

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

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

**SURREPLY IN SUPPORT OF FRIENDS OF THE EARTH'S
MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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Plaintiff Friends of the Earth ("FoE") files the present surreply in support of its motion for summary judgment, and in opposition to the cross-motions for summary judgment by defendants United States Environmental Protection Agency, *et al.* (collectively "EPA"), and District of Columbia Water and Sewer Authority ("WASA").

This surreply focuses on a few new arguments raised by EPA's August 20 reply. As to other arguments raised by EPA's August 20 reply, as well as arguments raised by WASA's August 27 reply, FoE respectfully refers the Court to FoE's May 20 and July 30 memoranda.

I. THE RECORD DOES NOT SUPPORT EPA'S ATTORNEYS' BELATED ASSERTION THAT THE BOD TMDLS PROPERLY ALLOW LARGE EPISODIC DISCHARGES.

Comments expressed concern that annual TMDLs for biochemical oxygen demand ("BOD") would allow large short-term peak discharges. FoE 7/30/04 Mem. 17 n.6 (citing comments). Nowhere in the TMDLs and approval documents was there an assertion that such large discharges would meet water quality standards with a margin of safety, and *a fortiori* no reasoned analysis in support of such an assertion. Likewise, EPA's opening memorandum in this Court cited to no such assertion or analysis in the administrative record.

Now EPA acknowledges that the TMDLs allow large episodic discharges, but claims that the TMDLs are nonetheless valid. According to EPA's August 20 reply memorandum, "Plaintiff in [sic] incorrect in arguing that EPA has no record support for its conclusion that large episodic discharges of BOD pollutants can occur without violating water quality standards *See, e.g.*, Plaintiff's July 30, 2004 Reply Mem., at 22. The modeling done with the TAM/WASP model shows just that." EPA 8/20/04 Mem. 5 n.1.

This argument is unavailing, for at least two reasons. First, the TMDLs' annual BOD allocation of 285,713 pounds, BOD TMDLs at 11[JA394], would not prevent discharge of

10,000, 20,000, 50,000 or even 100,000 or more pounds of BOD on a given day. EPA has cited to no assertion, analysis, or corroboration in the record documenting that such huge discharges can occur without violating water quality standards. While EPA claims its model supports that conclusion, the agency provides no record citation in support of such a claim.¹ Nor could it. Far from indicating that the model is based on annual loads that would allow large short-term peaks, the record shows that the model relied on daily loads. FoE 7/30/04 Mem. 21. *Accord*, Smith 11/6/01 Mem. at 2 [JA604] (undisputed expert memorandum states that the TAM/WASP model assumed a "daily maximum load").

Second, even if it could be concluded that large episodic discharges "can occur without violating water quality standards," EPA 8/20/04 Mem. 5 n.1 (emphasis added), that would not suffice. The Clean Water Act requires TMDLs to be set "at a level necessary to implement the applicable water quality standards" with "a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). Under this precautionary standard, *see* FoE 5/20/04 Mem. 18 n.10, it is not enough for EPA's attorneys to engage in uncorroborated speculation that, if multiple factors align just right, a large discharge might not violate water quality standards.² The annual BOD TMDLs do not restrict peak loads to any specific set of conditions (such as specific water temperatures, sunlight, or flow). To the contrary, as long as the

¹ In the text accompanying the above-cited footnote, EPA's attorneys cite pp. 17-20 of their June 2004 memorandum, but those pages contain no such citation either.

² *See* EPA 8/20/04 Mem. 4 (offering the generic assertion that BOD affects dissolved oxygen levels in "an indirect and contingent way" that depends "on a large number of variables, such as water temperature, amount of sunlight, and the volume and speed of the flow of water in the river").

annual maximum is not exceeded, large peak discharges would not violate the TMDLs -- even if they occur under conditions most likely to violate water quality standards.

II. EPA'S ATTORNEYS' ARGUMENTS CONCERNING SEDIMENT ARE UNAVAILING.

In EPA's June memorandum, the agency's attorneys claimed that the BOD TMDL would meet water quality standards by controlling resuspension of BOD from sediment during storms. EPA 6/17/04 Mem. 16-17. As FoE pointed out, however, this contention was refuted by statements in the TMDL and the TAM/WASP model document. FoE 7/30/04 Mem. 18, 20.

EPA now complains that FoE reads the TAM/WASP quotations "too broadly." EPA 8/20/04 Mem. 5. To the contrary, the TAM/WASP model document states categorically that the model "does not account for resuspension." FoE 7/30/04 Mem. 20 (quoting model document) (emphasis added). EPA's August 20 memorandum offers no citation from the model document or anywhere else in the administrative record supporting the resuspension argument made in the agency's June 17 memorandum.³ Indeed, the agency's August 20 memorandum no longer even

³ EPA argues that the TAM/WASP model "account[s] for" and "addresses" the impacts of BOD that has accumulated in river sediments. EPA 8/20/04 Mem. 6-7. These vague assertions do not track the argument made in EPA's June 17 memorandum, which was that the BOD TMDLs would meet water quality standards by controlling resuspension of BOD during storms. EPA 6/17/04 Mem. 16-17. Nor does EPA explain how these assertions otherwise support the validity of the TMDLs. Certainly they do not state or suggest that large episodic discharges of BOD during storms will meet water quality standards for dissolved oxygen with a margin of safety. To the contrary, the WASA document cited by EPA indicates: "Low dissolved oxygen levels in the Anacostia typically occur in the summer months of June to August and typically follow a significant local or upstream wet weather event. The low dissolved oxygen is driven by the naturally low saturation level of oxygen in the water due to the high water temperature and the influx of pollutant loads from wet weather events." Draft WASA Long Term Control Plan[JA518] (emphasis added), *cited in* EPA 8/20/04 Mem. 7. *See also* FoE 7/30/04 Mem. 16 (citing statements by EPA and the District).

claims that the argument is correct. Accordingly, the agency's June 17 resuspension argument must be rejected.

III. THE 77% REDUCTION ENVISIONED BY THE TSS TMDLS STILL ALLOWS 23% OF CURRENT LOADS TO BE DISCHARGED DURING ONE OR A FEW PEAK STORM EVENTS.

FoE's opening memorandum noted that EPA's TMDLs for total suspended solids ("TSS") are seasonal loads, and thus allow large short-term TSS loadings. FoE 5/20/04 Mem. 7-8, 20-22. EPA has recognized that TSS causes turbidity, which in turn interferes with recreational use of water. *See* EPA 6/17/04 Mem. 20, 23, 24. Moreover, FoE cited declarations from users of the Anacostia River, documenting the recreational and aesthetic impairment resulting from turbid water. *See* FoE 5/20/04 Mem. 28.

EPA's June 17 memorandum did not dispute this evidence. To the contrary, EPA's attorneys conceded that under the seasonal TSS TMDLs, "turbid water might reduce the enjoyment of the river for some people on some days." EPA 6/17/04 Mem. 25-26.

Instead of disputing that impairment, EPA's June 17 memorandum argued that the impairment does not matter. *Id.* FoE showed that argument to be contrary to the administrative record, the District's water quality standards, EPA's regulations and other prior EPA positions. FoE 7/30/04 Mem. 27-31. EPA's August 20 memorandum does not defend the validity of the agency's June 17 argument.⁴

Instead, EPA's lawyers claim to all of a sudden have discovered a "fundamental" flaw in the declarations cited by FoE. *See* EPA 8/20/04 Mem. 10. EPA's lawyers do not dispute the correctness of any of the averments in those declarations. Instead, they argue that the

⁴ EPA unpersuasively claims the argument is not a post hoc rationale, EPA 8/20/04 Mem. at 7 n.2, but does not claim that it is consistent with the record or applicable law.

declarations address current levels of TSS discharges, rather than the levels that will prevail after the 77% reduction envisioned by EPA's TMDLs. The argument is unavailing.

The 77% reduction at issue is a reduction in seasonal TSS levels. TSS TMDLs at 33, 35[JA712, 714]. Thus, the TMDLs do not prevent the remaining 23% -- nearly one-fourth of current loads -- from being discharged during one or a few large storms. EPA's lawyers cite no analysis or documentation in the administrative record showing that such huge peak loads would prevent turbidity of the kind documented in the undisputed record declarations.

IV. EPA'S REGULATIONS REQUIRE A WASTELOAD ALLOCATION FOR EACH SOURCE, NOT FOR EACH PERMIT.

In their latest attempt to defend the allocation of TMDLs by broad category instead of by source, EPA's attorneys now argue that, because the combined sewer overflow system and the separate storm-sewer system are each covered by "a single NPDES permit," it was appropriate for the TMDLs to allot each system a single wasteload allocation. EPA 8/20/04 Mem. 12, 13 n.5. Once again, the argument is unavailing.

EPA's regulations provide for allocation not by permit, but by source. FoE 5/20/04 Mem. 35 (citing regulations). EPA concedes that each of the permits at issue encompasses many sources (*i.e.*, many outfalls). *See* EPA 8/20/04 Mem. 12. Under EPA's regulations, each of those outfalls requires its own wasteload allocation. FoE 5/20/04 Mem. 35; FoE 7/30/04 Mem. 33-34.

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Respectfully submitted,

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