

VDOT, Fairfax County file suit against EPA for unlawfully attempting to regulate water itself as a pollutant

~Additional, unauthorized costs to implement “flow” TMDLs estimated at \$70 million for VDOT, at least \$110 million for Fairfax County~

RICHMOND (July 12, 2012)—The Virginia Department of Transportation (VDOT) and the Fairfax County Board of Supervisors today initiated litigation against the United States Environmental Protection Agency (EPA) seeking declaratory and injunctive relief from restrictions EPA seeks to impose on the flow of water in the Accotink Creek watershed, restrictions that exceed the federal agency’s legal authority under the Clean Water Act (CWA) and divert public funds that could be spent more effectively on stream restoration for Accotink Creek and other waterways in the region.

The complaint, filed in the U.S. District Court in Alexandria by the Office of the Attorney General for VDOT and by Fairfax County, challenges a massive expansion of EPA’s regulatory power. At issue is EPA’s move beyond its CWA-authorized role of establishing Total Maximum Daily Load (TMDL) restoration plans with maximum acceptable levels of “pollutant” discharges to meet water quality standards to EPA’s recently claimed authority to control the quantity or flow of water itself.

In 2011, EPA established a TMDL for Accotink Creek to improve the health of aquatic life in the creek. Rather than establish a TMDL for one of the pollutants in Accotink Creek, such as sediment, EPA chose to issue a TMDL for a surrogate, the flow of water. The term “pollutant” is defined in the CWA, EPA’s own regulations and Virginia’s Water Quality Standards Regulation to mean certain specifically enumerated substances, but the flow of water is not among them.

“EPA literally is treating water itself—the very substance the Clean Water Act was created to protect—as a pollutant,” the complaint notes.

The Accotink TMDL is one of the first four so-called “flow TMDLs” established by EPA anywhere in the United States. EPA issued the other three flow TMDLs for waterways in Missouri. All have been challenged in federal district courts.

VDOT and Fairfax County are committed to their environmental stewardship responsibilities. They have made and continue to make major investments in environmental improvements.

“Fairfax County has demonstrated a strong and unwavering commitment to water quality and environmental stewardship during the last six decades,” said Fairfax County Board of Supervisors Chairman Sharon Bulova. “We are absolutely committed to maintaining and improving water quality in Fairfax County and the Chesapeake Bay. However, we believe that regulations, whether federally or state imposed, must effectively address the targeted problem and be fiscally sound and realistic.”

Fairfax County has a long history of progressive environmental management, including many water quality protection and restoration initiatives and activities that far exceed CWA requirements applicable to the County. This history dates back to at least the 1950s, when the Fairfax County Park Authority began acquiring stream valley land for protection.

“The Virginia Department of Transportation strives to be an innovative pacesetter in environmental protection,” said VDOT Commissioner Gregory A. Whirley. “We are, and will remain, committed to protecting the environment through environmental stewardship and compliance with state and federal laws and regulations.”

VDOT and Fairfax County are challenging EPA's "flow TMDL" for Accotink Creek because it will cost more to implement than a lawful "pollutant"-based TMDL and will deliver a worse environmental result, as it will not meet its stated water quality objective of restoring the aquatic life of Accotink Creek.

EPA seeks to mandate through its Accotink TMDL dramatic reductions in the volume of water flowing in the Accotink Creek, requiring VDOT and Fairfax County to reduce the peak volume of water by approximately 50 percent.

The estimated cost to VDOT to meet its share of the mandated flow reductions in the Accotink TMDL is \$70 million or more. Moreover, because EPA's mandated reduction in flow cannot be achieved by retrofitting existing stormwater management structures, VDOT would be forced to acquire through eminent domain or otherwise significant amounts of private property to build numerous new stormwater management structures. In addition, because much of the stormwater flow from VDOT property into Accotink Creek originates from adjacent properties, the EPA is effectively forcing VDOT to regulate runoff from property that it neither owns nor controls.

Fairfax County estimates that it would cost approximately \$295 million to address a sediment TMDL for Accotink Creek, an approach not taken by EPA but which would have mirrored the County's commitment to stream restoration. However, to meet the Accotink TMDL's mandatory reductions in the peak volume of water flowing, Fairfax County estimates that it will cost the county an additional \$110 million to \$215 million in compliance costs, for a total of approximately \$405 million to \$510 million. The County, its residents, and its environment are also injured because the Accotink TMDL will force the County to redirect its limited resources to address EPA's unlawful and ineffective restriction rather than a more cost-effective approach to addressing the impairment in Accotink Creek.

According to the EPA, it has approved or established 3,691 TMDLs since 1995 for the pollutant actually at issue in Accotink Creek—sediment. EPA has historically interpreted and applied the CWA to exclude the regulation by TMDLs of the quantity of water alone (including flow rate, volume, and velocity of water), and had never established a TMDL for flow prior to 2011.

[Click here to view a copy of the complaint.](#)