

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA RIVERKEEPER, INC.
P.O. Box 29197
Washington, D.C. 20017,
and
FRIENDS OF THE EARTH
1717 Massachusetts Avenue, NW
Suite 600
Washington, DC 20036-2002,

Plaintiffs,

v.

STEPHEN L. JOHNSON,
Administrator, United States
Environmental Protection Agency,

Defendants.

Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This suit challenges a final action by the United States Environmental Protection Agency and its Administrator (“EPA”) on July 24, 2007, pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“the Act” or “CWA”), approving “total maximum daily loads” (“TMDLs”) for sediment and total suspended solids (“TSS”) in the Anacostia River and its tributaries. The TMDLs fail to comply with the Act because, among other things, they do not ensure compliance with EPA-approved water quality standards for the District of Columbia and the State of Maryland.

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 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. Friends of the Earth is dedicated to the protection and enhancement of the natural resources of this country, including air, water, and land. It 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 and Maryland, including the Anacostia River.

4. Plaintiffs are membership organizations with members and staff residing in the District of Columbia, Maryland, Virginia, and other states, including members who use and enjoy the Anacostia River and its tributaries in the District of Columbia and Maryland for recreation, wildlife watching, aesthetic enjoyment and other purposes. Plaintiffs' members suffer recreational, professional, and aesthetic injury from the water quality impairments afflicting the river and its tributaries, including pollution from total suspended solids. The acts and omissions of EPA alleged herein cause injury to Plaintiffs' members by prolonging the unsuitability of the Anacostia River and its tributaries for some or all of these uses. The physical well-being as well as recreational, aesthetic, professional, 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.

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

6. 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 with respect to the District of Columbia and Maryland. Mr. Johnson is being sued in his official capacity only.

JURISDICTION AND RIGHT OF ACTION

6. 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... 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. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because defendant's official residence is in the District of Columbia.

GENERAL ALLEGATIONS

I. REQUIREMENTS FOR TOTAL MAXIMUM DAILY LOADS UNDER THE CLEAN WATER ACT

7. 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).

8. 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) to (c), 1362(3).

9. 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).

10. The Act requires 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 [the CWA] are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A).

11. 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.” 33 U.S.C. § 1313(d)(1)(C). Pursuant to section 1314(a)(2), EPA has identified “[a]ll pollutants” as being suitable for TMDL calculation. 43 Fed. Reg. 60665 (Dec. 28, 1978). The Act requires that “TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards. . . .” 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1)(ii).

12. 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 regulations likewise 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. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.” 40 C.F.R. § 130.7(c)(1).

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

14. Submission of lists of impaired waters and related TMDLs by states and the District of Columbia trigger a duty of EPA to “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.*

15. TMDLs are implemented, *inter alia*, through incorporation into water quality management plans under § 303(e)(3)(C) 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) (emphasis added) Such limitations are known as “water quality-based effluent limitations.” Thus, water quality-based effluent limitations in point source discharge permits 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. EPA’S ADOPTION AND APPROVAL OF TMDLS FOR SEDIMENT AND TOTAL SUSPENDED SOLIDS IN THE ANACOSTIA RIVER

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

17. As of 1999, the District of Columbia was more than 18 years delinquent in submitting TMDLs for D.C. waters, including TMDLs for TSS. *See Kingman Park Civic Assoc. v. U.S. Environmental Protection Agency*, 84 F. Supp 2d. 1 (D.D.C. 1999). At that time, EPA was also in violation of its duties under the Act to adopt federal TMDLs to fill the gap left by the District. Pursuant to a consent decree entered in the *Kingman Park* case, EPA was required to approve or establish TMDLs for TSS in the District of

Columbia portion of the Anacostia River by December 15, 2001.

18. EPA first approved TMDLs for TSS for the Anacostia River in March 2002. However, because those TMDLs contained only seasonal load limits rather than the “daily loads” required under the CWA, EPA was required to vacate its approval of the prior March 2002 TSS TMDLs for the Anacostia. *Friends of the Earth v. U.S. Environmental Protection Agency*, 446 F.3d 140, 144-45 (D.C. Cir. 2006).

19. On July 24, 2007, EPA issued a final decision approving revised TSS TMDLs for the Anacostia River and its tributaries that were prepared by the District of Columbia and the State of Maryland. These new TSS TMDLs (“approved TSS TMDLs”) contain daily loads that are “annually-based” and “seasonally-based.”

20. EPA’s decision documents indicate that the approved TSS TMDLs were designed to implement the District of Columbia’s secchi depth criteria for water clarity in the tidal Anacostia River. *See* 21 DCMR § 1104.8, Table 1 (requiring minimum secchi depth of 0.8 meters as a seasonal average). These criteria are designed only to achieve the level of water clarity needed to support submerged aquatic vegetation (SAV) in the tidal portion of the Anacostia during the SAV growing season: April 1 through October 31 of each year.

21. SAV growth is impaired by poor water clarity in the Anacostia River. SAV provides critical habitat for fishes and invertebrates and serves as food for waterfowl and other organisms. SAV also positively affects nutrient cycling, sediment stability, and water turbidity. Adequate water column light penetration during the growing season is a crucial factor in the propagation, survival, and growth of SAV communities. Under turbid conditions frequently occurring in the Anacostia River, growth and reproduction of

SAVs are impaired.

22. Poor water clarity in the Anacostia caused by excessive TSS causes numerous other impairments against which the District's secchi depth criteria were not designed to protect. In particular, poor water clarity violates and prevents attainment of the following EPA-approved applicable water quality standards in the Anacostia and its tributaries in the District and Maryland:

a. Poor clarity substantially impairs and interferes with current and designated uses of the Anacostia, including recreational and aesthetic uses, and support of fish, shellfish, and wildlife. The Anacostia River is designated for several uses in the District, including Class A (Primary contact recreation – i.e., swimming), Class B (Secondary contact recreation and aesthetic enjoyment), and Class C (Protection and propagation of fish, shellfish and wildlife). 21 DCMR § 1101.2. Two tributaries of the Anacostia in the District (Hickey Run and Watts Branch) are designated for Class B, and C uses, among others. *Id.* Additionally, the Maryland portion of the Anacostia, along with all its tributaries except Paint Branch, is designated for Use I-P, which includes “water contact recreation.” COMAR § 26.08.02.08(O) and § 26.08.02.03-3(B). Some or all of the above-referenced uses are existing uses within the meaning of the CWA and implementing regulations. Pollution levels allowed by the approved TSS TMDLs impair all of the above-described designated and existing uses.

b. Many people, including Plaintiffs' members, boat in the Anacostia River, and walk, fish, or pursue other recreational activities along its banks. Their recreational and aesthetic experience of the River is substantially impaired by its

recurrent poor water clarity and muddy, turbid appearance on individual days when sediment and TSS levels are elevated.

c. Further, the District's water quality standards require that "[t]he surface waters of the District shall be free from substances attributable to point or nonpoint sources discharged in amounts that ... [p]roduce objectionable odor, color, taste or turbidity," or "[p]roduce undesirable aquatic life or result in the dominance of nuisance species." 21 DCMR § 1104.1(c) and (e). Pollution levels allowed by the approved TSS TMDLs violate these standards.

d. The District's standards also provide that "[t]he aesthetic qualities of Class B waters shall be maintained." 21 DCMR § 1104.4. Pollution levels allowed by the approved TSS TMDLs violate this standard.

e. The District's standards applicable to the Anacostia and its tributaries include a numeric turbidity criterion of 20 Nephelometer Turbidity Units (NTU) above ambient NTU. 21 DCMR § 1104.8, Table 1. NTU measurements assess the turbidity (cloudiness) of water. "Ambient" turbidity, as defined in D.C. law, includes "those conditions existing before or upstream of a source or incidence of pollution." 21 DCMR § 1199.1. Pollution levels allowed by the approved TSS TMDLs violate the District's NTU standard.

f. Maryland's water quality standards for turbidity for the Anacostia and its tributaries state that "[t]urbidity may not exceed levels detrimental to aquatic life" and "[t]urbidity in the surface water resulting from any discharge may not exceed 150 [NTU] at any time or 50 [NTU] as a monthly average." COMAR §§ 26.08.02.08(O) and 26.08.02.03-3(A)(5)(a) and (b). Pollution levels allowed by

the approved TSS TMDLs violate Maryland's NTU standard.

23. In short, the approved TSS TMDLs will allow violations of applicable water quality standards. Even if the approved TSS TMDLs are implemented, the Anacostia to be inundated with very high levels of suspended solids during days of high flow, resulting in periodic days when the designated uses of the Anacostia are substantially impaired by very turbid and muddy conditions. This will substantially impair and prevent attainment of applicable water quality standards for primary and secondary contact recreation and aesthetic enjoyment, as well as narrative standards prohibiting objectionable color and turbidity, cited above.

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

CLAIMS FOR RELIEF

25. Plaintiffs hereby incorporate all previous paragraphs as if set forth herein.

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

a. The TMDLs fail to implement the District's and Maryland's applicable water quality standards, including those discussed in ¶ 22, above, in violation of the CWA and implementing regulations.

b. The TMDLs fail to provide for attainment of water quality supporting all designated and existing uses in the Anacostia and its tributaries, and to meet

narrative and numeric water quality standards associated with those uses, in violation of the CWA and implementing regulations;

c. The TMDLs fail to take into account critical conditions and fail to protect water quality during high flow events, in violation of the CWA and implementing regulations. *See* 40 C.F.R. § 130.7(c)(1).

d. The TMDLs fail to allocate loads to individual point sources, in violation of the CWA and applicable regulations. *See* 33 U.S.C. § 1362(14) (definition of “point source”); 40 C.F.R. §§ 130.2(i) (definition of “total maximum daily load”); and 122.45(a) (requiring permit effluent limitations to be established for each outfall or discharge point).

e. The approved TSS TMDLs lack an adequate margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality, in violation of the CWA. 33 U.S.C. §1313(d)(1)(C).

27. EPA’s approval of the TSS TMDLs contravenes requirements of reasoned agency decision making because EPA failed to offer a reasoned explanation that responds to comments, considers relevant factors, and is supported by substantial evidence of record.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Declare that EPA’s decision approving the TSS TMDLs is unlawful and arbitrary for the reasons alleged herein;
2. Enter an order remanding the TSS TMDLs to EPA for reconsideration in light

of the Court's decision, and directing that EPA conclude the remand within six months of the Court's order;

3. Retain jurisdiction over this action to ensure compliance with the Court's decree.

4. Award plaintiffs their costs of litigation (including attorneys' and expert witness fees).

5. Grant such other relief as the Court deems necessary and proper.

DATED: January 15, 2009

Respectfully submitted,



Jennifer C. Chavez (D.C. Bar # 493421)

David S. Baron (D.C. Bar # 464222)

Earthjustice

1625 Massachusetts Ave., NW, Suite 702

Washington, DC 20036-2212

(202) 667-4500

Counsel for Plaintiffs