

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA RIVERKEEPER, INC.
and FRIENDS OF THE EARTH,

Plaintiffs,

Y.

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

LISA JACKSON,
Administrator,
United States Environmental
Protection Agency, et al.,

Defendants.

**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Intervenor-Defendant District of Columbia Water and Sewer Authority (“WASA”), by counsel, moves for summary judgment in favor of the United States Environmental Protection Agency (“EPA”) and against Plaintiffs. In accordance with Local Civil Rule 7(h)(1), WASA submits the accompanying Memorandum in Support of its Motion and Proposed Order.

Because Plaintiffs seek review of agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the statement of facts is included in the Memorandum in Support pursuant to Local Civil Rule 7(h)(2).

Pursuant to Local Civ. Rule 7(f), WASA requests an opportunity to present oral argument.

Respectfully submitted this 18th day of September, 2009.

DISTRICT OF COLUMBIA WATER AND
SEWER AUTHORITY

By Counsel

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**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY'S
COMBINED MEMORANDUM IN SUPPORT OF SUMMARY
JUDGMENT AND IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Intervenor-defendant, District of Columbia Water and Sewer Authority ("WASA") has moved for summary judgment in favor of the United States Environmental Protection Agency ("EPA") and opposes Plaintiffs' motion for summary judgment for the reasons set forth below.

I. INTRODUCTION

Anacostia Riverkeeper, Inc. and Friends of the Earth ("Plaintiffs") challenge EPA's approval of sediment and suspended solids load caps or "total maximum daily loads" ("TMDLs") for the Anacostia River and its tributaries ("Anacostia TMDLs").

This memorandum demonstrates that Plaintiffs' claim that the Anacostia TMDLs

unlawfully ignore the recreational use designations in the District of Columbia (“DC”) and Maryland water quality standards is without merit. The Anacostia River is listed as impaired due to sediment and suspended solids (“TSS”) for the aquatic life use designations, not the recreational use designations. A legal obligation to establish TMDLs exists only for those use designations listed pursuant to 33 U.S.C. § 1313(d)(1)(A) as impaired, and since the Anacostia is not listed by either DC or Maryland as impaired for their respective recreational use designations due to sediment and TSS, there was no legal obligation to establish sediment and TSS TMDLs for these use designations. Nevertheless, assuming for the sake of argument that EPA had an obligation to establish TMDLs to protect the Anacostia’s recreational use designations from sediment and TSS, the record in this case shows that EPA satisfied any such obligation. The Anacostia TMDLs, when fully implemented, will provide for an 85 percent reduction in sediment and TSS loads to the Anacostia, and “will substantially improve, if not achieve aesthetic, primary and secondary recreation water uses.”¹ Therefore, it was entirely reasonable for DC, Maryland, and EPA to take an adaptive management approach to addressing the impact of sediment and TSS on recreational uses in the Anacostia by first establishing and implementing the Anacostia TMDLs’ 85 percent reduction in sediment and TSS loads before calling for additional load reductions that may, in fact, not be needed to protect recreational uses in the Anacostia.

Also, this memorandum demonstrates that Plaintiffs have not carried their burden to show that EPA acted arbitrarily and capriciously or otherwise not in accordance with law when it concluded that implementation of DC’s numeric criterion for secchi depth (a measure of water

¹ See EPA Region III, Decision Rationale, Total Maximum Daily Loads, Anacostia River Basin Watershed For Sediment/Total Suspended Solids, Montgomery and Prince George’s Counties, Maryland, and the District of Columbia, 3 (July 24, 2007) (“Decision Rationale”) (R. #3).

clarity) would achieve the sediment and TSS reductions necessary to comply with DC's and Maryland's aquatic life use designations and the other relevant water quality criteria for the protection of aquatic life in the Anacostia. (R. #3, at 4.)

This memorandum further demonstrates that Plaintiffs' claim that the Anacostia TMDLs fail to take into account critical conditions for stream flow, loading, and water quality parameters is without merit because this claim is based on the erroneous premise that a legal obligation existed to establish sediment and TSS TMDLs for the recreational use designations. As a consequence, Plaintiffs incorrectly assert that the critical condition is a heavy and prolonged rainfall resulting in periodic high peak loads of sediment and TSS that impair recreational uses. The record shows that based on the advice of highly qualified technical consultants, DC and Maryland modeled the watershed using daily simulations for a three-year period which included an average year, a wetter than average year, and a drier than average year, and then evaluated these modeled conditions against the most stringent numeric criteria for the protection of aquatic life to reasonably conclude that aquatic life in the Anacostia would be protected under critical conditions for stream flow, loading, and water quality. (R. #3, at 2, 17-18.)

Finally, this memorandum demonstrates that Plaintiffs' claim that EPA violated its regulations by not assigning load limits to individual point sources fails because Plaintiffs have not carried their burden to show that EPA's interpretation and application of its own regulation is plainly erroneous or inconsistent with the regulation.²

II. RELEVANT STATUTORY AND REGULATORY BACKGROUND

The "Clean Water Act and Implementing Regulations" section of Plaintiffs'

² Plaintiffs also claim that EPA's approval of the margin of safety in the Anacostia TMDLs is legally insufficient and arbitrary and capricious. (Pl. Mem. at 20-22.) WASA has coordinated preparation of this memorandum with EPA, and in the interest of avoiding duplication, adopts and incorporates by reference EPA's arguments in opposition to Plaintiffs' margin of safety claim.

Memorandum of Points and Authorities in Support of their Motion for Summary Judgment (“Plaintiffs’ Memorandum” or “Pl. Mem.”) fails to provide a complete discussion of those provisions of the Clean Water Act (“CWA”) and its implementing regulations which are critical to an analysis of the issues in this case. Specifically, Plaintiffs’ Memorandum does not explain the impaired waters listing process and those CWA provisions which trigger the states’ and EPA’s legal obligation to establish and approve TMDLs.

The CWA requires each state to establish water quality standards sufficient to “protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.” 33 U.S.C. § 1313(c)(2)(A). A water quality standard consists of one or more “designated uses” of a water body and “water quality criteria ... based upon such uses” specifying the amount of various pollutants that may be present in the water body and still protect its designated use. Id. Thus, water quality criteria, whether numeric or narrative, are based upon protection of particular designated uses.

The CWA requires each state to “identify those waters within its boundaries for which [technology-based effluent limitations] are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). The list of impaired waters established pursuant to this section is commonly referred to as the “303(d) List.” A water body is included on the 303(d) List because one or more of its designated uses has been determined to be impaired. Impairment determinations are based on an evaluation of “all existing and readily available water quality-related data and information.” 40 C.F.R. § 130.7(b)(5). This evaluation consists of a review of physical, chemical and bacterial data, as well as other monitoring

information, land use data, observations of water quality conditions, and computer modeling to determine if the water body is meeting the relevant criteria.³

Impairment listings frequently identify the pollutants and sources that are known to cause or contribute to the impairments, but this is not always the case because the cause of the impairment is not always known. The water quality criteria play a role in the listing process where data and observations are assessed against the criteria to determine if an impairment exists. 40 C.F.R. § 130.7(b).

To comport with EPA regulations and guidance, a state's 303(d) List thus consists of waters within its jurisdiction that are impaired for at least one designated use, the uses which are impaired, and the pollutant or pollutants, if known, that are the cause of the impairment.⁴ Each state's integrated report on water quality and the 303(d) List are required to be updated every two years. 33 U.S.C. § 1315(b)(1).

Only after waters are listed as impaired for one or more designated uses does the CWA compel the establishment and approval of TMDLs "for those pollutants . . . suitable for such calculation . . . at a level necessary to implement the applicable water quality standards." 33

³ See D.C. Dep't of Health/Env'tl. Health Admin., District of Columbia Water Quality Assessment, 2006 Integrated Report to the U.S. EPA and U.S. Congress Pursuant to Secs. 305(b) and 303(d) of the Clean Water Act, at 29-31 ("DC 2006 Report"), available at http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/wqd/2006_dc_ir-1.pdf (excerpts attached at Exhibit A); see also D.C. Dept. of the Environment, District of Columbia Water Quality Assessment, 2008 Integrated Report to the Environmental Protection Agency and the U.S. Congress Pursuant to Sections 305(b) and 303(d), Clean Water Act (P.L. 97-117), at 31-34 ("DC 2008 Report"), available at http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/DC_IR_2008_Revised_9-9-2008.pdf (excerpts attached as Exhibit B); MD Dep't of the Env't, 2006 List of Impaired Surface Waters [303(d) List] and Integrated Assessment of Water Quality in Maryland, at 30-31 (Sept. 2006) ("Maryland 2006 Report"), available at http://www.mde.state.md.us/assets/document/Revised_Final_2006_Integrated_Report_Parts_A-D.pdf (excerpts attached at Exhibit C); see also MD Dep't of the Env't, 2008 Integrated Report of Surface Water Quality in Maryland, at 29-34 ("Maryland 2008 Report"), available at http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/Maryland%20303%20dlist/2008_Final_303d_list.asp (excerpts attached at Exhibit D).

⁴ See generally U.S. EPA, Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act (July 29, 2005), available at <http://www.epa.gov/owow/tmdl/2006IRG/report/2006irg-report.pdf>.

U.S.C. § 1313(d)(1)(C). Thus, the TMDLs are required to implement the “applicable water quality standards” which triggered the water’s listing on the 303(d) List, or more precisely, the designated use for which the water body has been listed as impaired.

III. STATEMENT OF FACTS

A. The Anacostia River

Both DC and Maryland have included various segments of the Anacostia River and its tributaries on their 303(d) Lists as impaired for the designated use of protection and propagation of aquatic life due to sediment and TSS.⁵ Recreational uses of the various segments of the Anacostia River Basin are listed as impaired. However, these listed impairments are based on levels of fecal coliform, and oil and grease rather than sediment and TSS. See DC 2006 Report, App. 3.4, 3.5 and Anacostia Detail Report; DC 2008 Report, Anacostia Detail Report. Although Plaintiffs contend that recreational use of the Anacostia River has been affected by turbid conditions during high river flows (Pl. Mem. at 17), they have not pointed to any evidence that these conditions have resulted in listing the Anacostia pursuant to 33 U.S.C. § 1313(d)(1)(A) as impaired for the recreational use designation. To the contrary, the record shows that DC and Maryland have conducted a thorough review of “all existing and readily available water quality-related data and information” on a biannual basis since developing the first 303(d) Lists in 1996 and have not listed any segment of the Anacostia River Basin as impaired for the recreational use designation due to sediment or TSS.⁶

Further, Plaintiffs’ Memorandum mischaracterizes the Anacostia TMDLs by describing

⁵ See DC 2006 Report, App. 3.4, 3.5; Maryland 2006 Report at 58; Maryland 2008 Report, Part F.4. Plaintiffs assert that “sediment and TSS clearly contribute to impairments of uses” of primary and secondary contact recreation in the Anacostia River based on comments filed by Barry Sulkin. (Pl. Mem. at 14.) If Plaintiffs believe that the Anacostia should be placed on the 303(d) List as impaired for the recreational use designation due to sediment and TSS, the proper forum for them to assert that claim is the 303(d) listing process, not this action.

⁶ 40 C.F.R. § 130(b)(5); *see, e.g.*, DC 2006 Report, at 29-31; DC 2008 Report, at 31-34; Maryland 2006 Report, at 30-31; Maryland 2008 Report, at 29-34.

conditions presently existing in the Anacostia to suggest that the same or similar conditions will exist after these TMDLs are fully implemented. Although EPA was not under a legal obligation to establish sediment and TSS TMDLs for the recreational use designation, Plaintiffs' description of the turbid conditions that will exist in the river following implementation of the Anacostia TMDLs mischaracterizes the impact that these conditions could have on recreational uses. The turbid conditions described by Plaintiffs reflect an extreme storm event that would occur only rarely and would be accompanied by conditions such as high flows, wave action, and wind that would make the river unsuitable, if not dangerous, for recreational use.⁷ Contrary to Plaintiffs' characterization, the record in this case shows that the Anacostia TMDLs will achieve an overall 85 percent reduction in sediment and suspended loads, and that EPA reasonably concluded that these TMDLs will "substantially improve" water quality in the Anacostia and "resolve the listed impairment and achieve the applicable water quality standards." (R. #3, at 3.)

Moreover, Plaintiffs' mischaracterization of river conditions fails to acknowledge the widespread efforts now underway to improve water quality in the Anacostia and its tributaries through control of the various sources of sediment and TSS such as storm water, nonpoint source runoff, and discharges from the District's combined sewer system. WASA, for example, is implementing a Combined Sewer System Long-Term Control Plan ("LTCP") that, when completed at a cost of nearly \$1,000,000,000 (in 2001 dollars), will reduce the volume of combined sewer overflow discharges to the Anacostia by 97.5 percent in the average year. (WASA Mem. Supp. Mot. Int. at 6-7.) The Anacostia TMDLs are based upon much of the work done by WASA during development of its LTCP and incorporate the LTCP's CSO control

⁷ As discussed below, modeling of sediment loading in support of the TMDLs used flow data from the three-year time period of 1995-1997. During this period several significant storms, including Hurricane Fran, affected the District of Columbia metropolitan area.

measures. (R. #3, at 20.)

WASA agrees that aggressive measures such as its LTCP are needed to improve and protect water quality in the Anacostia, but it is inaccurate for Plaintiffs to devote their description of the Anacostia to conditions presently existing in the river without acknowledging the dramatic improvements that will result from an 85 percent reduction in sediment and TSS called for in the Anacostia TMDLs.

B. The Anacostia TMDLs

Based on the listed impairment for the aquatic life designated use due to sediment and TSS, Maryland and DC prepared the Anacostia TMDLs and on June 22, 2007, submitted them to EPA for approval pursuant to 33 U.S.C. § 1313(d)(2). The objectives of the Anacostia TMDLs were “1) to ensure that aquatic life is protected in the tidal and non-tidal waters of the Anacostia; 2) to ensure that MD’s and DC’s sediment-related water quality standards that support aquatic life are met in their respective portions of the watershed; and 3) to ensure in particular that the numeric criteria for water clarity are met in the tidal waters.” (R. #4, at vi.)

The Anacostia TMDLs were developed following an extensive modeling effort to simulate flows and water clarity conditions which included modeling daily conditions based on information on tides, precipitation, tributary flows and estimates of sediment loads from various sources. *Id.* This modeling included simulating high flow events to account for increased loads that may result from large storm events. (R. #4, at vii.) The modeling showed that the critical endpoint for setting sediment and TSS load restrictions was DC’s tidal water clarity criterion of a secchi depth of 0.8 meters on a seasonal segment average from April 1 through October 31. (R. #4, at 28.); see also D.C. Mun. Regs. tit. 21, § 1104.8, Table 1 (2005). In other words, the modeling showed that if the 0.8 meter criterion is met, the other applicable water quality criteria

(including both the numeric criteria established by DC and Maryland and the narrative criteria for Maryland non-tidal waters related to the protection of aquatic life) will be met as well. (R. #4, at 28.)

As previously mentioned, the caps on sediment and TSS in the Anacostia TMDLs “constitute an 85% overall reduction of sediment/TSS from the baseline loads.” (R. #3, at ii.) Further, the modeling conducted by DC and Maryland shows that once attained, the Anacostia TMDLs will ensure compliance with all applicable water quality standards, and each jurisdiction has in place reasonable assurances to implement the allocations within the Anacostia TMDLs. (R. #4, at xiv.)

EPA reviewed the Anacostia TMDLs and agreed “that the impairment identified by both Maryland and the District on their respective 303(d) lists of impaired waters was related to aquatic life use” and that the TMDLs were “designed to restore and maintain the aquatic life uses in their respective waters ... [and] resolve the listed impairment and achieve the applicable water quality standards. (R. #3, at 3.) Thus, EPA found that (1) the 303(d) listings for sediment and TSS were limited to impairments related to aquatic life and (2) that the Anacostia TMDLs are designed to achieve all applicable water quality standards, including designated uses for aquatic life as well as the numeric and narrative criteria established for the protection of aquatic life. Based on these findings, EPA approved the Anacostia TMDLs on July 24, 2007. (R. #3, at i.)

IV. STANDARD OF REVIEW

Plaintiffs seek judicial review of EPA’s decision to approve the Anacostia TMDLs developed by DC and Maryland pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559, 701-706. The APA establishes a highly deferential standard on judicial review of agency action. Agency action is valid unless it is “arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This standard of review presumes the validity of agency action. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc). The court is not “to substitute its judgment for that of the agency.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). If the “agency’s reasons and policy choices conform to certain minimal standards of rationality,” the action is “reasonable and must be upheld.” Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (quoting Ethyl Corp., 541 F.2d at 36). The standard merely requires the court to determine whether the regulatory “decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Overton Park, 401 U.S. at 416. The “agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (internal quotations and citation omitted).

As to statutory interpretation, it is a “dominant, well settled [sic] principle of federal law” that reviewing courts must accord deference to federal agencies’ interpretations of statutes Congress has charged them with administering. National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417 (1992) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). This principle mandates that:

“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” Chevron, supra at 843. If the agency interpretation is not in conflict with the plain language of the statute, deference is due.

National R.R. Passenger Corp., 503 U.S. at 417. Also, the words of a statute must be read in the context of the overall statutory scheme. Food & Drug Admin. v. Brown & Williamson Tobacco

Corp., 529 U.S. 120, 132-33 (2000). The rule of deference is based on institutional fundamentals concerning the relationship between Congress, executive agencies, and the courts. See Chevron, 467 U.S. at 843-44. “To sustain [an agency’s] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.” Udall v. Tallman, 380 U.S. 1, 16 (1965) (internal quotations and citation omitted).

Further, courts grant an agency even greater deference in interpretations of their own regulations, with such interpretations being overturned only if they are “plainly erroneous or inconsistent” with the regulations. See United States v. Kanchanalak, 192 F.3d 1037, 1043 (D.C. Cir. 1999) (quoting Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997)).

V. ARGUMENT

A. The Anacostia TMDLs Implement all Applicable Water Quality Standards

1. No obligation existed to establish sediment and TSS TMDLs for the Anacostia recreational use designations.

Plaintiffs claim that DC’s and Maryland’s recreational use designations are “applicable” water quality standards for the Anacostia TMDLs and that by ignoring the impact of sediment and TSS on recreational uses, EPA acted unlawfully in approving the Anacostia TMDLs because they were not “established at a level necessary to implement the applicable water quality standards.” (Pl. Mem. at 9 (quoting 33 U.S.C. § 1313(d)(1)(A)). This claim fails because the Anacostia TMDLs were developed to address the listed impairment due to sediment and TSS, and since the recreational use designations are not listed as impaired due to sediment and TSS, the recreational use designations are not “applicable” water quality standards in this case.

As explained above, 33 U.S.C. § 1313(d)(1)(A) requires states to place waters on the 303(d) List when they determine that the technology-based effluent limitations required by the CWA “are not stringent enough to implement any water quality standard applicable to such waters.” Once an impaired water is placed on the 303(d) List, 33 U.S.C. § 1313(d)(1)(C) triggers the states’ obligation to establish a TMDL for that water as well as EPA’s obligation to approve or disapprove the TMDL. Section 1313(d)(1)(C) reads, in relevant part, as follows:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection [33 U.S.C. § 1313(d)(1)(A)] ... 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. Such load shall be established at a level necessary to implement the applicable water quality standards

(Emphasis added.) Plaintiffs seize upon the reference to “applicable water quality standards” in subsection (1)(C) above to assert that EPA acted unlawfully in approving the Anacostia TMDLs because they ignored the “applicable” water quality standards; namely, DC and Maryland’s recreational use designations. Plaintiffs argue that the recreational use designations are applicable water quality standards in this case because the Anacostia TMDLs established load caps for sediment and TSS and these pollutants adversely affect recreational use of the Anacostia following storm events. As explained below, they are wrong.

First, Plaintiffs’ position is inconsistent with the plain language of subsection (1)(C) because it effectively reads the clear connection between subsections (1)(A) and (1)(C) out of the statute. As explained above, subsection (1)(C) requires establishment of TMDLs only for those waters that have first been listed as impaired pursuant to subsection (1)(A). Plaintiffs would have this Court ignore subsection (1)(C)’s mandate that a water body first be listed as impaired pursuant to subsection (1)(A) before the states and EPA are required to establish a TMDL for

that water body. Therefore, since the Anacostia TMDLs establish load caps for sediment and TSS and since the Anacostia has not been listed as impaired for the recreational use designations due to sediment and TSS, these designations cannot be “applicable” water quality standards in this case.

Second, assuming for the sake of argument that subsection (1)(C) is ambiguous and therefore must be construed, Plaintiffs’ interpretation is unreasonable. Subsection (1)(A) requires states to identify those waters for which technology-based effluent limitations are not stringent enough to “implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A) (emphasis added). For waters so identified, subsection (1)(C) requires states to establish TMDLs at a level necessary to “implement the applicable water quality standards.” *Id.* (emphasis added). It is apparent from the above quoted language that the “applicable” water quality standards are the same standards under both subsections. As Plaintiffs point out, designated uses are water quality standards. (Pl. Mem. at 9.) It follows that since the Anacostia has not been identified under subsection (1)(A) as a water for which the technology-based effluent limitations are not stringent enough to implement the recreational use designations (*i.e.*, the “applicable” water quality standard under section (1)(A)) due to sediment and TSS, the recreational use designations cannot be the “applicable” water quality standards under subsection (1)(C) in this case. Therefore, Plaintiffs’ interpretation is unreasonable because it would mean that the recreational use designations are the “applicable” water quality standards under subsection (1)(C), but not under subsection (1)(A).

Although their reasoning and position are unclear, Plaintiffs appear to also contend that the water quality criteria adopted to protect the recreational use designations from impairments due to sediment and TSS are “applicable” water quality standards in this case simply because the

Anacostia TMDLs established load caps for these pollutants. Such an argument is fatally flawed because it would have to be based on the erroneous assumption that the water quality criteria can be “applicable” water quality standards under subsection (1)(C) independent of the use designations. The water quality criteria are adopted to protect specified use designation and Plaintiffs’ contention, if adopted, would effectively divorce the water quality criteria from the use designations that the criteria are designed to protect. Although water quality criteria are water quality standards, they have meaning only when applied to the designated use or uses that they are designed to protect. Thus, the criteria are “applicable” water quality standards under subsection (1)(C) in those cases where load caps must be established at a level necessary to implement the criteria in order to address the impaired use designation or designations for which the water body was listed as impaired. It follows that since the Anacostia has not been listed as impaired for the recreational use designations due sediment and TSS, the criteria designed to protect the recreational use designations from these pollutants can not be “applicable” water quality standards under subsection (1)(C).

Also, assuming for the sake of argument that the statute is ambiguous and more than one reasonable interpretation is possible, EPA’s Decision Rationale clearly evidences an interpretation by the agency that does not comport with the interpretation advanced by Plaintiffs. (R. #3, at 3.) (finding that the TMDLs which focused on restoring aquatic life uses would achieve “the applicable water quality standards” (emphasis added)). As EPA’s interpretation is reasonable and does not conflict with the plain language of the statute, it is entitled to deference under Chevron. National R.R. Passenger Corp., 503 U.S. at 417-18.

Plaintiffs further contend that irrespective of its obligations under 33 U.S.C. § 1313(d), EPA acted unlawfully in approving the Anacostia TMDLs because they did not establish load

caps at levels necessary to implement the recreational use designations and “[i]n the Anacostia River, sediment and TSS clearly contribute to impairments of uses not protected under these TMDLs.” (Pl. Mem. at 14.) Plaintiffs cite PUD No. 1 v. Washington Dep’t of Ecology, 511 U.S. 700, 717 (1994), to support this contention, but the ruling in PUD No. 1 and the quote from that ruling cited by Plaintiffs are not on point. In PUD No. 1, hydroelectric project developers challenged the condition in a state water quality certification issued pursuant to 33 U.S.C. § 1341 requiring the maintenance of specified minimum stream flows to protect salmon downstream of the project. In seeking to overturn a decision by the Supreme Court of Washington, the developers asserted that 33 U.S.C. § 1313 authorizes the states to protect designated uses solely through implementation of the water quality criteria, and since the criteria did not specify minimum stream flows, the state did not have the authority to impose a minimum stream flow requirement. In upholding the decision of the state supreme court, the U.S. Supreme Court concluded that the State’s authority was not limited to the criteria because the criteria may not always account for the impacts that could impair the designated uses of a water body.

PUD No. 1 stands for the proposition that the states can look beyond the adopted water quality criteria when imposing conditions to protect use designations that may be impacted because the criteria may not always encompass all of the foreseeable impacts from a project or activity. In this case, Plaintiffs do not assert that EPA acted unlawfully in approving the Anacostia TMDLs because DC and Maryland should have looked beyond the adopted criteria to ensure that the load caps would protect the use designations. Rather, Plaintiffs contend that EPA should have disapproved the Anacostia TMDLs because they failed to establish load caps based on the adopted criteria at levels necessary to implement the recreational use designations. Therefore, PUD No. 1 is clearly distinguishable from this case.

Finally, assuming for the sake of argument that Plaintiffs are correct in their contention that the recreational use designations are an applicable water quality standard, they have not carried their burden to show that the sediment and TSS load caps were not established at a level necessary to implement these designations. The record in this case shows that the Anacostia TMDLs will provide for an 85 percent reduction in sediment and TSS loads and “will substantially improve, if not achieve aesthetic, primary and secondary recreation water uses.” (R. #3, at 3.) Plaintiffs have not cited any authority for the proposition that EPA may not approve a TMDL unless it provides unqualified assurance it will provide for implementation of the applicable water quality standards under all conditions. Indeed, it is virtually impossible to provide such assurance in the case of impacts on recreational uses from storm-driven sediment and TSS loads because these impacts generally occur under conditions when recreation is not occurring due to high river flows, wave action and wind. See Friends of the Earth v. EPA, 346 F. Supp. 2d 182, 202 (D.D.C. 2004) (stating that EPA need not 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”), rev’d and remanded on other grounds by 446 F.3d 140 (D.C. Cir. 2006).

Therefore, it was entirely reasonable for DC, Maryland, and EPA to take an adaptive management approach to address the impacts of sediment and TSS on recreational uses in the Anacostia by first implementing the Anacostia TMDL’s 85 percent reduction in sediment and TSS loads before calling for additional load reductions that may, in fact, not be needed to protect recreational uses. Such an approach allows DC, Maryland, EPA and interested parties such as Plaintiffs to observe the impact, if any, of the remaining sediment and TSS loads under a range of storm conditions following implementation of the 85 percent reduction called for in the

Anacostia TMDL, and, if necessary, seek further reductions based on real-time observations of impacts on recreational uses. In fact, this Court has previously ruled that the use of a surrogate numeric target which achieved substantial reductions in TSS “allows EPA to reasonably assume that the recreational and aesthetic uses will nevertheless be met” rather than being forced to conduct a “separate data-intensive investigation” to show that such uses are supported by the TMDL. See Friends of the Earth, 346 F. Supp. 2d at 200-01.

2. The Anacostia TMDLs consider all applicable numeric water quality criteria.

Plaintiffs also claim that the Anacostia TMDLs allow for violations of DC’s NTU criterion during high flow conditions. (Pl. Mem. at 11-12.)⁸ Other than the unsupported, generalized allegations in the Plaintiffs’ Memorandum, this claim is based entirely on comments filed by Barry Sulkin. Aside from the fact that they are largely irrelevant because they are directed almost entirely at the impacts of sediment and TSS on recreational uses, Mr. Sulkin’s comments fail to provide a reasoned scientific basis for finding that EPA acted arbitrarily and capriciously in concluding that the Anacostia TMDL will provide for compliance with DC’s NTU criterion.

Mr. Sulkin uses simplistic calculations to arrive at the maximum levels of TSS that may occur assuming a flow rate of 10.75 m³/s combined with the maximum allowed sediment load. (R. #20, at 1-2.) Based on this “back-of-the-envelope” calculation using the gross total loads from the Anacostia TMDLs, Mr. Sulkin concludes that turbidity levels of 8,000 NTU or greater may occur. (R. #20, at 2.) Notably, Mr. Sulkin does not acknowledge (much less analyze) the extensive modeling and data analysis conducted by DC and Maryland in support of the

⁸ Plaintiffs refer to Mr. Sulkin as a Doctor in their memorandum. His curriculum vita, attached to his comments, indicates that he does not hold a doctorate. (R. #20, at 6.)

Anacostia TMDL load caps. (R. #4, at 26-36.) Mr. Sulkin's comments provide no basis for assuming that the maximum sediment loads allowed under the Anacostia TMDLs would occur at the flow rate assumed in the calculation, rather than at substantially higher flow rates which occur in the Anacostia River.⁹ Mr. Sulkin sought to support his comments with photos of a small stream near a construction site in Tennessee in which he measured turbidity in NTU and contends the turbidity "is not nearly as high as what is being proposed to be allowed at the high flow range by the draft TMDL." (R. #20, at 4.) Here, Mr. Sulkin bases his conclusion not only on overly simplistic calculations, but also on a visual comparison to conditions in a small stream that bears no relation to the Anacostia River, a large, tidally influenced, complex water body.

Mr. Sulkin concludes that "sediment values likely to be seen at times during higher flows will yield unacceptably muddy water not protective of all recreational and aesthetic uses, and they may also fail to protect fish and plants under, or as a result of these high flow conditions." (R. #20, at 3.) Mr. Sulkin offers no scientific or technical support for this conclusion. His comments do not include an analysis of how often the conditions he describes might occur, nor how long they might persist. His comments fail to acknowledge that the high flow events he assumes in his calculations are associated with extreme storm events, or evaluate the impacts that high flows, wave action and wind during such an event will have on recreational use of the river which, as discussed above, would make the river unsuitable for recreational use. Most notably, Mr. Sulkin's comments do not include any information on the aquatic life that he claims may be impacted or how they might be impacted.

⁹ Mr. Sulkin's comments assume a flow rate of 10.75 m³/s, which is the lowest flow level that falls within the top flow range under the Anacostia TMDLs. The Anacostia TMDL report includes an appendix analyzing flow durations and providing a regression analysis. (R. #4, at App. B.) This analysis shows flow rates in the Northeast and Northwest Branch, with maximum predicted flow rates of 3690 ft³/s, which converts to over 104 m³/s, or roughly 10 times higher than the flow rate used in Mr. Sulkin's calculations.

Contrary to Plaintiffs' claims, DC and Maryland specifically addressed Mr. Sulkin's comments, stating that the modeling conducted in support of the Anacostia TMDLs shows that when the DC secchi depth criterion is met, all other numeric criterion, including DC's criterion of 20 NTU above ambient conditions would be met. (R. #4, Comment Response Document at 17-18.) The Comment Response Document provides a graph comparing secchi depth to turbidity in NTU showing the relationship between the two measures, further demonstrating compliance with the NTU criterion. (*Id.* at 23.) EPA also specifically analyzed the 20 NTU criterion in its Decision Rationale and concluded that "turbidity will remain under 20 NTU on a long-term basis if the secchi depth remains at or above the criteria of 0.8 meters." (R. #3, at 4.)

Therefore, DC, Maryland and EPA considered and provided a reasoned response to Mr. Sulkin's comments regarding potential violation of DC's NTU criterion. While no response was provided to Mr. Sulkin's contention that aquatic life would be adversely impacted by turbidity levels allowed under the Anacostia TMDLs, these comments were broad allegations that were not supported by any scientific or technical data, and thus required no response. As EPA based its decision to approve the Anacostia TMDLs on substantial evidence in the record, and specifically considered and responded to the comments alleging that the NTU standard would be violated, EPA's decision to approve the Anacostia TMDLs was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

3. The Anacostia TMDLs include consideration of the applicable narrative water quality criteria

Plaintiffs further contend that narrative criteria applicable to the Anacostia River are not addressed by the Anacostia TMDLs, and that EPA failed to respond to substantive comments and provide a reasoned explanation why the TMDLs did not specifically establish loads designed to achieve the narrative criteria. (Pl. Mem. at 15.) Specifically, Plaintiffs point to DC's narrative

criterion that requires that surface waters be free of substances in amounts that produce objectionable color or turbidity. (Pl. Mem. at 11; see also D.C. Mun. Regs. tit. 21 § 1104.1(c) (2005).) It is unclear, however, whether Plaintiffs' narrative criterion claim relates to the recreational use designations or aquatic life use designations.

As discussed above, the Anacostia is not listed as impaired pursuant to 33 U.S.C. § 1313(d)(1)(A) for recreational use designations due to sediment or TSS. Thus, EPA was not required to consider the recreational use designations, including the narrative criteria designed to implement these uses, during its review of the Anacostia TMDLs. Therefore, EPA's failure to make a specific finding that the Anacostia TMDLs were established at a level necessary to implement the DC narrative criterion as it relates to recreational uses was not arbitrary and capricious as neither recreational uses, nor criteria establish to protect such uses, are "applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C); see also supra, Section V.A.1.

Plaintiffs' claim is also without merit to the extent it asserts that the DC narrative criterion is designed to protect aquatic life uses in the Anacostia and that EPA failed to consider the narrative criterion in concluding that the Anacostia TMDLs were established at a level necessary to implement the aquatic life use designation. Citing EPA guidance, Plaintiffs contend that methods exist for developing TMDLs for narrative and aesthetic water quality criteria. (Pl. Mem. at 15.) The referenced guidance states that "[w]hen numeric water quality criteria do not exist, impairment is determined on the basis of narrative water quality criteria" and the "narrative standard is then interpreted and used to develop indicator(s) with quantifiable target(s) to measure attainment." (R. #70, at 1-3 (emphasis added).) Thus, DC's narrative criterion must be interpreted into a quantifiable measure in order to be implemented through a TMDL.

In this case, such an interpretation has already been established as specific water quality criteria have been adopted by DC to meet and attain aquatic life uses in the Anacostia. D.C. Mun. Regs. tit. 21, § 1104.8, Table 1 (2005).¹⁰ Therefore, no further interpretation is necessary – rather, the Anacostia TMDLs are only required to ensure that the DC numeric water quality criteria applicable to aquatic life uses are implemented. See Friends of the Earth, 346 F. Supp. 2d at 201 (holding that the use of surrogate numeric standards for achieving aesthetic standards was within EPA’s discretionary authority where such values are “reasonably calculated to achieve compliance in the future”).

As explained above, the Anacostia TMDLs were specifically designed to implement DC’s secchi depth water quality criterion. Further, EPA specifically found that the Anacostia TMDLs would not only meet the secchi depth criterion, but “turbidity will remain under 20 NTU on a long-term basis if the secchi depth remains at or above the criteria of 0.8 meters.” (R. #3, at 4.) As the Anacostia TMDLs are specifically designed to meet DC’s narrative criteria as interpreted through and embodied by the numeric criteria, EPA’s decision to approve the Anacostia TMDLs was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

B. The Anacostia TMDLs Address Compliance With Water Quality Standards Over Appropriate Time Periods

Plaintiffs argue that the Anacostia TMDLs are unlawful as they are “set at a level necessary to attain and maintain the applicable water quality criteria expressed as a seasonal average” rather than meeting these criteria on a daily basis. (Pl. Mem. at 16 (quoting R. #3, at ii, 27).) Plaintiffs’ arguments are flawed for a number of reasons. First, Plaintiffs once again argue

¹⁰ The regulations include the 20 NTU criterion for protection primary and secondary contact recreation, and protection of aquatic life, as well as the 0.8 secchi depth criterion for the protection of aquatic life.

that the Anacostia TMDLs do not protect recreational uses for short time periods during periods of high flow. As discussed above, EPA was not required to consider the recreational use designation during its evaluation of the Anacostia TMDLs because the Anacostia has not been listed as impaired pursuant to 33 U.S.C. § 303(d)(1)(A) for this designation. See supra Section V.A.1.

Second, Plaintiffs' argument again relies heavily on the comments of Barry Sulkin and his contention that "unacceptably muddy water" will be present following implementation of the Anacostia TMDLs. Mr. Sulkin's comments reflect his personal aesthetic values and, as discussed above, he offers no scientific or technical support for his conclusions. See supra V.A.2.

Third, Plaintiffs claim that the Anacostia TMDLs do not "take into account critical conditions for stream flow, loading and water quality parameters" as required by the regulations. (See Pl. Mem. at 17 (quoting 40 C.F.R. § 130.7(c)(1)).) However, this claim is based on the erroneous assumption that the "critical conditions" are those that occur over short time periods during extremely high flow events. To the contrary, DC, Maryland, and EPA relied on the advice of highly qualified technical consultants to "model[] the watershed using daily simulations for three years [which] represent average flow, a wetter than average year, and a drier than average year" and then evaluated this modeled condition against the most stringent numeric criterion for the protection of aquatic life to reasonably conclude that aquatic life in the Anacostia would be protected under critical conditions for stream flow, loading, and water quality (R. #3, at 2, 17-18, 32.) Thus, EPA concluded that "[t]he TMDLs consider critical environmental conditions." (R. #3, at ix.)

Fourth, the Anacostia TMDLs are expressly designed to meet the most stringent

applicable numeric water quality criterion. (R. #3, at 3.) This criterion is expressly stated as a seasonal segment average, and Plaintiffs have offered no evidence to suggest that expressing the secchi depth criterion is not protective of aquatic life. See D.C. Mun. Regs. tit. 21, § 1104.8, Table 1. Thus, the “critical conditions” necessary to consider for the protection of SAV is the average loading over the growing season, which 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, allows for such excursions. If Plaintiffs believe that the criterion should be based on a shorter time period than a seasonal average, they should have challenged the criterion when it was adopted. This action is not the proper forum to challenge the criterion.

Moreover, even if Plaintiffs could challenge the criterion in this action, they fail to point to any evidence in the record to support their contention that the seasonal secchi depth criterion is not protective of aquatic life. Plaintiffs cite to conclusory statements in the comments and in an affidavit attached to their Memorandum which merely state that sediment during high flow events “may also fail to protect fish and plants.” (Pl. Mem. at 17 (citing R. # 20, at 3; Weiss Aff. ¶ 7).) These statements are not supported by any scientific evidence and fail to even identify sensitive species that they allege may be impacted by short term high flow events. Therefore, 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 SAV is the most sensitive endpoint and the appropriate basis for DC and Maryland's water quality standards for sediment and TSS. 5 U.S.C. § 706(2)(A).

C. The Anacostia TMDLs Include an Appropriate Margin of Safety.

WASA supports and adopts 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 30-33.)

D. The WLAs in the Anacostia TMDLs are Appropriate.

Plaintiffs contend that the CWA's implementing regulations require that waste load allocations ("WLAs") be established for every individual point source. (See Pl. Mem. at 18.) EPA regulations define WLAs as "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h). Plaintiffs cite this language to assert that there is a "clear requirement[]" that every individual CSO outfall have its own allocation. (See Pl. Mem. at 18.) This assertion overlooks the fact that WLAs covering multiple point sources establish an allocation covering each individual point source, and implements the purpose of the TMDL allocation process, *i.e.*, to established loads "necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). EPA concluded as much by stating that the "TMDLs include a total allowable load as well as individual waste load allocations. ..." (R. #3, at 2.) As EPA's interpretation of its own regulations is not "plainly erroneous or inconsistent" with the regulations, it should be upheld. See Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).

Further, Plaintiffs argument on this point has already been considered and rejected by this Court, which held that a single waste load assigned to all of the CSO outfalls covered by

WASA's permit "represents a reasonable interpretation of [EPA's] regulations" and that Plaintiffs' arguments were "mainly a policy quibble" and "meritless." Friends of the Earth, 346 F. Supp. 2d at 202-03.

Plaintiffs also argue that allocations to every individual CSO outfall are needed as a practical matter to ensure compliance because every individual CSO outfall could discharge the entire allocation "with no accountability." (Pl. Mem. at 19.) Plaintiffs are wrong. As Plaintiffs are well aware, the CSO outfalls are identified individually in WASA's permit, but WASA's LTCP calls for system-wide controls on the combined sewer system rather than controls on individual CSO outfalls. The accountability lies not in controls on individual outfalls, but in WASA's obligation to design, construct, and operate the approved system-wide controls. (WASA Mem. Supp. Mot. Int. at 7.). Therefore, WLAs for individual outfalls would serve no purpose other than to expose WASA to liability for violating limits unrelated to the almost \$1,000,000,000 (in 2001 dollars) in CSO controls for the Anacostia now under design.

Plaintiffs' argument overlooks the fact that WLAs are not needed for individual outfalls because the Anacostia is affected by many sources of sediment and TSS (both point and nonpoint) that impact the Anacostia over large areas rather than around individual outfalls. Therefore, while WLAs might be appropriate for individual outfalls where they involve toxic pollutants that can have localized impacts around or near the outfalls, they would serve no purpose in the case of storm-driven discharges of sediment and TSS. EPA concluded as much when it stated that "[t]he spatial domain considered for the calculation of the TMDLs is the entire Anacostia River watershed." (R. #3, at i.) A review of the CWA and its implementing regulations also reveals little in the way of guidance regarding how WLAs are to be established

in the TMDL process.¹¹ EPA has recognized the significant discretion granted to states in developing allocation schemes. (R. #36, at 69 (listing 19 different allocation schemes and stating that “regulatory authorities may use any reasonable allocation scheme that meets the antidegradation provisions and other requirements of State water quality standards”).)

Therefore, since EPA’s interpretations of its regulations granting deference to states in developing allocation schemes is not “plainly erroneous or inconsistent” with the regulations, it should be upheld. See United States v. Kanchanalak, 192 F.3d 1037, 1043 (D.C. Cir. 1999) (quoting Paralyzed Veterans, 117 F.3d at 584)).

VI. CONCLUSION

For the reasons stated above, WASA submits that this Court should deny Plaintiffs’ Motion for Summary Judgment and grant summary judgment in favor of EPA.

Respectfully submitted,

DISTRICT OF COLUMBIA WATER AND
SEWER AUTHORITY

By Counsel

/s/ David E. Evans

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¹¹ See 33 U.S.C. § 1313 (providing no requirements related to allocation of TMDLs); 40 CFR §§ 130.2, 130.7 (merely requiring that when a TMDL is developed it consist of waste load allocations and load allocations without providing requirements regarding how the allocation process be conducted).

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CERTIFICATE OF SERVICE

I certify that the following counsel are registered to receive filings in this case from the court's electronic filing system, and will receive a copy upon its filing of the District of Columbia Water and Sewer Authority's Motion for Summary Judgment and Combined Memorandum in Support of Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment.

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