(d)(1)(vii)(B).

II. IMPLEMENTATION OF THE TMDL PROGRAM BY EPA AND THE DISTRICT

18. "So important is Section 303(d) to the CWA's overall structure that Congress compelled both the states and EPA to abide by strict, date-certain deadlines for submitting and implementing TMDLs." *Kingman Park Civic Assn. v. USEPA*, 84 F. Supp. 2d 1, 3 (D.D.C. 1999). Congress allowed one year from enactment for EPA to identify pollutants suitable for TMDL calculations, 33 U.S.C. § 1314(a)(2)(D); 180 days for states to submit to EPA their initial identification of waters and the TMDLs established for those waters, 33 U.S.C. § 1313(d)(2); 30 days for EPA approval or disapproval of these submissions, *id.*; and 30 days for EPA establishment of TMDLs in the event of disapproval of state submissions, *id.* Measured from the October 18, 1972 enactment date, this statutory timeline would -- if it had been followed -- have resulted in establishment of TMDLs for the District's waters by mid-1974. That establishment, in turn, would have fit with Congress's mandate for achievement of water-quality-based effluent limitations by July 1, 1977, 33 U.S.C. § 1311(b)(1)(C), and with Congress's express intent that "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. § 1251(a)(2).

19. Neither EPA nor the District followed the statutory timeline, however. Instead of identifying pollutants within one year of enactment -- *i.e.*, by October 18, 1973 -- as mandated by 33 U.S.C. § 1314(a)(2)(D), EPA delayed an additional five years before publishing the identification on December 28, 1978. 43 Fed. Reg. 60665. *See Kingman Park*, 84 F. Supp. 2d at 3 n.1 ("Not until Judge John Sirica of this Court ordered EPA to delay no further did the agency

publish its identifications on December 28, 1978." Because of EPA's five-year delay, the 180-day deadline under 33 U.S.C. § 1313(d)(2) for the District to identify waters and set TMDLs was postponed until June 28, 1979.

20. The District did not meet that deadline, however. Instead, "[f]rom 1979 until 1994, the District of Columbia's response to its Section 303(d) obligations was absolute silence and intransigence." *Kingman Park*, 84 F. Supp. 2d at 3. During that time period, the District submitted neither an identification of waters nor any TMDLs.

21. In 1994, the District finally submitted an identification of waters, and has submitted subsequent identifications in 1996, 1998 and 2002. Nonetheless, through at least the end of 1997 the District still had not submitted a single TMDL to EPA. "More than 18 years after the District's duty to submit its first TMDL calculation ripened, it had not yet offered any TMDL to EPA for review." *Kingman Park*, 84 F. Supp. 2d at 3.

22. In 1998 Friends of the Earth and other plaintiffs filed suit in this Court, arguing *inter alia* that EPA had a nondiscretionary duty under the Clean Water Act to establish TMDLs for the District's waters. *Kingman Park Civic Assn. v. USEPA*, Civ. No. 98-758 CKK. EPA moved to dismiss, claiming *inter alia* it had no duty to establish TMDLs. The Court rejected EPA's motion to dismiss plaintiffs' nondiscretionary duty claim, finding the agency's reading of the statute "entirely unreasonable." *Kingman Park*, 84 F. Supp. 2d at 4-7.

23. Subsequently, Friends of the Earth and EPA negotiated a consent decree, which was signed by the Court on June 13, 2000. Under the decree, EPA must establish TMDLs for specified District waters and pollutants by specified deadlines. Consent Decree ¶ 5(a). However, if prior to the applicable deadline EPA approves a TMDL submitted by the District for a given

water and pollutant, the decree does not obligate the agency to establish a TMDL for that water and pollutant. Consent Decree ¶ 5(b).

A. EPA's December 2001 Approval of the District's TMDLs for Biochemical Oxygen Demand.

24. On December 14, 2000, EPA issued a final decision approving TMDLs for biochemical oxygen demand (BOD) in the Anacostia River. EPA's approval decision indicated that the District had submitted the TMDLs to EPA in May 2001. That May 2001 document includes BOD TMDLs for the Upper and Lower Anacostia River. Both EPA's approval decision, and the District's May 2001 TMDLs themselves, indicate that the TMDLs' goals include attaining the District's water quality standards for dissolved oxygen.

25. Dissolved oxygen is a basic requirement for a healthy aquatic ecosystem. Most fish and beneficial aquatic insects breathe oxygen dissolved in the water column. Depletion of dissolved oxygen causes adverse effects to the Anacostia River that include impairment of fish growth and reproduction, fish kills, and foul odors. These impacts in turn impair humans' recreational and aesthetic use of the Anacostia River.

26. The EPA's approved water quality standards applicable to the Anacostia River include both daily and hourly dissolved oxygen standards. The daily standard is 5.0 milligrams per liter (mg/l), and the hourly standard is 5.0 mg/l from March through June and 4.0 mg/l for the remainder of the year. 21 DCMR § 1104.6. (This and all other DCMR cites herein are to the version published in the January 21, 2000 D.C. Register).

27. These standards are repeatedly violated each year. In one incident described in the District's May 2001 TMDL document, a rainfall event in late May 1999 caused dissolved oxygen

to violate water quality standards, and in mid-June 1999 another rainfall event dropped dissolved oxygen to near zero and killed 5,000 to 7,000 fish in the Anacostia River. According to the TMDL, this event is typical of wet-weather-induced dissolved oxygen problems in the River.

28. Establishment of adequate TMDLs is an important and statutorily required step towards ending these water quality standards violations.

B. EPA's March 2002 Establishment of TMDLs for Total Suspended Solids.

29. On March 1, 2002, EPA issued a final decision establishing TMDLs for total suspended solids (TSS) in the Anacostia River. EPA's decision documents indicate that the TMDLs are designed to address water clarity problems.

30. Water clarity is relevant to several provisions of the District's EPA-approved water quality standards.

31. a. For example, the District's EPA-approved water quality standards include several designated uses applicable to District waters, including *inter alia* Class A (Primary contact recreation), Class B (Secondary contact recreation and aesthetic enjoyment), and Class C (Protection and propagation of fish, shellfish and wildlife). 21 DCMR § 1101.1. The Anacostia River is designated for Class A, B, and C uses, among others. 21 DCMR § 1101.2.

b. The District's EPA-approved water quality standards also include a provision that "[t]he surface waters of the District shall be free from substances attributable to point or nonpoint sources discharged in amounts that ... [p]roduce objectionable odor, color, taste or turbidity," or "[p]roduce undesirable aquatic life or result in the dominance of nuisance species." 21 DCMR § 1104.1(c) and (e).

c. The District's EPA-approved water quality standards also provide that "[t]he aesthetic qualities of Class B waters shall be maintained." 21 DCMR § 1104.4.

32. The Anacostia River in the District suffers from poor water clarity. Its water is frequently turbid, with a muddy or dirty appearance. Such turbid conditions are often at their worst following rains, and can persist for days or weeks thereafter.

33. The poor water clarity that repeatedly afflicts the Anacostia River interferes with recreational and aesthetic uses of that river. Many people boat in the Anacostia River and many people walk, fish, or pursue other recreational activities along its banks. Users' recreational and aesthetic experience of the River is impaired by its recurrent poor water clarity and muddy, turbid appearance.

34. The poor water clarity that repeatedly afflicts the Anacostia River also interferes with growth of submerged aquatic vegetation (SAV). SAV provides critical habitat for fishes and invertebrates and serves as food for waterfowl and other organisms. SAV also positively affects nutrient cycling, sediment stability, and water turbidity. Adequate water column light penetration during the growing season is a crucial factor in the survival, growth, and repropagation of SAV communities. Under the turbid conditions frequently occurring in the Anacostia River, growth and reproduction of SAVs are impaired.

35. The turbidity-induced impairments discussed above violate the District's EPA-approved water quality standards, including those cited in ¶ 31 *supra*.

36. Establishment of adequate TMDLs is an important and statutorily required step towards ending these water quality standards violations.

CLAIMS FOR RELIEF

COUNT I (Biochemical Oxygen Demand TMDLs)

37. Friends of the Earth hereby incorporates all previous paragraphs as if set forth herein.

38. EPA's approval of the District's BOD TMDLs constitutes agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C).

a. The TMDLs are phrased in annual terms. This approach violates the Clean Water Act's provision for a "total maximum daily load." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Moreover, this approach allows continued violations of water quality standards and fails to take into account critical conditions, in violation of the Act and implementing regulations. *See, e.g.*, 33 U.S.C. § 1313(d)(1)(C) (TMDLs "shall 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"); 33 U.S.C. § 1311(b)(1)(C) (requiring achievement of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations ... or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter"); 40 C.F.R. § 130.7(c)(1) ("TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS 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. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.").

b. The TMDLs fail to clearly identify wasteload allocations and load allocations, and to allocate loads to individual point sources, in violation of the Clean Water Act and applicable regulations. *See, e.g.*, 40 C.F.R. § 130.2(i) (a TMDL is "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background") (emphasis added); 40 C.F.R. § 130.2(h) (a wasteload allocation is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.") (emphasis added.); 33 U.S.C. § 1362(14) (a point source -- with certain agricultural exceptions -- is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged"); 40 C.F.R. § 122.45 (a) ("[a]ll permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility").

c. The TMDLs fail to include loads for nutrients, including phosphorus and nitrogen. Nutrients in the Anacostia River cause and contribute to oxygen depletion in violation of applicable water quality standards. Accordingly, the failure to set loads for nutrients violates the Clean Water Act and implementing regulations. *See, e.g.*, 33 U.S.C. § 1313(d)(1)(C) (States must establish TMDLs "for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation"); 43 Fed. Reg. 60665 (Dec. 28, 1978)

("EPA's identification is as follows: *All pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads*") (emphasis in original); 40 C.F.R. § 130.7(c)(1)(ii) ("TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section."). Moreover, without loads for nutrients, the TMDLs fail to provide for attainment of applicable WQS (including applicable WQS for dissolved oxygen), in violation of the Clean Water Act and implementing regulations. *See, e.g.*, 33 U.S.C. §§ 1313(d)(1)(C) and 1311(b)(1)(C) and 40 C.F.R. § 130.7(c)(1) (quoted *supra*).

d. The TMDLs fail to properly account for loads entering the District's portion of the Anacostia River from Maryland -- including loads of BOD that may not violate WQS at the DC/Maryland boundary, but may nonetheless cause or contribute to such violations further downstream in the District. By not properly accounting for upstream loads, the TMDLs fail to provide for attainment of applicable WQS, in violation of the Clean Water Act and implementing regulations. *See, e.g.*, 33 U.S.C. §§ 1313(d)(1)(C) and 1311(b)(1)(C) and 40 C.F.R. § 130.7(c)(1) (quoted *supra*).

e. EPA's approval of the TMDLs not only violates the Clean Water Act and implementing regulations, but also contravenes requirements of reasoned agency decisionmaking. For example, EPA has failed to offer a reasoned explanation that responds to comments, considers relevant factors, and is supported by substantial evidence of record.

COUNT II
(Total Suspended Solids TMDLs)

39. Friends of the Earth hereby incorporates all previous paragraphs as if set forth herein.

40. EPA's establishment of the TSS TMDLs constitutes agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C).

a. The TMDLs are phrased in seasonal terms. This approach violates the Clean Water Act's provision for a "total maximum daily load." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Moreover, this approach allows continued violations of water quality standards and fails to take into account critical conditions, in violation of the Act and implementing regulations. *See, e.g.*, the provisions cited in ¶ 38.a, *supra*.

b. The TMDLs fail to provide for attainment of water quality supporting designated and existing uses (including specifically recreational and aesthetic uses), and to meet narrative water quality standards associated with those uses (including water quality standards for objectionable turbidity, aesthetics, undesirable aquatic life and nuisance species), in violation of the Act and implementing regulations. *See, e.g.*, the provisions cited in ¶ 38.a, *supra*.

c. The TMDLs fail to clearly identify wasteload allocations and load allocations, and to allocate loads to individual point sources, in violation of the Clean Water Act and applicable regulations. *See, e.g.*, the provisions cited in ¶ 38.b, *supra*.

d. The TMDLs fail to include loads for nutrients, including phosphorus and nitrogen. Nutrients in the Anacostia River cause and contribute to impairment of designated and existing

uses (including aesthetics and recreation) and to violation of other applicable water quality standards (including those for objectionable turbidity, aesthetics, undesirable aquatic life and nuisance species). Accordingly, the failure to set loads for nutrients violates the Clean Water Act and implementing regulations. *See, e.g.*, the provisions cited in ¶ 38.c, *supra*. Moreover, without loads for nutrients, the TMDLs fail to provide for attainment of water quality supporting designated and existing uses (including specifically recreational and aesthetic uses), and to meet narrative water quality standards associated with those uses (including water quality standards for objectionable turbidity, aesthetics, undesirable aquatic life and nuisance species), in violation of the Act and implementing regulations. *See, e.g.*, the provisions cited in ¶ 38.a, *supra*.

e. EPA's establishment of the TMDLs not only violates the Clean Water Act and implementing regulations, but also contravenes requirements of reasoned agency decisionmaking. For example, EPA has failed to offer a reasoned explanation that responds to comments, considers relevant factors, and is supported by substantial evidence of record.

REQUEST FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the Court --

- a. Declare that the above-referenced TMDL decisions (including EPA's decision approving the BOD TMDLs and EPA's decision establishing the TSS TMDLs) suffer from the defects alleged herein;
- b. Enter an order remanding the above-referenced TMDLs to EPA for reconsideration in light of the Court's decision, and directing that EPA conclude the remand within six months of the Court's order;
- c. Retain jurisdiction over this action to ensure compliance with the Court's decree.
- d. Award plaintiff its costs of litigation (including attorneys' and expert witness fees).
- e. Grant such other relief as the Court deems necessary and proper.

DATED: January 21, 2004.

Respectfully submitted,



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