

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.

Petition for Review of Final Action
of the United States Environmental Protection Agency

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

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GLOSSARY

BOD	biochemical oxygen demand
Br	brief
CSO	combined sewer overflow
CWA	Clean Water Act
DCMR	District of Columbia Municipal Regulations
EPA	Environmental Protection Agency
FoE	Friends of the Earth
LTCP	Long Term Control Plan
TAM/WASP	Tidal Anacostia Model/Water Quality Analysis Simulation Program
TMDL	total maximum daily load
TSS	total suspended solids
WASA	Water and Sewer Authority
WLAs	wasteload allocations

SUMMARY OF ARGUMENT

Jurisdiction. Clean Water Act §509(b)(1)(E) grants this Court jurisdiction to review the Administrator's action in "approving or promulgating any effluent limitation or other limitation under section 1311"—*i.e.*, §301. The Environmental Protection Agency ("EPA") does not dispute that a total maximum daily load ("TMDL") constitutes an "effluent limitation or other limitation." However, because TMDLs are established pursuant to CWA §303, EPA argues they are not limitations under §301. To the contrary, the Supreme Court has expressly held that "[s]ection 301 ... incorporates §303 by reference." *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 713 (1994).

Merits. *Annual and Seasonal loads.* The annual and seasonal loads at issue here violate §303(d)(1)(C), which requires the "total maximum daily load." (Emphasis added.)

Moreover, the challenged loads also violate §303(d)(1)(C)'s requirement that a TMDL be established "at a level necessary to implement the applicable water quality standards" with "a margin of safety." Those long-term TMDLs allow short-term loading spikes associated with storm events, producing violations both of short-term (daily and hourly) dissolved oxygen standards and of the standard prohibiting objectionable turbidity. EPA's brief offers no reason to conclude otherwise. With respect to the biochemical oxygen demand ("BOD") TMDL, the agency's lawyers advance post hoc rationales and mischaracterizations of the record. With respect to the total suspended solids ("TSS") TMDL, they focus solely on aquatic life impacts, thus ignoring the severe impact the muddiness of the Anacostia River has on recreation and aesthetics.

Recreation and Aesthetics. Recreation and aesthetics are designated uses of the Anacostia—uses that form part of the District's water quality standards. Accordingly, the TSS

TMDL's failure to protect those uses from objectionable turbidity violates the statutory requirement that a TMDL implement applicable water quality standards with a margin of safety. The agency's arguments concerning the alleged "subjectiv[ity]" of recreation and aesthetics offer no basis for carving out an exemption from this express mandate.

Nutrients. EPA does not dispute that nutrient loads are required in order to fulfill the statutory directive to implement water quality standards. Although the agency's lawyers claim nutrient loads are included in one of the TMDLs under review, that TMDL contains language indicating the contrary.

Outfalls. EPA's argument that TMDLs need not include outfall-specific loads misreads the applicable regulation, which allows a TMDL's nonpoint source component to rely on "gross allotments," but requires the point source component to set forth the sum of the "individual" point source loads, each of which addresses "one" point source.

Upstream loads. EPA's brief cites no record response to expert comments indicating that the BOD TMDL fails to adequately account for upstream loads entering the District from Maryland.

ARGUMENT

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

Section §509(b)(1)(E) grants this Court jurisdiction to review (*inter alia*) "the Administrator's action ... (E) in approving or promulgating any effluent limitation or other

limitation under section 1311"—i.e., under CWA §301. It is undisputed that each of the TMDLs at issue here constitutes an "effluent limitation or other limitation." *See* FoE Br. 14-15.¹

Thus, the issue before the Court is whether a TMDL under §303(d) constitutes an "effluent limitation or other limitation under section 1311." §509(b)(1)(E) (emphasis added). The language of §§301 (1311) and 303 require that this question be answered in the affirmative. Stated simply, a TMDL "shall be established at a level necessary to implement the applicable water quality standards," §303(d)(1)(C) (emphasis added), and thus 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.) *See* FoE Br. 15-16.

EPA's brief confirms (at 27) that "Section 1311 explicitly authorizes the establishment of limitations necessary to achieve water quality standards, thus establishing the nexus to Section 1313." (Emphasis added.) The remainder of the agency's jurisdictional discussion, however, is devoted to a convoluted—and unsuccessful—attempt to disavow that fundamental insight.

The agency's statutory arguments are unpersuasive—but as a threshold matter, they are precluded by precedent. Specifically, EPA's argument that §303 is not incorporated by reference into §301 is refuted by the Supreme Court's decision in *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 713 (1994), which held precisely the opposite: "Section 301 ... incorporates §303 by reference." That ruling was a necessary predicate to the Court's resolution

¹ EPA's brief includes a footnote apparently intended to distance the agency from its regulations, which expressly characterize a wasteload allocation—the point source component of a TMDL—as "a type of water quality-based effluent limitation." 40 C.F.R. §130.2(h) (emphasis added), *discussed in* EPA Br. 29 n.8. However, the footnote does not actually deny that a wasteload allocation is an effluent limitation, and any such denial could not overcome the plain meaning of the regulation, or of the statutory definition of "effluent limitation." *See* FoE Br. 14 (quoting CWA §502(11)). In any event, EPA does not even attempt to argue that a TMDL is not an "other limitation" within the meaning of §509(b)(1)(E).

of the issue before it—i.e., it was a holding.² Because the Supreme Court has resolved this issue, it is not subject to reopening here. *See, e.g., NRDC v. NRC*, 216 F.3d 1180, 1185 n.11 (D.C. Cir. 2000) (judicial decision interpreting statute is accorded stare decisis effect).

Attempts to distinguish *PUD*. EPA's attempts to distinguish *PUD* are unavailing.

1977 Amendments and legislative history. First, EPA suggests (at 26) that the Supreme Court's ruling rests on the 1977 legislative history. To the contrary, the Court's initial and primary citation is to the Clean Water Act—specifically, §301(b)(1)(C), 511 U.S. at 713, precisely the provision relied upon by FoE here. FoE Br. 15-16. (The legislative history is introduced with a "See also." *Id.*)

EPA also argues that, because §401 was amended in 1977 and §509 was not, importation of §303 into the former is appropriate but not into the latter. EPA Br. 26. The 1977 amendment referenced by EPA was not, however, directed to §401(d), the provision construed in the relevant portion of *PUD*, but rather to §401(a). Moreover, the nature of that amendment undermines rather than supports EPA's argument. Specifically, in 1977 Congress amended §401(a) by adding an express reference to §303,³ but pointedly refrained from adding any such reference to §401(d). The Supreme Court nonetheless held that §401(d)'s pre-existing reference to §301 incorporated §303 by reference. There can be no basis for concluding otherwise here.

Substantive regulatory provision vs. choice-of-courts provision. EPA also contrasts §401 (a "substantive regulatory provision[]") with §509 (which simply addresses "the

² That the Supreme Court may have advanced an alternative holding (EPA Br. 28 n.7) does not render its holding concerning the §301/303 linkage any less binding. *NRDC v. NRC*, 216 F.3d 1180, 1189 (D.C. Cir. 2000). In any event, even if it were dicta, the Supreme Court's statement would still govern here. *Id.*

³ *See* Pub. L. No. 95-217, §64, 91 Stat. 1599 (December 27, 1977).

appropriate court to hear a challenge"), alleging that this contrast warrants incorporation of §303 into the former but not the latter. EPA Br. 27-28. EPA fails to explain why courts should be more willing to incorporate statutory language where substantive regulatory consequences ensue, than where only a choice-of-courts issue is involved. In any event, EPA's views on the policy implications of the Supreme Court's holding are an insufficient basis for refusing to apply that holding here.

Role of EPA's interpretation. Finally, EPA contrasts *PUD*, where the agency agreed with incorporation of §303, with the present case, where the agency opposes such incorporation. EPA Br. 28. However, this Court owes no deference to EPA's interpretation of §509(b), which speaks to the courts, not the agency. *See, e.g., Fox Television Stations v. FCC*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002).

Statutory arguments. In addition to attempting to distinguish *PUD*, EPA advances arguments concerning the statutory text. Those arguments simply amount to an attempt to reargue *PUD*, and in any event are unpersuasive.

"Effluent limitations." EPA notes that §301 is entitled "Effluent limitations," "which is defined in the Clean Water Act as a restriction on discharges 'from point sources.'" EPA Br. 20 (emphasis added; citation omitted). Because §303 "applies to waters impaired by pollutants from all sources, not just point source discharges," EPA asserts that TMDLs are not "effluent limitations under section 1311." *Id.* 20-21.

Aside from its reliance on the title of §301 rather than its text,⁴ EPA's argument suffers from several flaws. First, the argument that §301 is limited to "discharges" was rejected by the

⁴ *See, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 482 (2001).

Supreme Court in *PUD*, which held that §301(b)(1)(C) is a "broad enabling provision" that "is not limited to discharges." 511 U.S. at 713 n.3 (emphasis added). Second, EPA does not dispute that a TMDL contains effluent limitations applicable to point sources. *See* FoE Br. 14; EPA Br. 29 n.8. That a TMDL also contains a non-point-source component does not erase those effluent limitations, or otherwise place them outside the scope of the phrase "effluent limitation" in §509(b)(1)(E). Finally, EPA's exclusive focus on effluent limitations ignores §509(b)(1)(E)'s broad reference to "any effluent limitation or other limitation under section 1311 [301]." (Emphasis added.) EPA does not dispute that a TMDL is an "other limitation." *See* FoE Br. 14-15.

Water quality standards. EPA argues that TMDLs are "similar" to water quality standards, which "directly influence the calculation of effluent limitations," yet (according to EPA) are "reviewed in the district courts, not in the courts of appeals." EPA Br. 21 n.4. The argument is unavailing. Section 301(b)(1)(C) references limitations "necessary to meet water quality standards," or "required to implement" such standards. (Emphasis added.) Regardless of whether water quality standards themselves meet that description, TMDLs—as statutorily defined in §303(d)—plainly do.

Separate statutory references to §303 and 301. Citing several Clean Water Act provisions in which Congress expressly referenced both §301 and §303, EPA argues that these provisions show that "Congress viewed effluent limitations 'under section 1311' as distinct from effluent limitations or other EPA actions 'under section 1313.'" EPA Br. 21-22. This argument flies in the face of *PUD*'s holding that "Section 301 ... incorporates §303 by reference," 511 U.S. at 713, and if accepted would lead to the conclusion that even §401(d)'s reference to §301 does not incorporate §303—precisely the opposite of the conclusion reached by *PUD*. Moreover, as a

matter of statutory interpretation, Congress's decision to reference both §§301 and 303 in certain portions of the Act in no way undercuts the inexorable conclusion, compelled by §301(b)(1)(C), that a TMDL is an effluent limitation or other limitation under §301.

"Superfluous" language in §509. EPA cites language in §509 that it claims would be "superfluous" if §301 were read to encompass §303. EPA Br. 22-24. Once again, however, the Supreme Court expressly ruled that §301 does encompass §303, and that holding is not open to revision here. Moreover, the Supreme Court rejected an analogous argument concerning the Clean Air Act's judicial review provision. *Compare Harrison v. PPG Industries*, 446 U.S. 578, 587-94 (1980) (adopting broad reading) *with id.* 599-600 (dissent opposed broad reading on superfluous-language grounds). *See also* 5 U.S.C. §706(2)(A) (broad judicial review provision addressing agency action that is "not in accordance with law"), 706(2)(B), (C), and (D) (additional paragraphs duplicatively addressing various subsets of unlawful agency action).

Policy arguments. Assignment of TMDL review to district courts would produce the "truly perverse situation" in which courts of appeals review discharge permits, but lack the authority to review the TMDLs on which those permits rest. FoE Br. at 17 (quoting caselaw). EPA does not dispute this analysis, instead arguing that the "large number of potential challenges to TMDLs" are better suited to district courts, and that §509(b)'s 120-day statute of limitations might induce litigants to file protective challenges "well before the practical effect of a TMDL would be apparent." EPA Br. 28-29. Given the Supreme Court's holding that §301 incorporates §303 by reference, however, EPA cannot defeat such incorporation on policy grounds. Moreover, Congress wrote an even broader judicial review provision into the Clean Air Act, encompassing "any ... final action" taken by EPA, 42 U.S.C. §7607(b)(1) (emphasis added), thereby mandating review of a wide variety of EPA actions before their practical implications are

felt.⁵ Nonetheless, the Supreme Court declined to judicially narrow that provision. *Harrison*, 446 U.S. at 587-94. *A fortiori*, there is no anomaly in interpreting the narrower Clean Water Act judicial review provision as written, and consistently with *PUD*'s binding interpretation of §301.

II. EPA'S APPROVAL AND ESTABLISHMENT OF THE CHALLENGED TMDLS WAS UNLAWFUL AND ARBITRARY.

A. The Clean Water Act Is Not Silent About Whether a "Total Maximum Daily Load" Must Be "Daily."

EPA offers no basis for concluding that the annual and seasonal loads at issue here meet the statutory requirement for the "total maximum daily load." §303(d)(1)(C) (emphasis added).

1985 Regulation. Initially, EPA argues that "[t]he EPA statutory interpretation at issue here was established by regulation 17 year [sic] ago," and "it is too late to challenge it now." EPA Br. 31 (emphasis added). FoE is not challenging a regulation, but rather seeks timely review of EPA decisions concerning specific TMDLs, because *inter alia* those decisions violate the Clean Water Act. EPA's attempt to preclude this statutory challenge to specific, recent agency actions must be rejected. *Chevron, USA v. NRDC*, 467 U.S. 837, 843 n.9 (1984) (Congress's intent embodied in a statute "is the law and must be given effect").

Moreover, the cited regulation provides only that "TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. §130.2(i). That the regulation does not affirmatively state that loads must be daily does not transform it into an express authorization of annual or seasonal loads. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000) ("the regulation cannot change the statute, and a regulation promulgated to

⁵ *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024, 1028 (D.C. Cir. 2000) (Court reviews—and sets aside—guidance document, even though "[t]he case is presented to us in pure abstraction").

guide the Secretary's discretion in exercising his authority under the Act need not also restate all related statutory language").

Moreover, the interpretation at issue was raised, not in the 1985 regulation, but in the preamble. *See* EPA Br. 31 (quoting preamble). As this Court has held: "The preamble to a rule is not more binding than a preamble to a statute. 'A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'" *National Wildlife Federation v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002) (emphasis added; citation omitted). Finally, neither of the two decisions under review even cites the 1985 preamble language.

Waiver. Contrary to EPA's contention (EPA Br. 31-32), commenters did object below to annual and seasonal loads—and did so not solely because those loads would fail to implement water quality standards, but also because they conflict with §303(d)(1)(C)'s requirement for a "daily" load. *See* Fox 4/17/01 Mem. at 3[JA376]; Fox 2/4/02 Mem. at 3[JA648]. These comments placed EPA on notice of the claim urged here. *See, e.g., Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998). Indeed, the issue of whether a "total maximum daily load" must be "daily" is a fundamental one that EPA had an obligation to address in any event. *Id.* 818.

Merits. In an effort to escape *Chevron* Step One, EPA outlandishly argues that the Clean Water Act is "silent" on the issue at hand. EPA Br. 34. To the contrary, the statute expressly requires the "total maximum daily load," §303(d)(1)(C) (emphasis added)—not "annual" or "seasonal."

Moreover, there is no merit to EPA's suggestion (at 33-34) that the statutory "context" warrants inferring a contrary intent. Here, the context includes a statutory cross-reference

confirming that loads must be "daily," §304(a)(2) (providing for the identification of pollutants suitable for "maximum daily load measurement") (emphasis added), as well as language showing that Congress knew how to use temporal terms other than daily when it wished to do so. §303(d)(1)(C) (providing for "total maximum daily load" to be set at a level necessary to implement water quality standards "with seasonal variations") (emphasis added).

Nor has EPA met the standard for seeking relief from an express statutory requirement—*i.e.*, the agency has not "show[n] 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). To satisfy this standard, EPA must make "an extraordinarily convincing justification." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). In the challenged decisions, EPA offered no such justification,⁶ and the arguments advanced in the agency's briefs—in addition to being post hoc rationales—are limited to vague and generic claims that TMDLs expressed in other than daily terms would be more "appropriate." EPA Br. 35-36. Such claims do not even apply the *Engine Manufacturers* test, much less make an "extraordinarily convincing" justification that the test is satisfied.

In an argument not advanced by EPA itself, amici D.C. Water and Sewer Authority ("WASA"), *et al.*, seek support for longer-than-daily TMDLs in a 2000 amendment to the Act. *See* WASA Br. 6-10. But the 2000 statute, which amends §402, does not expressly amend §303(d)(1)(C)'s preexisting express requirement for establishment of the "total maximum daily

⁶ *Cf.*, *e.g.*, *Appalachian Power*, 249 F.3d at 1040, where the EPA decision under review did present arguments for an exemption from the statute's express language.

load." Basic principles of statutory interpretation disfavor implying such an amendment. *See, e.g., Cheney R.R. Co. v. Railroad Retirement Bd.*, 50 F.3d 1071, 1078 (D.C. Cir. 1995).

WASA's argument relies heavily on the 1994 EPA combined sewer overflow ("CSO") policy referenced in the 2000 legislation. WASA Br. 6-10. However, that policy likewise contains no indication that the express statutory requirements of §303(d) were being amended. Far from even purporting to do so, the policy reaffirms that CSOs are subject to "water quality based requirements of the CWA." 59 Fed. Reg. 18689/2 (April 19, 1994).

In any event, even if the express statutory requirement for "daily" loads were by itself insufficient grounds for rejecting EPA's annual and seasonal loads, there is another key statutory requirement that WASA does not dispute—specifically, the requirement that a TMDL be set at a level necessary to implement applicable water quality standards. §303(d)(1)(C). WASA's brief adds nothing to EPA's claims (refuted *infra*) concerning the water quality standards issue. Indeed, though attempting to defend the strategy set forth in its Long Term Control Plan ("LTCP"), WASA expressly recognizes that the Plan can pass muster only if it "achieves compliance with applicable water quality standards." WASA Br. 8. *Accord, id.* 9. Far from offering any basis to conclude that an annual or seasonal TMDL can assure such compliance, WASA actually confirms that the loads allowed by EPA's BOD TMDL will not be spaced evenly throughout the year, but instead will be concentrated in a few large events. *Id.* 11 ("the entire projected annual BOD load of 18,391 pounds would be discharged during the two overflows remaining after implementation of the LTCP") (emphasis added).⁷

⁷ WASA (at 10-13) questions the economic feasibility of a daily load. However, these claims rely on a version of the LTCP that was issued after the decisions reviewed here, and is not part of the record of these proceedings. Moreover, WASA's alarmist cost estimates were a matter of intense controversy during the public comment period on the LTCP, where commenters cited (... footnote continued next page)

B. Annual and Seasonal Loads Are Inadequate to Meet the Water Quality Standards for Dissolved Oxygen and Turbidity.

EPA does not dispute the requirement—set forth in §303(d) and implementing regulations—that TMDLs must implement applicable water quality standards with a margin of safety, and must take into account critical conditions. *See* FoE Br. 27. The TMDLs at issue here fail to do so.

(1) EPA's Attorneys' Arguments Concerning the BOD TMDL's Annual Averaging Time Are Impermissible Post Hoc Rationales, and Conflict Fundamentally With the Record.

EPA disputes neither of the grounds that establish the inadequacy of the annual BOD TMDL to meet water quality standards. To the contrary, the agency recognizes that the District's dissolved oxygen standards are expressed in daily and hourly terms. EPA Br. 40 n.11.⁸ Likewise,

(... footnote continued from previous page)
various alternatives to total sewer separation.

In any event, § 303(d)(1)(C) authorizes no cost-based exemption from the express requirement that TMDLs implement water quality standards with a margin of safety. *Accord*, § 301(b)(1)(C). Neither the CSO policy nor EPA regulations purport to abrogate this express statutory requirement. To the contrary, under the policy and regulations, cities claiming economic infeasibility can seek revision of the water quality standards themselves, 59 Fed. Reg. 18695 (citing 40 C.F.R. §131.10(g)), but the LTCP must provide for compliance with whatever standards are in place. *Id.* 18688-89; 40 C.F.R. § 130.7(c)(1).

⁸ Contrary to EPA's assertion (EPA Br. 42), the disconnect between the averaging times of the BOD TMDL on the one hand and the District's water quality standards on the other is not a "superficial" point. An annual TMDL allows large loadings on any given day (including loadings that violate daily or hourly dissolved oxygen standards) to be masked by averaging them together with lower loadings occurring at other times. *Cf. Alabama Power Co. v. Costle*, 636 F.2d 323, 386 (D.C. Cir. 1979) (where the applicable air quality requirements included not just annual but also daily and three-hour limits, to be exceeded no more than once per year, *see* 42 U.S.C. §7473(a) and (b), Court rejected industry challenge to EPA's use of second-highest concentration: "protection of the [air quality] increments, the statute says, is a well-nigh continuous responsibility, not a casual goal to be assured only on typical days").

EPA argues that "Petitioner's logic would preclude even the use of the daily TMDL advocated by
(... footnote continued next page)

EPA concedes that the loadings causing violation of those standards are not spaced evenly through the year, but rather are associated with episodic precipitation events. *Id.* 4 (BOD loads "primarily enter the Anacostia River during rainstorms," and thus "will vary widely from one day to the next"). The agency's attorneys' attempts to escape those basic realities are meritless.

First, in an especially egregious attempt to advance a post hoc rationale,⁹ EPA's attorneys argue that the annual TMDL will meet the District's dissolved oxygen standards by reducing resuspension of BOD from river sediments. EPA Br. at 40-41. The cited pages of the District's BOD TMDL make no such claim. *See* BOD TMDL at 9-10[JA392-93].

To the contrary, while contending that "[t]he increase in flow" associated with certain storms "scours the river sediments and re-suspends the BOD that was stored in the sediments," *id.*, the TMDL does not assert that control of this sediment resuspension would produce compliance with the daily and hourly dissolved oxygen standards—much less that such control could be achieved by an annual TMDL. To the contrary, the TMDL expressly recognizes that "[a] large thunderstorm in DC may not affect river flow significantly but have the same effect on dissolved oxygen as a longer more widespread rainfall in the upstream part of the basin, which will greatly increase stream flow." *Id.* (emphasis added). *Accord*, EPA BOD Rationale at 26[JA639] ("different combinations of events produce low dissolved levels"). Thus, the TMDL

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Petitioner," because a "daily TMDL [would] appear inconsistent with the hourly standard." EPA Br. 41-42 (emphasis in original). EPA ignores §303(d)(1)(C), which expressly calls for a "daily" load. *See* Part II.A, *supra*. Moreover, it would be possible to write a daily load sufficiently protective that, even if the entire daily allocation were discharged during one hour, the hourly standard would still be met. EPA does not claim that the annual BOD TMDL was written so protectively that, if the entire annual allocation were discharged during one (or even a few) days or hours, the daily and hourly BOD standards would be met.

⁹ *See, e.g., Florida Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996).

expressly indicates that, even when the increased flow that allegedly causes scouring and resuspension is absent, rainfall events nonetheless cause equivalent impacts on dissolved oxygen. EPA's post hoc attempt to argue the contrary must be rejected.

EPA's attorneys also argue that reliance on an annual load is supported by the water quality model used in developing the BOD TMDL. EPA Br. 42-43. This claim is doubly wrong.

First, the model decisively refutes EPA's attorneys' claim that the TMDL's annual averaging time is attributable to concerns about resuspension of BOD during storms. As the modeling framework document expressly states, the model "does not currently resuspend BOD from the sediments during storm events." The TAM/WASP Model (D.C. Dept. of Health Oct. 2000), at xii[JA141] (emphasis added). *Accord, id.* 122[JA264] ("the model does not account for resuspension.") (emphasis added).¹⁰

Second, the model itself is based on daily loads. TAM/WASP Model at 38[JA180] ("WASP requires a daily input load for each of the eight modeled constituents for each model segment.") (emphasis added). Model runs based on assumed daily loads (i.e., on the assumption that loads on each day do not exceed specified amounts) do not constitute substantial evidence¹¹ that such daily loads can be jettisoned in favor of annual loads (which allow loads on any given

¹⁰ Indeed, if the model did account for such resuspension, the likely result would be to further undermine the adequacy of the TMDL. The modeling framework indicates that the impacts of BOD loads on dissolved oxygen occur through (1) direct impacts of BOD loads in the water column, (2) decomposition of BOD from the top one-fourth meter of riverbed (known as "sediment oxygen demand") and (3) resuspension of BOD from sediment. TAM/WASP Model at 73, 70, xii[JA215, 212, 141]. By accounting for only (1) and (2) but not (3), the model likely understates the true impacts of BOD loads.

¹¹ See FoE Br. 10-11.

day to exceed the amounts assumed in the model, as long as loads on other days are sufficiently lower than an annual average is met).

Third, there is no merit to EPA's attempt (EPA Br. 43-44 n.12) to explain away the WASA long-term control plan—and public comments based thereon—showing that large BOD loading spikes will continue to occur under the TMDL. *See* FoE Br. 30. EPA's claim that the model "specifically accounts" for those spikes ignores the way in which it does so: as indicated above, the model assumes daily loads which—if adhered to—would prevent spikes of the size predicted by WASA's plan. However, the TMDL does not adopt the daily loads relied on by the model, instead opting for an annual TMDL that would not prevent those spikes.

Finally, EPA's attorneys erroneously assert that EPA's approval decision "agreed" with the District that an annual average was a reasonable way of "assuring" achievement of the dissolved oxygen standards. EPA Br. 39-40. To the contrary, EPA found (without basis, for reasons discussed above) that certain changes made in the TMDL would adequately address low dissolved oxygen events at the DC/MD boundary, but admitted that "it is less clear as to the effect of that load reduction on the low dissolved oxygen events predicted at Benning Road and Pennsylvania Ave." BOD TMDL Rationale at 21[JA634] (emphasis added). EPA offered the lukewarm suggestions that "it is reasonable that such a reduction would significantly reduce the number of low dissolved oxygen events," and that "EPA cannot predict that the TMDL allocation will not adequately address those downstream portions of the Anacostia River." *Id.* (emphasis added). A professed inability to predict that annual TMDLs would lead to violation of water quality standards falls far short of a finding, supported by substantial evidence,¹² that the

¹² *See* FoE Br. 10-11.

TMDL is adequate to implement those standards with a margin of safety. *See also* EPA Br. 31 (interpreting Act to require that a TMDL "assure[]" compliance with water quality standards).

In short, EPA's attorneys' arguments fundamentally mischaracterize the decisions below, and advance new post hoc rationales that are not cognizable here, and in any event are conclusively refuted by the record. Moreover, although comments repeatedly flagged the inadequacy of the annual averaging time,¹³ neither EPA nor the District ever offered a reasoned response or explanation to support the chosen approach.

(2) The TSS TMDL's Seasonal Averaging Time Is Based Entirely on the Aquatic Life Use, Thus Failing to Protect Recreational and Aesthetic Uses That Form Part of the District's Water Quality Standards.

In the case of the TSS TMDL, EPA's defense of a non-daily load relies entirely on the argument that a seasonal TMDL will protect the aquatic life use—*i.e.*, that the seasonal averaging time suffices to protect aquatic plants from being shaded out by turbidity. EPA Br. 44-47. In particular, EPA apparently contends that aquatic vegetation can survive some short-term turbidity episodes, but not longer-term sustained turbidity. *See id.* 46 ("the environmental impacts of TSS occur when TSS reduces water clarity over numerous days during the growing season") (emphasis in original).

Whatever the merits of this contention concerning aquatic plants, it is insufficient to establish the adequacy of a seasonal averaging time to implement applicable water quality standards with a margin of safety—or, in EPA's words, to "assure[]" compliance with those standards. *See* EPA Br. 31. In particular, EPA's brief does not even attempt to argue that the seasonal averaging time will prevent turbidity and nuisance aquatic life from interfering with

¹³ *See* Smith 10/16/00 Mem. at 4[JA351]; Fox 4/17/01 Mem. at 2-3[JA375-76]; Smith 4/17/01 Mem. at 4[JA381]; Fox 11/6/01 Mem. at 1-2[JA601-02]; Smith 11/6/01 Mem. at 1-3[JA603-05].

recreational and aesthetic uses of the Anacostia River. *See* 21 DCMR §§1101.1, 1101.2[JA51-52] (in the District's water quality standards, "recreation" and "aesthetic enjoyment" are among the designated uses of the Anacostia River); FoE Br. 33-34 (citing statutory, regulatory and caselaw authority establishing that designated uses are part of a state's water quality standards, and must be protected).

Indeed, any such argument would flatly contradict the record. It is undisputed that TSS loadings are not spaced evenly throughout the year, but rather occur in spikes associated with precipitation events. *See* FoE Br. 30. Likewise, undisputed record evidence (including declarations from two eyewitnesses active both in using the River and in observing others' use) establishes that impairment of recreational and aesthetic use occurs on any occasion when a recreationist encounters turbid water—regardless of whether the water may be clearer at other times. *See* FoE Br. 35.

In a case involving impacts of aircraft noise on recreation, this Court recently remanded an agency's decision to rely on annual averages to limit air craft noise in the Grand Canyon: "As [petitioner] ... points out, the use of an annual average does not correspond to the experience of the Park's actual visitors. People do not visit the Park on 'average' days, nor do they stay long enough to benefit from averaging noise over an entire year. For the typical visitor, who visits the Grand Canyon for just a few days during the peak summer season, the fact that the Park is quiet 'on average' is cold comfort." *U.S. Air Tour Assn. v. FAA*, 298 F.3d 997, 1017 (D.C. Cir. 2002) (emphasis added). Here too, a long-term average is deficient. As the record attests, a seasonal average fails to prevent objectionable turbidity and nuisance aquatic life that impairs recreational and aesthetic uses of the Anacostia River.

C. Regardless of Whether EPA Considers the Recreational and Aesthetic Provisions of the District's Water Quality Standards to Be "Subjective," the Act Requires That TMDLs Assure Compliance With Those Standards.

EPA does not deny that its TSS TMDL was expressly based on the Class C use (aquatic life), even though the Anacostia River is also designated for the Class A and B uses ("recreation" and "aesthetic enjoyment"). *See* Part II.B.2, *supra*; FoE Br. 33-34. EPA likewise does not deny that the Class A and B uses are just as much a part of the District's water quality standards as the Class C use. Finally, far from denying that TSS interferes with the Class A and B uses, EPA expressly confirms that "turbid water generally interferes with recreational use and aesthetic enjoyment of water," EPA Br. 49, a conclusion confirmed by undisputed record evidence attesting to the impairment turbidity causes to recreational and aesthetic enjoyment of the Anacostia River. *See* FoE Br. 35.

EPA nonetheless argues that "[t]he protection of the beauty and aesthetic quality of water ... is subjective and not readily amenable to a numeric endpoint." EPA Br. 49 (emphasis added). The Act and EPA's regulations require that TMDLs implement water quality standards with a margin of safety. FoE Br. 27. No exemption is made for so-called "subjective" standards. Indeed, given the existence of numerous statutes using broad concepts such as the "public interest," *see, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 474 (2001), any notion that agencies may refuse to implement standards they consider "subjective" would wreak havoc on administrative law.

Moreover, far from arguing that it would be impossible to comply with the statutory requirement to implement the District's water quality standards,¹⁴ EPA concedes that "it would

¹⁴ *See Alabama Power Co. v. Costle*, 636 F.2d 323, 359-60 (D.C. Cir. 1979) (agency bears "heavy burden" to demonstrate existence of an impossibility justifying relief from a statutory
(... footnote continued next page)

be possible" to develop a TMDL implementing recreational uses. EPA Br. 50. Indeed, EPA previously approved TMDLs based on such an approach. FoE Br. 37. That the agency might prefer not to do so here is no grounds for flouting the statute, or for abandoning without reasoned explanation an approach it previously approved.

EPA also argues that the TSS TMDL will "address[]" the recreational and aesthetic provisions of the District's water quality standards. EPA Br. 49-50. No substantial record evidence¹⁵ is cited in support of this claim, which rests entirely on a partial, conclusory, generic statement in a 16-year-old guidance document. FoE Br. 36. Indeed, EPA's claim is decisively refuted by record evidence demonstrating the inadequacy of the TSS TMDL to protect the recreation use. *See* Part II.B.2, *supra*.

Finally, EPA claims that the TMDL can be revised later to incorporate a recreational endpoint. EPA Br. 50. However, an agency cannot escape judicial accountability for arbitrary or otherwise unlawful action simply by holding out the prospect of future revisions. See FoE Br. 32. Indeed, because agencies frequently retain authority to revise their actions, any such approach would open a major loophole in judicial review. Such a wait-and-see approach contravenes the express requirement of §303(d) and implementing regulations that TMDLs implement water quality standards with a margin of safety. Moreover, the further delay inherent in such an

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requirement; burden is "especially heavy" where agency has not made "good faith effort" to comply with statute, but instead "seek[s] vindication of an approach contrary to the explicit statutory design on the basis of its estimate of its lack of capacity to handle the task delegated to it").

¹⁵ *See* FoE Br. 10-11.

approach undermines Congress's express intent that recreation is central to the Act's goals, and that waters be suitable for recreation by 1983. CWA §101(a)(2).

D. Because Nutrient TMDLs Are Undisputedly Required, the Court Should Either Clarify that Such TMDLs Are Included in the TMDLs Under Review, or Should Remand for Establishment of Nutrient TMDLs.

Because nutrients (especially nitrogen and phosphorus) interfere with attainment of the District's water quality standards for dissolved oxygen and turbidity, a TMDL cannot "implement" those standards unless it includes TMDLs for nutrients. FoE Br. 37-40. EPA concedes that such nutrient loads are a "necessary component" of the BOD TMDL. EPA Br. 51. However, EPA contends that the BOD TMDL already contains nutrient TMDLs, *id.* 51-52, and relies on these alleged nutrient loads as a basis not only for the BOD TMDL, but the TSS TMDL as well. *Id.* 53.

The administrative record, however, contains statements indicating that no such nutrient TMDLs exist—including statements by the District in the TMDL itself. *See* EPA Br. 52 n.13. Accordingly, FoE is concerned that either EPA or a third party (such as WASA or the District)¹⁶ might argue at a subsequent date—for example in proceedings concerning discharge permits under §402—that no TMDL for nutrients exists. *Cf. Indiana & Michigan Elec. Co. v. USEPA*, 733 F.2d 489 (7th Cir. 1984) (EPA, in approving state air pollution plan submission, improperly purported to amend that submission).

¹⁶ WASA and the District both discharge pollutants requiring permits under CWA §402—WASA from its CSO outfalls, and the District from its separate storm outfalls. *See In Re Government of the District of Columbia Municipal Separate Storm Sewer System*, 2002 EPA App. LEXIS 1 (EPA EAB 2002).

Accordingly, the Court should not let matters rest with the mere assertions in EPA's brief, but instead should either expressly hold that the TMDLs under review include TMDLs for nutrients, or should remand the matter for EPA to secure establishment of such TMDLs.

E. The TMDLs Unlawfully and Arbitrarily Assign Loads Solely to Source Categories, Rather Than to Individual Point Sources.

By assigning loads solely to broad source categories, the TMDLs arbitrarily and unlawfully violate EPA regulations requiring that a TMDL include "individual" wasteload allocations ("WLAs"), each of which represents the portion of a waterbody's loading capacity allocated to "one" of its point sources. FoE Br. 41 (quoting 40 C.F.R. §130.2(i) and (h)).

EPA argues that, because its regulations define a TMDL as the "sum" of the individual wasteload allocations, *see* §130.2(i), outfall-specific loads are not required. EPA Br. 56 n.15. To the contrary, one cannot compute the "sum of the individual WLAs" (see §130.2(i) (emphasis added)) unless such individual WLAs exist.

That conclusion, clear on the face of §§130.2(i) and (h), is further confirmed by contrasting those sections' careful requirement for "individual" WLAs, each for "one" point source, with §130.2(g), which provides that nonpoint source allocations may be presented as "gross allotments." EPA's attempt to erase the express distinction between these provisions, and to import the looser nonpoint source language into the point source provision, must be rejected.¹⁷

EPA further argues that the TMDLs are expressed in percentage terms, thus making it possible to arrive at a source-specific allocation by simply "do[ing] the math." EPA Br. 54-55.

¹⁷ The district court case cited by EPA (at 56 n.15) involved scientific limitations on detecting and measuring dioxin, a pollutant that is toxic in infinitesimal quantities. EPA has not asserted, and could not credibly assert, that the pollutants at issue here pose any such measurement or detection problem.

EPA mischaracterizes the BOD TMDL, which is not presented in percentage terms, but instead in "pounds." BOD TMDL at 11, 13[JA394, 396]. While the TMDL does estimate what percentage reduction those loads represent, it nowhere states that the percentage figures constitute the legally operative portion of the TMDL. Moreover, EPA's BOD approval decision expressly cautions that permit limits will "need to be consistent with the allocations contained in the TMDL rather than determined as an expression of CSO volume or percent reduction." BOD Decision Rationale at 10 (emphasis added)[JA623].

In any event, even assuming *arguendo* that both TMDLs were expressed in percentage terms, they still violate EPA's regulations. First, neither TMDL states that an equal percentage reduction is required of each and every outfall. To the contrary, both TMDLs assign reductions to broad source categories. Second, to convert a percentage figure to an absolute load, one must know the baseline to which the percentage is to be applied (*e.g.*, 77% of what?). Nowhere in the TMDLs is outfall-specific baseline information presented.

F. The Record—in Particular, a Significant Comment to Which EPA Offered No Response—Undermines the BOD TMDL's Assumption Concerning Upstream Loads from Maryland.

There is no dispute concerning the assumption made by the BOD TMDL concerning upstream loads from Maryland: specifically, the TMDL assumed that upstream loads would meet the District's water quality standards at the Maryland/DC border. FoE Br. 43-44; EPA Br. 59. As a water quality expert pointed out in comments, however, that assumption is inadequate, because BOD continues to exert effects as it moves downstream. FoE Br. 44.

EPA unpersuasively claims (at 59) that this expert's comment is "unsupported." First, the opinion of an expert such as Dr. Smith—whose expertise EPA does not dispute—is itself evidence. *See, e.g.*, Fed. R. Ev. 702. Second, Dr. Smith explains the reasoning underlying his

objection, and cites to a water quality textbook in support. Smith 4/17/01 Mem. at 2-3 & n.1[JA379-80]. Although this comment was plainly significant and substantive enough to warrant a response, *see* FoE Br. 44, EPA failed to offer any. That failure was arbitrary, and moreover leaves Dr. Smith's comment as the only record evidence on this point.

EPA points to a change made in the TMDL subsequent to Dr. Smith's comment—specifically, a 17,224-pound reduction in Maryland loads. EPA Br. 60-61. That change, however, was made to achieve compliance with standards at the Maryland/DC boundary. May 2001 TMDL at 14[JA397]. Nowhere in the decision documents is there any acknowledgment of, much less response to, Dr. Smith's comment that even if standards are met at the boundary, unexerted BOD from Maryland will cause violations downstream.

CONCLUSION

Petitioner Friends of the Earth respectfully requests that the Court grant these petitions, and enter the relief requested in FoE's opening brief and this brief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Corrected Reply Brief of Petitioner Friends of the Earth** has been served by United States first-class mail this 15th day of April, 2003, upon the following:

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I hereby further certify that the foregoing brief contains 6,982 words, which is less than the applicable 7,000 word limit set by Fed. R. App. P. 32(a)(7)(B)(ii).

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