

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 05-5015

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

FRIENDS OF THE EARTH,

Appellant,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Appellees.

On Appeal from a Final Decision of the
United States District Court for the District of Columbia

**INITIAL OPENING BRIEF OF PLAINTIFF-APPELLANT
FRIENDS OF THE EARTH**

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DATED: August 25, 2005

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____)	
FRIENDS OF THE EARTH,)	
)	
Appellant,)	
)	D.C. Cir. No. 05-5015
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Appellees.)	
_____)	

**APPELLANT FRIENDS OF THE EARTH'S
CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), appellant Friends of the Earth hereby 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.

Plaintiffs. Friends of the Earth.

Defendants. United States Environmental Protection Agency and Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency.

Intervenors. District of Columbia Water and Sewer Authority (intervenor-defendant).

Amici Curiae. Association of Metropolitan Sewerage Agencies and Combined Sewer Overflow Partnership (on behalf of defendants).

(ii) Parties, intervenors, *amici* in this Court.

Appellant. Friends of the Earth.

Appellees. United States Environmental Protection Agency, Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, and District of Columbia Water and Sewer Authority.

Amici curiae. Association of Metropolitan Sewerage Agencies and the Combined Sewer Overflow Partnership (on behalf of appellees).

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

There is no parent company or publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) in FoE.

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.

(B) Rulings Under Review.

The ruling at issue in this Court is the order and memorandum opinion entered by Judge Richardo M. Urbina on November 29, 2004. *Friends of the Earth v. U.S. EPA*, 346 F.Supp.2d 182 (D.D.C. 2004).

(C) Related Cases.

This case was heard previously before this Court, *Friends of the Earth v. U.S. EPA*, D.C. Cir. Nos. 02-1123 and 02-1124. *See Friends of the Earth v. USEPA*, 333 F.3d 184 (D.C. Cir. 2003). Appellant is unaware of any pending 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 “total maximum daily loads” for waters in the District of Columbia.

Dated: August 25, 2005

Respectfully Submitted,

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GLOSSARY

APA	Administrative Procedure Act
BOD	biochemical oxygen demand
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
mg/L	milligrams per liter
NPDES	national pollutant discharge elimination system
SAV	submerged aquatic vegetation
TMDL	total maximum daily load
TSS	total suspended solids
WASA	District of Columbia Water and Sewer Authority
WQS	water quality standards

JURISDICTIONAL STATEMENT

(A) District Court. The district court had jurisdiction under 28 U.S.C. §1331.

(B) Court of Appeals. Under 28 U.S.C. §1291, this Court has jurisdiction of the present appeal from the district court's final memorandum and order disposing of all claims with respect to all parties.

(C) Timeliness. This appeal was filed on December 30, 2004—*i.e.*, within sixty days of the district court's November 29, 2004 final memorandum and order.

(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 of its 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 herein, and the declarations submitted to the district court[JA____].

STATEMENT OF ISSUES PRESENTED

1. Whether EPA acted lawfully by approving and establishing total maximum daily loads ("TMDLs") as annual and seasonal—rather than daily—loads.
2. Whether EPA provided a reasoned basis for concluding that the biochemical oxygen demand TMDLs implement the applicable water quality standards.
3. Whether EPA provided a lawful, reasoned basis for concluding that the total suspended solids TMDLs implement the applicable water quality standards.

STATUTES AND REGULATIONS

Pertinent 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 District Court.

This case seeks review of water pollution caps—total maximum daily loads, or "TMDLs"—that are inadequate to remedy serious water pollution afflicting the Anacostia River. Specifically, FoE seeks review of:

- The Environmental Protection Agency's ("EPA's") December 14, 2001 action approving TMDLs for biochemical oxygen demand ("BOD"). (Those TMDLs had been submitted to EPA by the District of Columbia in May 2001.)

- EPA's March 1, 2002 action establishing TMDLs for total suspended solids ("TSS").

The district court granted summary judgment to defendants, and denied it to plaintiff.

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 ("WQSs") 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 1311(b)(1)(A) and section 1311(b)(1)(B) of this title [CWA §§301(b)(1)(A) and 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).

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

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

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)[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 TMDLs"), 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 DCMR 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

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
(... footnote continued next page)

aquatic plants for photosynthesis. EPA, Total Maximum Daily Loads, Upper Anacostia River, Lower Anacostia River – Total Suspended Solids (March 2002) ("TSS TMDLs"), 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 [JA____-____, ____-____]. 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):

(... footnote continued from previous page)
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. [JA____].

2. Pollutants Causing Oxygen and Turbidity Violations.

Dissolved oxygen ("DO") violations result *inter alia* from "biochemical oxygen demand" or "BOD"—a phrase "describ[ing] 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].

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>.

Turbidity violations result *inter alia* from total suspended solids ("TSS")—*i.e.*, "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.

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 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 [JA398] (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 [JA382], and in December 2001 EPA approved [JA611], TMDLs for the Upper Anacostia River and Lower Anacostia River, addressed to the District's dissolved oxygen standards. In January 2002 EPA proposed, and in March 2002 finalized [JA662 and 672], TMDLs for the Upper Anacostia River and Lower Anacostia River, 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.⁴ After EPA's final decisions, FoE challenged those decisions via direct petition for review to this Court under Clean Water Act §509(b)(1), 33 U.S.C. §1369(b)(1). This Court dismissed for lack of jurisdiction and transferred to the district court, holding that jurisdiction lies with that court. *Friends of the Earth v. USEPA*, 333 F.3d 184, 189 and 193 (D.C. Cir. 2003).

STANDARD OF REVIEW

1. DISTRICT COURT. As a suit seeking review of agency action, the case before the district court presented only issues of law. *See, e.g., Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Accordingly, this Court's review on appeal is *de*

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

novo, and the district court's decision "is not entitled to any particular deference." *Dr. Pepper/Seven Up Cos. v. FTC*, 991 F.2d 859, 862 (D.C. Cir. 1993).

2. EPA. 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, the Court defers to an agency interpretation that is "reasonable." *See Chevron*, 467 U.S. at 845.

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 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), *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 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

The loads at issue here are annual and seasonal, and thus contravene the statutory requirement for establishment of the "total maximum daily load." The district court's remarkable conclusion that "daily" can mean "non-daily" is untenable.

Moreover, EPA has offered no lawful, reasoned basis for concluding that the annual and seasonal loads at issue here implement the applicable water quality standards. Because of their long-term timeframe, these loads allow large short-term peak loadings that threaten continued violation of applicable water quality standards—including the numerical dissolved oxygen standards, as well as the narrative standard banning objectionable turbidity that impairs recreational and aesthetic uses.

ARGUMENT

I. ANNUAL AND SEASONAL LOADS ARE NOT THE "TOTAL MAXIMUM DAILY LOAD" REQUIRED BY THE ACT.

A. EPA's Annual and Seasonal Loads Are Unlawful under *Chevron* Step One.

Under Step One of *Chevron*, EPA acted unlawfully by approving and establishing annual and seasonal loads. The Act expressly provides for the "total maximum daily load." §303(d)(1)(C) (emphasis added).

(1) Statutory Analysis

"Total Maximum Daily Load." Absent a statutory definition providing the contrary, statutory terms are presumed to have their ordinary meaning. *See, e.g., Aid Assn. for Lutherans v. USPS*, 321 F.3d 1166, 1176 (D.C. Cir. 2003). Indeed, cases under environmental statutes have repeatedly emphasized the importance of applying the ordinary meaning of statutory terms. *See, e.g., Bluewater Network v. EPA*, 370 F.3d 1, 25 (D.C. Cir. 2004) (Clean Air Act); *Engine Mfrs. Assn. v. South Coast Air Quality Management District*, 541 U.S. 246, 252-53 (2004) (same).

Here, EPA did not even address the ordinary meaning of "daily," and certainly did not argue that it encompasses "seasonal" or "annual." Indeed, any such argument would be untenable. Webster's Third New International Dictionary (1981) ("daily" 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")(emphasis added).

Statutory context. Statutory context confirms §303(d)(1)(C)'s reference to the "total maximum daily load."

"Total maximum daily load." The word "daily" appears in the phrase "total maximum daily load," thus establishing that a TMDL is to represent the total maximum pollutant load that is allowable on a daily basis. EPA's interpretation thwarts this context by expressing the total maximum in terms far longer than a day—such as an entire year or season.

Cross-reference to maximum "daily" loads. The statutory context also includes an express cross-reference confirming that loads must be "daily." Specifically, §303(d)(1)(C) provides for establishment of "the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." (Emphasis added.) Section 1314(a)(2) in turn provides for the identification of pollutants suitable for "maximum daily load measurement." Clean Water Act §304(a)(2), 33 U.S.C. §1314(a)(2) (emphasis added). Thus, §304(a)(2) confirms that maximum loads under §303(d)(1)(C) are to be daily, not annual or seasonal.

Indeed, 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.⁵

Contrast between statutory terms "daily" and "seasonal." In addition to requiring establishment of the "total maximum daily load," §303(d)(1)(C) provides *inter alia* that "[s]uch load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations." (Emphasis added.) Thus, Congress knew the difference between "daily" and "seasonal." Its decision to require a "total maximum daily load"—rather than a seasonal or annual one—must be given effect.

Statutory requirement for implementation of water quality standards. EPA has argued that TMDLs "may be expressed in terms of an appropriate averaging period, such as weekly or monthly, as long as compliance with applicable WQS is assured." 50 Fed. Reg. 1776/1 (Jan. 11, 1985)[JA16] (emphasis added). This reading ignores another element of the statutory context. Specifically, §303(d)(1)(C) requires both that the "total maximum daily load" be established, and that "[s]uch load shall be established at a level necessary to implement the applicable water quality standards." Yet under EPA's reading, the statutory term "daily" adds nothing to the separate statutory language requiring implementation of water quality standards.

EPA lacks authority to strike words from the statute books, or to drain them of meaning. "An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage." *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995). This principle has repeatedly been applied to

⁵ By the time of EPA's 1978 identification, BOD and TSS were known pollutants. *See, e.g.,* A Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) ("1972 Legis. Hist."), at 788 (House Report); 1226 (testimony of EPA Administrator William Ruckelshaus); 1337 (Council on Environmental Quality report, quoted by Sen. Mondale).

environmental statutes. *See, e.g., Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (Clean Air Act); *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996) (Resource Conservation and Recovery Act).

Legislative history. The clear statutory text makes resort to legislative history unnecessary. *See Exxon Mobil Corp. v. Allapattah Services*, 125 S. Ct. 2611, 2626 (2005). In any event, the legislative history confirms that maximum loads must be "daily." *See* 1972 Legis. Hist. at 306, 308, 793 (Conference Report, and report of the House Committee where §303(d) originated).

In short, under Step One of *Chevron*, EPA acted unlawfully in approving and establishing these 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).

(2) EPA's Position.

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[JA16] (preamble to national TMDL regulations); 65 Fed. Reg. 43629/2-3 (July 13, 2000)[JA82](preamble to revised national rule, which has since been withdrawn). No statutory argument has been advanced, however, that could justify redefining the statutory phrase "total maximum daily load" as "total maximum annual load" or "total maximum seasonal load."

In the July 2000 preamble (accompanying a regulation that never took effect, and was subsequently withdrawn),⁶ 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 total maximum daily load. 65 Fed. Reg. 43629/3 [JA82]. To the contrary, the Act expressly mandates the "total maximum daily load." §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.

(3) Second Circuit's decision.

Nor did the Second Circuit offer any persuasive rationale for its decision (contrary to the Seventh Circuit in *Scott, supra*) shunting aside the statutory phrase "total maximum daily load." *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 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." Far from conflicting with establishment of a "total maximum daily load," the cited reference to §1314(a)(2) confirms that requirement. *See* pp. 11-12, *supra*.

⁶ *See* 66 Fed. Reg. 53044/3 (Oct. 18, 2001); 68 Fed. Reg. 13608 (March 19, 2003).

The Second Circuit also suggested that applying the phrase "total maximum daily load" 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 phrase "total maximum daily load" 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 phrase "total maximum daily load" 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.⁷ As discussed in the following sections *infra*, that is not the case here. But in any event, where Congress has plainly provided for the "total maximum daily load," courts are not free to shunt that mandate 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

⁷ *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").

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").

(4) Decision of the District Court below.

The district court did not deny that the plain meaning of "total maximum daily load" precludes annual or seasonal loads. Instead, the court overrode that plain meaning. *See* 346 F. Supp. 2d at 194[JA____] (finding "inapposite" the principle that "words should be given their plain meaning," and holding that the Act's purpose "contradicts plain meaning").

This result was not based on a finding that the *Engine Manufacturers* test was met. On the contrary, the district court expressly disclaimed the Second Circuit's contention that the Act would produce "absurd" consequences. *Id.* 189 n.3[JA____]. Far from finding that the *Engine Manufacturers* test was met, the district court refused even to apply the test. *Id.*

Instead, the district court devised its own paradigm of statutory interpretation. According to the court, applying the Act's plain meaning would improperly treat the statutory term "daily" as a "sacred signifier." *Id.* 190[JA____]. Instead, the Court indicated that the statutory phrase "total maximum daily load" would be dispositive only if confirmed by other indicia of congressional intent. *See, e.g., id.* 192[JA____] ("Because none of the potential benefits of applying a literal application of the statute were explicitly contemplated by Congress, they are immaterial to reconstructing Congress' intent or the statute's purpose."), 193[JA____] (listing possible goals of daily TMDLs, and indicating that, "[w]ere there evidence of congressional purpose to achieve any of these goals, that would be the end of the matter, and daily TMDLs would be mandatory"); 191 n.5[JA____] ("no evidence" exists that the TMDL section results from "hard-fought political compromise").

This is backwards. The Supreme Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Natl. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, as *Engine Manufacturers* confirms, it is not up to the proponents of a statute's plain meaning to find corroborative evidence that Congress meant what the statute's words say. Instead, it is up to EPA to demonstrate that the plain meaning should be shunted aside. Indeed, as this Court has confirmed in two post-*Engine-Manufacturers* cases involving EPA, "[t]here must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning," *State of New York v. USEPA*, 413 F.3d 3, 41 (D.C. Cir. 2005), and that evidence must be "extraordinarily convincing." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). *Accord*, *NPR v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) ("[e]xtremely strong" presumption that a statute's plain language reflects congressional intent).

The district court identified no evidence of congressional intent that comes close to justifying the court's remarkable conclusion that the phrase "total maximum daily load" grants EPA "discretion to phrase TMDLs in non-daily terms." 346 F. Supp. 2d at 189 n.3[JA____] (emphasis added). In particular, none of the statutory language cited by the court states or implies that "daily" can mean "annual" or "seasonal."

Section 303(d)(1)(C): implementation of water quality standards. The district court relied on §303(d)(1)(C)'s requirement that TMDLs "be established at a level necessary to implement the applicable water quality standards," thereby supplementing the technology-based controls mandated by §301(b)(1)(A) and (B). 346 F. Supp. 2d at 192[JA____]. According to the court, "[t]o require daily load limits regardless of their effect on WQSs would be to substantively transform TMDLs into technology-based controls." *Id.*

This analysis ignores fundamental principles of statutory interpretation. Section 303(d)(1)(C) requires not only that a TMDL implement water quality standards, but also that it be established as a "total maximum daily load." Both of these requirements appear in the statute, and both must be respected by EPA and the courts. By accepting a TMDL of any duration (daily or non-daily) as lawful so long as it purportedly implements water quality standards, the district court's test would impermissibly drain the statutory word "daily" of meaning. *See* pp. 13-14, *supra*.

Moreover, the district court's approach incorrectly presupposes an inconsistency between the requirement that a TMDL be "daily" and that it implement water quality standards. To the contrary, requiring that total maximum loads be "daily" (rather than longer-term averages that allow large short-term peak pollutant discharges) helps ensure that they do implement water quality standards.

In a related vein, the district court also suggested that a daily load would have "zero" benefits. 346 F. Supp. 2d at 192[JA ____]. This suggestion is unavailing for at least two reasons.

First, the court's zero-benefits argument ignores the appropriate manner in which such issues are to be raised. Under this Court's precedent, it is not up to a court to judicially decree that a statute's plain meaning will have no benefit. Instead, the burden is on the agency to make that showing. *See Alabama Power Co. v. Costle*, 636 F.3d 323, 360 (D.C. Cir. 1979) ("Determination of when matters are truly de minimis naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing."); *Assn. of Admin. Law Judges v. FLRA*, 397 F.3d 957, 963 (D.C. Cir. 2005)(emphasizing "the narrow limits of the de minimis doctrine," under which "the Authority will bear the burden

before this court of showing that any particular application of the de minimis exception is reasonable").

Second, the zero-benefits argument was based on the court's assumption that daily loads would necessarily be more stringent than needed to meet water quality standards—an assumption not borne out by the record. Moreover, the district court itself identified benefits from "daily" loads, *see id.* 193[JA____], thus refuting its own suggestion that no such benefits exist. Also significant is the district court's decision to uphold the TSS TMDLs, even though those TMDLs undisputedly allow short-term pollutant peaks sufficiently severe to impair recreational use following storms. *See id.* 202[JA____]. Whether or not such peaks violate water quality standards, neither the district court nor EPA claimed that eliminating them would offer "zero" benefit. *See Alabama Power Co. v. Costle*, 636 F.3d at 360-61 ("[T]he de minimis authority to provide exemption [applies] when the burdens of regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.").

Other statutory provisions. In overriding the statute's plain meaning, the district court also cited other statutory language. Before turning to each of the provisions cited, two overarching flaws in the court's analysis deserve mention.

First, the court's reliance on statutory context was selective. While citing certain provisions, the court rejected out of hand other, far more relevant provisions—including §303(d)(1)(C)'s own reference to setting daily loads with "seasonal" variations (thus confirming that Congress knew the difference between daily and seasonal timeframes), and §303(d)(1)(C)'s cross-reference to §304(d)(1), which in turn confirms Congress's intent that the "maximum daily

load" be established. The court's rejection rested not on specific features of these provisions, but rather on a general allegation about the overall "complexity" of the Act. 346 F. Supp. 2d 193[JA ____]. In addition to improperly carving out an environmental-statute exception to normal rules of statutory interpretation, this approach would if accepted equally disqualify the other Clean Water Act provisions the court did rely on.

Second, the provisions shunted aside by the court were contemporaneous with §303(d)(1)(C), which was enacted in 1972 and has not been amended since. In contrast, the court relied heavily on provisions enacted after §303(d)(1)(C)—in 1977, 1987, and 2000. None of these provisions expressly amended §303(d)(1)(C), however, and basic principles of statutory interpretation disfavor implying such an amendment. *See, e.g., Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988); *Cheney R.R. Co. v. Railroad Retirement Bd.*, 50 F.3d 1071, 1078 (D.C. Cir. 1995). As shown below, none of the subsequently enacted provisions overcome the presumption against amendment by implication. More broadly, the district court erred by elevating less probative statutory evidence (*i.e.*, subsequently enacted provisions that did not amend §303(d)(1)(C)) over more probative evidence (*i.e.*, contemporaneously enacted language that is contained in and cross-referenced by §303(d)(1)(C)).

Section 302 (1972, amended 1987). The district court cited §302(b)(2)(A), which the court described as "allow[ing] EPA to issue a permit modifying an effluent limitation if 'there is no reasonable relationship between the economic and social costs and the benefits.'" 346 F. Supp. 2d at 192[JA ____] (quoting 33 U.S.C. §1302(b)(2)(A)). This provision, however, makes no reference to §303(d)(1)(C) or TMDLs, and on its face does not address whether §303(d)(1)(C) loads should use a daily time period or some other measure. Moreover, §302(b)(2)(A) is a

variance provision which by its terms is limited to modifying "the effluent limitations required by subsection (a) of this section" (emphasis added)—*i.e.*, §302. Thus, by its terms it does not address §303(d)(1)(C).

Section 303(d)(4) (1977). The 1977 amendments added a new subparagraph (4) to §303(d). *See* 346 F. Supp. 2d at 192[JA ____]. However, that provision—like §303(d)(1)(C)—references the "total maximum daily load," and thus falls far short of overcoming the presumption against amendment by implication.

Section 402(p)(3)(B) (1987). Enacted in 1987, §402(p)(3)(B) addresses discharge permits for municipal stormwater, and provides *inter alia* that such permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. §1342(p)(3)(B). The district court advanced two differing (and mutually inconsistent) assertions relying on this provision.

First, the court claimed that applying §303(d)(1)(C) as written "would in essence alter th[e] congressional choice [in §402(p)(3)(B)], mandating daily effluent limits instead of permitting more manageable practices such as non-daily loads." 346 F. Supp. 2d at 191[JA ____]. To the contrary, §402(p)(3)(B) does not even speak to TMDLs, but simply addresses the point source permit process. Thus, the district court erred in characterizing §402(p)(3)(B) as an "exception" to §303(d). *See* 346 F. Supp. 2d at 191[JA ____].

Moreover, §402(p)(3)(B)'s applicability is limited to one specific kind of point source permit (municipal stormwater), while §303(d)(1)(C) mandates loads for use in various contexts, applicable to point as well as nonpoint sources. It was especially inappropriate for the district

court to rely on the specialized, stormwater-specific §402(p)(3)(B) as a basis for narrowing the entire overarching mandate of §303(d)(1)(C).

In any event, nothing in §402(p)(3)(B) states or suggests that TMDLs cannot be established as daily loads, or that such loads cannot be incorporated into point source permits for stormwater dischargers. Nor is there any inherent inconsistency in requiring municipalities to implement technology-based stormwater management practices and also comply with "total maximum daily loads." Thus, §402(p)(3)(B) is simply silent on whether §303(d)(1)(C) loads must be calculated on a daily basis, or may employ a longer timeframe such as seasonal or annual.

Establishment of daily loads in the TMDL process would leave dischargers free, in a future permit proceeding, to advance whatever arguments they choose concerning how the TMDLs should be incorporated into permits (and of course, citizens like FoE's members would be free to oppose those arguments). But those arguments are not ripe in this proceeding, which addresses the establishment of total maximum daily loads at levels adequate to meet water quality standards—not the manner in which those loads will be incorporated into permits.

Second, and inconsistently with its first rationale, the district court claimed that "section 402's choice of 'best management practices' over 'end-of-pipe numeric effluent limits' for regulating storm sewer discharges and section 303(d)'s choice of 'total maximum daily loads' for pollutants interfering with WQSs reveals an ambiguity in the intent of Congress as to which method it prefers." 346 F. Supp. 2d 191 (quoting 64 Fed. Reg. 68765 (Dec. 8, 1999)). This rationale does not even speak to the appropriate timeframe for a TMDL—*i.e.*, whether the TMDL should be daily (as the statute provides), or annual or seasonal (as EPA contends). In denying the applicability of any numeric effluent limits, the district court's second rationale

would undermine the annual and seasonal limits challenged here just as much as the daily ones required by §303(d)(1)(C). EPA has not made such a sweeping argument here, and §402(p)(3)(B) would not support it.⁸

Section 402(q) (2000). Likewise untenable was the district court's reliance on §402(q), which was enacted in 2000 to address combined sewer overflows. Section 402(q) addresses discharge permits, orders and decrees—not total maximum daily loads. Thus, §402(q), like §402(p)(3)(B), is not an "exception" to §303(d). *See* 346 F. Supp. 2d at 191[JA___] (erroneously suggesting the contrary).

Noting that §402(q) provides for compliance with EPA's 1994 CSO policy, the district court claimed that "[i]f municipalities cannot calculate non-daily TMDLs for their sewage overflow programs, they cannot implement EPA's CSO Policy." 346 F. Supp. 2d at 191 n.4[JA___]. But no such impossibility claim was advanced by EPA, which bears the burden of justifying divergences from the plain meaning of §303(d)(1)(C). *See* pp. 19-20, *supra*.

Moreover, any such claim is refuted by the CSO policy itself, which expressly reaffirms that CSOs are subject to "all" CWA requirements, 59 Fed. Reg. 18697/1 (April 19, 1994),⁹ including the Act's "water-quality based" requirements. *Id.* 18695/2, 18689/2. Thus, compliance with §303(d)(1)(C) is not only consistent with, but affirmatively required by, the CSO Policy—and thus is also required by §402(q). Moreover, the Policy expressly envisions use of a "total

⁸ Far from asserting that the Act prohibits end-of-pipe numeric effluent limits from being included in stormwater discharge permits, the 1999 Federal Register notice quoted by the district court says the opposite. *See* 64 Fed. Reg. 68765/3 (December 8, 1999) ("NPDES permits can impose end-of-pipe numeric effluent limits"), *cited in* 346 F. Supp. 2d at 191[JA___].

⁹ *See also* 59 Fed. Reg. 18690/2-3, 18691/2-3, 18692/3, 18695/3, 18696/1, 18696/3, 18697/2.

maximum daily load" where (as here) water quality standard violations stem from a combination of CSO and non-CSO sources. *Id.* 18693/1 (emphasis added).

Finally, as in the case of §402(p)(3)(B), the district court disregarded the tailored, source-specific nature of §402(q), using a provision limited to one kind of source (combined sewer overflows) to override the broad-based mandate of §303(d)(1)(C), which is applicable across the board to point and nonpoint sources. The district court claimed this approach was appropriate, "[a]bsent evidence of the uniqueness of sewage overflow." 346 F. Supp. 2d at 191[JA____] (emphasis added). Once again, the court reversed the appropriate burden. Given the presumption against amendment by implication, an absence of evidence compels the conclusion that §402(q) did not impliedly amend §303(d)(1)(C).

Statutory purpose. In addition to its discussion of individual statutory provisions, the district court claimed more broadly that §303(d)(1)(C)'s plain meaning "is inapposite where, as here, the statute's purpose contradicts plain meaning." 346 F. Supp. 2d at 193-94[JA____]. First, for reasons previously stated, the district court's analysis does not show that daily loads would disserve the Act's purpose. To the contrary, by helping to control short-term pollutant peaks, daily loads would serve the Act's water quality purposes, which are "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including *inter alia* achieving water quality that provides for "the protection and propagation of fish" and "recreation in and on the water." §101 and 101(a)(2), 33 U.S.C. §1251 and 1251(a)(2).

Second, "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). In §303(d)(1)(C), Congress specified a water quality purpose, as well

as the means by which that purpose is to be achieved—namely, establishment of the "total maximum daily load."

Judicial precedent. Finally, the district court cited judicial precedent, which it claimed supports a departure from §303(d)(1)(C)'s plain meaning. 346 F. Supp. 2d at 194, 189 n.2[JA____, ____]. The court's claim that the present case "differs little" from this precedent (*id.* 194[JA____]) is untenable.

For example, the court extensively discussed caselaw construing the Clean Water Act phrase "navigable waters." *Id.* 194, 189 n.2[JA____, ____]. However, this phrase is statutorily defined in broad terms to encompass "the waters of the United States." §502(7), 33 U.S.C. §1362(7). Wetlands contain water,¹⁰ so defining them as "waters" requires nothing like the impossible alchemy of transforming "daily" into "annual" or "seasonal."

The court also overlooked the Supreme Court's rejection of the argument that, given the §502(7) definition, "the use of the word navigable in the statute does not have any independent significance." *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (quoting Solicitor) (ellipses and internal quotations omitted). As the Court explained: "We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute." *Id.* The district court's approach, under which a TMDL of any duration (daily, seasonal, or annual) passes muster so long as it purportedly implements water quality standards, impermissibly reads the word "daily" out of the statute.

¹⁰ See, e.g., *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985) (under Corps of Engineers regulation, wetlands are "areas that are inundated or saturated by surface or ground water").

Likewise inapposite is the court's citation to *Chevron*. See 346 F. Supp. 2d at 194[JA____]. There, the Supreme Court upheld an EPA rule defining a "source" to include all emissions units at an industrial facility, rather than just a single emissions unit. The Court noted that the statute defined "major stationary source" to encompass a "stationary facility or source of air pollutants," *id.* 851 (emphasis added), and observed that "[t]he ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose." *Id.* 860 (emphasis added). "Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts." *Id.* (emphasis added). Here by contrast, defining "daily" as "annual" or "seasonal" is a serious "affront to common English usage," and there is no statutory definition that supports such an approach.

B. Even If The Issue Were Governed by *Chevron* Step Two, EPA's Annual and Seasonal Loads Are Unlawful.

Even assuming *arguendo* that there were an ambiguity, EPA's interpretation must be rejected under *Chevron* Step Two because it is not "reasonable." *Chevron*, 467 U.S. at 844. To implement a statutory requirement for a total maximum "daily" load by using annual and seasonal loads—*i.e.*, loads measured over periods up to 365 times longer than a day—"diverges from any realistic meaning" of §303(d)(1)(C). See *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting agency statutory interpretation under *Chevron* Step Two). Moreover, EPA has failed to offer a reasoned explanation for its interpretation, because *inter alia* it has not linked its interpretation to the key statutory phrase "total maximum daily load," see *Tax Analysts v. IRS*, 117 F.3d 607, 615 (D.C. Cir. 1997) (agency interpretation rejected under Step Two where "we are hard pressed to find any reason derived from §6103 in favor of the IRS's interpretation," and "[t]he IRS has offered none")(emphasis added), and indeed

has drained the term "daily" of meaning. *See Halverson v. Slater*, 129 F.3d 180, 189 (D.C. Cir. 1997) (agency interpretation rejected under Step Two where it would deprive statutory language "of virtually all effect").

II. EPA OFFERED NO REASONED EXPLANATION FOR CONCLUDING THAT THE ANNUAL BOD LOADS IMPLEMENT THE APPLICABLE WATER QUALITY STANDARDS.

Assuming *arguendo* that the statutory phrase "total maximum daily load" does not resolve the matter, EPA still acted arbitrarily in approving the annual BOD loads at issue here. Specifically, the agency offered no reasoned basis for concluding that the applicable water quality standards will be achieved through an annual load, which allows large short-term peak loadings.

Applicable statutory and regulatory provisions. Section 303(d)(1)(C) 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.)¹¹ 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).

¹¹ 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, 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. 1776/1 [JA16]. Likewise, EPA's subsequently withdrawn 2000 TMDL regulation "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].

Nature of discharges and of water quality standards. Indeed, such an explanation is especially needed here, given the nature of the discharges and of the applicable water quality standards.

Concerning the discharges, the TMDLs recognized:

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 TMDLs at 6-7, 9 (emphasis added)[JA389-90, 392].

As for the water quality standards, they are phrased not as annual limits, but as daily and hourly ones. *See* p. 5, *supra*. These short-term limits reflect the acute harms (such as fish kills) associated with oxygen depletion. *See* p. 5, *supra*. Fish subjected to deadly low levels of oxygen

cannot be expected to hold their breath for days or weeks to await the more favorable portions of an annual distribution curve.

EPA's failure to offer reasoned explanation. This Court has repeatedly remanded EPA decisions refusing to protect against short-term peaks, where (as here) the agency has failed to offer a reasoned explanation for those refusals. *See, e.g., Environmental Defense Fund v. EPA*, 898 F.2d 183, 185 and 190 (D.C. Cir. 1990) (Court noted that "[s]hort-term concentrations, which are only indirectly and incompletely limited by an annual average, may have adverse health and welfare effects," and remanded agency decision that had set only annual but not short-term limits); *American Lung Assn. v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998) (remanding where EPA failed to offer adequate explanation for refusing to protect against short-term peaks). *See also Muszynski*, 268 F.3d at 99 (where basis for setting annual loads "remain[ed] unclear," court remanded to EPA). The Court should do so here as well.

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. For example, a D.C. Water and Sewer Authority report considering just one of the major source categories of BOD (specifically, combined sewer overflows) indicated that if such overflows were reduced to two per year, "the entire BOD load for CSOs occurs in two discrete days of the year, or at least 5,126 lbs/day." *Id.* 9-24 (emphasis added) [JA521]. Two days at 5,126 lbs each would total approximately 10,252 lbs—well within the BOD TMDLs' annual CSO load of 152,906 lbs. Indeed, WASA predicted—based on water quality modeling—that an annual CSO BOD load of 152,906 lbs (the figure allotted by the TMDL under review here) would allow violations of the daily dissolved oxygen standard of 5.0 mg/L. *Id.* 9-22 (Table 9-6) [JA519].

EPA never claimed—or provided any reasoned, record-supported basis for believing—that the huge short-term loadings allowed by the annual TMDL would implement the District's dissolved oxygen standards with a margin of safety. On the contrary, the record offers only Delphic, internally contradictory statements on this issue. For example, EPA's approval rationale indicates 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 Rationale at 26[JA639] (emphasis added).¹² Similarly, the District's BOD TMDLs concede that "[t]he worst case scenario occurs when there is a large rainfall event which carries the CSOs and storm sewers into the river," but then asserts that it is establishing "annual loads for the wet weather events." BOD TMDLs at 9[JA392] (emphasis added). *Accord*, D.C. Response to Comments at 3[JA482] ("The load allocation was described in the BOD TMDL as an annual load not daily load in order to account for high flow events.")(emphasis added).

Nowhere in the record does EPA (or the District) explain why, if the event mean is the limiting parameter, the load should be set as an annual average—thus allowing, not prohibiting, the large discharge events that the BOD TMDLs characterize as the "worst case scenario." *See* BOD TMDLs at 9[JA392]. In the absence of such an explanation, the Court and public are left to guess at the agency's reasoning. As this Court held in remanding an EPA decision that failed adequately to explain the agency's refusal to protect against short-term air pollution peaks: "With its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review can occur only when agencies explain their decisions with precision, for it will not do for

¹² According to EPA, the "event mean" concentration is the mean concentration "over the course of an event (storm)." BOD Decision Rationale at 24 n.18[JA637].

a court to be compelled to guess at the theory underlying the agency's action." *ALA*, 134 F.3d at 392 (citation, internal quotations and ellipsis omitted).

EPA's failure to articulate a reasoned basis for its decision is all the more glaring, given public comments pointing out the flaws in the TMDLs' annual averaging time.¹³ EPA nowhere responded to those comments, and *a fortiori* offered no reasoned explanation that could justify dismissing the commenters' concerns. *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.").

EPA's post hoc rationales in the district court.

Sediment resuspension. Perhaps recognizing the fundamental flaws in the TMDLs that EPA approved, the agency's attorneys blatantly rewrote those TMDLs, claiming that the TMDLs made statements that nowhere appear in them. According to the attorneys, the TMDLs assert that the annual TMDLs will meet the District's dissolved oxygen standards by reducing resuspension of BOD from river sediments. EPA 6/17/04 Mem. 16-17[JA____]. *See also id.* 2[JA____]. The cited pages of the District's BOD TMDLs make no such claim. *See* BOD TMDLs at 9-10[JA392-93].

To the contrary, the cited TMDL passage undercuts EPA's attorneys' new-found resuspension argument. That passage states 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.* 9[JA392]. However, the TMDLs do not assert that control of this sediment resuspension

¹³ *See* Mem. from H. Fox (11/6/01), at 1-2 [JA601-02]. Mem. from J. Smith, Ph.D. (11/6/01), at 1-3[JA 603-05]; Mem. from J. Smith, Ph.D. (10/16/00), at 4 ¶ 7[JA351]; Mem. from H. Fox (4/17/01), at 3 ¶ 3[JA376]; Mem. from J. Smith, Ph. D. (4/17/01), at 4 ¶ 6[JA381].

would produce compliance with the daily and hourly dissolved oxygen standards—much less that such control could be achieved by an annual TMDL.

Far from it. The TMDLs expressly recognize 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 TMDLs expressly indicate that, even when the increased flow that allegedly causes scouring and resuspension is absent, rainfall events nonetheless cause equivalent impacts on dissolved oxygen.

In short, EPA's lawyers' argument was not raised in the decision documents at issue here, and thus amounts to a post-hoc rationalization by counsel. *See, e.g., Florida Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996) ("the agency runs this regulatory program, not its lawyers; parties are entitled to the agency's analysis of its proposal, not post hoc salvage operations of counsel"). Moreover, that argument is unsupported by—indeed, contradicted by—the cited TMDLs. *See* p. 10, *supra* (citing caselaw) (agency acts arbitrarily when it reaches a conclusion that is unsupported by substantial evidence, or runs counter to the record).

Model. EPA's attorneys also argued below that reliance on an annual load is supported by the water quality model used in developing the BOD TMDLs. EPA 6/17/04 Mem. 18-19[JA___]. This claim is doubly wrong.

First, the model decisively refutes EPA's attorneys' claim that the TMDLs' annual averaging time stems from 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).

Second, EPA counsel's assertions concerning the model amount to yet another post-hoc characterization unsupported by the record. The agency's lawyers assert: "The District concluded, and EPA agreed, that based on the model's simulation of the daily dissolved oxygen levels of each segment on each day over the three year period, these allocations would achieve the daily dissolved oxygen criterion even though the allocations are expressed as an annual average." EPA 6/17/04 Mem. 19[____] (emphasis in original). However, the cited pages of EPA's decision document do not state that the model was based on annual average loads.¹⁴

Indeed, any such claim would contradict the record, which establishes that the model relied 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 evidence that such daily loads can be jettisoned in favor of annual loads (which allow loads on any given day to exceed the amounts assumed in the model, as long as loads on other days are sufficiently lower that an annual average is met). *See* p. 10, *supra* (citing caselaw) (agency acts arbitrarily when it reaches a conclusion that is unsupported by substantial evidence, or runs counter to the record).

District court decision.

Sediment resuspension. Over plaintiff's objection, the district court entertained and accepted EPA counsel's post hoc rationale concerning sediment resuspension. This was error.

¹⁴ EPA's memorandum cited pp. 20-21 and 26 of EPA's decision document [JA633-34, 639].

The resuspension argument was no mere "amplified articulation," *see* 346 F. Supp. 2d at 196 (citation omitted), but a new rationalization that appeared nowhere in EPA's decision document, contradicted the very portion of the TMDL it claimed to be interpreting, and is refuted by the administrative record. *See* pp. 32-34, *supra*. *See also* *EDF v. Costle*, 657 F.2d at 285 ("The new material should be merely explanatory of the original record and should contain no new rationalizations."); *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218 (D.C. Cir. 2004) (even where agency's brief "does cite several studies with particularity," those citations "cannot save" the challenged agency action; "The expertise of the agency, not its lawyers, must be brought to bear on this issue in the first instance.").

Indeed, the district court's decision illustrates the wisdom of the ban on post hoc rationalizations. In trying to make sense of EPA counsel's new rationale, the court went fundamentally astray. The court claimed that the model "included sub-models factoring the effects of (if not supplying a single variable for) sediment resuspension." 346 F. Supp. 2d at 196[JA____]. To the contrary, the model states categorically that it does not account for resuspension. *See* pp. 33-34, *supra*. The record page cited by the district court addressed, not resuspension of sediments, but the release of BOD from the upper layer of the riverbed into the water column.¹⁵

¹⁵ The cited page indicates that the model accounts for "sediment oxygen demand," TAM/WASP model at xi[JA140], which involves release of pollutants from the "active layer" of sediment. *Id.* D-1[JA297] (sediment oxygen demand model addresses bacterial decomposition occurring "in a homogenous layer of the sediment of constant depth, termed the 'active layer'") (emphasis added). *Accord, id.* 67[JA209] (model accounts for decomposition "in the sediment layer") (emphasis added), 70[JA212] (decomposition occurs in "the active sediment layer") (emphasis added).

Model. The district court's discussion of the model undermines rather than supports the TMDLs. Specifically, the court found that "[i]t is true, as the plaintiff observes, that inputs into the model include only daily values, not average annual ones." 346 F. Supp. 2d at 197[JA ____]. In short, the model does not answer the question of how water quality would be impacted if those daily values were aggregated into larger totals, as the annual TMDL allows. Thus, EPA's (and the district court's) use of the model "assumes away the exact effect that the agency attempted to use it to justify," and is "circular." See *Public Citizen v. FMCSA*, 374 F.3d at 1219.

This problem is not cured simply because the agency based the model runs on "historical yearly data," 346 F. Supp. 2d at 197[JA ____], and reduced the permissible annual load by 17,244 pounds from the level initially proposed. *Id.* 198[JA ____]. Neither of these two points addresses, much less answers, the fundamental circularity in assuming away the aggregation that an annual load undisputedly allows, but that is not addressed by the model.¹⁶ Nowhere does the record state or show that these large aggregated peak loads would implement the applicable water quality standards with a margin of safety.

III. EPA OFFERED NO LAWFUL, REASONED EXPLANATION FOR CONCLUDING THAT THE SEASONAL TSS LOADS IMPLEMENT THE APPLICABLE WATER QUALITY STANDARDS.

Protection of recreational and aesthetic uses is at the heart of the Clean Water Act. §101(a)(2) (establishing a national goal of achieving "water quality which ... provides for recreation in and on the water"). EPA offered no lawful, reasoned explanation for concluding

¹⁶ The district court also attached significance to the fact that, during some of the model runs generated in developing the TMDL, the model predicted water quality standard violations during storms. 346 F. Supp. 2d at 197[JA ____]. This simply shows that the distribution of daily load inputs used by the model produced violations, not that the model analyzed the impact of aggregating those daily loads into even larger peak loads. Yet the TMDL allows such larger peaks, as long as the annual limit is met.

that the seasonal TSS loads protect these uses by implementing the applicable water quality standards.

The water quality standard addressed by the TSS TMDLs 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 aquatic life or result in the dominance of nuisance species." [JA57] The TSS TMDLs unlawfully and arbitrarily fail to provide for attainment of this standard. Specifically, the TMDLs only target 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 No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 714-15 (1994) (emphasis added).

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 aesthetic enjoyment"), 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].

Beyond the designated uses, EPA's regulations expressly require protection of "the existing uses," 40 C.F.R. §131.12(a)(1) -- *i.e.*, "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 C.F.R. §131.3(e). As documented in undisputed declarations, the existing uses of the Anacostia include recreational and aesthetic uses. *See* p. 46, *infra*. Accordingly, the TMDLs must protect those uses.

Nonetheless, EPA expressly excluded the Class A and B uses from the TSS TMDLs, 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 TMDLs at 6 (emphasis added)[JA685]. This exclusion is unlawful. Because the Class A and B uses are also designated—and existing—uses of the Anacostia River, turbidity that interferes with recreational and aesthetic uses of the River is just as "objectionable" (21 DCMR §1104.1(c)) as turbidity that shades out underwater grasses. Likewise, algal blooms that interfere with recreation and aesthetics constitute "undesirable aquatic life" or "nuisance species" (21 DCMR §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 neither 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), nor at levels necessary to protect existing uses. *Id.* §131.12(a)(1).

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

First, the seasonal averaging time is inadequate. Data presented by EPA in the TMDLs, 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* TSS TMDLs at 36 [JA715] ("the loads are all precipitation driven"); TSS TMDLs at 15 [JA694] (non-storm TSS concentrations range from about 4 to 20 mg/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"); Connolly Dec. ¶15b [JA____ - ____] (declarant personally observed substantial increases in the River's turbidity over time periods ranging from "a matter of minutes" to two days). 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. ¶15 [JA____ - ____]; Whitehead Dec. ¶9 [JA____].

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. In a case involving impacts of aircraft noise on recreation, this Court remanded an agency's decision to rely on annual averages to limit aircraft 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 inadequate, because it fails to protect against short-term pollutant loadings that harm recreational and aesthetic use. Indeed, the seasonal TMDLs allow up to 23% of current loads to be discharged during one or several storm events. *See* 346 F. Supp. 2d at 201[JA____].

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's position. EPA never addressed this evidence, offered no reasoned explanation (indeed, no explanation) for rejecting it, and pointed to no contrary evidence. Instead, the agency 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* pp. 5-6 n.2, *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." *See Data Processing*, 745 F.2d at 683-84. Moreover, as discussed above, EPA's belief is not only uncorroborated, but also "runs

counter" to the record evidence, *see MVMA*, 463 U.S. at 43, which shows the inadequacy of the TMDL (especially its seasonal averaging time) to protect the Class B use.

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 the 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," "undesirable aquatic life," and "nuisance species") 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 conceded

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

below that it would be "possible" to develop a numerical endpoint for the protection of recreational uses. EPA 6/17/04 Mem. 24[JA____].

EPA cited a 1986 guidance document contending that aesthetic concepts "may vary within the minds of individuals encountering the waterway," and that "a rationale for these qualities cannot be developed with quantifying definitions." TSS TMDL at 6-7 [JA685-86] (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). Indeed, given that the narrative water quality standards at issue here closely track the model water quality standards presented in the Gold Book chapter on "Aesthetic Qualities," *see* Gold Book [JA1____], EPA cannot credibly claim that aesthetics can be disregarded in implementing those standards.

EPA's suggestion that narrative aesthetics criteria cannot be implemented is further refuted by *PUD*, where the Supreme Court rejected the argument that designated uses "are too open ended, and that the Act only contemplates enforcement of the more specific and objective 'criteria.'" 511 U.S. at 715. The Court responded that "this argument is belied by the open-ended nature of the criteria themselves." *Id.* 715-16. "As the Solicitor General points out, even 'criteria' are often expressed in broad, narrative terms, such as 'there shall be no discharge of toxic

pollutants in toxic amounts." *Id.* 716. Thus, "Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects." *Id.* For example, the standards "specify that 'aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.'" *Id.* In short, "petitioners' attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, 'aesthetics.'" *Id.* (emphasis added). EPA's current position that aesthetics-based narrative standards are too open-ended to implement conflicts with the Supreme Court's ruling in *PUD*, and with the position espoused by the federal government in that case.

The district court's ruling.

Surrogate. The district court claimed that in targeting the TMDL on aquatic plants, EPA properly used a "surrogate standard for achieving the aesthetic and recreational uses of the river." 346 F. Supp. 2d at 200-01 (emphasis added)[JA____]. But this Court's precedent precludes EPA from simply assuming, without supporting data or explanation and in the face of unrebutted contrary evidence, that use of a surrogate will meet statutory requirements. That turbidity may take "numerous" days to kill underwater plants¹⁸ does nothing to address or rebut evidence that adverse recreational and aesthetic impacts occur with a single exposure to turbid water. *See Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001) (remanding: "even

¹⁸ *See* EPA 6/17/04 Mem. 22[JA____] (TSS's impacts "occur when TSS reduces water clarity over numerous days during the growing season") (emphasis in original), 3[JA____] ("TSS discharges are not significant because they occur on any given day, but rather when they reduce water clarity overall within the growing season to the extent that the reduced sunlight affects the growth and survival of submerged aquatic vegetation").

if, as EPA claims, accounting for non-MACT factors is difficult, the Agency may not use a proxy for the best performers that it has considerable reason to believe falls short of section 7412(d)(3)'s requirements;" to pass muster, EPA must demonstrate the validity of its approach "with substantial evidence—not mere assertions")(emphasis added); *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1243 (D.C. Cir. 2004) (remanding EPA decision adopting surrogate: "We cannot review under any standard the adequacy of the EPA's correlation determination if we do not know what correlation the EPA found to exist.").

The district court's reliance on *Muszynski* is likewise inapt. There, the Second Circuit approved a drinking water standard based on a surrogate level devised for other problems (biological nuisances and cultural eutrophication), but only upon finding that "the problems phosphorus creates for drinking water stem from biological nuisances and cultural eutrophication." 268 F.3d at 101 (emphasis added). Here, EPA has not claimed that TSS's impacts on recreation and aesthetics "stem from" its impacts on underwater plants. To the contrary, undisputed record evidence shows that recreational and aesthetic impacts stem from viewing turbid water. *See* p. 39, *supra*.

Subjective standard. The district court also claimed that, because the narrative standard is "subjective" and has not been transformed into a numeric endpoint, "no frame of reference exists against which to compare evidence," and thus the court could not recognize plaintiff's evidence as "objective facts that clearly contradict" EPA. 346 F. Supp. 2d at 201[JA____]. But courts frequently review—and find wanting—agency decisions applying narrative, non-quantified standards. For example, in *ALA* this Court reviewed an EPA decision under a broadly worded statutory standard ("public health"). 134 F.3d at 389. Nonetheless, the Court remanded, holding that EPA had not offered a reasoned explanation for its refusal to regulate short-term pollution

peaks, and in particular that "[t]he link between [EPA's] conclusion and the factual record as interpreted by EPA ... is missing." *Id.* 392-93.

In *City of Naples Airport Authority v. FAA*, 409 F.3d 431 (D.C. Cir. 2005), the applicable statutory standard was even broader ("reasonable"). *Id.* 432. Nonetheless, the Court remanded, finding that the agency's position was supported by "no evidence—aside from speculation," that the record contained evidence, "much of which the FAA never addressed," and that "[t]he FAA provided no data to contradict the study data. It did not perform any sound analysis. And it did not otherwise collect information on the subject." *Id.* 435-36.

"Reasonable" recreational use. The district court also claimed that, "[w]ithout any evidence on the point, the court is not prepared to say that recreational and aesthetic use reasonably contemplates the utilization of waters immediately after infrequent, disruptive storm events." 346 F. Supp. 2d at 202[JA ____]. This rationale was never articulated by EPA, and thus cannot salvage the agency's decision. *See* pp. 33, 35, *supra*.

Moreover, the district court's claim is untenable. First, as EPA itself has emphasized, "[n]arrative water quality criteria apply to all designated uses at all flows unless specified otherwise in a state's water quality standards." 54 Fed. Reg. 23882 (June 2, 1989). *Accord*, EPA Water Quality Standards Handbook (August 1994), at 5-9 to 5-10 (emphasis added) ("[a]t all times," waters shall be free from substances that produce objectionable turbidity and undesirable or nuisance aquatic life), 3-24, 7-9.¹⁹

¹⁹ Available at: <http://www.epa.gov/waterscience/standards/handbook/>. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (EPA policy document is "judicially cognizable apart from the record as authorit[y] marshaled in support of a legal argument").

Indeed, other provisions of the District's water quality standards show that the District is fully capable of expressly allowing for flexibility. Moreover, in doing so, the District's standards include safeguards such as protection of designated and existing uses, and prohibition of objectionable turbidity.²⁰ The district court's effort to read an exemption into the District's water quality standards—an exemption that interferes with designated and existing uses, and allows objectionable turbidity—must be rejected.

Second, the district court erred in claiming that evidence was lacking on use during and after storms. Unrebutted eyewitness evidence documents such use—indeed, use of the Anacostia River day in and day out throughout the year, except when the River is frozen. Connolly Dec. ¶¶2-6[JA____]; Whitehead Dec. ¶¶2-5[JA____]. The district court did not explain why it is unreasonable to use the River for daily exercise, as many do—individually and in rowing clubs. *See* Connolly Dec. ¶¶2-6[JA____]. Nor did the court explain why it is unreasonable for those who stroll along the River's banks to expect clean water. *See id.* ¶8[JA____]; Whitehead Dec. ¶4[JA____]. As this undisputed evidence shows, what the district court characterized as the

²⁰ *See, e.g.*, §§1101.3(b)[JA53] (use can be removed if *inter alia* "[n]atural, ephemeral, intermittent or low flow conditions prevent the attainment of the use"); 1102.2[JA54] (limited degradation of existing water quality can be allowed, but in doing so, "the District shall assure water quality adequate to protect existing uses fully"); 1102.3(c)[JA55] (allowing for limited "[s]hort-term degradation of the water quality"); 1102.4(b)[JA55] (limited exemption for "[c]onstruction or development projects," provided that "there are no long term adverse water quality effects and no impairment of the designated uses of the segment occurs"); 1102.4(c)[JA56] (limited exemption for "[s]hort term degradation of water quality" due to "construction projects"); 1105.1 and 1105.2[JA66-67] (authorizing "temporary" variance of no more than three years, provided that such a variance "shall not be granted" if it "will result in loss of protection for an existing use"); 1105.7[JA69] (authorizing limited exception from water quality standards for a "small area" around the discharge, provided that "[m]ixing zones shall be free from discharged substances that ... produce objectionable color, odor or turbidity").

"whim" of an "unlikely aquatic enthusiast" (346 F. Supp. 2d at 202[JA____]) is in reality the daily routine of the Anacostia River.

In any event, whatever the district court may think of these uses, they are undisputedly within the scope of the Anacostia River's designated Class A and B uses, and are also existing uses of the River. As such, they must be protected. *See* pp. 37-38, *supra*.

Prospect of future revision. Finally, the district court's suggestion that better TMDLs may be promulgated in the future (346 F. Supp. 2d at 202[JA____]) 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). Beyond the conflict with §303(d)(1)(C) itself, the further delay inherent in such a wait-and-see 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).

CONCLUSION

Friends of the Earth respectfully requests that the Court reverse the district court, hold that EPA acted unlawfully and arbitrarily in the respects shown above, and remand the challenged actions to EPA for reconsideration in light of the Court's decision. 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).

DATED: August 25, 2005.

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Initial Opening Brief of Plaintiff-Appellant Friends of the Earth** contains 13,751 words, as counted by counsel's word processing system.

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ADDENDUM OF STATUTES AND REGULATIONS

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Statutes

Clean Water Act § 301(a) and (b), 33 U.S.C. § 1311(a) and (b)

Clean Water Act § 302, 33 U.S.C. § 1312

Clean Water Act § 303, 33 U.S.C. § 1313

Clean Water Act § 304(a), 33 U.S.C. § 1314(a)

Clean Water Act § 402, 33 U.S.C. § 1342

Clean Water Act § 502, 33 U.S.C. § 1362

Regulations

40 C.F.R. § 130.2

40 C.F.R. § 130.7

40 C.F.R. § 131.3

40 C.F.R. § 131.12

District of Columbia Municipal Regulations

21 DCMR 1101.1

21 DCMR 1101.2

21 DCMR 1104.1

21 DCMR 1104.2

21 DCMR 1104.6

21 DCMR 1199