IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA RIVERKEEPER, INC. and FRIENDS OF THE EARTH, Plaintiffs, v. LISA JACKSON, Administrator, United States Environmental Protection Agency, Defendant, DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Intervenor.	)	Case No. 1:09-cv-00097-RWR

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION AND RESPONSE TO EPA'S AND WATER ASSOCIATIONS' CROSS-MOTIONS

INTRODUCTION

EPA and Intervenors have failed to show that they are entitled to summary judgment, or that the Plaintiffs are not entitled to summary judgment, concerning EPA's approval of total maximum daily loads "TMDLs" that have not been shown to protect the beneficial uses and water quality standards adopted by the District of Columbia and Maryland for the Anacostia. EPA's arguments fail for three key reasons: (1) the approval did not meet basic requirements for reasoned agency decisionmaking and is therefore entitled to no deference from the Court; (2) EPA failed to address significant comments concerning its refusal to include allocations for individual outfalls or small aggregates of outfalls; and (3) EPA failed to explain a rational basis or connect the facts in the record with its conclusion that the approved margin of safety is adequate. Because all of these are mandatory requirements under the Clean Water Act and implementing regulations, Plaintiffs are entitled to summary judgment, and the cross-motions of EPA and Intervenors should be denied.

All of the parties agree that the existing water quality in the Anacostia River is severely degraded, particularly in the downstream portion that runs through the neighborhoods in Northeast Washington, D.C. No exaggeration is required to convey the dire conditions in the Anacostia, or the impact those conditions have on potential users of the Anacostia, contrary to suggestions by Intervenor D.C. Water and Sewer Authority ("WASA") that Plaintiffs have engaged in mischaracterization of the conditions in the Anacostia and their impacts on human uses. *Compare* Memorandum of D.C. WASA in Support of its Cross-Motion at 7 *with* Plaintiffs' Memorandum in Support of their Motion for Summary Judgment ("Pl. Memo") quoting Video Comments, AR # 17 at 4:30:

> Anacostia Riverkeeper Brian Van Wye: These days we bring kids out for tours of the River on the boat, and one of the first things we ask is … 'what do you think about when you think about the Anacostia River?' And they say 'trash, [excrement], bodies, you know, pollution…' and we say, 'have you guys ever been down here, on the river?' and [they say] 'no, no, no, it's gross,' and …. these are kids who live like one-quarter mile, half-mile from the river. This river should be a great resource for them.

Plaintiffs have also submitted evidence that poor water quality conditions in the river that are *permitted to exist even after implementation of the approved limits* will continue to impede and impair the use and enjoyment of the Anacostia, especially for Plaintiffs' members and other many people whose communities lie alongside the river.

That the Anacostia requires drastic pollution cuts before the river will meet the water quality standards is disputed by neither EPA nor its allies, Intervenors D.C. WASA and assorted groups representing water pollution management utilities ("Water Associations"). Instead, those parties credit themselves for recognizing that decades of pollution and neglect have necessitated "profound" improvements in water quality, while attempting to belittle the Plaintiffs' concerns and to portray their arguments as demanding an unreasonable level of water quality for the

recreational enjoyment of a few.[1] On the contrary, Plaintiffs' claims are rooted in the District of Columbia and Maryland water quality standards set forth in their state laws, the Clean Water Act, and the Administrative Procedure Act.

District and Maryland water quality standards. The relevant water quality standards are listed and discussed in the Pl. Memo at 5-7. Of particular concern to Plaintiffs and their members is EPA's approval of limits designed to implement only one water quality standard – the District's requirement that water be clear enough to allow secchi depth readings of 0.8 as an average over the course of the growing season (April-Oct.) for underwater submerged aquatic vegetation (SAV). EPA, Maryland and D.C. focused solely on that criterion, and chose to adopt limits that are "flow variable," meaning that although the TMDLs call for an overall reduction of 85% in sediment discharges over the course of the relevant seasonal and average periods, they still allow enormous loads to be discharged under high flow conditions (when the Anacostia requires the greatest protection from water quality impairment) while allowing much smaller limits during drier conditions. See Decision, AR # 3 at iii. The agencies concluded that these limits satisfy D.C.'s seasonal secchi depth criteria, a conclusion Plaintiffs do not contest. Rather, the Plaintiffs assert that, as a result of this narrow focus, the TMDL authorities did not even attempt to examine available data to ensure that the limits would also meet other standards that are likely to be violated after storm events when the Anacostia becomes inundated with sediment and suspended solids.

[1] Plaintiffs' claims are based entirely on assessments of water quality conditions that the TMDLs allow after (*i.e.* caused by) high flow scenarios associated with storm events. Assertions that the Plaintiffs demand "water clear enough for Plaintiffs' members to enjoy a swim during a winter rainstorm," or recreation on the river during "an extreme storm event [with] high flows, wave action, and wind" are frivolous and require no serious response. EPA Memo at 24; WASA Memo at 7.

The Clean Water Act ("Act" or "CWA"). The CWA in 1972 expressed a "national goal" to restore the ability of waters of the U.S., including the Anacostia River, to "provide[] for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Under the Act, that goal was to be "achieved by July 1, 1983," yet the Anacostia continues to suffer pollution levels among the most severe in the country.

The Administrative Procedure Act ("APA"). The APA mandates that EPA provide substantial evidence in support of its decisions and to respond to significant concerns with rational explanations, not "high-handed and conclusory" assertions. *See* 5 U.S.C. § 706(2); *Assn. of Data Processing v. Bd. of Governors*, 745 F.2d 677, 681-82 (D.C. Cir. 1984); *Chemical Mfrs. Ass'n v. E.P.A*, 28 F.3d 1259, 1266, (D.C. Cir. 1994).

Because EPA's approval fails to meet the above requirements, Plaintiffs request summary judgment and other appropriate relief to ensure that the Anacostia receives the full protection Congress conferred under the CWA and the APA.

ARGUMENT

I. EPA FAILS TO SHOW THAT ITS APPROVAL DECISION MET BASIC REQUIREMENTS FOR AGENCY DECISIONMAKING

EPA has not shown that certain aspects of its decision to approve limits for sediment and total suspended solids (collectively "TSS") were "supported by a reasoned decision based upon substantial evidence," or that EPA's reasons for approval of them were "responsive to the particular concerns raised" by the Plaintiffs in their timely public comments. *See Williston Basin Interstate Pipeline Co. v. FERC* , 358 F.3d 45, 48-49 (D.C. Cir. 2004). EPA contends that because EPA and the District of Columbia "did not choose to translate [the District's] narrative criteria into numerical targets for purposes of developing the TMDL, and concluded that an 85

percent reduction in sediment load would satisfy its narrative criteria, the Court should not step in and change those decisions." To the contrary, the APA empowers this Court to hold arbitrary and capricious and to reverse EPA's action approving the TSS TMDLs if the agency has not "identified and explained the reasoned basis for its decision," *Transactive Corp. v. U.S.*, 91 F.3d 232, 236 (D.C. Cir. 1996); if it has relied on irrelevant factors, or failed to consider relevant factors, *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); if it has reached a conclusion that is unsupported by substantial evidence or runs counter to the record, *Assn. of Data Processing v. Bd. of Governors*, 745 F.2d , 683-84, *MVMA*, 463 U.S. at 43; or if it has failed to explain a connection between the facts and its conclusions. *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1407 (D.C. Cir. 1995).

It is a settled principle of judicial review that an agency's decision must stand or fall on the rationale that was articulated by the agency, as EPA's decision to approve the TMDLs must do. In its decision discussing the District's narrative criteria and recreational use standards, EPA stated in passing, without supporting evidence or rationale, that "impairment of other beneficial water uses such as primary recreation (swimming) and secondary (boating) contact recreation was neither the focus of the listed impairment nor the goal for these TMDLs." Decision, AR # 3 at 3. However, in its decision rationale and in its briefs in this case EPA asserts that "a TMDL meeting the District's secchi depth criterion of 0.8 meters, averaged over the submerged aquatic vegetation growing season, would also meet other aesthetic and turbidity standards that apply to the Anacostia." Decision, AR # 3 at 3-4, Response to Comments, AR # 4 at 3-4. Intervenor D.C. WASA, picking up and elaborating on the first statement, now offers an alternative rationalization for EPA's decision. WASA Memo in Support of Cross-Motion at 11-15. Because that rationale was not articulated by EPA in its approval decision, the Court should not

consider these arguments. Even assuming *arguendo* that the court should properly consider them, this memorandum explains below why those arguments are not supported by the text of the CWA or by the District of Columbia's listings of pollution-impaired waters.

II. EPA OFFERS NO EVIDENCE OR ANALYSIS TO SUPPORT ITS CLAIM THAT THE TSS POLLUTION LIMITS WILL IMPLEMENT ALL OF THE APPLICABLE WATER QUALITY STANDARDS

EPA has failed to demonstrate that the approved limits for sediment and total suspended solids (collectively "TSS") will assure achievement of applicable water quality standards and criteria, with the exception of one numeric criterion designed to promote seasonal growth of SAV—just one of a number of water quality criteria impaired by excessive sediment. Instead, EPA asserts that the "the most stringent reduction in sediment loads" will be achieved through application of that single criterion, and "the improvement of water quality after implementation of these TMDLs will substantially improve, if not achieve aesthetic, primary and secondary recreation water." Decision, AR # 3 at 4. EPA continues to assert those arguments, while failing to address significant comments and evidence to the contrary.

EPA argues that Plaintiffs did not submit sufficient "evidence pertaining to conditions in the Anacostia if [the numeric secchi depth] criterion is met as a seasonal average." EPA Memo in Support of Cross-Motion at 17. *See also* WASA Memo in Support of Cross-Motion at 17-18 (criticizing the Plaintiffs' "simplistic calculations" that do not include in-depth analysis of the "extensive modeling and data analysis conducted by DC and Maryland"). As an initial matter, these arguments suggest wrongly that Plaintiffs should have raised their concerns with a level of detail that would be nearly impossible for informed members of the public to achieve in the 30-day comment period provided. Members of the public cannot be asked to match a level of detail in 30 days that took EPA, Maryland, D.C. and their engineering contractors years to achieve.

Instead, Plaintiffs simply assessed the end results of that modeling and analysis—the actual numeric daily load limits that will govern water pollution activities and permits in the Anacostia watershed—and raised significant concerns based on that assessment.

Plaintiffs submitted comments with the aid of their water quality consultant Mr. Barry Sulkin[2] that included a quantitative assessment of the water quality conditions that would be allowed under the approved limits during periodic times under high flow conditions associated with storm events. That assessment is not based on current conditions; rather, it looked at the actual TMDL limits that are approved for various flow conditions. *See* Decision, AR # 3 at iii. Plaintiffs submitted scientific analysis along with a step-by-step explanation of that analysis, showing that, during and after those high flow conditions, waters are likely to be very muddy and turbid and will contain concentrations of sediment that will impair not only human use and enjoyment of the Anacostia, but also would fail to protect fish, shellfish, and tiny benthic aquatic organisms that can be smothered by sediment. Sulkin Memo, AR # 20 at 4. Plaintiffs also noted information in the draft TMDL concerning impairments that are not addressed by the approved TMDLs. Pl. Comments, AR # 18 at 5 quoting the draft TMDLs:

> Suspended sediment in streams may reduce visibility and prevent fish from seeing their prey, and may clog gills and filter feeding mechanisms of fish and benthic (bottom-dwelling) organisms. Excessive deposition of sediment on streambeds may bury eggs or larvae of fish and benthic macroinvertebrates, or degrade habitat by clogging the interstitial spaces between sand and gravel particles. Suspended sediment also reduces the amount of light reaching aquatic plants and can cause a decline or disappearance of communities of submerged aquatic vegetation (SAV), an important component of tidal ecosystems.

[2] Plaintiffs' erroneous reference to Mr. Sulkin as "Dr." in their opening memo was simply an oversight. *Cf*. WASA Memo at 17 n. 8. This error has no bearing on the validity of Mr. Sulkin's assessment of the TMDLs.

EPA's decision rationale focuses entirely on limits needed to protect SAV, and omits any analysis of how the sediment discharges allowed during high flow conditions will protect aquatic life other than SAV.

A. EPA cannot assume without evidence that limits designed to implement the District's seasonal average SAV criteria are as stringent as limits needed to implement other applicable water quality standards

EPA argues that its approval of limits that address only one criterion, the numeric secchi depth criteria for water clarity to protect SAV, is justified because that criterion "is the most stringent of the applicable water quality standards." EPA Memo at 14. There is no evidence in the record that this determination considered protection of the aquatic life use (other than protection of SAV) or the narrative criterion applicable to sediment. Instead, it reflects only a comparison between Maryland's criteria for water clarity with the District's. Decision, AR # 3 at 4, 24. Plaintiffs do not contest the determination that, as between those few criteria, the District's 0.8 secchi depth criterion requires the more stringent reductions. However, EPA has failed to explain how implementation of that criterion alone also satisfies *other* criteria in the Anacostia, identified and discussed in Plaintiffs' opening memo at 5-7. *See e.g.* COMAR 26.08.02-03-3(A)(5)(a) which sets a narrative standard for turbidity in Maryland waters stating that "Turbidity may not exceed levels detrimental to aquatic life."

All EPA offers is its unsubstantiated belief that an overall reduction, averaged over the course of the year, of 85% of current sediment loads "would 'profoundly' improve water quality in the Anacostia and that it would 'achieve the applicable water quality standards'." EPA Memo at 15; Decision, AR # 3 at 15. This *ipse dixit* assertion does not meet basic requirements for reasoned agency decision making because it is unsupported by substantial evidence. *See Northeast Maryland Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, (D.C.

Cir. 2004) (remanding to the agency where EPA "stated only that it 'believes' state permit limits reasonably reflect the actual performance of the best performing units without explaining why this is so"); *see also Assn. of Data Processing v. Bd. of Governors*, 745 F.2d at 683-84, *MVMA*, 463 U.S. at 43. Moreover, it runs counter to the record which demonstrates that the approved daily limits "allow for possible high incursions of sediment on days where extremely high flow conditions prevail."

EPA claims that its approval finds support in past instances where the agency approved the use of "surrogate" criteria to ensure implementation of other criteria. This, by itself, does not justify EPA's approval in this case. Here, EPA has simply asserted – with no intervening evidence, analysis or discussion – that compliance with the SAV secchi criteria "in the long term" and "overall" is an adequate stand-in for the narrative water quality criteria for aesthetic enjoyment and protection of aquatic life uses, which are not limited to or averaged over any particular season. EPA's conclusion is invalid because the agency failed to explain a connection between the facts (the District's narrative criteria and designated uses, as well as data on the concentration and turbidity of sediment-laden waters under high flow conditions) and its conclusion that limits designed to implement one seasonal average criterion will also implement other water quality criteria applicable to the Anacostia. *See Dickson*, 68 F.3d 1396, 1407 (D.C. Cir. 1995).

B. Regardless Whether EPA Considers the District's Narrative Water Quality Standards to be "Subjective," the Act Requires that TMDLs Assure Compliance With Those Standards

EPA contends that its conclusion that the District's numeric criterion also implements the narrative criteria and other standards is not reviewable because the District's narrative standards and designated uses (particularly for recreational and aesthetic use) are "subjective." EPA

Memo at 17. EPA asserts that, absent a translation of these criteria into numeric limits by the TMDL authorities, "plaintiffs' evidence cannot clearly contradict EPA's assertion" that the narrative criteria will be met. *Id.*[3] EPA cites a conclusory, generic statement in the agency's 1986 criteria guidance that claimed "a rationale for these qualities cannot be developed with quantifying conditions." EPA Memo at 16. This decades-old document is directly refuted by EPA's own guidance documents cited by Plaintiffs in their comments to the agency describing various methods for translating narrative criteria into appropriate numeric values. *See* EPA Memo at 18.

EPA also suggests that it is subject to a lesser requirement for providing a reasoned basis for agency decision when its mandatory duties involve imprecise judgments concerning a range of potentially appropriate limits. This is wrong. Given the existence of numerous statutes setting broad standards such as "in the public interest," *see e.g. Whitman v. American Trucking Assns.*, 531 U.S. 457, 474 (2001), the notion that EPA may refuse to implement standards it considers "subjective" would undermine fundamental principles of administrative law. EPA's reliance on *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990-91 (D.C. Cir. 1997) is unavailing. There, plaintiff AISI objected to EPA's approval of "translator methodologies" for translating narrative standards in the Great Lakes region into appropriate numeric values, because AISI argued that the methodologies were not based on adequate science. The court rejected that argument, but the important distinction is that in *AISI*, unlike this case, EPA had

[3] This reasoning echoes the decision of this court in *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182 (D.D.C. 2004), rev'd on other grounds, *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006) which, as EPA correctly notes, is not binding on this court and "has no precedential authority whatsoever." While that decision was reversed based on only one issue (failure to include daily limits), the Circuit Court of Appeals did not reach much less endorse the decision on the issues for which EPA relies on that decision. The appellate decision, and Plaintiffs' choice to limit the issues on appeal, simply reflects standards for efficient appellate review.

actually developed methodologies for translating such narrative standards into numeric values. Here, EPA had no such methodology but instead simply threw up its hands when it came to implementation of narrative criteria in these TMDLs. This approach merits no deference, and provides no basis for judicial review.

C. EPA's Approval Must be Based on the Relevant Water Quality Standards as They Are Written, Not as EPA Would Prefer

EPA accepted, with no supporting evidence, the District's assertion that its other numeric standard aimed at curbing turbidity that exceeds 20 Nephelometric Turbidity Units ("NTU") above ambient NTU, 21 DCMR § 1104.8, Table 1, "has limited applicability" and "is not intended to be applied generally to attain water clarity throughout the river." No such limitation exists in District law. *Id.*

In the alternative, EPA responded to Plaintiffs' objection to this claim by offering a table that shows a comparison of NTU estimates with projected conditions under the 0.8 secchi depth criteria, to show that the 20 NTU standard would be met *generally when considered as an average*. Decision, AR # 3 at 4. However, the District's numeric NTU criterion is not applicable only as an average or "on a long-term basis." Rather, the District's criterion must be interpreted consistently with the District's own water quality standards, which define "ambient," as "those conditions existing before or upstream of a source or incidence of pollution." Nothing in the District's standards or its definition of "ambient" support EPA's decision to disregard the District's unqualified criterion of 20 NTU above ambient conditions.

EPA also claims that, where the District's criteria do not specify that they are applicable every day, they need not be meet every day. EPA reasons that this approach is justified by comparing numeric criteria that are measured on small timescales, such as "30 day geometric mean" or "single sample value," with other criteria that "do not specify that they must be met on

any given day or over a given period." As an initial matter, this argument confuses the significance of *measuring* standards on small timescales with the significance of *applying* those standards at specified times. Merely because a criterion is measured on a certain timescale does not mean that it is only applicable on that timescale. Moreover, this argument proves too much for, if a given criterion specifies no particular timeframe on which it must be measured or applied, then agencies could decide on an *ad hoc* basis that the particular criterion it is *not* applicable on *any* given day or, perhaps, that it is only applicable once per year, or averaged over a month, or twice per decade, or any timescale the agency pleases. If upheld, this approach would produce absurd and tragic results for water quality standards in the District and elsewhere.

D. WASA's Argument that Other Criteria and Designated Uses are Not "Applicable" is Unavailing.

Intervenor D.C. WASA offers a strained interpretation of CWA § 303(d), 33 U.S.C. § 1313(d), to argue that EPA was not required to ensure that the approved TMDLs will achieve standards for recreational use. As noted above, because EPA did not assert this argument in its decision, the Court should not consider it. However, if the Court decides to consider this argument it should reject that reading of § 303(d).

The relevant sections state as follows:

> (A) Each 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 are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.
> ***
> (C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, 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 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.

33 U.S.C. § 1313(d)(1).

The District and Maryland have identified the Anacostia as one of those waters "for which the effluent limitations… are not stringent enough to implement any water quality standards applicable" to the Anacostia. However, WASA asserts that "the recreational use designations are not listed as impaired due to sediment and TSS," so "the recreational use cannot be the 'applicable' water quality standards under § 303(d)(1)(A) or (C). In fact, the District has listed its *waters* as impaired by particular *pollutants*, consistent with the plain language of § 303(d). *See* WASA Memo Ex. A at 7, listing waterbody/segment names and "pollutant(s) or pollutant categories causing impairment." The District's listing of impaired waters and the pollutants that impair them are not limited to specific use designations, and such listing is not required by the plain language of § 303(d), which contains no reference to designated uses as distinguished from other types of water quality standards. Indeed, most criteria are not limited in applicability to any particular use designation but are instead relevant to several. *See*, *e.g.*, the District's water quality standards that require 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 odor, color, taste or turbidity," or "[p]roduce undesirable aquatic life or result in the dominance of nuisance species." 21 DCMR § 1104.1(c) and (e).

EPA's regulations governing the listing of impaired waters define "applicable water quality standards" very broadly. "For the purposes of listing waters …, the term 'water quality standard applicable to such waters' and 'applicable water quality

standards' refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements." 40 C.F.R. § 130.7. WASA does not mention or address this regulation, which controverts its argument. In any case, nothing in this regulatory definition suggests that "applicable water quality standards" for impaired water listings are limited to specific designated uses. Consistent with CWA § 303(d) and the District's impaired waters list, the Court should confirm that for waters that are unable to meet "any water quality standard applicable to such waters" are listed as impaired by particular pollutants, TMDLs for those waters and pollutants must be set at a level necessary to implement the applicable water quality standards.

E. EPA's Ability to Reconsider TMDLs to Protect Recreational Values in the Future Cannot Excuse its Failure to Set Appropriate Limits Now

EPA claims that its refusal to separately analyze and address uses and criteria related to recreation "reflect EPA's approval of an iterative or 'adaptive' approach, citing a 2006 EPA memorandum. EPA Memo at 19 n. 10. Without conceding that such approaches are ever valid in TMDL development, Plaintiffs note that EPA's claim does not find support in its 2006 memo. That document endorses an approach whereby "TMDLs must be calculated to meet water quality standards given EPA's current understanding of the data," with the expectation that "future data" may show that revisions are necessary. *Id*. (emphasis added). EPA cites no evidence that it looked at any data concerning current impairments of recreational use or other standards not addressed by the TMDL. Consequently EPA's approach in this case does not comport with its policy.

III. EPA'S APPROVAL OF AGGREGATE POLLUTION ALLOCATIONS IS NOT CONSISTENT WITH ITS REGULATIONS AND NOT SUPPORTED BY THE AVAILABLE DATA

EPA contends that, because it has discretion generally to approve pollution allocations to aggregated individual outfalls, its decision to approve the particular allocations in the TSS TMDLs is entitled to deference. However, EPA approved allocations to aggregates of outfalls (*e.g.* an allocation to all outfalls of the Montgomery County, Maryland stormwater system that discharge to non-tidal portion of the Anacostia). Plaintiffs' textual argument concerning the insufficiency of this approach under the CWA and its regulations is set forth in Plaintiffs' opening memorandum at 17-19 and need not be repeated here.

In addition to their textual argument, Plaintiffs' comments to EPA stated a concern that the approved aggregate allocations did not reflect information in the record supporting allocations to smaller aggregates. EPA states incorrectly that "Plaintiffs contend that EPA had the necessary data to assign wasteload allocations to individual outfalls… but do not support this point with adequate evidence in the record." EPA Memo at 29. Plaintiffs made no such claim regarding the record, but instead asserted that the record evidences "sufficient information to allocate the TSS TMDL loads on a much smaller scale than the allocations included in the approved TMDL," such as "wasteload sub-allocations for each county and each major subwatershed," or "sub-allocation to MS4 point sources broken down to the sub-basin level." Pl. Comments, AR # 18 at 7-8; Pl. Memo at 18.

EPA offers no explanation for why the TMDLs do not include allocations on these smaller scales, but instead only states that Plaintiffs did not "demonstrate that there was data in the record sufficient to make a *further* sub-allocation to each individual outfall." EPA Memo at 29 (emphasis in original). This argument is a *non sequitur* – just because Plaintiffs did not

submit data on individual outfalls does not justify EPA's failure to include "sub-allocations" "on a much smaller scale" than those that EPA approved. Contrary, again, to EPA's assertion, EPA did not "further assign[] wasteload allocations to many smaller groups of outfalls." EPA cites its Decision, AR # 3 (EPA Memo Ex. 2) at 28-30, and Technical Memorandum (EPA Memo Ex. 4) at 3-4, which do indeed contain information about annual and seasonal pollutant loads from smaller aggregates and industrial permittees, but do not contain daily limits for those sources. EPA expressly refused to include allocations of the approved daily limits for these smaller sources. *See id*. at 1; Md. and D.C. Response to Comments, AR # 4 (EPA Memo Ex. 3) at 19 ¶ 41 (declining to include smaller allocations in the TMDL so that, "[i]n the event, during implementation, these sub-allocations are found to require revision… then only the revised technical memorandum will require re-opening for another round of review and approval." This is arbitrary and capricious in light of EPA's 2002 guidance permitting aggregate wasteload allocations only "when data and information are insufficient to assign each source or outfall individual WLAs" and requires that if allocations are made to categories of outfalls "these categories should be defined as narrowly as available information allows." EPA Memo Ex. 8 at 1-2.

EPA's last argument is that the lack of individual allocations is justified because such allocations are not enforceable. EPA quotes the state authorities' remark that "[t]he monitoring for compliance scenario implicit in such a notion would likely be well beyond the financial means of even the wealthiest jurisdictions." EPA Memo at 30. This assertion does not justify the lack of individual allocations, but instead begs the question: How will EPA ensure that pollution discharges and permits comply with TMDL allocations that lump many outfalls

together? In any case, the legal requirement to include wasteload allocations in TMDLs cannot be disregarded for reasons of practical convenience or even financial difficulty.

IV. EPA'S APPROVAL OF THE MARGIN OF SAFETY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR ANALYSIS

EPA's response in defense of its approval of the margin of safety claimed to exist in the TMDL does not refute Plaintiffs' argument that the margin of safety is not supported by substantial evidence or analysis in the record. EPA simply argues that it need not adopt an "objectively identifiable and measurable" margin of safety because the statute and regulations do not require it. Plaintiffs neither contest nor endorse EPA's authority to employ implicit margins of safety, but they do contest EPA's notion that this authority permits EPA to adopt a margin of safety that fails to comply with the statutory requirement to account for "concerning the relationship between the chosen pollution limits and water quality." 33 U.S.C. § 1313(d)(1)(C). Since EPA failed to assess the uncertainties involved in its translation of the numeric criteria to load limits, despite evidence submitted by the Plaintiffs of significant uncertainty, it could not have determined that the margin of safety meets the statutory requirement. It is not enough for EPA to assert simply that it is "confident" in the results of its modeling or to note that the model is highly calibrated.

CONCLUSION

Plaintiffs Anacostia River and Friends of the Earth respectfully request that the Court grant their motion for summary judgment, and deny EPA's, WASA's, and the Water Associations' cross-motions for summary judgment.

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Respectfully submitted,

/s/ Jennifer C. Chavez

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