

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH)

Plaintiff,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, and)
MICHAEL O. LEAVITT, Administrator)
United States Environmental Protection Agency)

Defendants.)

Case No. 04-92 (RMU)

Judge Ricardo M. Urbina

EPA'S REPLY MEMORANDUM IN FURTHER SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

APA	Administrative Procedure Act
BOD	Biochemical Oxygen Demand
CSO	Combined Sewer Overflow
CWA	Clean Water Act
District	District of Columbia
DO	Dissolved Oxygen
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NPDES	National Pollution Discharge Elimination System
SAV	Submerged Aquatic Vegetation
TMDL	Total Maximum Daily Load
TSS	Total Suspended Solids

Defendants United States Environmental Protection Agency and Michael O. Leavitt, Administrator, United States Environmental Protection Agency (collectively, "EPA") submit this reply memorandum in further support of EPA's motion for summary judgment.

INTRODUCTION

In EPA's Motion and Memorandum for Summary Judgment, filed June 17, 2004, EPA presented the arguments supporting its motion for summary judgment and opposing Plaintiff's motion for summary judgment. In most instances, the arguments presented in EPA's June 17, 2004 memorandum address the issues raised by Plaintiff in its July 30, 2004 Reply Memorandum. In those instances, EPA relies on its previous arguments and will not repeat the Agency's arguments here. Instead, this reply memorandum will focus on a limited number of specific points stated in Plaintiff's Reply Memorandum that warrant some additional response.

For the reasons stated in EPA's June 17, 2004 Memorandum and in this reply memorandum below, EPA's Motion for Summary Judgment should be granted and judgment should be entered for EPA and against Plaintiff.

ARGUMENT

- I. EPA NOW AGREES THAT PLAINTIFF HAS NOT WAIVED ITS CHALLENGE TO EPA'S AUTHORITY TO APPROVE OR ESTABLISH TMDLS EXPRESSED AS TIME PERIODS OTHER THAN 24 HOURS, BUT DOES DISPUTE PLAINTIFF'S CLAIM THAT THE AGENCY'S STATUTORY INTERPRETATION IS UNREASONABLE.

In its June 17, 2004 memorandum, EPA argued that Plaintiff had waived its challenge to EPA's authority to approve or establish TMDLs expressed as time periods of other than 24 hours, because it had not challenged EPA's interpretation in a 1985 rulemaking. EPA June 17, 2004 Mem., at 10.

In Response, Plaintiff has cited to certain D.C. Circuit caselaw to the contrary. Plaintiff's July 30, 2004

Reply Mem., at 4. Having considered this caselaw and the specific circumstances here, EPA has reconsidered this waiver argument and is now withdrawing its argument that Plaintiff's challenge to EPA's statutory interpretation is time-barred.

To be clear, although EPA does not now dispute that Plaintiff may challenge EPA's statutory interpretation in this litigation, EPA does dispute Plaintiff's contention that its statutory interpretation is unreasonable. For the reasons discussed in its June 17, 2004 Memorandum, at 11-15, EPA's interpretation is reasonable and should be upheld by this Court.

II. PLAINTIFF'S RELIANCE ON EPA'S USE OF THE PHRASE "TOTAL MAXIMUM DAILY LOADS" IN A 1978 FEDERAL REGISTER NOTICE DOES NOT SUPPORT PLAINTIFF'S ARGUMENTS.

As part of its efforts to show that TMDLs must be stated as a 24-hour load, Plaintiff cites a statement by EPA in a 1978 Federal Register notice (43 Fed. Reg. 60,662, 60,665/1 (December 12, 1978)) that "all pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." Plaintiff's July 30, 2004 Reply Mem., at 9. See also Plaintiff's May 20, 2004 Mem. at 17 (citing same statement). From this statement, and by underlining the word "daily" when it quotes this statement, Plaintiff argues that EPA has previously found that all TMDLs can be expressed as a 24-hour load.

The statement cited by Plaintiff is not properly read as a conclusion by EPA that all TMDLs can be stated as a 24-hour load; EPA's use of the word "daily" in this statement occurred simply because EPA used the full phrase "total maximum daily load" rather than the "TMDL" shorthand. A review of this 1978 Federal Register notice demonstrates that EPA was silent on the time period for which a TMDL could be stated, and instead focused on the fact that the TMDL must be established

such that water quality standards will be met. 43 Fed. Reg. at 60,662/3 (“A TMDL can generally be defined as the pollutant loading for a segment of water that results in an ambient concentration equal to the numerical concentration limit required for that pollutant by the numerical or narrative criteria in the water quality standards.”)

In short, EPA’s use of the phrase “total maximum daily load” here begs the question of whether TMDLs are required to be stated as 24-hour loads or may be stated as the loads for different time periods. As EPA states in its June 17, 2004 Memorandum (at 1-3 and 15-22), some TMDLs are properly stated as a 24-hour load, but the specific TMDLs at issue here were reasonably stated as annual and seasonal loads.

III. **PLAINTIFF’S ARGUMENTS FAILS TO RECOGNIZE THAT THE RELEVANT ISSUE IS NOT WHETHER THE BOD TMDL WILL ALLOW SOME LARGE DAILY DISCHARGES OF BOD POLLUTANTS, BUT WHETHER THE TMDL WILL PROTECT THE DAILY DISSOLVED OXYGEN WATER QUALITY STANDARD.**

In several places, Plaintiff criticizes EPA’s BOD TMDL as permitting large quantities of BOD pollutant discharges in short periods of time. See, e.g., Plaintiff’s July 30, 2004 Reply Mem., at 15-16, 19. From this criticism, Plaintiff’s seek to argue that large episodic discharges will lead to the violation of the daily dissolved oxygen water quality standard. At one point, Plaintiff offers a beer analogy in support of its argument, stating that an annual limit on beer consumption of 365 beers would allow consumption “10, 20 or even 50 or more beers on a given day.” Plaintiff’s July 30, 2004 Reply Mem., at 15-16.

Plaintiff’s beer analogy is helpful on this point because it demonstrates how Plaintiff fundamentally misunderstands the scientific basis for the BOD TMDL. The key concept that Plaintiff

ignores is that a discharge of BOD pollutants does not directly lead to a depletion of oxygen. Using Plaintiff's beer analogy, if a person were to drink a large number of beers in a given day, that beer consumption would immediately and directly lead to that person's intoxication. By contrast, a large discharge of BOD pollutants does not necessarily lead to a large drop in dissolved oxygen in the water. As discussed in EPA's June 17, 2004 Memorandum (at 2), BOD discharges may have some immediate effect or they may accumulate in sediment and not cause oxygen depletion until some later point in time when conditions arise that support the biological and chemical reactions that consume oxygen. See BOD Decision Rationale (BOD-1), at 26 (JA 639). As noted in EPA's previous memorandum, whether a given discharge of BOD pollutants causes oxygen depletion at the time of discharge (or later in time or not at all) is contingent on a large number of variables, such as water temperature, amount of sunlight, and the volume and speed of the flow of water in the river. See EPA June 17, 2004 Mem., at 2-3; BOD TMDL Report (BOD-20), at 9 (JA 392). See also TAM/WASP Model (BOD-48), at 68-69 and 74-76 (JA 210-211, 216-218) (tables showing variables used in model).

Because the discharge of BOD pollutants affects dissolved oxygen levels in such an indirect and contingent way, Plaintiff's criticism of the BOD TMDL as allowing large episodic discharges is insufficient to show that the BOD TMDL will not be protective of water quality. The relevant issue is not whether the BOD TMDL will allow some large daily discharges of BOD pollutants, but whether the TMDL will protect the daily dissolved oxygen water quality standard. As discussed in EPA's June 17,

2004 Memorandum (at 17-20), the modeling done with the TAM/WASP model shows that the BOD TMDL will protect dissolved oxygen on a daily basis, and thus should be upheld.^{1/}

IV. THE ADMINISTRATIVE RECORD DEMONSTRATES THAT THE IMPACTS OF ACCUMULATED BOD POLLUTANTS ARE ACCOUNTED FOR WITHIN THE TAM/WASP MODEL.

One complexity in the way that BOD pollutants affect dissolved oxygen levels is that BOD pollutants may not have an immediate effect on dissolved oxygen, but may settle in the river sediment and then affect dissolved oxygen levels at some point in the future when conditions support the chemical and biological reactions that consume oxygen. See EPA June 17, 2004 Mem., at 16-17 (citing BOD TMDL Report (BOD-20), at 9 (JA-392)). As the District noted, BOD pollutant discharges may have effects on dissolved oxygen that occur years after the pollutants are first discharged into the river. EPA June 17, 2004 Mem. at 16 (quoting BOD TMDL Report (BOD-20), at 9 (JA-392) (“[T]here is a memory in the sediment of BOD loads from two to three years in the past.”)).

In its July 30, 2004 Reply Memorandum, at 20, Plaintiff claims that the TAM/WASP model fails to account for the resuspension of BOD pollutants, based on two quotations that it reads too broadly. As an initial point, EPA does not contend that the model contains direct numerical representations of each and every variable that affects how and when BOD pollutants impact dissolved oxygen levels, or that the model is otherwise a precise simulation of the Anacostia River. Both the District and EPA have been very candid about the limitations of the model. See, e.g., TAM/WASP

^{1/} It is for this same reason that Plaintiff is incorrect in arguing that EPA has no record support for its conclusion that large episodic discharges of BOD pollutants can occur without violating water quality standards. See, e.g., Plaintiff’s July 30, 2004 Reply Mem., at 22. The modeling done with the TAM/WASP model shows just that.

Model (BOD-48), at xi-xii (JA-140-141) (“Overall, the model performs well in simulating dissolved oxygen levels in the tidal Anacostia, [but] with mixed success . . . on some specific issues.”). That said, and despite its limitations, the calibration and verification of the model proves that it is a reasonable basis for reaching conclusions about how different changes in pollutant loads will affect dissolved oxygen levels in the Anacostia River under varying conditions. See, e.g., EPA June 17, 2004 Mem. at 18-19. Thus, because Plaintiff has not shown that the model “bears no rational relationship to the characteristics of the data to which it is applied,” this Court should defer to EPA’s technical expertise in deciding that it was appropriate to rely on the TAM/WASP model. National Wildlife Federation v. EPA, 286 F.3d 554, 565 (D.C. Cir. 2002) (“We may reject an agency’s choice of a scientific model ‘only when the model bears no rational relationship to the characteristics of the data to which it is applied.’”) (citations omitted).

Further, with respect to Plaintiff’s specific point about the model’s treatment of resuspension of previously discharged BOD pollutants, while EPA agrees that there is not a specific numerical input for sediment resuspension (which is the point of the sentences that Plaintiff quotes in Plaintiff’s July 30, 2004 Reply Mem., at 20), the record demonstrates that the effects of accumulated BOD pollutants on dissolved oxygen levels are accounted for in the TAM/WASP model. The overall TAM/WASP model is composed of three sub-models: (1) a “hydrodynamic sub-model” that simulates the movement of water and suspended constituents in the river, (2) a “sediment exchange sub-model” that simulates exchanges of constituents (including BOD pollutants) between of the sediment and the water column, and (3) a “water quality sub-model” that simulates the various chemical and biological processes that affect dissolved oxygen levels in the water column. BOD Decision Rationale (BOD-1), at 9 (JA-622).

Within the TAM/WASP model, the sediment exchange sub-model addresses the continuing impacts of BOD pollutants that have settled in the sediment. See, e.g., TAM/WASP Model (BOD-48), at xi (JA 140) (discussing the addition of the sediment oxygen demand model to TAM/WASP in the early 1990's) and 67-71 (JA 209-213) (technical discussion of sediment exchange sub-model).

See also WASA Long Term Control Plan - Draft Report (June 2001), at 9-21 (JA 518) (noting that TAM/WASP model includes modeling of the sediment oxygen demand and discussing how testing with the model showed that changes in BOD loads caused effects that were realized over a period of years.)

V. CONTRARY TO PLAINTIFF'S CLAIM, EPA DOES NOT RELY ON IMPERMISSIBLE POST HOC RATIONALIZATIONS, BUT INSTEAD PRESENTS AN "AMPLIFIED ARTICULATION" OF ITS DECISION, WHICH IS PERMITTED.

At certain points, Plaintiff claims that EPA's arguments in its June 17, 2004 memorandum are "post hoc rationalizations" that are not permitted. See, e.g., Plaintiff's July 30, 2004 Reply Mem., at 18, 20-21.

First, EPA's arguments were accompanied by numerous citations to the record, and EPA believes that a reasonable reading of the cited pages supports its statements and arguments. See, e.g., EPA June 17, 2004 Mem., at 16-17 (cited by Plaintiff's July 30, 2004 Reply Mem., at 18) and 19 (cited by Plaintiff's July 30, 2004 Reply Mem., at 20-21).^{2/}

Second, Plaintiff fails to recognize that the rule against post hoc rationalizations does not prevent an agency from presenting a more detailed explanation of the agency's decision in response to

^{2/} Further, Plaintiff incorrectly contends that EPA's discussion of U.S. Air Tour Ass'n v. FAA, 298 F.3d 997, 1017 (D.C. Cir. 2002), is a post hoc rationalization. Plaintiff's July 30, 2004 Reply Mem., at 27. An agency is allowed to distinguish the case law cited against it in litigation, and that is what EPA did in discussing the U.S. Air Tour case. See EPA June 17, 2004 Mem., at 25-26.

a plaintiff's legal challenge. As long as the agency is not presenting a new rationale for the agency action, an agency in litigation may supply a clearer or more detailed explanation of the agency's rationale in its briefs in litigation.^{3/} As the D.C. Circuit has stated, an agency in litigation may present an "amplified articulation" of its decision in litigation. Local 814, Int'l Bhd. of Teamsters v. NLRB, 546 F.2d 989, 992 (D.C. Cir. 1976). Further, this amplified articulation may provide an explanation that puts together the basic elements of the Agency's rationale beyond what is expressly articulated in the record, as long as the "essential postulates for the agency rule" are in the record. Center for Auto Safety v. Peck, 751 F.2d 1336, 1361 (D.C. Cir. 1985) ("It is simply not the case . . . that all of the essential postulates for an agency rule must be contained in the record. Every judgment of any consequence is constructed upon an infinitude of other judgments, of greater or lesser certitude, in a progression of logical dependency terminating in a first principle the equivalent of $1 + 1 = 2$. They cannot all possibly be included in the statement of basis and purpose for a rulemaking."). Thus, EPA's arguments in this litigation – which provide a more detailed explanation of EPA's rationale but rely entirely on the administrative record – are not post hoc rationalizations that must be rejected by this Court.

^{3/} Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1233 (D.C. Cir. 1994) (court rejected plaintiffs' argument that position taken by agency in litigation was a post hoc rationalization, even though the agency "could have placed a finer point on [the] issue in announcing [the agency's] rationale" in the record); Public Citizen, Inc. v. F.A.A., 988 F.2d 186, 197 (D.C. Cir. 1993) (Courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (quoting Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)); Local 814, Int'l Brotherhood of Teamsters v. NLRB, 546 F.2d 989, 992 (D.C. Cir. 1977) ("The 'post hoc rationalization' rule is not a time barrier which . . . bars it from further articulation of its reasoning.").

VI. PLAINTIFF'S CITATION TO WASA'S DRAFT LONG TERM CONTROL PLAN DOES NOT SUPPORT ITS ARGUMENT THAT THE BOD TMDL IS NOT PROTECTIVE OF WATER QUALITY STANDARDS.

In its May 20, 2004 memorandum, at 21-22, Plaintiff argued that the draft Long Term Control Plan ("LTCP") by WASA supported its conclusion that the BOD TMDL would lead to some combined sewer overflows ("CSO's") having discharges that would cause violations of the dissolved oxygen water quality standard. In its June 17, 2004 Mem., at 19-20 n. 7, EPA explained that Plaintiff's argument on this point was incorrect because WASA's Long Term Control Plan assumed different reductions than the BOD TMDL at issue here. In its July 30, 2004 Reply Mem., at 22, Plaintiff presses this argument again by stating that the Long Term Control Plan and the BOD TMDL at issue here used the same 152,906 pound figure for discharges from CSOs.

Plaintiff's argument here is flawed because one cannot look at the BOD pollutant discharges from CSOs in isolation; the total impact of BOD pollutant discharges is based on the total discharges from all sources, not just CSOs. Indeed, the portion of the record cited here by Plaintiff demonstrates this point. In WASA's draft LTCP (Table 9-7 at 9-23 (JA 520)), the loads from CSOs under the various scenarios remain constant at 152,906 pounds, but the scenarios use very different load figures for other BOD discharges, ranging from zero to 754,965 pounds.

Again, the question of whether a given loading of BOD pollutants will cause a violation of water quality standards is complex and certainly cannot be judged by looking at the discharges from just one group of sources of BOD pollutants. Instead, the District's and EPA's approach of using the TAM/WASP model to evaluate different load scenarios from all of the various sources of BOD pollutants and then establish the BOD TMDL based on that modeling was reasonable and should be upheld.

VII. PLAINTIFF'S ARGUMENT THAT THE TSS TMDL WILL NOT PROTECT RECREATIONAL AND AESTHETIC USES OF THE RIVER IS BASED ON PAST DISCHARGE LEVELS AND FAILS TO RECOGNIZE THAT THE TSS TMDL IDENTIFIES A 77% REDUCTION IN DISCHARGES FROM CURRENT LOADS.

In its previous briefing, EPA explained that it reasonably concluded that the 77% reduction of TSS discharges to protect aquatic life would also be protective of recreational and aesthetic uses of the Anacostia River. EPA June 17, 2004, Mem. at 23-26. In reply, Plaintiff relies in part on the declarations of several persons who use the river for recreation and aesthetic enjoyment, and who comment on how their and others' use of the river is impaired by "objectionable turbidity" in the river. Plaintiff's July 30, 2003 Mem., at 27-28.

A fundamental flaw in Plaintiff's argument on this point is that Plaintiff relies on declarations from persons who complain about water clarity under the current levels of TSS discharges, rather than present evidence that water clarity will continue to be objectionable after the reductions in TSS discharges identified in the TSS TMDL. As EPA noted in its opening memorandum, , the TSS TMDL identifies a 77% reduction in TSS discharges. EPA June 17, 2004 Mem., at 22; TSS TMDL Report (TSS-1), at 33, 36 (JA 712, 715); TSS Decision Rationale (TSS-1), at 8, 9 (JA 670, 671). Based on its analysis, EPA concluded that the TSS TMDL would achieve applicable water quality standards. TSS TMDL Report (TSS-1), at 8-10, 36 (JA 687-89, 715); TSS Decision Rationale (TSS-1), at 1, 5-6, 8 (JA 663, 667-8, 670). Although Plaintiff has presented various declarations pointing to objectionable turbidity in the past and present, Plaintiff has not presented any analysis, data, modeling or any other basis for concluding that "objectionable turbidity" would continue in the future after a 77% reduction in TSS discharges from current loads.

VIII. EPA'S DECISION TO ESTABLISH OR APPROVE TMDLs WITH WASTELOAD ALLOCATIONS EXPRESSED IN THE FORM OF A SPECIFIC PERCENT REDUCTION FOR EACH CATEGORY OF SOURCES WAS REASONABLE.

In its opening memorandum, EPA explained how the TMDLs at issue here identified individual wasteload allocations by specifying a percent reduction in current discharges for each category of source. EPA June 17, 2004 Mem., at 28-29. In reply, Plaintiff cites to a sentence in the BOD Decision Rationale that Plaintiff suggests is inconsistent with EPA's position. See Plaintiff's July 30, 2004 Reply Mem., at 35 (quoting BOD Decision Rationale, at 10 (JA 623)). When read in the context of the paragraph in which this sentence appears, the sentence quoted by Plaintiff is properly understood to say that the effluent limits in WASA's permit must be consistent with the TMDL (and in particular the wasteload allocations in the TMDL) rather than the volume and percent reduction figures discussed in the Long Term Control Plan. See BOD Decision Rationale, at 10 (JA 623). This sentence should not be read as a general pronouncement that effluent limits in an NPDES permit cannot be based on percentage reductions stated in a TMDL. Instead, this sentence is properly understood as simply restating the rule in 40 C.F.R. § 122.44(d)(1)(vii)(B), which requires that a permit effluent limit be "consistent with the assumptions and requirements of any available wasteload allocation" prepared and approved within a TMDL.

Further, contrary to Plaintiff's claim (in its July 30, 2004 Reply Mem., at 30), EPA explained that the percentages identified in the TMDLs would be applicable to future permits. EPA June 17, 2004 Mem., at 30. For example, in the TSS TMDL, EPA specifies that "Any DC NPDES permit reissued to discharge into the District's portion of the Anacostia River must be consistent with the

[wasteload allocations] set forth in this TMDL (expressed as percent reductions from 'existing' loads).” TSS TMDL Report (TSS-1), at 43 (emphasis added) (JA 722).

Plaintiff’s argument on this point also fails because, in addition to specifying percentage reductions to be applied to each point source, both TMDLs specify wasteload allocations for each pollutant for each of the segments of the Anacostia River for the CSOs and stormwater sources (including the District’s municipal separate storm sewer system (or “MS4”). The BOD TMDL specifies a wasteload allocation for each pollutant for each of the District’s segments of the Anacostia River to CSOs and stormwater sources (including the MS4). BOD Decision Rationale (BOD-1), at 22-23 (JA-635 to JA-636); BOD TMDL Report (BOD-20), at 11 (JA-394). In the TSS TMDL, because of the use of the 36 segment TSS model, similar wasteload allocations are provided for each pollutant to each source but in even smaller segments. TSS TMDL Report (TSS-1), at 35 (JA-714). Further, Plaintiff does not dispute that all CSO outfalls to the Anacostia River are addressed by a single NPDES permit to the Blue Plains Water Treatment Plant. TSS Decision Rationale (TSS-1), at 17 (JA-696). Similarly, Plaintiff does not dispute that several hundred stormwater outfall pipes are covered by a single NPDES permit issued to the District for the MS4 . TSS Decision Rationale (TSS-1), at 17 (JA-696). Taking all of these factors into consideration, the approach of providing a pollutant specific, segment specific wasteload allocation attributable to a single regulated entity was reasonable and entirely consistent with both the Act and regulation. Further, with respect to any concern by Plaintiff that the TMDLs do not provide a basis for the permit writer to set enforceable permit limits, EPA notes that 40 C.F.R. § 122.44(d)(vii)(B) requires that a permit be “consistent with the assumptions and requirements of any available wasteload allocation” prepared and approved within

a TMDL under 40 C.F.R. § 130.7.^{4/} Thus, there is sufficient information in the TMDLs to allow permit writers to establish appropriate effluent limits for the relevant permits here – to WASA for the CSOs and to the District for the MS4. For Plaintiff to argue that more is required is demanding form over substance on this issue.^{5/}

^{4/} EPA notes that NPDES permits are distinct Agency decisions issued through a public process in accordance with EPA NPDES regulations (and, where applicable, the regulations of an authorized State NPDES permit program). 40 C.F.R. Parts 122, 123 and 124. Permitting decisions are reviewable in administrative and judicial proceedings as to whether the permit is consistent with those federal and, where applicable, State NPDES requirements. EPA Region III issues NPDES permits to regulated point sources in the District of Columbia and, as such, those final NPDES permitting decisions are reviewable in accordance with 40 C.F.R. Part 124. Neither the federal NPDES permit regulations in 40 C.F.R. Parts 122-124, nor the TMDL regulations in 40 C.F.R. Part 130, specify a particular form for the wasteload allocation. Among the many NPDES permit requirements is the requirement that the NPDES permit effluent limit be consistent with the assumptions and requirements of the TMDL. 40 C.F.R. § 122.44 (d)(1)(vii)(B). In short, Plaintiff will have the opportunity to challenge NPDES permit decisions on their own merits including whether the effluent limits are consistent with the TMDL wasteload allocations.

^{5/} Plaintiff devotes considerable space to responding to EPA's Footnote 11 (in June 17, 2004 Mem., at 30-31), which states EPA's position on the Agency's authority to assign wasteload allocations to categories of sources. See Plaintiff's July 30, 2004 Reply Mem., at 32-34. The Court need not reach this issue, because EPA has not simply assigned allocations to broad categories of sources, but to the two regulated facilities that contribute the pollutants of concern, as discussed above. Thus, EPA will not present any further response to Plaintiff's argument on this point, but will stand by its statement in Footnote 11 of its June 17, 2004 memorandum.

IX. PLAINTIFF RELIES ON UNSUPPORTED CLAIMS BY ITS CONSULTANT TO ARGUE THAT EPA FAILED TO CONSIDER CONTINUING IMPACTS OF THE BOD POLLUTANTS THAT FLOW INTO AND THROUGH THE DISTRICT FROM MARYLAND.

In its June 17, 2004 memorandum, EPA demonstrated that it had considered the continuing impacts of BOD pollutants that flow into and through the District from Maryland, and reasonably concluded that the BOD TMDL would achieve water quality standards. EPA June 17, 2004 Mem., at 31-34. In making that demonstration, EPA noted that Plaintiff's counter-argument on this point relies on the unsupported claims of its consultant, Dr. Jack Smith. EPA June 17, 2004 Mem., at 33. In reply, Plaintiff contends that Dr. Smith's comment is not "unsupported" because his reasoning is explained and because he cites a textbook in support of his conclusion. Plaintiff's July 30, 2004 Reply Mem., at 36.

First, Plaintiff's argument does not address the fundamental point made by EPA – that Dr. Smith's comment fails to cite to any data, models or analyses in the record, and simply states an argument that is unsupported by any facts. See Smith Memorandum, at 2-3 (JA 379-80). Second, Dr. Smith's citation to a textbook does not support his specific conclusions here. The textbook citation is presented in support of a general concept, not to show that the effect claimed by Dr. Smith will actually occur in the Anacostia River on the facts in this administrative record. See Smith Memorandum, at 2-3 & n.1 (JA 379-80). Finally, Plaintiff is incorrect that this kind of unsupported expert commentary is admissible under Rule 702 of the Federal Rule of Evidence. Rule 702 expressly states that expert testimony is admissible if it is, among other things, "based on sufficient facts or data."

Because his opinion is not supported by any facts or data, Dr. Smith's comments here do not satisfy that requirement of Rule 702.

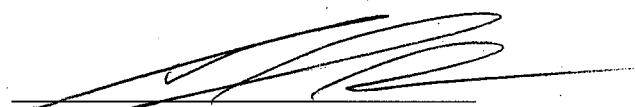
Thus, Dr. Smith's comments should be viewed as unsupported and insufficient to lead this Court to overturn EPA's conclusions, which were based on extensive data and modeling. See EPA June 17, 2004 Mem. at 31-34.

CONCLUSION

For these reasons and for the reasons stated in EPA's June 17, 2004 memorandum, the Court should grant summary judgment for EPA and against Plaintiff.

Respectfully submitted,

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Dated: August 20, 2004

CERTIFICATE OF SERVICE

I, Scott J. Jordan, hereby certify that on August 20, 2004, I caused to be served a true and accurate copy of EPA's REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT by electronic transmission and regular mail upon:

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