ARGUED MARCH 2, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5015

FRIENDS OF THE EARTH,

Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

Appellees.

APPELLANT FRIENDS OF THE EARTH'S SUPPLEMENTAL BRIEF ON MOOTNESS

On Appeal from a Final Decision of the
United States District Court for the District of Columbia

Howard I. Fox
Earthjustice
1625 Massachusetts Avenue, NW, Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for Plaintiff-Appellant
Friends of the Earth

DATED: March 9, 2006

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL AND D.C. REGISTERS

*Cases or authorities upon which we chiefly rely are marked with asterisks.

I. Appellant Friends of the Earth respectfully submits that this case is not moot. The Anacostia River remains filthy due to pollutant discharges, and FoE's members' use remains impaired. The Environmental Protection Agency approved and established "total maximum daily loads" that—because of statutory violations and arbitrary decisionmaking—are not equal to the task of cleaning up this pollution. Those loads remain in place, and EPA asks the Court not to vacate them. Supp. Br. 5. The agency recognizes that the loads can be altered only after public comment, *id.*, and indeed notice-and-comment procedures are required by the agency's own regulations. 40 C.F.R. §130.7(c)(1)(ii), (d)(2). The mere possibility that the loads might be altered in the future does not moot FoE's challenge. *See, e.g., General Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

II. EPA claims that this case has been mooted "by the independent action of the District of Columbia in adopting changed water quality standards." Supp. Br. 5 n.2. To the contrary, the District's action addressed only the content of water quality standards under Clean Water Act §303(c), and did not purport to—nor could it—amend the TMDLs approved and established under §303(d). In reality, EPA's mootness argument rests not on the District's actions, but on EPA's. It is EPA who approved the District's standards, *see* EPA Supp. Br. 2, and it is EPA who is arguing to this Court that EPA intends to ignore the TMDLs. *Id.* 2-4. The standard for determining whether a defendant's voluntary conduct moots a case, however, is "stringent," and the "heavy" burden of showing mootness rests with EPA. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 189 (2000) (citation omitted).

EPA has not and cannot shoulder that burden. First, the agency cannot show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). To the contrary, the wrongful conduct

complained of—*e.g.*, the violation of requirements that loads be "daily" and that they protect all uses, including recreational and aesthetic uses—has never ceased. Nothing in the amended standards even purports to abrogate these requirements—nor could those standards abrogate requirements of the Clean Water Act and EPA regulations. Moreover, of particular relevance to the TSS TMDLs, the revised standards retain the key predicate provisions—including the recreational and aesthetic uses for the Anacostia River, 52 D.C. Reg. 9622, as well as the narrative standard barring "objectionable ... turbidity." *Id.* 9627.

Second, EPA has not and cannot show that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189 (citation omitted). There is no basis for simply assuming that review of the TMDLs pursuant to the revised water quality standards will correct the flaws at issue here.

On the statutory issue concerning "daily" loads, the most EPA can muster is the suggestion that it would "reconsider" the appropriateness of annual and seasonal loads. Supp. Br. 5. This falls far short of the "absolute[] cl[arity]" required by *Laidlaw*—especially given EPA's resolute insistence that daily loads are inappropriate. EPA Br. 13-14, 18-19, 28-29, 35-36.

On the recreation and aesthetics issue, EPA does not even suggest it will correct its refusal to protect those uses. While the agency touts a new numerical standard for water clarity, Supp. Br. 2, that standard by its terms addresses the Class C aquatic life use (52 D.C. Reg. 9628-29 (§1104.8 and n.3)), not the Class A and B recreational and aesthetic uses. Thus, it is far from "absolutely clear" that application of the new standards will lead EPA to correct its errors. To the contrary, EPA "has not renounced" its unlawful and arbitrary approach. *See EDF v. Costle*, 636 F.2d 1229, 1248 (D.C. Cir. 1980).

III. EPA is especially wide of the mark in arguing (Supp. Br. 2-4) that this case can be mooted by the agency's own announced intention to disregard the challenged TMDLs. Under the guise of an Article III mootness argument purportedly designed to avoid adjudication of statutory and regulatory issues, EPA's argument would require the Court to adjudicate such issues. But instead of the issues properly raised by FoE and briefed on the merits by the parties, EPA would have the Court adjudicate—on the basis of five-page supplemental briefs—a different issue: whether the Clean Water Act and implementing regulations allow a permitting agency to disregard TMDLs, where water quality standards have been revised.

The Court should decline the invitation, and leave adjudication of such issues to a future permit proceeding, where the statutory and regulatory interpretation advanced in EPA's mootness brief might well be rejected—either by EPA itself in response to public input, *see* CWA §402(a)(1) ("public hearing"), 40 C.F.R. §124.19 (administrative appeal), or by a reviewing court. *See Amer. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir 1997) (subsequent EPA statement did not moot case, because it "could be withdrawn" or "could be stricken down by a reviewing court"). *See also Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 89 (1998).

In any event, there is no merit to EPA's claim that TMDLs are automatically drained of all effect, simply because water quality standards have changed. For example, these TMDLs have already been incorporated into the District's stormwater permit.[1]

Likewise, the TMDLs will continue to constrain future permit decisions. The Act requires achievement *inter alia* of "any more stringent limitation, including those necessary to meet water

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[1] *See* NPDES Permit #DC0000221 at 5, 41-43 (issued 8/17/04, expires 8/18/09), http://www.earthjustice.org/backgrounder/display.html?ID=150. Any attempt to modify these provisions would have to comply with specified procedures, including an opportunity for public review. *See* 40 C.F.R. §122.62; *In re District of Columbia Municipal Storm Sewer System*, 10 E.A.D. 323, 357-358 (2002).

quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation." §301(b)(1)(C) (emphasis added). On its face this provision is not limited to water-quality-standard-based limitations, but broadly encompasses "any" limitation more stringent than the primary and secondary treatment required by §301(b)(1)(A) and (B). *See also* 65 Fed. Reg. 24644/3 (April 27, 2000) ("EPA would not disapprove a TMDL on the grounds that it was more stringent than needed to meet the applicable water quality standard"). Likewise, §§510 and 502(3) bar the District of Columbia from adopting or enforcing "any effluent limitation, or other limitation," that is less stringent than a Clean Water Act limitation. There can be no doubt that TMDLs are "limitations." CWA §502(11); 40 C.F.R. §130.2(h), (i).

Moreover, EPA's regulations expressly require permits to be consistent with a TMDL's "assumptions and requirements." *Id.* §122.44(d)(1)(vii)(B) (emphasis added). EPA's theory (Supp. Br. 2-4) would allow the agency to jettison TMDL requirements.

FoE submits that the foregoing points are clearly correct. At a minimum, however, they represent arguments that commenters can raise during permit proceedings, and EPA would be required to consider and respond to those arguments. Thus, the TMDLs retain ample viability to satisfy Article III. *See Natl. Parks Conserv. Assn. v. Manson*, 414 F.3d 1, 6-7 (D.C. Cir. 2005).

IV. Even accepting *arguendo* EPA's theory concerning the effect of water quality standards revisions on TMDLs, the case would still not be moot. EPA's erroneous approach to these TMDLs "is likely to affect its evaluation of all" future Anacostia TMDLs. *See Motor & Equipment Mfrs. Assn. v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998). Moreover, the issues raised here are capable of repetition (*see* p. 2, *supra*), yet would evade judicial review. *See Montgomery Environmental Coalition v. Costle,* 646 F.2d 568, 580-82 (D.C. Cir. 1980). The Act

requires that water quality standards be reviewed and revised at three-year intervals. §303(c). EPA says "18 months" are needed in order to evaluate how the previous cycle of water quality standards revisions affects TMDLs, Supp. Br. 5, leaving at most 18 more months before the end of the next §303(c) revision cycle. In light of the District's and EPA's history of delay on TMDLs, *see Kingman Park Civic Assn v. USEPA*, 84 F. Supp. 2d 1 (D.D.C. 1999), the window for judicial review is likely to be much less than eighteen months.

V. In short, this case is not moot. EPA argues that the Court should nonetheless decline to "decid[e] the case on the merits," instead simply remanding for the TMDLs to be revised "in light of the District of Columbia's new water quality standards." Supp. Br. 5. This argument ignores "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Bridges v. Kelly*, 84 F.3d 470, 475 (D.C. Cir. 1996) (citation omitted), and in particular to construe the law and identify arbitrary agency action. FoE Opening Br. 10. Moreover, because EPA has not abandoned the positions espoused in this litigation, and because the water quality standards revisions will not require the agency to revisit those positions, *see* p. 2, *supra*, such a remand will delay rather than eliminate the need for judicial review of those positions. The result will be further thwarting of congressional intent, already undermined by over thirty years of agency delay, to the detriment of FoE's members and other users of the severely polluted Anacostia River.

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Respectfully submitted,

Howard I. Fox
Earthjustice
1625 Massachusetts Ave., NW, Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for Plaintiff-Appellant Friends of the Earth

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Appellant Friends of the Earth's Supplemental Brief on Mootness** has been served by United States first-class mail this 9th day of March, 2005, upon the following, in addition to a courtesy copy sent via electronic mail:

John A. Bryson
Appellate Section, Environment & Natural
Resources Division,
U.S. Department of Justice
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026-3795
(202) 514-2748
Fax: (202) 353-1873
John.Bryson@usdoj.gov
for U.S. EPA

Stewart T. Leeth
David E. Evans
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1000
Fax (804) 775-1061
sleeth@mcguirewoods.com
devans@mcguirewoods.com
for DC WASA

F. Paul Calamita
John A. Sheehan
AquaLaw, PLC
Wytestone Plaza
801 E. Main Street, Suite 1002
Richmond, VA 23219
(804) 716-9021
Paul@AquaLaw.com
john@aqualaw.com
for AMSA and CSO Partnership

Julie James
Litigation Assistant