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What's New in Takings Law and Stormwater Regulation

Fairfax County Against the EPA

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Accotink Creek Facts:

- Accotink Creek is a 25 mile long tributary of the Potomac River.
- The Accotink Creek watershed is approximately 52 square miles and is the second largest in the County. (Difficult Run is the largest at approximately 58 square miles)
- Approximately 12 square miles of the watershed are located outside the County's jurisdiction.
- Approximately 87% of the watershed is developed, with the remaining 13% remaining as either open space (primarily along stream corridors) or water.

County's Position Prior to Litigation:

- DEQ identified two segments of Accotink Creek as having benthic impairments and determined that sedimentation caused by excessive stormwater runoff is the most probable stressor impacting the health of the benthic macroinvertebrate community.
- By using flow as a surrogate for sediment instead of targeting sediment loads, the TMDL addresses only one of the sediment-related processes necessary for stream stability. This approach reduces the likelihood that implementation of the TMDL will result in a restored benthic community.
- The most effective approach to addressing a benthic impairment is to identify the primary stressor, which in Accotink Creek is sediment, determine a loading limit, and develop an implementation plan that uses the full suite of stormwater management practices to reduce and/or mitigate the impacts of the stressor on the stream.
- The Accotink Creek Flow TMDL jumps instead to one solution, flow reduction, without providing any supporting evidence that this one adjustment to an already altered system will result in attainment of the water quality standard.
- The TMDL also does not recognize that urban streams undergo complex and irreversible geomorphic responses to their altered flow regimes. The single unit flow reduction prescribed by the TMDL is an oversimplification that may not benefit, and may actually harm, portions of the stream.
- The Accotink Creek TMDL proposes to drastically change Fairfax County's approach to addressing common stream impairments caused by excessive stormwater runoff without providing sufficient assurances that the required flow reductions will achieve the ultimate water quality goal of a restored benthic community.

Excerpts taken from the Court's Opinion:

- Accotink Creek, which was the subject of the litigation, had been identified as having a "benthic impairments" which is to say the community of organisms that live on or near the bottom of the creek were not as numerous or as healthy as they should be.

- On April 18, 2011, EPA established a Total Maximum Daily load (TMDL), commonly referred to as a pollution diet which limited the flow rate of stormwater in Accotink Creek.
- The County and State concurred with EPA that sediment is a pollutant and stormwater is not.
- The single issue before the court was: Does the Clean Water Act authorize the EPA to regulate the level of a pollutant in Accotink Creek by establishing a limit for the flow of a non-pollutant (stormwater) into the creek.
- EPA has tried out its novel approach of regulating sediment via flow in only four instances nationwide, and all four attempts were challenged in court. One has settled, the other three are still pending.
- EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined.
- The Court concluded that stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via a TMDL.

<u>County's Position After Litigation:</u>

- The results of the lawsuit do not reduce the County's commitment to protecting our watersheds, and improving water quality in our streams and the Chesapeake Bay.
- The County will continue working with the State and the community to develop and implement economical, effective, and sustainable plans to address water quality impairments in Accotink Creek and other streams in the County.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VIRGINIA DEPARTMENT OF TRANSPORTATION, *et al.*,	)	
Plaintiffs,	)	
	)	Civil Action No. 1:12-cv-775-LO-TRJ
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This motion is premised solely on the legal proposition that the U.S. Environmental Protection Agency ("EPA") lacks statutory authority to regulate water flow as a pollutant under the Clean Water Act.

LEGAL STANDARD APPLICABLE TO RULE 12(C) MOTIONS

Rule 12(c) provides: "After the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." Ordinarily, the Rule serves the same function as a Rule 12(b)(6) motion. *See, e.g., GATX Leasing Corp. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). Rule 12(c) is available to plaintiffs as well as defendants where a legal right is clear. *Aetna Cas. & Sur. Co. v. Abbott*, 130 F.2d 40 (4th Cir. 1942). *See also Mincey v. World Sav. Bank, F.S.B.*, 614 F. Supp. 2d 610 (D.S.C. 2008); *Gov't Accountability Project v. HHS*, 568 F. Supp. 2d 55 (D.D.C. 2008). "'A Rule 12(c) motion for judgment on the

pleadings is appropriate when all material allegations of fact are admitted in the pleadings and only questions of law remain.'" *Wells Fargo Equip. Fin., Inc. v. State Farm Fire & Cas. Co.*, 805 F. Supp. 2d 213, 216 (E.D. Va. 2011) (quoting *Republic Ins. Co. v. Culbertson*, 717 F. Supp. 415, 418 (E.D. Va. 1989)).

When considering a Rule 12(c) motion, a Court looks to the pleadings and judicially noticed facts. *See Hebert Abstract Co. v. Touchstone Props.*, 914 F.2d 74, 76 (5th Cir. 1990) ("A motion brought pursuant to Fed. R. Civ. P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts."). Like review of a 12(b)(6) motion, the court relies upon the allegations in the complaint and documents attached as exhibits or incorporated by reference. *See Davis v. Hudgins*, 896 F. Supp. 561, 566 (E.D. Va. 1995); *see* Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). And "[j]udgment should be entered when the pleadings" demonstrate that the case may "be decided as a matter of law." *O'Ryan v. Dehler Mfg. Co.*, 99 F. Supp. 2d 714, 718 (E.D. Va. 2000) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997)); *see also Burns Int'l Sec. Servs. v. Int'l Union*, 47 F.3d 14, 16 (2d Cir. 1995) (per curiam).

THE CHALLENGED AGENCY ACTION

The EPA established the Total Maximum Daily Load ("TMDL") for Benthic Impairments in the Accotink Creek Watershed (the "Accotink TMDL") on April 18, 2011. Pls.' Compl. ¶ 2; Answer ¶ 2. Rather than establishing a maximum load for a

"pollutant," the Accotink TMDL establishes a "target flow rate" of 681.8 ft^3/acre-day, which is also referred to as the "Non-impaired Composite Unit-Area Flow Rate." Accotink TMDL at E-5, 5-20; *see* Pls.' Compl. ¶ 139, 140; Answer ¶ 139, 140. The Accotink TMDL is one of the first so-called "flow TMDLs" established by the EPA anywhere in the United States, all of which were established in 2011. Pls.' Compl. ¶ 3; Answer ¶ 3.

ARGUMENT

A. Under the Plain Meaning of Sections 304(a)(2)(D) and 502(6) of the Clean Water Act, the EPA Lacks Statutory Authority to Establish a Flow TMDL.

For the reasons set forth in the Plaintiffs' Complaint, the Plaintiffs are entitled to judgment as a matter of law because the EPA acted beyond its statutory authority by establishing a TMDL that regulates water alone, rather than a pollutant discharged into the water. Under the architecture of the Clean Water Act, TMDLs regulate "pollutants suitable for maximum daily load measurement." CWA § 304(a)(2)(D); 33 U.S.C. § 1314(a)(2)(D); *see* CWA § 303(d); 33 U.S.C. § 1313(d). The Clean Water Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *See* CWA § 502(6); 33 U.S.C. § 1362(6); Pls.' Compl. ¶¶ 71-85, 168-173; *see also* 40 C.F.R. § 122.2; 9 Va. Admin. Code § 25-31-10. It is self-evident that water itself – the very thing that the Clean Water Act is intended to protect – is not among those

substances identified as a pollutant. Congress defined the alteration of the natural flow of water as "pollution," *see* CWA § 502(19); 33 U.S.C. § 1362(19) ("the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"), but, for the purpose of establishing TMDLs, opted to regulate pollutants rather than pollution.

Under the law of this circuit, review of an administrative agency's statutory interpretation is conducted pursuant to the analysis set forth by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 504-05 (4th Cir. 2011); *Philip Morris USA Inc. v. Vilsack*, No. 3:11-cv-87, 2012 U.S. Dist. LEXIS 145582, at *14-15 (E.D. Va. Oct. 9, 2012). These cases prescribe a two-step analysis: The first step ("*Chevron* step one") requires this Court to "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. Pursuant to this analysis, courts use "traditional tools of statutory construction" to determine whether Congress's intent is clear on the question at issue. *Id.* at 843 n.9. If Congress's intent is clear, "*that is the end of the matter*; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (emphasis added). If "the court determines Congress has not directly addressed the precise question at issue," only then does the Court proceed to what is called "*Chevron* step two," at which point "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Pursuant to *Chevron*, a court must first analyze the words of the authorizing statute itself, before analyzing an agency's interpretation. "[I]f there is any question whether an agency action taken pursuant to a regulation exceeds the agency's statutory authority, the statutory inquiry under *Chevron* step one (whether the intent of Congress is clear) must take place prior to interpreting the agency's own regulation. This ordering is a function of the *Chevron* test itself: If Congress has spoken clearly to the issue, then the regulation is inapplicable." *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003). *See also Owen Elec. Steel Co. v. Browner*, 37 F.3d 146, 148 (4th Cir. 1994) ("Pursuant to *Chevron*, the Court must first ask whether Congress has spoken directly to the issue in question. If it has, then Congress' directive displaces any contrary agency interpretation.").

In this instance, under *Chevron* step one, the question is whether § 502(6) of the Clean Water Act unambiguously sets forth the substances Congress intended the EPA to regulate as pollutants. The first question in a *Chevron* analysis "is for the Court to decide, and the Court 'owe[s] the agency no deference on the existence of ambiguity.'" *Nat'l Mining Ass'n v. Jackson*, Nos. 10-1220, 11-0295, 11-0446, 11-0447, 2012 U.S. Dist. LEXIS 106057, at *45; 42 ELR 20165 (D.D.C. July 31, 2012) (quoting *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005)). To answer this question, a court looks to the plain language of the statute. "It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987)

(quotation marks omitted). The statute sets forth the limits of an agency's authority and "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. . . . An agency may not exceed a statute's authorization or violate a statute's limits." *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 42 (D.C. Cir. 2012) (internal citations and quotation marks omitted); *see Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 142, 144 (D.C. Cir. 2006) (holding that a TMDL must be expressed as a daily load, rather than a seasonable or annual load, because "[d]aily means daily, nothing else").

The Clean Water Act with respect to the issue presented here is clear on its face; just as the act requires that a TMDL be expressed as a "daily" load, so too must a TMDL be established for a "pollutant," rather than a non-pollutant surrogate. *See Friends of the Earth*, 446 F.3d at 142, 144. CWA Section 502(6) sets forth a comprehensive and specific list of substances deemed to be pollutants, leaving no gap that needs to be filled. Nor does it include any expansive language granting the EPA discretion to further interpret or expand Congress' stated definition. That the statute requires TMDLs to be "established at a level necessary to implement the applicable water quality standards" speaks only to the amount of pollutants that may be permitted by the TMDL, and does not authorize or even contemplate the EPA setting permissible levels for non-pollutants. *See id.* at 145 ("The existence of two conditions does not authorize the EPA to disregard one of them."). A TMDL, which is restricted to "pollutants suitable for maximum daily

load measurement," therefore, may not be established to regulate the flow of water, particularly when Congress could have substituted for "pollutants" the more inclusive term, "pollution."

In adopting the Clean Water Act, "Congress did not provide the EPA Administrator with discretion to define the statutory terms. Senator Randolph, the Chairman of the Senate Committee [originally considering the Act], explained, 'We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow.' 117 Cong. Rec. 38805 (Nov. 2, 1971)." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011), *cert. granted, Decker v. Nw. Envtl. Def. Ctr.*, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (No. 11-338). *See also* Senator Muskie's remarks as he submitted the conference report on the Federal Water Pollution Control Act Amendments of 1972 on the Senate floor: ". . . I would like to call attention to the fact that we have tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." *Senate Agreement to Conference Report on S. 2770, Oct. 4, 1972*, 118 Cong. 33693 (1972).

The EPA's interpretation flies in the face of this legislative history, the comprehensiveness of the list of substances included in the CWA definition of "pollutant," and the absence of any catch-all language allowing the EPA to add more substances to that list. Nor can the EPA imply Congressional authorization for it to expand the list simply from the fact that the CWA does not contain an explicit

prohibition against the EPA doing so. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original). *See also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (quoting *Federal Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973))). The EPA's expansion of the Clean Water Act's unambiguous definition of pollutants to include water itself is beyond the EPA's authority, circumvents Congress's stated intent, and is not entitled to deference under *Chevron* step one. This Court's inquiry should end there.

Since the EPA's interpretation should be rejected under step one of the *Chevron* analysis, there is no need for this Court to undertake step two - *i.e.,* to decide whether the EPA's interpretation is "based on a permissible construction of the statute" (*Chevron,* 467 U.S. at 843) - because the straightforward statute needs no interpretation. "[I]f the language is plain and the statutory scheme is coherent and consistent, [the court] need not inquire further.' . . . [The court's] sole function 'is to enforce [the statute] according to its terms.'" *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) (quoting *In re Coleman*, 426 F.3d 719, 725 (4th Cir. 2005)).

B. The EPA Must Act In Conformity With Congressional Intent Expressed in Its Authorizing Statute, Even If It Has Policy Reasons For Wanting to Expand Its Authority.

An administrative agency is bound by the plain language of its authorizing statute, even if the agency has beneficial policy reasons for its wrongful interpretation of the statute. As noted by the D.C. Circuit when it applied the *Chevron* analysis to reject the EPA's interpretation of the CWA's requirement of setting "total maximum daily loads" for pollutants, the "EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Friends of the Earth*, 446 F.3d at 145 (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)). The Court further noted, "Nor can we set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications. . . . Here, as in *Sierra Club [v. EPA*, 294 F.3d 155 (D.C. Cir. 2002)], the EPA advances a reasonable policy justification for deviating from an environmental statute's plain language. Our answer is the same: 'the most reliable guide to congressional intent is the legislation the Congress enacted.'" *Id.* at 145-46 (quoting *Sierra Club*, 294 F.3d at 161). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (holding that Congress had not granted the FDA jurisdiction to regulate tobacco products and noting, "no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from

Congress."). *See also Natural Res. Def. Council v. EPA*, 643 F.3d 311, 323 (D.C. Cir. 2011) (vacating an EPA guidance document that gave ozone nonattainment areas flexibility to choose between the statutorily mandated program and an equivalent program alternative, because the guidance violated the plain language of the Clean Air Act); *Envtl. Def. v. EPA*, 467 F.3d 1329, 1336 (D.C. Cir. 2006) (overturning EPA regulation establishing interim tests to demonstrate conformity to ground-level ozone National Ambient Air Quality Standards because it contravened the plain language of the Clean Air Act - even though the "EPA's rule may be more stringent and even arguably better for the environment than what was required by Congress. If so, the Agency ought to make its argument to Congress").

C. An Agency's Attempt to Expand Its Authority via Its Statutory Interpretation Merits Heightened Scrutiny by the Court.

Furthermore, action by an administrative agency that is seeking to expand its authority via its own interpretation of its authorizing statute, as in this case, deserves heightened scrutiny. "[A]scertaining congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998). "The more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission. Not surprisingly, therefore, an agency ruling that

broadens its own jurisdiction is examined carefully." *Hi–Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981).

CONCLUSION

The EPA has promulgated a TMDL regulating a non-pollutant. In doing so, it has exceeded its authority as a matter of law. Plaintiffs are therefore entitled to judgment on the pleadings, vacating the TMDL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VIRGINIA DEPARTMENT OF TRANSPORTATION, ET AL, Plaintiffs, -v- UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL, Defendants.	Civil Action No. 1:12-CV-775

Memorandum Opinion

Before the Court is the Plaintiffs' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The Defendants opposed the motion, and the Plaintiffs replied. The Court heard oral arguments on December 14, 2012 and now issues this memorandum opinion and accompanying order granting the Plaintiffs' motion.

Background

The Clean Water Act, 33 U.S.C. § 1251 et seq., establishes the basic structure for regulating discharge of pollutants into the waters of the United States, and provides certain mechanisms to improve and maintain the quality of surface waters.

One such mechanism is the requirement that states identify "designated uses" for each body of water within their borders, as well as "water quality criteria" sufficient to support those uses. 33 U.S.C. § 1313(c)(2)(A). The Environmental Protection Agency ("EPA") evaluates the uses and criteria developed by the states, and either approves them or else proposes and

promulgates its own set of standards. § 1313(c)(3).

Once the standards are in place, each state is required to maintain a list—also subject to approval or modification by EPA—of its waterbodies that are "impaired" because they do not meet their respective water quality criteria. 33 U.S.C. § 1313(d)(1)(A). For each waterbody on the impaired list, the state is required to establish a set of total maximum daily loads ("TMDLs") sufficient to bring the body back into compliance with its water quality criteria. § 1313(d)(1)(C). Each TMDL establishes the maximum amount of a pollutant that may be added to the waterbody daily from all sources (runoff, point sources, etc.). EPA is required to publish a list of pollutants suitable for maximum daily load measurement, § 1314(a)(2)(D), and it has determined that *all* pollutants are suitable for TMDLs, *see* Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662. Therefore, any pollutant that falls within the relatively broad definition of "pollutant" set forth in § 1362(6) may be regulated via TMDL. EPA can approve or modify as it sees fit TMDLs proposed by the states. § 1313(d)(2).

Here the state in question is Virginia, and the waterbody is a 25-mile long tributary of the Potomac River, located in Fairfax County, called Accotink Creek. The creek has been the subject of litigation in the past that is not relevant to this matter except the result: EPA was required to set TMDLs for Accotink Creek once Virginia failed to do so by a certain date. Specifically, the creek had been identified as having "benthic impairments," which is to say the community of organisms that live on or near the bottom of the creek were not as numerous or healthy as they should be. EPA was to set appropriate TMDLs to improve the health of the benthic community in Accotink Creek.

On April 18, 2011, EPA established a TMDL for Accotink Creek which limited the flow rate of stormwater into Accotink Creek to 681.8 ft^3/acre-day. The TMDL was designed to

regulate the amount of sediment in the Accotink, because EPA believed sediment was a primary cause of the benthic impairment. Both parties agree that sediment is a pollutant, and that stormwater is not. EPA refers to stormwater flow rate as a "surrogate" for sediment.

The Plaintiffs are now challenging the TMDL on multiple grounds, but presently before the Court is a single issue: Does the Clean Water Act authorize the EPA to regulate the level of a pollutant in Accotink Creek by establishing a TMDL for the flow of a nonpollutant into the creek?

Analysis

I. Standard of Review

Count I of the complaint, at issue here, is brought under the Administrative Procedures Act. *See* Comp. ¶ 169. The APA "confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency." *Shipbuilders Council of Am. V. U.S. Dept. of Homeland Sec.*, 770 F. Supp. 2d 793, 802 (E.D. Va. 2011). As such, the district court "sits as an appellate tribunal," and APA claims can be resolved equally well in the context of Rule 12 or Rule 56. *Univ. Med. Ctr. Of S. Nev. V. Shalala*, 173 F.3d 438, 441 n. 3 (D.C. Cir. 1999).

Because Count I presents a question of statutory interpretation, the Court reviews EPA's decision using the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). For a given question of statutory interpretation, the first step under *Chevron* is to determine whether Congress addressed the "precise question at issue." 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter . . . ." *Id.* If the Court cannot find that Congress has squarely addressed the question, the Court must move to Chevron's second step. In

the second step of statutory construction under *Chevron*, the Court must determine whether the agency's interpretation of the statute is "permissible." *Id.* at 843. The agency's construction is permissible if it is reasonable, but it need not be what the Court considers the *best* or *most reasonable* construction. *See id.* at 845. The Court is not to simply impose its own construction on the statute, but instead it gives deference to any reasonable statutory construction by the agency. *Id.* at 843.

II. Chevron Step One

Whether statutory ambiguity exists so that the issue cannot be settled at *Chevron's* first step is for the Court to decide, and the Court "owe[s] the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). The Court begins the inquiry by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. As always, the analysis begins with the text of the statute. *Nat'l Elec. Mfrs. Ass'n v. U.S. Dept't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011).

The text of the statute that requires states to establish their own TMDLs, 33 U.S.C. § 1313(d)(1)(C), is:

> 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. (emphasis added)

The next subsection, § 1313(d)(2), grants EPA the authority to set TMDLs when the state

has not done so adequately. "Pollutant" is a statutorily defined term. 33 U.S.C. § 1362(6).

The Court sees no ambiguity in the wording of this statute. EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them authority to regulate nonpollutants. The parties agree that sediment is a pollutant under 33 U.S.C. § 1362(6), and stormwater is not. Then how does EPA claim jurisdiction over setting TMDLs for stormwater?

EPA frames the stormwater TMDL as a surrogate. EPA's research apparently indicates that the "[sediment] load in Accotink Creek is a function of the amount of stormwater runoff generated within the watershed." Def. Opp. at 8. And EPA believes that framing the TMDL in terms of stormwater flow rate is superior to simply expressing it in terms of maximum sediment load.

The DC Circuit has considered and rejected a similar attempt by EPA to take liberties with the way Congress intended it to express its TMDLs. In *Friends of the Earth, Inc. v. Env. Protection Agency*, EPA had promulgated TMDLs for the Anacostia River that expressed the maximum load of certain pollutants in terms of annual and seasonal amounts. 446 F.3d 140, 143 (D.C. Cir. 2006). The court found that expressing a TMDL in terms of annual or seasonal maximums was not allowed, because the statute granted authority only for daily loads. *Id.* at 148. The court reached its conclusion even though EPA apparently made a strong argument that expressing TMDLs in terms of annual or seasonal loads was an effective and reasonable approach. *See id.* Presumably a daily load could have been derived by simply dividing the annual load by 365, yet the court still required expression in the terms dictated by Congress.

Here too, EPA hopes to express a TMDL in terms other than those contemplated by the statute, arguing that such an expression is the most effective method. But, as *Friends of the Earth* illustrates, EPA may not regulate something over which it has no statutorily granted power—

annual loads or nonpollutants—as a proxy for something over which it *is* granted power—daily loads or pollutants.

EPA's argument that its surrogate approach should be allowed because the statute does not specifically forbid it fails. EPA is not explicitly forbidden from establishing total maximum *annual* loads any more than they are explicitly barred from establishing TMDLs for nonpollutants. The question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority. And in this case, as in *Friends of the Earth*, the statute simply does not grant EPA the authority it claims.

The dicta in *Weyerhaeuser Co. v. Costle* is not as helpful to EPA's case as it would like. 590 F.2d 1011, 1022 n.6 (D.C. Cir. 1978). It is true that the court said in a footnote "[i]t is well recognized that EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm." *Id.* But in that case, the non-harmful pollution parameters the EPA sought to regulate were components of the effluent commonly discharged from paper mills, *id.* at 1022, making them effluents themselves. And power to regulate effluents is expressly granted to the EPA in the relevant statutory section. *See* 33 U.S.C. § 1314(b).

EPA would like to create the impression that Congress has given it loose rein to determine exactly what it could and could not regulate. On page 16 of its opposition to this motion, EPA points out that "Congress authorized EPA to determine which pollutants were suitable for TMDL calculation and measurement." (Internal quotes removed). While this may be true, EPA glosses over the fact that 33 U.S.C. § 1314(a)(2)(D) only gives EPA the power to regulate pollutants as that term is defined—by Congress—elsewhere in the statute. And, as discussed above, sediment is a pollutant for these purposes, but stormwater is not.

In a similar vein, EPA regulations which imply that the agency has discretion to set the

TMDL as it sees fit do not bear on the question now before the Court. EPA has promulgated a regulation allowing TMDLs to be "expressed in terms of either mass per time, toxicity, or other appropriate measure," 40 C.F.R. § 130.2(i), and another that allows TMDLs to be expressed as a "property of pollution," 50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). But, EPA citing these regulations to demonstrate that the surrogate TMDL approach is permissible is mere bootstrapping. To the extent the regulations allow EPA to set TMDLs for nonpollutants, they exceed the statutory authority of EPA.

The plain language of the statute trumps all, but legislative history also supports Plaintiffs' argument. Congress's intent to limit EPA's discretion in this context is evidenced by the committee record cited by Plaintiffs, which has also been used by the Ninth Circuit, in which Senator Randolph, Chairman of the Senate committee that amended the act in 1972, explained, "We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." Pl. Mot. 7, *citing Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011). Congress created a statutory scheme that included a precise definition of the word "pollutant," and then gave EPA authority to set TMDLs for those pollutants. Senator Randolph's comments strongly imply that Congress did not intend anything more or less than what is written in the statute.

The Court considers the language of 33 U.S.C. § 1313(d)(1)(C) to be unambiguous. Congress has spoken directly on the question at issue, and its answer is that EPA's authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants. The legislative history of the CWA is consistent with this reading. Therefore, this Court finds EPA's interpretation of § 1313 and the related provisions to be impermissibly broad based on analysis

under the first step of *Chevron* analysis.

III. Chevron Step Two

Because the Court considers Congress's intent to be clear and unambiguously expressed by the language of the statute, it need not move to the second step of *Chevron* analysis. But the Court notes that there is substantial reason to believe EPA's motives go beyond "permissible gap-filling."

Page 9 of EPA's opposition says, "stormwater flow rates as a surrogate would more effectively address the process by which sediment impairs aquatic life in Accontink Creek." If the sediment levels in Accotink Creek have become dangerously high, what better way to address the problem than by limiting the amount of sediment permitted in the creek? If sediment level is truly "a function of" the amount of stormwater runoff, as EPA claims, then the TMDL could just as easily be expressed in terms of sediment load.

In fact, the Board of Supervisors of Fairfax County argued at the December 14th hearing (without objection from EPA) that EPA has approved 3,700 TMDLs for sediment nationwide, and in Virginia has addressed 111 benthic impairments with TMDLs. None of them regulated the flow rate of stormwater. By comparison, EPA has tried out its novel approach of regulating sediment via flow in only four instances nationwide, and all four attempts were challenged in court. One has settled, the other three are still pending.

The Court suspects that the decision to regulate stormwater flow as a surrogate for sediment load would not constitute a permissible construction of § 1313(d)(1)(C), even given the deference due at *Chevron's* second step. This is especially likely because EPA is attempting to increase the extent of its own authority via flow TMDLs, which courts must examine carefully.

See Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155, 161-62 (4th Cir. 1998). EPA's attempt to set TMDLs for nonpollutants probably goes beyond "permissible gap-filling" and is instead an impermissible construction of the statute.

Conclusion

The language of § 1313(d)(1)(C) is clear. EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority. For these reasons, the Plaintiffs' motion for Rule 12(c) judgment on the pleadings on Count I of their complaint is granted.

January 3, 2013
Alexandria, Virginia

/s/ LOG
Liam O'Grady
United States District Judge