

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

ANACOSTIA RIVERKEEPER, INC.	)	
	)	
And FRIENDS OF THE EARTH	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:09-cv-00097-RWR
	)	
LISA JACKSON	)	
Administrator,	)	
United States Environmental	)	
Protection Agency, et al	)	
	)	
Defendants.	)	
	)	

**WATER ASSOCIATIONS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Intervenor-Defendant, National Association of Clean Water Agencies ("NACWA"), the Wet Weather Partnership ("WWP"), the Maryland Association of Municipal Wastewater Agencies ("MAMWA"), the Virginia Association of Municipal Wastewater Agencies ("VAMWA"), the Virginia Municipal Stormwater Association ("VAMSA"), the Storm Water Association of Maryland ("SWAM"), and the West Virginia Municipal Water Quality Association ("WVMWQA") (collectively, "Water Associations"), by counsel, moves for summary judgment in favor of Water Associations, the United States Environmental Protection Agency ("EPA"), and the District of Columbia Water and Sewer Authority ("WASA").

Water Associations submit that EPA did not act arbitrarily or capriciously, or in violation of the Clean Water Act. EPA is not required to address all TSS/Sediment-related water quality standards when it adopts a TMDL addressing aquatic life impairments due to TSS/sediment.



Additionally, the Anacostia TMDLs properly implements the secchi depth criteria and is protective of aquatic life. Lastly, EPA's allocation of wasteloads to sectors (i.e., stormwater systems) is both necessary and appropriate.

In support of its motion, Water Associations submit the accompanying memorandum of law.

Respectfully Submitted,

WATER ASSOCIATIONS  
By Counsel

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Case No. 1:09-cv-00097-RWR

LISA JACKSON )

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**WATER ASSOCIATIONS' COMBINED MEMORANDUM IN SUPPORT OF CROSS-  
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

Intervenor-Defendants National Association of Clean Water Agencies ("NACWA"), the Wet Weather Partnership ("WWP"), the Maryland Association of Municipal Wastewater Agencies ("MAMWA"), the Virginia Association of Municipal Wastewater Agencies ("VAMWA"), the Virginia Municipal Stormwater Association ("VAMSA"), the Storm Water Association of Maryland ("SWAM"), and the West Virginia Municipal Water Quality Association ("WVMWQA") (collectively, "Water Associations"), by counsel, hereby move for summary judgment in favor of the United States Environmental Protection Agency ("EPA") and oppose Plaintiffs' Motion for Summary Judgment for the following reasons:

**INTRODUCTION**

The Water Associations are environmental organizations in the business of managing and treating public sources of pollution to protect public health and the environment. We do this day in and out. We support the priority attention which the Anacostia River has received over the



years. We also support a realistic, affordable and efficiently implemented national TMDL program that will help restore all waters of the United States. However, by necessity, such a program must have a foundation of fair public process and rational prioritization of agency and public/private TMDL resources.

Impaired waters listings and TMDLs should be done for pollutants which impair a particular use. §1313(d)(1)(A) and (C). The TMDL at issue does just that by addressing TSS/Sediment which impairs the aquatic life use.

Plaintiffs' first seek to distract the Court with extraneous discussion about current water quality in the Anacostia followed by murky projections ("very, very muddy"- Plaintiffs' Memorandum at 13)(hereafter "Pl. Mem.") about what the Anacostia might look like after the 85 percent reduction in solids in the TMDL at issue is implemented. We think it bears noting that an 85 percent reduction in TSS/sediment is an extraordinary commitment that, if actually attainable, would yield enormous improvements in water clarity. By comparison, other approved sediment/TSS TMDLs for impaired waters in Maryland and Virginia only call for achieving a range of 3 to 50 percent load reductions. This is much less stringent than the 85 percent reduction called for in this TMDL.<sup>1</sup>

Plaintiffs then advance the novel argument that once a TMDL is announced for a pollutant, EPA must prepare a TMDL for all applicable standards (designated uses and associated narrative and numeric criteria) that apply to that pollutant. Id. Thus, here, they argue that in addition to addressing the aquatic life use (and associated numeric/narrative criteria) EPA

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<sup>1</sup> Maryland Sediment TMDLs require the following load reductions: Evitts Creek, 3.4%; Conococheague Creek, 5.9%; Willis Creek, 14.7%; Youghiogheny River, 23.6%; Upper North Branch Potomac River, 30.9%; Double Pipe Creek, 31.3%; Georges Creek, 34.9%; Lower Monocacy River, 38.4%; Antietam Creek, 39.5%; Catoctin Creek, 50.2%. See Approved TMDLs, <http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/ApprovedFinalTMDL/index.asp>. Virginia Sediment TMDLs require the Lick Creek to achieve a 46.8% reduction. Lick Creek | Mid-Atlantic Water | US EPA, [http://www.epa.gov/reg3wapd/tmdl/VA\\_TMDLs/LickCreekSediment/index.html](http://www.epa.gov/reg3wapd/tmdl/VA_TMDLs/LickCreekSediment/index.html).



must also expressly address recreational uses as they may or may not be impacted by TSS/Sediment.

EPA has interpreted 33 U.S.C. § 1313(d) to allow it the discretion to prioritize among TMDLs such that it can develop TMDLs which address a specific pollutant impairing a specific designated use. That is exactly what the TMDL at issue here does. The Anacostia TSS/Sediment TMDL directly addresses TSS/Sediment impairment of the aquatic life use (making sure the submerged vegetation gets enough light during the growing season) while noting the massive beneficial improvement in water quality for purposes of other uses including recreational, which will result from the 85 percent reduction in TSS/Sediment called for in the TMDL.

Plaintiffs argument that EPA must address all uses (aquatic and recreational in this case) is directly inconsistent with the statutory authorization in 33 U.S.C. § 1313(d)(1)(A) and (C) for EPA to prioritize its TMDL development based upon the uses of the impaired waters.<sup>2</sup> Arguing that EPA is required to address all uses relating to an announced pollutant is directly inconsistent with the authorization to prioritize among TMDLs based upon uses. If everything is a priority, nothing is. This Court should not require EPA to prioritize all uses for a particular pollutant because then none are a priority, thereby defeating the statutory scheme in 33 U.S.C. § 1313(d)(1)(A) and (C).

Plaintiffs want this Court to require EPA to go back and see if additional TSS/Sediment reductions may be necessary to address speculative future (after implementation of the 85 percent reduction) recreational use impairments Plaintiffs in the Anacostia. This relief would

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<sup>2</sup> The statute expressly allows EPA to prioritize the TMDLs which it prepares, “taking into account the severity of the pollution and the uses to be made of such waters.” 33 U.S.C. § 1313 (d)(1)(A) (emphasis added); *See also* 33 U.S.C. § 1313(d)(1)(C) (requiring each state to establish TMDLs for impaired water “in accordance with the priority ranking” established pursuant to 33 U.S.C. § 1313 (d)(1)(A)).



allow them to bypass the 33 U.S.C. § 1313(d)(1)(A) public listing process because the Anacostia is not listed for recreational use impairment for TSS/Sediment. They then invite this Court further out on a limb by asking the Court to trump EPA's express statutory authority to prioritize which TMDLs it prepares based upon severity of pollution and the uses which are impacted. See 33 U.S.C. §§ 1313(d)(1)(A) and (C). Plaintiffs effectively ask this Court to require EPA to dedicate its limited TMDL resources to potentially reducing a bit more TSS/Sediment to the Anacostia than allowing EPA to prioritize those resources to address waters without stringent TMDLs in place – which is what the District of Columbia, State of Maryland, and EPA have done here. Plaintiffs' basis for asking the Court to allow them to avoid the 33 U.S.C. § 1313(d)(1)(A) listing process and trump EPA's statutory prioritization authority is that EPA was already dealing with the Anacostia so they should have addressed everything related to TSS/Sediment while they were at it.

An analogy to Plaintiffs demands is to tell a dentist that she must fix every tooth in a patient's head during the first visit regardless of whether that makes sense for the patient and whether other patients with more pressing problems are waiting.

Further, this Memorandum also explains why the TMDL and waste load allocations at issue are in fact protective of DC's secchi depth criteria and aquatic life. The memo goes on to explain how the implicit margin of safety is legally correct. Lastly, we explain why EPA's allocation of wasteloads to source sectors (i.e., municipal stormwater systems) is both necessary and appropriate.

For the reasons explained below, this Court should grant Defendant U.S. Environmental Protection Agency's Cross-Motion for Summary Judgment and deny Plaintiffs' Cross-Motion for Summary Judgment on all issues.



## ARGUMENT<sup>3</sup>

### **I. EPA is not Required to Address “All” TSS/Sediment-Related Water Quality Standards Just Because it Decided to Develop a TMDL to Address Aquatic Life Impairments Due to TSS/Sediment.**

Plaintiffs argue that because EPA decided to develop a TMDL for TSS/Sediment for Aquatic life protection that it must also prepare TMDLs for all water quality standards<sup>4</sup> related in any way to TSS/Sediment. Pl. Mem. at 13. In essence, Plaintiffs would have this court adopt an interpretation of 33 U.S.C. § 1313(d) that if EPA decides to address a pollutant for a water body, it must develop TMDLs for all uses and supporting criteria which relate to that pollutant.

Plaintiffs are legally incorrect for several reasons.

#### **A. The Anacostia must first be listed under 33 U.S.C. § 1313(d)(1)(A) for recreational impairment before a TMDL is required for recreational use impairments.**

The Anacostia is not listed for recreational use impairment. Therefore, the Plaintiffs asserted violation of the recreational uses of the Anacostia is not an “applicable water quality standard” for which 33 U.S.C. § 1313(d)(1)(C) compels EPA to develop a TMDL. It is that straightforward in our view.

Plaintiffs must first make their case to the District of Columbia and/or State of Maryland that the remaining 15 percent TSS/Sediment not controlled by this TMDL interferes with applicable recreational uses such that some or all of the Anacostia River should be listed on the next list of impaired waters developed under 33 U.S.C. § 1313(d)(1)(C). We note that is far from an obvious conclusion. Few – if any – urban rivers in this country will actually achieve an

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<sup>3</sup> The Associations appreciate this Court allowing their intervention in this case. Because Defendant EPA’s Memorandum adequately covers the Statement of Facts and Standard of Review, we hereby incorporate and adopt those sections of EPA’s Memorandum and will not address those sections here.

<sup>4</sup> Water quality standards are defined to include designated uses and the numeric and narrative criteria which apply to those uses.



85 percent reduction in TSS/Sediment. See Footnote 1 for a summary of other TSS/Sediment TMDL reductions in Virginia and Maryland. Regardless, until Plaintiffs or the States justify listing some or all of the Anacostia for recreational or other uses as part of the impaired waters listing process under 33 U.S.C. § 1313(d)(1)(A), EPA is not formally required to perform a recreational use TMDL under 33 U.S.C. § 1313(d)(1)(C).

**B. Even if the Anacostia were listed as being impaired for recreational uses for TSS/Sediment, the Statute gives EPA express discretion not to develop a recreational use TMDL at this time.**

Even if the Anacostia were listed as being impaired for recreational uses due to TSS/Sediment, the statute expressly allows EPA to prioritize the TMDLs which it prepares, “taking into account the severity of the pollution and the uses to be made of such waters.” 33 U.S.C. § 1313 (d)(1)(A) (emphasis added); See also 33 U.S.C. § 1313(d)(1)(C) (requiring each state to establish TMDLs for impaired water “in accordance with the priority ranking” established pursuant to 33 U.S.C. § 1313 (d)(1)(A)).

Plaintiffs’ interpretation that EPA must address all uses for any pollutant which EPA decides to target is directly inconsistent with EPA’s statutory authority to prioritize TMDL development based, in part, on the applicable uses which are impacted. Plaintiffs would have this Court write out of the statute the command to develop TMDLs according to agency priority because all uses would have to be addressed in each TMDL for any particular pollutant.

Here, EPA has done just that by electing to address the aquatic life impairment in great detail and in an extremely aggressive manner while noting the obvious enormous benefits to recreational uses that will also arise from the 85 percent reduction called for in the TMDL. Notably, this Court previously upheld the prior version of this TMDL which featured a 77



percent growing season TSS/Sediment reduction.<sup>5</sup> The States and EPA have exercised the express prioritization authority given to them by the Statute in fully addressing the aquatic life use first while also providing an 85 percent reduction in TSS/Sediment for recreational use enhancements and, on top of that, an express commitment to revisit the recreational issue if it turns out the 85 percent reduction leaves recreational uses unattained. However, the States and EPA all concluded that the 85 percent reduction will meet aesthetic and turbidity standards which apply to the Anacostia outside of the aquatic life standards. TMDL Report at vi.

It was perfectly rational for the States and EPA to leave the remaining 15 percent TSS/Sediment unaddressed for the time being while this TMDL is implemented while they move on to address other waters that do not have the benefit of any TMDL in place. Moreover, the severity of remaining pollution in the Anacostia (15 percent for TSS/Sediment) is far less than many other streams remaining on the District of Columbia's and State of Maryland's 303(d) lists.

Thus, EPA made a rational and clearly correct decision to give priority to other waters rather than continue to focus on marginal – at best – additional TSS/Sediment reductions in the Anacostia. This TMDL will require massive investment in public and private resources to get anywhere near the 85 percent reduction. One could start by considering how this Court would reduce TSS/Sediment by 85 percent from its facilities to get a feel for how extensive a requirement this is on a watershed-wide basis. DC WASA's CSO program provides another objective measure of just what a massive undertaking it will be to achieve an 85 percent

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<sup>5</sup> This court, in *Friends of the Earth* 346 F.Supp.2d at 200-01 (D.D.C. 2004), found that EPA's finding that a TSS TMDL will achieve recreational WQS was not arbitrary and capacious. This Court further added that a narrative recreational use standard "does not mean that EPA's decision-making process must yield to the whim of that unlikely aquatic enthusiast who will not tolerate anything less than the immediate enjoyment of river waters after disruptive storm events." *Id.* at 202.



reduction in TSS from combined sewer overflows. See WASA Summary Judgment Motion.

We are years away from knowing whether we can even come close to 85 percent, never mind go beyond 85 percent. At bottom, Plaintiffs would have EPA stop developing meaningful TMDLs calling for reductions that can be achieved with existing technology and practices, to engage in an academic exercise about whether we could remove more than 85 percent of the TSS/Sediment currently discharged to the Anacostia River.<sup>6</sup>

The prioritization authority given to EPA under the Statute allows EPA, for example, to move past deciding whether something beyond 85 percent is attainable and necessary for recreational uses in the Anacostia and, instead, address impairments in other waters which are not being controlled at all.<sup>7</sup> The States' and EPA's decision to formally address aquatic life in the TMDL, with recreational use issues addressed implicitly was a clearly rational decision by EPA and one of priority squarely given to the Agency in the Statute.

**C. Plaintiffs' argument is inconsistent with decades of impaired waters listings and TMDL development with nationwide adverse implications if this Court were to grant Plaintiffs requested relief.**

Plaintiffs' position is completely inconsistent with decades of implementation of both the listing (See 33 U.S.C. § 1313(d)(1)(A)) and TMDL development (See 33 U.S.C. § 1313(d)(1)(C)) aspects of the national impaired waters program.

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<sup>6</sup> It is important to note that few regulated point sources contribute TSS to the Anacostia. Thus, to even get to the 85 percent reduction will require extraordinary efforts by non-regulated sources. That will be a major challenge for all stakeholders concerned about the Anacostia.

<sup>7</sup> Under Plaintiffs' view, EPA would be compelled to address lesser priority TMDLs just because they are associated with the pollutant. For example, if a water is impaired for copper for aquatic life purposes, EPA would have to develop at least two (if not more) TMDLs if it wants to address the toxic aquatic life concern posed by copper. The first TMDL would be for copper for aquatic life purposes. The second would be for human health purposes (an applicable standard for copper in DC's regulations). This standard may not be violated at all but would be related to the pollutant "copper." Finally, the TMDL would have to address any other designated use or narrative standard applicable to copper. All of this so EPA can address its real concern of copper toxicity to aquatic life. There is no statutory basis for imposing such illogical and counterproductive restrictions on EPA's priority-making authority and TMDL resources.



As to listing, addressing a recreational use in this TMDL bypasses the listing process whereby everyone would be given an opportunity for input into whether additional TSS/Sediment reductions beyond 85 percent are necessary to address recreational uses. This Court should not allow these Plaintiffs (or any other stakeholders) to bypass that listing step.

More importantly, most TMDLs in the country have addressed a particular use – such as aquatic life or recreational use, but rarely both. Plaintiffs’ argument that because EPA chose to perform a TSS/Sediment TMDL for aquatic life protection it was required to develop TMDLs for any other TSS/Sediment-related standards (recreational and beyond) would call into question EPA’s approval all of these other TMDLs. There are literally thousands of them. See DDOE: Anacostia TMDL p1, <http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495470.asp> (last visited Sept. 18, 2009); See also Approved TMDLs, <http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/ApprovedFinalTMDL/index.asp> (last visited Sept. 18, 2009).

For example, EPA approved a TMDL in June of 2003 for TSS/Sediment in Watts Branch, in the District of Columbia. That TMDL was addressed solely to aquatic life concerns arising from aquatic habitat degradation due to “severe channel erosion during high flows.”<sup>88</sup> This TMDL identifies “secondary contact recreation” as an “applicable use” but does not develop a TMDL to protect that use. *Id.* If EPA was compelled to stop and develop a second TMDL for recreational uses of Watts Branch, it would have come at the expense of some other TMDL, such as the one at issue here for the Anacostia. We doubt that a TMDL to address TSS/Sediment for recreational use in Watts Branch should be EPA’s next priority. However, this would be the result if the Court rules in Plaintiffs favor here. At bottom, EPA and the

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<sup>88</sup> DC Department of Health, *Final Total Maximum Daily Loads for Total Suspended Solids in Watts Branch 1* (June 2003), <http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/ApprovedFinalTMDL/index.asp>.



District of Columbia and State of Maryland would be forced to return to waters like Watts Branch and add non-priority TMDLs to achieve non-priority uses relating to the pollutant which EPA elected to address (there TSS/Sediment).

**D. Assuming, Arguendo that EPA has an obligation to address recreational use water quality standards, this TMDL achieves those standards. Otherwise there is a genuine issue of material fact and resolution of this issue would not be proper for Summary Judgment.**

Assuming, *arguendo*, that EPA is required to address recreational use standards when it approves a TSS/Sediment TMDL for aquatic life, the TMDL at issue here does so as explained above and in EPA's memorandum.

Additionally, Plaintiffs assertions about recreation during large storm events are misleading. Numerous factors beyond TSS/Sediment levels go into whether the Anacostia is suitable for recreation during such events including, water depth, current/velocity, debris, commercial traffic, other pollutants such as bacteria, etc. Primary and secondary contact recreation occurs today in the Anacostia River. It will only be improved by an 85 percent reduction in TSS/Sediment but even a 100 percent reduction in TSS/Sediment won't affect whether the river is suitable for recreation during and following large storm events. *See Friends of the Earth* 346 F.Supp.2d 182, 202 (D.D.C. 2004) (Holding that a narrative recreational use standard "does not mean that EPA's decision-making process must yield to the whim of that unlikely aquatic enthusiast who will not tolerate anything less than the immediate enjoyment of river waters after disruptive storm events.").

Should the Court disagree with the State of Maryland, District of Columbia, and EPA's conclusion that the TMDL will meet all applicable water quality standards as a matter of law then we are left with a genuine issue of material fact. Accordingly, summary judgment should not lie for Plaintiffs.



**E. EPA was not required to address the narrative standards at this time and it had the discretion to defer other numeric standards beyond secchi depth if the TMDL for secchi depth did not fully address the other numeric criteria.**

Plaintiffs argue that EPA failed to implement the District of Columbia's narrative water quality standards. That argument fails for the same reasons explained above as to why EPA is not required to formally address the District's recreational uses for the Anacostia at this time. The Anacostia is not listed as being impaired for the narrative standards so EPA is not required to prepare a TMDL at this time. Moreover, even if it were listed, as we explain above, EPA has the express authority to prioritize TMDLs based upon designated uses and the severity of pollution and the narrative standards relate to the severity of pollutants. Each narrative describes a threshold (severity) of pollution so EPA has express authority to prioritize when such a TMDL would be done to the extent one were required here, which it is not.

Moreover, Plaintiffs acknowledge that applying the narrative criteria would be particularly resource intensive for EPA as these standards would have to be first translated into objective TMDL endpoints before they could be used as the basis for TMDL development. Pl. Mem. at 15. Thus, EPA's prioritization to not address narrative standards directly in the TMDL is rational and must be upheld.

The same argument applies to the District of Columbia, State of Maryland, and EPA's conclusion that the secchi depth criteria were the most stringent of the applicable numeric criteria. The record demonstrates that the TMDL meets the secchi depth criteria and, thereby, the less stringent NTU criterion (Pl. Mem. at 11-12.)

Plaintiffs essentially attack EPA's priority but they recognize they could not do so in a direct manner given the express authority given to EPA in 1313(d)(1)(A) and (C) and because



squeezing a few more percentage – if it could even be shown to be warranted – in TSS/Sediment reduction for the Anacostia is of a lesser priority than addressing other significant and unaddressed water impairments in the District. That is why Plaintiffs had to resort to a weak and unprecedented “bootstrapping” argument that once EPA identifies a pollutant it has to address all applicable uses and associated standards. That argument is legally incorrect for the reasons stated above.

## **II. The Anacostia TMDLs Properly Implement the Secchi Depth Criteria**

Plaintiffs object to the TMDLs as being impermissibly “set at a level necessary to attain and maintain the applicable water quality criteria expressed as a seasonal average” rather than imposing these criteria on a daily basis. (Pl. Mem. at 16. (quoting R. #3 at ii, 27.)) The TMDLs are correctly expressed for the following reasons.

Plaintiffs reassert arguments that the Anacostia TMDLs do not protect recreational uses. As discussed above, EPA is not required to formally develop TMDLs for recreational uses at this time because the Anacostia is not listed as being impaired for recreational use. See 33 U.S.C. § 303(d)(1)(A). This Court cannot allow them to bypass that public process through this legal challenge. Moreover, even if the Anacostia were listed as being impaired for recreational use, EPA has the express authority to prioritize TMDL development between different uses and, here, properly selected aquatic life as the primary use to address in the TMDLs.

Next, Plaintiffs fault the TMDLs for not protecting the aquatic life use during high flow events. However, this assertion of error is based on Plaintiffs view that the “critical conditions” are those that occur over short time periods during extremely high flow events. To the contrary, DC, Maryland, and EPA all applied their extensive technical expertise in modeling the Anacostia during wet, dry, and average conditions and found that the TMDL loadings will be protective of aquatic life under critical conditions for stream flow, loading, and water quality (R. #3 at 2, 17-



18, 32.) Thus, EPA properly determined that “[t]he TMDLs consider critical environmental conditions.” (R. #3 at ix.)

The Anacostia TMDLs implement the most stringent applicable numeric water quality criterion. (R. #3 at 3.) This criterion is expressly stated as a seasonal average. See 21 D.C. Mun. Reg. § 1104.8, Table 1. Plaintiffs offer only their speculation that the TMDL is not protective of aquatic life. It is indisputable that the seasonal average for TSS/Sediment is the appropriate “critical condition” to consider for the protection of aquatic life. Therefore, EPA correctly concluded that “potential for infrequent, periodic high daily sediment loadings does not mean that these TMDLs have not been set at a level necessary to attain and maintain the applicable water quality criteria expressed as a seasonal average.” (R. #3 at 23-24.)

Finally, Plaintiffs’ contention that allowing short excursions above the seasonal criteria is not protective of fish and plants ignores the fact that the secchi depth criterion implemented by the Anacostia TMDLs is based on a seasonal average value, and therefore, was set at a level (0.8 meters) which expressly contemplated such excursions. If Plaintiffs believe that the criterion should be based on a shorter time period than a seasonal average or a different depth than 0.8 meters, they should have challenged the criterion when it was adopted. This action is not the proper forum to seek to object to the express of a duly adopted water quality standard for the Anacostia.

The seasonal secchi depth standard was duly promulgated by the District of Columbia and there is no credible evidence in the record to show that DC, Maryland, and EPA acted arbitrarily and capriciously or otherwise not in accordance with the law in concluding that the SAV-related secchi depth criteria are the most sensitive endpoints and, therefore, the appropriate



bases for DC and Maryland's water quality standards for sediment and TSS. 5 U.S.C. § 706(2)(A).

### **III. The Anacostia TMDLs Includes an Appropriate Margin of Safety**

The Water Associations support and adopt the arguments advanced and authorities cited by EPA regarding the appropriateness of the margin of safety included in the Anacostia TMDLs. (See EPA Mem. at 30.)

### **IV. The Sector Waste Load Allocations in the TMDLs are Appropriate**

The Water Associations support and adopt the arguments advanced and authorities cited by EPA (See EPA Mem. at 25) and DC WASA regarding the appropriateness of the sector wasteload allocations in the TMDLs.

Moreover, we note that the TMDL effectively "bubbles" loadings from MS4 and certain non-point source discharges rather than trying to assign a wasteload allocation to every "pipe, ditch, channel, tunnel, et cetera" as Plaintiffs would have EPA develop. (Pl. Mem. at 18.)

Plaintiffs want individual WLAs established for every "pipe, ditch, channel, tunnel, et cetera" (*Id.*) so they can do "actual real-time monitoring – that is taking a sample for TSS – and comparing it to any given WLA." (Pl. Mem. at 19.) This is completely unrealistic for several reasons.

First, just identifying all of the "point sources" in the Anacostia watershed would be a monumental task that would significantly erode the States' and EPA's resources.

Second, developing and applying specific WLAs to these myriad and extraordinarily diverse sources would consume State and EPA TMDL resources for years. Such a requirement would prevent EPA from ever addressing large water bodies, such as the Chesapeake Bay where literally thousands of sources throughout the watershed must be addressed. In these large and



complex TMDLs, major point sources get WLAs, but more discrete point sources must be addressed through sector loadings.

Third, there is no need for this level of scale to implement the seasonal average secchi depth TMDL.

Fourth, a ruling that sector loadings are impermissible would undermine numerous TMDLs already in place, forcing EPA and the States to go back and redo them for little or no gain yet completely eroding the agencies' available resources to address other impairments.

Fifth, Plaintiffs assert that the "practical effect is that every outfall within the area to which the allocation is assigned could conceivably discharge the entire allocation, with no accountability under the approved TMDL." (Pl. Mem. at 19.) Plaintiffs fundamentally misunderstand the TMDL. It expressly precludes this outcome because it mandates that all outfalls must live within the overall allocation without specifying an allocation to them individually.

The sector approach in the TMDLs is the right approach for practical necessity (we can't develop WLA for all point sources as defined by Plaintiffs) as well as to efficiently and flexibly implement the TMDL. Imposing a fixed allocation at each outfall will significantly raise compliance costs and is not required by law. If the standard can be met by assigning a loading to all sources within a river segment so be it. If we went beyond that, and assigned loads to individual outfalls, there is nothing to stop them from "bubbling"/trading their loads anyway.

Finally, even if the Court were interested in the scale of the sector allocation for "point sources" addressed by the TMDL, arguments about the appropriate scale would constitute a material issue of fact which is not suitable for resolution by summary judgment.

### **CONCLUSION**



For the reasons stated above, the Water Associations submit that this Court should conclude that EPA's decision to approve the Anacostia TSS TMDL submitted by Maryland and District of Columbia was not arbitrary or capricious, and was in accordance with law. For that reason, the Court should deny Plaintiffs' Cross-Motion for Summary Judgment and Grant EPA's Cross-Motion for Summary Judgment.

Respectfully Submitted,

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By counsel

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