UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

EPA'S OPPOSITION TO PLAINTIFFS' MOTION TO STAY VACATUR AND SET DEADLINE

In this litigation, the parties have recently submitted competing Motions urging this Court to stay the vacatur of Total Maximum Daily Loads ("TMDLs") that were established or approved by the U.S. Environmental Protection Agency ("EPA") for the Anacostia River. Neither EPA nor plaintiff Friends of the Earth ("FOE") desires for those TMDLs to be vacated before the District of Columbia and EPA can establish and approve replacement TMDLs, which are important for protecting and improving water quality in the Anacostia. The Court of Appeals ordered this Court to vacate the TMDLs as inconsistent with the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"), but invited the parties to seek a stay of this Court's vacatur order pending a "reasonable opportunity" for new TMDLs to be developed. *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006).

The difference between the parties is over how long a stay is required, and what should happen at the end of it. EPA has submitted a Motion, supported by a detailed affidavit from the EPA Region III official supervising EPA's participation in the Anacostia TMDL revision efforts,

stating that EPA believes that a stay of vacatur until June 2008 would give the District and EPA a reasonable opportunity to complete the development of new TMDLs. In contrast, FOE claims – with no factual support – that it can be done in six months. FOE also urges this Court to go beyond the remedial instructions of the Court of Appeals, and in addition to vacating the flawed TMDLs, order EPA to approve or establish new ones under penalty of contempt of court. The Court should reject both of these suggestions and deny FOE's Motion.

ARGUMENT

A. Six months is not a "reasonable opportunity" to establish new TMDLs.

EPA's Motion to Stay Order of Vacatur, submitted on August 7, 2006, sets forth the reasons why a stay of only six months is insufficient for the establishment and approval of new TMDLs for the Anacostia River. EPA will not reiterate those reasons here, but will address two specific aspects of FOE's proposed six-month timetable.

First, the Court of Appeals explained that the parties could seek "a reasonable opportunity" for the District of Columbia to establish daily load limits." *Friends of the Earth*, 446 F.3d at 148. It relied on the greater ability of this Court to determine what a "reasonable opportunity" might be, apparently contemplating that such a finding would be based on factual submissions by the parties and findings of fact by this Court.[1/] In response, EPA submitted a detailed affidavit with its Motion, describing the coordinated steps to be taken by EPA, the District, and Maryland in developing the new TMDLs, why those steps were necessary, and how

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[1/]Where the Court of Appeals believes that it already has sufficient information before it to determine the appropriate length of a stay, it has done so. *See, e.g., U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (staying issuance of the vacatur mandate for 60 days); *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (staying issuance of the vacatur mandate for six months).

long it will take. *See* Declaration of Thomas M. Henry (attached to EPA's Motion to Stay Order of Vacatur, submitted August 7, 2006). FOE has submitted no evidence, but only the unsupported contention of its counsel that "six months is a more than ample time frame." FOE Mot. at 2. This is not a sufficient factual basis for the Court to conclude that FOE's recommended time frame is "reasonable," but EPA's is not.[2/] *See National Treasury Employees Union v. Horner*, 854 F.2d 490, 500 (D.C. Cir. 1988) (rejecting the District Court's imposition of a six-month schedule "without an adequate basis" to assess the burden of such a schedule on the agency).

Second, FOE suggests that it is acceptable to reduce the TMDL schedule because EPA and the District have done prior work on TMDLs for the Anacostia. FOE Mot. at 3. EPA's submission demonstrates why this is not the case, in particular because the planned TMDL revisions will involve watershed-based, multijurisdictional activities that greatly exceed the scale of the original District-specific effort.

B. The Court should not impose a deadline for the establishment of new TMDLs.

The other key point of contention between the parties is whether this Court should order EPA to establish or approve new TMDLs on a particular schedule under the penalty of contempt, or whether the Court's jurisdiction is limited to considering the duration of an appropriate stay. In EPA's view, an enforceable deadline for establishment or approval of new TMDLs is not only unwise, it is beyond the Court's authority on remand.

[2/]FOE further suggests that 60 days is the time contemplated by statute for the establishment of new TMDLs (although, notably, it does not contend that 60 days is a "reasonable opportunity" to establish new TMDLs). FOE Mot. at 2-3. This argument is related to their proposal for an order requiring new TMDLs and will be addressed below.

1. Vacatur is the only remedy available for FOE's cause of action.

The D.C. Circuit has instructed this Court, if it finds merit in the parties' arguments, to vacate the original TMDLs after a "reasonable opportunity" for the *District of Columbia* to formulate new ones. *Friends of the Earth*, 446 F.3d at 148. Although the D.C. Circuit referred to this Court's "remedial discretion" in evaluating the merits of arguments for a stay of vacatur, that phrase will not bear the weight that FOE tries to load upon it. The purpose of remand, and the scope of the discretion remaining to this Court after the D.C. Circuit's decision, is to evaluate the merits of the parties' stay applications and determine the length of an appropriate stay before vacating the TMDLs. The Court of Appeals did not suggest that in addition to vacatur, this Court should order *EPA*, rather than the District of Columbia, to establish new TMDLs according to a court-ordered deadline. Certainly, if the Court envisioned that remedy, it could have stated so. *See Horner*, 854 F.3d at 499-501.

The remedy in this case should also be limited to vacatur because that is the limit of the Court's jurisdiction under the cause of action that FOE has pled. FOE has argued, and the D.C. Circuit found, that the TMDLs at issue were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Compl. ¶¶ 38, 40 (citing 5 U.S.C. § 706(2)(A)); *Friends of the Earth*, 446 F.3d at 148. Vacatur is complete relief for this cause of action. The section of the Administrative Procedure Act under which FOE has won relief authorizes the Court to "set aside" agency action, not to correct it. 5 U.S.C. § 706(2). FOE did not also ask the Court to "compel agency action unlawfully withheld" under 5 U.S.C. § 706(1). Nor could it have done so, since by FOE's own admission, Compl. ¶¶ 23-24, 29, EPA fulfilled its duty either to act on

the TMDLs that the District submitted or to establish its own.[3/]

Given the limited nature of this cause of action, there is no legal basis for the Court to order a remedy that includes the establishment and approval of a new TMDL by a date certain. "When a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc., v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). On remand, the Court's discretion to impose a schedule for expedited rulemaking is sharply limited, because "[s]uch an order constitutes extraordinary relief." *Consumer Fed'n of Am. v. Dep't of Health and Human Servs.*, 83 F.3d 1497, 1507 n.8 (D.C. Cir. 1996). Thus, in some instances, the Court has vacated faulty rules and permitted the parties to seek a stay before that vacatur would take effect. *See Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998). In another, it has vacated rules and stayed the vacatur for only 60 days on its own initiative, for the express purpose of pressuring the agency to act. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004). However, even though the Court envisioned further agency activity in each of those cases, it did not include in any of them an enforceable deadline for new action.

It is true that where an agency has made a decision that may be substantively defensible, but which involved procedural errors or an inadequate record, the courts have employed a

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[3/]For this reason, FOE's protests that the TMDLs at issue are now "almost twenty-five years overdue," FOE Mot. at 3, ring hollow. The District's failure to submit TMDLs initially was remedied by the Court's consent decree in *Kingman Park Civic Ass'n v. EPA*, No. 1:98-cv-00758 (D.D.C.). *See* FOE Mot. at 3. EPA completed its obligations under that consent decree in good faith and in a timely manner.

remedy known as "remand without vacatur," sending the decision back to the agency so it can be reconsidered according to proper procedures. *See, e.g., Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999). This was the situation in *Horner*, the case that FOE cites to support its argument that the Court can order EPA to establish new TMDLs. In *Horner*, the D.C. Circuit concluded that the Office of Personnel Management ("OPM") acted arbitrarily and capriciously in exempting a certain class of positions from the competitive civil service. 854 F.2d at 498-99. It did not conclude that the agency *could never* exempt the positions in question, only that it had failed to articulate "a rational connection between the facts found and the choice made." *Id.* at 499. As a result, it remanded the decision to the agency without vacating it, giving the agency an opportunity to demonstrate record support for the decision under review, and imposed a time limit on that additional procedural step. *Id.* at 500-01.

The present case is closer to *Cement Kiln* and *Columbia Falls* than to *Horner*.[4] The Court of Appeals here has ordered that the TMDLs in question be vacated; that is the only procedural step that remains in the life of those TMDLs. The Court of Appeals found the TMDLs in question to be substantively inconsistent with the CWA, and no procedural corrections can save them. *Friends of the Earth*, 446 F.3d at 144-45. In *Horner*, the agency on remand was ordered to reconsider its basis for a decision for which the Court had already accepted jurisdiction, conducted review, and issued instructions. Here, the District and EPA (in

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[4]The Court of Appeals cited both *Cement Kiln* and *Horner* to support its decision to remand the question of an appropriate stay to this Court. The context of those citations makes clear that the Court of Appeals did not cite *Horner* as a tacit invitation for this Court to order further rulemaking, but rather as recognition that this Court is "in the best position to determine the shortest reasonable timetable." *Friends of the Earth*, 446 F.3d at 148 (citing *Horner*, 854 F.2d at 501).

cooperation with Maryland) are developing new TMDLs – a process into which the courts have not yet entered. EPA and the District fully intend to carry out that process in compliance with the substantive and procedural requirements of the CWA and according to the schedule proposed in the Henry Declaration. If FOE finds fault with EPA's actions in establishing new TMDLs, its remedy is a suit under the Administrative Procedure Act to "compel agency action unlawfully withheld" or to challenge the new TMDLs themselves. 5 U.S.C. § 706(1), (2). At this point, however, such claims would be premature, and the Court should not at this time grant FOE a remedy that would only be available, if ever, in some future, hypothetical litigation.

2. An order requiring EPA to establish new TMDLs upsets the federal-state balance in the CWA.

In addition to being inconsistent with the decision of the D.C. Circuit, an order requiring EPA to establish new TMDLs by a date certain would be inconsistent with the CWA's principles of federalism. Under the scheme established by the CWA, a TMDL is developed and submitted in the first instance by a state. *See* 33 U.S.C. § 1313(d)(1)(C).[5/] Only then does EPA approve or disapprove the TMDL, and only if the TMDL is disapproved does EPA establish one in its place. *See id.* § 1313(d)(2). It would be inconsistent with the carefully calibrated federal-state balance embodied in the CWA for the Court to order EPA to establish TMDLs in the first instance. EPA will be assisting the District of Columbia and Maryland in their TMDL development efforts, *see* Henry Decl. ¶¶ 6-7, 15-16, but EPA has no power to force the District to submit TMDLs on a schedule set by the Court. And the Court may not order the District of Columbia to submit TMDLs by a date certain, because the District is not a party to this litigation. By contrast, setting

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[5/]The CWA defines "state" to include the District of Columbia. *See* 33 U.S.C. § 1362(3).

a date for the vacatur of the faulty TMDLs puts all the necessary parties to work without a court order, since neither the District nor EPA wants to be left without TMDLs for the Anacostia.

FOE suggests that it is appropriate to order EPA to establish TMDLs because if a state's TMDL submission is not sufficient, the CWA gives EPA a nondiscretionary duty to step in and establish a TMDL. *See* FOE Mot. at 2-3. There are several problems with this argument. First, as noted above, FOE has not raised a claim to "compel agency action unlawfully withheld" under the APA, *see* 5 U.S.C. § 706(1), or an action to compel the Adminstrator to "perform any act or duty . . . which is not discretionary with the Administrator" under the CWA, *see* 33 U.S.C. § 1365(a)(2). At some future time, FOE may wish to attempt such a claim, but it would not now be ripe.[6] Second, even if FOE had raised those claims in its current complaint, EPA's duty to establish TMDLs is not triggered until it has disapproved the proposed TMDL submitted by the District, *see id.* § 1313(d)(2) – an event which has not occurred here.

FOE's request to skip straight to an order for an EPA-established TMDL is like an attempt to resurrect the nondiscretionary duty claim that has already been decided in *Kingman Park Civic Ass'n v. EPA*, 84 F. Supp. 2d 1 (D.D.C. 1999). In that case, this Court held that the District's delay of eighteen years in submitting proposed TMDLs to EPA should be construed as a "constructive submission" of no TMDLs, triggering EPA's nondiscretionary duty to establish TMDLs itself. *Kingman Park*, 84 F. Supp. 2d at 5. However, nothing in that case suggests that EPA's duty to step into the shoes of the District would be triggered during the 22 months in which the District, Maryland, and EPA would be actively working on establishing new TMDLs.

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[6] Additional procedural requirements would also apply to a separate claim for the relief that FOE seeks here, such as the requirement to provide EPA sixty days' notice of such a claim. *See* 33 U.S.C. § 1365(b).

3. An order for EPA to establish new TMDLs unnecessarily limits EPA's discretion to respond to the Court of Appeals' decision.

FOE's argument that EPA should be forced by court order to establish or approve new TMDLs is further weakened by the fact that the Court of Appeals clearly contemplated that EPA could choose a different response to its decision. The Court of Appeals stated that this Court's order on remand should "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." *Friends of the Earth*, 446 F.3d at 148 (ellipsis in original). Although EPA currently plans to cooperate with the District of Columbia in developing daily load limits, a stay of vacatur that is substantially shorter than the time EPA seeks might influence EPA to consider the option of amending the regulations that the Court of Appeals described. An order *requiring* new load limits on a court-imposed deadline would effectively negate EPA's discretion to choose this alternative, a result that the Court of Appeals clearly did not contemplate. This Court may not dictate the course that the agency must ultimately take to comply with the decision of the Court of Appeals. *See National Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990).

4. Pragmatic considerations support a simple stay of vacatur.

FOE offers two additional reasons for imposing an enforceable deadline to establish new TMDLs, *see* FOE Mot. at 4: FOE argues that EPA is unlikely to act without a deadline enforceable by court order, and also that such an order will help the parties avoid additional proceedings. Neither of these rationales is true. A stay of vacatur by itself provides sufficient incentive for EPA and the District to act before the stay expires, because (as FOE recognizes)

EPA does not want the Anacostia to be without any TMDLs at all for the relevant pollutants. This is also why EPA has asked the Court not to vacate the original TMDLs until sufficient time has passed within which EPA believes it can approve new TMDLs. If, by contrast, the stay is too limited – whether or not it has an enforceable deadline – further proceedings are much more likely. A six-month stay would be much more likely than a longer stay to prompt EPA to return to the Court and seek further relief, whether that may be an extension of the six-month stay or modification of the Court's order. The remedy that would require the least further attention from the Court and the parties is a simple stay of vacatur until June 7, 2008.

CONCLUSION

For the foregoing reasons, FOE's Motion to Stay Vacatur of TMDLs and Set Deadline for Completion of EPA Action on Remand should be denied.

Respectfully submitted,

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