



U.S. Department of Justice

Environment and Natural Resources Division

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March 1, 2006

Mr. Mark Langer, Clerk  
U.S. Court of Appeals for the  
District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

Re: Friends of the Earth v. United States Environmental  
Protection Agency, D.C. Cir. No. 05-5015;  
**Oral argument scheduled for March 2, 2006**

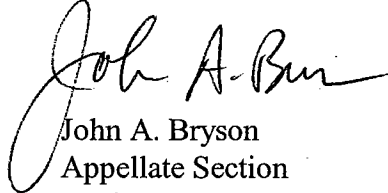
Dear Mr. Langer:

Pursuant to Rule 28(j), appellants have submitted EPA's very recent decision on February 15, 2006, approving in part and disapproving in part amendments to the District of Columbia water quality standards. Appellants assert EPA's decision is relevant to arguments about recreational and aesthetic uses considered in the TSS TMDL. EPA's decision establishing the TSS TMDL was issued March 1, 2002, and must be judged on the basis of the administrative record of the agency's decision at that time and not on subsequent decisions. This recent decision is not relevant to recreational use in the TSS TMDL.

The recent approval of these amendments, however, appears to EPA to raise a serious question whether the instant case continues to present a live case or controversy under Article III. Appellants challenge two TMDLs established to address impaired water quality of the Anacostia River because of exceedances of the water quality standards for DO and turbidity. The TMDLs established wasteload allocations for reducing loading of BOD pollutants and TSS, which allocations were derived from computer modeling employing numerical endpoints for satisfying the DO and turbidity standards. JA 677-685, 747-749. The District of Columbia has now made material changes to those standards, effective upon EPA's approval. The DO standard now applies criteria under EPA's guidance for protecting the Chesapeake Bay to all tidal influenced Class C waters, which includes the Anacostia and some or all of its tributaries within the District of Columbia, that are different from the previously applicable numerical criteria. See 21 DCMR 1104.8, Table 1, Note 3. Moreover, the standards now establish numeric criteria for turbidity and

water clarity that did not exist in the prior standards. Table 1. Because of these changes, it is not clear that the TMDLs are designed to implement the currently applicable water quality standards. To assist the Court in determining its continuing jurisdiction, EPA is concurrently filing a motion for leave to file a supplemental brief addressing whether this case is moot.

Sincerely,

A handwritten signature in cursive script that reads "John A. Bryson". The signature is written in black ink and is positioned above the typed name and title.

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