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.	)	

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

Plaintiffs' Motion for Judgment on the Pleadings is a discrete legal challenge to the authority of the EPA to regulate water flow under the Total Maximum Daily Load ("TMDL") process of § 303(d) of the Clean Water Act ("CWA"). (Doc. 10) (ordering separate consideration of Rule 12(c) motion). Plaintiffs' motion is based solely on a *Chevron* step one analysis. *See* Doc. 30 at 4-8. Under *Chevron* step one, the Court must "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In employing this analysis, courts use "traditional tools of statutory construction" to determine whether Congress's intent on the question at issue is clear. *Id.* at 843 n.9. Here the question at issue is the authority of the EPA to regulate water flow as a pollutant under the TMDL process.

The "traditional tools of statutory construction" for answering this question begin with the plain meaning. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*

Found., 484 U.S. 49, 56 (1987) ("It is well settled that the 'starting point for interpreting a statute is the language of the statute itself.'" (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)*; see also Friends of the Earth Inc. v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006) (Under TMDL Program, "Daily means daily, nothing else."). EPA's claim that it has authority to regulate water flow under the TMDL process conflicts with its delegated authority which requires EPA to 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). Pollutant is a defined term that does not include water flow. CWA § 502(6); 33 U.S. § 1362(6). Although Congress defined the alteration of the natural flow of water as "pollution," CWA § 502(19), 33 U.S.C. § 1362(19), for the purpose of establishing TMDLs, Congress opted to regulate pollutants rather than pollution. To paraphrase the District of Columbia Circuit in *Friends of the Earth*: Under the TMDL program, pollutant means pollutant, nothing else.

THE EPA LARGELY FAILS TO JOIN ISSUE.

Most of EPA's memorandum in opposition (Doc. 41) seeks to justify what the agency has done in terms one would expect to see in a *Chevron* step two analysis or in an Administrative Process Act ("APA") review on the merits. For example, the EPA begins with statutory and regulatory background (Doc. 41 at 2-5), describes the Virginia TMDL consent decree (*id.* at 5), explains its concerns with Accotink Creek (*id.* at 5-6), identifies sediment as the pollutant of concern (*id.* at 6-7), claims a strong relationship between sediment and flow rate (*id.* at 7-8); and declares flow a surrogate for sediment (*id.* at 8-9). Later the EPA argues that its interpretation is

consistent with the objectives and structure of the CWA (*id*. at 20-23) and that its interpretation is reasonable and entitled to deference. (*Id*. at 25-26).

WHERE THE EPA DOES JOIN ISSUE IT
RELIES UPON ERRONEOUS PRINCIPLES.

It is only between pages 12 and 20 of its memorandum in opposition (*id*. at 12-20) that the EPA attempts to join issue on *Chevron* step one; but in doing so it advances two erroneous propositions. First, the EPA boldly claims that "the CWA is ***silent*** on the precise question of interpretation at issue here." (*Id*. at 12) (emphasis added). But in determining the EPA's authority to issue TMDLs under the CWA, the statutory direction to regulate pollutants no more constitutes silence than did the statutory direction to express TMDLs in daily terms. *Friends of the Earth*, 446 F.3d at 142 ("Daily means daily, nothing else."). Moreover, the claim that the EPA has really issued a TMDL for the pollutant sediment, but expressed it in terms of flow, is as contrary to the text of the CWA as was the agency's argument that it could frame a Total Maximum Daily Load for the Anacostia River in non-daily terms. *See Friends of the Earth*, 446 F.3d at 142. This is particularly so when it is remembered that "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); *Accord Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998) ("[a]scertaining congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction"). The only rejoinder the EPA makes to the need for heightened scrutiny in this case is entirely circular and begs the question of whether the EPA is expanding its authority by

regulating flow: "Because Congress explicitly authorized EPA to establish TMDLs, this is not a case where EPA is 'attempting to expand the scope of its jurisdiction.'" Accordingly, Plaintiffs' attempt to invoke 'heightened scrutiny' is unavailing." (Doc. 41 at 16 n.11) (internal citations omitted). Actually, the EPA admitted in its Answer that a TMDL of this type has only been attempted three other times and that all three are in litigation. (Doc. 7 at 24, ¶¶ 131-33). This seemingly would make it difficult to argue that the EPA is not attempting to extend its jurisdiction.

The EPA also advances in support of the supposed silence of the CWA the proposition that the statutory list of pollutants "is neither comprehensive nor specific". (Doc. 41 at 13 n.7) (citing cases). The fact that items on the list "may be broad and generic" (*id*.) is a far cry from an authorization to regulate something — water flow — that is not even arguably on the list at all. Nor are the cases cited individually helpful to the EPA. *Sierra Club*, *Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 565 (5th Cir. 1996), stands for the proposition that in a citizen's suit under the CWA, a court had the power to find that a waste called produced water — oil drilling wastewater containing treatment chemicals, *id* at 550 — is a pollutant under the headings of "chemical wastes" and "industrial wastes" of 33 U.S.C. § 1362(6). *id* at 568. Although *NRDC v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987), treats a partial list of pollutants as non-exclusive, it does not quote all of the statutory terms. Hence, it is a tautology for that court to say that the act defines pollutant to include the court's partial list "among other things." *Id*. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 171-73 (D.C. Cir 1982), properly notes

that pollution is a broader term than pollutant; doing so in the course of affirming the proposition that "pollutant" does not include dam-induced changes in water. Finally, a conviction for discharging gasoline had been obtained in district court in *United States v. Hamel* on the theory that gasoline was a pollutant because it fell under the term "biological materials" in 33 U.S.C. § 1362(6). 551 F.2d 107, 110 (6th Cir. 1977). The Sixth Circuit affirmed on a different theory, holding that "the broad generic terms" of the CWA to be "an expression of Congressional intent to encompass at the minimum what was covered under the Refuse Act of 1899." *Id.* at 110. Under that act, the Supreme Court had "not only held that gasoline was encompassed in the term refuse but that it was undoubtedly a pollutant." *Id.* at 111. In the end the cases cited by the EPA stand for the unremarkable proposition that courts must remain tethered to the text and thus, while the statutory definition of pollutants includes various contaminants, the EPA is not free to regulate every pollution-related condition or activity – especially stream flow – under its pollutant authority.

The second fallacy – following the first fallacy that the text is "silent" – underlying the EPA's *Chevron* step one analysis depends upon a misstatement of what the step one inquiry actually is. According to the EPA it may regulate storm water flow rates under the TMDL process so far as "the CWA does not unambiguously foreclose" the EPA from doing so. (Doc. 41 at 12, 14). That of course is not the question to be answered if one applies ordinary canons of statutory construction, particularly under conditions of heightened scrutiny. The proper step

one question is whether one can determine congressional intent with respect to EPA's claimed authority to regulate water flow under the TMDL process. *See Chevron*, 467 U.S. at 843, n.9. If so, the inquiry is at an end. *Id.* at 842. And in this case it is clear, employing ordinary canons of construction, that the EPA has been delegated authority to regulate pollutants – not pollution generally or nonpollutants.

The EPA employs post-modernist word torture, posing as textualism, in an attempt to establish its erroneous "not unambiguously foreclosed" standard. According to the EPA, had § 303(d)(1)(C) of the act, codified at 33 U.S.C. § 1313(d)(1)(C), required States to establish, for impaired waters, "the total maximum daily load, [of] those pollutants which the Administrator identifies . . . as suitable for such calculation," then perhaps the agency would lack the authority to regulate water flow. But, says the EPA, because the States are required to establish "the total maximum daily load ***for*** those pollutants," the agency has the power to do so. (Doc. 41 at 14-15) (emphasis added). This, of course, is utter nonsense. The phrases "the total maximum daily load of" and "the total maximum daily load for" are equally deprived of meaning when separated from "those pollutants which the Administrator identifies . . . as suitable for such calculation." Load means load of, or load for, a pollutant. Load by itself means nothing. *See Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011) (TMDLs "specify the absolute amount of particular pollutants the entire waterbody can take on . . . ").

Because *Chevron* step one deals with the intent of Congress, the EPA cannot bootstrap based upon its own regulations. (Doc. 41 at 16 n.10) (arguing that by regulation, "a TMDL 'can be expressed in terms of either mass per time, toxicity, or other appropriate measure.'") (*Id.*) (citing 40 C.F.R. § 130.2(i)). EPA takes the phase "other appropriate measure" out of context (*id.*) thereby begging the question, "Measure of what?" Pursuant to the CWA, the answer is of a pollutant. Nor is the EPA engaged in needed gap-filling; the statute is fully coherent and gap free under ordinary canons of construction.

THE EPA RELIES UPON INAPPOSITE CASES AND PRINCIPLES.

Because this case is a *Chevron* step one challenge to the authority of the EPA to regulate flow under the CWA's TMDL process, cases involving other statutes and other issues are not apposite. *Kennecott Greens Creek Mining Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 955 (D.C. Cir. 2007) (cited in Doc. 41 at 17), was a challenge to a Mine Safety and Health Administration regulation related to diesel exhaust under a broad express grant of authority to regulate "harmful physical agents," and the decision only concerned whether the agency arbitrarily exercised its granted authority, not whether it had the authority to regulate the particular substance. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1022 n.6 (D.C. Cir. 1978) (cited in Doc. 41 at 17), was a challenge to paper mills effluent standards. The cited footnote explaining the "biological oxygen demand" is beside the point, because the EPA is expressly granted the authority to regulate this parameter, CWA § 304(b), 33 U.S.C. § 1314(b), and other "characteristics of pollutants," CWA § 304(b), 33 U.S.C. § 1314(b), in the (unrelated) context of setting technology standards for

various manufacturing processes, which is completely different than the TMDL process. The fact that what EPA labels regulatory "surrogates" or "indicators" are permitted in some different contexts sheds no light on the ability of the EPA to define the allowable pollutant load established by a TMDL in non-pollutant terms. For this reason the Clean Air Act cases cited by EPA – *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1350 n.4 (11th Cir. 2006) (enforcement action for alleged violation of air permit limit, not for emitting air itself); *Bluewater Network v. EPA*, 370 F.3d 1, 17-18 (D.C. Cir. 2004) (snowmobile technology standards for a pollutant, hydrocarbons, under an express grant of authority to set standards as the EPA "deems appropriate"); *Sierra Club v. EPA*, 353 F.3d 976, 985 (D.C. Cir. 2004) (pollutant-for-pollutant surrogate under hazardous air pollutant technology standard authority); *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 635-38 (D.C. Cir. 2000) (same) – are uninformative. (Doc. 41 at 20).

Although the EPA states that "States and EPA commonly develop TMDLs for indicator or surrogate parameters," (Doc. 41 at 18), it cites only one TMDL case for this proposition, *Anacostia Riverkeeper*, *Inc.*, 798 F. Supp. 2d 210 (Doc. 41 at 18-19). The first thing to note about *Anacostia* is that the TMDLs at issue set maximum loads for ***pollutants*** (sediment and total suspended solids) rather than a surrogate of any kind. The surrogate reference that EPA takes out of context pertains only to EPA's decision to calculate the sediment and solids TMDLs to meet the more stringent of two related numeric water quality standards, 0.8 meters Secchi depth and 20 Nephelometer Turbity Units (NTU). *Id.* at 217, 236 & n.20. Both are

standards for water turbidity (cloudiness), and the more stringent of the two (Secchi depth) was used as the basis for the calculated pollutant TMDLs. *Id.* at 248. The court held that EPA need not undertake the meaningless act of also calculating sediment and solids TMDLs based on the less stringent NTU standard, because achieving more stringent Secchi depth standard would "effectively satisfy" NTU. In other words, the TMDLs were sufficiently stringent to meet both underlying water quality standards – an entirely different issue than the one before this Court. TMDLs for pollutants exist to achieve water quality standards. Setting TMDLs for identified pollutants of concern to achieve those standards as in *Anacostia Riverkeeper* does not involve using a surrogate of any kind (pollutant or non-pollutant) for a pollutant of concern. Similarly, the pollutants (biological oxygen demanding pollutants, pH, and suspended solids) that EPA itself acknowledges were part of contested regulations in *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988), and *Weyerhaeuser*, 590 F.2d at 1022 n.6 (Doc. 41 at 19), were regulated under a broad express grant of authority under §§ 304(a) and (b) and present a stark contrast when compared EPA's claim of authority to regulate stream flow through the TMDL process.

The EPA's citation to "dissolved oxygen," "pH," and "'benthic'" in the 1999 Consent Decree, (Doc. 41 at 18), is misleading because each is a duly promulgated Virginia water quality standard and, thus, a proper object to be advanced by a TMDL. *See* CWA § 303(d)(1)(C) (the TMDL "shall be established at the level necessary to implement the applicable ***water quality standards***"); 9 Va. Admin.

Code § 25-260-50 (setting forth numerical water quality criteria for dissolved oxygen in various types of waters ranging from oceans to swamps and for the desired range of 6.0 to 9.0 for pH (acidity)). In fact, "benthic" is a reference to a narrative water quality standard. AR000010-11; Doc. 1 at 25, ¶ 112; 9 Va. Admin. Code §§ 25-260-10 and -20. Because TMDLs budget pollutant loading capacity to meet these standards, their inclusion in the 1999 Consent Decree in no way supports EPA's expansive view of its TMDL jurisdiction as including stream flow and other non-pollutants. Nor does the fact that Vermont may have established a TMDL to limit flow (Doc. 41 at 18 at n.13) augment the EPA's authority to force Virginia or Fairfax County to do so.

The EPA continues its practice of citing other cases under different statutory provisions that do not address § 303(d) and are thus easily distinguished. For example, while it is true that *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1206 (4th Cir. 1986), describes the use of pH, BOD, suspended solids, dissolved oxygen and fecal coliform as parameters for water quality, and *American Paper Institute v. Train*, 543 F.2d 328, 349-50 (D.C. Cir. 1976), addresses color limits for paper mill effluents, the relevant point of statutory interpretation is that the CWA ***expressly requires*** EPA to identify "pollutants classified as ***biological oxygen demanding***, suspended solids, fecal coliform, and ***pH***," CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4), and, more broadly still, to promulgate point source effluent limitation guidelines "identifying, in terms of amounts of ***constituents and chemical, physical, and biological characteristics of***

pollutants, the degree of effluent reduction attainable" through various technologies, *see* CWA §§ 304(b)(1), (2), (4) (for various industrial facilities); § 304(d) (for publicly owned treatment works, *i.e.*, municipal wastewater treatment plants); *see also* § 301(b)(1)-(2) (setting deadlines for regulating industrial facilities and publicly owned treatment works for pollutants identified under § 304(b) and other provisions). Thus, the cited characteristics of pollutants are all regulated by EPA under an express statutory grant of authority. Had Congress similarly authorized EPA to regulate allowable stormwater flow rates and volumes of the nation's rivers and streams, Count I of the present case would not be before the Court. But despite EPA's regulation, under other authority of the referenced water quality parameters, they are not surrogate pollutants and do not serve as precedent or authority for the EPA to use a non-pollutant surrogate for a pollutant in a TMDL.

EPA's reliance on the use of "indicator parameters" for § 402 NPDES discharge permit limits is also misplaced. (Doc. 41 at 19). First, NPDES permits are largely based on technology standards under §§ 301(b) and 304(b) and, as explained above, those provisions are broader than § 303(d) because they expressly regulate "characteristics of pollutants." *See* § 402(a)(1); 33 U.S.C. § 1342(a)(1) (requiring compliance with §§ 301, 302, 306, 307, 308 and 403). Second, § 402(a)(2) sets forth a broad express grant of authority by Congress to "prescribe conditions for such permits to assure compliance with the requirements of paragraph (1)" of § 402(a); however, there is no similar, expansive "catch-all" provision in § 303(d) that would allow EPA to forego budgeting pollutant loading and instead regulate a

correlated non-pollutant physical condition or human activity. Third, pursuant to § 402(a)(2)'s broad authority to condition discharges, EPA has adopted a regulation authorizing permitting authorities (typically States) to "[e]stablish effluent limitations on an indicator parameter for the pollutant of concern," 40 C.F.R. § 122.44(d)(1)(vi)(c); in contrast, EPA's TMDL regulations address "pollutants" only and do not allow EPA to budget for other "indicators" much less for the flow of water itself. Fourth, as the D.C. Circuit explained in *Am. Paper Inst., Inc. v. EPA.*, 996 F.2d 346, 350 (D.C. Cir. 1993), (cited in Doc. 41 at 19), "indicator parameter" refers to "a different ***pollutant*** also found in the point source's effluent." The court upheld the permitting regulation at issue as a reasonable requirement for permit writers to "create ***chemical-specific*** limitations on discharges of ***pollutants***." *Id.*, at 350-51 (emphasis added). Effluent regulations separately authorized by the CWA – not TMDLs and not non-pollutant surrogates – were at issue in *Rybachek v. EPA*, 904 F.2d 1276, 1292 (9th Cir. 1990) (upholding EPA's limitations on a non-conventional, non-toxic mining effluent pollutant, settleable solids, as a toxic pollutant indicator authorized by 40 C.F.R. § 125.3(h)(1)); *Cf. Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 262 n.2 (5th Cir. 1988) (holding similarly regarding permit limits for an indicator pollutant under 40 C.F.R. § 125.3(h)(1)); *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 559-61 (4th Cir. 1985) (holding similarly regarding total toxic organic pollutant limits expressed as limits for conventional pollutants, oil and grease, so as to reduce burden on the regulated industrial sector); 40 C.F.R. § 125.3(h)(1) (authorizing permit limits using a conventional or nonconventional

pollutant as an indicator for a toxic pollutant, where § 304(b) effluent limitation guidelines addressing characteristics of industry sector's pollutants so provide). In the context of a step one *Chevron* review of the authority conferred on the EPA to issue TMDLs, EPA's examples and analogies are much ado about nothing.

THE EPA MAKES ANOTHER IRRELEVANT ARGUMENT.

To the extent that the EPA simply argues that its interpretation is consistent with the objectives and structure of the CWA, (Doc. 41 at 20-23), it is not making a *Chevron* step one argument at all. Furthermore, the EPA's citation of *PUD. No 1 of Jefferson Co.* v. *Washington Dept. of Ecology*, 511 U.S. 700 (1994) (Doc. 41 at 21) suffers from the same flaw as EPA's other arguments in that the decision concerns an express grant of authority under a different statutory provision (here, CWA § 401(d), which authorizes States to impose conditions on a federal license applicant to comply "with any other appropriate requirement of State law"). *See* 511 U.S. at 711-12. This role that Congress granted to the States over federal licenses is entirely separate from and much broader than EPA's role under § 303(d).

To the extent that the EPA wishes to argue counter-historically to what it actually did that it could have issued a TMDL for municipal waste (Doc. 41 at 22-23), and thereby accomplish the same regulation of storm water, its position depends upon eliding the definition of pollutant. According to the EPA, 33 U.S.C. § 1362(6) includes "'municipal . . . waste'" within the definition of pollutant. Actually it includes "industrial, municipal, and agricultural waste ***discharged into water***" **and** therefore provides no support for TMDL regulation of water flow alone. EPA also argues that it can regulate the flow of water on the grounds that doing so is

"consistent with" Congress' decision to require municipal separate storm sewer systems ("MS4s") such as those owned and operated by Plaintiffs to obtain an NPDES discharge permit under § 402(p). (Doc. 41 at 23). This provision, however, ***allows*** stormwater discharges, CWA § 402(p)(3)(B)(ii), 33 U.S.C. 1342(p)(3)(B)(ii), and requires that the discharge of ***pollutants*** be reduced to the maximum extent practicable, CWA § 402(p)(3)(B)(iii), 33 U.S.C. 1342(p)(3)(B)(iii).

LEGISLATIVE HISTORY.

When the EPA argues that legislative history does not support Plaintiffs' interpretation, it contends that the proffered statements are too insubstantial to be compelling. However, legislative history is at worst a wash for Plaintiffs, because the EPA's counter-offered legislative history provides no support for its sudden deviation from decades of prior practice, as previously explained by EPA itself for a national audience: "EPA does not believe that flow, or lack of flow, is a pollutant as defined by CWA Section 502(6) … EPA interprets section 303(d)(1)(C) to require that TMDLs be established for "pollutants" and does not believe "low flow" is a pollutant … It is not one of the items specifically mentioned in the list of pollutants Congress included at section 502(6) of the CWA. Nor does it fit within the meaning of any of those terms. 65 Fed. Reg. 43586, 43592-93 (July 13, 2000); see also Doc. 1 at 19, ¶ 85, and Exhibit B (EPA guidance under § 303(d) stating that "EPA does not believe that flow, or lack of flow, is a pollutant as defined by the CWA Section 502(6)").

ANOTHER IRRELEVANT ARGUMENT.

At page 25 of its memorandum (Doc. 41 at 25), the EPA asserts that its interpretation of the CWA is reasonable and entitled to deference. This is clearly a *Chevron* step two or APA merits argument beyond the scope of the pending motion and, in any case, is fully addressed by the arguments set forth above.

THE LAND USE ARGUMENTS OF AMICI ARE BEFORE THE COURT.

On pages 26-29 the EPA asks this Court to reject the land use arguments raised by amici. (Doc. 41 at 26-29). The EPA is simply incorrect in its assertions that the arguments pressed by the Water Association Amici and the Virginia Manufacturers Association were not made by Plaintiffs. (Doc. 41 at 27, 29.) Although it is true that an amicus curiae generally is not permitted to raise an issue not raised by a party to the lawsuit, *see Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007), those raised by Amici were raised by Plaintiffs in their Complaint. *See* (Doc. 1 at 27, ¶ 123) (noting that, through the imposition of flow TMDLs, "EPA asserts the regulatory power to control the flow of clean water, and by implication, land use and the amount of 'impervious cover' (*e.g.,* buildings and roads) from which the stormwater flow runs off"); (Doc. 1 at 30, ¶ 136) ("EPA's concept of regulating a surrogate, as encouraged in the EPA Flow Memo and applied in the Accotink TMDL, appears to know no bounds or criteria for its application, opens the door to regulating any number of land uses and human activities such as existing buildings and roads ('impervious cover'), and expands EPA's TMDL and NPDES permit jurisdiction far beyond the management of 'pollutants' authorized by the CWA.").

Moreover, "[a] traditional function of an amicus is to assert 'an interest of its own separate and distinct from that of the [parties],' whether that interest be private or public." *United States v. Barnett*, 376 U.S. 681, 738 (1964). There can be no doubt that amici have an independent interest in the EPA not improperly intruding, through an expansive interpretation of its authority to establish TMDLs, into "local land use planning." (Doc. 28 at 2.) And amicus briefs often seek to comment on the larger legal landscape and the practical and theoretical ramifications of a decision to provide the Court an "aid . . . in analyzing the legal questions" at issue. *See Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 434 n.16 (1984). In fact, the United States Supreme Court Rules require that amicus briefs "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties," while disfavoring the filing of amicus briefs that do no more than to expand upon the parties' theories and their implications. *See* Sup. Ct. R. 37(1). As these amici are well situated to evaluate the effects of EPA's assertion of authority, and well positioned to address the shift of authority threatened by this action, this Court should consider their concerns regarding the EPA's assertion of authority to control the amount of water that runs off impervious surfaces in the Accotink watershed, as this plainly would affect the uses to which that land may be put and arrogate to the EPA greater authority over the rights of property.

CONCLUSION

For the reasons stated in the Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings, in this Reply Memorandum, and to be stated at oral argument, Plaintiffs' Motion for Judgment on the Pleadings should be granted.

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December 12, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 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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