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

THE OCCOQUN WATERSHED COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*

Defendants.

Civil Action No. 1:12cv820

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF FACTS, POINTS AND AUTHORITIES

THE OCCOQUAN WATERSHED COALITION
and
THE SPRINGFIELD DISTRICT COUNCIL

/s/ *David W. Schnare*
David W. Schnare (VSB No. 44522)
Free-Market Environmental Law Clinic
9033 Brook Ford Road
Burke, Virginia 22015
Telephone: (571) 243-7975
Schnare@fmelawclinic.org

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Regulations

Constitutional Provisions

MOTION FOR SUMMARY JUDGMENT

Plaintiffs Occoquan Watershed Coalition ("OWC") and Springfield District Council ("SDC"), pursuant to Federal Rule of Civil Procedure 56 and local Civil Rule 7(F), hereby move for summary judgment on the grounds that the U.S. Environmental Protection Agency ("EPA") has exceed its authority under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*., or in the alternative, the Tenth Amendment of the U.S. Constitution, by mandating Virginia to incorporate a TMDL for Benthic Impairments in the Accotink Creek Watershed ("Accotink Creek TMDL") into Virginia's Water Quality Management Plan and mandating Virginia to issue National Pollutant Discharge Elimination System ("NPDES") permits that are consistent with the TMDL wasteload allocations. The OWC and SDC request that this Court enter a judgment (1) declaring that EPA does not have the authority necessary to issue the Accotink Creek TMDL mandate letter either under the CWA or the Tenth Amendment and thus that letter is void *ab initio*, and, (2) declare that any Benthic TMDL for Accotink Creek can only have the force of guidance. Plaintiffs also request that the Court award Plaintiffs its reasonable attorneys' fees and costs. The Material Facts, Points and Authorities in support of this Motion are set forth below.

INTRODUCTION

The U.S. Environmental Protection Agency (EPA) has demanded that Virginia and Fairfax County do the impossible, to wit, eradicate the benthic impairment in Accotink Creek. The law never requires impossibilities[1] and the Clean Water Act provides two means to address

[1] *The Casco*, 1842 U.S. Dist. LEXIS 39 (D. Me. 1842) ("The law never requires impossibilities. '*Impossibilium nulla obligatio est*;'" *and see, Cryer v. M & M Mfg. Co*., 273 So. 2d 818, 830 (La. 1973) ("The Roman maxim, "Impossibilium nulla obligatio est (There is no obligation to do impossible things)", Broom's Legal Maxims 248 (1874), expresses the principle which Gaius stated as "If we stipulate for something to be given to us, which is of such a nature that this cannot be done, it is evident that such a stipulation is void by natural law * * *." Gaius, Digest

this impossibility. Virginia did not avail itself of the CWA mechanism it could use to address this impossibility, nor did EPA use the other available means. Instead, EPA chose to mandate the impossible and in so doing acted *ultra vires*.

Virginia has identified the lowest section of Accotink Creek as suffering from sediment depositing onto the bottom of the creek and harming the organisms living there. These are called "benthic" organisms and they constitute the bottom of the food chain for fish living in that portion of the creek. The poor quality of this benthic community impairs the goal of a fishable stream. Under the Clean Water Act, this impairment forces EPA to prepare a Total Maximum Daily Limit ("TMDL") which, if met, would result in a reduction of the sedimentation and an end to the impairment of the benthic organism. As explained below, this has been physically impossible within the Accotink Creek watershed since time immemorial and there is no evidence that the "benthic impairment" has ever been anything but a normal, natural phenomenon since formation of the continent and this watershed. Further, even if it were possible to craft a TMDL that would result in meeting the fishable goal for Accotink Creek, EPA does not have authority to mandate implementation of a TMDL in this instance.

Plaintiffs differentiate this case from a similar one filed by Virginia and Fairfax County. *See*, *VDOT et al. v. EPA*, U.S. Dist. Ct. Eastern Dist. of Virginia, 1:12-cv-00775. In that case, this Court remanded the TMDL to EPA so that it could reissue it, presumably setting a TMDL

44.7.1.9 (Scott translation, 1932).); *and*, *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) ("'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.'" c*iting to Mineral Park Land Co. v. Howard*, 172 Cal. 289, 293, 156 P. 458, 460, L.R.A. 1916 F, 1 (1916). Accord, *Whelan v. Griffith Consumers Company*, D.C.Mun.App., 170 A.2d 229 (1961)); *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 826 F.2d 239, 278 (4th Cir. Va. 1987); *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1100 (4th Cir. Va. 1987).

based on allowable sediment loadings. *See VDOT* "Amended Order", (1:12-CV-775, Dkt. No. 56).

Plaintiffs do not quibble with the form of the TMDL but instead challenge EPA's authority to impose any nonpoint source TMDL on Virginia and Fairfax County against their will, an issue not raised in *VDOT* and remaining properly before the Court. The fact that the court has remanded the TMDL to EPA reflects the fact that, under Court order EPA must prepare a benthic TMDL for Accotink Creek. The question we raise here is as to whether that TMDL must be mere guidance or one EPA can force Virginia and Fairfax County to implement. Resolution of the issues Plaintiffs have raised will significantly affect the nature of the revised TMDL and the bargaining positions of Virginia, Fairfax County and EPA during that revision.

For the reasons discussed below, we ask the Court to declare any benthic TMDL for Accotink Creek can only have the force of guidance and that EPA has no authority to mandate implementation of a nonpoint source benthic TMDL for Accotink Creek.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court will construe the facts in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Declaratory Judgment Act authorizes relief "[i]n a case of actual controversy." *See* 28 U.S.C. § 2201(a). "[T]he dispute must be a 'case or controversy' within the confines of Article III of the United States Constitution.' *White v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 913 F.2d 165, 167 (4th Cir. 1990). To qualify, "[i]t must be a real and substantial

controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (*quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 241, (1937)); *and see, Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n,* 2012 U.S. App. LEXIS 22302 (4th Cir. S.C. Oct. 26, 2012).

STANDING

OWC and SDC bring this lawsuit on behalf of their members, all of whom operate, live, work and recreate on Accotink Creek or neighboring watersheds and many of whom will certainly suffer from the loss of watershed restoration funds needed to address serious problems on their property as a result of forced implementation of a benthic TMDL for Accotink Creek. The $295 million to $400 million required to implement a TMDL on Accotink Creek that EPA considers sufficient to ameliorate benthic impairment, will consume all watershed restoration funding available to Fairfax County for over 20 years, leaving none for the other 29 watersheds within the County, much less the 8 watersheds within the OWC's and 9 watersheds within the SDC's area.

The implications of a forced TMDL implementation are specific, immediate and detrimental. We include here, by reference, discussions of reasonably expected injuries made in the Amended Complaint and accompanying declarations (Dkt. No. 8 and attachments). Since filing the amended complaint, OWC members from Clifton have confronted the inevitable, the need for emergency, temporary watershed restoration for lack of funding of project PH9800 (*see* Dck. No. 8 at ¶ 15) already contemplated by Fairfax County and for which funding will never be available if the County is forced to implement a benthic TMDL on Accotink Creek, regardless of the form of that TMDL. *See* Exhibit 2. After forced implementation of the TMDL, funding for

this kind of temporary, emergency project will have to be paid out of some other account, imposing an opportunity cost[2] of significant dimension. This event is but a mild precursor of what would occur if the Court permits EPA to mandate Fairfax County and VDOT implement a benthic TMDL on Accotink Creek.

A National Academy of Sciences study (*see* AR000201)[3] identified opportunity costs as certain to arise from TMDLs targeting benthic impairments. The extraordinary costs of any Accotink Creek benthic TMDL will reduce the ability of the County to meet other of OWC and SDC members' needs, including watershed management needs, local road repairs, school programs, drug rehabilitation programs, adult care programs and low-cost housing programs, all programs OWC and SDC members use and need.

Forced implementation of an Accotink Creek TMDL for benthic impairment will injure OWC and SDC members by depriving them of funds needed to address problems in their watersheds. These facts establish standing under Article III because they establish that OWC and SDC members suffer (1) individual "injury in fact" that is concrete and particularized as well

---

[2] The kind of opportunity costs that will arise from forced implementation of a $400 million TMDL are not speculative. Previous budget reductions forced by circumstances on Fairfax County have resulted in environmental improvements being among the first programs sacrificed, with affordable housing, drug and mental health care, emergency services and the district court immediately behind. *See* Fairfax County FY2013 Adopted Budget Plan "Overview" p. 206-209, http://www.fairfaxcounty.gov/dmb/fy2013/adopted/budget_narratives.htm (*accessed* 12/22/2012).

[3] Citations that begin with the prefix "AR" refer to documents that are included in the Administrative Record for the Accotink Creek Benthic TMDL. This record was prepared for use in *VDOT v. EPA*, U.S. Dist. Ct. Eastern Dist. of Virginia, 1:12-cv-00775, being heard in conjunction with this case. Counsel for EPA has provided counsel for OWC and SDC a disk containing this Administrative Record, and a copy of that disk was also hand-delivered to the Court as required by Order in the *VDOT* matter (1:12-cv-00775 Dkt. No. 17). Plaintiffs include by reference into the record of the instant matter the entire Administrative Record for the Accotink Creek benthic TMDL as documented on the disk, and will supply a second copy of the disk for inclusion in the Docket for the instant case if directed by the Court.

as actual or imminent; (2) fairly traceable to a forced implementation of any Accotink Creek benthic TMDL; and (3) likely to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

OWC and SDC have standing to sue EPA on its members' behalf because this suit is germane to OWC and SDC organizational interests in watershed management and preservation and wise use of Fairfax County revenues; the suit does not require its members' individual participation; and, those members would have standing to sue in their own right. *See* Dkt. No. 8 at ¶ 18, 22-24, 28-33; *and see*, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (describing three-factor organizational standing test). Because OWC members suffer individualized injury due to the forced implementation of the TMDL, they have standing to argue the 10th amendment violations.[4]

STATEMENT OF MATERIAL FACTS

I. Procedural Posture

1. In June, 1999, Judge T.S. Ellis of the U.S. District Court for the Eastern District of Virginia entered a consent decree between the U.S. Environmental Protection Agency and the American Canoe Association.[5] (Exhibit 3).

2. This decree required EPA to establish water pollution "Total Maximum Daily Limits" (TMDLs) for "Category 1 Waters" in Virginia whose water quality was "impaired" and

---

[4] *See*, *Bond v. United States*, 131 S. Ct. 2355, 2361 (U.S. 2011) (plaintiff could assert her own injury resulting from governmental action that exceeded the authority that federalism defined, finding that federalism's limitations were not a matter of rights belonging only to the states).

[5] Exhibit 3: *American Canoe Association, Inc. et al. v. U.S. Environmental Protection Agency, et al.*, Civil Action No. 98-979-A (U.S. Dist. Ct. Eastern District of Virginia) (Consent Decree entered June 11, 1999), *see* p. 11 & Attachment A thereto at p. 4.

"primarily affected by nonpoint source contributions," as documented on the October 14, 1998 Section 303(d) list. *Id* at pp. 6 & 11.

3. The Court ordered these TMDLs to be established by no later than May 1, 2011, but only in the event Virginia itself did not establish those TMDLs by May 1, 2010. *Id*. at p. 11.

4. Included in the list of streams covered by this decree is Accotink Creek, an urban stream in Fairfax County, Virginia. *Id* at Attachment A, p. 4.

5. Virginia did not establish an Accotink Creek TMDL for Benthic impairment by May 1, 2010, leaving the duty to EPA to complete by May 1, 2011. *See* AR007877.

6. EPA admits it has no discretion and must establish a TMDL for Accotink Creek. *See*, AR000215.

7. EPA established a TMDL for Accotink Creek Benthic Impairment on April 18, 2011. *See* AR000003, subsequently vacated by this Court on January 3, 2013.

8. EPA issued a letter mandating Virginia administer a federal regulatory program, adopt a federal regulatory system as its own and requiring Virginia to regulate its waters by ordering the Commonwealth to incorporate the Accotink Benthic TMDL "into Virginia's Water Quality Management Plan pursuant to 40 CFR § 130.7(d)(2)"; and, requiring MS4 permits covering Accotink Creek to "be consistent with the TMDL wastload (sic) allocations, pursuant to 40 CFR § 122.44(d)(1)(vii)(B)." *See* AR 000001 (the Capacasa letter, attached hereto as Exhibit 1). EPA issues such a letter upon publication of every TMDL it prepares or approves.

9. In response to the establishment of the Accotink TMDL and the Capacasa letter, Virginia and Fairfax County filed suit to "enjoin EPA from enforcing, requiring the Commonwealth of Virginia to enforce, or otherwise acting pursuant to the Accotink TMDL," thus indicating they do not agree to voluntarily administer a federal regulatory program or adopt

a federal regulatory system as its own in order to regulate Accotink creek water quality by incorporating the Accotink Benthic TMDL into Virginia's Water Quality Management Plan pursuant to 40 CFR § 130.7(d)(2); or, to require Fairfax County MS4 permits covering Accotink Creek to be consistent with the TMDL wasteload allocations, pursuant to 40 CFR § 122.44(d)(1)(vii)(B). *See, VDOT et al. v. EPA*, Complaint for Declaratory and Injunctive Relief at p. 41, Para. No. 5. (U.S. Dist. Ct. Eastern Dist. of Virginia, 1:12-cv-00775, Dkt. No. 1).

II. Historically, Accotink Creek Watershed is naturally highly impervious and Benthic Impairment is Inevitable and Unavoidable

10. At no time did EPA or Virginia recognize that a poor benthic community in the lowest reaches of Accotink Creek is, likely always was and certainly always will be a normal phenomenon that, because of the nature of the watershed, is, likely always was and certainly always will be "impaired" under the water quality criterion EPA and Virginia use.

11. The Clean Water Act requires states to establish water quality standards that "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A).

12. Virginia designated its in-stream uses as: "recreational uses; the propagation and growth of a balanced, indigenous population of aquatic life which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources." 9VAC25-260-10, *or see*, AR000025.

13. Virginia failed to include in its list of in-stream uses the historic and inevitable function (in-stream use) as a conveyance of stormwater.[6] *Id.*

[6] Had Virginia included conveyance of stormwater in its list of in-stream uses, the TMDL would have to balance the tension between protecting benthic populations and ensuring channeling of stormwater. This is one of the two means of addressing the impossible challenge and because

14. Nature formed Accotink Creek as a streambed that receives and carries stormwater away from 30,643 acres of land, one-eighth of Fairfax County. AR000011.

15. The vast majority of the Accotink Creek watershed (82%) consists of Class C and D soils that effectively prevent infiltration of water and instead force the water to flow overland and rapidly into Accotink Creek. No less than 71.3 percent of the watershed consists of Class D clays that are equivalent to impervious surfaces. AR000030.

16. EPA admits that "when impervious cover is within the 10-25% range," "aquatic impairment is evident" and "when the watershed impervious cover exceeds 25%", "the impairment is almost assured." AR000192.

17. EPA admits 25 percent of Accotink Creek watershed consists of impervious surfaces (AR000060) but fails to recognize that, because 82 percent of the underlying soils are impervious, human development within the Accotink watershed increases imperviousness by a mere 5 percent over the historic natural background imperviousness, a total imperviousness well in excess of 25 percent.

18. This soil imperviousness causes routine and frequent flooding and that flooding is an historic feature of Accotink Creek. After a day and one-half of rain on February 23-25, 1772, the lower portion of Accotink Creek, at what is now the U.S. Route 1 crossing, was "swelled by the late rains" so as to prevent George Washington from "being able to cross Accatinck." *See,* The Diaries of George Washington. Vol. 3. Donald Jackson, ed.; Dorothy Twohig, assoc. ed. The Papers of George Washington. Charlottesville: University Press of Virginia, 1978. (*accessible at* http://memory.loc.gov/cgi-bin/query/P?mgw:1:./temp/~ammem_mEjE::, *accessed* 12/16/2012). As discussed below, this was a typical event.

---

the Court cannot direct Virginia to take this step, it is not discussed further herein.

III. Federal Data Documents the Inevitability of Scouring Events

19. In 1940, the Fairfax County population was approximately 41,000. By 1970, the population had grown to approximately 455,000. *See* AR001188. By 1990, the population was 818,000 and today it is slightly greater than one million. *See*, US Bureau of the Census, "Population of Counties by Decennial Census 1900 to 1990" at http://www.census.gov/population/cencounts/va190090.txt; and "Profile of General Population and Housing Characteristics: 2010 at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

20. According to records kept by the United States Geological Service, the average flow in upper Accotink Creek (site 01654000, immediately north of Braddock Road) from 1947 through 2011 was 29.3 ft^3/sec. (s.d. 82.5 ft^3/sec.). *See*, USGS Surface-Water Daily Data for the Nation, at http://nwis.waterdata.usgs.gov/nwis/dv/?referred_module=sw (*accessed* 12/18/2012).

21. The sum of the average flow and its standard deviation approximately establishes the 95th percentile flow, meaning only five percent of flows in the Accotink Creek were higher than 112 ft^3/sec. at this point in the Creek. Although a conservative estimate of "extreme high-scour events," information about this five percent of the flows provides insight into the Accotink Creek's natural in-stream function as a conduit for stormwater. *Id. and see* Exhibit 4.

22. It is not unreasonable to use 1947 to 1967 stream flows as a baseline for "natural" flows within Accotink Creek as that period reflects a Fairfax County population and development that was relatively modest on the Accotink Creek watershed.

23. In comparison to this natural baseline, the size of extreme high-scour flows for the period from 1988 to 2012, measured in cubic feet per second, increased on average a mere 1.8 percent, despite a doubling of population growth and development. *Id.*

24. Each year since 1947, Accotink Creek has experienced these 95th percentile extreme high-scouring events on average 17 times each year (s.d. 7.7). *Id*.

25. The Administrative Record offers, and EPA does not refute or reject, a less conservative estimate of significant scouring events – those associated with a one inch rainfall. AR000191.

26. Comparison of U.S.G.S. flow measurements and NOAA rainfall measurements documents a very high correlation (0.736) between the two, lending additional credence to use of rainfall as a surrogate for Accotink streamflow. *See*, Exhibit 4.

27. According to the National Oceanic and Atmospheric Administration, between October 1, 1947 and October 31, 2012, the Washington D.C. area (measured at Reagan Airport) received no less than one inch of rain on 4,633 days. This is an average of a significant sediment scouring event once every five days, or six days each month, or 71 days each year, for the past sixty-five years. *NOAA* Custom Report "GHCN-Daily Precipitation for GHCND:USW00013743 - WASHINGTON REAGAN NATIONAL AIRPORT, VA US (6/2/1947 through 12/14/2012)" (*accessed at* http://www1.ncdc.noaa.gov/pub/orders/114864.csv on 12/18/2012).

IV. Sediments causing reductions in the Accotink Creek Benthic community result from nonpoint sources.

28. EPA admits, and courts have relied on the admission, that "the Act divides the causes and control of water pollution into two categories, *point sources of pollutants* (regulated through the § 402 permit program) and *nonpoint sources of pollution* (regulated by the states through "areawide waste treatment management plans" under [CWA] § 208, *33 U.S.C. § 1288*). The latter category is defined by exclusion and includes all water quality problems not subject to [CWA] § 402." *See*, *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982);

and see, National Wildlife Federation v. Consumers Power Co., 862 F.2d 580, 582 (6th Cir. Mich. 1988).

29. Congress has defined the term "point source," limiting it to conveyance structures that "discharge" pollutants. 33 U.S.C. § 1362(14).

30. EPA did not designate stormwater as a pollutant for Accotink Creek. *See*, AR000087 (listing the potential pollutants causing stress in Accotink Creek).

31. EPA twice admits the Accotink Creek benthic impairment is caused by a nonpoint source of pollution. It states deposition of sediment originating within the stream or from erosion of the stream bed and that this sediment is not transported through a point source into the stream by stormwater. *See*, AR000091-92. It also negotiated and agreed to a Consent Decree specifying that the Accotink Creek benthic TMDL is "primarily affected by nonpoint source contributions." *See* Exhibit 3, (Consent Decree) at p. 6,

32. Congress defines changes in the movement, flow, or circulation of any navigable waters, including changes caused by flow diversion facilities such as stormwater sewers as "nonpoint sources of pollution." 33 U.S.C. § 1314(f)(F).

V. The Cost of implementing <u>any</u> Accotink Creek benthic TMDL would vastly exceed the resources made available by EPA to Virginia and Fairfax County for nonpoint programs.

33. EPA reports that for Fiscal Year 2011, Virginia was awarded $3,498,224 under CWA § 319, 33 U.S.C. § 1329(h), a grant for implementation of Virginia's nonpoint source implementation program. Exhibit 5.

34. Fairfax County did not and cannot receive any of these funds to prepare MS4 permits or otherwise directly implement projects to reduce flows or sediment erosion on Accotink Creek. *See*, CWS § 319(h)(7), 33 U.S.C. § 1329(h)(7).

35. Virginia's Department of Conservation and Recreation ("DCR") is the state agency delegated by EPA to implement the regulatory oversight of stormwater including the issuance of NPDES VSMP permits for both MS4s and construction stormwater. AR008017-18.

36. Virginia has budgeted $22,522,633 in state funds for DCR's statewide implementation of a nonpoint source management plan for 2013, an amount that will drop to $11,579,937 in 2014. *See*, Department of Natural Resources 2013-2014 budget, http://dpb.virginia.gov/budget/buddoc12/pdf/partb/naturalresources.pdf (*accessed* 12/21/2012).

37. Fairfax County will not receive any of these funds to prepare MS4 permits or otherwise directly implement projects to reduce flows or sediment erosion on Accotink Creek.

38. EPA admits, "Despite the dedicated funding source the majority of stormwater utilities responding to a recent survey 55 percent indicated that current funding levels were either inadequate or just adequate to meet their most urgent needs (Black and Veatch 2005). *See*, AR001931.

39. Fairfax County does not have a "stormwater utility" through which to collect revenues for stormwater management.

40. Fairfax County has established a dedicated fund to pay for stormwater management, known as Fund 125. In 2013, Fairfax County will have $8 million for stream and water quality improvements. *See*, Fairfax County Fiscal Year 2013 Fund 125 adopted budget; http://www.fairfaxcounty.gov/dmb/fy2013/adopted/volume2/125.pdf (*accessed*, 12/21/2012).

41. Fairfax County estimates of the cost for implementation what EPA considers the only effective means to prevent scouring in Accotink Creek and thus the only means effective in curing the benthic impairment (by controlling scouring through control of water flows) at $405

to $510 million. *See*, *VDOT et al. v. EPA*, Complaint at ¶ 49. (U.S. Dist. Ct. Eastern Dist. of Virginia, 1:12-cv-00775, Dkt. No. 1).

42. The former Chief of economic, legislative and policy analysis for EPA's Office of Drinking Water and Ground Water provided the only detailed cost estimate found in the administrative record for implementation of what EPA considers the only effective means to prevent scouring and it is based on EPA standard assumptions. He estimated an implementation cost at approximately $400 million. AR000210.

43. Bill Frost, a Senior Associate with the Water Resources Practice of KCI Technologies, estimated the cost of partial implementation of scouring controls at no less than $100 million. AR000206. Mr. Frost's professional focus at KCI is on retrofitting stormwater management into developed urban areas. *See*, http://www.awsps.org/publications/watershed-science-bulletin/review-committee.html (*accessed* 12/21/2012).

44. In addition, Fairfax County estimates it will need to spend $70 - $90 million per year to bring the County's stormwater system into compliance with the Chesapeake Bay TMDL, prepared by EPA and opposed by Virginia and Fairfax County. *See*, Fairfax County Fiscal Year 2013 Fund 125 adopted budget, http://www.fairfaxcounty.gov/dmb/fy2013/adopted/volume2/125.pdf (*accessed*, 12/21/2012).

45. Prior to the TMDL remand, EPA intended to apply the same stormwater TMDL to other urban streams within the County, implying even larger cost burdens on Fairfax County. AR007968.

46. According to the National Academy of Sciences ("NAS"), the direct cost estimates fail to capture the "opportunity cost" of a TMDL, costs NAS claims are "significant."

AR000201. The administrative record is replete with examples of these costs. *See*, AR001932, AR007424, AR007341, AR000216.

47. When EPA issues an Accotink TMDL for the pollutant of concern (sediment), Fairfax County estimates that it would cost the County $295 million to address the sediment TMDL. *See*, *VDOT et al. v. EPA*, Complaint at ¶ 48. (U.S. Dist. Ct. Eastern Dist. of Virginia, 1:12-cv-00775, Dkt. No. 1).

48. Virginia law does not allow management of water quality resource projects to exceed the capability of the responsible unit of government. 9 VAC § 25-390-20(11).

49. Fairfax County has engaged in an extensive, sophisticated, comprehensive process to assess the status of its 30 watersheds and how best to manage them, an effort costing $15.2 million. Fairfax County "Environmental Improvement Program – Fiscal Year 2012", p. B-20, *available at* http://www.fairfaxcounty.gov/living/environment/eip/fy2012-eip/complete-eip.pdf (*accessed* 12/22/2012). Included in this effort is a 165 page report entitled Accotink Creek Watershed Management Plan. *See*, http://www.fairfaxcounty.gov/dpwes/watersheds/publications/ac/ac_plan_022411.pdf (*accessed* 12/22/2012).

ARGUMENT

I. Under the Clean Water Act, Congress intended States to maintain control over nonpoint source pollution.

Plaintiffs argue, and ask the Court to declare, that a TMDL addressing only nonpoint source pollutants is merely guidance and EPA does not have authority to mandate incorporation of the quantitative limits in the TMDL into MS4 permits or Virginia's Water Quality Management Plan, as demanded in the Capacasa letter, which reflects EPA's routine mandate letter issued upon publication of any TMDL.

Congress codified establishment of TMDLs within the authorities established to control point source pollution. 33 U.S.C. § 1313(d). Congress left control of nonpoint sources to States, limiting the federal role to development of information and preparation of guidelines. 33 U.S.C. § 1314(f) & § 1288; *and see*:

> "[T]he Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process. . . . Between requiring regulatory authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the latter course, judging that these matters were appropriately left to the level of government closest to the sources of the problem."

See S. Rep. No. 370, 95th Cong., 1st Sess. 8-9, 1977 Leg. Hist. 635, 642-43 (*cited to in National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982)).

EPA admits "Congress was aware that there might be pollution associated with water management activities but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution." *citing to* US EPA Memorandum from EPA General Counsel Ann Klee to EPA Assistant Administrator for Water Benjamin Grumbles "Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers," August 5, 2005 http://www.epa.gov/ogc/documents/water_transfers.pdf. *See* AR007592. EPA also admits there is a "delicate balance created in the statute between protection of water quality to meet federal water quality goals and the management of water quantity left by Congress in the hands of States and water resource management agencies." *See* AR007593. And, EPA admits the Clean Water Act embodies the Congressional intent to "protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" (*citing to* 33 U.S.C. § 1251(b)). *See*, AR007707 – 08.

Finally, as recently as December 5, 2012, EPA admits a TMDL is essentially a water quality planning process which is ***"not binding on the states***," *see, VDOT v. EPA* Case 1:12-cv-00775-LO-TRJ Document 41 Page 28 of 31 ("United States' Opposition to Plaintiffs' Motion for Judgment on the Pleadings") (*emphasis added*), *citing favorably to, Am. Farm Bureau Fed'n v. EPA*, No. 11-cv-00067 (M.D. Pa.) Dkt. No. 140 p. 10 ((Mem. of Nat'l Ass'n of Clean Water Agencies, *et al.*, filed Apr. 20, 2012).

With regard to the benthic impairment in Accotink Creek, EPA admits the Accotink Creek benthic TMDL addresses a nonpoint source problem, stating: "[a]s runoff enters Accotink Creek during storm events increased sediment loads from in-stream sources (e.g., bank erosion) are generated causing habitat degradation for aquatic life." *See,* Accotink Creek TMDL, AR000091.

Despite all these admissions and despite the material facts stated *supra*, EPA issued the Capacasa letter, stating that the Accotink Creek nonpoint source TMDL is binding on Virginia. AR000001. As a matter of statutory law, EPA has no authority to issue that kind of mandate.

The Congressional decision to leave nonpoint source issues in the hands of the State reflects a particularly persuasive ground truth as to why Virginia and Fairfax County should be allowed to employ their own sovereignty over Accotink Creek. Fairfax County has been living with the nature of this creek for well over 200 years. They have built roads, bridges, stormwater facilities and, over the past decade, they have developed a sophisticated, detailed and comprehensive watershed plan and restoration program. *See* ¶ 49, *supra*. Knowing best the on the ground conditions of this watershed, the County recognizes that the most they can do in Accotink Creek watershed is to prevent any additional reduction in the health of the aquatic environment. *See* AR001238 (stating the primary goal of watershed restoration level II activities

is "to prevent further degradation" and due to cost, these activities must be ranked by priority); *and see*, AR001220, (identifying Accotink Creek as a watershed restoration level II area).

Virginia and Fairfax County have worked together on how best to manage this highly impervious watershed. The conceit that EPA can mandate a better outcome through a TMDL is invalidated by the facts about this watershed and the opportunity costs inherent in any attempt to implement a TMDL on this creek. Even EPA acknowledges that Accotink Creek has natural impervious soils covering in excess of 70% (*see* ¶ 15, *supra*) of the watershed and that greater than 25% imperviousness is certain to cause benthic impairment (*see*, ¶ 16, *supra*).

Fairfax County will have to exhaust all the funds it has accumulated not only for comprehensive watershed management of Accotink Creek, but also for the other 29 watersheds within the County, if it is forced to implement an Accotink Creek benthic TMDL, as the cost of physical construction associated with a TMDL, alone, would obviate use of those funds needed for other structural and non-structural projects, and yet with no reasonable expectation of eliminating the benthic impairment in a creek whose watershed is 71% impervious Class D soil (clay).

In light of the relevant facts and law, Plaintiffs ask the court to declare the Accotink Creek TMDL is merely guidance and EPA does not have authority to mandate the quantitative limits in a nonpoint source TMDL be incorporated into MS4 permits or Virginia's Water Quality Management Plan.

II. EPA mandate letters for nonpoint source TMDLs improperly alter the constitutional balance between the states and the federal government.

As discussed above, in the Clean Water Act, Congress "made a clear and precise" decision that "reserved to State and local governments" control over nonpoint sources, and nothing in that Act suggests otherwise. The *Gregory* plain statement rule requires that "if

Congress intends to alter the usual constitutional balance, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991); *and see, Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (U.S. 2000) *and, Suhail Najim Abdullah Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 231 (4th Cir. Va. 2012) (4th Cir. applying the plain statement rule).

Not only did Congress not make a clear and unmistakable statement that it intended to shift traditional responsibility for nonpoint sources from the States to EPA, it specifically stated that it would not. The Capacasa letter manifests a routine attempt by EPA to improperly alter the usual constitutional balance and for this reason, Plaintiffs ask the court to declare any nonpoint source Accotink Creek TMDL can be only guidance and EPA does not have authority to mandate quantitative limits be incorporated into MS4 permits or Virginia's Water Quality Management Plan in such a TMDL.

III. The CWA § 319 grant does not create the power to mandate implementation of the Accotink Creek benthic TMDL and thus EPA nonpoint source mandate letters violate the Tenth Amendment.

Mandate letters such as the Capacasa letter violate the Tenth Amendment on three bases, each associated with the rule reiterated in *Printz*: "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. U.S.* 521 U.S. 898, 925 (1997).

A. The absence of a federal grant protects Fairfax County's sovereignty.

Neither Congress nor EPA has created or applied a spending power that constitutes a contract to implement the TMDL as required by the Capacasa letter, especially with regard to Fairfax County. In general, "[t]he Spending Clause is a 'permissible method of encouraging a State to conform to federal policy choices,' because 'the ultimate decision' of whether to

conform is retained by the States -- who can always decline the federal grant." *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. Va. 2006) (*citing to New York v. United States*, 505 U.S. 144, 168, (1992)). Admittedly, CWA sections 205(j) and 319(h), 33 U.S.C. §§ 1285(j) & 1329(h), provide grants to prepare water quality management plans and place a "priority" on controlling nonpoint source pollution problems; ***however***, the act also limits use of these funds to demonstration projects, when given by a state to a county (CWA § 319(h)(7), 33 U.S.C. § 1329(h)(7)). Thus, the Section 319 grants are not available to Fairfax County to implement the Accotink Creek TMDL and thus cannot be part of any "contract" "encouraging a State to conform to federal policy choices." Thus, absent a grant to Fairfax County, EPA is barred from forcing Fairfax County to implement, by legislation or executive action, federal regulatory programs, as demanded in the Capacasa letter with regard to the Fairfax County MS4 permit.

B. Virginia did not knowingly agree to impose $295 million costs on Fairfax County when accepting CWA § 319 grant funds.

EPA mandate letters are directed to states such as Virginia which have received Section 319 grants. EPA may argue that this grant forces Virginia to require Fairfax County to implement a federal program, but it does not. These mandate letters violate the requirement for an unambiguous grant condition, the second prong of *South Dakota v. Dole* federal spending test. Only by meeting this test can EPA surmount the *Printz* rule barring a federal mandate commandeering state officials and their budgets. This prong requires "that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

As discussed, CWA § 319(h)(7) specifically prohibits use of the grants by Counties except for conducting demonstration projects. In light of this proscription, Virginia did not and

could not have known that EPA planned to issue an *ultra vires* demand letter violating Section 319(h)(7).

Further, Virginia could not have known that the consequences of taking less than $4 million in grants from the federal government for purposes of developing management plans and conducting demonstration projects EPA would require Virginia to force Fairfax County to undertake a $295 million compliance program on a single creek and in so doing commandeer more than 100 percent of Fairfax County's entire watershed management budget.

Nor could Virginia know that EPA would demand the state to violate its own laws that require "the management demands of a water resource project do not exceed the capability of that unit of government responsible for its operation and maintenance." 9 VAC § 25-390-20(11), as mandated under VA Code § 62.1-44.36,

Finally, Virginia could not know that EPA would not consider itself also bound by the consequences of entering a grant agreement. When entering into a grant agreement Virginia is bound by its own laws and now may rely on the principle of *caveat emptor, qui ignorare non debuit quod jus alimenum emit* (let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another). In Virginia *caveat emptor* is a "well-settled principle:

> In the early case of *Bayly v. Merrel*, Cro. Jac., 386, it was adjudged that "the law gives no remedy for voluntary negligence," and so the law is at the present day. Hence, generally speaking, if the parties have equal means of information, so that, with ordinary prudence or diligence, either may rely on his own judgment, they are presumed to have done so; or, if they have not done so, they must abide the consequences of their own folly or carelessness.

Lake v. Tyree, 90 Va. 719, 723, (1894); *Costello v. Larsen*, 182 Va. 567, 571, (1944).

> This principle is illustrated in the application of the doctrine of *caveat emptor* . . .

We said the doctrine provides that:

> Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in

> general, will leave him where he has been placed by his own imprudent confidence.
>
> *Kuczmanski*, 225 Va. at 369, 302 S.E.2d at 50 (quoting *Horner v. Ahern*, 207 Va. 860, 863-64, 153 S.E.2d 216, 219 (1967); *Costello*, 182 Va. at 571-72, 29 S.E.2d at 854.)"

Virginia Natural Gas Co. v. Hamilton, 249 Va. 449, 455-456 (Va. 1995). EPA "must abide the consequences of their own folly or carelessness" and should have known that Virginia was bound by laws limiting the impact of state regulations on counties and that Virginia could not enter a contract that would violate that law. For this reason, again, Virginia could not have been cognizant of EPA's refusal to be bound by the Virginia regulatory impact limitation, and cannot be bound by an ambiguous grant agreement. EPA's failure to prepare an unambiguous grant agreement with regard to implementation of a $400 million unfunded regulatory mandate, now in the guise of a $4 million dollar grant means EPA "must abide the consequences of their own folly or carelessness."

For these reasons, the terms of the grant agreement were not unambiguous and did not enable Virginia to exercise is choice knowingly, cognizant of the consequences of its participation. Having failed to meet this prong of the *Dole* test, the *Printz* rule applies and EPA may not require Virginia to consider the Accotink Creek benthic TMDL as anything more than guidance.

C. EPA mandate nonpoint source letters impermissibly create a regulatory mandate

As Justice O'Connor explains, "[t]here is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants." *S.D. v. Dole*, 483 U.S. at 215-216. "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of

Congress' delegated regulatory powers." *Id. (relying on United States v. Butler*, 297 U.S. 1 (1936)).

EPA has taken the position that a state that accepts Section 319 grant funds must incorporate a nonpoint source TMDL into its water quality plan and NPDES permits. *American Farm Bureau v. EPA*, (Middle Dist. Penn. 1:11-cv-00067-SHR Dkt. No. 140, p. 9 (10/24/12). This is not a statement on "how the money should be spent" but is instead a regulatory mandate. As an example of EPA mandate letters, the Capacasa letter specifically "requires" Virginia to incorporate the TMDL into its Water Quality Management Plan and any NPDES permits (including MS4 permits) it issues. More specifically, it "requires" incorporation of the quantitative wasteload allocations into the MS4 permits, making them enforceable regulatory requirements on Fairfax County. EPA goes so far as to specify the regulations under which it will enforce its TMDL mandate, to wit, 40 C.F.R. § 130.7(d)(2) (mandating inclusion of the TMDL wasteload and load allocations in Virginia's Water Quality Management Plan) and 40 C.F.R. § 122.44(d)(1)(vii)(B) (mandating wasteload and load allocations in MS4 permits). This is an obvious transgression of the *Butler* rule prohibiting the expansion of a grant agreement into regulatory territory.[7]

For these reasons, Plaintiffs ask the court to declare any Accotink Creek nonpoint source TMDL can be no more than guidance and EPA does not have authority to mandate the

[7] Plaintiffs note, in the only appellate court case addressing implementation of nonpoint source TMDLs as enforceable elements of water quality plans or NPDES permits, the 9th Circuit did not address whether TMDLs could be so included under today's EPA rules, specifically expressing no opinion as to the validity of such a requirement. *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002). Whether EPA can mandate implementation of a nonpoint source TMDL through regulation is raised here as a matter of first impression for any federal court, and we argue is barred by the *Butler* rule.

quantitative limits in a nonpoint source TMDL be incorporated into MS4 permits or Virginia's Water Quality Management Plan.

IV. The cost of implementing the TMDL is confiscatory and a violation of the Tenth Amendment bar on commandeering.

The preceding section identifies a number of Tenth Amendment issues. We set out two of them more specifically here as stand-alone Tenth Amendment questions now before the court.

A. The federal government may not commandeer Fairfax County officials and budgets where there is no federal grant program that provides Fairfax County funds.

There is no contract between EPA and Fairfax County. Fairfax County has received no grant funds from EPA or from Virginia originating from federal coffers, to prepare an MS4 permit or implement controls required by its MS4 permit. EPA mandate letters "require" a nonpoint source TMDL be incorporated, for example, into Fairfax County's MS4 permit and, because EPA mandates such implementation of its federal program through this permit, this kind of letter "requires" Fairfax County to implement a federal program. This EPA may not do.

> Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The *Commerce Clause*, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Printz v. U.S. 521 U.S. 898, 924 (1997) (quoting . *New York v. United States*, 505 U.S. 144, 166 (1992)). Plaintiffs appreciate that this subsection raises the thorny issue identified by Justice Scalia, to wit:

> The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. . . . . We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.

Printz v. U.S. 521 U.S. at 917-18. This case is the proper case and it opens up the unlitigated question, can the federal government enforce federal requirements against local governments if the state, itself, has not directly regulated the local government. While most federal environmental regulatory programs operate through the states, sometimes states do not accept the federal program, leaving it to federal agencies to regulate directly. We are aware of this problem within the ambit of the Clean Air Act, the Superfund program, and here within the Clean Water Act. In this case, Virginia has rejected the TMDL and cannot incorporate it into Fairfax County's MS4 permit as a result. If the Court does not agree with Plaintiffs other arguments, *supra*, it must now address this issue.

B. The presumption that a grant program is no more than an enticement to follow federal policies is invalid if a grant does not constitute "reimbursement" but instead imposes regulatory costs.

Professor Baker has examined the coercion test and suggests that if a grant is no more than a reimbursement for state action, it is constitutional; but, if the grant is not a reimbursement, and establishes the potential for a penalty, or is one, then the factual predicate for providing the grant disappears and the local expenditures are no more than regulatory spending – an unfunded mandate to implement a federal program, and unconstitutional. *See,* Baker, Lynn A. *Conditional Federal Spending After Lopez,* 95 Colum. L. Rev. 1911, 1916 (1995). Professor Berman extends and explains this definition of coercion, arguing "Because such purposes make the burden a penalty, the proposal can be successfully challenged as coercion without the state having first to call the federal government's bluff, as it were." Berman, Mitchell N. "*Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 58 (2001).

Plaintiffs suggest that Fairfax County should not have to first suffer a compliance action by EPA before arguing that the Capacasa letter imposes regulatory costs and thus is unconstitutional under *Printz* and *New York*.

CONCLUSION

Because EPA mandate letters associated with a nonpoint source TMDLs "require" states and counties to implement a federal program absent the voluntary agreement of the states and counties, in contravention of both the Clean Water Act and the Tenth Amendment, the OWC and SDC request that this Court enter a judgment declaring that EPA does not have the authority necessary to issue a mandate letter either under the CWA or the Tenth Amendment and thus that any such letter like the Capacasa letter is void *ab initio*; declare that any Benthic TMDL for Accotink Creek can only have the force of guidance; and, award Plaintiffs its reasonable attorneys' fees and costs.

DATED January 3, 2013

Respectfully submitted,

THE OCCOQUAN WATERSHED COALITION
and
THE SPRINGFIELD DISTRICT COUNCIL:

/s/ *David W. Schnare*
David W. Schnare (VSB No. 44522)
Free-Market Environmental Law Clinic
9033 Brook Ford Road
Burke, Virginia 22015
Telephone: (571) 243-7975
Schnare@fmelawclinic.org

Counsel for Plaintiffs

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

THE OCCOQUN WATERSHED COALITION, *et al.*, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.* Defendants.	Civil Action No. 1:12cv820

I hereby certify that on this 3red day of January, 2013, I electronically filed the foregoing Plaintiff's "Motion for Summary Judgment and Supporting Memorandum of Facts, Points and Authorities" with the Clerk of the Court using the CM/EMF system which will send notification of such filing to the following:

DENNIS C. BARGHAAN, JR.
Assistant U.S. Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: (703) 299-3891
Fax: (703) 299-3983
Email: dennis.barghaan@usdoj.gov

KENNETH C. AMADITZ
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044-7611
Telephone: (202) 514-3698
Fax: (202) 514-8865
Email: kenneth.amaditz@usdoj.gov

Because Exhibit 4 is a spreadsheet, I have also made service by email of that Exhibit as an editable MS Excel file and will provide it to the Court in that form upon request.

/s/ David W. Schnare