

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

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<b>FRIENDS OF THE EARTH,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>No. 04-cv-0092 (RMU)</b>
<b>v.</b>	)	
	)	
<b>UNITED STATES ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**EPA’S MOTION TO STAY  
ORDER OF VACATUR**

On April 25, 2006, the Court of Appeals for the D.C. Circuit issued an opinion remanding to this Court, with instructions to vacate, the U.S. Environmental Protection Agency’s (“EPA”) establishment and approval of Total Maximum Daily Loads (“TMDLs”) for certain pollutants discharged into the Anacostia River. *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006). In doing so, the D.C. Circuit explicitly invited the parties to request a stay of this Court’s order vacating EPA’s actions, to avoid a situation in which no TMDLs were in place for the relevant pollutants while new TMDLs are being established. *Id.* EPA hereby moves for a stay of the Court’s vacatur order until June 7, 2008, the amount of time that EPA estimates will be required to conduct the various steps, including complex pollution modeling and intergovernmental coordination, necessary to establish and approve new TMDLs in accordance with the D.C. Circuit’s opinion.

Counsel for the other parties have indicated to EPA that although they also desire a stay, this Motion will be opposed due to disagreement over the necessary duration.

### **I. Factual Background**

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA”), prohibits the discharge of any pollutant from a point source into waters of the United States, unless that discharge complies with the requirements of the CWA. 33 U.S.C. §§ 1311(a), 1362(12). A discharge of a pollutant may comply with the CWA if it conforms to the terms of a permit issued by EPA under the National Pollutant Discharge Elimination System (“NPDES”). 33 U.S.C. § 1342. NPDES permits must contain both (1) technology-based effluent limitations that reflect the pollution reduction available based on the best available pollutant reduction technology; and (2) water quality-based effluent limitations that represent any more stringent limitations necessary to meet applicable water quality standards. 33 U.S.C. § 1311(b).

For water bodies that fail to meet the applicable water quality standards, the CWA also requires states to establish, and EPA to approve, a TMDL for each pollutant in that body of water that contributes to the failure. A TMDL establishes the maximum amount or “load” for the pollutant in that water body, with an adequate margin of safety, that will achieve the applicable water quality standard for that pollutant. 33 U.S.C. § 1313(d). Each TMDL is then implemented by, for example, being translated into NPDES permit effluent limitations, which limit the discharge of pollutants by individual sources to amounts consistent with the assumptions and requirements of the applicable TMDL for the water body as a whole. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B).

The TMDLs at issue in this litigation were initially established for the District of Columbia portion of the Anacostia River. They pertain to two pollutants, biochemical oxygen demand (“BOD”) and total suspended solids (“TSS”). The BOD TMDL was established by the

District of Columbia (the “District”) and approved by EPA to address the Anacostia River’s failure to meet the water quality standard for total dissolved oxygen, and the TSS TMDL was established by EPA to address the Anacostia’s failure to meet the water quality standard for “turbidity,” or murkiness. The TMDL for BOD was based on the total annual discharge of oxygen-depleting pollutants, and the TMDL for TSS was based on the seasonal discharge of pollutants contributing to turbidity.

Friends of the Earth challenged EPA’s approval and establishment of these TMDLs under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, arguing that the seasonal and annual TMDLs failed to meet the CWA’s requirement for the establishment of total maximum “daily” loads of pollutants. On cross-motions for summary judgment, this Court granted summary judgment in favor of EPA, ruling that the establishment of the TMDLs was a reasonable interpretation of the CWA designed to implement the water quality standards for the Anacostia that were established under the CWA. *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182 (D.D.C. 2004). Friends of the Earth appealed this decision.

The D.C. Circuit took a different view of the merits of Friends of the Earth’s claim, rejecting the seasonal and annual TMDLs as inconsistent with the CWA’s reference to “daily” pollutant loads. *Friends of the Earth*, 446 F.3d at 144-46. Accordingly, the D.C. Circuit remanded to this Court to vacate the approval of the seasonal and annual TMDLs for the BOD and TSS pollutants. However, the D.C. Circuit invited EPA to file the present Motion:

[W]e recognize that neither [Friends of the Earth] nor EPA wants the Anacostia River to go without dissolved oxygen and turbidity TMDLs. The district court retains some remedial discretion, however, and the parties may move to stay the district court’s order on remand to give either the District of Columbia a *reasonable opportunity to establish daily load limits* or EPA a chance to amend

its regulations.

*Id.* at 148 (emphasis added).<sup>1/</sup>

## II. Argument

The task before EPA is to approve new TMDLs for TSS and BOD to replace those developed for the District of Columbia portion of the Anacostia River.<sup>2/</sup> The District (working in cooperation with Maryland) intends to develop TMDLs that take into account conditions throughout the Anacostia watershed, including those portions that lie within Maryland. It is anticipated that the District and Maryland will jointly submit for EPA's approval TMDLs for TSS and BOD (and a related nutrient TMDL for Maryland) that will cover the entire watershed in both of those jurisdictions. The D.C. Circuit invited the parties to seek a stay that would provide EPA and the District of Columbia a "reasonable opportunity" to accomplish these tasks before the existing TMDLs are vacated. For the reasons outlined below, EPA believes that a stay until June 7, 2008, is necessary to provide that "reasonable opportunity."

### A. D.C. Circuit law supports the stay of the Court of Appeals' instructions to vacate.

The D.C. Circuit's invitation to the parties to seek this stay is one example of that Court's various methods of temporarily preserving rules that must be vacated but are expected to be

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<sup>1/</sup>The District of Columbia Water and Sewer Authority recently filed a petition for certiorari in the United States Supreme Court seeking review of this decision. Should the petition for certiorari be granted, EPA reserves the right to seek a further stay of this litigation pending the Supreme Court's review.

<sup>2/</sup>The D.C. Circuit did leave open the option that EPA could revise its 1978 determination that all pollutants, including TSS and BOD, are appropriate for TMDL development. *See Friends of the Earth*, 446 F.3d at 148. At this time it is EPA's plan, instead, to revise the TMDLs consistent with the D.C. Circuit's decision.

replaced with revised standards.<sup>3/</sup> In some cases, the D.C. Circuit has itself refused to vacate rules pending the agency's further efforts to explain its existing rules or formulate new rules to replace them. *See National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999).

In the alternative, the Court may vacate flawed rules, but provide the opportunity for the parties to seek a stay before that vacatur will take effect, in order to provide an incentive for agencies to act to correct deficiencies in their actions on remand. For example, in *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001), the Court of Appeals refused to grant a stay on its own because there were petitioners whose claims had not yet been decided. However, it invited EPA to file a motion to stay issuance of the mandate, so that the Court would have an opportunity to fully consider whether there were sufficient reasons not to vacate the rule immediately. *Id.*; *see also Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998). The Court in *Cement Kiln* suggested that EPA should request "a reasonable time to develop interim standards." 255 F.3d at 872.

In this case, additional facts (provided with this Motion in the Declaration of Thomas M. Henry) are necessary to determine the duration of an appropriate stay. The D.C. Circuit therefore ordered that the TMDLs be vacated, but remanded proceedings to the District Court, relying on this Court's discretion to consider and establish an appropriate schedule for vacatur. *See Friends of the Earth*, 446 F.3d at 148. As in *Cement Kiln*, the Court's guidance is to permit EPA and the District of Columbia "a reasonable opportunity to establish daily load limits." *Id.* The Court

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<sup>3/</sup>Although neither the establishment nor the approval of a TMDL is a "rule" as that term is used in the Administrative Procedure Act, the Court's decisions addressing the vacatur of agency rules are relevant to the Court's consideration of TMDLs.

may thus exercise its discretion to stay the vacatur of the Anacostia TMDLs for the time period necessary to develop new TMDLs for TSS and BOD in accordance with the instructions of the Court of Appeals.

B. Good cause exists in this case for a stay until June 7, 2008.

Consistent with the D.C. Circuit's suggestion, it is in the best interest of the parties and the public for the Anacostia TMDLs, which must ultimately be vacated, to remain in effect during the development of new replacement TMDLs. The Anacostia River is an unusually vulnerable river, given that its watershed in Maryland and in the District of Columbia is highly urbanized. *See* Declaration of Thomas M. Henry, ¶ 3 (attached hereto as Exhibit A). The District's water quality standards for dissolved oxygen and turbidity in the Anacostia have not been met since prior to the development of the existing TMDLs. Those water quality standards for the Anacostia were formulated to protect a variety of human and wildlife uses such as recreation, aesthetic enjoyment, protection of fish & wildlife (including the human health effects related to consumption of fish and shellfish), and navigation. If the existing TMDLs are vacated and there is a lengthy period with no TMDLs while new ones are developed and approved, the efforts of EPA and the District to implement the water quality standards protective of these uses may be compromised.

This Court should exercise its discretion to give the District and EPA a reasonable opportunity to avoid such a vacuum. EPA seeks a stay until June 7, 2008 to ensure that, based on the schedule estimated by its water quality experts, sufficient time will exist to develop new TMDLs that satisfy the instructions of the Court of Appeals. The reasons for this recommendation are outlined in the attached Declaration of Thomas M. Henry, the TMDL

Program Manager for EPA's Region III, who would supervise EPA's participation in the development, and ultimately the approval, of new TMDLs for the Anacostia River. Mr. Henry estimates that EPA can establish or approve a replacement TMDL for TSS by November 7, 2007, and can establish or approve a replacement TMDL for BOD by June 7, 2008. Henry Decl. ¶ 2.

Establishing these TMDLs is a complex process for many reasons. Most importantly, the Anacostia is a large and unusually complex watershed. It is affected by pollutants from storm runoff, overflows from the District of Columbia sewer system, pollutant contributions from multiple states, and tidal influences from the Potomac estuary. Henry Decl. ¶ 3. As a result, the most effective tool for calculating how the discharge of pollutants into the Anacostia affects the relevant water quality standards is a computer model that accounts for many variables. This model is calibrated using historical data and has been updated since the completion of the existing TMDLs to provide more detail. Prior to the establishment of new TMDLs, EPA expects to continue this process of refining the model, including by introducing new water quality data. *Id.* ¶¶ 8-12. The District's water quality standards for clarity and sediment have also been revised in 2006. Factoring in these changes will also increase the time necessary to revise the old TMDLs in accordance with the decision of the D.C. Circuit. *Id.* ¶ 5.

Significant value, but an additional layer of complexity, is added by EPA's, Maryland's, and the District's desire to coordinate their efforts in the revision and establishment of these TMDLs. Because more than 85% of the Anacostia's watershed is in Maryland, EPA, Maryland, and the District intend to use the time sought from the Court to coordinate the development of comprehensive TSS and BOD TMDLs (and in Maryland, a nutrient TMDL) not just for that portion of the Anacostia River within the District, but also for the upstream portion of the river in

Maryland that feeds into D.C. *Id.* ¶¶ 6-7. This is a more complex and time-consuming process than simply revising the two D.C. TMDLs but one that EPA believes will pay dividends in the long run.

This coordination is already underway with respect to the development of new TMDLs. *Id.* ¶ 7. For one of the pollutants at issue here, BOD, part of the time that EPA seeks will be used to implement the computer model basinwide, so that the variables affecting the Anacostia in Maryland (and, by extension, in the District of Columbia) can be taken into account. *Id.* ¶ 11. The CWA contemplates the cooperation of state and local authorities in implementing TMDLs, and full implementation is most likely when those authorities are involved in the development of the TMDLs. *Id.* ¶ 6.

The goal of this work is to ensure that TMDLs are as accurate as possible, ensure that the District of Columbia's water quality standards are met, will be effectively implemented by state and local authorities, and do not impose undue costs upon the regulated community. *Id.* ¶ 12.

EPA's request for an 18-month stay of vacatur to complete both of these TMDLs is based on its assessment of the interim steps that will make up this process. It is intended to be a realistically achievable estimate given the complexities of the task at hand. The Henry Declaration (¶¶ 15-16) describes a number of these steps and the time estimated, based on EPA's experience and discussions with Maryland and the District, to complete them:

- Each of the proposed schedules incorporates an initial period for consultation with the state agencies involved, which has already begun.
- Each of the proposed schedules incorporates a period to conduct the main technical work on the TMDLs, including reviewing the model, expanding it basinwide (in the case of the BOD TMDL), and analyzing the results of the pollution modeling.



- Each of the proposed schedules incorporates a reasonable period for public comment – comment which will benefit each of the other parties in this litigation, as well as the rest of the public – and a reasonable period to respond to and incorporate those comments.
- Each of the proposed schedules incorporates a short period for EPA to review and take final action on the TMDLs.

Moreover, this process will occur amidst a TMDL docket at EPA's Region III that calls for review or establishment under Court order of approximately 2000 other TMDLs in fiscal years 2006 and 2007 for impaired waters in the District of Columbia and other states. *See* Henry Decl. ¶ 17.

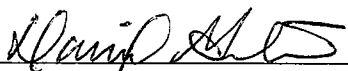
EPA Region III believes that, despite the technical challenges involved in revising these TMDLs and the competing demands of other Court-ordered commitments to develop TMDLs, a new TSS TMDL, addressing the new TSS water quality standards, can be established and approved by November 7, 2007, and a new BOD TMDL, addressing the new BOD water quality standards, can be established and approved by June 7, 2008. If EPA took less time to complete these tasks, for example by focusing solely on the District's portion of the river or by doing a simplistic analysis of water conditions and pollutant capacity, the resulting TMDLs would not reflect the integrated, multistate, watershed-based effort contemplated by EPA, they would likely not be as comprehensive and technically sound, and their ability to guide achievement of the applicable water quality standards would be at risk. *Id.* ¶ 12. Thus, a shorter schedule would not only frustrate the purpose of the TMDLs themselves, but could result in substantially higher compliance costs than are necessary for sources of BOD and TSS in Maryland and in the District of Columbia. *Id.*

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The stay proposed in this Motion is important to protect the water quality of the vulnerable Anacostia River while EPA and the District, in cooperation with Maryland, prepare comprehensive, watershed-based TMDLs that conform to the instructions of the Court of Appeals. It is in the best interest of the parties and the public. For the foregoing reasons, the Court should grant the Motion and stay its order of vacatur until June 7, 2008. At that time, absent application for further relief from the parties, the Court could vacate the currently-existing TMDLs.

Respectfully submitted,

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Dated: August 7, 2006

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

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**FRIENDS OF THE EARTH,** )  
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**Plaintiff,** )  
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**v.** )  
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**UNITED STATES ENVIRONMENTAL** )  
**PROTECTION AGENCY, et al.,** )  
) )  
**Defendants.** )

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**No. 04-cv-0092 (RMU)**

**[PROPOSED] ORDER GRANTING  
EPA'S MOTION TO STAY VACATUR**

Upon consideration of EPA's Motion to stay this Court's order of vacatur, and upon the exhibits submitted therewith, and finding that good cause exists to grant the Motion:

The Motion to Stay Order of Vacatur is hereby GRANTED, and it is ORDERED that all proceedings in this case be stayed until June 7, 2008, at which time, if the parties do not apply to the Court for further relief, the Court will act upon the mandate of the Court of Appeals described in *Friends of the Earth v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006).

SO ORDERED.

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Hon. Ricardo M. Urbina  
United States District Judge

Dated: \_\_\_\_\_, 2006

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**MOTION BY PLAINTIFF FRIENDS OF THE EARTH TO STAY VACATUR OF  
TMDLS AND SET DEADLINE FOR COMPLETION OF EPA ACTION ON REMAND**

In this case, Plaintiffs Friends of the Earth (FOE) challenged actions by the U.S. Environmental Protection Agency (EPA) approving and establishing “total maximum daily loads” (TMDLs) for the Anacostia River pursuant to the Clean Water Act. TMDLs are pollution caps designed to ensure that a river meets clean water standards and is suitable for designated uses, such as fishing and swimming. FOE challenged TMDLs for two pollutants in the Anacostia - biochemical oxygen demand (BOD) and total suspended solids (TSS) - on the ground that, among other things, they were expressed as annual or seasonal, rather than daily caps. On cross-motions for summary judgment, this Court rejected FOE’s challenge. 346 F. Supp. 2d 182 (D.D.C. 2004). FOE appealed, and in a decision issued April 25, 2006, the D.C. Circuit reversed, holding that the Clean Water Act required TMDLs to be set as daily loads. *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

The Court of Appeals remanded the case with instructions to vacate EPA’s approval of the non-daily loads. *Id.* 148. At the same time, the Court recognized that neither FOE nor EPA

wanted the Anacostia River to go without TMDLs for the pollutants at issue. The Court therefore stated that the “district court retains some remedial discretion . . . and the parties may move to stay the district court’s order on remand to give either the District of Columbia a reasonable opportunity to establish daily load limits or EPA a chance to amend its regulation declaring ‘all pollutants . . . suitable’ for daily loads.” *Id.* It is FOE’s understanding that EPA does not intend to amend its regulation. For reasons further detailed below, FOE accordingly moves the Court to stay vacatur of the TMDLs for six months, and direct EPA to complete action approving or establishing daily load limits within the same time frame.<sup>1</sup>

**1. The Court Should Stay Vacatur of the TMDLs For a Limited Period to Allow for Corrective Action by EPA**

As stated by the D.C. Circuit, neither FOE nor EPA wants the Anacostia to be left without the protection of any TMDLs. Accordingly, FOE supports a stay of vacatur of the non-daily loads for a limited period of time to allow EPA to either approve or establish corrective TMDLs. In both its complaint and motion for summary judgment in this case, FOE specifically asked the Court to set a six month time frame for EPA to complete such corrective action.<sup>2</sup> FOE continues to believe that six months is a more than ample time frame. Indeed, the Clean Water Act contemplates a much shorter time frame. Section 303(d)(2) of the Act requires EPA to

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<sup>1</sup> Intervenor District of Columbia Water and Sewer Authority has petitioned the U.S. Supreme Court for certiorari with respect to the D.C. Circuit decision. Petition for Writ of Certiorari, *District of Columbia Water and Sewer Auth. v. Friends of the Earth*, No. 06-119 (U.S., filed 7-21-06). EPA has not so petitioned, however, and because no party has moved to stay the Court of Appeals’ mandate, which issued June 16, 2006, this Court now has authority to move forward with remand proceedings. See Fed R. App. P. 41.

<sup>2</sup> Complaint at 18 (Jan. 21, 2004)(asking the Court to “[e]nter an order remanding the above-referenced TMDLs to EPA for reconsideration in light of the Court’s decision, and directing that EPA conclude the remand within six months of the Court’s order”); Motion of Plaintiff Friends of the Earth for Summary Judgment at 1 (May 20, 2004)(moving the Court to “[d]irect EPA to conclude remand proceedings, including any final actions disapproving and establishing TMDLs

approve or disapprove any TMDLs submitted by a state (or the District) within 30 days of submission. 33 U.S.C. §1313(d)(2). If EPA disapproves a state-submitted TMDL, the statute requires the agency to establish its own TMDL within 30 days of the disapproval. *Id.* Thus, Congress contemplated a time frame of no more than 60 days for EPA to establish new TMDLs after submittal of deficient ones. Here, the deficient non-daily TMDLs were submitted to EPA years ago. Even if they were submitted to EPA for the first time today, the Act would allow EPA no more than 60 days to establish corrective TMDLs.

A six month time frame is also sufficient given that the District and EPA have already spent considerable time collecting and evaluating data relevant to development of the TMDLs: They are hardly starting from scratch. EPA's approval and establishment of the TMDLs at issue here occurred as the result of a consent decree entered by Judge Kollar-Kotelly on June 13, 2000, in a suit by FOE and others. *Kingman Park Civic Assn v. EPA*, No.1:98CV00758 (D.D.C.). Pursuant to schedules set in that decree (as later modified), EPA approved the District's BOD TMDL in December 2001, and established the TSS TMDL in March 2002. Thus, EPA and the District have already spent substantial amounts of time on development of TMDLs for these pollutants.

A protracted schedule for adoption of daily loads would thwart Congressional intent. In 1999, Judge Kollar-Kotelly found (in denying a motion to dismiss *Kingman Park*) that these TMDLS were already more than *eighteen years* late under the Act's timetables. *Kingman Park Civic Assn v. EPA*, 84 F. Supp. 2d 1, 3-4 (D.D.C. 1999). They are now almost twenty-five years overdue. Further delay will only aggravate the violation of Congress' mandates.

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consistent with such opinion, as well as any final actions approving TMDLs consistent with such opinion, within six months of the Court's order").

**2. The Court Should Order EPA to Complete Corrective Action By the End of the Stay Period**

Given the long history of delay by the District and EPA in establishing adequate TMDLs for the Anacostia, there is strong reason to expect further foot-dragging. FOE is very concerned that, in the absence of a court-ordered deadline, EPA will simply fail to complete corrective action during the period of the stay of vacatur. The Court would then be left with the prospect of either vacating the pre-existing TMDLs (leaving the river with no TMDLs for the relevant pollutants), or giving EPA yet more time. Such an outcome would only further undermine the Act's mandates and require the Court and the parties to expend yet more time and resources on additional proceedings. A court-ordered deadline for completion of EPA action would help to avoid these adverse consequences, and effectuate the Act's mandates for adoption of adequate TMDLS for the Anacostia.

Accordingly, FOE respectfully requests an order directing EPA to complete its corrective action on these TMDLS within the same timeframe allowed for the stay of vacatur. As noted above, FOE's complaint and summary judgment motion in this matter both requested that the Court direct EPA to complete remand proceedings within six months. *See* note 2, *supra*. Entry of such an order would be consistent with the D.C. Circuit's decision, which recognized that this Court "retains some remedial discretion." 446 F.3d at 148. In so stating, the D.C. Circuit cited, among other cases, *National Treasury Employees Union v. Horner*, 854 F.2d 490, 501 (D.C. Cir. 1988), wherein the circuit court remanded a defective agency rule with instructions for the district court "to establish, in consultation with the parties, an expedited schedule for further rulemaking proceedings" to correct the defective rule. The court so ordered because no party wanted vacatur of the challenged rule until adoption of a replacement. The situation is virtually identical here.

**CONCLUSION**

For all the foregoing reasons, FOE respectfully requests that the Court stay vacatur of the TMDLs at issue for six months, and further order EPA to complete action within that six month period approving or establishing daily TMDLs consistent with the D.C. Circuit's opinion.

DATED this 7<sup>th</sup> day of August, 2006.

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