

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

THE OCCOQUN WATERSHED COALITION
Springfield, VA
c/o 9033 Brook Ford Rd.
Burke, VA 22015

and

THE SPRINGFIELD DISTRICT COUNCIL
Springfield, VA
c/o 9033 Brook Ford Rd.
Burke, VA 22015

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and
LISA P. JACKSON, ADMINISTRATOR
1200 Pennsylvania Ave., N.W.
Washington, DC 20460,

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY REGION III, and
JON M. CAPACASA, DIRECTOR
WATER PROTECTION DIVISION
1650 Arch St.
Philadelphia, PA 19103

Defendants.

Civil Action No. 1-12 CV 820

**AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiff Occoquan
Watershed Coalition hereby files an AMENDED COMPLAINT. The AMENDED

COMPLAINT adds a second Plaintiff, the Springfield District Council. Rule 15 authorizes a party to amend its pleading after 21 from initial service “with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Defendants have provided the requisite written consent. *See* Exhibit 1.

Counsel for Plaintiff has conferred with counsel for the Defendants and is authorized to state that the Defendants do not oppose this motion subject to the agreement that Defendants be provided until October 16, 2012, to answer or otherwise respond to the amended complaint. *Id.*

The Occoquan Watershed Coalition (OWC), and the Springfield District Council (SDC), by and through counsel, bring this action pursuant to the Tenth Amendment of the U.S. Constitution, and with reference to the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, and the Unfunded Mandates Relief Act for declaratory and injunctive relief against the United States Environmental Protection Agency, its Administrator Lisa P. Jackson, the United States Environmental Protection Agency Region III, and Jon M. Capacasa, Director, Water Protection Division (collectively, “EPA” or “Defendants”), and allege as follows:

NATURE OF THE ACTION

1. The Occoquan Watershed Coalition (OWC) and the Springfield District Council (SDC) bring this civil action on behalf of its members seeking declaratory and injunctive relief pursuant to 28 U.S.C. § 2201, asking the Court to: (1) declare the Total Maximum Daily Loading (TMDL) for Benthic Impairments in the Accotink Creek Watershed an unconstitutional commandeering of the Commonwealth of Virginia and arms thereof, in violation of the Tenth Amendment of the U.S. Constitution; (2) issue a permanent injunction against the Defendants, barring EPA from directing inclusion of TMDLs in Municipal Separate Storm Sewer System

(MS4) permits ; and (3) order such necessary and proper additional injunctive relief as this Court deems just and proper.

2. EPA has imposed an unfunded mandate that requires Fairfax County, Virginia, and the Virginia Department of Transportation (VDOT), to implement a federal program – one not imposed by or under Virginia law. Specifically, by letter of April 18, 2011, Jon M. Capacasa, Director of the EPA Region III Water Protection Division, ordered the Commonwealth of Virginia to incorporate the dictates of the Accotink Creek TMDL into its Water Quality Management Plan, thus requiring Fairfax County and VDOT to control the non-point sources of sediment – a forced implementation of an unfunded federal mandate. This violates the *Printz* rule that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 925 (1997); and see, *NFIB v. Sebelius*, slip op. at 47-48 ("[T]he Constitution simply does not give Congress the authority to require the States to regulate. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.") (*internal citations omitted*).

3. EPA established the Accotink TMDL to control the quantity of rain water allowed to flow into the creek. (see http://www.epa.gov/reg3wapd/pdf/pdf_tmdl/AccotinkPortfolio.pdf). The TMDL is intended to address an impairment in stream quality, specifically a reduction in quality of the "benthic" ecosystem, the organisms that live on and near the bottom of healthy streams. The EPA correctly recognizes that high flows of water will scour the sides of streams, causing soils to mix into the water only later to settle onto the bed of the stream and thereby suffocate the benthic organisms.

4. The federal Clean Water Act (CWA) places management of sediments that flow

into the stream through pipes (point sources) firmly in EPA's hands. That act, however, leaves management of sediments that come from "non-point" sources firmly in the hands of the State and its local governments. The Capacasa Accotink TMDL implementation mandate "requires" Virginia to apply the Accotink TMDL in permits that regulate non-point sources of pollution. It is that mandate that violates the Commonwealth's sovereignty and its Tenth Amendment rights. This mandate constitutes an actual and imminent threat of federal enforcement, which could include loss of transportation funds for highway construction and penalties against Fairfax County for failure to implement the impossible-to-implement TMDL requirements associated with a revised stormwater permit.

5. If the Commonwealth were forced to implement this unfunded federal mandate, it would exhaust the resources available to address all other stream restoration projects already planned, including several high priority projects in the OWC territory. The additional \$225 million needed to comply with the EPA unfunded mandate, over and above what the County had already planned to expend on Accotink Creek for stream restoration, would consume the entire County budget for all watershed restoration for all 30 of the county's watersheds for a period of 45 years. Eight of those watersheds are within the OWC territory.

6. Indeed, the additional \$225 million needed to comply with the EPA unfunded mandate for a single stream equals 65.2 percent of the county's annual operating expenses (General Fund Direct Expenditures).¹

7. The Virginia Department of Transportation is similarly impacted. They would have to expend \$70 million to comply with the TMDL, would have to engage in major road realignment, would have to assume responsibility for runoff from private properties and, at the end of the day, would not have eliminated the impairment of the stream due to the rainwater

¹ See, Fairfax County Adopted 2012 Budget, <http://www.fairfaxcounty.gov/dmb/fy2012/adopted/overview.zip>.

passing over VDOT lands. This cost would significantly reduce the ability of VDOT to address high priority road maintenance and construction desperately needed in northern Virginia.

8. The injuries arising out of the commandeering of state and county funds would be directly traceable to the federal unfunded mandate. The relief sought would allow the County and the Commonwealth to address the Accotink non-point sources of pollution in a manner compatible with other County duties to preserve and protect its citizens and their property, including implementation of stream restoration within the OWC area.

9. This is the kind of coercive commandeering the Constitution does not authorize – commandeering that tramples the sovereignty of the state and local governments.

10. For twenty years, the Plaintiffs have worked assiduously to maintain and improve stream quality in Fairfax County, working shoulder to shoulder with the Commonwealth, VDOT and Fairfax County who have as well. The question raised here is whether the U.S. EPA has the Constitutional authority to replace the Commonwealth's and Fairfax County's pre-existing right to determine how, at what speed and at what cost they will address the non-point source pollution in Accotink Creek.

PARTIES

Plaintiff Occoquan Watershed Coalition

11. Plaintiffs include by reference and in support of allegations made herein the declaration of David W. Schnare, President of the Occoquan Watershed Coalition (OWC). Exhibit 2.

12. The Occoquan Watershed Coalition is a nonpartisan, broad-based citizens group organized on December 7, 1994. The Coalition works with many organizations as well as the Fairfax County Board of Supervisors to address issues confronting a defined area of the

Springfield District. The boundaries include Union Mill Road to the west, Route 123 to the east, Braddock Road to the north and south to the Prince William/Fairfax County border. This area is zoned for low impact 5 acre development in order to protect the Occoquan Reservoir, one of the two sources of drinking water for the County. It is generally referred to as the “Downzoned” area. It includes approximately 4813 homes with a population of approximately 16,426.

13. The OWC membership consists of 69 Associations serving approximately 2,200 lot owners. In addition, there are 400 individual members. These 2,600 lot owners constitute approximately 46% of the home owners in the OWC territory.

14. The OWC’s downzoned area contains eight of the county’s 30 watersheds, specifically, Little Rocky Run, Johnny Moor Creek, Old Mill Branch, Popes Head Creek, Sandy Run, Ryan’s Dam, Occoquan Creek and Mill Branch.

15. Town of Clifton is a member of the OWC sitting in the Popes Head Creek watershed. Among the watershed restoration projects are eight that, if not completed, directly injure the Town. These include a project (PH9885) at the elementary school that is the second highest rated priority project in the watershed. As well, projects PH9800 and PH9400 are needed to prevent undermining a bridge (PH9400) and a road (PH9800) to ensure continued emergency access to Clifton citizens.

16. The OWC-area watershed plans also include dozens of “non-structural” projects that affect every citizen in the Downzoned area, including every individual member of the OWC. In the Popes Head Creek, alone, are projects to support citizen organizations who actively work to prevent stream degradation, projects to educate ATV users and enforce against them if they violate county rules by destroying the stream valleys, walls and watercourses, and projects to educate landowners and private pond owners on how to prevent stream degradation on and near

their properties.

17. The OWC Board of Director ex-officio members include the Chairman of the Fairfax County Board of Supervisors, the Fairfax County Springfield District Supervisor and the House of Delegates and Senators representing the Downzoned area.

18. The OWC has three standing committees, the Executive Committee, the Environmental Committee and the Transportation Committee. The latter two have engaged in multiple projects that protect the Downzoned area's eight watersheds, and the Chairman of each committee has routinely been appointed to the Fairfax County Environmental Quality Advisory Council and the Transportation Advisory Council, respectively. The OWC has testified before the House of Delegates regarding protection of Virginia waters, including the Fairfax County watersheds. The OWC is one of only two organizations specifically dedicated to protection of the Downzoned watersheds. During the public comment period for the challenged action, David W. Schnare, Chairman of the Environmental Committee, provided extensive legal, policy, and technical comments on EPA's Draft Benthic TMDL Development for Accotink Creek (the "Draft Accotink TMDL"), which EPA largely disregarded. *See* EPA Response.

19. Because implementation of the federal unfunded Accotink TMDL mandate would exhaust all funds dedicated to watershed management within Fairfax County, OWC members are directly and imminently threatened with injuries from failure to implement long-standing, high priority watershed projects, due exclusively to loss of long-planned funding of restoration projects in the Downzoned area, projects that would receive funding but for the federal unfunded mandate. The relief sought in this matter would redress the imminent harm by placing decision-making on watershed funding back into county hands that are committed to funding high-priority projects in the Downzoned area.

20. The OWC asserts its members' rights to local sovereignty over non-point source pollution, and their rights to protection of the County's drinking water supply, transportation funding of critical projects and protection of the stream banks on their own lands. These interests fall within the zone of interests protected by the Constitution and the structure of the Constitution, as they deal with direct harm to property and safety, and to the citizenship rights of the Commonwealth's citizens.

21. The injuries that the federal unfunded mandate would cause are direct and specific, as they relate to specific numbered projects planned for the OWC watersheds. Some of these projects affect only OWC members (*e.g.*, projects PH9885, PH9800 and PH9400). None of the harms are so widely experienced as to constitute generalized grievances.

22. Because the OWC is dedicated to preservation of water quality in the Occoquan Reservoir and in the eight watersheds draining into that drinking water source, because OWC members would be directly injured in fact by the concrete and particularized actual and imminent threat causally related to and fairly traceable to the federal unfunded mandate, because the threat to OWC members would be relieved by the remedy sought in this matter, the Plaintiffs meet the requirements for Article III standing.

23. Because OWC members suffer individualized injury due to the implementation of the TMDL, they have standing to argue the 10th amendment violations.²

24. Despite consultation by the OWC with the Virginia Attorney General's offices and the Fairfax County Attorney, neither has taken steps to protect their clients' sovereignty, specifically choosing instead to leave this task to the OWC. *See*, USDC ED Virginia 1:12CV775

² *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).

JCC/TRJ Complaint. Because of the cost of litigation to any single individual or town, the OWC is the only organization available to assert the rights of their members, each of which would otherwise have standing to sue in their own right. Because the injuries listed herein are concrete, specific and not generalized grievances that fall within the zone of interests protected by the U.S. Constitution, the structure of that Constitution and the Constitution of the Commonwealth of Virginia; and, because the interests we seek to protect are germane to the OWC's purposes, the Plaintiffs meet the requirements for prudential standing and organizational standing.

Plaintiff Springfield District Council

25. Plaintiffs include by reference and in support of allegations made herein the declaration of James R. Kirkpatrick, Chair of the Springfield District Council (SDC). Exhibit 3.

26. The Springfield District Council is an unincorporated, nonpartisan, broad-based association. The Council works with many organizations as well as the Fairfax County Board of Supervisors to address issues confronting the Springfield Magisterial District. This district includes, and the SDC represents the interests of approximately 42,537 homes with a population of approximately 121,127. The SDC membership consists of civic and homeowners associations, including, for example, the Old Mill Community (OMC) homeowners association.

27. The Old Mill Community homeowner association owns a parcel of land identified by Fairfax County Tax Map No. 0783 06 D1. A tributary of Pohick Creek, one of ten watersheds in the Springfield Magisterial District, runs across the Old Mill Community parcel. The OMC parcel, and private homes who are members of the OMC, have flooded because Fairfax County's stormwater management program has not has sufficient funds to maintain the stormwater facilities used to manage the flow of water into Pohick Creek. These maintenance funds come out of the same account that would be used to pay for compliance with the Accotink

TMDL.

28. The Springfield District Council has a long history of concern over environmental issues within Fairfax County, including participation in the support efforts that resulted in establishment of Fairfax County Budget Fund 125, the stormwater fund used to manage the 30 Fairfax County watersheds. In 2011, this fund contained \$8,343,937 for watershed maintenance and restoration and will grow to \$39,775,000 by 2013. To understand the actual magnitude of this amount, this equates to about \$1.3 million per watershed each year after 2013. The most recent stormwater facility maintenance to prevent flooding of the OMC parcel and homes cost in excess of \$1 million – one project out of hundreds described in the Fairfax County watershed management plans for the 10 watersheds within the Springfield District. Because the OMC stormwater maintenance has a limited lifespan, it will need to be redone at a similar cost within the next decade. Because Fairfax County has placed 100 percent compliance with its Clean Water Act MS4 permit (*see*, FY 213 Adopted Budget Plan (Vol. 2) at p. 259, available at www.fairfaxcounty.gov/dmb/fy2013/adopted/volume2/125.pdf) as its highest priority, followed by dam restoration and parking facility maintenance, if EPA TMDL becomes enforceable, it will empty Fund 125, eliminating the funds necessary to prevent inundation of OMC land and flooding of its members' homes.

29. The SDC asserts its members' rights to local sovereignty over non-point source pollution, and their rights to protection of the County's drinking water supply, transportation funding of critical projects and protection of the stream banks on their own lands. These interests fall within the zone of interests protected by the Constitution and the structure of the Constitution, as they deal with direct harm to property and safety, and to the citizenship rights of the Commonwealth's citizens.

30. The injuries that the federal unfunded mandate would cause are direct and specific, as they relate to specific numbered projects planned for the SDC watersheds. Some of these projects directly affect SDC members. None of the harms are so widely experienced as to constitute generalized grievances.

31. Because the SDC is dedicated to preservation of water quality in the Occoquan Reservoir and in the watersheds draining into that drinking water source, because SDC members would be directly injured in fact by the concrete and particularized actual and imminent threat causally related to and fairly traceable to the federal unfunded mandate, because the threat to SDC members would be relieved by the remedy sought in this matter, SDC meets the requirements for Article III standing.

32. Because SDC members suffer individualized injury due to the implementation of the TMDL, they have standing to argue the 10th amendment violations.

33. Despite consultation with the Virginia Attorney General's offices and the Fairfax County Attorney, neither has taken steps to protect their clients' sovereignty, specifically choosing instead to leave this task to the plaintiffs in this case. *See*, USDC ED Virginia 1:12CV775 JCC/TRJ Complaint. Because of the cost of litigation to any single individual or town, the SDC is an organization available to assert the rights of their members, each of which would otherwise have standing to sue in their own right. Because the injuries listed herein are concrete, specific and not generalized grievances that fall within the zone of interests protected by the U.S. Constitution, the structure of that Constitution and the Constitution of the Commonwealth of Virginia; and, because the interests they seek to protect are germane to the SDC's purposes, SDC meets the requirements for prudential standing and organizational standing and would be a proper plaintiff in this matter.

Federal Defendants

34. Defendant United States Environmental Protection Agency is the federal agency primarily responsible for overseeing the implementation of the CWA, including the review, approval, and, if necessary, direct establishment of TMDLs in the States, including Virginia.

35. Defendant Lisa P. Jackson is the Administrator of the United States Environmental Protection Agency and, as such, is charged with the supervision and management of all decisions and actions of the agency, including those taken pursuant to the CWA in Virginia. She is sued in her official capacity only.

36. Defendant United States Environmental Protection Agency Region III is one of ten regional offices of Defendant United States Environmental Protection Agency and is the regional office with jurisdiction including Virginia and Accotink Creek.

37. Defendant Jon M. Capacasa is Director of the Water Protection Division of the United States Environmental Protection Agency Region III and is sued in his official capacity only.

Non-Party Sovereigns

Virginia Department of Transportation

38. VDOT is an agency of the Commonwealth of Virginia that is responsible for building, maintaining and operating Virginia's roads, bridges and tunnels. VDOT's mission is to plan, deliver, operate and maintain a transportation system that is safe, enables easy movement of people and goods, enhances the economy, and improves quality of life. VDOT maintains the majority of the interstate, primary, and secondary roads in Virginia, including in the Accotink Creek watershed. Accotink TMDL at 6-9.

39. Since the 1970s, erosion and sediment control plans have been a major component of the activities undertaken by VDOT and, since the early 1990s, post-construction stormwater best management practices (“BMPs”) have been an integral design component of all roadway and facility construction plans regulated under the Virginia Stormwater Management Act, Va. Code Ann. § 10.1-603.2 *et seq.*, and Regulations, 4 Va. Admin. Code § 50-60-10 *et seq.*

40. As a delegated administrator of its erosion and sediment control and stormwater management programs, VDOT has produced numerous guidance documents, including Road and Bridge Standards and Specifications and design, construction, and maintenance directives. Many of these guidance documents are recognized as standard-setting and are used by localities and private entities statewide to protect water quality.

41. VDOT partners with various service and conservation groups to reforest areas of State-owned property. Through this effort, over one million trees have been planted along Northern Virginia’s roadsides. The resulting restoration of the tree canopy supports filtering of air and stormwater, slows the erosive acceleration of stormwater runoff, and lowers stormwater runoff temperatures from heated impervious surfaces.

42. VDOT’s research arm, the Virginia Center for Transportation Innovation and Research, has conducted numerous environmentally progressive research projects, including a pilot project in partnership with Fairfax County to evaluate the effectiveness of Low Impact Development (“LID”) measures for potential use on linear highway projects. Other projects have resulted in the evaluation and development of new and innovative practices in erosion and sediment control, pollution prevention, and post construction stormwater management.

43. In Fairfax County alone, VDOT has created approximately 10 acres of wetlands and restored 2,635 linear feet of streams to compensate for unavoidable impacts from highway

construction projects. VDOT also participates as a watershed advisory group member to support Fairfax County's development of watershed management plans.

44. VDOT has routinely and regularly worked with the OWC to ensure local participation in development of its transportation and environmental plans.

45. The Accotink TMDL assigns an aggregated MS4 and construction stormwater wasteload allocation to VDOT, requiring a 50.5% reduction in the one-year, 24-hour flow rate over an allocated 4,190.4 acres in the Accotink Creek watershed. Accotink TMDL at 6-9.

46. Such a reduction in flow as demanded by EPA in a highly urbanized area cannot be achieved by VDOT through retrofitting existing stormwater management structures due to functionally impervious soils, the presence of environmentally sensitive areas, and the public safety needs of maintaining the structural integrity of building foundations, roadways, bridge abutments, and retaining walls. Consequently, efforts to achieve such a reduction in stormwater flow as demanded by EPA would require significant public takings of private property in order to build numerous new stormwater management structures.

47. In addition, since much of the stormwater flow from VDOT property into Accotink Creek originates from adjacent properties, EPA is effectively forcing VDOT to regulate runoff from adjacent properties which it neither owns nor controls.

48. The Accotink TMDL mandates stormwater flow rate reductions by VDOT that VDOT estimates will cost \$70 million or more to implement. However, these costly flow reductions are not expected to achieve the desired healthy benthic ecology in Accotink Creek.

49. VDOT holds a Phase II MS4 NPDES permit (Permit Number VAR040115) for its Northern Urban Area, including an extensive land area within the Accotink Creek Watershed. Accotink TMDL at 2-14 and B-1.

50. VDOT is, or imminently will be, adversely affected by EPA's Accotink TMDL because EPA takes the position that 40 C.F.R. § 122.44(d)(1)(vii)(B) requires that the terms and conditions of NPDES permits for MS4s, such as VDOT's, must be consistent with any applicable TMDL, notwithstanding the specific standard for MS4 permits set forth in CWA § 402(p)(3)(B)(iii). *See* EPA, Accotink TMDL, Response to Comments Document at Comments # 42, *available at* http://www.epa.gov/waters/tmdl/docs/va/VA_AccotinkResponsetoComments3-24-2011.pdf (the "EPA Response"); *see also* Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, regarding "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'" at 3 (November 12, 2010), *available at* http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf (*citing* 40 C.F.R. § 122.44(d)(1)(vii)(B)) (the "EPA Flow Memo").

51. The adverse and costly TMDL requirements and the MS4 permit conditions that will imminently result from the Accotink TMDL will reduce the funds available to meet other pressing transportation and watershed restoration projects elsewhere in Fairfax County, including in the Downzoned area, and this causes a concrete and particularized injury to OWC members, which is directly traceable to the Accotink TMDL, and a favorable decision by this Court will redress OWC's members' injuries.

52. The OWC has been informed that VDOT has filed against EPA, challenging the Accotink Benthic TMDL on technical grounds and under the Administrative Procedure Act, but is not pressing a claim of unconstitutional commandeering.

Fairfax County

53. Fairfax County is a political subdivision of the Commonwealth of Virginia.

54. Fairfax County has a long-held commitment to water quality protection and restoration initiatives and activities that far exceed CWA requirements applicable to the County. This history dates at least back to the 1950s, when the Fairfax County Park Authority began acquiring stream valley land for protection.

55. In the 1960s, in what became a model for Virginia's subsequent Erosion and Sediment Control Law, Fairfax County adopted its Erosion and Sediment Control Ordinance and began to require new development to manage stormwater by reducing peak flow rates to pre-development peak flow rates. Also in the 1960s, in anticipation of widespread development in the Pohick Creek Watershed, Fairfax County strategically planned and built six large dams to provide water quality and flood-protection benefits, among others, within the watershed.

56. In the 1970s, Fairfax County incorporated an Environmental Quality Corridor Policy into its Comprehensive Plan to protect areas adjacent to streams from development.

57. In the 1980s, Fairfax County rezoned nearly 41,000 acres of its Occoquan River Watershed to significantly reduce development densities for water quality improvement (the Downzoned area). At the same time, the Board created a Water Supply Protection Overlay District, implementing water quality BMPs on approximately 63,000 acres.

58. In the 1990s, Fairfax County adopted the Chesapeake Bay Preservation Ordinance to protect areas along tributary streams as Resource Protection Areas ("RPAs") and went above and beyond State requirements by extending water quality BMP requirements to all areas in Fairfax County through a voluntary countywide Resource Management Area designation. Then, in 2003, Fairfax County significantly expanded the areas designated as RPAs to include smaller

perennial streams.

59. In 1998, Fairfax County launched an ambitious stream protection strategy initiative focusing not only on chemical water quality but on the overall health of the aquatic ecosystem. Based on the results of its initial study, the County undertook a watershed planning initiative from 2001 to 2011 to develop Watershed Management Plans for all thirty of its watersheds.

60. In 2004, Fairfax County adopted an Environment Agenda that establishes goals and procedures for water quality protection and environmental stewardship efforts. This led to initiation of an Environmental Improvement Program, which is updated annually to address environmental and policy needs and assist in decision making regarding environmental funding and project planning.

61. Fairfax County was the first county in Virginia to establish a Tree Conservation Ordinance, and the County recently amended its Comprehensive Plan to strengthen protection of headwater streams. Fairfax County has established forty-two Agricultural and Forestal Districts, all of which have conservation plans, maintain open space, and protect streams.

62. Fairfax County's jurisdictional area includes the majority of Accotink Creek and a significant portion of the Accotink Creek watershed.

63. The Accotink TMDL assigns an aggregated MS4 and construction stormwater wasteload allocation to Fairfax County, requiring a 47.2% reduction to the one-year, 24-hour in-stream flow rate. Accotink TMDL at 6-9.

64. Fairfax County holds a Phase I MS4 NPDES permit (Permit Number VA0088587), which applies to thousands of acres in the Accotink Creek watershed. Accotink TMDL at 2-14.

65. Fairfax County is, or imminently will be, adversely affected by EPA's Accotink TMDL because EPA takes the position that 40 C.F.R. § 122.44(d)(1)(vii)(B) requires that the terms and conditions of NPDES permits for MS4s, such as the County's, must be consistent with any applicable TMDL, notwithstanding the specific standard for MS4 permits set forth in CWA § 402(p)(3)(B)(iii). *See* EPA Response at Comment # 42; *see also* EPA Flow Memo at 3.

66. To meet the federal unfunded Accotink TMDL's mandatory flow reductions, Fairfax County estimates that it will cost the County an *additional* \$110 million to \$215 million in compliance costs, over and above the amount estimated in its watershed restoration plans.

67. The OWC is injured by the Accotink TMDL's mandated in-stream flow rate reductions, by the associated costs of compliance with the mandated flow reductions of the Accotink TMDL and the MS4 permit conditions that will imminently result from the Accotink TMDL, due to the resultant exhaustion of watershed restoration funds as required for the Accotink TMDL and thus loss to all other Fairfax County watersheds.

68. The OWC and the environment in the Downzoned area are injured in that the Accotink TMDL will force the County to divert approximately \$110 million to \$215 million of its limited resources to meet the federal unfunded TMDL mandate, rather than a more cost-effective and direct approach to addressing the habitat needs of benthic organisms.

69. These concrete and particularized injuries to OWC members, which are actual or imminent, are directly traceable to the Accotink TMDL, and a favorable decision by this Court will redress the injuries.

70. The OWC has been advised that Fairfax County has filed against EPA, challenging the Accotink Benthic TMDL on technical grounds and under the Administrative Procedure Act, but is not pressing a claim of unconstitutional commandeering.

JURISDICTION AND VENUE

71. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under the Constitution of the United States.

72. The declaratory and injunctive relief requested is authorized by 28 U.S.C. §§ 2201 and 2202, including immediate postponement of the effective date of the Accotink TMDL to preserve the status and rights of the Plaintiffs and the respective sovereigns' MS4 NPDES permits pending the conclusion of this litigation.

73. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391 (b) (2) because Plaintiffs' jurisdictional interests and its members property adversely affected by the Accotink TMDL are located in this district; and, because the non-party sovereigns, VDOT and Fairfax County and their transportation and watershed protection projects in the Downzoned area affected by the Accotink TMDL are located in this district, and a substantial part of the events giving rise to the claims occurred within this district.

STATUTORY AND REGULATORY BACKGROUND

74. 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.³ This decree required EPA to establish enforceable water pollution "Total Maximum Daily Limits" (TMDLs) for rivers and streams in Virginia whose water quality was "impaired", but only in the event Virginia itself did not establish those standards. Included in the list of streams covered by this decree is Accotink Creek, an urban stream in Fairfax County, Virginia. Virginia suggested a traditional sediment-based TMDL for

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)

Accotink Creek, but EPA rejected the approach. Virginia therefore did not establish a benthic TMDL within the time required under the Consent Decree and thus EPA was bound by the court to prepare one itself. On April 18, 2011 EPA published the final standard, one that, according to EPA, Virginia is required to adopt and implement through a water quality permit Fairfax County and VDOT are required to obtain from the State.⁴ As a result of this decree, Fairfax County and VDOT would become responsible for limiting the amount of rain water entering the stream.

75. The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.⁵ More specifically, the Act declares it is the national goal that wherever attainable, the U.S. Environmental Protection Agency (EPA), acting through the states and localities, protect the health and propagation of fish, shellfish, and wildlife and provide for recreation through control of both point and nonpoint sources of pollution.⁶ By extension, this objective includes protection of the food chain of fish, shellfish and wildlife living in those waters. The bottom of the food chain consists of organisms living on the bottom of these waters, commonly called benthic organisms.

76. The CWA is an exercise in cooperative federalism and explicitly recognizes "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, and to consult with the Administrator in the exercise of his authority under [the CWA]." CWA § 101(b), 33 U.S.C. § 1251(b); *see Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); *New York v. United States*, 505 U.S. 144, 167 (1992); *United States v. Cooper*, 482 F.3d

⁴ Letter from Jon Capacasa, Director EPA Region III Water Protection Division to Ellen Gilinsky, Ph.D., Director Division of Water Quality Programs, Virginia Department of Environmental Quality (April 18, 2011).

⁵ See, Clean Water Act §101(a), 33 U.S.C. §1251(a).

⁶ *Id.*

658, 667 (4th Cir. 2007).

77. The State-Federal regulatory “partnership” addresses the national objectives, in part, through identification of “impaired” waters, establishment of Total Maximum Daily Loads (TMDLs) for each such impaired water, and development of an implementation plan by which to restore the water to a point where it is no longer impaired. The state has the lead responsibility for developing the TMDLs and the implementation plans. In the event the state fails to take these actions, EPA is required to do so not only as a function of the *American Canoe* consent decree but as a matter of federal law.⁷

78. Where pollution arises from a “point source”, the state issues a permit that limits that pollution. Again, if the state does not issue such permits, EPA must do so. In contrast, states have the sole responsibility for addressing pollution from “non-point” sources, which they do through impaired waters implementation plans, among other means. EPA has repeatedly reiterated the dominance in the state role with regard to water quantity management activities, especially as they affect water quality.⁸ Its official policy statement on the state role:

“The question touches on the 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.”⁹

79. Notably, the Clean Water Act limits EPA’s authority to enforce the Act.¹⁰ EPA may enforce for violations of point-source permits or for failure to otherwise take action required by the Act. Thus, EPA can enforce the Act against a state for failure to prepare a non-point source implementation plan, if the state has accepted legal responsibility to do so. But EPA has

⁷ Clean Water Act §303(d), 33 U.S.C. §1313.

⁸ U.S. EPA, *Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers*, Memorandum from Ann Klee, General Counsel, and Benjamin Grumbles, Assistant Administrator for Water, to Regional Administrators, August 5, 2005.

⁹ *Id.* (emphasis added).

¹⁰ Clean Water Act §309, 33 U.S.C. §1319.

no authority to force a state to be successful in carrying out that plan. Even in the case where the state fails to develop an acceptable TMDL or implementation plan, the Act does not contemplate an enforcement action against the state, but instead simply places a responsibility on EPA to write the TMDL and implementation plan, as memorialized in the 1999 Consent Decree. Nothing in the Act gives EPA authority to force private parties or municipalities to take action under an implementation plan, unless it is specifically related to a point source permit.

80. EPA takes as much latitude in this authority as it can. Thus, it has concluded that water collected in storm drains constitutes a discharge from a “point source” and thus, according to EPA, the owner of those drains must obtain a point-source permit. In the case of storm water, these permits are called Municipal Separate Storm Sewer System permits, or MS4 permits. In case of the Accotink stream, it is EPA’s TMDL that EPA now requires the state to insert into Fairfax County’s and VDOT’s MS4 permits.

81. To make this point extremely clear, EPA has forced Fairfax County and VDOT to comply with a federal mandate. Neither VDOT nor Fairfax County have received any funding under the Clean Water Act to comply with the MS4 permit. EPA has commandeered Fairfax County’s entire storm water revenue stream and a substantial portion of VDOT’s budget for northern Virginia. Under *Printz*, this tramples Fairfax County’s and Virginia’s sovereignty and is unconstitutional.

Primary Statutory Provisions

82. State and federal laws and regulations create the law that EPA claims authorizes and requires inclusion of its Accotink Benthic TMDL into the MS4 permit for Accotink Creek. Tracing these statutory and regulatory provisions demonstrates that EPA has imposed an unfunded mandate that requires Fairfax County and VDOT to implement a federal program –

one not imposed by or even through Virginia. This violates the *Printz* rule that "The Federal Government may not compel the States to enact or administer a federal regulatory program."¹¹

83. Section 303(d) of the Clean Water Act (CWA), 33 U.S.C. §1313(d), and EPA's implementing regulations at 40 C.F.R. §130.7(b)-(e) require each State to (1) identify those State waters that it expects will fail to achieve applicable water quality standards after application of technology-based effluent limitations and other controls; (2) establish a priority ranking for such waters; and (3) establish total maximum daily loads (TMDLs) for pollutants for which those waters are not in attainment with water quality standards.

84. Virginia implements this federal mandate through various statutes and titles. It authorizes the State Water Control Board to adopt TMDLs and related criteria and standards by major river basin, but it does not automatically accept TMDLs prepared by EPA.¹² It controls stormwater "point sources" through Title 4, Chapter 60 Virginia Stormwater Management Program (VSMP) Permit Regulations that apply to the MS4 permitting program. That Chapter defines TMDL as:

"Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations for point sources, load allocations (LAs) for nonpoint sources, natural background loading and a margin of safety. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. The TMDL process provides for point versus nonpoint source trade-offs.¹³

This chapter defines WLA's as:

"Wasteload allocation" or "wasteload" or "WLA" means the portion of a receiving surface water's loading or assimilative capacity allocated to one of its existing or future point sources of pollution. WLAs are a type of water quality-based effluent limitation.

Virginia defines "load allocation" (LA), "load or loading" and "nonpoint source" as follows:

¹¹ 521 U.S. at 933.

¹² 9 Va. Code § 24-720-20.

¹³ 4 Va. Code § 50-60-10.

"Load or loading" means the introduction of an amount of matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (background loading).

"Load allocation (LA)" means the portion of a receiving water's loading capacity attributable either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

"Nonpoint source" means a source of pollution, such as a farm or forest land runoff, urban storm water runoff, mine runoff, or salt water intrusion that is not collected or discharged as a point source.¹⁴

85. Load allocations are those loadings that do not enter the stream through a point source. They are, by definition, non-point sources or natural background sources. They are accounted for in an MS4 permit, but they are not controlled by the permit. They serve as the baseline pollution contributions to the stream, unaddressable and uncontrollable through point source controls or permits.

86. Erosion of stream banks is, in part, a natural event that has happened long before the advent of major human development near streams and rivers.¹⁵ But, there is no question that increased flow of stormwater due to human development causes erosion that would not have happened naturally. This human-caused erosion may not be natural but remains a nonpoint source load because it emerges from the stream bank directly into the stream, never passing through ("discharged as") a point source.

87. Under the Clean Water Act, reduction of load allocations are left to the sole discretion of the state and are addressed through the CWA Section 319 Nonpoint Source

¹⁴ 9VAC25-720-10.

¹⁵ *See, e.g.,* Arkansas v. Tennessee - 246 U.S. 158 (1918) where normal river flow severed a meander of the Mississippi River, depositing a small Tennessee village on the Arkansas side of the river. The Court discussed the nature of natural erosion and its lack of relationship to human activities.

Pollution Management Program (NSPMP) (33 U.S.C. § 1329). Under this section of the Act, EPA's sole means for requiring address of LA's is by withholding funds or approving an NSPMP submitted by local government acting for the state over the lands within its jurisdiction. Only the state has the authority to limit LAs, and does not do so through an MS4 permit.

88. The existing MS4 permit for Accotink Creek acknowledges this limitation, authorizing specified "existing and new storm water point source discharges to waters of the state from those portions of the Municipal Separate Storm Sewer System owned or operated by the permittee."¹⁶ The MS4 permit also includes a "TMDL Reopener" that requires modification of the permit "if any approved wasteload allocation procedure, pursuant to Section 303(d) of the Clean Water Act, imposes wasteload allocations, limits, or other conditions on the facility that are not consistent with the requirements of this permit."¹⁷

89. EPA now argues that its Accotink Creek Benthic TMDL wasteload allocation requires modification of the MS4 permit to limit the amount of water entering the creek.

90. Sediments eroded from the banks of watercourses are not discharged into water through point sources. Thus, the sediments causing problems in Accotink Creek are not properly included in wasteload allocations (WLAs) for point source discharges. These sediments must be included in the Load Allocation (LA), the loadings from "non-point sources".

91. Because EPA uses stormwater discharge as a surrogate for sediments, it bypasses the need to allocate sediment to either a point source WLA or to the portion of the "pollution" attributable to non-point sources and not subject to an MS4 permit. If EPA wished to continue

¹⁶ Permit No.: VA0088587, Effective Date: January 24, 2002, Expiration Date: January 24, 2007, AUTHORIZATION TO DISCHARGE UNDER THE VIRGINIA POLLUTANT DISCHARGE ELIMINATION SYSTEM AND THE VIRGINIA STATE WATER CONTROL LAW, A. DISCHARGE AUTHORIZED UNDER THIS PERMIT, §1. Authorized Discharge (*emphasis added*).

¹⁷ *Id.* at Sec. D (3).

its illusion that water is a surrogate for the “sediment pollutant”, it would have to recognize that the only sediment at issue is that sediment passing through the stormwater culverts. While there is some small amount of such sediment, EPA has not estimated what that might be, and it is certainly not the sediment resulting from erosion of the streambed. Thus, the EPA “water as a surrogate for point source sediment pollution” would result in a very tiny WLA as compared with the non-point source LA.

Collateral Statutory provisions

92. Although the Title 4 provisions of the Virginia Stormwater Management Program control the MS4 permit, Title 9 (General Virginia Pollutant Discharge Elimination System) contains general policies associated with protecting Virginia waters, some of which buttress the argument that a flow-based TMDL constitutes an unfunded Federal mandate that commandeers Fairfax County sovereignty.

93. The Virginia Legislature recognizes the tension between maintaining water quality and meeting the needs of a growing population. It specifically addresses this, while emphasizing the state sovereignty, under Title 9:

The State Water Control Board finds that the Virginia water resource policy must be based upon the following broad precepts of natural and man-made law and must recognize natural conditions and the distribution and growth of Virginia's population and industry:

* * *

14. State constitutional provisions, statutes and common law constrain water resources use;

15. Federal constitutional provisions and federal statutes constrain and influence water resources use at state level;¹⁸

94. The Legislature also gives specific attention to the economic implications of its water quality policy, limiting those impacts to practicable levels:

¹⁸ 9 Va. Code § 25-390-10 (*emphasis added*).

The board has established its Water Resources Policy in order to fulfill its statutory responsibilities under § 62.1-44.36 of the Code of Virginia, as follows:

* * *

11. Assure that the management demands of a water resource project do not exceed the capability of that unit of government responsible for its operation and maintenance;¹⁹

95. These policies help explain the basis for Virginia rejecting a flow-based TMDL for Accotink Creek. That EPA is not bound by these policies does not ameliorate the sovereignty of both the state (VDOT) and Fairfax County in wishing to address benthic impairments through other means than those demanded by EPA.

96. Notably, Virginia and Fairfax County address benthic impairments from sediment on other streams. In those cases, the State established a sediment level measured in tons of sediment per year allowed into the stream.²⁰ Fairfax County addressed the problem by protecting stream beds with various kinds of bank armor, including placement of rock or rip wrap against highly eroding banks. Because Virginia is sovereign over its own waters, it has the authority to require Fairfax County to control bank erosion. Although because such erosion is a non-point source, the mechanism Virginia used is not authorized by the federal Clean Water Act and is only arguably authorized under Virginia law. That notwithstanding, while Virginia may have the authority to impose such a TMDL, the USEPA does not.

Secondary Statutory provisions

97. EPA has previously argued that water is a pollutant or serves as a surrogate for a pollutant and thus, because it is discharged into a stream through a point source, the point source wasteload allocation process applies. Both the County and VDOT, as well as the Virginia Water Board have all rejected a definition of water, itself, as pollutant. Fairfax County and VDOT

¹⁹ 9 Va. Code § 24-390-30 (*emphasis added*).

²⁰ 9 Va. Code § 25-720-50 (Establishing three different Total Maximum Daily Sediment Loads, one each for Difficult Creek; Bull Run; and Popes Head Creek).

dispute that water quantity is a proper surrogate for sediment, as a point source pollutant. They take these stands, in part, following relevant Virginia point source law.

98. Virginia addresses point source TMDLs and wasteload allocations, in part, through Title 9, Chapter 151, addressing “General Virginia Pollutant Discharge Elimination System (VPDES) Permit For Discharges Of Storm Water Associated With Industrial Activity”.²¹

There Virginia defines a TMDL as:

“the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. A TMDL includes wasteload allocations (WLAs) for point source discharges, load allocations (LAs) for nonpoint sources and/or natural background, and must include a margin of safety (MOS) and account for seasonal variations.”²²

Note with care that the Chapter 151 definition of TMDL addresses “pollutants” and that the definition is intended to address stormwater discharges associated with industrial activity.

99. In a separate Title 9 Chapter, Virginia defines pollutants under the title, as:

"Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.²³

100. Under its EPA-approved MS4 permit, Fairfax County is required to obtain a VPDES permit to deal with stormwater associated with industrial activity.²⁴

101. Further, under the VPDES program, stormwater is regulated by a VPDES permit if “A discharge which either the board or the regional administrator determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to surface

²¹ 9 Va. Code § 25-151-10. Definitions (*emphasis added*).

²² *Id.*

²³ 9 Va. Code § 25-31-10.

²⁴ *Op. cite*, Permit No.: VA0088587 at § A(1)(b).

waters.”²⁵ This code continues,

[O]perators shall be required to obtain a VPDES permit only if:

(1) The board or the EPA regional administrator determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern;²⁶

The key word in this requirement is the term “discharge”, a word defined by code:

"Discharge of a pollutant" means:

1. Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
2. Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into surface waters from: surface run-off which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.²⁷

Because the sediment causing the impairment of Accotink Creek comes from the bank of the creek, it does not fall within the definition of a pollutant or within the definition of a discharge of a pollutant. Nor does water, including rain water, fall within the definition of a pollutant.

102. EPA has no basis for demanding a VPDES permit requirement or the Accotink Creek Benthic TMDL to be incorporated into the MS4 permit, either under Federal or Virginia law.

Federal TMDL Regulations do not apply to an MS4 Permit

103. Section 303(d)(2) of the CWA, 33 U.S.C. §1311(d)(2), requires EPA to approve or

²⁵ 9 Va. Code § 25-31-120.

²⁶ *Id.* at § A(7)(a) (*emphasis added*).

²⁷ 9 Va. Code § 25-31-10. Definitions.

disapprove a State's Section 303(d) list or TMDL submissions within 30 days of such submission. If EPA disapproves a State's Section 303(d) list or TMDL, then EPA must identify such waters in the State or establish the TMDL for such waters that EPA determines necessary to implement applicable water quality standards.

104. Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations at 40 C.F.R. §130.5 require that each State have an EPA-approved Continuing Planning Process (CPP), and that EPA from time to time review each State's CPP in order to ensure that it is at all times consistent with the CWA.

105. EPA's implementing regulations at 40 C.F.R. §122.44(d)(1)(vii)(A) provide that, when developing water quality-based effluent limits, the permitting authority shall ensure that "the level of water quality to be achieved by limits on point sources is derived from and complies with all applicable water quality standards".

106. EPA's implementing regulations at 40 C.F.R. §122.44(d)(1)(vii)(B) provide that, when developing water quality-based effluent limits, the permitting authority shall ensure that "effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. §130.7".

107. CWA Section 303(d)(2) provides that States shall incorporate TMDLs into their current water quality management plans under subsection (e) of Section 303 of the CWA, and hence in the permits issued thereunder.

108. As discussed above, Virginia, like most states, operates two permitting systems. One is to control pollution from commercial and industrial discharges and municipal waste

treatment facilities. This program, regulated by the State Water Control Board under 9VAC25 *et seq.*, controls water pollution under the Virginia Pollutant Discharge Elimination System (VPDES) and requires municipalities to obtain VPDES permits for storm water under limited conditions.

109. The second permitting more generally controls storm water discharge into streams under the Virginia Stormwater Management Program (VSMP), regulated by the Virginia Soil and Water Conservation Board under 4VAC50-60 *et seq.* To that end, municipalities are required to obtain MS4 permits under this program.

110. Under the requisite Stormwater Pollution Prevention Plan used to implement Virginia's Stormwater Management program, the State includes limited requirements with regard to TMDLs.

“If a specific WLA for a pollutant has been established in a TMDL and is assigned to stormwater discharges from a construction activity, additional control measures must be identified and implemented by the operator so that discharges are consistent with the assumptions and requirements of the WLA in a State Water Control Board-approved TMDL.”²⁸

Note with care that the TMDL only addresses “pollutants”, and as discussed above, water is not a pollutant and sediment eroded from a stream bed is not a discharge. Nor does the TMDL address exclusively construction activity. Nor is EPA's TMDL a State Water Control Board-approved TMDL.

111. Virginia Administrative Code references to TMDLs in MS4 permits always include the necessity that they are established by the State Water Control Board, not EPA.²⁹ Because the Virginia State Water Control Board did not approve a water flow-based TMDL, much less the EPA TMDL, the MS4 permits cannot include the EPA TMDL wasteload

²⁸ 4 Va. Code § 50-60-54 (*emphasis added*).

²⁹ See, 4 Va. Code §§ 50-60-54, 1170, 1210 & 1240.

allocations or load allocations.

ADDITIONAL FACTUAL BACKGROUND

112. On April 18, 2011, as EPA's twelve-year compliance period under the 1999 Consent Decree was drawing to a close, EPA issued the Accotink TMDL to regulate the flow of water.

113. Prior to April 18, 2011, EPA had informally asked Virginia's Department of Environmental Quality (DEQ) to regulate water flow directly and adopt a "flow TMDL" for Accotink Creek.

114. As discussed in brief above, DEQ declined to issue a flow TMDL without first conducting a rulemaking in accordance with the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, to establish flow TMDL-related implementing regulations under the statutory authority of the Virginia State Water Control Law, Va. Code Ann. § 62.1-44.2 *et seq.*, and the Virginia Stormwater Management Act, Va. Code Ann. § 10.1-603.2 *et seq.* DEQ recognized that, even under its significantly broader State statutory authority, notice and comment rulemaking was a necessary prerequisite to issuing a flow TMDL. *See Agency Background Document available at* <http://www.townhall.state.va.us/L/viewstage.cfm?stageid=5168&display=general> ("DEQ Background Document"); 25 Va. Reg. Regs. 4,466 (August 31, 2009).

115. In 2009, DEQ issued a Notice of Intended Regulatory Action pursuant to its broad State-law authority to "correct or reduce the alteration of the physical, chemical or biological properties of any state waters due to flow." DEQ Background Document; 25 Va. Reg. Regs. 4,466 (August 31, 2009). After notice and comment, DEQ and the State Water Board declined to establish a flow-based TMDL or to define water as a pollutant

116. EPA decided to regulate flow on the basis that “the pollutant (*i.e.*, sediment) load in Accotink Creek is a function of the amount of stormwater runoff generated within the Accotink Creek watershed,” Accotink TMDL at 5-1. EPA’s Accotink TMDL argues that its chosen surrogate represents something less (and possibly far less) than 75% of the sediment load to the creek.

117. EPA’s decision to address less than 75% of the sediment load with the flow surrogate, instead of addressing 100% by targeting the pollutant sediment directly, significantly reduces the Accotink TMDL’s potential to improve water quality.

118. Commenters noted this major deficiency, but EPA did not adjust the proposed TMDL to address this problem.³⁰ In contrast, the sediment-based approach favored by the Commonwealth, VDOT and Fairfax County would address all sediment loadings, regardless as to whether they rise from point or non-point sources.

119. EPA adopted a Numeric Flow Criterion (681.8 ft³/acre-day). *See* Accotink TMDL at 5-4, 6-11.

120. EPA uses the Numeric Flow Criterion to model a flow rate that EPA believes would protect a fictitious pristine stream from impairment. The Numeric Flow Criterion is applied in the Accotink Creek as a binding legal norm and would necessarily govern permissible flow rates under EPA’s new “model” TMDL approach for other urban streams that are also in the geographic areas of Virginia comprising the Northern Piedmont or Piedmont eco-regions.

121. EPA’s action denied Virginia the State primacy that it is assured by the CWA. *See, e.g.*, CWA § 101(b), 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and

³⁰ *See, e.g.*, EPA Response at Comments # 4, 6, 10, 21, 23, 30, and 49.

enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”); CWA § 303(c), 33 U.S.C. § 1313(c) (adoption of water quality standards); CWA § 303(d), 33 U.S.C. § 1313(d) (identification of impaired waters and establishment of TMDLs).

CLAIM FOR RELIEF

COUNT I

EPA’s Capacasa Demand Letter is Unconstitutional

122. The Plaintiffs hereby incorporate by reference and re-allege all preceding paragraphs of this Complaint as if set forth in this Count.

123. In its April 18, 2011, letter to Virginia, EPA’s Jon Capacasa asserted that its Accotink Benthic TMDL must be incorporated into Virginia’s Water Quality Management Plan, thus requiring Fairfax County and VDOT obtain either a VPDES permit for stormwater discharges or inclusion of the TMDL wasteload and load allocations (and control of them) in the County’s and VDOTs MS4 permits.

124. Because the Virginia State Water Board has never approved the Accotink Creek Benthic TMDL, EPA stands alone as the author of the TMDL and any mandates flowing from it.

125. The U.S. EPA has provided no funding to incorporate and implement the TMDL they demand be implemented through the VDOT and Fairfax County MS4 permits.

126. Implementation of the TMDL would commandeer the personnel and funds of VDOT and Fairfax County; and do so in a manner that extinguishes the possibility of restoration of any other watersheds within Fairfax County, causing direct harm to OWC members.

127. This constitutes commandeering in violation of the U.S. Constitution, its structure, its intent and as specifically precluded by the 10th Amendment. The Court has articulated the applicable law with regard to supremacy, at least under the Commerce Clause –

the federal government may not compel the states or arms of the states to enact or administer a federal program.³¹

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Immediately postpone the effective date of the Accotink TMDL pending the conclusion of this litigation, to preserve the status and rights of VDOT and Fairfax County and their respective MS4 permits and to prevent the imminent harm to Plaintiffs that would result from incorporation of the costly flow rate reductions mandated by the Accotink TMDL into VDOT and Fairfax County MS4 Permits;
2. Declare that EPA's action mandating implementation of the Accotink TMDL is unlawful because it commandeers VDOT and Fairfax County personnel and resources in a manner not in keeping with the U.S. Constitution and the structure of the Constitution and federal form of government;
3. Vacate the Accotink TMDL or, in the alternative, remand the Accotink TMDL to EPA for reconsideration in light of the Court's decision;
4. Enjoin EPA from regulating the flow of water and from enforcing, requiring the Commonwealth of Virginia to enforce, or otherwise acting pursuant to the Accotink TMDL; and

³¹ *New York* 505 U.S. at 188, *Printz* 521 U.S. at 933.

5. Grant such other relief as may be necessary and appropriate or as the Court deems just and proper.

DATED: September 5, 2012

Respectfully submitted,

THE OCCOQUAN WATERSHED COALITION
and
THE SPRINGFIELD DISTRICT COUNCIL:

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