



entitled to a high degree of deference. Because EPA's interpretation represents a reasonable construction of the Act that is consistent with Congress' objectives and well-established regulatory practice, the Agency's interpretation should be upheld, and the Court should enter judgment in EPA's favor on Count I of the Complaint.

## **BACKGROUND**

### **I. STATUTORY AND REGULATORY BACKGROUND**

#### **A. The Clean Water Act ("CWA")**

Congress adopted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that "shared objective," the CWA "anticipates a partnership between the States and the Federal Government[.]" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

##### **1. Section 402 Permits**

One aspect of that partnership is the CWA permitting program, known as the National Pollutant Discharge Elimination System ("NPDES"). Section 301 of the CWA prohibits the discharge of any pollutant from a point source into waters of the United States unless the discharge complies with CWA requirements, including NPDES permits issued under Section 402 of the Act. 33 U.S.C. § 1311(a). Under Section 402, EPA, or a State that has been authorized to administer the program, may issue permits for the discharge of pollutants from point sources, provided the permit complies with certain requirements, including water quality standards. *Id.* § 1342(a)-(b).

The CWA defines "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). Point sources include pipes, ditches, channels, tunnels, and conduits. "Pollutant" under the CWA means "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.” *Id.* § 1362(6). The CWA defines “pollution” to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” *Id.* § 1362(19). Sediment is a pollutant under the CWA. *See Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1351 (N.D. Cal. 2000) (citing cases), *aff’d sub nom.*, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).

Among the point sources subject to NPDES permit requirements are certain municipal separate storm sewer systems. *See* 33 U.S.C. § 1342(p)(2), (6). Section 402(p)(2) of the Act specifies that discharges from such systems serving populations of 100,000 or more require permits. *Id.* § 1342(p)(2).

## 2. Water Quality Standards

Section 303 of the CWA, 33 U.S.C. § 1313, also embodies the “shared authority” approach between the Federal Government and the States. Under Section 303(c), States establish water quality standards that identify the “designated uses” for each body of water (*e.g.*, aquatic life or recreation) and the “water quality criteria” necessary to support those uses (*e.g.*, oxygen concentrations necessary to support aquatic life or bacteria levels for recreation). 33 U.S.C. § 1313(c)(2)(A). EPA either approves a State’s proposed water quality standards or, if it disapproves, proposes and promulgates standards for the State. *Id.* § 1313(c)(3).

## 3. Total Maximum Daily Loads

Section 303(d) requires States to list all waterbodies that are impaired because they fail to meet water quality standards. *Id.* § 1313(d)(1)(A). As with the water quality standards

themselves, EPA must either approve a State's Section 303(d) list or, if it disapproves, establish a list of impaired waters for the State. *Id.* § 1313(d)(2).

Section 303(d) also requires each State to establish a "total maximum daily load" or "TMDL" for each waterbody on the Section 303(d) list. *Id.* § 1313(d)(1)(C). The purpose of a TMDL is to identify the maximum amount of a pollutant that can be added to a waterbody from all sources and still attain applicable water quality standards. 40 C.F.R. § 130.7(c)(1).

Specifically, the CWA requires the State to establish

the total maximum daily load, for those pollutants which the [EPA] 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.

33 U.S.C. § 1313(d)(1)(C). In 1978, EPA determined that all pollutants were suitable for TMDL calculation. 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978). A TMDL must account for "seasonal variations" that affect water quality, "critical conditions for stream flow, loading, and water quality parameters," and it must include a "margin of safety." 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). A TMDL can be developed for either a specific pollutant (*e.g.*, sediment, nitrogen, iron) or a "property of pollution, for example, acidity, biochemical oxygen demand, radioactivity, or toxicity." 50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). Finally, a TMDL "can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i).

In addition to establishing a maximum total load for a waterbody, the TMDL divides that load into smaller components, or "allocations." *Id.* § 130.2(g)-(i). Point source shares of the total load are called "wasteload allocations," and shares allocated to other sources (known as "nonpoint sources") are called "load allocations." *Id.*

As with water quality standards and Section 303(d) lists, EPA must either approve a State's TMDL or, if it disapproves, establish a TMDL for that impaired waterbody. 33 U.S.C. § 1313(d)(2). Once established, the TMDL plays an important role in achieving water quality goals, though the TMDL does not by itself prohibit or require any particular implementation actions. Rather, it "serves as an informational tool for the creation of the state's implementation plan." *Pronsolino*, 291 F.3d at 1140. The load allocations identified in the TMDL may be achieved through a variety of mechanisms. *See Sierra Club v. Meiberg*, 296 F.3d 1021, 1025 (11th Cir. 2002). For example, EPA and authorized States are responsible for ensuring that NPDES permits for point sources are consistent with the "assumptions and requirements" of any wasteload allocations in a TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B). Under Virginia law, the Virginia Department of Environmental Quality ("Virginia DEQ") must develop and implement a plan to bring impaired waters with TMDLs into "fully supporting" status. Va. Code §§ 62.1-44.19:7.

#### **B. The Virginia TMDL Consent Decree**

Virginia's failure to submit TMDLs for approval by EPA caused this Court in 1999 to enter a consent decree ("1999 Consent Decree") requiring EPA to establish TMDLs for all waters on Virginia's 1998 Section 303(d) list if the Commonwealth failed to do so by certain deadlines. *See* AR006718-6801; *American Canoe Ass'n. v. EPA*, 54 F. Supp. 2d 621, 624 (E.D. Va. 1999); *see also American Canoe Ass'n. v. EPA*, 30 F. Supp. 2d 908, 920-22 (E.D. Va. 1998).

#### **II. THE ACCOTINK CREEK TMDL**

EPA established the TMDL at issue here on April 18, 2011, to address two segments of Accotink Creek where water quality is impaired. *TMDL for Benthic Impairments in the Accotink*

*Creek Watershed* (Apr. 18, 2011) (“*Accotink Creek TMDL*”), AR00003-AR000157.<sup>1</sup> The Commonwealth of Virginia had included portions of the Creek on its CWA Section 303(d) list of impaired waters for more than a decade because the Creek has failed to meet the Commonwealth’s water quality standard applicable to aquatic life<sup>2</sup> due to poor health in the benthic biological community.<sup>3</sup> AR000010.

Accotink Creek had been identified in the 1999 Consent Decree as a “category 1 water,” requiring the establishment of a TMDL by certain deadlines. *See* Compl. Ex. C; AR000021-22; AR006752. The Consent Decree required EPA to establish a TMDL for Accotink Creek by May 1, 2011, if Virginia failed to do so by May 1, 2010. *See id.* Prior to that date, both the Virginia DEQ and EPA acknowledged that Virginia would be unlikely to meet its deadline and, therefore, the parties agreed that EPA would complete the TMDL. *See* AR006717. EPA established the TMDL in April 2011 to meet its commitment under the 1999 Consent Decree. AR000022.

**A. The TMDL Identifies Sediment as the Pollutant of Concern.**

As its first step in developing the Accotink Creek TMDL, EPA sought to determine what pollutant stressor(s) were causing the impacts to the aquatic (*i.e.*, benthic macroinvertebrate) community in the Creek. For this effort, EPA undertook a rigorous analysis of the available

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<sup>1</sup> Citations that begin with the prefix “AR” refer to documents that are included in the administrative record. Consistent with the Court’s November 7, 2012 Order [Dkt. No. 17], counsel for EPA has provided each of the parties with a disk containing these documents, and a copy of that disk was also hand-delivered to the Court.

<sup>2</sup> The applicable Virginia water quality standard provides that: “All state waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life.” 9 VAC 25-260-20.

<sup>3</sup> The “benthic” biological community refers to aquatic life that exists in a stream bed. Water quality assessments often consider the health of benthic macroinvertebrates, which are bottom-dwelling organisms that have no backbone and are large enough to be seen without a microscope. They include aquatic insects, larval stages of insects such as dragonflies, crustaceans such as crayfish, and worms and mollusks. *See* AR003148.

environmental monitoring data in the Accotink Creek watershed, which included benthic community sampling, habitat condition assessments, chemical water quality sampling, sediment and fish tissue sampling, toxicity testing, and discharge monitoring data collected by Virginia DEQ, EPA, and the United States Geological Survey. AR000011; AR000027-86.

Using this wealth of data, Virginia DEQ prepared and submitted to EPA a “stressor identification analysis” that evaluated each potential stressor that could have been causing the impairment in Accotink Creek. AR000087094. The analysis indicated that “sedimentation and sediment carried by stormwater runoff are the most probable stressors” degrading the health of benthic macroinvertebrates in Accotink Creek. AR000092; *see also* AR000012.

**B. The TMDL Identifies a Strong Relationship Between the Impairment, the Pollutant (Sediment), and Stormwater Flow Rates.**

To further evaluate the sediment load into Accotink Creek, EPA developed a “sediment rating curve” that correlates water flow rates and observed measurements of sediment (known as “total suspended solids” or “TSS”) over 84 concurrent observations between 1993 and 2007. AR000092-93; AR000142-47. The curve “indicat[ed] a direct relationship between sediment and stream flow” that is “very strong.” AR000012, AR000092. EPA concluded that the pollutant load (sediment) impairing the benthic community in Accotink Creek is a function of the amount and timing of excess stormwater flows. AR000094-95.

EPA next identified “endpoints” for the TMDL, which are water quality targets that represent the stream condition at which the waterbody would meet the relevant State water quality standards. AR000095. Consistent with Virginia’s water quality standards, EPA identified unimpaired streams that have similar characteristics to Accotink Creek, but that support a healthy biological community. EPA used those streams as a reference points. AR000097-105. Because EPA had identified sedimentation and flow as the stressors for Accotink

Creek, EPA looked at the flow characteristics of the unimpaired reference streams to establish numeric water quality targets. *See id.*

EPA concluded that the TMDL would be “expressed as the greatest rate of stormwater runoff Accotink Creek can receive without violating the stream’s aquatic life criteria.”

AR00095. To derive this numeric water quality target, EPA developed “flow duration curves.” These analytical tools compared the flow characteristics in the reference streams with the flow characteristics in Accotink Creek to determine target conditions that would allow Accotink Creek to meet the relevant water quality standard. AR000012-13; AR000105-114. Based on these analyses and further modeling, EPA calculated a target flow rate for the TMDL of 681.8 ft<sup>3</sup>/acre-day, which “represents the maximum flow rate that Accotink Creek can receive during the one-year, 24-hour flow event without violating the stream’s aquatic life criteria.”

AR000014; *see* AR000113-114.<sup>4</sup>

**C. The TMDL Uses Stormwater Flow Rates as a “Surrogate” for Sediment.**

The Accotink Creek TMDL employs a “surrogate” approach, which EPA, with the support of Virginia DEQ, *see* AR007988, determined would be the most effective method for addressing sediment. EPA explained that the “surrogate” approach is consistent with EPA’s regulations, which provide that a TMDL “can be expressed in terms of either mass per time, toxicity, or *other appropriate measure.*” 40 C.F.R. § 130.2(i) (emphasis added); *see* AR000141. The use of a stormwater flow rate as a surrogate was appropriate here “because the pollutant (i.e., sediment) load in Accotink Creek is a function of the amount of stormwater runoff generated” within the watershed. AR000095. Moreover, because the relationship between

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<sup>4</sup> Although not directly relevant here, the TMDL also established load allocations, incorporated a margin of safety, and took account of critical stream conditions, as required by the CWA and EPA’s regulations. *See* AR000115-127.



stormwater runoff and sediment loads is “especially strong,” EPA concluded that “the stormwater runoff surrogate effectively represents the pollutant of concern.” *Id.*

EPA also explained that a stormwater flow rate is an appropriate surrogate “[b]ecause the dynamic relationship between the biological impairment and pollutant (sediment) in Accotink Creek is best characterized through the relationship of flow to sediment transport within the waterbody[.]” AR000161. That technical determination was informed by a “detailed analysis of habitat degradation and the role of sediment.” AR000141. Although the TMDL by its own terms did not treat “flow rate” as a CWA pollutant, “numerous studies have recognized that there are pollutants associated with stormwater that can affect aquatic life[.]” and that “excess stormwater flow may cause scour and resuspension of sediment (a pollutant) in receiving waters.” *Id.*

In light of the relevant information, EPA made a technical determination that a TMDL that employs stormwater flow rates as a surrogate would more effectively address the process by which sediment impairs aquatic life in Accotink Creek. *See* AR00142-47. The Accotink TMDL, EPA concluded, “will address the aquatic life impacts caused by the pollutants in stormwater,” and, as a secondary benefit, will address the hydrologic and creek-altering impacts of stormwater. AR000142.

### **STANDARD OF REVIEW**

Plaintiffs have asserted all of their claims, including Count I at issue here, under the Administrative Procedure Act (“APA”). *See* Compl. ¶ 169. Where “a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal,” and “[t]he ‘entire case’ on review is a question of law.” *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *accord Genetics & IVF Inst. v. Kappos*, 801 F. Supp. 2d 497, 502 (E.D. Va.

2011). Accordingly, the APA presents the standard of review for the agency action, regardless of whether that legal question is presented in the context of a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment. *Univ. Medical Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 441 n. 3 (D.C. Cir. 1999) (an APA claim presents a legal question “which the district court can resolve on the agency record—regardless of whether it is presented in the context of a motion for judgment on the pleadings or in a motion for summary judgment (or in any other Rule 12 motion under the Federal Rules of Civil Procedure).”); *accord Am. Bioscience*, 269 F.3d at 1083; *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).<sup>5</sup> The administrative record is therefore considered part of the materials that a district court can use in adjudicating any APA challenge, whether under Rule 12 or Rule 56.

At issue here is EPA’s interpretation of the Clean Water Act, which must be reviewed pursuant to the standards announced in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). “*Chevron* deference is a tool of statutory construction whereby courts are instructed to defer to the reasonable interpretations of expert agencies charged by Congress to fill any gap left, implicitly or explicitly, in the statutes they administer.” *Am. Online, Inc. v. AT & T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001) (internal quotations and emphasis omitted). Under *Chevron*, a court first inquires whether Congress “has directly spoken to the precise question at issue,” in which case the court “must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43. In this first step of *Chevron*, a reviewing court is to “employ [ ] traditional tools of statutory construction” to determine whether Congress addressed “the precise question at issue.” 467 U.S. at 842, 843 n. 9. The court “begin[s] with the text and structure of the statute”

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<sup>5</sup> Plaintiffs and Amici cite to the Complaint to support certain assertions in their briefs. EPA denies any such assertions insofar as they conflict with or are otherwise inconsistent with the administrative record.

and “bring[s] to bear principles of grammatical usage.” *Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 505 (4th Cir. 2011) (citations omitted). Although legislative history may also be consulted in this step, courts should “ordinarily wade into a statute’s legislative history only after deeming the statute ambiguous[.]” *Id.*

If the statute is “silent or ambiguous with respect to the specific issue,” the court proceeds to *Chevron*’s second step, where it must defer to the agency’s interpretation so long as it is “based on a permissible construction of the statute.” 467 U.S. at 843. Particular deference is given to an agency’s interpretation of a statute it administers when the statute is complex and within the agency’s expertise, such as the CWA. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *NRDC, Inc. v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988) (“As the agency charged with interpreting the complicated statutory provisions that comprise the [Clean Water Act], EPA is entitled to considerable deference in the interpretive process of making the regulatory machinery work.”). And when EPA’s action relies on scientific or technical information touching upon the Agency’s area of expertise, a reviewing court applies “an extreme degree of deference.” *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (citation omitted).

### **ARGUMENT**

The sole disputed legal question before the Court is whether EPA acted within its statutory authority in establishing the Accotink Creek TMDL. For present purposes, however, there are a number of issues that are not in dispute. There is no dispute that a TMDL is required to remedy benthic impairment in Accotink Creek, or that sediment is a cause of that impairment.<sup>6</sup>

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<sup>6</sup> Plaintiffs apparently concede that the development of a TMDL expressed as maximum daily amounts of sediment (e.g., tons per day) in the Accotink Creek would have been permissible under the CWA. Compl. ¶¶ 5-6, 12 (alleging that sediment is a CWA “pollutant”).

Similarly, the parties agree that sediment is a “pollutant” within the meaning of the CWA, that municipal stormwater contains sediment, and that the stormwater flow rate in the Accotink Creek TMDL is designed to reduce sediment loading to the Creek. For the purposes of resolving the present issue of law, Plaintiffs do not contest the validity of EPA’s scientific conclusions, including the correlation between stormwater flow rates and sediment loading. *See* AR00012; AR000092-93. The parties even agree that the *Chevron* analysis supplies the framework for the Court’s analysis.

It is at this point, however, that the Plaintiffs and EPA part ways. Plaintiffs contend that EPA’s interpretation of the CWA is foreclosed by the CWA under the first step of the *Chevron* analysis. In fact, as we establish below, the CWA is silent on the precise question of interpretation at issue here, and EPA has reasonably interpreted the Act to allow EPA or a State to express a TMDL by using a surrogate parameter for a pollutant.

**I. THE CWA DOES NOT UNAMBIGUOUSLY FORECLOSE EPA FROM USING STORMWATER FLOW RATES AS A SURROGATE PARAMETER FOR SEDIMENT IN A TMDL**

Plaintiffs contend that EPA has acted beyond its authority by establishing a TMDL that “regulates” a “non-pollutant surrogate” -- stormwater flow rates -- rather than a “pollutant” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Mem. in Support of Pls.’ Mot. for J. on the Pleadings (“Pls. Br.”) [Dkt. No. 30] at 6. According to Plaintiffs, the definition of “pollutant” under the CWA is unambiguous. They further assert that EPA’s purported attempt to expand that definition “to include water itself” must be rejected under step one of the *Chevron* analysis. Pls. Br. at 8.

Plaintiffs are mistaken in several respects. Critically, Plaintiffs fail at the outset to properly frame the “precise question” that the Court must address at *Chevron* step one. The

question is not whether the definition of “pollutant” under the CWA includes “water itself,”<sup>7</sup> because the Accotink Creek TMDL does not attempt to regulate water as a pollutant. Rather, the Accotink Creek TMDL is expressed in terms of stormwater flow rates as a surrogate for the factor that EPA determined to be the chief cause of benthic impairment in the Creek: sediment, which Plaintiffs concede is a “pollutant.” *See* Compl. ¶¶ 5-6. Moreover, the Accotink TMDL is not a TMDL for “flow.” *See* Brief of Amicus Curiae Va. Mfrs. Ass’n in Supp. of Pls. [Dkt. 40] (“VMA Amicus Br.”) at 1. It is a TMDL for sediment. *See* AR000142 (“The primary pollutant of concern in Accotink Creek is sediment.”). What the Accotink TMDL does that distinguishes it from the more typical TMDLs is that it uses the flow rate of stormwater as a surrogate or indicator parameter -- a measuring stick -- to establish maximum limits on the amount of sediment in the Accotink. Because reducing stormwater flow rates will reduce sediment loading, the TMDL is designed to establish a daily cap on sediment in the Accotink.<sup>8</sup> *See* AR00012 (“In

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<sup>7</sup> On this point, Plaintiffs contend that the CWA “sets forth a comprehensive and specific list of substances deemed to be pollutants, leaving no gap that needs to be filled.” Pls. Br. at 6. EPA disagrees. Although the list of substances may be broad and generic, it is neither comprehensive nor specific. *See* 33 U.S.C. § 1362(6); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 565 (5th Cir. 1996) (“the breadth of many of the items in the list of ‘pollutants’ tends to eviscerate any restrictive effect.”); *NRDC v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987) (“The term ‘pollutant’ is broadly defined”); *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 173 (D.C. Cir. 1982) (“Congress did not intend the term ‘pollutant’ to be all-inclusive”); *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977) (noting that the definition is set forth in “broad generic terms.”). For example, the list of substances does not include certain “conventional pollutants” that Congress identified in Section 304(a)(4) of the CWA, 33 U.S.C. § 1314(a)(4). *See Nat’l Wildlife Fed’n*, 693 F.2d at 174 n.56 (noting that “Congress did not pay careful attention to its own definition”). Indeed, Plaintiffs implicitly concede that the CWA list of pollutants is not comprehensive, because that list does not specifically include sediment, which Plaintiffs assert is “a ‘pollutant’ as defined in the CWA.” Compl. ¶ 5.

<sup>8</sup> By way of comparison, and as discussed further *infra*, this approach is similar to actions that seek to control pH because control of the parameter pH would by definition control the underlying pollutants that affect pH levels. *See Nat’l Wildlife Fed’n*, 693 F.2d at 174 n.56.

this TMDL, reductions for a surrogate (stormwater runoff) are established to achieve the necessary reductions for the pollutant of concern (sediment.)”<sup>9</sup>

It follows that the “precise question” before the Court under *Chevron* is whether the CWA unambiguously forecloses EPA from using the flow rate of stormwater as a surrogate parameter for sediment. As we establish below, that question must be answered in the negative because the CWA is silent on that issue, and EPA’s interpretation of the statute is reasonable under step two of the *Chevron* analysis.

**A. The CWA Is Silent as to the Type of Metric or Parameter that EPA or a State Must Use to Express a TMDL.**

The analysis under *Chevron* step one begins, of course, with the statutory text. Section 303(d)(1)(C) of the CWA requires States to establish, for impaired waters,

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.

33 U.S.C. § 1313(d)(1)(C).

This provision sets forth several general requirements for establishment of a TMDL. The TMDL must establish a total maximum amount, on a daily basis. *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006). Importantly, however, aside from requiring a total daily maximum, the statute says nothing about *how* that amount -- the “load” -- must be expressed. Moreover, the statute does not require that the “load” be “of” a pollutant, which

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<sup>9</sup> As noted, for the purposes of the present Rule 12(c) Motion, Plaintiffs do not contest the correlation EPA identified between stormwater flow rates and sediment. Whether that correlation is reasonable and supported by the record is an issue that will be addressed (if at all) on cross-motions for summary judgment, pursuant to the Court’s October 16, 2012 Scheduling Order [Dkt. 10].

might suggest that the State or EPA would need to express the load value specifically in terms of the amount of the pollutant itself. Rather, the statute uses a different grammatical structure, requiring that the load be established “for” the pollutant, meaning that the load must be established with respect to, or with the purpose of addressing, a particular pollutant. *See Webster’s 9th New Collegiate Dictionary* (1990), at 481 (defining “for” to mean, *inter alia*, “used as a function word to indicate purpose,” or “with respect to”); *see also Lawson ex rel. Lawson v. Fortis Ins. Co.*, 301 F.3d 159, 165 (3d Cir. 2002) (adopting the same interpretation of “for” in the context of an insurance policy). The only other textual limitation requires the load to “be established at a level necessary to implement the applicable water quality standards,” which indicates what the “level” must achieve, but provides no indication that Congress meant for the load level to be expressed using any particular metric or parameter. In short, the statutory text does not address the use of surrogate parameters, nor does it identify a particular metric or unit of measurement that the State or EPA must employ. Thus, the statute is silent on the precise question of statutory construction at issue in this case.

Plaintiffs nevertheless contend that the CWA is “clear on its face” in requiring that a TMDL be expressed in terms of “a ‘pollutant,’ rather than a non-pollutant surrogate.” Pls. Br. at 6. But this contention sets up a false dichotomy with no basis in the language or structure of the CWA. It is true that the statute requires a TMDL “for . . . pollutants,” but the statute says nothing about using surrogates as a means of addressing those pollutants, much less expressing a clear bar to such an approach. As discussed above, the Act does not specify or dictate a specific methodology for how the TMDL must be measured or expressed, so long as it establishes a total daily maximum that addresses the pollutant at issue. Accordingly, there is no support for Plaintiffs’ claim that the CWA precludes the use of a surrogate to establish a TMDL for a

pollutant. Because the statute is silent on that point, Congress implicitly authorized EPA to fill the gap through regulatory interpretation,<sup>10</sup> and EPA's interpretation is entitled to deference under *Chevron* step two. *See Chevron*, 467 U.S. at 844; *see also* 33 U.S.C. § 1361(a) (authorizing EPA to "prescribe such regulations as are necessary to carry out [its] functions under [the CWA]").

Contrary to Plaintiffs' assertion, this is not an instance where EPA's construction asks the Court to presume a delegation of power from the absence of an express withholding of power. Pls. Br. at 8. Rather, this is a quintessential example of agency "gap-filling" within the scope of an expressly delegated power. *See Chevron*, 467 U.S. at 844. Here, Congress expressly charged States (and EPA, where States fail to do so) with establishing TMDLs that will provide for attainment of water quality standards, but otherwise largely left the interstitial details to EPA's discretion.<sup>11</sup> For example, Congress authorized EPA to determine which pollutants were "suitable" for TMDL calculation and measurement. 33 U.S.C. §§ 1313(d)(1)(C), 1314(a)(2)(D). Congress also authorized EPA to determine the load level that would be necessary to implement water quality standards. *Id.* § 1313(d)(2) (if EPA disapproves the State TMDL, the EPA Administrator shall establish a TMDL "as he determines necessary to implement the [applicable] water quality standards"). At the same time, the statute says nothing about the technical approach EPA or a State must use to calculate a TMDL or (as noted) what type of metric must be employed for expressing the TMDL. Congress, having explicitly given EPA the discretion to

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<sup>10</sup> EPA's regulations clarify that a TMDL "can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2(i). Based on the circumstances here, EPA determined that the TMDL would be expressed as an "other appropriate measure," i.e., the flow rate of stormwater. *See* AR000141.

<sup>11</sup> Because Congress explicitly authorized EPA to establish TMDLs, this is not a case where EPA is "attempting to expand the scope of its jurisdiction." Pls. Br. at 10 (citation omitted). Accordingly, Plaintiffs' attempt to invoke "heightened scrutiny," *id.* at 10-11, is unavailing.



determine what pollutants are susceptible to TMDL development in the first place, and the discretion to determine how such TMDLs are tailored to meet water quality standards, could not simultaneously have intended to tie EPA's hands in determining the most technically sound manner in which to express a TMDL. The statutory silence on that point firmly indicates Congress' intent to leave that determination to EPA's applied technical expertise in water quality. *See Chevron*, 467 U.S. at 843-45; *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009) (omission of specified factors in a statutory standard "can reasonably be interpreted to suggest that the EPA is accorded greater discretion in determining its precise content.").

Indeed, this particular brand of technical "gap-filling" -- the use of surrogates or indicator parameters -- is well-established in the field of environmental regulation and has consistently received judicial approval. *See Kennecott Greens Creek Mining Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 955 (D.C. Cir. 2007) ("there is nothing inherently problematic with an agency regulating one substance as a surrogate for another substance."). "It is well recognized that EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1022 n.6 (D.C. Cir. 1978).

EPA's use of surrogates and indicators is long-standing and has been repeatedly upheld by the courts in the context of the CWA and other environmental statutes.<sup>12</sup> In the TMDL

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<sup>12</sup> The concept of indicator parameters for pollutants is also embodied in the CWA, though in a somewhat indirect fashion. Section 304(a)(4) of the Act requires EPA to publish and revise information "identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH." 33 U.S.C. § 1314(a)(4); *see* 40 C.F.R. § 401.16 (listing conventional pollutants). The identification of a pollutant as a "conventional pollutant" triggers certain technology-based effluent limitations under Section 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E). Although pH is not itself a "pollutant" in the conventional sense -- it is more aptly characterized as an indicator parameter for the effects of acids and bases from all sources -- Congress recognized that the control of that parameter would by definition control the underlying pollutants affecting pH levels. *Nat'l (continued on the next page . . . )*

context, EPA has interpreted the CWA to allow for the use of indicator or surrogate parameters for more than three decades. *See* 43 Fed. Reg. at 60,662 (“EPA believes that the determination of TMDL’s for parameters which indicate the presence of pollutants (e.g., total dissolved solids, suspended solids) can be useful in certain situations and should not be excluded from consideration.”). States and EPA commonly develop TMDLs for indicator or surrogate parameters,<sup>13</sup> such as “total suspended solids,” “dissolved oxygen,” and pH.<sup>14</sup> *E.g.*, *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 234 (D.D.C. 2011) (discussing TMDLs for total suspended solids and dissolved oxygen); State of Washington Dep’t of Ecology, “Water Quality Improvement Project, Wenatchee River Area: Dissolved Oxygen & pH,” *available at* <http://www.ecy.wa.gov/programs/wq/tmdl/WenatcheeMulti/DOPH.html> (visited Dec. 3, 2012) (discussing TMDL for dissolved oxygen and pH). Indeed, the 1999 Consent Decree, pursuant to which EPA established the Accotink Creek TMDL, lists Accotink Creek and other waters as impaired for dissolved oxygen (“DO”), pH, and “benthic.” AR006749-57.

The parameters and indicators discussed above are not in themselves pollutants in the conventional sense, nor do they actually measure the mass or molecules of a particular pollutant,

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*Wildlife Fed’n*, 693 F.2d at 174 n.56. In other words, Congress has endorsed the use of indicator or surrogate parameters in the CWA itself.

<sup>13</sup> Indeed, in 2006, EPA approved a TMDL prepared by the State of Vermont that used “the surrogate of stormwater runoff volume in place of the traditional ‘pollutant of concern’ approach.” *Total Maximum Daily Load To Address Biological Impairment in Potash Brook (VT0511), Chittenden County, Vermont* (Dec. 2006) at 4, AR006687. Plaintiffs’ interpretation of the CWA would prevent EPA from approving TMDLs established by States like Vermont to address the particular water quality concerns they identify.

<sup>14</sup> “Total suspended solids” is a measurement of organic and inorganic materials suspended in water. *See FMC Corp. v. Train*, 539 F.2d 973, 977 n.3 (4th Cir. 1976). “Dissolved oxygen” is the amount of oxygen dissolved in water; minimum levels of dissolved oxygen are necessary for a healthy ecosystem. *See Friends of Earth*, 333 F.3d at 187 n.7. Reductions in dissolved oxygen can result from decomposition of organic matter. It is linked to another parameter known as “biochemical oxygen demand,” which measures the oxygen consumed by pollutants that deplete oxygen as they decompose. *See id.* pH is a measure of the acidity or alkalinity of a solution. *Weyerhaeuser Co.*, 590 F.2d at 1022 n.6.

but they are commonly accepted as indicators (in Virginia and elsewhere) for assessing water quality impacts caused by other pollutants. *See Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) (referring to biochemical oxygen demand, pH, and total suspended solids as “commonly-used indicia of water quality”); *Weyerhaeuser Co.*, 590 F.2d at 1022 n.6 (describing importance of using pH and biochemical oxygen demand as parameters for water quality). Courts have approved the use of surrogate parameters in the TMDL context. *See Anacostia Riverkeeper*, 798 F. Supp.2d at 247-48 (upholding the use of the “Secchi depth criterion” as a surrogate indicator for visibility in a TMDL aimed at addressing sediment).

EPA also uses surrogates in the permitting program under Section 402 of the CWA, 33 U.S.C. § 1342. The applicable regulations allow States to establish effluent limitations in permits based “on an indicator parameter for the pollutant of concern[.]” 40 C.F.R. § 122.44(d)(1)(vi)(C); *see Am. Paper Inst. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (rejecting challenge to that regulation); *see also Stoddard v. W. Carolina Reg’l Sewer Auth.*, 784 F.2d 1200, 1206 (4th Cir. 1986) (describing violation of “permit’s limits on the bio[chemical] oxygen demand, total suspended solids, dissolved oxygen, pH and fecal coliform parameters.”). EPA has also used surrogate indicators to establish effluent limitations applicable to specific types of discharges, and courts have endorsed that approach. *See Rybachek v. EPA*, 904 F.2d 1276, 1291-92 (9th Cir. 1990) (upholding EPA’s use of settleable solids as an indicator for toxic pollutants in placer mining); *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 262-63 & n.2 (5th Cir. 1988) (upholding EPA’s use of diesel oil as an indicator for toxic pollutants in oil drilling operations); *Am. Paper Inst. v. Train*, 543 F.2d 328, 349-50 (1976) (upholding EPA’s use of color as a pollution parameter in paper production effluent); *see also Reynolds Metals Co. v. EPA*, 760 F.2d 549, 559-61 (4th Cir. 1985) (upholding EPA effluent guidelines applicable to can-making where

discharges of total toxic organics were controlled through the regulation of oil and grease discharges).

Courts similarly have approved the use of surrogate parameters -- such as “opacity” as a measurement of particulate matter -- and surrogate pollutants in regulatory programs under the Clean Air Act. *See Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1350 n.4 (11th Cir. 2006) (“While opacity is not itself a regulated pollutant, it acts as a measurement surrogate for particulate matter, which is a regulated pollutant”); *Bluewater Network v. EPA*, 370 F.3d 1, 18 (D.C. Cir. 2004) (upholding EPA’s regulation of hydrocarbon emissions from snowmobiles as a means of controlling emissions of particulate matter); *Sierra Club v. EPA*, 353 F.3d 976, 985 (D.C. Cir. 2004) (upholding the EPA’s regulation of particulate matter as a surrogate for metal hazardous air pollutants with respect to copper smelters); *National Lime Ass’n v. EPA*, 233 F.3d 625, 635-38 (D.C. Cir. 2000) (upholding EPA’s regulation of particulate matter as a surrogate for metal hazardous air pollutants with respect to cement kilns).

That EPA’s use of surrogates and indicator parameters is long-standing and has received consistent approval from the courts further confirms that Congress did not intend to bar EPA from employing such an approach in the TMDL program. Rather, the use of a surrogate is a proper exercise of EPA’s authority to fill a regulatory gap in an area of technical expertise where the CWA is silent.

**B. EPA’s Interpretation is Consistent with the Objectives and Structure of the CWA.**

EPA’s interpretation also draws support from the broader structure and purposes of the CWA. Congress passed the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and it set a “national goal” of achieving “water quality which provides for the protection and propagation of fish, shellfish, and

wildlife and provides for recreation in and on the water,” *id.* § 1251(a)(2). To reach that goal, the CWA as a whole “does not stop at controlling the ‘addition of pollutants,’ but deals with ‘pollution’ generally, *see* [33 U.S.C.] § 1251(b), which Congress defined to mean ‘the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,’ [33 U.S.C.] § 1362(19).” *S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 385 (2006). As the Supreme Court explained in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, that definition represents a “broad conception of pollution . . . which expressly evinces Congress’ concern with the physical and biological integrity of water” and further refutes any notion that the CWA “draws a sharp distinction between the regulation of water ‘quantity’ and water ‘quality.’” 511 U.S. 700, 719 (1994); *accord Manufactured Housing Inst. v. EPA*, 467 F.3d 391, 401 (4th Cir. 2006) (“That quality and quantity of water should not be distinguishable has been decided by the [Supreme] Court under the Clean Water Act.”) (citing *PUD No. 1*).

Accordingly, and contrary to Plaintiffs’ arguments, the CWA cannot reasonably be read to preclude EPA from using a pollution metric related to the quantity or velocity of water as a surrogate for a specific pollutant in a TMDL, where appropriate. Although Section 303(d)(1)(C) of the CWA (33 U.S.C. § 1313(d)(1)(C)) requires establishment of TMDLs for “pollutants,” as opposed to “pollution,” *see* Pls. Br. at 7, that provision must be read in light of Congress’ broader purposes and its determination to protect the physical and biological integrity of water. Indeed, in Section 303(d)(1)(A), Congress acknowledged this broader view by requiring States to prioritize how they would address impaired waterways (*i.e.*, those requiring TMDLs) by “taking into account the severity of the *pollution*[.]” 33 U.S.C. § 1313(d)(1)(A) (emphasis added). EPA’s approach in the Accotink TMDL is consonant with these broader objectives of the CWA.

The Accotink Creek TMDL's use of stormwater flow rates as a surrogate is designed not only to reduce sediment generally, but also to address the in-stream movement and deposition of sediment. *See* AR000091-92; AR000141-142. That approach not only meets the requirements of Section 303(d); it also is consistent with Congress' broader aim of protecting the physical and biological integrity of waters like the Accotink.

EPA's approach here is also consistent with Congress' determination to regulate stormwater under the CWA. *See* 33 U.S.C. § 1342(p). In the 1987 amendments to the CWA, Congress adopted Section 402(p), which subjected certain sources of stormwater runoff (including municipal storm sewers) to permitting requirements. *Id.* § 1342(p)(2)(C)-(D), (3)(B). Stormwater contains sediment and other pollutants, *see, e.g., Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1525 n.1 (11th Cir. 1996); AR000092-93; AR000141, and Congress decided to create a permitting requirement in recognition of "the environmental threat posed by storm water runoff[.]" *NRDC, Inc. v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992). EPA's use of stormwater flow rates as a surrogate for sediment in the Accotink TMDL similarly acknowledges the relationship between stormwater and pollutants and is consistent with Congress' decision to focus on that source of impairment.

Finally, EPA would prevail even if the Court were to accept Plaintiffs' framing of the "precise question" to be resolved under *Chevron's* first step. The discussion above demonstrates that the Accotink Creek TMDL was well-within EPA's statutory authority because it was established for a pollutant -- sediment -- and the CWA does not preclude EPA from expressing that TMDL in terms of a surrogate parameter, such as stormwater flow rate. However, EPA could also have established a TMDL for municipal stormwater, which qualifies as a "pollutant" under the CWA, had EPA chosen to do so in this circumstance. The CWA defines "pollutant" to

mean, *inter alia*, “municipal . . . waste[.]” 33 U.S.C. § 1362(6). In turn, Section 212(2)(B) of the Act, which addresses grants for construction of treatment works, expressly refers to “storm water runoff” as a type of municipal waste. 33 U.S.C. § 1292(2)(B) (defining “treatment works” to mean, in relevant part, any “method or system for preventing, abating . . . or disposing of *municipal waste, including storm water runoff* [.]”) (emphasis added); *accord* 33 U.S.C. § 1298(a) (identical language). That identification of municipal stormwater runoff as a pollutant is consistent with Congress’ decision to require CWA Section 402 permits for specified “discharges composed entirely of stormwater,” including municipal stormwater discharges. *Id.* § 1342(p)(1), (2). In addition, it is consistent with the case law concluding that runoff or other wastewater can qualify as a pollutant within the meaning of the CWA. *See N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160-61 (9th Cir. 2003) (unadulterated groundwater from methane gas extraction discharged into a river is “industrial waste” and therefore a “pollutant” under the CWA); *Hughey*, 78 F.3d at 1525 n.1 (stormwater is a pollutant under the CWA); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 568-69 (5th Cir. 1996) (“produced water” from oil and gas drilling operations is “chemical waste” and “industrial waste” and thus a “pollutant” under the CWA).

Because municipal waste is defined as a “pollutant” within the meaning of the CWA, EPA could have established a TMDL for municipal waste, including municipal stormwater runoff, which is a component of municipal waste and is the primary source of stormwater flow to Accotink Creek. AR000014-15; AR000118-119. The existence of this alternate source of authority further demonstrates that EPA acted well-within the ambit of its authority by using stormwater flow rates as a surrogate for sediment in the Accotink Creek TMDL.

**C. Legislative History Does Not Support Plaintiffs' Interpretation.**

Because the text of the CWA is silent on the question at issue here, the Court need not “wade into [the] statute’s legislative history[.]” *Nat’l Elec. Mfrs. Ass’n*, 654 F.3d at 504-05 (citations omitted). But even if the Court were to consider the legislative history, it provides no support for Plaintiffs’ position.

Plaintiffs quote two statements from individual legislators that allegedly evince Congress’ intent to draft a clear bill that limited EPA’s “discretion to define the statutory terms.” Pls. Br. at 7. These statements, however, are unavailing in a number of respects. First, the provision of the CWA at issue here is silent on the question of statutory interpretation in this case. EPA has not attempted to “define the statutory terms,” but has rather filled a gap left by Congress as to the metric or parameter that may be used to express a TMDL.

Second, the cited statements are general, aspirational, and conclusory; each presents nothing more than one legislator’s assessment of what he believed to be a “clear” bill. As such, they carry no weight as interpretive guides to the statute. Indeed, one of the legislators quoted by Plaintiffs – Senator Muskie – recognized that the Act gave EPA discretion in determining the scope of key terms in the statute, including the definition of “pollutant.” *See Nat’l Wildlife Fed’n*, 693 F.2d at 173 (quoting Senator Muskie as saying “I do not get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator. Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another.”) (quoting 117 Cong. Rec. 38,838 (1971), 1972 Leg. Hist. 1347).

Third, one need only review CWA jurisprudence over the past 40 years to find that the legislators’ optimistic statements about the clarity of the statute turned out to be inaccurate, as



courts have repeatedly identified gaps or ambiguities in the language of the CWA. The series of cases, cited *supra*, addressing the definition of “pollutant” are just one example. *See, e.g., Cedar Point Oil Co.*, 73 F.3d at 565 (“although Congress clearly stated that the rationale for listing pollutants was to avoid ‘litigable issues’ over whether a particular material is subject to the statute, the inclusion in the list of such imprecise terms as ‘industrial, municipal, and agricultural waste’ generates more litigable issues than it resolves.”).

And finally, the most authoritative legislative history on this point -- the Conference Report -- shows in plain terms that Congress “intended that EPA would exercise substantial discretion in interpreting the Act.” *Nat’l Wildlife Fed’n*, 693 F.2d at 173. Specifically, the Conference Report stated that Congress provided “guidance to the [EPA] Administrator in as much detail as could be contrived. Virtually every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others.” *Id.* (quoting 1972 Leg. Hist. 332, 1972 U.S.C.C.A.N. at 3776, 3826).

For these reasons, the legislative history cited by Plaintiffs provides no support for their position. If anything, it confirms Congress’ determination to leave the details of TMDL development to EPA’s discretion through regulatory gap-filling. Because the statute is silent as to the question of statutory interpretation at issue here, the analysis shifts to the second step of *Chevron*.

## **II. EPA’S INTERPRETATION OF THE CWA IS REASONABLE AND ENTITLED TO DEFERENCE.**

In the second step of the *Chevron* analysis, the Court must defer to EPA’s interpretation so long as it is “based on a permissible construction of the statute.” 467 U.S. at 843. If the Agency’s construction is reasonable, then that construction prevails, even if it is “not necessarily

the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.” *Entergy Corp.*, 556 U.S. at 218 (emphasis in original).

Here, Plaintiffs have not argued that EPA’s interpretation was unreasonable or impermissible under *Chevron* step two. Even if Plaintiffs have not conceded the point, the Court should uphold EPA’s construction. As the agency charged by Congress with implementing the CWA, EPA’s construction is entitled to considerable deference. *NRDC, Inc. v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988). Here, EPA has reasonably filled a gap in the statute by determining that a TMDL for a pollutant may be expressed using a surrogate parameter -- in this case, stormwater flow rates. That construction is consistent with EPA’s regulations. *See* 40 C.F.R. § 130.2(i). It is consistent with EPA’s long-standing practice of using surrogates in the TMDL program, other CWA regulatory programs, and the Clean Air Act -- a practice that the courts have consistently affirmed. *See* Part I.A. *supra*. And EPA’s approach is in harmony with the broader purposes of the CWA, including Congress’ objectives of protecting the physical and biological integrity of waters, and reducing the water quality impacts of stormwater. *See* Part I.B. *supra*.

Plaintiffs’ Motion should therefore be denied, Count I of the Complaint should be dismissed, and partial judgment should be entered in favor of EPA on Count I.

### **III. THE COURT SHOULD REJECT THE ARGUMENTS RAISED BY AMICI**

Amici the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies, and the American Public Works Association (collectively “the Water Association Amici”) spend the bulk of their brief arguing that EPA based its legal authority for the Accotink Creek TMDL on an EPA guidance memorandum.

Brief of Amici Curiae Nat'l Ass'n of Flood & Stormwater Mgmt. Agencies, et al. [Dkt. No. 28] ("Water Ass'n Amici Br.") at 3-5.

The Court should reject that argument for two reasons. First, an amicus curiae is not permitted to raise an issue not raised by a party to the lawsuit. *Snyder v. Phelps*, 580 F.3d 206, 216-17 & n.8 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011); *Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007) ("The Court agrees that it may not consider legal issues or arguments not raised by the parties."); *see also Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (citing cases), *aff'd*, 537 U.S. 186 (2003); *Cellnet Communic'ns. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998). Because Plaintiffs have not argued that EPA improperly relied upon the guidance memorandum, the Water Association Amici cannot press that argument here. Second, even if the Court decides to entertain the argument, the argument must be rejected because EPA did not in fact rely upon the guidance memorandum as a source of its authority to establish the Accotink Creek TMDL. As discussed above, EPA exercised its authority under the relevant provisions of the CWA and EPA's regulations, as informed by the particular scientific record in this case. *See, e.g.*, AR000141.

The Water Association Amici fare no better with their claim that an attempt by EPA to adopt water quality standards for stormwater volume or flow "would raise serious constitutional questions, as an improper intrusion of the federal government into the area of local land use planning." Water Ass'n Amici Br. at 2. Like their first argument, this argument is barred because it was not raised by the Plaintiffs. Indeed, this argument appears to go well beyond Plaintiffs' claims to broadly challenge EPA's authority to establish TMDLs in the first place, because any TMDL EPA may establish could affect local land use, depending on how it is implemented. EPA's authority to establish TMDLs -- which is plain on the face of the CWA

(see 33 U.S.C. § 1313(d)(2)), and is settled law in this District (see *American Canoe Ass'n*, 54 F. Supp. 2d at 628-29); *American Canoe Ass'n*, 30 F. Supp. 2d at 920–22) -- is not at issue here; the Amici's argument should thus be rejected.

In any event, the argument is entirely speculative and inapposite, because EPA has not established water quality standards for stormwater flow or volume, and no water quality standard has been challenged in this case. To the extent that the Water Association Amici contend that the Accotink Creek TMDL interferes with local land use planning in violation of the CWA or the Constitution, their argument must also be rejected because Amici fail to provide any explanation as to how the Accotink Creek TMDL makes EPA a “de facto regulator of property.” In fact, the Accotink TMDL is not self-implementing, and in itself requires nothing of landowners. See *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216 (TMDLs “are not self-implementing instruments”); *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003) (a TMDL “does not, by itself, prohibit any conduct or require any actions.”). It does not allocate loads to specific parcels of land, does not restrict the uses of land as might a local zoning board, and the actual implementation of the TMDL will be carried out by the Commonwealth, not EPA. As one of the Water Association Amici argued in defense of EPA's 2010 Chesapeake Bay TMDL, a TMDL is “essentially a water quality planning process, which . . . is not binding on the states[.]”<sup>15</sup> Thus, Amici's claim of federal intrusion into local land use issues is baseless.<sup>16</sup> See

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<sup>15</sup> *Am. Farm Bureau Fed'n v. EPA*, No. 11-cv-00067 (M.D. Pa.), Dkt. No. 104 (Mem. of Nat'l Ass'n of Clean Water Agencies, *et al.*, filed Apr. 20, 2012), at 10.

<sup>16</sup> For the foregoing reasons, any concern about the alleged costs of implementing the Accotink TMDL is premature. The Accotink TMDL, like all TMDLs, is a planning tool primarily intended to guide State and local (not federal) watershed restoration efforts. The TMDL is not self-implementing and does not itself impose any requirements. Thus, at this preliminary stage before the adoption of State and local implementation plans, any attempt to predict the cost of implementing the TMDL will be highly speculative. As with all TMDLs, EPA is willing to work with State and local entities to assist in the development of effective and efficient implementation strategies.

*Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002) (rejecting the claim that EPA’s establishment of a TMDL intruded into the States’ traditional area of control over land use).

Amicus curiae the Virginia Manufacturers Association (“VMA”) generally joins in the arguments advanced by Plaintiffs here, but also appears to join the Water Association Amici’s argument with respect to EPA’s guidance memorandum. *See* VMA Amicus Br. at 9. That argument should be rejected for the reasons set forth above. The remaining arguments addressed by VMA appear to relate to Plaintiffs’ claim that EPA’s establishment of the Accotink Creek TMDL was arbitrary or capricious, *see id.* at 2-9, which is not before the Court at this time.

**CONCLUSION**

For these reasons, the Court should deny Plaintiffs’ Motion and enter partial judgment in favor of EPA with respect to Count I of the Complaint.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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