

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FRIENDS OF THE EARTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04cv92 RMU
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**COMBINED MEMORANDUM OF PLAINTIFF FRIENDS OF THE EARTH  
(1) REPLYING IN SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT, AND (2) OPPOSING EPA'S AND  
WASA'S MOTIONS FOR SUMMARY JUDGMENT**

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Plaintiff Friends of the Earth ("FoE") submits this combined memorandum replying in support of FoE's motion for summary judgment, and opposing the motions for summary judgment by defendants United States Environmental Protection Agency, *et al.*, (collectively "EPA"), and intervenor-defendant District of Columbia Water and Sewer Authority ("WASA"). This memorandum also responds to arguments made in the amicus brief of Association of Metropolitan Sewerage Agencies and Combined Sewer Overflow Partnership (collectively "AMSA").

### SUMMARY OF ARGUMENT

**Annual and Seasonal loads.** The annual and seasonal loads at issue here violate Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C), which requires the "total maximum daily load." (Emphasis added.)

Moreover, the challenged loads also violate §303(d)(1)(C)'s requirement that a TMDL be established "at a level necessary to implement the applicable water quality standards" with "a margin of safety." Those long-term TMDLs allow short-term loading spikes associated with storm events, producing violations both of short-term (daily and hourly) dissolved oxygen standards and of the standard prohibiting objectionable turbidity. EPA's brief offers no reason to conclude otherwise. With respect to the biochemical oxygen demand ("BOD") TMDLs, the agency's lawyers advance post hoc rationales and mischaracterizations of the record. With respect to the total suspended solids ("TSS") TMDLs, they focus solely on aquatic life impacts, thus ignoring the severe impact the muddiness of the Anacostia River has on recreation and aesthetics.

**Recreation and Aesthetics.** Recreation and aesthetics are designated uses of the Anacostia -- uses that form part of the District's water quality standards. Accordingly, the TSS

TMDLs' failure to protect those uses from objectionable turbidity violates the statutory requirement that a TMDL implement applicable water quality standards with a margin of safety. The agency's arguments concerning the alleged "subjectiv[ity]" of recreation and aesthetics offer no basis for carving out an exemption from this express mandate.

**Nutrients.** EPA does not dispute that nutrient loads are required in order to fulfill the statutory directive to implement water quality standards. Although the agency's lawyers claim nutrient loads are included in the BOD TMDLs, those TMDLs contain language indicating the contrary.

**Outfalls.** EPA's argument that TMDLs need not include outfall-specific loads misreads the applicable regulation, which allows a TMDL's nonpoint source component to rely on "gross allotments," but requires the point source component to set forth the sum of the "individual" point source loads, each of which addresses "one" point source.

**Upstream loads.** EPA's brief cites no record response to expert comments indicating that the BOD TMDLs fail to adequately account for upstream loads entering the District from Maryland.

**I. THE ACT REQUIRES THE "TOTAL MAXIMUM DAILY LOAD," NOT THE TOTAL MAXIMUM ANNUAL OR SEASONAL LOAD.**

As shown in FoE's opening memorandum, EPA's decisions approving and establishing annual and seasonal TMDLs violate the Clean Water Act's requirement for the "total maximum daily load." FoE 5/20/04 Mem. 13-17. As a threshold matter, EPA argues that FoE's argument is time-barred. On the merits, EPA, as well as WASA and AMSA, argue that annual and seasonal loads comply with the Act. None of these arguments have merit.

**A. Plaintiffs' Statutory Challenge to EPA's 2001 and 2002 TMDL Decisions Is Not Time-Barred.**

EPA argues that "[t]he EPA statutory interpretation at issue here was established by regulation 19 year [sic] ago," and "it is too late to challenge it now." EPA Mem. 10 (emphasis added). The argument is untenable.

FoE is not challenging a regulation, but rather seeks timely review of EPA decisions concerning specific TMDLs, because *inter alia* those decisions violate the Clean Water Act. EPA's attempt to preclude this statutory challenge to specific, recent agency actions must be rejected. *Chevron, USA v. NRDC*, 467 U.S. 837, 843 n.9 (1984) (Congress's intent embodied in a statute "is the law and must be given effect").

In any event, the interpretation at issue was not promulgated in the 1985 regulation. Far from expressly authorizing annual or seasonal loads, the 1985 regulation provides only that "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. §130.2(i). That the regulation does not affirmatively state that loads must be daily does not transform it into an express authorization of annual or seasonal loads. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000) ("the regulation cannot change the statute, and a regulation promulgated to guide the Secretary's discretion in exercising his authority under the Act need not also restate all related statutory language").

In reality, the interpretation at issue appeared, not in the 1985 regulation, but in the preamble. *See* EPA Mem. 10 (quoting preamble). As the D.C. Circuit has held: "The preamble to a rule is not more binding than a preamble to a statute. 'A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'" *National Wildlife Federation v.*

*EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002) (emphasis added; citation omitted). Indeed, neither of the two decisions under review even cites the 1985 preamble language.

Finally, EPA's argument ignores longstanding precedent concerning challenges to regulations. The D.C. Circuit has observed that, "unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). Thus, the D.C. Circuit has "frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits." *Independent Community Bankers v. Board of Governors*, 195 F.3d 28, 34 (D.C. Cir. 1999). Assuming *arguendo* the present action represents a challenge to EPA's 1985 regulation at all, that challenge would be an as-applied challenge (*i.e.*, a challenge to the use of the 1985 regulation as a basis for EPA's 2001 and 2002 TMDL decisions), not a facial challenge (*i.e.*, an attack on the 1985 regulation in the abstract). Under the longstanding D.C. Circuit precedent cited above, that challenge would not be time-barred.<sup>1</sup>

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<sup>1</sup> As-applied challenges may be barred where "the statute authorizing judicial review explicitly prohibit[s] all review after the prescribed period." *Independent Community Bankers*, 195 F.3d at 35. That is not the case here. Because the 1985 regulation was promulgated under Clean Water Act § 303, judicial review of that regulation would be governed by the Administrative Procedure Act. *Friends of the Earth v. USEPA*, 333 F.3d 184, 187-93 (D.C. Cir. 2003). The APA contains no prescribed review period, and *a fortiori* no language explicitly prohibiting all review after the prescribed period. *See* 5 U.S.C. §§ 701-706. Even if the 1985 regulation was instead reviewable under the Clean Water Act's judicial review provision, the present suit -- for reasons stated above -- does not challenge that regulation, and thus is not time-barred. *See, e.g., 1000 Friends of Maryland v. Browner*, 265 F.3d 216, 223-24 (4th Cir. 2001) (rejecting EPA's argument that  
(footnote continued next page ...)

**B. The Attempt of EPA and Its Allies to Abrogate the Statutory Requirement for the "Total Maximum Daily Load" is Unavailing.**

**(1) EPA.**

**Statutory "silence."** Under *Chevron* Step One, the intent of Congress clearly expressed in a statute "is the law and must be given effect." 467 U.S. at 843 n.9. Here, the applicable statutory language calls for the "total maximum daily load" -- not the "total maximum annual load" or the "total maximum seasonal load." This express statutory language -- which includes the word "daily" -- refutes EPA's outlandish argument (EPA Mem. 12) that the Clean Water Act is "silent" on the issue at hand.

**Absence of statutory definition.** EPA also argues that, because the statute does not separately define the terms in the phrase "total maximum daily load," that there is a "gap" which EPA has discretion to fill. *Id.* (arguing that "[t]he Clean Water Act neither defines a TMDL nor specifies how a TMDL should be expressed," and that EPA has "[f]ill[ed] in the gap left by the absence of a statutory directive or definition of a TMDL"). To the contrary, in the absence of a separate statutory definition, the statutory terms are presumed to have their ordinary meaning. *Aid Assn. for Lutherans v. USPS*, 321 F.3d 1166, 1176 (D.C. Cir. 2003) ("Since the statute does not define 'coverage,' we must presume that Congress intended to give the term its ordinary meaning."). Indeed, cases under environmental statutes have repeatedly emphasized the importance of applying the ordinary meaning of statutory terms. *See, e.g., Bluewater Network v. EPA*, 370 F.3d 1, 25 (D.C. Cir. 2004) (Clean Air Act); *Engine Mfrs. Assn. v. South Coast Air Quality Management District*, 124 S. Ct. 1756, 1761 (2004) (same).

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(... footnote continued from previous page)  
petitioner's suit challenging a recent Clean Air Act approval decision represented an untimely challenge to previously promulgated regulations).

Here, EPA does not even address the ordinary meaning of "daily," and certainly does not argue that it encompasses "seasonal" or "annual." Indeed, any such argument would be untenable. Webster's Third New International Dictionary (1981) ("daily" means "occurring or being made, done, or acted upon every day," "reckoned by the day," "covering the period of a day," or "based on a day") (emphasis added).

In some circumstances, statutory terms are given a more technical meaning. Specifically, "where Congress has used technical words or terms of art, it is proper to explain them by referring to the art or science to which they are appropriate." *Alabama Power Co. v. USEPA*, 40 F.3d 450, 454 (D.C. Cir. 1994) (citations, brackets and internal quotations omitted). Unlike the phrase "low NOx burners" at issue in *Alabama Power*, the term "daily" is a commonplace word in everyday usage, and EPA has cited no evidence that Congress intended it to have anything other than its ordinary meaning. Nor has EPA argued that "daily" as used in § 303(d) is a technical term or term of art, or offered a technical definition drawn from a relevant "art or science."

To the contrary, EPA has proffered no reading of "daily" at all -- neither ordinary nor technical. To ignore statutory language is not to interpret it.

Indeed, if EPA is entitled to approve and promulgate TMDLs using any averaging period (daily, weekly, monthly, seasonal, annual, or even longer), then the term "daily" has been rendered superfluous. Under EPA's interpretation, "TMDLs may be expressed in terms of an appropriate averaging period, such as weekly or monthly, as long as compliance with applicable water quality standards is assured." EPA Mem. 12 (citation, brackets, and ellipsis omitted) (emphasis added). Under this reading, the statutory term "daily" adds nothing to the separate statutory language requiring that TMDLs 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." § 303(d)(1)(C) (emphasis added).

EPA lacks authority to strike words from the statute books, or to drain them of meaning. "An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage." *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995). *Accord, TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (a statute should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant"). This principle has repeatedly been applied to environmental statutes. *See, e.g., Alaska Dept. of Environmental Conservation v. EPA*, 124 S. Ct. 983, 996 n.13 (2004) (Clean Air Act); *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996) (Resource Conservation and Recovery Act). Given that *Chevron* Step One analysis is based on "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, the traditional rule against statutory surplusage further undermines EPA's interpretation.

**Statutory context.** There is no merit to EPA's suggestion (EPA Mem. at 11-12) that the statutory "context" supports annual or seasonal TMDLs. To the contrary, the context reinforces rather than undermines the import of the word "daily." That word appears in the phrase "total maximum daily load," thus establishing that a TMDL is to represent the total maximum pollutant load that is allowable on a daily basis. EPA's interpretation thwarts this context by phrasing the total maximum in terms far longer than a day -- such as an entire year or season.

The statutory context also includes an express cross-reference confirming that loads must be "daily," §304(a)(2), 33 U.S.C. § 1314(a)(2) (providing for the identification of pollutants suitable for "maximum daily load measurement") (emphasis added), as well as language showing

that Congress knew how to use temporal terms other than daily when it wished to do so. §303(d)(1)(C) (providing for "total maximum daily load" to be set at a level necessary to implement water quality standards "with seasonal variations") (emphasis added). EPA's interpretation contravenes this context as well.

**Absurd results.** EPA argues that reading the statutory term "daily" as written would be an "absurd" interpretation. EPA Mem. 14 (quoting *Natural Resources Defense Council v. Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001)). However, D.C. Circuit precedent establishes a specific test for considering agency claims for relief from an express statutory requirement -- and EPA has failed to meet that test. Specifically, the agency has not "show[n] either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Assn. v. USEPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). To satisfy this test, EPA must make "an extraordinarily convincing justification." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). In the challenged decisions, EPA offered no such justification,<sup>2</sup> and the arguments advanced in the agency's memorandum -- in addition to being post hoc rationales -- are limited to vague and generic claims that TMDLs expressed in other than daily terms would be more "appropriate." EPA Mem. 12-13. Such claims do not even apply the *Engine Manufacturers* test, much less make an "extraordinarily convincing" justification that the test is satisfied.

Indeed, these circumstances are especially inapt for divergence from the plain meaning of the Act. As FoE pointed out -- and EPA does not dispute -- the agency has determined that "[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total

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<sup>2</sup> *Cf., e.g., Appalachian Power*, 249 F.3d at 1040, where the EPA decision under review did present arguments for an exemption from the statute's express language.

maximum daily loads." FoE 5/20/04 Mem. at 17 (quoting EPA) (emphasis added). Given EPA's express finding as to the suitability of "daily" loads, the agency cannot make an "extraordinarily convincing justification" (*Appalachian Power*, 249 F.3d at 1041) that such loads would be absurd.

Moreover, even assuming *arguendo* that daily loads would produce absurd results for some pollutants in some situations, that would not support EPA's assertion that it is free to diverge from the statutory mandate for a "total maximum daily load" at will -- even in situations where (as here) the agency has neither alleged nor documented an absurd result. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("The rule that statutes are to be read to avoid absurd results ... [is not] a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.").

**Deference.** EPA argues that the Court should grant *Chevron* deference to the agency's interpretation. EPA Mem. 12. Because EPA's interpretation contravenes congressional intent embodied in the Clean Water Act, however, this case is governed by Step One of *Chevron* -- which involves *de novo* review, without deference to the agency. *See* FoE 5/20/04 Mem. 10 (citing caselaw).

Even assuming *arguendo* that there were an ambiguity, EPA's interpretation must be rejected under *Chevron* Step Two because it is not "reasonable." *Chevron*, 467 U.S. at 844. To implement a statutory requirement for a total maximum "daily" load by using annual and seasonal loads -- *i.e.*, loads measured over periods up to 365 times longer than a day -- "diverges from any realistic meaning" of § 303(d). *See Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting agency statutory interpretation under *Chevron* Step

Two). Moreover, EPA has failed to offer a reasoned explanation for its interpretation, because *inter alia* it has not linked its interpretation to the key statutory phrase "total maximum daily load," see *Tax Analysts v. IRS*, 117 F.3d 607, 615 (D.C. Cir. 1997) (agency interpretation rejected under Step Two where "we are hard pressed to find any reason derived from § 6103 in favor of the IRS's interpretation," and "[t]he IRS has offered none") (emphasis added), and indeed has drained the term "daily" of meaning. See *Halverson v. Slater*, 129 F.3d 180, 189 (D.C. Cir. 1997) (agency interpretation rejected under Step Two where it would deprive statutory language "of virtually all effect").

**(2) WASA and AMSA.**

**Amendments to CWA sections other than § 303.** In an argument not advanced by EPA itself, WASA and AMSA seek support for longer-than-daily TMDLs in § 402(q) of the Act, 33 U.S.C. § 1342(q). See WASA Mem. 11-14; AMSA Br. 6, 9-10. AMSA makes a similar argument with respect to § 402(p). AMSA Br. 6-8. But these provisions, which were added to the Act in 2000 and 1987, respectively, did not amend §303(d)(1)(C)'s preexisting express requirement for establishment of the "total maximum daily load." Basic principles of statutory interpretation disfavor implying such an amendment. See, e.g., *Cheney R.R. Co. v. Railroad Retirement Bd.*, 50 F.3d 1071, 1078 (D.C. Cir. 1995); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988). Indeed, it would be especially inappropriate to use these § 402 provisions, which address two specific kinds of point sources (combined sewer overflows and municipal stormwater) as a pretext for narrowing the overarching mandate of § 303(d), which applies across the board to all kinds of point sources as well as to nonpoint sources.

The § 402(q) and (p) arguments must be rejected for other reasons as well.

§ 402(q). WASA's and AMSA's arguments concerning § 402(q) rely heavily on the 1994 EPA combined sewer overflow ("CSO") policy referenced in the 2000 legislation. WASA Mem. 11-14, 15; AMSA Br. 9-10. However, that policy refutes rather than supports WASA's and AMSA's § 402(q) argument. Far from stating or even suggesting that the express statutory requirements of §303(d) were being amended, the policy reaffirms that CSOs are subject to "water-quality based requirements of the CWA." 59 Fed. Reg. 18689/2 (April 19, 1994).

§ 402(p). Likewise, there is no merit to AMSA's claim (AMSA Br. 8) that § 402(p) "cannot be read together" with § 303(d). The language cited by AMSA from § 402(p)(3)(B) -- like § 402(p) as a whole -- applies to the point source permit process for specified sources. Accordingly, that language neither speaks to, nor is in any way inconsistent with, the overarching mandate of § 303(d) -- which is designed to produce loads for use in various contexts, applicable to point as well as nonpoint sources. Moreover, nothing in § 402(p)(3)(B) states or suggests that TMDLs cannot be established as daily loads, or that such loads cannot be incorporated into point source permits for stormwater dischargers.

In any event, establishment of daily loads in the TMDL process would leave AMSA members free, in a future permit proceeding, to advance whatever arguments they choose concerning how the TMDLs should be incorporated into permits (and of course, citizens like FoE's members would be free to oppose those arguments). But those arguments are not ripe in this proceeding, which addresses the establishment of total maximum daily loads at levels adequate to meet water quality standards -- not the manner in which those loads will be incorporated into permits.

Finally, it bears emphasis that AMSA's § 402(p) argument does not even speak to the dispute concerning the appropriate timeframe for a TMDL -- *i.e.*, whether the TMDL should be

daily (as the statute provides), or annual or seasonal (as EPA contends). Instead, AMSA's argument takes aim at any numerical TMDL, arguing that stormwater should be addressed only through "a 'management' control program rather than the 'end-of-pipe numeric effluent limits.'" AMSA Br. 7. Were this argument accepted, it would call into question any numerically based TMDL, including the annual and seasonal loads at issue here. Neither the Act nor EPA's regulations support such a radical, sweeping limitation on the TMDL program.<sup>3</sup>

**Requirement to meet water quality standards.** In any event, even if the express statutory requirement for "daily" loads were by itself insufficient grounds for rejecting EPA's annual and seasonal loads, there is another key statutory requirement that WASA and AMSA do not dispute -- specifically, the requirement that a TMDL be set at a level necessary to implement applicable water quality standards. §303(d)(1)(C). WASA's and AMSA's submissions add nothing to EPA's claims (refuted *infra*) concerning the water quality standards issue.

Indeed, though attempting to defend the strategy set forth in its Long Term Control Plan ("LTCP"), WASA expressly recognizes that the LTCP can pass muster only if it "achieves compliance with applicable water quality standards." WASA Mem. 12. *Accord, id.* 13. Far from offering any basis to conclude that an annual or seasonal TMDL can assure such compliance, WASA actually confirms that the loads allowed by EPA's BOD TMDLs will not be spaced evenly throughout the year, but instead will be concentrated in a few large events. *Id.* 14-15

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<sup>3</sup> Likewise meritless is AMSA's reliance on a regulatory definition of "secondary" treatment in monthly and weekly terms. AMSA Br. 8 n.3. TMDLs are not a form of "secondary" treatment, but rather are designed to foster compliance with water quality standards in waters where secondary treatment is inadequate to achieve such compliance. *Compare* § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) (providing for secondary treatment) *with* § 303(d)(1)(A) and (d)(2) (providing for establishment of TMDLs governing those waters "for which the effluent limitations required by section 1311(b)(1)(A) and 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard") (emphasis added).

(under WASA's Draft LTCP, CSO discharges will occur in an average of four discharge events per year, involving 96 million gallons of sewage-contaminated water; "the entire projected annual BOD load of 10,253 pounds would be discharged during the few overflows remaining after implementation of the Draft LTCP") (emphasis added).

**Compliance costs.** WASA and AMSA invoke alleged economic impacts that they claim would result from daily loads. WASA Mem. at 14-17; AMSA Br. 10, 12-13. Once again, however, these arguments -- which are a matter of intense controversy<sup>4</sup> -- are not at issue in this proceeding. Instead, this proceeding addresses the specific task of establishing total maximum daily loads at levels necessary to implement applicable water quality standards.

Section 303(d)(1)(C) authorizes no cost-based exemption from the express requirement that TMDLs be "daily," or that they implement water quality standards with a margin of safety. *Accord*, § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (requiring effluent limits necessary to meet water quality standards). If a municipality believes that the resulting economic impact is excessive, it can seek revision of the water quality standards. 40 C.F.R. § 131.10(g). *Accord*, 59 Fed. Reg. 18695 (CSO policy). In the meantime, however, dischargers must comply with whatever standards are in place. 40 C.F.R. § 130.7(c)(1). *Accord*, 59 Fed. Reg. 18688-89 (CSO policy).

**EPA's Chesapeake Bay memorandum.** AMSA cites an EPA memorandum that postdates both of the two EPA decisions at issue here, claiming that the memorandum supports establishment of longer-than-daily loads. AMSA Br. 10-11. The cited memorandum speaks to the permit process rather than the establishment of TMDLs, and in any event is not law. *See, e.g.*,

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<sup>4</sup> For example, in the public comment period on WASA's Long Term Control Plan, the public identified various alternatives to total sewer separation.

*Sierra Club v. Meiburg*, 296 F.3d 1021, 1033 (11th Cir. 2002) (rejecting reliance on guidance document concerning TMDLs; guidance documents do not "have the effect of law," and in particular "can modify neither statutes nor regulations. To legally change its regulations, EPA must comply with the rulemaking procedures set out in the Administrative Procedures Act. 5 U.S.C. §§ 551-706. The method by which guidance documents are created does not even come close to compliance with those procedures."). *Accord, Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

Moreover, the document does not support AMSA's critique of daily TMDLs. The memorandum suggests that daily permit limits might not be a feasible way of addressing the impacts of two particular pollutants (nitrogen and phosphorus) on the Chesapeake Bay. Whatever the merits of that claim (which FoE does not concede), the memorandum does not claim or demonstrate that it would be impossible to establish daily loads for the Anacostia River. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 359-60 (D.C. Cir. 1979) (agency bears "heavy burden" to demonstrate existence of an impossibility justifying relief from a statutory requirement; burden is "especially heavy" where agency has not made "good faith effort" to comply with statute, but instead "seek[s] vindication of an approach contrary to the explicit statutory design on the basis of its estimate of its lack of capacity to handle the task delegated to it"); *Mova Pharmaceutical* (quoted at p. 9, *supra*). Indeed, while discussing annual limits for the Bay, the memorandum expressly indicates that "[s]horter averaging periods might be appropriate and necessary to protect against local nutrient impacts in rivers or streams in the basin." Memo from J. Hanlon to J. Capacasa at 2 (emphasis added).

**Previously prepared TMDLs.** AMSA also argues that, if the statutory requirement for a "total maximum daily load" were upheld, previously established annual loads might be called

into question. AMSA Br. 8-9. To the extent that occurs, however, it is a product of the Act. *See, e.g., F.J. Vollmer Co. v Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) ("we do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation").

## **II. ANNUAL AND SEASONAL LOADS ARE INADEQUATE TO MEET THE WATER QUALITY STANDARDS FOR DISSOLVED OXYGEN AND TURBIDITY.**

EPA does not dispute the requirement -- set forth in §303(d) and implementing regulations -- that TMDLs must implement applicable water quality standards with a margin of safety, and must take into account critical conditions. *See* FoE 5/20/04 Mem. 18. The TMDLs at issue here fail to do so.

### **A. EPA's Attorneys' Arguments Concerning the BOD TMDLs' Annual Averaging Time Are Impermissible Post Hoc Rationales, and Conflict Fundamentally With the Record.**

EPA disputes none of the grounds that establish the inadequacy of the annual BOD TMDLs to meet water quality standards. To the contrary, the agency recognizes that the District's dissolved oxygen standards are expressed in daily and hourly terms. EPA Mem. 16 n.4. Likewise, EPA concedes that the loadings causing violation of those standards are not spaced evenly through the year, but rather are associated with episodic precipitation events. *Id.* 2 (BOD loads "primarily enter the Anacostia River during rainstorms," and thus "will vary widely from one day to the next").

Finally, EPA nowhere disputes that the annual TMDLs would allow large quantities of BOD to be discharged during such episodic events. The TMDLs' annual BOD allocation of 285,713 pounds, BOD TMDLs at 11[JA394], would not prevent discharge of 10,000, 20,000, 50,000 or even 100,000 or more pounds of BOD on a given day -- just as an annual limit capping

alcohol consumption at 365 beers would not prevent consumption of 10, 20, or even 50 or more beers on a given day.

EPA cites no discussion in the record that explains how an annual load protects against short-term peaks. Indeed, the record offers only Delphic, internally contradictory statements on this issue. For example, EPA's approval rationale indicates that "[t]he TMDLs are expressed as average annual loads recognizing that for these precipitation driven events, the event mean concentration is the limiting parameter." EPA BOD Rationale at 26[JA639] (emphasis added).<sup>5</sup> Similarly, the District's BOD TMDLs concede that "[t]he worst case scenario occurs when there is a large rainfall event which carries the CSOs and storm sewers into the river," but then asserts that it is establishing "annual loads for the wet weather events." BOD TMDLs at 9[JA392] (emphasis added). *Accord*, D.C. Response to Comments at 3[JA482] ("The load allocation was described in the BOD TMDL as an annual load not daily load in order to account for high flow events." ) (emphasis added).

Nowhere in the record does EPA (or the District) explain why, if the event mean is the limiting parameter, the load should be set as an annual average -- thus allowing, not prohibiting, the large discharge events that (as the BOD TMDLs themselves concede) constitute the "worst case scenario." *See* BOD TMDLs at 9[JA392]. In the absence of such an explanation, the Court and public are left to guess at the agency's reasoning. As the D.C. Circuit held in remanding an EPA decision that failed adequately to explain the agency's refusal to protect against short-term air pollution peaks: "With its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review can occur only when agencies explain their decisions with

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<sup>5</sup> According to EPA, the "event mean" concentration is the mean concentration "over the course of an event (storm)." BOD Decision Rationale at 24 n.18[JA637].

precision, for it will not do for a court to be compelled to guess at the theory underlying the agency's action." *American Lung Assn. v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998) (citation, internal quotations and ellipsis omitted). *Accord, Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (court can uphold agency decision only "if the agency's path may reasonably be discerned")(citation omitted).

Indeed, in the very *Muszynski* case relied upon so prominently by EPA, the Second Circuit remanded an EPA decision that failed adequately to explain the agency's approval of annual TMDLs. *Natural Resources Defense Council v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001). And the D.C. Circuit has likewise remanded inadequately explained refusals to protect against short-term pollution peaks. *See ALA v. EPA, supra; Environmental Defense Fund v. EPA*, 898 F.2d 183, 185 and 190 (D.C. Cir. 1990), *cited in* FoE 5/20/04 Mem. 25. The Court should likewise remand EPA's inadequately explained decision here.

Finally, EPA's failure to articulate a reasoned basis for its decision is all the more glaring, given that public commenters pointed out the flaws in the TMDLs' annual averaging time.<sup>6</sup> EPA nowhere responded to those comments, and *a fortiori* offered no reasoned explanation that could justify dismissing the commenters' concerns. *See, e.g., Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998)("An agency must ... demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.").

None of the arguments offered by EPA's summary judgment memorandum provide any basis for doubting the foregoing conclusions.

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<sup>6</sup> *See* Mem. from H. Fox (11/6/01), at 1-2 [JA601-02]. Mem. from J. Smith, Ph.D. (11/6/01), at 1-3[JA 603-05]; Mem. from J. Smith, Ph.D. (10/16/00), at 4 ¶ 7[JA351]; Mem. from H. Fox (4/17/01), at 3 ¶ 3[JA376]; Mem. from J. Smith, Ph. D. (4/17/01), at 4 ¶ 6[JA381].

**Sediment resuspension.** First, perhaps recognizing the fundamental flaws in the TMDLs that EPA approved, the agency's attorneys blatantly rewrite those TMDLs, claiming that the TMDLs made statements that nowhere appear in them. According to the attorneys, the TMDLs assert that the annual TMDLs will meet the District's dissolved oxygen standards by reducing resuspension of BOD from river sediments. EPA Mem. 16-17. *See also id.* 2. The cited pages of the District's BOD TMDLs make no such claim. *See* BOD TMDLs at 9-10[JA392-93].

To the contrary, the cited TMDL passage cuts against EPA's attorneys' new-found resuspension argument. That passage states that "[t]he increase in flow" associated with certain storms "scours the river sediments and re-suspends the BOD that was stored in the sediments." *Id.* 9[JA392]. However, the TMDLs do not assert that control of this sediment resuspension would produce compliance with the daily and hourly dissolved oxygen standards -- much less that such control could be achieved by an annual TMDL.

Far from it. The TMDLs expressly recognize that "[a] large thunderstorm in DC may not affect river flow significantly but have the same effect on dissolved oxygen as a longer more widespread rainfall in the upstream part of the basin, which will greatly increase stream flow." *Id.* (emphasis added). *Accord*, EPA BOD Rationale at 26[JA639] ("different combinations of events produce low dissolved levels"). Thus, the TMDLs expressly indicate that, even when the increased flow that allegedly causes scouring and resuspension is absent, rainfall events nonetheless cause equivalent impacts on dissolved oxygen.

In short, EPA's lawyers' argument was not made by the District -- much less EPA -- in the decision documents at issue here, and thus amounts to a post-hoc rationalization by counsel. *See, e.g., Florida Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996) ("the agency runs this regulatory program, not its lawyers; parties are entitled to the agency's analysis of its

proposal, not post hoc salvage operations of counsel"). Moreover, that argument is unsupported by -- indeed, contradicted by -- the cited TMDLs. *See* FoE 5/20/04 Mem. 11 (citing caselaw) (agency acts arbitrarily when it reaches a conclusion that is unsupported by substantial evidence, or runs counter to the record).

**Short-term water quality standards.** EPA attempts to dismiss the significance of the short averaging times embodied in the District's EPA-approved dissolved oxygen standards. EPA does not dispute that those standards require compliance on a daily and hourly basis. EPA Mem. 16 n.4. Instead, the agency criticizes FoE's reliance on these short-term averaging times as "superficial." EPA Mem. 17. To the contrary, the daily and hourly averaging times in the District's water quality standards reflect the undisputed reality -- documented in the TMDLs themselves -- that short-term drops in dissolved oxygen cause serious environmental harm such as fish kills. BOD TMDLs at 2[JA385]. By approving annual TMDLs, which allow large daily discharges of oxygen-depleting pollutants, EPA has ignored that fundamental reality.<sup>7</sup>

Indeed, the D.C. Circuit has repeatedly remanded EPA decisions refusing to protect against short-term peaks, where (as here) the agency has failed to offer a reasoned explanation for those refusals. *See, e.g., Environmental Defense Fund v. EPA*, 898 F.2d 183, 185 and 190 (D.C. Cir. 1990) (in Clean Air Act case, Court noted that "[s]hort-term concentrations, which are only indirectly and incompletely limited by an annual average, may have adverse health and

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<sup>7</sup> EPA argues that "Plaintiff's logic would preclude even the use of the daily TMDL advocated by Plaintiff," because a "daily TMDL [would] appear inconsistent with the hourly standard." EPA Mem. 17 (emphasis in original). EPA ignores §303(d)(1)(C), which expressly calls for a "daily" load. *See* Part I.B, *supra*. Moreover, it would be possible to write a daily load sufficiently protective that, even if the entire daily allocation were discharged during one hour, the hourly standard would still be met. EPA does not claim that the annual BOD TMDLs were written so protectively that, if the entire annual allocation were discharged during one (or even a few) days or hours, the daily and hourly dissolved oxygen standards would be met.

welfare effects," and remanded agency decision that had set only annual but not short-term limits); *ALA v. EPA* (cited at p. 17, *supra*). The Court should do so here as well.

**Model.** EPA's attorneys also argue that reliance on an annual load is supported by the water quality model used in developing the BOD TMDLs. EPA Mem. 18-19. This claim is doubly wrong.

First, the model decisively refutes EPA's attorneys' claim that the TMDLs' annual averaging time is attributable to concerns about resuspension of BOD during storms. As the modeling framework document expressly states, the model "does not currently resuspend BOD from the sediments during storm events." The TAM/WASP Model (D.C. Dept. of Health Oct. 2000), at xii[JA141] (emphasis added). *Accord, id.* 122[JA264] ("the model does not account for resuspension.") (emphasis added).<sup>8</sup>

Second, EPA's assertions concerning the model amount to yet another post-hoc characterization unsupported by the record. The agency's lawyers assert: "The District concluded, and EPA agreed, that based on the model's simulation of the daily dissolved oxygen levels of each segment on each day over the three year period, these allocations would achieve the daily dissolved oxygen criterion even though the allocations are expressed as an annual

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<sup>8</sup> Indeed, if the model did account for such resuspension, the likely result would be to further undermine the adequacy of the TMDLs. The modeling framework indicates that the impacts of BOD loads on dissolved oxygen occur through (1) direct impacts of BOD loads in the water column, (2) decomposition of BOD from the top one-fourth meter of riverbed (known as "sediment oxygen demand") and (3) resuspension of BOD from sediment. TAM/WASP Model at 73, 70, xii[JA215, 212, 141]. By accounting for only (1) and (2) but not (3), the model likely understates the true impacts of BOD loads.

average." EPA Mem. 19 (emphasis in original). However, the cited pages of the administrative record do not state that the model was based on annual average loads.<sup>9</sup>

Indeed, any such claim would contradict the record, which establishes that the model relied on daily loads. TAM/WASP Model at 38[JA180] ("WASP requires a daily input load for each of the eight modeled constituents for each model segment.") (emphasis added). Model runs based on assumed daily loads (*i.e.*, on the assumption that loads on each day do not exceed specified amounts) do not constitute substantial evidence that such daily loads can be jettisoned in favor of annual loads (which allow loads on any given day to exceed the amounts assumed in the model, as long as loads on other days are sufficiently lower that an annual average is met). *See* FoE 5/20/04 Mem. 11 (citing caselaw) (agency acts arbitrarily when it reaches a conclusion that is unsupported by substantial evidence, or runs counter to the record).

**WASA's long-term control plan.** A WASA report indicates, without contradiction in the record, that the annual TMDLs would allow combined sewer overflows to discharge thousands of pounds of BOD at a time. FoE 5/20/04 Mem. 21-22. EPA does not dispute that, under the annual TMDLs, "there will be some overflow events," but claims that "the TAM/WASP model -- and thus the TMDL -- specifically accounts for those events." EPA Mem. 20 n.7. However, the cited page of EPA's TMDL rationale<sup>10</sup> does not state that individual overflow events of the magnitude predicted by WASA's report (*i.e.*, discharges of 5,000 or more pounds of BOD on a single day) would comply with the daily and hourly dissolved oxygen water quality standards. Still less does it state that water quality standards would be met under the even

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<sup>9</sup> EPA's memorandum cited pp. 20-21 and 26 of EPA's decision document [JA633-34, 639].

<sup>10</sup> BOD Decision Rationale at 20[JA633].

larger discharges allowed by the annual BOD TMDLs -- which, as noted above, allow 285,713 pounds of BOD to be discharged annually, thus allowing individual discharge events of tens of thousands of pounds or larger. *See* p. 15, *supra*.

EPA also notes that the BOD allocations assumed by WASA's report differ somewhat from those in the final TMDLs, and suggests that this change undercuts the relevance of WASA's report. EPA Mem. 19-20 n.7. The argument is untenable. First, the allocation assumed by WASA for CSOs was the same as that in the final EPA-approved TMDLs -- *i.e.*, 152,906 pounds. *Compare* WASA draft LTCP at 9-23[JA520] *with* May 2001 BOD TMDLs at 11[JA394]. This allocation would allow the 5,000-pound BOD discharge events discussed in the WASA report -- indeed, it would allow far larger discharges. As indicated above, EPA has pointed to no record finding or explanation that such large discharges would comply with the dissolved oxygen standards.

Second, to the extent EPA is suggesting that changes made in allocations for non-CSO sources will compensate for the adverse impact of CSO discharges, the suggestion lacks any support in the record. Under the final TMDLs, non-CSO stormwater sources in the District will still be allowed to discharge 132,807 pounds of BOD per year, with no limitation on short-term peaks. BOD TMDLs at 11[JA394]. When added to the 152,906 pounds for CSOs, the result is a combined annual allowable load from CSO and non-CSO stormwater sources of 285,713 pounds. All of these sources discharge during the same timeframe -- *i.e.*, during and after storms. BOD TMDLs at 9[JA392] ("The worst case scenario occurs when there is a large rainfall event which carries the CSOs and storm sewers into the river.") (emphasis added). EPA has pointed to no finding or explanation showing that the huge discharge events allowed by these allocations will comply with water quality standards.

Nor has EPA even pointed to any record document in which EPA responds to the public comments<sup>11</sup> relying on the WASA report, much less any document in which the agency offers a reasoned basis for rejecting the concerns expressed by those comments. The agency's lawyers' post hoc assertions concerning the points raised in those comments cannot compensate for this gap in EPA's decisionmaking documents. *See* pp. 18-19, *supra* (citing caselaw).

**B. The TSS TMDLs' Seasonal Averaging Time Is Based on the Aquatic Life Use, Thus Failing to Protect Recreational and Aesthetic Uses That Form Part of the District's Water Quality Standards.**

In the case of the TSS TMDLs, EPA's defense of a non-daily load rests on the argument that a seasonal TMDL will protect the aquatic life use -- *i.e.*, that the seasonal averaging time suffices to protect aquatic plants from being shaded out by turbidity. EPA Mem. 20-22. In particular, EPA apparently contends that aquatic vegetation can survive some short-term turbidity episodes, but not longer-term sustained turbidity. *See id.* 22 ("the environmental impacts of TSS occur when TSS reduces water clarity over numerous days during the growing season") (emphasis in original).

Whatever the merits of this contention concerning aquatic plants, it is insufficient to establish the adequacy of a seasonal averaging time to implement applicable water quality standards with a margin of safety -- or, in EPA's words, to "assure[]" compliance with those standards. *See* EPA Mem. 12. In particular, arguments concerning aquatic plants do not establish that the seasonal averaging time will prevent turbidity and nuisance aquatic life from interfering with recreational and aesthetic uses of the Anacostia River. *See* 21 DCMR §§1101.1, 1101.2[JA51-52] (in the District's water quality standards, "recreation" and "aesthetic

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<sup>11</sup> *See* Mem. from H. Fox (11/6/01), at 1-2 [JA601-02]; Mem. from J. Smith, Ph.D. (11/6/01), at 1-3[JA 603-05].

enjoyment" are among the designated uses of the Anacostia River); FoE 5/20/04 Mem. 26-27 (citing statutory, regulatory and caselaw authority establishing that designated uses are part of a state's water quality standards, and must be protected).

**III. REGARDLESS OF WHETHER EPA CONSIDERS THE RECREATIONAL AND AESTHETIC PROVISIONS OF THE DISTRICT'S WATER QUALITY STANDARDS TO BE "SUBJECTIVE," THE ACT REQUIRES THAT TMDLS ASSURE COMPLIANCE WITH THOSE STANDARDS.**

EPA does not deny that its TSS TMDLs were expressly based on the Class C use (aquatic life), even though the Anacostia River is also designated for the Class A and B uses ("recreation" and "aesthetic enjoyment"). *See* Part II.B, *supra*; FoE 5/20/04 Mem. 26-27. EPA likewise does not deny that the Class A and B uses are just as much a part of the District's water quality standards as the Class C use. Indeed, EPA does not deny the relevance of the Class A and B uses to the District's narrative standard for "objectionable ... turbidity," "undesirable aquatic life" and "the dominance of nuisance species." *See* FoE 5/20/04 Mem. 30-31 (noting that the District's narrative standards at issue here closely track EPA's own model water quality standards for "Aesthetic Qualities").

Finally, EPA does not deny that TSS-induced turbidity interferes with the Class A and B uses, or that such turbidity constitutes "objectionable turbidity" within the meaning of the District's water quality standards. To the contrary, EPA expressly confirms that "turbid water generally interferes with recreational use and aesthetic enjoyment of water," EPA Mem. 24, a conclusion confirmed by undisputed record evidence attesting to the impairment turbidity causes to recreational and aesthetic enjoyment of the Anacostia River. *See* FoE 5/20/04 Mem. 28.

**"Subjective" standard.** EPA nonetheless argues that "[t]he protection of the beauty and aesthetic quality of water ... is subjective and not readily amenable to a numeric endpoint." EPA 5/20/04 Mem. 24 (emphasis added). The Act and EPA's regulations require that TMDLs

implement water quality standards with a margin of safety. FoE 5/20/04 Mem. 18. No exemption is made for so-called "subjective" standards. Indeed, given the existence of numerous statutes using broad concepts such as the "public interest," *see, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 474 (2001), any notion that agencies may refuse to implement standards they consider "subjective" would wreak havoc on administrative law.

Moreover, far from arguing that it would be impossible to comply with the statutory requirement to implement the District's water quality standards,<sup>12</sup> EPA concedes that "it would be possible" to develop a TMDL implementing recreational uses. EPA Mem. 24-25. Indeed, EPA previously approved TMDLs based on such an approach. FoE 5/20/04 Mem. 30. That the agency might prefer not to do so here is no grounds for flouting the statute, or for abandoning without reasoned explanation an approach it previously approved.

**Vague and unsupported claim that TMDLs will "address" recreational uses.** EPA also argues that the TSS TMDLs will "will make the water more desirable for recreation," thereby "addressing" the recreational and aesthetics standards. EPA Mem. 24. Even taken at face value, this claim is inadequate. The issue is not whether the TMDLs will cause some improvement in the currently appalling state of the Anacostia River's water quality,<sup>13</sup> but rather whether they will cause enough improvement to implement the District's water quality standards with a margin of safety. Vague assertions that the TMDLs will "address" those water quality standards by making recreation "more desirable" are inadequate.

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<sup>12</sup> *See* p.14, *supra* (citing *Alabama Power*).

<sup>13</sup> *See Kingman Park Civic Assn. v. EPA*, 84 F.Supp.2d 1, 4 (D.D.C. 1999) (describing the Anacostia River's serious water quality problems).

Moreover, even assuming EPA had asserted that the TMDLs would meet recreation- and aesthetics-based water quality standards with a margin of safety, a mere assertion is not sufficient. Instead, to pass muster under the arbitrary and capricious standard, EPA must accompany that assertion with a reasoned explanation, supported by substantial evidence. FoE 5/20/04 Mem. 11 (citing caselaw). EPA has not done so here.

To the contrary, EPA's assertion rests entirely on a partial, conclusory, generic statement in an 18-year-old guidance document. FoE 5/20/04 Mem. 30. Indeed, EPA's assertion is decisively refuted by record evidence demonstrating the inadequacy of the TSS TMDLs to protect the recreation and aesthetic uses. It is undisputed that TSS loadings are not spaced evenly throughout the year, but rather occur in spikes associated with precipitation events. *See* FoE 5/20/04 Mem. 21. Likewise, undisputed record evidence (including declarations from two eyewitnesses active both in using the River and in observing others' use) establishes that impairment of recreational and aesthetic use occurs on any occasion when a recreationist encounters turbid water -- regardless of whether the water may be clearer at other times. *See* FoE 5/20/04 Mem. 28.

Unable to deny that turbidity will occur, or that it impairs recreational and aesthetic enjoyment of the Anacostia River, EPA's attorneys resort to the absurd contention that the impairment doesn't matter. Discussing a D.C. Circuit case that criticized the use of annual averages to address jet noise in the Grand Canyon, the agency's attorneys argue that

recreational use of the Anacostia River does not show the same pattern as the Grand Canyon for the "typical visitor." Though there are no doubt some persons who only use the river occasionally, the declarations presented by Plaintiff describes [sic] frequent, repeated use of the Anacostia River year round, not just visits for a couple of days during certain seasons. Thus, though turbid water might reduce the enjoyment of the river for some people on some days, the TSS TMDL will ensure that the overall recreational and aesthetic use of the river will be protected.

EPA Mem. 25-26 (emphasis added; footnote omitted). This post hoc rationale appears nowhere in the administrative record, and thus cannot salvage EPA's arbitrary and capricious decision. *See* pp. 18-19, *supra* (citing caselaw).

Even if it were properly before the Court, the above rationale will not withstand scrutiny. TSS is discharged to the Anacostia during and after rainfalls, primarily by combined sewer overflows and municipal separate storm sewers. *See* TSS TMDLs at 16, 32[JA695, 711]; TSS TMDL Decision Rationale at 7[JA669]. From these sources "significant contributions of soil particles, dust, debris, and other accumulated materials are transported to the Anacostia River." TSS TMDLs at 16[JA695]. Indeed, during combined sewer overflow events, raw, untreated sewage flows directly into the River from toilets in homes and businesses. BOD TMDLs at 4[JA387].

Undisputed record evidence shows that the resulting turbidity impairs recreational and aesthetic use of the Anacostia River. Contrary to EPA's attorneys' assertion, this impairment affects both frequent and occasional users of the Anacostia River.

As to frequent users, the undisputed declaration of James Connolly states:

My aesthetic enjoyment of the Anacostia is adversely affected by the River's turbidity. I am disappointed when I cannot see as deeply below the surface of the River as I could on a clean river, and apart from depth of visibility, turbid water is displeasing in and of itself due to its unpleasant appearance -- including specifically its objectionable dirtiness, muddiness, and color.

...

When I am on the River in the District of Columbia for an hour or two during a particular day, the quality of my experience depends on the appearance of the River at that time -- not on averaging together the River's condition at that time with its condition at other times. When the River is objectionably or unaesthetically turbid during the time I am viewing it, my experience is impaired, even if a seasonal or multi-year average is met. For example, my experience is impaired during periods of turbid water even though, as a frequent user, I have observed the River on other occasions -- during the same season or otherwise -- when water is clearer. Those other, less impaired experiences do not erase or

diminish the impairment that occurs when I observe the River in its more turbid condition.

Connolly Declaration ¶¶ 11, 15.a[Supp. JA21, 22-23]. *Accord*, Declaration of Damon Whitehead ¶¶ 6-9[Supp. JA27]. *See also* Declaration of Duncan Spencer, Exhibit to FoE 5/20/04 Motion for Summary Judgment, at ¶¶ 9-10 ("[M]y typical rowing route takes me past several outfalls through which combined sewer overflows enter the Anacostia River. During and after rains, a disgusting and unsightly plume of discolored, sewage-laced water flows from these outfalls, often covering the width of the River. At such times, in order to continue my route, I row directly through this sewage-polluted water. On any day when I visit the Anacostia River and find it to be polluted, for example with turbidity or sewage, my recreational and aesthetic use of the River is impaired. That impairment exists, regardless of whether the River may be less polluted on other days.").

As to more occasional users, the undisputed Connolly declaration states:

[T]here are many people who use the River less frequently than I do, whose encounter with turbid conditions may represent their only experience of the River. Through my work with AWS, I have observed such people myself on a number of occasions. When such individuals' experience is impaired through turbidity, clearer water at other times -- times when they are not on the River -- does not erase that impairment. Indeed, based on my observations, these impaired experiences are particularly vivid to the people who experience them and are likely to be remembered, deterring many such people from further use of the River.

Connolly Dec. ¶ 15.a[Supp. JA23]. *See also* Declarations of Joseph Lawrence Bohlen and Mark Wenzler, Exhibits to FoE's Motion for Summary Judgment (undisputed declarations by occasional users of the Anacostia River, attesting to impairment of their recreational and aesthetic enjoyment by turbidity).

If EPA's attorneys mean to suggest that these impairments are allowed by the District's water quality standards, the suggestion is meritless. Those standards broadly provide 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 ... turbidity," or "[p]roduce undesirable aquatic life or result in the dominance of nuisance species." 21 DCMR § 1104.1(c) and (e)[JA57] (emphasis added). EPA's apparent position that some occurrences of objectionable turbidity are permissible contradicts the unrestricted character of this prohibition.

Such a position also contradicts the unrestricted character of the District's designated uses, which broadly designate the Anacostia River for "Primary contact recreation" and "Secondary contact recreation and aesthetic enjoyment." §§ 1101.1, 1101.2[JA51-52]. This designation is not limited to either frequent or occasional users, but uses broad terms that protect both. Indeed, the District's standards expressly emphasize that, "[f]or the waters of the District with multiple designated uses, the most stringent standards or criteria shall govern." § 1104.2[JA57] (emphasis added).

Likewise, EPA's regulations expressly require protection of "existing uses," 40 C.F.R. § 131.12(a)(1) -- *i.e.*, "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 C.F.R. § 131.3(e). As documented in the undisputed declarations, the existing uses of the Anacostia include both occasional and frequent recreational and aesthetic uses. Accordingly, the TMDLs must protect both.

Consideration of the District's water quality standards as a whole further undermines any argument for implying limitations on the broad language of §§ 1104.1, 1101.1, and 1101.2. Specifically, other provisions of the District's standards show that the District is fully capable of expressly allowing for flexibility. Moreover, in doing so, the District's standards include safeguards such as protection of designated and existing uses, and prohibition of objectionable

turbidity.<sup>14</sup> EPA's effort to read an exemption into the District's water quality standards -- an exemption that interferes with existing and designated uses, and allows objectionable turbidity -- must be rejected.

Finally, EPA's attorneys' current position contradicts the agency's own prior position. In its water quality standards handbook, the agency notes that narrative water quality criteria -- including those addressing "objectionable ... turbidity" and "undesirable or nuisance aquatic life" -- "apply to all designated uses at all flows and are necessary to meet the statutory requirements of section 303(c)(2)(A) of the CWA." EPA, Water Quality Standards Handbook (August 1994), at 3-24 (emphasis added).<sup>15</sup> *Accord, id.* 7-9 ("The WLA<sup>16</sup>] and permit limit should be calculated to prevent water quality standards impairment at all times.") (emphasis added).

Likewise, though indicating that water quality standards may allow for certain exemptions from numeric criteria, the handbook cautions:

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<sup>14</sup> See, e.g., §§ 1101.3(b)[JA53] (use can be removed if *inter alia* "[n]atural, ephemeral, intermittent or low flow conditions prevent the attainment of the use"); 1102.2[JA54] (limited degradation of existing water quality can be allowed, but in doing so, "the District shall assure water quality adequate to protect existing uses fully"); 1102.3(c)[JA55] (allowing for limited "[s]hort-term degradation of the water quality"); 1102.4(b)[JA55] (limited exemption for "[c]onstruction or development projects," provided that "there are no long term adverse water quality effects and no impairment of the designated uses of the segment occurs"); 1102.4(c)[JA56] (limited exemption for "[s]hort term degradation of water quality" due to "construction projects"); 1105.1 and 1105.2[JA66-67] (authorizing "temporary" variance of no more than three years, provided that such a variance "shall not be granted" if it "will result in loss of protection for an existing use"); 1105.7[JA69] (authorizing limited exception from water quality standards for a "small area" around the discharge, provided that "[m]ixing zones shall be free from discharged substances that ... produce objectionable color, odor or turbidity").

<sup>15</sup> Available at: <http://www.epa.gov/waterscience/standards/handbook/>. See *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (EPA policy document is "judicially cognizable apart from the record as authorit[y] marshaled in support of a legal argument").

<sup>16</sup> A WLA, or wasteload allocation, is a point source component of a TMDL. See 40 C.F.R. § 130.2(h), (i).

At all times, waters shall be free from substances that settle to form objectionable deposits; float as debris, scum, oil, or other matter; produce objectionable color, odor, taste, or turbidity; cause acutely toxic conditions; or produce undesirable or nuisance aquatic life.

*Id.* 5-9 to 5-10 (emphasis added).

In short, EPA's attorneys' attempt to dismiss the recreational and aesthetic impairment allowed by the TSS TMDLs is not only an impermissible post hoc rationale, but also conflicts with the record, the District's water quality standards, EPA's own regulations and other prior EPA positions.

**Prospect of future revision.** Finally, EPA claims that the TMDLs can be revised later to incorporate a recreational endpoint. EPA Mem. 24. However, an agency cannot escape judicial accountability for arbitrary or otherwise unlawful action simply by holding out the prospect of future revisions. *See* FoE 5/20/04 Mem. 24. Indeed, because agencies often have authority to revise their actions, any such approach would open a major loophole in judicial review. Such a wait-and-see approach contravenes the express requirement of §303(d) and implementing regulations that TMDLs implement water quality standards with a margin of safety. Moreover, the further delay inherent in such an approach undermines Congress's express intent that recreation is central to the Act's goals, and that waters be suitable for recreation by 1983. CWA §101(a)(2), 33 U.S.C. § 1251(a)(2).

**IV. BECAUSE NUTRIENT TMDLS ARE UNDISPUTEDLY REQUIRED, THE COURT SHOULD EITHER CLARIFY THAT SUCH TMDLS ARE INCLUDED IN THE TMDLS UNDER REVIEW, OR SHOULD REMAND FOR ESTABLISHMENT OF NUTRIENT TMDLS.**

Because nutrients (especially nitrogen and phosphorus) interfere with attainment of the District's water quality standards for dissolved oxygen and turbidity, a TMDL cannot "implement" those standards unless it includes TMDLs for nutrients. FoE 5/20/04 Mem. 32-35.

EPA concedes that such nutrient loads are a "necessary component" of the BOD TMDLs. EPA Mem. 26. However, EPA contends that the BOD TMDLs already contain nutrient TMDLs, *id.* 26-27, and relies on these alleged nutrient loads as a basis not only for the BOD TMDLs, but the TSS TMDLs as well. *Id.* 27-28.

The administrative record, however, contains statements indicating that no such nutrient TMDLs exist -- including statements by the District in the BOD TMDLs themselves. *See* EPA Mem. 27 n.9. Accordingly, FoE is concerned that either EPA or a third party (such as WASA or the District)<sup>17</sup> might argue at a subsequent date -- for example in proceedings concerning discharge permits under § 402 -- that no TMDL for nutrients exists. *Cf. Indiana & Michigan Elec. Co. v. USEPA*, 733 F.2d 489 (7th Cir. 1984) (EPA, in approving state air pollution plan submission, improperly purported to amend that submission).

Accordingly, the Court should not let matters rest with the mere assertions in EPA's memorandum, but instead should either expressly hold that the TMDLs under review include TMDLs for nutrients, or should remand the matter for EPA to secure establishment of such TMDLs.

**V. THE TMDLS UNLAWFULLY AND ARBITRARILY ASSIGN LOADS SOLELY TO SOURCE CATEGORIES, RATHER THAN TO INDIVIDUAL POINT SOURCES.**

**A. EPA's Regulations Require Assignment of Loads to Individual Point Sources.**

By assigning loads solely to broad source categories, the TMDLs arbitrarily and unlawfully violate EPA regulations requiring that a TMDL include "individual" wasteload

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<sup>17</sup> WASA and the District both discharge pollutants requiring permits under CWA §402 -- WASA from its CSO outfalls, and the District from its separate storm outfalls. *See In Re Government of the District of Columbia Municipal Separate Storm Sewer System*, 2002 EPA App. LEXIS 1 (EPA EAB 2002).

allocations ("WLAs"), each of which represents the portion of a waterbody's loading capacity allocated to "one" of its point sources. FoE 5/20/04 Mem. 35 (quoting 40 C.F.R. § 130.2(i) and (h)).

EPA argues that, because its regulations define a TMDL as the "sum" of the individual wasteload allocations, *see* § 130.2(i), outfall-specific loads are not required. EPA Mem. 30 n.11. To the contrary, one cannot compute the "sum of the individual WLAs" (see § 130.2(i) (emphasis added)) unless such individual WLAs exist.

That conclusion, clear on the face of § 130.2(i) and (h), is further confirmed by contrasting those provisions' careful requirement for "individual" WLAs, each for "one" point source, with § 130.2(g), which provides that nonpoint source allocations may be presented as "gross allotments." EPA's attempt to erase the express distinction between these provisions, and to import the looser nonpoint source language into the point source provision, must be rejected.<sup>18</sup>

EPA argues that "in the municipal storm water context EPA has interpreted the Clean Water Act to allow systemwide, rather than individual outfall, treatment of municipal storm water discharges in TMDLs and NPDES permits." EPA Mem. 30-31 n.11. However, the statutory and regulatory provisions upon which EPA relies (CWA § 402(p)(3)(B)(i) and 40 C.F.R. § 122.26(d)) address the permit process, not TMDLs -- and nothing in the cited provisions conflicts with the EPA regulations requiring TMDLs to include outfall-specific WLAs.

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<sup>18</sup> The district court case cited by EPA (at 30 n.11) involved scientific limitations on detecting and measuring dioxin, a pollutant that is toxic in infinitesimal quantities. EPA has not asserted, and could not credibly assert, that the pollutants at issue here pose any such measurement or detection problem. *See also* AMSA Br. 14 (making argument based on PCBs, not on the pollutants at issue here).

In a further attempt to support its municipal stormwater argument, EPA also cites a guidance document. EPA Mem. 31 n.11. That document post-dates the decisions under review here, and thus cannot supply a reasoned basis for those decisions. In any event, as the document itself recognizes, guidance does not constitute law, and thus cannot trump EPA's regulations requiring that loads be assigned to individual sources. Memorandum from R. Wayland to EPA Water Division Directors (Nov. 22, 2002), at 5-6.<sup>19</sup> *See also* p. 14, *supra* (citing caselaw).

Moreover, even on its face the guidance does not support EPA's position. The guidance indicates that it "may" be reasonable to express storm water WLAs on a categorical basis -- but only "when data and information are insufficient to assign each source or outfall." Wayland Mem. at 1. Here, the record would not support a contention that information is insufficient to assign source-specific WLAs. *See* FoE 5/20/04 Mem. 37 (noting availability of substantial information concerning outfalls discharging to the Anacostia). Indeed, EPA itself contemplates that compliance will be measured by "monitor[ing] individual pipes," which will necessarily require identifying those pipes. EPA Mem. 30 (quoting BOD Decision Rationale). *See also* 40 C.F.R. § 122.26(d)(1)(iii)(B)(1), 122.26(d)(2)(ii) (permit regulations require identification of individual outfalls).<sup>20</sup>

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<sup>19</sup> Available at: <http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf>.

<sup>20</sup> AMSA's argument that "it serves no purpose" to assign source-specific loads (AMSA Br. 13) ignores EPA's recognition that compliance will be monitored at individual pipes. Thus, identifying what each pipe is allowed to discharge serves the important purpose of facilitating accountability and enforcement. AMSA's further contentions are likewise meritless. AMSA's argument that assignment of source-specific limits would be impossible (*id.* 13-14) is unsupported by the record. Likewise meritless is the argument (*id.* 14) that source-specific loads threaten to prevent "cost-effective" solutions. Source-specific limits are the norm under the Act's point source program. As long as water quality standards are met, TMDLs can be allocated to sources based on cost-effectiveness considerations.

**B. The BOD and TSS TMDLs Do Not Assign Loads to Individual Point Sources.**

EPA argues that the TMDLs are expressed in percentage terms, thus making it possible to arrive at a source-specific allocation by simply "do[ing] the math." EPA Mem. 28-29. EPA mischaracterizes the BOD TMDLs, which are not presented in percentage terms, but instead in "pounds." BOD TMDLs at 11, 13[JA394, 396]. While the BOD TMDLs do estimate what percentage reduction those loads represent, they nowhere state that the percentage figures constitute the legally operative portion of the TMDLs. Moreover, EPA's BOD approval decision expressly cautions that permit limits will "need to be consistent with the allocations contained in the TMDL rather than determined as an expression of CSO volume or percent reduction." BOD Decision Rationale at 10 (emphasis added)[JA623].

In any event, even assuming *arguendo* that the BOD and TSS TMDLs were expressed in percentage terms, they still violate EPA's regulations. First, the TMDLs do not state that an equal percentage reduction is required of each and every outfall. To the contrary, the TMDLs assign reductions to broad source categories. Second, to convert a percentage figure to an absolute load, one must know the baseline to which the percentage is to be applied (*e.g.*, 77% of what?). Nowhere in the TMDLs is outfall-specific baseline information presented.

**VI. THE RECORD -- IN PARTICULAR, A SIGNIFICANT COMMENT TO WHICH EPA OFFERED NO RESPONSE -- UNDERMINES THE BOD TMDLS' ASSUMPTION CONCERNING UPSTREAM LOADS FROM MARYLAND.**

There is no dispute concerning the assumption made by the BOD TMDLs concerning upstream loads from Maryland: specifically, the TMDLs assumed that upstream loads would meet the District's water quality standards at the Maryland/DC border. FoE 5/20/04 Mem. 38-39; EPA Mem. 33. As a water quality expert pointed out in comments, however, that assumption is

inadequate, because BOD continues to exert effects as it moves downstream. FoE 5/20/04 Mem. 38.

EPA unpersuasively claims (at 33) that this expert's comment is "unsupported." First, the opinion of an expert such as Dr. Smith -- whose expertise EPA does not dispute -- is itself evidence. *See, e.g.*, Fed. R. Ev. 702. Second, Dr. Smith explains the reasoning underlying his objection, and cites to a water quality textbook in support. Smith 4/17/01 Mem. at 2-3 & n.1[JA379-80]. Although this comment was plainly significant and substantive enough to warrant a response, *see* FoE 5/20/04 Mem. 39 (citing case), EPA failed to offer any. That failure was arbitrary, and moreover leaves Dr. Smith's comment as the only record evidence on this point.

EPA points to a change made in the TMDLs subsequent to Dr. Smith's comment -- specifically, a 17,224-pound reduction in Maryland loads. EPA Mem. 33-34. That change, however, was made to achieve compliance with standards at the Maryland/DC boundary. May 2001 BOD TMDLs at 14[JA397]. Nowhere in the decision documents is there any acknowledgment of, much less response to, Dr. Smith's comment that even if standards are met at the boundary, unexerted BOD from Maryland will cause violations downstream.

### CONCLUSION

Plaintiff Friends of the Earth respectfully requests that the Court grant FoE's motion for summary judgment, and deny EPA's and WASA's motions for summary judgment.

**DATED:** July 30, 2004.

Respectfully submitted,

/s/

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
FRIENDS OF THE EARTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04cv92 RMU
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**ORDER AND JUDGMENT**

Upon consideration of the motions for summary judgment by plaintiff Friends of the Earth, and the cross-motions by defendants United States Environmental Protection Agency, *et al.* (collectively "EPA"), and intervenor-defendant District of Columbia Water and Sewer Authority ("WASA"), the Court being fully advised in the premises, it is hereby ORDERED:

1. Friends of the Earth's motion for summary judgment is hereby granted, and the motions for summary judgment by EPA and WASA are hereby denied.
2. Summary judgment is hereby entered for Friends of the Earth, and against EPA and WASA.
3. For reasons stated in the accompanying memorandum opinion, the Court holds that EPA acted unlawfully and arbitrarily in taking the actions challenged herein -- specifically, the December 14, 2001 action approving TMDLs for biochemical oxygen demand (BOD), and the March 1, 2002 action establishing TMDLs for total suspended solids (TSS).
4. Those actions are hereby remanded to EPA for reconsideration in light of the accompanying memorandum opinion. EPA shall conclude remand proceedings, including any

final actions disapproving and establishing TMDLs consistent with such opinion, as well as any final actions approving TMDLs consistent with such opinion, within six months of this order.

*See Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988); *Sierra Club v. EPA*, 719 F.2d 436, 469-70 (D.C. Cir. 1983); *Natural Resources Defense Council v. EPA*, 22 F.3d 1125, 1137 (D.C. Cir. 1994).

5. Per plaintiff's request, the Court refrains from vacating the challenged actions, thus leaving those actions in effect during the remand.

6. The Court will retain jurisdiction for purposes of enforcing this judgment.

7. The Clerk is directed to enter this final judgment forthwith.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2004.

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Ricardo M. Urbina  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
FRIENDS OF THE EARTH,	)	
	)	
Plaintiff,	)	
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v.	)	Civil Action No. 04cv92 RMU
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFF FRIENDS OF THE EARTH'S RESPONSE TO EPA'S AND WASA'S  
STATEMENTS OF MATERIAL FACTS**

Pursuant to D.D.C. Rule LCvR 7(h), plaintiff Friends of the Earth agrees with defendants Environmental Protection Agency, *et al.*, and intervenor-defendant District of Columbia Water and Sewer Authority, that that there are no material facts in this case. *See, e.g., Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("Appellants ... overlook the character of the questions before the district court when an agency action is challenged. The entire case on review is a question of law, and only a question of law.").

Should the Court conclude that further submissions on this issue are necessary, plaintiff will of course comply.

DATED: July 30, 2004.

Respectfully submitted,

/s/

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