

ORAL ARGUMENT SCHEDULED FOR APRIL 21, 2003

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

No. 02-1123 (Consolidated with No. 02-1124)

FRIENDS OF THE EARTH,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
CHRISTINE TODD WHITMAN, Administrator,
United States Environmental Protection Agency,

Respondents.

Petitions For Review of Final Action
of the United States Environmental Protection Agency

**CORRECTED FINAL OPENING BRIEF OF PETITIONER
FRIENDS OF THE EARTH**

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Petitioner,)	
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v.)	
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UNITED STATES ENVIRONMENTAL)	No. 02-1123
PROTECTION AGENCY and)	(Consolidated with 02-1124)
CHRISTINE TODD WHITMAN,)	
Administrator,)	
United States Environmental)	
Protection Agency,)	
)	
Respondents.)	
)	
)	

**CERTIFICATE OF PETITIONER FRIENDS OF THE EARTH
AS TO PARTIES, RULINGS, AND RELATED CASES**

Petitioner Friends of the Earth submits the following certificate as to parties, rulings, and related cases.

(A) Parties and Amici.

(i) Parties, intervenors, and amici who appeared in the district court. This case is a petition for review of agency action, not an appeal from a district court.

(ii) Persons who are parties, intervenors, and amici in this Court. Petitioner is Friends of the Earth. Respondents are United States Environmental Protection Agency and Christine Todd

Whitman, Administrator, United States Environmental Protection Agency. *Amici* are the Association of Metropolitan Sewerage Agencies and the District of Columbia Water and Sewerage Authority.

Petitioner Friends of the Earth (“FoE”) hereby makes the disclosures required by D.C. Circuit Rule 26.1:

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, including the Anacostia River. FoE is a membership organization with members residing in the District of Columbia, Maryland, Virginia, and other states, including members who use the Anacostia River in the District of Columbia for boating, observation from its banks, and other uses, and who suffer injury from the water quality impairments afflicting the River.

There is no parent company or publicly held company that has a 10% or greater ownership interest in FoE.

(B) Rulings under Review.

(1) No. 02-1123. The United States Environmental Protection Agency's March 2002 establishment of total maximum daily loads for total suspended solids for the Anacostia River, as set forth in a March 1, 2002 letter from Rebecca W. Hanmer to James R. Collier; an accompanying document dated March 1, 2002 and entitled "Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River, District Of Columbia, Total Suspended Solids"; an accompanying document

entitled "Decision Rationale, Total Maximum Daily Loads, Total Suspended Solids, Upper Anacostia River, Lower Anacostia River, District of Columbia"; and any other document embodying said establishment. To FoE's knowledge, these documents have not been published in the Federal Register, but are available on the United States Environmental Protection Agency website:

<http://www.epa.gov/reg3wapd/tmdl/whatsnew.htm>

(2) **No. 02-1124.** The United States Environmental Protection Agency's December 2001 approval of total maximum daily loads for biochemical oxygen demand for the Anacostia River, as set forth in a December 14, 2001 letter from Jon M. Capacasa to James R. Collier; an accompanying document entitled "Decision Rationale, Total Maximum Daily Loads, Anacostia River Watershed, For Biochemical Oxygen Demand"; and any other document embodying said approval. To petitioner's knowledge, these documents have not been published in the Federal Register, but are available on the United States Environmental Protection Agency website:

<http://www.epa.gov/reg3wapd/tmdl/whatsnew.htm>

(C) Related Cases.

These cases have not previously been before this Court or any other court. Petitioner is unaware of any case that is related within the meaning of D.C. Circuit Rule 28(a)(1)(C). However, the Court should be aware of Kingman Park Civic Association v. USEPA, D.D.C. Civ. No. 98-758 CKK, in which the parties negotiated, and the district court entered, a consent decree providing for EPA establishment of TMDLs for waters in the District of Columbia.

DATED: April 15, 2003.

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act
BOD	Biochemical Oxygen Demand
CPR	Consolidated Permit Regulation
CSO	Combined Sewer Overflow
CWA	Clean Water Act
DCMR	District of Columbia Municipal Regulations
DO	Dissolved Oxygen
EPA	Environmental Protection Agency
FoE	Friends of the Earth
LAs	Load Allocations
LTCP	Long-Term Control Plan
µg/L	Micrograms per Liter
NPDES	National Pollutant Discharge Elimination System
NPS	Non-Point Source
PS	Point Source
SAV	Submerged Aquatic Vegetation
TMDL	Total Maximum Daily Load
TSS	Total Suspended Solids
WASA	Water and Sewer Authority
WLAs	Wasteload Allocations
WQS	Water Quality Standard

JURISDICTIONAL STATEMENT

(A) Agency. Under § 303(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d), respondents U.S. Environmental Protection Agency and its Administrator (collectively "EPA") have jurisdiction to approve and establish total maximum daily loads ("TMDLs").

(B) Court of Appeals. Pursuant to Clean Water Act § 509(b)(1), 33 U.S.C. § 1369(b)(1), this Court has jurisdiction to review final EPA action approving or establishing TMDLs.

(C) Timeliness. These petitions were filed on April 12, 2002, within 120 days of (1) EPA's December 14, 2001 approval of the District of Columbia's TMDL for biochemical oxygen demand ("BOD"), and (2) EPA's March 1, 2002 establishment of a TMDL for total suspended solids ("TSS"). See CWA § 509(b)(1).

(D) Standing. A membership organization dedicated to the protection and enhancement of natural resources, including water, Friends of the Earth ("FoE") has standing to litigate this case on behalf its longstanding members who use the Anacostia River in the District of Columbia for boating, observation from its banks, and other uses, and who suffer injury from the water quality impairments afflicting the River. See, e.g., Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000). Facts supporting FoE's standing appear in the materials cited in this brief, and the declarations appended hereto. See Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

STATEMENT OF ISSUES PRESENTED

1. Whether this Court has jurisdiction under Clean Water Act § 509(b)(1) to review EPA's approval or establishment of TMDLs.
2. Whether EPA acted unlawfully or arbitrarily by –
 - (a) approving and establishing TMDLs phrased as annual and seasonal loads;

- (b) establishing a TSS TMDL that allows turbidity and algal blooms to continue impairing recreational and aesthetic uses, thus violating water quality standards;
- (c) approving and establishing TMDLs that contain no TMDLs for nutrients, and thus allow continued violation of applicable water quality standards;
- (d) approving and establishing TMDLs that allocate wasteloads to broad source categories rather than individual point sources; and
- (e) approving a BOD TMDL that underestimates the impact of upstream loads, and thus allows continued violation of applicable water quality standards.

STATUTES AND REGULATIONS

All applicable statutes and regulations appear in an addendum at the end of this brief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition in the Agency.

These petitions seek review of TMDLs for BOD (No. 02-1124) and TSS (No. 02-1123) that are inadequate to remedy serious water pollution afflicting the Anacostia River. The BOD TMDL was submitted by the District in May 2001, and approved by EPA on December 14, 2001. The TSS TMDL was proposed by EPA on January 4, 2001, and established on March 1, 2002.

II. Statement of Facts.

A. The Clean Water Act.

Three decades ago, in 1972, Congress enacted the Clean Water Act ("CWA"), "mark[ing] the ascendancy of water-quality control to the status of a major national priority." Monongahela Power Co. v. Marsh, 809 F.2d 41, 45-46 (D.C. Cir. 1987). The Act's core objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a),

33 U.S.C. § 1251(a). To achieve that objective, Congress declared as a "national goal" that "the discharge of pollutants into the navigable waters be eliminated by 1985," and that "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." §§ 101(a)(1) and (2).

In furtherance of the above goals, the Act required *inter alia* that point sources—including any "pipe," "conduit," or other "discernible, confined and discrete conveyance"¹ – meet technology-based effluent limitations. § 301(b)(1)(A) and (B), 33 U.S.C. § 1311(b)(1)(A) and (B). However, recognizing that this approach by itself would not produce clean water, the Act also required each state to have in place EPA-approved water quality standards sufficient to "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." § 303(c)(2)(A).

The achievement of water quality standards is one of the Act's "central objectives." Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992). To provide for such achievement, "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters." § 303(d)(1)(A). For the waters thus identified, States must establish "the total maximum daily load," "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). The Act provides for EPA approval or disapproval of State TMDLs, as well as for establishment of federal TMDLs. § 303(d)(2).

¹ See CWA § 502(14), 33 U.S.C. § 1362(14).

TMDLs are implemented *inter alia* through point source discharge permits, which must be consistent with the TMDL. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (requiring achievement of " any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter"). See also 40 C.F.R. § 122.44(d)(1)(vii)(B); Environmental Defense Fund v. Costle, 657 F.2d 275, 294 (D.C. Cir. 1981).

B. The Anacostia River.

The Anacostia River flows for several miles through the District of Columbia from the Prince George's County Line to its confluence with the Potomac River near Hains Point. Though surrounded by residential neighborhoods, and lined with parks, marinas, and other recreational facilities, the River suffers from severe water pollution that impairs its safety and value for recreational activities and aesthetic enjoyment. Indeed, after many decades of environmental degradation and neglect, the Anacostia River was "bestowed with the dubious distinction of being one of the ten most polluted rivers in the country." Kingman Park Civic Assn. v. EPA, 84 F.Supp.2d 1, 4 (D.D.C. 1999).

1. Water Quality Standards for Dissolved Oxygen and Turbidity, and Violation of Those Standards by the Anacostia River.

The Anacostia River violates several of the water quality standards established by the District and approved by EPA, and has been identified for TMDL development pursuant to § 303(d)(1)(A). District of Columbia, List of Water Bodies Required to be Listed under 303(d) of the CWA (1998) ("1998 303(d) List")[JA36]. At issue here are two standards in particular.

Dissolved oxygen. Aquatic organisms need oxygen to survive, and when oxygen levels drop too low, fish and other aquatic life die. See, e.g., *Natural Resources Defense Council v. USEPA*, 656 F.2d 768, 771 (D.C. Cir. 1981); *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 575 (D.C. Cir. 1980). Prevention of these impacts is a key purpose of the District's EPA-approved water quality standards. See 21 District of Columbia Municipal Regulations ("DCMR") §§ 1101.1 and 1101.2 [JA51, 52] (the designated uses of the Anacostia River include *inter alia* Class C, "Protection & propagation of fish, shellfish and wildlife"). Accordingly, those standards set both daily and hourly minimum oxygen levels. 21 DCMR § 1104.6 [JA58] (daily minimum of 5.0 mg/L, and hourly minima of 5.0 mg/L from March-June, and 4.0 mg/L from July-February). Unfortunately, the Anacostia River repeatedly violates these standards, with serious consequences:

A rainfall event of about one-inch in later May, 1999 cause[d] the dissolved oxygen to drop into the potential fish kill range. Then it remain[ed] in violation of the water quality standards until the June 12 rainfall event of 1.3 inches which dropped the dissolved oxygen to near zero and result[ed] in killing of about 5,000-7,000 fish in the Anacostia River. This particular event is typical of wet weather induced problems in the Anacostia River.

D.C. Dept. of Health, "Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River, District of Columbia – Biochemical Oxygen Demand" (May 2001) ("BOD TMDL"), at 2 [JA385].

Turbidity. Turbid water – water that is murky or muddy, with low visibility – has important adverse impacts. First, it "interferes with recreational use and aesthetic enjoyment of water." EPA, Decision Rationale for Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River – Total Suspended Solids (March 2002) ("EPA TSS Decision Rationale"), 6 [JA668]. See 21 DMCR 1101.1 and 1101.2 [JA51, 52] (the designated uses of the Anacostia River include *inter alia* Class A, "Primary contact recreation," and Class B,

"Secondary contact recreation and aesthetic enjoyment").² Second, it can block light needed by aquatic plants for photosynthesis. EPA, Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River – Total Suspended Solids (March 2002) ("TSS TMDL"), at 8 [JA687]. See p. 5, supra (the Anacostia River is listed for the Class C use, involving protection of aquatic life).

To address these impacts, the District's EPA-approved water quality standards 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]. Unfortunately, the Anacostia suffers from severe turbidity, which limits visibility to as little as 3-4 inches, and creates an unattractive murky appearance that seriously impairs recreational use of the River. See Declarations of James Connolly and Damon Whitehead [Supp. JA17, 26]. This problem is vividly illustrated by the following photograph, in which the highly turbid Anacostia (lower right) contrasts sharply with the less murky waters of the Washington Ship Channel (center):

² Primary contact recreation includes "those water contact sports or activities which result in frequent whole body immersion and/or involve significant risks of ingestion of the water." 21 DCMR 1199 [JA77]. Secondary contact recreation includes "those water contact sports or activities which seldom result in whole body immersion and/or do not involve significant risks of ingestion of the water." Id.



Attachment to Connolly Dec. [Supp. JA25].

2. **Pollutants Causing Oxygen and Turbidity Violations.**

Dissolved oxygen violations result from at least two pollutants. First, "biochemical oxygen demand" or "BOD" "describe[s] pollutants which, when they decompose, deplete oxygen necessary to support aquatic life." American Meat Inst. v. EPA, 526 F.2d 442, 447 (7th Cir. 1975).³ "When BOD increases in the water body, DO concentrations decrease." BOD TMDL at 4 [JA387]. Second, nutrients also play an important role: "Excessive algal growth caused by over enrichment with nitrogen and/or phosphorus contribute to dissolved oxygen violations through

³ See also EPA, *National Water Quality Inventory: 1998 Report to Congress* (Aug. 1998) ("EPA 1998 Inventory"), at 19 (BOD "is a measure of how much oxygen is consumed during the degradation of organic matter and the oxidation of some inorganic matter."), available at <http://www.epa.gov/305b/98report/chap1.pdf>.

the daily photosynthesis cycle and through the decay of dead algal cells." BOD TMDL at 4 (emphasis added)[JA387]. Accord, Mem. from Jack Smith, Ph.D. (10/16/00), at 2-4 [JA349-51].⁴

Turbidity violations are likewise traceable to at least two pollutants. First, total suspended solids ("TSS") "are particles of organic and inorganic matter suspended in the water or floating on its surface." Amer. Meat Inst., 526 F.2d at 447. Such particles "scatter light and reduce clarity in waterbodies." EPA 1998 Inventory at 22. Second, nutrients also contribute, by producing algal blooms that block light. TSS TMDL at 10 [JA689] (reducing nutrient loads "will ... tend to reduce algae thus further promoting water clarity"); Smith Mem. (2/1/02) at 10 [JA660] (if TSS is reduced without adequately reducing nutrients, "[t]he resulting increased algal growth will only replace objectionable brown turbidity with objectionable green turbidity").

3. Sources of Pollution in the Anacostia.

The pollutants added to the District portion of the Anacostia come preponderantly from stormwater, channeled through point source outfalls belonging to two main systems. The older, more central areas of the District's Anacostia basin are served by an antiquated system in which wastewater from offices, businesses and residences shares the same pipes as stormwater from streets. During dry weather and light rains, this wastewater is generally routed to the treatment plant at Blue Plains, which treats the effluent and discharges it to the Potomac River. During heavier rains, however, the capacity of the system is exceeded and a mixture of sewage and

⁴ See also, EPA 1998 Inventory at 19 ("Excess nutrients (especially nitrogen and phosphorus compounds) overstimulate the growth of aquatic weeds and algae. Excessive growth of these organisms, in turn, can clog navigable waters, interfere with swimming and boating, outcompete native submerged aquatic vegetation (SAV), and, with excessive decomposition, lead to oxygen depletion. Oxygen concentrations can fluctuate daily during algae blooms, rising during the day as algae perform photosynthesis and falling at night as algae continue to respire, which consumes oxygen. Beneficial bacteria also consume oxygen as they decompose the abundant organic food supply in dying algae cells.").

stormwater – at least 1.5 billion gallons per year – flows directly into the Anacostia from several outfalls known as "combined sewer overflows" ("CSOs"). BOD TMDL at 2-4 [JA385-87].

Portions of the Anacostia watershed in the District that were developed more recently are served by a separate storm sewer system. During rains, stormwater flows from city streets through stormwater outfalls into the Anacostia, sweeping with it sediment, fertilizer, industrial waste, animal manure, and other pollutants. BOD TMDL at 4 [JA387]; 64 Fed. Reg. 68725 (Dec. 8, 1999).

In addition to these two main systems, smaller stormwater systems also contribute pollutants to the Anacostia through their outfalls. BOD TMDL at 15-16 [JA398-99] (noting several federal facilities that have stormwater discharge permits).

As the above description indicates, the pollutants added to the District's portion of the Anacostia are not spaced evenly through the year, but rather are almost all associated with periodic rainfall events. See, e.g., BOD TMDL at 6-7 [JA389-90] ("There are no continuous permitted point source loads that contribute to the dissolved oxygen problem. The problem is due to a precipitation induced pollution load.").

C. The Anacostia TMDLs.

In May 2001 the District submitted, and in December 2001 EPA approved, a TMDL addressed to the District's dissolved oxygen standards. In January 2002 EPA proposed, and in March 2002 finalized, a TMDL addressed to the District's turbidity standards. During the administrative process, environmental commenters had argued that the TMDLs were inadequate to meet the requirements of the Clean Water Act and implementing regulations.⁵ After EPA's

⁵ See, e.g., memoranda by Howard Fox (with accompanying memoranda by Jack Smith, Ph. D., and other attachments) dated 10/17/00, 4/17/01, 11/6/01, and 2/4/02 [JA345, 373, 601, 646].

final decisions, these petitions followed. EPA's motion to dismiss the petitions was referred to the merits panel. Order of July 5, 2002.

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), "the reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Statutory Violations. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron, USA v. NRDC, 467 U.S. 837, 843 n.9 (1984). "An agency is given no deference at all on the question whether a statute is ambiguous." Cajun Electric Power Cooperative v. FERC, 924 F.2d 1132, 1136 (D.C. Cir. 1991)(emphasis added).

If Congress has not expressed a clear intention on the question at hand, and if Congress has delegated interpretational authority to the agency, then the Court defers to an agency interpretation that is "reasonable." See Chevron, 467 U.S. at 845; United States v. Mead Corp., 533 U.S. 218 (2001). See also Rettig v. Pension Benefit Guarantee Corp., 744 F.2d 133, 151 (D.C. Cir. 1984)(under *Chevron* Step Two, "a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether the agency considered the matter in a detailed and reasoned fashion.") (citation and internal quotations omitted).

Arbitrary and Capricious Action. Agency action will be held arbitrary and capricious if the agency has not "identified and explained the reasoned basis for its decision," Transactive Corp. v. US, 91 F.3d 232, 236 (D.C. Cir. 1996); if it has relied on irrelevant factors, or failed to

consider relevant factors, Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), Fox Television Stations v. FCC, 280 F.3d 1027, 1050-51, 1052 (D.C. Cir. 2002); if it has reached a conclusion that is unsupported by substantial evidence, or runs counter to the record, Assn. of Data Processing Service Orgs. v. Board of Governors, 745 F.2d 677, 683-84 (D.C. Cir. 1984), MVMA, 463 U.S. at 43; or if it has failed to explain a connection between the facts and its conclusions. Dickson v. Secretary of Defense 68 F.3d 1396, 1407 (D.C. Cir. 1995).

SUMMARY OF ARGUMENT

JURISDICTION. Under Clean Water Act § 509(b)(1), this Court has jurisdiction to review (*inter alia*) "the Administrator's action ... in approving or promulgating any effluent limitation or other limitation under section 1311." A TMDL specifies the "total maximum daily load" of pollutants, § 303(d)(1)(C), and thus qualifies as an "effluent limitation or other limitation." See, e.g., CWA § 502(11); 40 C.F.R. § 130.2(h) and (i). Moreover, a TMDL is an effluent limitation "under section 1311" – specifically, it is a more stringent water quality-based limitation within the scope of CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). See also PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 713 (1994) ("Section 301 ... incorporates § 303 by reference.").

MERITS. Seasonal and Annual TMDLs. EPA's approval and establishment of TMDLs phrased in annual and seasonal terms violate the Clean Water Act's express requirement to establish the "total maximum daily load." § 303(d)(1)(C) (emphasis added).

Moreover, the annual and seasonal loads at issue unlawfully and arbitrarily allow violation of water quality standards. § 303(d)(1)(C) (TMDLs "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety") (emphasis added). Accord, 40 C.F.R. § 130.7(c)(1). The annual BOD TMDL

allows peak loadings that violate the "daily" and "one hour" dissolved oxygen water quality standards, see 21 DCMR 1104.6 Table 1 [JA58], with associated fish kills and other adverse aquatic life impacts. Likewise, the seasonal TSS TMDL allows peak loadings that violate the District's water quality standards barring pollutant-induced "objectionable ... turbidity" or "undesirable or nuisance aquatic life." See 21 DCMR 1104.1 [JA57].

Recreational and Aesthetic Uses. In establishing the TSS TMDL, EPA focused on protecting only one use of the Anacostia – the Class C use, addressing "Protection and propagation of fish, shellfish and wildlife." 21 DCMR §§ 1101.1 and 1101.2 [JA51-52]. In so doing, the agency unlawfully and arbitrarily allowed the persistence of "objectionable ... turbidity" and "undesirable or nuisance aquatic life" (see 21 DCMR 1104.1 [JA57]) that interfere with recreational and aesthetic uses. The TMDL must protect those uses, which are among the designated uses of the Anacostia River set forth in the District's water quality standards. See 21 DCMR §§ 1101.1, 1101.2 [JA51-52] (designating Anacostia River for the Class A use, "Primary contact recreation," and the Class B use, "Secondary Contact Recreation"); PUD, 511 U.S. at 714-15.

Nutrients. Nutrients – including phosphorus and nitrogen – produce algal blooms that contribute to violations of the District's water quality standards for dissolved oxygen, objectionable turbidity, and undesirable or nuisance aquatic life. Because the TMDLs under review contain no TMDLs for nutrients, they unlawfully and arbitrarily allow continued violation of those water quality standards, see § 303(d)(1)(C) and 40 C.F.R. § 130.7(c)(1), and also contravene § 303(d)(1)(C)'s requirement that TMDLs be established "for those pollutants which the Administrator identifies under [CWA § 304(a)(2)] as suitable" for TMDL calculation.

See 43 Fed. Reg. 60665/1 (Dec. 28, 1978) [JA11] (pursuant to § 304(a)(2), EPA identified "[a]ll pollutants" as suitable).

Outfalls. The TSS and BOD TMDLs unlawfully and arbitrarily allocate wasteloads to general categories of sources, *i.e.*, "CSOs" and "stormwater," instead of to individual point sources as required by EPA's regulations. 40 C.F.R. § 130.2(h) and (i).

Upstream Loads. The BOD TMDL unlawfully and arbitrarily allocated the District a BOD load that fails to account accurately for upstream loads from Maryland, and thus is too large to provide for attainment of the District's dissolved oxygen standard.

ARGUMENT

I. REVIEW OF EPA'S APPROVAL AND ESTABLISHMENT OF TMDLS IS WITHIN THIS COURT'S JURISDICTION UNDER CWA § 509(b)(1).

EPA has moved to dismiss these petitions, asserting that the agency's approval and establishment of TMDLs are outside the scope of Clean Water Act § 509(b)(1), which enumerates specific kinds of EPA actions subject to appellate court review. Respondent EPA's Motion to Dismiss for Lack of Jurisdiction (June 13, 2002). To the contrary, the agency's approval and establishment of TMDLs are within the scope of § 509(b)(1)—at a minimum, of § 509(b)(1)(E). FoE respectfully submits that the Ninth Circuit case holding the contrary (Longview Fibre Co. v. Rasmussen, 980 F.2d 1307 (9th Cir. 1992)) should not be followed, as it contravenes the language and history of the CWA as well as precedent of this Court and the Supreme Court – including a subsequent Supreme Court decision not considered by the Ninth Circuit.

Section 509(b)(1)(E) provides for appellate court review of "the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 1311,

1312, 1316, or 1345 of this title" – i.e., under CWA §§ 301, 302, 306, or 405. The actions under review fit within the plain scope of this language.

A. A TMDL Constitutes an "Effluent Limitation or Other Limitation."

EPA's motion to dismiss does not deny that a TMDL constitutes an "effluent limitation or other limitation" within the meaning of § 509(b)(1)(E). In Longview the agency "concede[d] that the total maximum daily load is an effluent limitation," and the Ninth Circuit took no issue with that proposition. 980 F.2d at 1310 (emphasis added).

Moreover, both the CWA and EPA's regulations compel the conclusion that a TMDL is an effluent limitation. First, under the Act an effluent limitation is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." § 502(11) (emphasis added). This description plainly encompasses § 303(d)(1)(C)'s mandate for establishment of "the total maximum daily load" for "pollutants," which load "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." (Emphasis added.)

EPA's regulations confirm this conclusion, providing that a TMDL includes – as its point source component – "wasteload allocations," which constitute "a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(i), (h) (emphasis added).

Moreover, even assuming *arguendo* that a TMDL did not constitute an effluent limitation, it certainly – as described in § 303(d) and 40 C.F.R. §§ 130.2 and 130.7(c) – is some kind of limitation. Accordingly, it fits easily within § 509(b)(1)(E)'s reference to an "effluent

limitation or other limitation." (Emphasis added.) See, e.g., Natural Resources Defense Council v. USEPA, 673 F.2d 400, 404 n.11 (D.C. Cir. 1982) ("Because § 509(b)(1)(E) provides for our review of both effluent limitations and other limitations, we see no need to determine that the CPRs [consolidated permit regulations] are one or the other. It suffices that they fit within the statutory disjunctive phrase."). Indeed, TMDLs fit that description at least as much as the far more general action – promulgation of nationwide consolidated permit regulations – at issue in NRDC. See id. 405 (contrasting CPRs with category-specific effluent limits, Court states: "The CPR's, everyone agrees, are far more general and rest dominantly on policy choices.").

B. A TMDL Constitutes an Effluent Limitation or Other Limitation "Under Section 1311."

(1) The Plain Terms of the Act Compel the Conclusion that a TMDL is a Limitation under CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

While not denying that a TMDL constitutes an "effluent limitation or other limitation," EPA claims (Mot. 6-8) that a TMDL does not fit within § 509(b)(1)(E)'s reference to "an effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title." (Emphasis added.) To the contrary, although § 303 is not expressly enumerated in § 509(b)(1)(E), the latter provision does expressly enumerate "section 1311" – i.e., CWA § 301. The plain meaning of §§ 301 and 303 compels the conclusion that a TMDL constitutes an "effluent limitation or other limitation under section 1311." § 509(b)(1)(E) (emphasis added).

Specifically, § 301(b)(1) first enumerates (in § 301(b)(1)(A) and (B)) requirements for technology-based limitations, and then proceeds to require that there be achieved, "not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law

or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter." § 301(b)(1)(C) (emphasis added.)

A TMDL plainly fits this description. First, by the express terms of the Act, a TMDL applies to "those waters ... for which the 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." § 303(d)(1)(A) (emphasis added). Thus, a TMDL constitutes a "more stringent" limitation within the meaning of § 301(b)(1)(C).

Second, the Act requires that a TMDL "shall be established at a level necessary to implement the applicable water quality standards." § 303(d)(1)(C) (emphasis added).

Accordingly, a TMDL constitutes a limitation "necessary to meet water quality standards" and "required to implement any applicable water quality standard" within the meaning of § 301(b)(1)(C) (emphasis added).

(2) Precedent of the Supreme Court and this Court Compels the Conclusion that a TMDL is a Limitation under CWA § 301(b)(1)(C).

While the plain terms of the Act amply suffice to establish that a TMDL is a limitation under § 301, that conclusion is further confirmed by the precedent of the Supreme Court and this Court.

In PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700 (1994), the Supreme Court addressed § 401(d), which allows states to set permit conditions to assure compliance with (*inter alia*) "any applicable effluent limitations and other limitations, under section 1311 ... of this title." 33 U.S.C. § 1341(d). The Court held:

Although § 303 is not one of the statutory provisions listed in § 401(d), the statute allows states to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. § 1311. Section 301, in turn, incorporates § 303 by reference. See 33

U.S.C. § 1311(b)(1)(C); see also H.R.Conf.Rep. No. 95-830, p. 96 (1977) ("Section 303 is always included by reference where section 301 is listed"). As a consequence, state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process.

Id. 712-13 (emphasis added). Like § 401(d), § 509(b)(1)(E) expressly references § 301, which "in turn, incorporates § 303 by reference." Accordingly, TMDLs adopted "pursuant to § 303 are among the 'other limitations'" within this Court's § 509(b)(1)(E) review jurisdiction.

This conclusion is further confirmed by precedent of this Court, which "follows the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction." NRDC, 673 F.2d at 405. In NRDC, the Court rejected arguments that it lacked § 509(b)(1) jurisdiction over challenges to EPA consolidated permit regulations, holding:

If we were to grant the motion to dismiss, one or more district courts might proceed to review the CPR's, yet review of a permit issued under the CPR's would take place directly in a court of appeals under section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (1976). This "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits ... but would have not power of direct review of the basic regulations governing those individual actions." E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 136, 97 S. Ct. 965, 979, 51 L. Ed. 2d 204 (1977).

Id. 405-06. The same reasoning obtains here. As EPA's regulations (and its motion, at 5) recognize, once a TMDL is approved or established, discharge permits must be consistent with the TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B). Thus, dismissal here would lead to the same kind of "perverse" result as in NRDC: this Court could be called on to review a discharge permit under § 509(b)(1)(F), while review of key water-quality-based limitations incorporated into the permit would proceed (perhaps simultaneously) in district court.⁶

⁶ Because Clean Water Act permitting authority has not been delegated to the District, EPA retains responsibility for issuing § 402 permits addressing discharges to the District's waters. See <http://www.epa.gov/reg3wapd/npdes/index.htm>.

Indeed, the statutory basis for § 509(b)(1)(E) jurisdiction is stronger here than in NRDC. There the Court noted that "EPA cited § 301 as a statutory basis for the CPR's, and the CPR's set out procedures for obtaining permits that comply with § 301." 673 F.2d at 405 n.15 (emphasis added). Here, regardless of whether EPA cited § 301, the applicable statutory and regulatory provisions plainly establish—as shown above—that a TMDL is a limitation under § 301. Moreover, a TMDL likewise establishes limitations—not merely procedural but substantive—that govern compliance with § 301(b)(1)(C) in discharge permits.⁷

Likewise in American Iron & Steel Inst. v. EPA, 115 F.3d 979, 986 (D.C. Cir. 1997), this Court held it had § 509(b)(1)(E) jurisdiction over EPA guidance under § 118, even though "[i]t is true that § 118 of the Act ... is not one of the provisions listed in § 509(b)(1)(E)." (Emphasis added.) The Court based that holding on highly general language in § 118 directing EPA to promulgate guidance "pursuant to this section and the Administrator's authority under this chapter." Id. (emphasis added). The statutory language at issue here is far clearer, unambiguously establishing that TMDLs are limitations under § 301. Moreover, American Iron also relied on language in the Guidance requiring that the States – for purposes of compliance with § 301 – adopt requirements consistent with the Guidance. Id. Here, the above-cited EPA regulation expressly requires that water-quality-based effluent limitations in permits be consistent with TMDLs. See also n.7 supra (quoting the decisions challenged herein).

⁷ The decisions under review recognize as much. See, e.g., "Decision Rationale, Total Maximum Daily Loads, Anacostia River Watershed, for Biochemical Oxygen Demand" (EPA December 2001), at 10 [JA623] ("NPDES [national pollutant discharge elimination system] permit effluent controls for the CSO [combined sewer overflow] system need to be consistent with the allocations contained in the TMDL"), 25 [JA638] ("[f]uture NPDES permits require BOD reductions consistent with the waste load allocations"); "Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River, District Of Columbia, Total Suspended Solids" (EPA March 1, 2002), at 43 [JA722] ("[a]ny DC NPDES permit reissued to discharge into the District's portion of the Anacostia River must be consistent with the WLAs set forth in this TMDL").

(3) The Arguments Advanced Against § 509(b)(1) Review Are Unpersuasive.

In an effort to escape the clear statutory language establishing that TMDLs are limitations under § 301, EPA argues: "Permits must include effluent limitations necessary to protect water quality standards even in the absence of TMDLs. 33 U.S.C. § 1311(b)(1)(C). A TMDL is simply one tool that permit writers use to establish such limitations." EPA Mot. 5 n.3 (emphasis added).

To the extent that EPA is attempting to argue that a TMDL not a "limitation" within the meaning of §§ 509(b)(1)(E) or 301(b)(1)(C), that argument flatly conflicts with EPA's concession in Longview, with the Act, and with EPA's own regulations. See Part I.A, supra.

EPA may instead be arguing that a TMDL is indeed one kind of water-quality-based limitation, but that there are other kinds as well—for example, water-quality-based limitations set on a case-by-case basis in discharge permits. That argument, even if true, is statutorily irrelevant. That a TMDL may not be the only kind of water-quality-based limitation fails to refute the clear conclusion—compelled by the plain language of the Act—that it is at least one kind of such limitation. Section 301(b)(1)(C) expressly encompasses, not just some water-quality-based limitations that are more stringent than required by § 301(b)(1)(A) or (B), but "any" such limitations. Likewise, § 509(b)(1)(E) provides for appellate court review of EPA's action in approving or promulgating "any" effluent limitation or other limitation under § 301, not just some such limitations. See, e.g., Harrison v. PPG Industries, 446 U.S. 578, 588 (1980) (Court rejects attempt to narrow scope of appellate review section of Clean Air Act, holding that "the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, any other final action") (emphasis in original); Dept. of HUD v. Rucker, 122 S. Ct. 1230, 1233 (2002) ("the word 'any' has an expansive

meaning, that is, 'one or some indiscriminately of whatever kind') (citation and internal quotations omitted).

EPA argues for a strict construction of § 509(b)(1), because "[f]ederal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by the Constitution or statute." EPA Mot. 5. FoE has amply demonstrated that—under the plain meaning of the Act—jurisdiction exists here. Moreover, EPA appears to be advocating precisely the kind of "cramped" construction of § 509(b)(1) that has repeatedly been rejected by this Court and the Supreme Court in favor of a "practical" approach. See pp. 16-18, supra. The practical interpretation counseled by precedent risks no improper expansion of federal courts' jurisdiction: as EPA concedes, even if this Court were to conclude it lacks jurisdiction to hear FoE's claims, those claims would still be reviewable in a federal district court. EPA Mot. 8-9. Thus, the issue before the Court is not whether the federal judicial power should extend to FoE's claims, but rather which federal court should hear those claims.

Nor are the rationales advanced by the Ninth Circuit in Longview (which was decided before, and thus did not consider, the Supreme Court's ruling in PUD) any more persuasive than EPA's. The Ninth Circuit's textual analysis of the key statutory issue—whether a TMDL is a limitation under § 301(b)(1)(C)—is limited to the following two sentences:

The section 1311 reference is in the context of establishing a "Timetable for achievement of objectives." 33 U.S.C. § 1311(b). It requires achievement of the described limitations "not later than July 1, 1977." 33 U.S.C. § 1313(b)(1)(C).

Longview, 980 F.2d at 1312. Longview did not explain how these references to timing undercut § 301(b)(1)(C)'s clear statutory language encompassing "any" more stringent limitation needed to meet water quality standards—a description that clearly fits TMDLs.⁸

Absent specific textual support for its result, Longview resorted to the general doctrine of *expressio unius*:

It would be an odd use of language to say "any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 or this title" in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.

980 F.2d at 1313. This characterization begs the question whether a TMDL is an "effluent limitation or other limitation under section 1311." Because the unambiguous terms of the Act require that question to be answered in the affirmative, TMDLs are not among the class of actions that Congress intended to exclude from § 509(b)(1). Moreover, in American Iron this Court rejected the approach advocated in Longview, upholding § 509(b)(1)(E) jurisdiction over an EPA action under § 118, which is "not one of the provisions listed in § 509(b)(1)(E)." See p. 18, supra. Likewise, in PUD the Supreme Court has held that § 303 is within the scope of § 401(d), even though it is not expressly listed there. See pp. 16-17, supra.

Next, Longview shifts forward in time, devoting much of its attention to the 1977 CWA Amendments and their legislative history. Id. at 1311-12. But the statutory terms establishing jurisdiction here—the relevant language of §§ 509(b)(1)(E), 301(b)(1)(C), and 303(d)—all originated in the 1972 Act. The 1977 Amendments did not expressly amend or repeal that language, and well-established principles of statutory interpretation counsel against finding

⁸ Moreover, one of the cited provisions is the title of § 301(b), which cannot be used to trump unambiguous language in the body of the Act. See, e.g., Whitman v. American Trucking Assns., 531 U.S. 457, 483 (2001); Holland v. Williams Mtn. Coal Co., 256 F.3d 819, 822 (D.C. Cir. 2001).

amendment or repeal by implication. See, e.g., Cheney Railroad Co. v. Railroad Retirement Bd., 50 F.3d 1071, 1078 (D.C. Cir. 1995); United States v. Vonn, 122 S. Ct. 1043, 1050 (2002).⁹

Finally, Longview also cited EPA's claim that "its regulatory process treats the section 1311(b)(1)(C) limitations separately from the section 1313 limitations, despite some similarity of purposes." 980 F.2d at 1312 (emphasis added). EPA's "regulatory process," even assuming Longview accurately characterized it, cannot override the statutory language in §§ 301(b)(1)(C), 303(d), and 509(b)(1)(E).¹⁰

II. EPA'S APPROVAL OF THE DISTRICT'S BOD TMDL AND ESTABLISHMENT OF THE TSS TMDL WERE UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

A. EPA Unlawfully and Arbitrarily Approved and Established Annual and Seasonal Loads.

By approving an annual BOD TMDL and establishing a seasonal TSS TMDL, EPA violated the Act and EPA's own regulations, and acted arbitrarily and capriciously.

⁹ Longview noted that the 1977 Congress inserted cross-references to § 303 into § 401 (specifically, into § 401(a)), but not into § 509(b)(1)(E). 980 F.2d at 1312. However, as demonstrated above, the 1972 version of § 509(b)(1)(E) already included § 301, and therefore also encompassed TMDLs established under § 303. Moreover, two years after Longview the Supreme Court approvingly cited 1977 legislative history stating that "[s]ection 303 is always included by reference where section 301 is listed." PUD, 511 U.S. at 713 (emphasis added) (quoting 1977 conference report).

¹⁰ The discussion in the text demonstrates that these petitions are within this Court's jurisdiction under CWA § 509(b)(1). If the Court should conclude otherwise, however, EPA itself concedes that "[p]ersons seeking to challenge EPA approval or establishment of a TMDL under Section 1313(d)(2) may bring their claims under the Administrative Procedure Act in a federal district court." EPA Mot. 8. See 5 U.S.C. § 701 through 706 (providing for judicial review of agency action); 28 U.S.C. § 1331 (federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). See also Bennett v. Spear, 520 U.S. 154, 175 (1997) (despite lack of remedy under Endangered Species Act citizen suit provision, remedy was available under the APA: "No one contends (and it would not be maintainable) that the causes of action against the Secretary set forth in the ESA's citizen suit provision are exclusive, supplanting those provided by the APA.").

(1) Annual and Seasonal Loads Are Not the "Total Maximum Daily Loads" Required by the Act.

Under Step One of Chevron, EPA acted unlawfully in approving and establishing annual and seasonal loads. The Act expressly provides for "total maximum daily loads." § 303(d)(1)(C) (emphasis added). See also A Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) ("1972 Legis. Hist."), at 306, 308, 793 (the word "daily" is also used in descriptions of § 303(d) by the Conference Report and by the report of the House Committee where § 303(d) originated).

"Daily" does not mean "seasonal" or "annual"—it 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." Webster's Third New International Dictionary (1981) (emphasis added). As illustrated by § 303(d) itself, Congress knows the difference between "daily" and other temporal terms. § 303(d)(1)(C) (providing for a "daily" load, set at a level necessary to implement applicable water quality standards "with seasonal variations") (emphasis added).

In short, under Step One of Chevron, EPA acted unlawfully in approving and establishing annual and seasonal TMDLs. See Scott v. City of Hammond, 741 F.2d 992, 996 (7th Cir. 1984) ("A TMDL establishes a maximum daily discharge of pollutants into a waterway. A TMDL must be obeyed even if a monthly allowable average could be achieved in the face of some daily discharges above the TMDL.")(emphasis added); Sierra Club v. Hankinson, 939 F. Supp. 865, 871 (N.D. Ga. 1996)(certain Georgia TMDLs "clearly do not satisfy the requirements of § 303(d) because they do not provide daily limits for priority pollutants.")(emphasis added).

In neither of the two challenged decisions did EPA offer any statutory analysis attempting to square its annual and seasonal loads with the terms of the Act. In the past, however, EPA has argued that the statute allows for loads expressed in longer-than-daily terms.

50 Fed. Reg. 1776/1 (Jan. 11, 1985)[JA16] (preamble to national TMDL regulations); 65 Fed. Reg. 43629/2-3 (July 13, 2000)[JA82](preamble to revised national rule, which has not taken effect). No statutory argument has been advanced, however, that could justify redefining the statutory word "daily" as "annual" or "seasonal."

In the July 2000 preamble (accompanying a regulation that has never taken effect, is under challenge in this Court, and under review by EPA),¹¹ the agency argued that the Act does not "define" a TMDL or "specify how a TMDL may or should be expressed," and thus is "silent" on whether a TMDL must be expressed as a daily load. 65 Fed. Reg. 43629/3 [JA82]. To the contrary, the Act expressly mandates "total maximum daily loads." § 303(d)(1)(C) (emphasis added). That such intent is expressed in § 303 itself, rather than in the Act's definition section, makes it no less binding on the agency. Wherever in the statute it appears, Congress's intent "is the law and must be given effect" under Chevron Step One. 467 U.S. at 843 n.9. EPA's argument (65 Fed. Reg. 43629/3 [JA82]) that it has "discretion" to issue an interpretation with "controlling weight" on this statutorily resolved issue must be rejected.

Nor did the Second Circuit offer any persuasive rationale for its decision (contrary to the Seventh Circuit in Scott, supra) shunting aside the statutory term "daily." Natural Resources Defense Council v. Muszynski, 268 F.3d 91, 98-99 (2d Cir. 2001). While recognizing that the Act "calls for establishment of a total maximum daily load, not an hourly, weekly, monthly, or annual load," the Second Circuit invoked the "overall structure and purpose" of the Act as a basis for concluding that "the term 'total maximum daily load' is susceptible to a broader range of

¹¹ See Amer. Farm Bur. Fed. v. Whitman, D.C. Cir. Nos. 00-1320 (and consolidated cases); 66 Fed. Reg. 53044/3 (Oct. 18, 2001) (EPA defers effective date of July 2000 regulation, stating: "EPA believes that it is important at this time to re-consider some of the choices made in the July 2000 rule, while continuing to operate the program under the 1985 TMDL regulations, as amended in 1992.").

meanings." Id. 98 (emphasis added). However, the only textual citation offered by the Second Circuit was § 303(d)(1)(C)'s language mandating establishment of TMDLs for those "pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." On its face, this provision in no way conflicts with establishment of daily loads.

To the contrary, the language expressly cross-references § 304(a)(2), which directed EPA to develop and publish by 1973 "the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives." 33 U.S.C. § 1314(a)(2) (emphasis added). Thus, the pollutant identification process cited by the Second Circuit expressly confirms the requirement that loads be "daily."

The Second Circuit also suggested that applying the term "daily" as written would be an "absurd" reading. 268 F.3d at 99. Under this Court's precedent, however, "for the EPA to avoid a literal interpretation at Chevron Step One, it must show 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). Neither the Second Circuit nor EPA have cited any evidence that "as a matter of historical fact," Congress intended the statutory term "daily" to be disregarded or to have something other than its plain meaning. To the contrary, as discussed above, the textual and legislative history evidence point in the opposite direction.

Nor have the Second Circuit or EPA demonstrated that, "as a matter of logic and statutory structure," Congress "almost surely could not have meant" the term "daily" to be given effect. First, as indicated above, the one "structur[al]" argument offered by the Second Circuit supports rather than undermines the plain meaning of the statutory text. Second, on the issue of "logic," the Second Circuit contended that "effective regulation may best occur by some other periodic

measure than a diurnal one." Muszynski, 268 F.3d at 99 (emphasis added). Apparently, the court was concerned that for some pollutants, daily loads might be stricter than necessary.¹² As discussed in the next section infra, that is not the case here. But in any event, where Congress has plainly provided for "daily" loads, courts are not free to shunt that term aside in quest of the "best" approach to effective regulation. Nor can EPA do so based on vague and conclusory assertions (see 50 Fed. Reg. 1776/1 [JA16]) concerning selection of an "appropriate" averaging period. See, e.g., Engine Mfrs., 88 F.3d at 1089 (an agency cannot "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy").

In short, the Act expressly requires that EPA identify those pollutants suitable for "daily" loads, § 304(a)(2), and that "daily" loads be established for the pollutants thus identified. § 303(d)(1)(C). EPA's § 304(a)(2) identification expressly states: "All pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. 60665/1 (Dec. 28, 1978)(emphasis added)[JA11]. The broad identification of "all" pollutants necessarily encompasses BOD and TSS.¹³ Under Chevron Step One, EPA's insistence on approving and establishing annual and seasonal loads for those pollutants violates § 303(d).

¹² See Muszynski, 268 F.3d 98 (contrasting "highly toxic" pollutants that may cause harm "almost immediately" with other pollutants like phosphorus for which "the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately").

¹³ Indeed, by the time of EPA's 1978 identification, BOD and TSS were known pollutants. See, e.g., 1972 Legis. Hist. at 788 (House Report); 1226 (testimony of EPA Administrator William Ruckelshaus); 1337 (Council on Environmental Quality report, quoted by Sen. Mondale).

(2) Annual and Seasonal Loads Unlawfully and Arbitrarily Allow Continued Violations of Water Quality Standards.

Assuming *arguendo* that the statutory term "daily" does not by itself resolve the matter, the annual and seasonal loads at issue here nonetheless violate the Act and EPA's regulations. Section 303(d)(1)(C) expressly provides that loads "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." (Emphasis added.)¹⁴ EPA's regulations provide that

TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS 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) (emphasis added).

Indeed, although EPA has asserted that the statutory term "daily" is not controlling, it has conceded that a longer-than-daily averaging period can be used only if "compliance with applicable WQS is assured." 50 Fed. Reg. 1776 (Jan. 11, 1985) [JA16]. Likewise, EPA's 2000 TMDL regulation indicated that it was "retaining" language from the 1985 rule on the appropriate time expression for a TMDL, and that EPA interprets that 1985 language "to permit TMDLs to be expressed in terms other than daily loads as long as compliance with the applicable water quality standards is assured." 65 Fed. Reg. 43629/2-3 (emphasis added)[JA82].

¹⁴ The reference to a "margin of safety" underscores Congress's intent that EPA adopt a precautionary approach fully adequate to protect public health and the environment. See, e.g., Hercules Inc. v. EPA, 598 F.2d 91, 104 (D.C. Cir. 1978); Ethyl Corp. v. EPA, 541 F.2d 1, 14-15 (D.C. Cir. 1976).

Indeed, EPA "acknowledge[d] the concern that use of other than daily loads could allow for excessive loadings over short time periods that, when averaged with periods of no loading, might satisfy the wasteload and load allocations, but would cause the water quality standard to be exceeded." Id. 43629/3 (emphasis added)[JA82]. Thus, any TMDL for a longer-than-daily period must be accompanied by an "explanation ... as to the reasons why it is appropriate to express the TMDL in terms other than a daily load," addressing *inter alia* "the difference between acute short-term impacts during storm flows and long-term effects of the pollutants in the system over time." Id. 43629-30 (emphasis added)[JA82-83]. "If a TMDL for a particular pollutant contained an expression other than a daily load, and the situation indicated that expressing the TMDL as a daily load is a necessity to attain and maintain water quality standards, EPA would disapprove the TMDL as insufficient to attain and maintain water quality standards." Id. 43630/1 (emphasis added)[JA83].

Here, TMDLs expressed as annual and seasonal loads allow continued violation of water quality standards, thus contravening CWA § 303(d) and 33 C.F.R. § 130.7(c)(1). This conclusion is compelled by the nature of the water quality standards at issue, and the nature of the discharges.

Nature of the Water Quality Standards. Neither of the water standards at issue is phrased in annual or seasonal terms. To the contrary, the BOD TMDL addresses "daily" and "one hour" dissolved oxygen criteria. 21 DCMR 1104.6 Table 1 [JA58]. BOD peak discharges that violate these daily and hourly standards can nonetheless meet an annual load, by virtue of being averaged together with smaller discharges occurring at other times.

Moreover, the dissolved oxygen sags allowed by an annual load violate not only the letter of § 1104.6, but also one of its key purposes: to protect aquatic life from fish kills and other

adverse impacts. See p. 5, supra (quoting description in the BOD TMDL of fish kills caused by dissolved oxygen sags during late May and June, 1999). Fish subjected to deadly low levels of oxygen cannot be expected to hold their breath for days, weeks or even months to await the more favorable portions of an annual distribution curve.

Likewise, the water quality standard addressed by the TSS TMDL is not phrased in seasonal terms. To the contrary, that standard broadly provides that District waters "shall be free from substances attributable to point or nonpoint sources discharged in amounts that ... "[p]roduce objectionable ... turbidity" or "[p]roduce undesirable or nuisance aquatic life or result in the dominance of nuisance species." 21 DCMR § 1104.1, quoted in TSS TMDL at 6 [JA685]. No exemption is made for objectionable turbidity or undesirable or nuisance aquatic life that last a short time, such as a day. See pp. 33-37, infra (explaining how short-term turbidity interferes with the Anacostia River's designated uses, and thus violates WQS).

Nature of the Discharges. Neither of the pollutants at issue are discharged in constant, even amounts throughout the year. To the contrary, both are discharged in substantially higher amounts during and after periodic rainfall events. As to BOD, the TMDL observes:

There are no continuous permitted point source loads that contribute to the dissolved oxygen problem. The problem is due to a precipitation induced pollution load.

...

The worst case scenario occurs when there is a large rainfall event which carries the CSOs and storm sewers into the river. The DO decreases after the storm when the BOD has quickly used up the oxygen.

BOD TMDL at 6-7, 9 (emphasis added)[JA389-90, 392]. EPA itself recognized that "for these precipitation driven events, the event mean concentration is the limiting parameter." EPA, Decision Rationale, Total Maximum Daily Loads, Anacostia River Watershed for Biochemical Oxygen Demand (Dec. 2001) ("EPA BOD Decision Rationale") at 26 (emphasis added)[JA639].

Likewise for TSS, EPA stated that "the loads are all precipitation driven," TSS TMDL at 36 [JA715], and presented data indicating that concentrations associated with storm events are substantially higher than those at other times. TSS TMDL at 15 (non-storm TSS concentrations range from about 4 to 20mg/l, while storm concentrations range from 30 to 60 mg/l); Smith Mem. (2/1/02) at 7 [JA657](clarity "fluctuates as a result of storm-related discharges of TSS as well as day to day cycles of algal growth and decay").

The nonuniform nature of loadings during the course of a year or season is confirmed by a WASA report on the District's CSO system, which indicates that low DO levels "typically follow a significant local or upstream wet weather event," and that "[d]issolved oxygen levels of 2.0 mg/L can occur several times per summer month, with each episode lasting 1 to 2 days." District of Columbia Water and Sewer Authority, Combined Sewer System Long Term Control Plan – Draft Report (June 2001) ("WASA LTCP"), at 9-21 (emphasis added)[JA518]. According to WASA's own modeling, the annual TMDL would allow up to eight CSO overflows, sending raw sewage into the Anacostia in "short, intense, episodic events." Id. 9-23 [JA520]. However, with eight overflows (or even fewer), numerous violations of the daily dissolved oxygen standard of 5.0 mg/L will continue to occur. Id. 9-22 (Table 9-6)[JA519]. See also Smith Mem. (2/1/02) at 7 [JA657] (TSS TMDL will result in daily TSS concentrations as high as 80 mg/L, far above EPA's 15 mg/L target value).

In short, the District's water quality standards; statements by EPA, the District, and WASA; and uncontradicted evidence in the record all amply establish the inadequacy of the annual and seasonal loads to attain the water quality standards at issue here—and thus the unlawfulness of those loads under § 303(d) and 40 C.F.R. § 130.7(c)(1). Those sources also establish that the "critical conditions" which the TMDLs "shall take into account," 40 C.F.R.

§ 130.7(c)(1), encompass not just annual or seasonal concentrations—but also individual storm events.

EPA's decisions never even grapple with these fundamental issues, which are flagged by the various governmental documents in this record and by public comments. Certainly EPA nowhere offers any explanation—much less a reasoned explanation supported by substantial evidence—that could support a conclusion that the annual and seasonal loads assure compliance with the District's water quality standards, or that they take account of critical conditions. See Muszynski, 268 F.3d at 99 (where basis for setting annual loads "remain[ed] unclear," court remanded to EPA).

To the contrary, for the BOD TMDL the agency offers the conclusory—and internally contradictory—assertion 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 Decision Rationale at 26 (emphasis added)[JA639]. Accord, id. 28 n.18, 29. For TSS, EPA's rationale is equally flawed. See p. 34-35, infra (discussing and refuting rationale).¹⁵

¹⁵ In the TSS TMDL, EPA also suggests that, because "the loads are all precipitation driven," daily loads would not be "readily enforceable." TSS TMDL at 36 [JA715]. This conclusory and unexplained assertion falls far short of a lawful, reasoned explanation for not setting daily loads. First, because that same sentence also suggests that "growing season loads" are not "readily enforceable" either, id. (emphasis added), that sentence can offer no support for the choice of seasonal over daily loads. Second, under the Act and EPA's regulations, total maximum daily loads are to be implemented by incorporation into discharge permits. See p. 4, supra. Any claim that such an approach is inappropriate or infeasible for stormwater discharges is refuted by EPA's regulations, which provide for implementation of TMDLs via effluent limitations in stormwater discharge permits. See, e.g., 40 C.F.R. § 122.34(e)(1). Likewise, EPA's decision approving the BOD TMDL – which, like the TSS TMDL, addresses stormwater-induced pollutant loads – envisions "monitor[ing] individual pipes" to "determine the event mean concentration to document conformance to this TMDL." EPA BOD Decision Rationale at 24 (emphasis added)[JA637].

EPA's suggestion that better TMDLs may be promulgated in the future (EPA BOD Decision Rationale at 21, 28-29 [JA634, 641-42]) cannot cure the defects in these TMDLs, which violate applicable statutory and regulatory requirements and are arbitrary and capricious. See, e.g., Chlorine Chemistry Council v. EPA, 206 F.3d 1286, 1291 (D.C. Cir. 2000) (where EPA's action violated the applicable statute, "EPA cannot avoid this result by dubbing its action 'interim.' The statute applies broadly to any '[a]gency action'; whether the action is interim is irrelevant.").

The foregoing defects in the annual and seasonal TMDLs at issue here amply establish their unlawfulness. That conclusion applies with special force, given the statute's use of the term "daily." Assuming *arguendo* that EPA has discretion to diverge from the plain meaning of that term in some circumstances, it was not "reasonable" within the meaning of Chevron for EPA to do so here, where the annual and seasonal loads violate other statutory language (specifically, § 303(d)(1)(C)'s mandate for setting of TMDLs at a level necessary to implement water quality standards with a margin of safety); run counter to the record; and are unaccompanied by a reasoned explanation. See, e.g., Rettig, 744 F.2d at 151 (under *Chevron* Step Two, "a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether the agency considered the matter in a detailed and reasoned fashion.") (citation and internal quotations omitted); Natural Resources Defense Council v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting under Step Two an agency interpretation that "diverges from any realistic meaning of the statute") (citation and internal quotations omitted).

B. EPA Unlawfully and Arbitrarily Established a TSS TMDL That Allows Turbidity and Algal Blooms to Continue Impairing Recreational and Aesthetic Uses, Thus Violating Water Quality Standards.

The water quality standard addressed by the TSS TMDL is 21 DCMR 1104.1, which provides that the District's waters "shall be free" from substances attributable to point or nonpoint sources that *inter alia* "[p]roduce objectionable ... turbidity," or "[p]roduce undesirable or nuisance aquatic life or result in the dominance of nuisance aquatic species." [JA57]. The TSS TMDL unlawfully and arbitrarily fails to provide for attainment of this standard. Specifically, the TMDL only addresses TSS's impact on propagation of aquatic vegetation, thus allowing TSS to continue causing turbidity and undesirable or nuisance aquatic life that interfere with recreational and aesthetic uses.

Water quality standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." § 303(c)(2)(A). Accord, 40 C.F.R. § 130.2(d). Indeed, the Supreme Court has observed that "the language of § 303 is most naturally read to require that a project be consistent with both components, namely the designated use and the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards." PUD, 511 U.S. at 714-15.

The District's water quality standards designate the Anacostia River for several uses, including *inter alia* Class A ("Primary contact recreation"), Class B ("Secondary Contact Recreation"), and Class C ("Protection and propagation of fish, shellfish and wildlife"). 21 DCMR §§ 1101.1 and 1101.2 [JA51-52]. Thus, under § 303(c)(2)(A) and 40 C.F.R. § 130.2(d), the water quality criteria in 21 DCMR 1104.1—including the bans on objectionable turbidity and undesirable or nuisance aquatic life—are "based upon" all of these uses, not upon some subset of

them. Indeed, the District's standards expressly provide that "[f]or the waters of the District with multiple designated uses, the most stringent standards or criteria shall govern." Id. § 1104.2 (emphasis added)[JA57].

Nonetheless, EPA has expressly excluded the Class A and B uses from the TSS TMDL, indicating that "[t]his TMDL is designed specifically to protect designated use C, protection and propagation of fish, shellfish, and wildlife, through the protection of SAV [submerged aquatic vegetation]." TSS TMDL at 6 (emphasis added)[JA685]. This exclusion is unlawful. Because the Class A and B uses are also designated uses of the Anacostia, turbidity that interferes with recreational and aesthetic uses of the River is just as "objectionable" (21 DMCR § 1104.1(c)) as turbidity that shades out underwater grasses and interferes with their growth. Likewise, algal blooms that interfere with recreation and aesthetics constitute "undesirable or nuisance aquatic life" (21 DMCR § 1104.1(e)) just as much as algal blooms that shade underwater grasses. Thus, a TMDL that fails to protect recreational and aesthetic uses has not been "established at a level necessary to implement the applicable water quality standards," § 303(d)(1)(C), nor "at levels necessary to attain and maintain the applicable narrative and numerical WQS." 40 C.F.R. § 130.7(c)(1).

EPA conceded that "turbid water interferes with recreational use and aesthetic enjoyment of water." EPA TSS Decision Rationale at 6 [JA668]. However, the record establishes the inability of the TMDL to correct that interference.

First, the seasonal averaging time is inadequate. Data presented by EPA in the TMDL, corroborated by comments from a water quality expert and eyewitness observation by a frequent user of the River, document that TSS concentrations do not remain constant over the course of a season, but rather fluctuate extensively over short-term periods such as days or even minutes.

See p. 30, supra (quoting TMDL); Smith Mem. (2/1/02) at 7 [JA657]; Connolly Dec. at 7-8 ¶ 15b [Supp.JA23-24]. Moreover, declarations from staffers of two Anacostia River conservation organizations, active both in using the River and in observing others' use, attested that recreational and aesthetic use is impaired on any occasion when a user encounters turbid water, regardless of whether water is less turbid on other days. Connolly Dec. (2/1/02) at 6 ¶ 15 [Supp. JA22]; Whitehead Dec. (2/1/02) at 2 ¶ 9 [Supp.JA27]. Simply stated, a recreationist who encounters water with the murky appearance depicted in the photograph on p. 7, supra, will experience impairment of use—even if a seasonal average turbidity limit is met.

Second, the TMDL's target value was insufficient to protect the Class A use. EPA used an endpoint of 15 mg/L, TSS TMDL at 10 [JA689], far in excess of the 5 to 7 mg/L derived by a water quality expert from published scientific studies. Smith Mem. (2/1/02) at 6-7 [JA656-57].

EPA never addressed – much less refuted – this evidence. Instead, it indicated that it "believes recreational pursuits such as boating and fishing, use designation B, will be adequately protected by suspended solids criteria developed for protection of fish and other aquatic life." EPA TSS Decision Rationale at 6 (emphasis added)[JA668]. On its face, however, this justification only addresses the Class B use, and thus does not even attempt to argue that the TMDL will protect the Class A use, which includes swimming as well as forms of boating (such as kayaking) where the risk of ingesting water is significant. See p. 6, supra. Even as to the Class B use, the mere assertion of a "belief" does not constitute a reasoned explanation, much less one supported by substantial evidence – and indeed, as discussed above, EPA's belief "runs counter" to the evidence in the record,¹⁶ which shows the inadequacy of the TMDL (especially its seasonal averaging time) to protect the Class B use.

¹⁶ See MVMA, 463 U.S. at 43.

The only citation EPA offered for its belief that the Class B use will be protected was a 1986 guidance document asserting that Class B uses "such as boating and fishing will be adequately protected by suspended solids criteria developed for protection of fish and other aquatic life." See Gold Book (1986)[JA4], cited in EPA TSS Decision Rationale at 6 [JA668]. This guidance document does not constitute law,¹⁷ and the cited sentence is couched in general, conclusory language that does not speak to the specific circumstances of the Anacostia TMDLs, is unsupported by citation to any evidence, and does not even purport to address the Class A use.

Equally unpersuasive is EPA's assertion that it "does not have turbidity or solids ... standards specifically for protection of recreational uses." TSS TMDL 7 [JA686]. TMDLs must be set "at levels necessary to attain and maintain the applicable narrative and numerical WQS." 40 C.F.R. § 130.7(c)(1) (emphasis added). Implementing narrative standards through TMDLs inherently involves transforming narrative language (here, "objectionable ...turbidity" and "undesirable or nuisance aquatic life") into numerical terms. Indeed, with respect to the Class C use, EPA implemented the narrative standards through a numerical target, designed to ensure that aquatic plants will receive sufficient light to support photosynthesis. TSS TMDL at 8 [JA687]. There is no reason why the agency cannot derive such a target to protect the recreational and aesthetic uses. Indeed, comments cited scientific papers offering precedent for recreationally based targets, Smith Mem. (2/1/02) at 6-7 [JA656-57], and EPA itself has approved TMDLs based on such targets. See, e.g., Muszynski, 268 F.3d at 100.

EPA cites a 1986 guidance document contending that aesthetic concepts "may vary within the minds of individuals encountering the waterway," and that "a rationale for the qualities cannot be developed with quantifying definitions." TSS TMDL at 6-7 [JA685-86]

¹⁷ See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

(quoting 1986 Gold Book). However, far from suggesting that EPA can simply throw up its hands and refuse to protect aesthetic uses, the document indicates that "decisions concerning such quality factors can portray the best in the public interest." *Id.* 7[JA686]. Even if the Gold Book is correct in claiming that the "rationale" for people's aesthetic preferences cannot readily be quantified, those preferences themselves can be. *See, e.g., Muszynski*, 268 F.3d at 100 (EPA-approved TMDL was based on numerical criteria established through "user surveys . . . in which citizens are asked to best describe the physical condition of the lake with respect to algal levels and the recreational suitability of the lake at the time of sampling") (internal quotations omitted).

Protection of recreational and aesthetic uses is at the heart of the Act, § 101(a)(2) (establishing a national goal of achieving "water quality which . . . provides for recreation in and on the water"), and is required by § 303(d) and 40 C.F.R. § 130.7. EPA has acted unlawfully, and arbitrarily and capriciously, by establishing a TMDL that does not purport to, and does not, protect those uses.

C. EPA Unlawfully and Arbitrarily Approved and Established TMDLs that Contain No TMDLs For Nutrients, and Thus Allow Continued Violation of Applicable Water Quality Standards.

EPA unlawfully and arbitrarily approved and established TMDLs for BOD and TSS that contain no TMDLs for nutrients (such as phosphorus and nitrogen). First, § 303(d)(1)(C) expressly provides that TMDLs "shall" be established "for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation" – not for some subset of them. Pursuant to the referenced provision (Clean Water Act § 304(a)(2), 33 U.S.C. § 1314(a)(2)), EPA has determined that "[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. 60665/1

(Dec. 28, 1978)(emphasis added)[JA11]. EPA does not dispute that nutrients are pollutants suitable for TMDLs.¹⁸

Second, § 303(d)(1)(C) further provides that TMDLs "shall be established at a level necessary to implement the applicable water quality standards with an adequate margin of safety." (Emphasis added.) The record – including EPA's own statements – confirms that nutrients contribute to violations of the water quality standards addressed by these TMDLs.

With respect to the dissolved oxygen water quality standard addressed by the BOD TMDL, EPA notified the District that "the BOD reduction, and attainment of the DO [dissolved oxygen] criterion, cannot be met unless nutrients are reduced." Letter from Thomas Henry to James Collier [JA109]. For its part, the District agreed that "[e]xcessive algal growth caused by over enrichment with nitrogen and/or phosphorus contribute to dissolved oxygen violations through the daily photosynthesis cycle and through the decay of dead algal cells." BOD TMDL at 4 [JA387] (emphasis added).

Indeed, the loads set forth in the BOD TMDL – which are presented as a means of complying with the dissolved oxygen standard – include loads for both nitrogen and phosphorus. BOD TMDL at 7-9, 11, 13 [JA390-92, 394, 396]. But while characterizing the BOD figures as "allowable BOD loads," the District claimed that the nitrogen and phosphorus figures are mere "projected reductions." Id. 11 [JA394]. In short, the District relied on both BOD reductions and nitrogen and phosphorus reductions in order to meet dissolved oxygen standards – but refused to treat the latter as TMDLs. It is this approach that EPA unlawfully and arbitrarily approved.

¹⁸ By the time of EPA's 1978 identification, nutrients – including phosphorus and nitrogen – were known pollutants. See, e.g., 1972 Legis Hist. at 245 (Cong. Harsha), 435 (Cong. VanderJagt), 493 (Cong. Vanik),

With respect to the turbidity standard addressed by the TSS TMDL, EPA "agrees that nutrients need to be addressed in order to protect the aquatic life use." EPA Response to Comments, TSS TMDL at 2[JA744]. However, as in the BOD TMDL, no TMDLs for nutrients were set.

Aside from the express governmental statements on this issue, public comments submitted on both TMDLs – including memoranda by a water quality expert – explained that nutrient reductions are necessary in order to meet the dissolved oxygen and turbidity standards, and that nutrient TMDLs were therefore required.¹⁹ EPA offered no reasoned basis for rejecting these comments.

The rationales offered by EPA for its approach fail to meet minimum standards of reasoned agency decisionmaking. First, the TSS TMDL erroneously asserted that "the impairment of the Anacostia River for nutrients was previously addressed by the DC BOD TMDL." TSS TMDL at 10 [JA689]. The record refutes this assertion: while the BOD TMDL set "allowable BOD loads," it offered only "projected reductions" for nitrogen and phosphorus. BOD TMDL at 11 (emphasis added) [JA394].

Second, EPA argued that nutrients TMDLs need not be set until the District has expressly identified nutrients, in the District's "Section 303(d) list," as pollutants impairing the Anacostia River. EPA BOD Decision Rationale at 19 [JA632]. See also BOD TMDL at 13, 17 [JA396, 400]. The phrase "Section 303(d) List" alludes to EPA's regulations, which provide for periodic state submission of lists of waters identified pursuant to § 303(d)(1)(A). 40 C.F.R. § 130.7(b). Although § 303(d)(1)(A) itself speaks only of identifying "waters," the regulations also require

¹⁹ Mem. from Jack Smith, Ph. D. (10/16/00), at 2-4 [JA349-51]; Mem. from Howard Fox (4/17/01), at 2-3 [JA375-76]; Mem. from Howard Fox (2/4/02), at 4 [JA649]; Mem. from Jack Smith, Ph. D. (2/1/02), at 10 [JA660].

the state to identify both waters (§ 130.7(b)(1) and (2)) and "the pollutants causing or expected to cause violations of the applicable water quality standards." § 130.7(b)(4) (emphasis added). The regulation then provides that "TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section." § 130.7(c)(1)(ii). These regulatory provisions concerning identification of "pollutants" in the Section 303(d) List cannot trump the statutory requirement that TMDLs encompass those pollutants identified by EPA pursuant to § 304(a)(2), and that they be set at a level necessary to implement the applicable water quality standards with a margin of safety. § 301(b)(1)(C). Nor does the regulation purport to do so. While it expressly requires TMDLs for pollutants identified on the Section 303(d) List, the regulation does not state that TMDL are required only for such pollutants.

Third, EPA and the District expressed a preference to address nutrients through non-TMDL programs, such as the voluntary Chesapeake Bay Program. TSS TMDL at 10 [JA689]; BOD TMDL at 14 [JA397]. But the Act requires that TMDLs be set for nutrients, see pp. 37-39, supra, and EPA lacks authority to shunt that mandate aside simply because it might prefer another approach. See, e.g., Engine Mfrs. Assn. v. USEPA, 88 F.3d at 1089 (agency cannot "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy"). This is especially true where the record offers no analysis, discussion, or evidence that could support a conclusion that the voluntary programs will achieve reductions sufficient to attain the water quality standards for dissolved oxygen and turbidity. See NRDC v. Daley, 209 F.3d at 755 (rejecting agency's reliance on voluntary measures).

D. EPA Unlawfully and Arbitrarily Assigned Loads to Source Categories Rather than to Individual Point Sources.

The TSS and BOD TMDLs unlawfully allocate wasteloads to general categories of sources, e.g., “CSO” and “Stormwater & Minor Tributaries,” instead of to individual point sources as required by EPA's regulations. TSS TMDL at 35-36 [JA714-15]. Accord, BOD TMDL at 11 [JA394].

Under EPA's regulations, a TMDL is “[t]he sum of the individual WLAs [wasteload allocations] for point sources and the LAs [load allocations] for nonpoint sources and natural background.” 40 C.F.R. § 130.2(i) (emphasis added). A 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.” 40 C.F.R. § 130.2(h). Under the Act, each stormwater outfall is a "point source" – i.e., a "pipe," "conduit," or other "discernible, confined and discrete conveyance." CWA § 502(14).

Thus, 40 C.F.R. § 130.2(h) and (i) require that the BOD and TSS TMDLs assign a specific pollutant load to each such outfall. By instead grouping them into broad categories, EPA acted unlawfully and arbitrarily. See, e.g., IMS v. Alvarez 129 F.3d 618, 621 (D.C. Cir. 1997)(an agency’s failure to comply with its regulations “is fatal to the deviant action”) (internal quotations and citations omitted); Ortiz v. Secretary of Defense, 41 F.3d 738, 741 (D.C. Cir. 1994); Mine Reclamation Corp. v. Federal Energy Regulatory Comm’n, 30 F.3d 1519, 1524 (D.C. Cir. 1994).

In addition to unlawfully violating its regulations, EPA arbitrarily failed to offer a reasoned explanation of its approach, or a reasoned response to comments objecting to it. The agency did not deny that its regulations require wasteloads to be allocated to individual point

sources, but claimed that it grouped them into categories due to data problems.²⁰ This argument ignores the affirmative duty placed on EPA and the District by 40 C.F.R. § 130.2(h) and (i) to assign wasteloads to individual point sources. In sharp contrast to the provision of EPA's regulations expressly allowing the assignment of "gross allotments" to nonpoint sources (e.g., diffuse runoff) "depending on the availability of data and appropriate techniques for predicting the loading," 40 C.F.R. § 130.2(g) (emphasis added), the regulation governing point sources allows no such data-availability exception.

Moreover, EPA concedes that allocation of the TMDL to individual outfalls can be done at the permitting stage. See, e.g., EPA BOD Decision Rationale at 24 (for "permitting purposes," "individual pipes" can be monitored "to document conformance to this TMDL") (emphasis added) [JA637]. Thus, the agency's argument reflects, not a genuine data availability problem, but rather a decision to postpone individual-source allocation until the permitting phase. That decision violates § 130.2(h) and (i), which require allocation to individual sources at the TMDL phase.

In any event, EPA does have information about discharges from individual point sources. For example, the CSO Long Term Control Plan ("LTCP") contains detailed, outfall-specific monitoring data on BOD and suspended solids levels in discharges from the largest CSO outfalls on the Anacostia River. WASA LTCP at 4-3 to 4-9[JA492-98]. The LTCP further provides outfall-specific data, based on modeling, on the volume of discharges from each CSO outfall on the Anacostia River, both today and under various control scenarios. Id. at 6-2 to 6-3,

²⁰ Specifically, EPA claimed that "[d]ata from NPS[nonpoint sources] and PS [point source] storm water were combined in the data collection and modeling phase of the TMDL," TSS TMDL at 32 [JA711], and that "[t]he permitted point source CSO loads are not entered into the model individually but are added together for each model segment." EPA BOD Decision Rationale at 22 [JA635].

9-16[JA500-01, 513]. EPA could have relied on this and other available data to assign wasteloads to individual point sources. See American Iron and Steel, 115 F.3d at 992 (despite limited data, EPA must comply with the Clean Water Act requirement that it specify numeric limits on pollutants in the Great Lakes).

Finally, EPA argues that its failure to allocate wasteloads to individual point sources lacks “practical significance.” EPA Response to Comments on TSS TMDL at 2 [JA744]. To the contrary, that failure means that source-specific allocation decisions will be postponed and made on an *ad hoc*, source-by-source basis in individual permit proceedings, rather than comprehensively and up-front in the TMDL process. Setting limits in advance to guide permit writers, rather than punting allocation decisions to them, is a key benefit of the approach expressly mandated by EPA's regulations. EPA's obligation in this proceeding is to follow those regulations, not shunt them aside based on policy arguments.

E. EPA Unlawfully and Arbitrarily Approved a BOD TMDL that Underestimates the Impact of Upstream Loads, and Thus Allows Continued Violation of Applicable Water Quality Standards.

EPA's approval of the District's BOD TMDL is unlawful and arbitrary and capricious because the BOD load assigned to the District fails to properly account for upstream loads from the Maryland portion of the Anacostia River, and thus is too large to implement the District's dissolved oxygen standards. Specifically, the assumption used in the TMDL was that Maryland need reduce its BOD loads only to a level complying with the District's dissolved oxygen standard at the Maryland-DC boundary. See BOD TMDL at 7[JA390]. That assumption is unsupported by – indeed, refuted by – the record, and lacks a reasoned explanation. See pp. 10-11, supra (citing cases).

As a water quality expert pointed out in public comments, even if Maryland reduces its loads sufficiently to meet the District's water quality standards at the Maryland-DC boundary, those reduced Maryland loads will nonetheless flow downstream into the District and cause dissolved oxygen impacts there. Specifically, because BOD is exerted over a period as long as 20 days, "BOD remaining in the Anacostia at the Maryland-DC boundary will be carried with the flow of the river downstream and will be exerted in the DC portion of the river, even while a dissolved oxygen standard may be satisfied at the Maryland-DC boundary." Smith Mem. (4/17/01) at 2-3 (emphasis added)[JA379-80]. "[T]he remaining unexerted BOD (and phosphorus) load from Maryland will be large enough to cause dissolved oxygen violations downstream in the DC portion of the Anacostia." *Id.* at 2 (emphasis added)[JA379].

EPA's approval of the District's BOD TMDL was unlawful and arbitrary and capricious because the TMDL was not set at a level sufficient to implement the applicable water quality standards as required by Clean Water Act § 303(d)(1)(A) and 40 C.F.R. § 130.7(c)(1). In addition, EPA's approval was arbitrary and capricious because the boundary assumption used in the TMDL is unsupported – on the contrary, refuted – by the record, and is unaccompanied by any reasoned explanation. Indeed, EPA did not even offer any response to the above-cited comments. 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.").

CONCLUSION

For the foregoing reasons, Friends of the Earth respectfully requests that the Court hold that EPA acted unlawfully and arbitrarily in the respects shown above, and remand the challenged decisions to EPA for reconsideration in light of the Court's decision. Because the

statutory deadline by which EPA and the District were required to establish TMDLs for the Anacostia River passed more than twenty years ago, see Kingman Park Civic Assn. v. EPA, 84 F. Supp. 2d at 3, FoE requests that the Court direct EPA to conclude remand proceedings within six months of the Court's decision. See Environmental Defense Fund v. EPA, 852 F.2d 1316, 1331 (D.C. Cir. 1988) ("EPA's history of delay and missed deadlines with respect to its statutory obligations to complete the § 8002 mining waste studies ... indicates that a court-imposed schedule is necessary here."), Sierra Club v. EPA, 719 F.3d 436, 469-70 (D.C. Cir. 1983) (setting six-month remand deadline); Natural Resources Defense Council v. EPA, 22 F.3d 1125, 1137 (D.C. Cir. 1994) (setting five-month remand deadline).

To avoid the adverse environmental implications that would result from vacating the TMDLs (leaving the Anacostia River with no TMDLs for BOD or TSS), Friends of the Earth requests that the Court leave the TMDLs in place while EPA reconsiders them on remand. See Davis County Solid Waste Management v. US EPA, 108 F.3d 1454, 1460 (D.C. Cir. 1997); Environmental Defense Fund v. Administrator, 898 F.2d 183, 190 (D.C. Cir. 1990).

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CERTIFICATE OF SERVICE AND WORD COUNT

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I hereby further certify that the foregoing brief contains 13,627 words, which is less than the applicable 14,000 word limit set by Fed. R. App. P. 32(a)(7)(B)(i).

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