

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA RIVERKEEPER)	
PO Box 29197)	
Washington DC 20017,)	
FRIENDS OF THE EARTH)	
1717 Massachusetts Avenue, NW)	
Suite 600)	
Washington, DC 20036-2002,)	
and)	
POTOMAC RIVERKEEPER)	
1717 Massachusetts Avenue, NW)	
Suite 600)	
Washington, DC 20036-2002;)	
)	
Plaintiffs,)	CIVIL ACTION NO.
)	
v.)	
)	
STEPHEN L. JOHNSON,)	
Administrator, United States)	
Environmental Protection Agency,)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This complaint challenges final actions by the United States Environmental Protection Agency and its Administrator (“EPA”) pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“the Act” or “CWA”), approving legally deficient pollution limits (“total maximum daily loads” or “TMDLs”) for District of Columbia waters.

PARTIES

2. Plaintiff Anacostia Riverkeeper, Inc. is a not-for-profit corporation existing under the laws of the District of Columbia, with its principal place of business in Washington, D.C. Anacostia Riverkeeper is dedicated to advocating for a clean and healthy Anacostia River,

engaging in efforts to protect and enhance water quality in the river, and enforcing existing federal and state laws governing the Anacostia watershed, and educating the public about issues affecting the Anacostia.

3. Plaintiff Friends of the Earth (“FOE”) is a not-for-profit corporation existing under the laws of the District of Columbia, with its principal place of business in Washington, D.C. FOE is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land. FOE has a long history of involvement in water-quality related activities on both the national and local levels, and is actively engaged in efforts to protect and enhance water quality in the District of Columbia.

4. Plaintiff Potomac Riverkeeper, Inc. is a not-for-profit corporation existing under the laws of Maryland, with its principal place of business in Washington, D.C. Potomac Riverkeeper is dedicated to advocating for a clean and healthy Potomac River and its tributaries, enforcing existing federal and state laws governing the Potomac watershed, and protecting the Potomac from pollution and exploitation, and educating the public about issues affecting the Potomac watershed.

5. Plaintiffs are each membership organizations with members and staff residing in the District of Columbia, Maryland, Virginia, and other states, including members who use and enjoy the District of Columbia waters at issue herein¹ for boating, observation from their banks, and their other uses. Plaintiffs’ members and staff regularly patrol the waters at issue to protect against unlawful pollution or use of the waters. Plaintiffs’ members suffer recreational, professional, and aesthetic injury from water quality impairments afflicting those waters, including impairments from fecal coliform bacteria, organics, metals, pH, and total suspended

¹ The specific water bodies addressed in this Complaint are the Anacostia River, Chesapeake and Ohio Canal, Kingman Lake, Oxon Run, the Potomac River Watershed, Rock Creek, Tidal Basin, Washington Ship Channel, and Watts Branch.

solids. The acts and omissions of EPA alleged herein cause injury to Plaintiffs' members by prolonging these impairments, thereby adversely affecting members' use and enjoyment of these waters. The physical well-being as well as recreational, aesthetic, and environmental interests of Plaintiffs' members have been and continue to be adversely affected by the actions of EPA described herein. Granting the requested relief would redress the injuries described above.

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

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

JURISDICTION AND RIGHT OF ACTION

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361. *Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("original jurisdiction over EPA actions not expressly listed in section 1369(b)(1) lies not with us . . . but with the district court"). This Court can issue a declaratory judgment and grant further relief pursuant to 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 2201 and 2202. Plaintiffs have a right to bring this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 through 706.

GENERAL ALLEGATIONS

I. THE CLEAN WATER ACT AND THE TMDL PROGRAM

9. Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The

goal of the Clean Water Act is to eliminate “the discharge of pollutants into the navigable waters,” and in the interim, to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. §§ 1251(a)(1) and (2).

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

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

12. Congress required each State to “identify those waters within its boundaries for which the [technology-based] effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.” *Id.* § 1313(d)(1)(A). For the waters thus identified, “[e]ach State shall establish . . . the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation.” § 1313(d)(1)(C). EPA has identified “[a]ll pollutants” as being suitable for TMDL calculation. 43 Fed. Reg. 60665 (Dec. 28, 1978).

13. Section 303(d) further provides that TMDLs “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C). EPA implementing

regulations provide that “TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 40 C.F.R. § 130.7(c)(1).

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

15. Lists identifying impaired waters and TMDLs for those waters are to be prepared by states and submitted to EPA, which “shall either approve or disapprove such identification and load not later than thirty days after the date of submission.” 33 U.S.C. § 1313(d)(2). “If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.” *Id.*

16. TMDLs are implemented, *inter alia*, through incorporation into water quality management plans under § 303(e) of the Act, and through point source discharge permits issued under § 402. Such permits must include not only technology-based effluent limitations, but also

“any more stringent limitation . . . required to implement any applicable water quality standard established pursuant to this chapter.” 33 U.S.C. § 1311(b)(1)(C). Water-quality-based effluent limitations, in turn, must be consistent with the assumptions and requirements of any available wasteload allocations in applicable TMDLs. *See, e.g.*, 40 C.F.R. 122.44(d)(1)(vii)(B).

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

15. “So important is Section 303(d) to the CWA’s overall structure that Congress compelled both the states and EPA to abide by strict, date-certain deadlines for submitting and implementing TMDLs.” *Kingman Park Civic Assn. v. EPA*, 84 F. Supp. 2d 1, 3 (D.D.C. 1999). Congress allowed one year from enactment for EPA to identify pollutants suitable for TMDL calculations, 33 U.S.C. § 1314(a)(2)(D); 180 days for states to submit to EPA their initial identification of waters and the TMDLs established for those waters, 33 U.S.C. § 1313(d)(2); 30 days for EPA approval or disapproval of these submissions, *id.*; and 30 days for EPA establishment of TMDLs in the event of disapproval of state submissions, *id.*

16. Neither EPA nor the District followed the statutory timeline, however. Instead of identifying pollutants within one year of enactment – *i.e.*, by October 18, 1973 – as mandated by 33 U.S.C. § 1314(a)(2)(D), EPA delayed an additional *five years* before publishing the identification on December 28, 1978. 43 Fed. Reg. 60665. *See Kingman Park*, 84 F. Supp. 2d at 3 n.1 (“Not until Judge John Sirica of this Court ordered EPA to delay no further did the agency publish its identifications on December 28, 1978.”). Because of EPA’s five-year delay, the 180-day deadline under 33 U.S.C. § 1313(d)(2) for the District to identify waters and set TMDLs was postponed until June 28, 1979.

17. The District did not meet that deadline, however. Instead, “[f]rom 1979 until 1994, the District of Columbia’s response to its Section 303(d) obligations was absolute silence

and intransigence.” *Kingman Park*, 84 F. Supp. 2d at 3. During that time period, the District submitted neither an identification of waters nor any TMDLs.

18. In 1994, the District finally submitted an identification of waters, and has submitted subsequent identifications in 1996, 1998, 2002, 2004, and 2008. Nonetheless, through at least the end of 1997 the District still had not submitted a single TMDL to EPA. “More than 18 years after the District’s duty to submit its first TMDL calculation ripened, it had not yet offered any TMDL to EPA for review.” *Kingman Park*, 84 F. Supp. 2d at 3.

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

20. Subsequently, FOE and EPA negotiated a consent decree, which was signed by the Court on June 13, 2000. Under the decree, EPA must establish TMDLs for specified District waters and pollutants by specified deadlines. Consent Decree ¶ 5(a). However, if prior to the applicable deadline EPA approves a TMDL submitted by the District for a given water and pollutant, the decree does not obligate the agency to establish a TMDL for that water and pollutant. *Id.* ¶ 5(b).

A. Friends of the Earth’s Challenge to Non-Daily TMDLs

21. Pursuant to the *Kingman Park* consent decree discussed *supra*, the District has submitted, and the EPA approved, several TMDLs for the District’s waters. On January 21, 2004, FOE challenged EPA’s adoption of two such TMDLs in this Court. Specifically FOE

challenged EPA's December 14, 2000 decision approving TMDLs for biochemical oxygen demand (BOD) in the Anacostia River and EPA's March 1, 2002 decision establishing TMDLs for total suspended solids (TSS) in the Anacostia River. FOE argued *inter alia* that those TMDLs were in violation of the Act's provision for a "total maximum *daily* load" because they were phrased in annual, rather than daily terms. *See* 33 U.S.C. § 1313(d)(1)(C).

22. Ultimately, the D.C. Circuit Court of Appeals agreed with FOE, held that TMDLs phrased in non-daily terms violated the plain language of the Clean Water Act, and vacated the two Anacostia TMDLs. *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

23. Despite this unambiguous holding that "daily means daily, nothing else," *Friends of the Earth*, 446 F.3d at 142, the District has failed to correct fifteen TMDLs that were issued prior to this decision and were phrased in annual or monthly terms in violation of the Act.

B. Adoption of Remaining "Non-Daily" TMDLs

24. The District has submitted and EPA has approved numerous TMDLs that are impermissibly expressed as either monthly or annual limits. The District's remaining non-daily TMDLs were approved as follows:

a. On August 28, 2003 EPA issued a final decision approving the TMDLs for fecal coliform bacteria in the tidal Anacostia River and its tributaries submitted by the District in June 2003. EPA amended that decision on October 16, 2003. The TMDLs in question are expressed as average annual loads.

b. On August 28, 2003 EPA issued a final decision approving the TMDLs for organics and metals in the tidal Anacostia River and its tributaries submitted by the District in June 2003. EPA amended that decision on October 16, 2003. The TMDLs in question are expressed as average annual loads.

c. On October 31, 2003, EPA issued a final decision approving the TMDLs for fecal coliform bacteria in Kingman Lake submitted by the District in October 2003. The TMDLs in question are expressed as maximum monthly loads.

d. On October 31, 2003, EPA issued a final decision approving the TMDLs for organics and metals in Kingman Lake submitted by the District in September 2003. The TMDLs in question are expressed as annual average loads.

e. On December 19, 2003, EPA issued a final decision approving TMDLs for total suspended solids in Watts Branch submitted by the District on or about July 15, 2003. The TMDLs in question are expressed as annual average loads.

f. On February 27, 2004, EPA issued a final decision approving the TMDLs for metals in Rock Creek submitted by the District on or about February 25, 2004. The TMDLs in question are expressed as annual average loads.

g. On February 27, 2004, EPA issued a final decision approving the TMDLs for fecal coliform bacteria in Rock Creek submitted by the District on or about February 9, 2004. The TMDLs in question are expressed as annual average loads.

h. On February 27, 2004, EPA issued a final decision approving the TMDLs for organics and metals in Broad Branch, Dumbarton Oaks, Fenwick Branch, Klinge Valley Creek, Luzon Branch, Melvin Hazen, Valley Branch, Normanstone Creek, Pinehurst Branch, Piney Branch, Portal Branch, and Soapstone Creek (collectively "Rock Creek tributaries"). The TMDL report submitted by the District for these waters is dated February 2004, and was received by EPA on February 6, 2004. The TMDLs in question are expressed as annual loads.

i. On October 6, 2004, EPA issued a final decision approving the TMDLs for fecal coliform bacteria in Upper Potomac River, Middle Potomac River, Lower Potomac River,

Battery Kemble Branch, Foundry Branch, and Dalecarlia Tributary (collectively “tidal mainstream Potomac River and three tributaries”). The TMDL report submitted by the District for these waters is dated July 2004 and was received by EPA on August 2, 2004. The TMDLs in question are expressed as annual average loads.

j. On December 15, 2004, EPA issued a final decision approving the TMDLs for fecal coliform bacteria in the Chesapeake and Ohio Canal submitted by the District in October 2004. The TMDLs in question are expressed as annual average loads.

k. On December 15, 2004, EPA issued a final decision approving the TMDLs for organics, metal and bacteria in Oxon Run submitted by the District in December 2004. The TMDLs in question are expressed as annual average loads.

l. On December 15, 2004 EPA issued a final decision approving the TMDLs for fecal coliform bacteria in the Tidal Basin and Washington Ship Channel submitted by the District in December 2004. The TMDLs in question are expressed as annual average loads.

m. On December 15, 2004 EPA issued a final decision approving the TMDLs for organics in the Tidal Basin and Washington Ship Channel submitted by the District in December 2004. The TMDLs in question are expressed as annual average loads.

n. On December 15, 2004 EPA issued a final decision approving the TMDLs for pH in Washington Ship Channel submitted by the District in December 2004. The TMDLs in question are expressed as annual average loads.

o. On May 24, 2005, EPA issued a final decision approving the TMDLs for organics and metals in Battery Kemble Creek, Foundry Branch, and Dalecarlia Tributary (collectively “Potomac River Tributaries”) submitted by the District on August 24, 2004. The TMDLs in question are expressed as annual average loads.

25. The District's waters suffer from numerous conditions associated with the impairments required to be addressed by these TMDLs. The pollutants that the TMDLs are required to limit are associated with a variety of adverse effects on human health, wildlife and aesthetic values. For example, the bacterial impairments in the Anacostia River, Chesapeake and Ohio Canal, Kingman Lake, Oxon Run, Potomac River Watershed, Rock Creek, Tidal Basin and Washington Ship Channel are associated with an increased risk of pathogen-induced illness to humans, including gastrointestinal, respiratory, eye, ear, nose, and throat infections and skin diseases.

26. Establishment of adequate TMDLs is an important and statutorily required step towards ending the water quality standards violations that continue to plague the waterbodies of the District.

CLAIMS FOR RELIEF

27. Anacostia Riverkeeper, FOE, and Potomac Riverkeeper hereby incorporate all previous paragraphs as if set forth herein.

28. EPA's approval of each of the TMDLs as described *supra* ¶ 24 constitutes agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C).

29. EPA's approval of each of the TMDLs as described *supra* ¶ 24, violates the Clean Water Act because each of those of those TMDLs is set as either an annual or monthly load, contrary to the Act's mandate for a "total maximum *daily* load." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). In *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006), the D.C. Circuit unambiguously held that TMDLs phrased in non-daily terms violated the plain language

of the Clean Water Act and must be vacated, noting that “daily means daily, nothing else.” *Id.* at 142.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court –

- a. Declare that EPA’s 15 TMDL decisions referenced above are unlawful and arbitrary for the reasons stated herein;
- b. Enter an order vacating and remanding the above-referenced TMDL decisions to EPA for reconsideration in light of the Court’s decision, and directing that EPA conclude the remand, including the approval or establishment of TMDLs meeting the Act’s requirements for daily loads, within six months of the Court’s order;
- c. Retain jurisdiction over this action to ensure compliance with the Court’s decree.
- d. Award plaintiffs their costs of litigation (including attorneys’ and expert witness fees).
- e. Grant such other relief as the Court deems necessary and proper.

DATED: January 15, 2009

Respectfully submitted,



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