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

I hereby certify that on the 16th day of November, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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