THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 04-CV- 0092 (RMU)

RESPONSE BY PLAINTIFF FRIENDS OF THE EARTH TO EPA'S MOTION TO STAY VACATUR OF TMDLS

On April 25, 2006, the U.S. Court of Appeals for the District of Columbia Circuit held that EPA's approval and establishment of non-daily load limits for the Anacostia River violated the Clean Water Act ("CWA"), and remanded with instructions to vacate EPA's unlawful actions. *Friends of the Earth v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006). Acknowledging that neither Plaintiff Friends of the Earth ("FOE) nor EPA wished for the Anacostia River to go without TMDLs limiting these pollutants, the court of appeals noted that this court had equitable discretion in crafting an appropriate remedy, and stated that "the parties may move to stay the district court's order on remand…." Both FOE and EPA seek a stay of vacatur of the existing TMDLs until EPA establishes appropriate daily load limits. *See* EPA Mot. to Stay Vacatur, Dkt. # 38 (Aug. 7, 2006); FOE Mot. to Stay Vacatur and Set Deadlines, Dkt. # 39 (Aug. 7, 2006).

At issue is: i) the time the Court should allow for EPA to establish new daily load limits for biochemical oxygen demand ("BOD") and total suspended solids ("TSS") for the District portion of the Anacostia; ii) whether the Court should order EPA to complete action within that time frame. There is no dispute that EPA must establish or approve new TMDLs that comply

with the Act. *See Friends of the Earth*, 446 F.3d at 148. FOE seeks to prevent further delay in the establishment of appropriate controls for these two pollutants, which already seriously afflict the Anacostia. Accordingly, FOE seeks a six-month stay of vacatur and a court order requiring EPA to comply with the remand within the same six-month stay period. However, EPA asks the court to stay vacatur for more than two years, without any order requiring the agency to actually complete the approval or establishment of daily loads within that timeframe. FOE respectfully urges the Court to reject the protracted stay proposed by EPA, and further asks the Court to issue a six-month stay of vacatur coupled with an order requiring EPA to achieve compliance by the end of the six-month stay period.

I. THE COURT SHOULD REJECT EPA'S PROPOSED TWENTY-SIX MONTH STAY

As the court of appeals recognized, the purpose of a stay of vacatur here is to prevent further degradation of the Anacostia due to absence of oxygen or turbidity TMDLs. *See Friends of the Earth*, 140 F.3d at 148. EPA should not be allowed to treat the stay of vacatur as an opportunity for further footdragging in establishing appropriate TMDLs. Moreover, given the long history of delay in establishing and implementing the TMDLs here at issue, it would be particularly inappropriate to allow EPA to further frustrate Congressional goals by delaying corrective action.

A. EPA SHOULD NOT BE ALLOWED TO THWART THE REQUIREMENTS OF THE CLEAN WATER ACT

EPA's proposed twenty-six month delay would flout the CWA schedule for establishing TMDLs. Under that schedule, legally sufficient TMDLs to protect the Anacostia River from excess BOD and TSS pollution were due more than *twenty-five years* ago. *See Kingman Park Civic Assn. v. EPA*, 84 F. Supp. 2d 1, 3-4 (D.D.C. 1999). By its unlawful approval and establishment of non-daily load limits that the District submitted in 2001, EPA has already

contributed substantially to the time during which the Anacostia has gone without TMDLs that comply with the CWA. Approval of the protracted schedule that EPA proposes will only exacerbate these violations.

EPA's claim that it requires twenty-six months to establish appropriate TMDLs is refuted by the text of the CWA. Section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2), requires EPA to approve or disapprove any TMDLs submitted by a state or the District of Columbia *within 30 days* after the TMDLs are submitted to EPA. If EPA disapproves the state's TMDLs, § 303(d)(2) requires EPA to establish its own TMDLs *within 30 days* after disapproval. Thus, Congress intended for EPA to complete the entire process – including reviewing newly submitted TMDLs, deciding to disapprove the state's submittal, and establishing its own appropriate TMDLs – within 60 days at most. Thus, six months is more than ample time to allow EPA to establish the required TMDLs for the Anacostia.

EPA is hardly in a starting position with respect to the Anacostia River TMDLs for BOD and TSS. As noted in FOE's motion, EPA and the District already spent many months developing these TMDLs under the consent decree in *Kingman Park*. Further, the court of appeals' decision puts EPA in essentially the same position as it would be if initially rejecting the District's non-daily load limits, whereby EPA would be required to establish appropriate TMDLs within thirty days. Plaintiffs have proposed a six-month stay of vacatur and deadline out of an abundance of caution, to avoid any possible claim of impossibility by EPA, provide EPA yet one more opportunity to work with the District, and to allow time for public participation. In contrast, EPA's proposed schedule would completely eviscerate the statutory timetable, extending more than two years past the 30-day corrective schedule contemplated by Congress.

B. EPA Has Not Proven That it Cannot Take Corrective Action to Establish Appropriate TMDLs in a Shorter Timeframe Than its Proposed Schedule

As Judge Friedman recently noted in a case involving EPA violation of statutory deadlines, Congress' intent that the agency complete regulations within a certain time is "of utmost importance," and "a court considering a claim of impossibility must not 'order a remedy that would… completely neutralize the mandatory nature of the statutory directive.'" *Sierra Club v. Johnson, et al*, 2006 WL 2148566, *6 (D.D.C. 2006), citing *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 95 (D.D.C. 2001). "[T]he district court must scrutinize carefully claims of impossibility, and 'separate justifications grounded in the purposes of the Act from the footdragging efforts of a delinquent agency.'" *Id*., citing *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975). The court described the agency's burden to prove that it delay is necessary, stating: "[a]n agency thus bears 'a heavy burden to demonstrate the existence of an impossibility.'… That burden is especially heavy where 'the agency has failed to demonstrate any diligence whatever in discharging its statutory duty to promulgate regulations and has in fact ignored that duty for several years.'" *Id.* (internal citations omitted). Thus, EPA must demonstrate that a protracted twenty-six month stay is necessary because the agency cannot establish appropriate TMDLs that comply with the Act in a shorter period. The agency has completely failed to make such a showing here.

As further detailed below, EPA's reasons for seeking more time are driven by flawed presumptions and the agency's policy preferences rather than any claim or showing of impossibility.

1. EPA incorrectly implies that it must await submittal of new daily load limits by the District

EPA's motion attempts to suggest that the agency must allow the District to submit its own daily load limits before the agency establishes a TMDL. *See* EPA Mot. at 4. However, the

time for this has passed. The District made its TMDLs submittal in 2001. The court of appeals has already found that EPA's approval of these non-daily load limits was unlawful, and ordered EPA's approval to be vacated. Under CWA § 303(d)(2), EPA has a duty to establish corrective TMDLs within thirty days of disapproval. The agency may comply with the statute either by approving new daily load limits developed by the District that meet CWA requirements or by establishing its own daily load limits.[1] However, nothing in the CWA or the circuit court's order entitles EPA to await submittal of new TMDLs by the District once the inadequacy of District's previously submitted TMDLs has been established.

2. EPA has not shown that its planned activities justify its extensive delay

EPA tries to justify its proposed schedule by citing various activities that it desires to undertake in connection with TMDL development. EPA has not shown, however, that these activities or the timeframes proposed for them are necessary to comply with the statute, and that compliance in a shorter time frame is impossible. Each of the grounds for delay that EPA proffers are insufficient to justify delay.

a. Complex pollution modeling

EPA wishes to use "complex pollution modeling," to develop the TMDLs, and to recalibrate the model and apply it to the entire basin before it establishes TMDLs for the District portion of the Anacostia River. *Id*. at 1. However, EPA offers no evidence that these activities are *necessary* to establish appropriate TMDLs that protect the Anacostia and comply with the CWA and EPA's TMDL regulations. Nothing in the declaration submitted with EPA's motion changes this. *See* Decl. of Thomas M. Henry. Mr. Henry's declaration states that "[w]hile it might be possible to establish TMDLs without reliance on complex computer models on a

[1] The court of appeals also noted that EPA could comply by amending its regulation declaring "all pollutants … suitable for daily loads." *Friends of the Earth v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006). However, EPA has stated that it does not plan to amend its regulation at this time. *See* EPA Mot. to Stay Order of Vacatur at 4.

shorter time schedule, such TMDLs would be less accurate and reliable…." *Id*. at 5. However, the declaration offers absolutely no basis for this conclusory statement. This is insufficient to justify the proposed delay. *See Sierra Club v. Johnson*, 2006 WL 2148566 at *9, citing *Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 899 (N.D. Cal. 1984) (it is insufficient for the agency merely to say that "further study always makes everything better"); and *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 788-89 (N.D. Cal. 1982) ("by calling for further elaborate study of the… problem and the concomitant increased use of EPA resources, the EPA envisions a level of thoroughness and scientific certainty not within the contemplation of Congress...").

b. Agency Coordination

EPA argues that cause exists for delay because EPA, Maryland, and the District desire to "coordinate their efforts" in establishing TMDLs for the Anacostia watershed. However, there is no indication that EPA cannot devise appropriate TMDLs for the Maryland portion of the Anacostia that harmonize with the District's TMDLs within six months, or even after the District TMDLs are in place. Nonetheless, EPA asks the court to approve additional delay beyond the statutory timeframe for the purpose of conducting this prolonged "coordination." Moreover, EPA has offered nothing more than vague descriptions of the activities EPA, the District and Maryland wish to conduct. To illustrate, the declaration states that EPA has already consumed two months (July and August 2006) to "[m]eet with District and [Maryland] to establish coordination." Such statements fail even to describe the EPA's planned activities, much less prove that they are necessary to achieve compliance.

EPA attempts to bolster its argument by stating that "the goal of this work is to ensure that TMDLs are as accurate as possible, [and] ensure that the District of Columbia's water quality standards are met." EPA Mot. at 8. EPA also asserts that TMDLs completed in a shorter timeframe "would likely not be as comprehensive and technically sound." *Id*. at 9. However,

Congress required EPA to establish TMDLs that both comply with the CWA's water quality requirements, *and* to do so within the timeframe required by the CWA.

Courts have rejected agency claims that additional time is need to improve the quality of or soundness of the regulation to be completed. *See Sierra Club*, 2006 WL 2148566 at *7, citing *Sierra Club v. Ruckelshaus*, 602 F. Supp. at 899. "Courts also tend to reject as contrary to the relevant statute agency approaches to rulemaking that sacrifice the timely implementation fo the statute in favor of extensive agency information gathering and analysis." *Sierra Club v. Johnson*, 2006 WL 2148566 at *7. *See also New York v. Gorsuch*, 554 F. Supp. 1060, 1064 (S.D. N.Y. 1983) ("I suggest that this evidence does not demonstrate 'impossibility,' but rather a difference in rulemaking philosophy from that evinced by Congress"); and *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 788-89 (N.D. Cal. 1982) ("EPA envisions a level of thoroughness and scientific certainty not within the contemplation of Congress..."). Here, EPA's request for a twenty-six month stay of vacatur with no deadline for final action defies Congress' requirement in CWA § 303(d)(2) that EPA to establish corrective TMDLs within sixty days of the date defective TMDLs are submitted by a State or the District.

c. EPA Region III's TMDL docket

EPA argues that its proposed schedule is justified because EPA Region III's TMDL docket calls for review or establishment under court order of 2,000 other TMDLs in 2006-2007. The fact that the agency may have other obligations, however, does not show inability to promptly fulfill its duties in this case.

Further, EPA offers no explanation for why the agency proposes two separate, consecutive periods for completing action on the two relevant TMDLs, rather than a single concurrent schedule. The declaration submitted with EPA's motion for stay contains no explanation for this choice, which appears to be the least efficient approach. Moreover, EPA's

proposed schedule contradicts its own recent statements to the D.C. Circuit. *See* Declaration of Thomas M. Henry dated March 6, 2006, stating that the process of revising the two relevant Anacostia TMDLs could be completed in eighteen months from that date (i.e., by September 6, 2007, rather than October 2008 as EPA is now proposing). Given that EPA's own statements on this point have been highly inconsistent, the most recent declaration submitted by EPA does not establish that EPA's proposed schedule is necessary for EPA to achieve compliance.

II. THE COURT SHOULD SET A DEADLINE REQUIRING EPA TO ESTABLISH APPROPRIATE TMDLS BY THE END OF A SIX-MONTH STAY PERIOD.

EPA implies incorrectly that this Court's discretion is limited by the court of appeals' guidance on remand. *See* EPA Motion to Stay Vacatur at 6. However, the D.C. Circuit expressly stated that this Court retains remedial discretion, and such discretion includes the power order deadlines for compliance. *See Sierra Club v. Johnson*, 2006 WL 2148566, *6 ("When an agency has failed to meet the statutory deadline for a nondiscretionary act, the court may exercise its equity powers 'to set enforceable deadlines both of an ultimate and an intermediate nature' ") (internal citations omitted). Accordingly, courts have set enforceable deadlines by which EPA must take corrective action to comply with its duty, including deadlines for development of TMDLs. *See, e.g. Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996) (setting deadlines for development and approval of TMDLs).

Further, an order requiring EPA to comply within a limited time period would help vindicate the aims of CWA § 303, while preventing further footdragging. The court in *Sierra Club v. Hankinson* discussed this point in detail:

> The tight deadlines for submission of TMDLs demonstrate a congressional intent that TMDLs be established promptly.
>
> While these tight deadlines might mean that initially established TMDLs would be based on less than ideal data, that fact alone was considered and addressed by Congress, as demonstrated by the statutory direction to use 'a

> margin of safety which takes into account any lack of knowledge.' [33 U.S.C.] § 1313(d)(1)(C). As expressed by one EPA employee, 'In other words, Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving.'

Id. at 872.

Finally, an order setting a deadline for action would conserve judicial resources. FOE is concerned that, in the absence of a court-ordered deadline, EPA will simply fail to complete corrective action during the period of the vacatur. The parties would be required to return to court to seek a court-ordered deadline at that time or an extension of the stay of vacatur, requiring the parties and the court to expend additional time and resources on further proceedings. Granting a stay of vacatur along with an order for the agency to complete action by the end of the vacatur period will avoid such waste of resources while furthering the CWA's mandate for adequate TMDLs for the Anacostia River.

CONCLUSION

For the foregoing reasons, FOE requests an order granting a stay of vacatur for six months, and an order directing EPA to complete its corrective action and establish appropriate TMDLs within the timeframe allowed for the stay of vacatur.

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