

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

_____ NAIOP NORTHERN VIRGINIA, THE) COMMERCIAL REAL ESTATE) DEVELOPMENT ASSOCIATION,))	
NATIONAL ASSOCIATION OF HOME) BUILDERS,))	
NORTHERN VIRGINIA ASSOCIATION OF) REALTORS,))	
Plaintiffs,)	
v.)	Civil Action No. 1:12-cv-00775-LO-TRJ
UNITED STATES ENVIRONMENTAL) PROTECTION AGENCY, and) LISA P. JACKSON, ADMINISTRATOR,))	
UNITED STATES ENVIRONMENTAL) PROTECTION AGENCY REGION III, and) SHAWN M. GARVIN, REGIONAL) ADMINISTRATOR,))	
_____ Defendants.)	

INTERVENORS' COMPLAINT

NAIOP Northern Virginia, the Commercial Real Estate Development Association (“NAOIP”), National Association of Home Builders (“NAHB”), Northern Virginia Association of Realtors® (“NVAR”), by and through counsel, bring this action pursuant to the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* and 5 U.S.C. § 701 *et seq.*, 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 Regional Administrator Shawn M. Garvin (collectively, “EPA” or “Defendants”), and allege as follows:

NATURE AND PURPOSE OF ACTION

1. This case challenges a massive expansion of EPA's regulatory power, from 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.

2. The final agency action at issue is EPA's establishment of the Total Maximum Daily Load for Benthic Impairments in the Accotink Creek Watershed (the "Accotink TMDL"), which was signed and issued by the Director of the Water Protection Division of EPA Region III on April 18, 2011.

3. The Accotink TMDL is one of the first of four so-called "flow TMDLs" established by EPA anywhere in the United States.

4. Like most urban streams across the nation, Accotink Creek, which flows through Fairfax County and drains into a tidal embayment of the Potomac River, has experienced both the water quality and water quantity effects of urbanization, ranging from higher pollutant loads (water quality) to physical changes in stream condition, shape, size, and hydrology (water quantity).

5. The Accotink TMDL purportedly was established to remedy a "benthic" impairment—the lack of a healthy benthic biological community (*e.g.*, insects, worms, and other species typically found on the bottom of non-impaired streams) – due to excessive amounts of sediment, which is a "pollutant" as defined in the CWA.

6. EPA's action in establishing the Accotink TMDL, however, violated the CWA and the APA by unlawfully and arbitrarily limiting the flow of water in Accotink Creek as a claimed "surrogate" for the pollutant sediment.

7. Even if EPA were found to have the statutory authority to regulate the flow of water through TMDLs and related National Pollutant Discharge Elimination System (“NPDES”) permits, which it does not, the Accotink TMDL remains fatally flawed due to other significant CWA and APA violations and major technical deficiencies that lack a rational basis in the administrative record.

8. Further, although the Accotink TMDL requires landowners to engage in costly and severe stormwater runoff reduction measures, there is confusion as to (i) whether the reduction applies to the total volume of runoff from a site from a storm event, thus requiring retention of the water volume on site and reuse, evapotranspiration or infiltration of the volume reduction, or only to the volume of runoff from a site during a 24-hour period (allowing less costly detention methods), and (ii) if the 24-hour equivalent design storm to be utilized by site civil engineers in designing a stormwater management system for a landowner is 2.7 inches (as defined in Table 6.19 of the Fairfax County Public Facilities Manual (2011 Edition, pages 6-91)) or 1.25 inches as calculated by Fairfax County DPWES. Accordingly, the Accotink TMDL is void for vagueness.

PARTIES

The Intervening Plaintiffs

9. NAIOP Northern Virginia, the Commercial Real Estate Development Association (“NAIOP”), is a consortium of over 700 Northern Virginia land owners, local developers, investors and asset managers headquartered in Alexandria, Virginia.

10. The National Association of Home Builders (“NAHB”) is a national trade association whose 140,000 members are involved in home building, remodeling, multifamily housing construction, property management, building product manufacturing, and other aspects

of residential and light commercial construction. In Virginia, the affiliated associations include the Home Builders Association Virginia (“HBVA”) and Northern Virginia Building Industry Association (“NVBIA”). HBVA has approximately 4,000 members operating throughout the Commonwealth of Virginia, including approximately 790 members of NVBIA.

11. The Northern Virginia Association of Realtors® (“NVAR”) is a northern Virginia based trade association with approximately 10,000 members. NVAR’s members include realtors and about 200 affiliate members which own, operate, sell and develop property within the Accotink TMDL Watershed. NVAR also owns real property within the Accotink Creek Watershed.

12. NAIOP, NAHB and NVAR are collectively referred to as Plaintiffs.

13. Certain members of the Plaintiffs and NVAR have coverage, and in the future will be required to have coverage in their normal course of business activity, under the Virginia Stormwater Management Program (“VSMP”) General Permit for Stormwater Discharge from their properties. The VSMP is the Virginia name for the NPDES permit for construction activities delegated under the Clean Water Act to the Commonwealth of Virginia by EPA. The area of certain permits includes areas within the Accotink Creek Watershed.

14. Specifically, any member or property owner developing a site that disturbs more than 2,500 square feet in the Accotink Watershed must obtain a VSMP permit that will require compliance with the Accotink TMDL by July 1, 2014. The 2,500 square feet is more restrictive than the national standard of 1 acre under NPDES due to the fact that entire watershed area has been designated as either a Resource Management Area or a Resource Protection Area by various localities under the Chesapeake Bay Preservation Act, triggering additional state regulations. Certain Plaintiff members and NVAR are currently and/or will be subject to this

requirement. The current VSMP regulations, which expire on June 30, 2014, and the proposed draft VSMP regulations require that the Stormwater Pollution Prevention Plan (“SWPP”) developed by the operator in order to qualify for a VSMP must be consistent with the requirements related to any applicable TMDL with a wasteload allocation (“WLA”). Virginia Department of Conservation and Recreation (“DCR”) staff have interpreted this requirement to only apply to TMDLs in effect at the time of the VSMP issuance. Consequently, NAIOP members expect the requirements of the Accotink TMDL requirement to be in force and effect by July 1, 2014.

15. Finally, all such projects developed by Plaintiffs’ members and NVAR will likely be within a Municipal Separate Storm Sewer System (“MS4”) jurisdiction, and such MS4 permits are expected to include requirements for localities to ensure that plan review processes include provisions to ensure that land development plans incorporate means to meet all applicable TMDL requirements during construction and post-construction. Thus all such projects are expected to have stormwater management facilities that meet both current local and state stormwater requirements, as well as Accotink TMDL requirements and other overlapping TMDL requirements, such as the Chesapeake Bay TMDL.

16. Plaintiffs’ members and NVAR imminently will be adversely affected by the Accotink TMDL and incur significant cost and expenses in implementing the flow rate reduction standards for stormwater runoff described herein.

17. While Plaintiffs’ members and NVAR will incur significant expenses in complying with the Accotink TMDL, the regulations will not result in the desired improvements to Accotink Creek. In a video conference meeting on March 19, 2012 with locality

representatives and a consultant, EPA could not provide any example of such requirements being implemented and successfully restoring a similar stream, or any stream.

18. These adverse impacts, including the inevitable costs associated with the unlawful flow-based TMDL, constitute a concrete and particularized injury which is fairly traceable to EPA's actions and can only be redressed by a decision of this Court.

The Federal Defendants

19. 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.

20. 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.

21. 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.

22. Defendant Shawn M. Garvin is the Regional Administrator of the United States Environmental Protection Agency Region III and is sued in his official capacity only.

JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under the laws of the United States, and pursuant to the APA's provisions for judicial review of final agency action at 5 U.S.C. §§ 701-706. *See also*

Friends of the Earth v. EPA, 333 F.3d 184, 189 (D.C. Cir. 2003) (“[O]riginal jurisdiction over EPA actions not expressly listed in [33 U.S.C. §] 1369(b)(1) lies . . . with the district court.”).

24. The declaratory and injunctive relief requested is authorized by 28 U.S.C. §§ 2201 and 2202, and by 5 U.S.C. §§ 701-706, including immediate postponement of the effective date of the Accotink TMDL to preserve the status and rights of the Plaintiffs.

25. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because EPA is an agency of the United States, Plaintiffs’ property at issue is located in the district, and a substantial part of the events giving rise to the claims occurred within this district.

STATUTORY AND REGULATORY BACKGROUND

26. Congress enacted the CWA in 1972 with a goal to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a).

27. In Virginia, most CWA-related programs and activities, whether regulatory or non-regulatory in nature, are administered by the Department of Environmental Quality and its associated State Water Control Board (collectively, “DEQ”) or the Department of Conservation and Recreation and its associated Soil and Water Conservation Board (collectively, “DCR”).

28. The Commonwealth, acting through DEQ, has promulgated the following water quality criteria as part of its EPA-approved Water Quality Standards Regulation: “State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or

harmful to human, animal, plant or aquatic life.” 9 Va. Admin. Code § 25-260-20 (*cited in* Accotink TMDL at 1-6) (emphasis added).

Listing of Impaired Waters and Establishment of TMDLs

29. EPA is required to publish an “identification of pollutants suitable for maximum daily load measurement.” CWA § 304(a)(2)(d), 33 U.S.C. § 1314(a)(2)(D) (emphasis added).

30. “Pollutants” are defined in the CWA, as well as EPA’s implementing regulations and Virginia’s Water Quality Standards Regulation, to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” CWA § 502(6), 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2; 9 Va. Admin. Code § 25-31-10. This definition includes many specific substances, but not the flow of water. *See* CWA § 502(6), 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2; 9 Va. Admin. Code § 25-31-10.

31. In 1978, pursuant to CWA § 304(a)(2)(d), 33 U.S.C. § 1314(a)(2)(D), EPA identified all pollutants as suitable for TMDL calculations. 43 Fed. Reg. 60665 (Dec. 28, 1978) (“All pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads.”).

32. Each state is required to establish a TMDL for those pollutants identified by EPA pursuant to CWA § 304(a)(2)(d), 33 U.S.C. § 1314(a)(2)(D), for each water identified on its 303(d) impaired waters list. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).

33. States must submit TMDLs to EPA for EPA’s approval. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). If EPA disapproves a state’s TMDLs, the EPA Administrator must

“establish such loads for such waters as [EPA] determines necessary to implement the water quality standards applicable to such waters.” *Id.*

34. A TMDL for a pollutant must “be established at a level necessary to implement the applicable water quality standard(s) with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).

35. According to EPA’s implementing regulations, a TMDL is comprised of wasteload allocations (“WLAs”) for point sources and load allocations (“LAs”) for nonpoint sources and natural background pollutant loads. 40 C.F.R. § 130.2(i).

36. “Wasteload allocation” is defined as “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution.” 40 C.F.R. § 130.2(h).

37. “Load allocation” means “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.” 40 C.F.R. § 130.2(g).

38. “Loading capacity” is defined as “[t]he greatest amount of loading that a water can receive without violating water quality standards.” 40 C.F.R. § 130.2(f) (emphasis added).

39. “Load” or “loading” means “an amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water.” 40 C.F.R. § 130.2(e).

40. In other words, a TMDL establishes a water body's "loading capacity," which is the maximum amount of a pollutant that can be introduced into a water body per day without violating water quality standards. *See* 40 C.F.R. § 130.2 (e)-(i).

41. EPA's implementing regulations provide that TMDLs may be established "using a pollutant-by-pollutant or biomonitoring approach" (*e.g.*, directly measuring aquatic life), 40 C.F.R. § 130.7(c)(1)(i), "for all *pollutants* preventing or expected to prevent attainment of water quality standards." 40 C.F.R. § 130.7(c)(1)(ii) (emphasis added). The regulations do not purport to authorize the use of non-pollutant surrogates.

42. In contrast to the definition of "pollutants" for which a TMDL is required, the CWA defines "pollution" more generally and more broadly to include "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19).

43. The flow or discharge of water itself; whether comprised of stormwater or otherwise, is not a "pollutant."

44. Furthermore, neither the CWA nor EPA's implementing regulations provide express authority to regulate the discharge of water alone as a "surrogate" for a defined pollutant.

Permitting Process for Private Land Owners

45. Developers seeking to develop or redevelop land or infrastructure in the Accotink Watershed who will disturb more than 2,500 square feet of watershed land must obtain an NPDES permit, the authority for which has been delegated to the Commonwealth of Virginia and known as a VSMP, issued through the DCR. The 2,500 square feet is more restrictive than the national standard of 1 acre under NPDES due to the fact that entire watershed area has been designated as either a Resource Management Area or Resource Protection Area by various

localities under the Chesapeake Bay Preservation Act, triggering said 2,500 square feet requirement under state regulations.

46. All such VSMP permits require the applicant to submit a Stormwater Pollution Prevention plan (SWPPP), which must meet all local TMDL requirements.

47. Accordingly, any landowner seeking to develop more than 2,500 square feet (which is a fraction of an acre) will be required after July 1, 2014 to comply with the Accotink TMDL.

FACTUAL BACKGROUND

EPA's New "Non-Conventional TMDL" Model for the Mid-Atlantic Region

87. In an undated letter from Jon M. Capacasa, Director, EPA Region III Water Protection Division, to Ellen Gilinsky, Director, DEQ Division of Water Quality Programs, EPA described a flow-based TMDL "as non-convention".

88. On April 18, 2011, EPA issued the Accotink TMDL to regulate the flow of water.

89. EPA did not abide by the Virginia Administrative Process Act prior to issuing the Accotink TMDL, and engage in proper notice and comment rulemaking to solicit input from private property owners within the Accotink Watershed.

90. In so doing, EPA effectively short-circuited the public participation safeguards of the Virginia Administrative Process Act and 5 U.S.C. § 553.

91. Upon information and belief, prior to 2011, EPA had never previously established such a flow-based TMDL.

92. EPA should have engaged in notice and comment rulemaking in accordance with 5 U.S.C. § 553 prior to implementing such a drastic change in its existing regulations or their implementation, particularly since EPA intends to use this approach as a prototype for the entire

Mid-Atlantic region, if not nationally. However, EPA failed to carry out the requisite APA rulemaking procedures.

Accotink Creek's Benthic Impairment

93. DEQ and EPA consider Accotink Creek to be impaired because it does not fully support the designated use of "propagation and growth of a balanced, indigenous population of aquatic life," specifically benthic macroinvertebrates or simply "benthics." 9 Va. Admin. Code § 25-260-10.

94. Benthic macroinvertebrates are invertebrate organisms, such as insects, crustaceans, snails, or worms, which live on the bottom of streams and rivers, are large enough to be seen with the naked eye, and are often extremely sensitive to pollutants.

95. To determine the cause of this benthic impairment, by means of the Virginia Stream Condition Index ("VSCI"), the Accotink TMDL includes a "stressor identification analysis," which identified many possible "stressors," including nutrients (nitrogen and phosphorus) that exceed screening values (Accotink TMDL at 4-3); toxicity of the water in the creek to living organisms (Accotink TMDL at 4-4); various metals, pesticides, and other organic contaminants, including heptachlor epoxide, PCBs, dieldrin, chlordane, mercury, and arsenic, all of which exceeded screening values for fish tissue (Accotink TMDL at 4-4 to 4-5); and excessive sediment (Accotink TMDL at 4-5 to 4-6).

96. Despite these numerous contributing causes to the benthic impairment, EPA selected sediment alone as the "most probable" stressor and the "pollutant of concern." Accotink TMDL at 5-1.

EPA's Preference for an Inferior "Surrogate" for the Pollutant

97. According to EPA's website, EPA has approved or established 3,691 TMDLs for the pollutant actually at issue here (sediment) since 1995.

98. Upon information and belief, EPA has historically interpreted and applied the CWA to exclude the regulation of the quantity of water alone (including flow rate, volume, and velocity) by TMDLs and NPDES permits and had never established a TMDL for flow prior to 2011.

99. Among the EPA-approved sediment TMDLs are TMDLs for Popes Head Creek, Bull Run, and Difficult Run in Fairfax County, Virginia, each of which has an aquatic life impairment similar to Accotink Creek. None of these TMDLs regulate the flow of water.

100. The EPA has identified at least 111 other water bodies as impaired for benthics, in addition to Accotink Creek. All of these TMDLs were due to be approved or established by EPA by May 1, 2011, and none of these impairments were addressed by regulating flow. Instead, upon information and belief, EPA established or approved TMDLs for "pollutants" for these impairments, as required by the CWA.

101. Nevertheless, upon information and belief, EPA selected the Accotink Creek Watershed area of Virginia and certain watersheds in Missouri to drastically change and expand EPA's national TMDL regulatory program. EPA took this action without adhering to rulemaking procedures and instead merely issued a guidance document. 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) (the "EPA Flow Memo").

102. EPA relied on the self-serving EPA Flow Memo to justify its approach, and it now seeks to apply the authority presumed in this guidance document through individual TMDLs. EPA asserts the regulatory power to control the flow of clean water, and by implication, land use and the amount of “impervious cover” (*e.g.*, buildings and roads) from which the stormwater flows run off.

103. EPA recognized the problems of addressing benthic impairments through regulating pollutants alone in its Response to Comments, citing to the 2008 National Research Council Report *Urban Stormwater Management in the United States*. EPA, Accotink TMDL, Response to Comments Document at Comment # 22, 25, and 42 (the “EPA Response”). That Report itself, however, notes, “Even though ‘pollutant’ is defined broadly in the Act to include nearly every substance added to surface waters, including heat, it has not traditionally been read to include water volume [33 U.S.C. § 1362(6)].” National Research Council, *Urban Stormwater Management in the United States* 50 (2008). The Report further notes, [s]ince the primary federal statute—the CWA—is concerned with limiting *pollutants* into surface waters, the volume of discharges are secondary and are generally not regulated at all.” *Id.* at 119 (emphasis added).

104. In light of the limitations of its existing authorities, EPA impermissibly established the flow TMDLs to expand its regulatory reach beyond its previously, and commonly, understood limitations.

105. Upon information and belief, EPA has based the four flow TMDLs it has established on guidance written by EPA staff and issued in final form on December 28, 2010 and on the “non-conventional” approach set forth therein. *See* EPA Flow Memo.

106. The EPA Flow Memo encourages TMDL writers to use “numeric parameters acting as surrogates for pollutants” and specifically recommends “stormwater flow volume or

impervious cover” as “surrogate pollutant parameter[s],” which itself is a misleading name given that neither flow nor impervious cover is a pollutant. EPA Flow Memo at 2, 5.

107. The EPA Flow Memo recommends, pursuant to 40 C.F.R. § 122.44(d)(1)(vii)(B), that the permitting authority (EPA or a state agency such as DCR) impose effluent limits and conditions for stormwater discharge. The Plaintiffs dispute that such federal statutory or regulatory authority exists.

108. EPA’s choice of flow as a surrogate is especially problematic because flow accounts for only 75% or less of the identified sediment problem. *See* Accotink TMDL at 4-7, Figure 4-1. Therefore, there is no rational basis for EPA to choose this surrogate, given that the Accotink TMDL itself and the public comment made to EPA demonstrate flow regulation to be inferior or ineffective as compared to the direct regulation of the real pollutant at issue (sediment). *See* EPA Response at Comment # 4, 6, 10, 21, 23, 30, and 49 (the “EPA Response”).

109. Flow is an unnecessary, unjustified, and inferior surrogate that never should have been selected for Accotink Creek. The result is that the Plaintiffs – and all Virginians – are left with a “non-conventional” TMDL leading to higher costs and worse water quality results than a traditional, lawful TMDL addressing a pollutant of concern.

110. EPA’s concept of regulating a surrogate, as encouraged in the EPA Flow Memo and applied in the Accotink TMDL, opens the door to regulating any number of land uses and human activities such as existing buildings and roads (“impervious cover”), and expands EPA’s TMDL and NPDES permit jurisdiction far beyond the management of “pollutants” authorized by the CWA.

111. As such, EPA’s regulation of “surrogates” interferes with the private property rights of landowners.

112. Regulation of the flow of water or any other non-pollutant or human activity based on an alleged correlation to a CWA pollutant contravenes the clear congressional intent to limit EPA's regulatory authority to the control of only the substances specifically enumerated in the definition of "pollutant." *See* CWA §§ 303(d)(1)(C), 502(6), 33 U.S.C. §§ 1313(d)(1)(C), 1362(6). EPA has no authority to arbitrarily expand the list of "pollutants" set by statute or to eviscerate the CWA's explicit distinction between "pollution" and "pollutant," as EPA has done in the Accotink TMDL. *See* CWA § 502(6), (19), 33 U.S.C. §§ 1362(6), (19).

113. Although EPA frequently claims in the TMDL to be regulating flow as a surrogate for the pollutant sediment, elsewhere in the TMDL EPA admits that it is actually regulating flow itself because high flows scour the creek's banks and bottom. *See, e.g.,* Accotink TMDL at 4-5 to 4-8. To the extent that EPA is regulating flow because it believes that the flow or quantity of water, in and of itself, is "the problem," EPA is not applying a surrogate approach at all, and instead is directly regulating a non-pollutant in excess of EPA's statutory authority. EPA literally is treating water itself – the very substance the Clean Water Act was created to protect – as a pollutant.

EPA's Flawed Numeric Flow Criterion

114. The Accotink TMDL next determines and adopts a permissible flow rate to define the "total maximum daily flow" that EPA will allow in Virginia streams from point sources. Accotink TMDL at 5-11 to 5-20.

115. EPA has calculated and adopted a generally applicable "Non-impaired Composite Unit-Area Flow Rate" of 681.8 ft³/acre-day (the "Numeric Flow Criterion"). *See* Accotink TMDL at 5-19 to 5-20.

116. EPA adopted the Numeric Flow Criterion (681.8 ft³/acre-day) based on two “reference streams” that together became the *de facto* water quality standard for Accotink Creek. See Accotink TMDL at 5-4, 6-11.

117. The chosen reference streams – the rather pristine rural streams of Buffalo Creek and Catoctin Creek – are both fundamentally different from Accotink Creek in many respects (*e.g.*, different eco-regions, physiographic conditions, soils, and watershed shape, slope, and size). See Accotink TMDL at 5-5 to 5-9.

118. Buffalo Creek’s very low natural flow skews the resulting Numeric Flow Criterion to a significantly lower level than would result from consideration of Catoctin Creek alone or other streams.

119. The chosen reference streams are non-representative of even a pristine Accotink Creek and are an inappropriate basis for setting the total maximum daily flow allowed.

120. The reference streams both significantly exceed Virginia’s definition of aquatic life use attainment (*i.e.*, a VSCI score of 60 or greater) and, therefore, fail to define the “maximum” loading capacity of the TMDL for Accotink Creek (*i.e.*, the highest flow tolerable under the aquatic life use water quality standard).

121. EPA made no meaningful effort to determine the true “maximum” loading capacity of Accotink Creek in the TMDL.

122. EPA uses the Numeric Flow Criterion to model a flow rate that EPA believes would protect a hypothetical pristine stream from impairment, but neither the criterion nor the Accotink TMDL itself provide any information predicting the in-stream effects of meeting this criterion in Accotink Creek, which is already impaired.

123. The Numeric Flow Criterion is applied in Accotink Creek as a binding legal norm and would necessarily govern permissible flow rates under EPA's new "model" TMDL approach that EPA intends to use for other urban streams in Virginia.

124. Just as EPA never subjected its expansion of the TMDL program to the public safeguards of APA notice and comment rulemaking under 5 U.S.C. § 553, EPA similarly evaded the CWA and APA procedural requirements that apply to EPA's adoption of a Numeric Flow Criterion on behalf of the Commonwealth of Virginia.

125. The Numeric Flow Criterion was adopted by EPA for Virginia in violation of the terms and procedures set forth in CWA § 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), for the adoption of such criteria.

126. EPA's action denied the Plaintiffs and the public generally the important procedural safeguards assured by the APA, not to mention appropriate transparency and accountability.

Flow Reduction Will Not Meet Water Quality Standards

127. Even if the Numeric Flow Criterion had been within EPA's authority, technically appropriate, and lawfully adopted, the Accotink TMDL would still be arbitrary and unlawful because it completely fails to take account of the physical characteristics of Accotink Creek's channel and its now urban watershed.

128. As many parties commented during the TMDL development process, simply returning Accotink Creek's flow rate to a presumed representation of pre-development levels, as would be required under the Numeric Flow Criterion, has in no way been demonstrated by EPA to meet the target required by law a balanced, indigenous population of benthic organisms in Accotink Creek. *See, e.g.*, EPA Response at Comments # 12, 13, 14, 19, 23, 30, 49, 51, 55 and

57. Instead, all that will result is that the same severely changed creek bed will have less water at the selected “1-year, 24-hour flow” condition.

129. The biological objective of a balanced, indigenous population of benthic organisms in Accotink Creek is the statutory linchpin of the Accotink TMDL, yet it is completely overlooked by the TMDL documentation, and a rational relationship is never established between the Numeric Flow Criterion of 681.8 ft³/acre-day and the restoration of Accotink Creek and its aquatic life.

130. Aquatic life use attainment is not possible without a comprehensive approach – completely ignored here – that takes into account the physical changes to the channel itself in combination with changes to the amounts of sediment and patterns of flow delivered from the watershed to the creek. Typically, stable streams over bank flow out of the stream channel into the associated floodplain in approximately one-year flow events. This floodplain connection allows waters in such larger storm events to disperse across the larger cross sectional area of the floodplain and slow down. This reduces the shear stress, velocity and erosion potential in the stream channel as compared to an incised stream that contains larger flows within its channel, and thus reduces sediment in the stream system. Simply reducing the selected “1-year, 24-hour flow” condition will not cause larger flows to reconnect to the floodplain and thus not reduce the velocity and erosion because the Accotink Creek is considered to be incised in most of its reaches causing the scour and erosion of its bed and banks that creates the majority of the sediment issues that cause the benthic impairment.

131. Failure to consider all factors in combination, and instead focusing on making just one of the three factors (flow) behave like two rural “reference streams,” means that there is no

rational basis to conclude that the Accotink TMDL is designed to achieve the aquatic life use other than by coincidence or accident.

132. If all factors were actually considered in combination, EPA's particular Numeric Flow Criterion of 681.8 ft³/acre-day would have no special biological relevance and need not control over any other adequate balance of the three factors.

133. Many parties commented on this major issue and concern—whether the Accotink TMDL is actually designed to restore the habitat needed to support a balanced, indigenous population of benthic organisms in Accotink Creek—yet the final Accotink TMDL and the EPA Response utterly fail to address this point.

134. The Accotink TMDL contains indisputable errors of fact as well as statistical errors central to the determination of the TMDL and related WLAs.

135. For all of the above reasons, EPA failed to establish the Accotink TMDL “at a level necessary to implement applicable water quality standards” as required by CWA § 303(d)(1)(C).

Misuse of Soil Information

136. In addition to the errors and inconsistencies described above, in creating the Accotink TMDL, the EPA originally incorrectly believed that the Accotink Watershed is predominately comprised with Type B Hydrologic Soil Group. Incorrectly believing that the Accotink Watershed soil was made up of the relatively permeable Type B soil, the EPA assumed that landowners could reduce stormwater runoff by using infiltration methods. Based on this assumption, the EPA leapt to a conclusion that the proposed flow reduction was a reasonable solution.

137. The Accotink Watershed, however, is composed of predominately Type D Hydrologic Soil Group soil.

138. Type D soil is significantly less permeable and allows less water infiltration than Type B soil. Consequently, Type D soils are almost never suitable for infiltration practices, and in low to medium density development areas it is not practicable to achieve the volume reduction desired by EPA through infiltration.

139. While EPA corrected its mistaken identification in the final version of Accotink TMDL, it never readdressed the conclusions and criteria which were based on the incorrect soil classification.

140. This mistake significantly impacts landowners' ability to use infiltration methods to reduce the required amount of stormwater runoff, and it will require landowners to use reuse nearly 50% of stormwater on site.

141. This poses significant problems and expenses for commercial building owners that do not have the size or capacity to reuse such flow and for residential building owners where water reuse is not currently permitted.

142. Stakeholders and property owners in the Accotink Watershed informed the EPA of this mistake; however, while the EPA corrected its soil data it never reviewed the impact that data had on its proposed Accotink TMDL.

Baseline Standard of Reduction

143. The Accotink TMDL calls for a nearly 50 % reduction in “one-year, 24-hour flow” rate of stormwater runoff for private property owners in Fairfax County possessing a VSMP permit after July 1, 2014 or subject to a plan of development approved by a locality after their MS4 is reissued with this TMDL requirement as a condition.

144. Although the Accotink TMDL requires private property owners to drastically reduce their stormwater runoff, the current regulations do not adequately describe the design basis to be utilized to achieve said reduction.

145. The term, "one-year, 24-hour flow," is defined as the "Maximum daily average flow rate with a one-year recurrence interval" in Section 5.4 of the Accotink TMDL.

146. This definition and term does not correspond with the storm event description methodology commonly used in stormwater management system designs.

147. The baseline commonly used for a one year storm event on stormwater management system designs is the "1 year, 24-hour storm event" standard, which yields 2.7 inches over a 24-hour period in this area as defined in Table 6.19 of the Fairfax County Public Facilities Manual (2011 Edition, pages 6-91) .

148. However, Fairfax County DPWES staff calculated that the 24-hour equivalent design storm for this watershed that achieved the one-year, 24-hour flow, as defined in Section 5.4 of the Accotink TMDL, is 1.25 inches.

149. It is impossible to determine from the Accotink TMDL whether it should apply the "1 year, 24-hour storm event" with a 2.7 inch baseline or the 1.25 inch baseline calculated by Fairfax DPWES to cause the flow rate defined to be the "one-year, 24-hour flow," used in the Accotink Watershed TMDL.

150. Furthermore, it is unclear whether the nearly 50 % reduction applies to the flow volume or rate during the first 24-hour period of a storm event or if the total volume from a storm event must be reduced in that percentage amount.

151. This distinction is of critical concern to landowners. If the reduction figure applies to the first 24-hour period of a storm event, landowners can employ water detention

techniques, such as stormwater ponds or tanks, to temporarily prevent runoff. However, if the reduction figure applies to total volume from a storm event, as the EPA as previously advised, such traditional detention techniques will not be available to landowners.

152. Accordingly, engineers and developers face fundamental problems in preparing for compliance with the Accotink TMDL as they are uncertain (i) which baseline standard to use for stormwater reduction and (ii) whether the reduction rate applies to the first 24-hours of a storm event or to the total volume of the event.

Effect on Landowners

153. Regardless of the resolution to the vagueness and statutory authority issues described above, the Accotink TMDL will have a significant and severe effect on private property owners seeking to develop their land.

154. While these costs will vary depending on the specific property at issue and the improvements thereon, Plaintiffs estimate that of compliance with the Accotink TMDL, specifically, the approximately 50% reduction in the flow or volume of stormwater runoff, will range between \$100,000 to \$200,000 per acre.

CLAIMS FOR RELIEF

COUNT I

EPA's Accotink TMDL Exceeds EPA's Statutory Authority and Violates the CWA Because Flow Is Neither a "Pollutant" Nor a Permissible "Surrogate"

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

156. Agency action, findings and conclusions must be held unlawful and set aside if found to be, among other things, *ultra vires*, in excess of statutory jurisdiction, authority, or

limitations, or short of statutory right, 5 U.S.C. § 706(2)(C); or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A).

157. Pursuant to the CWA and EPA's implementing regulations, a TMDL must be established for a "pollutant" in impaired water "at a level necessary to implement the applicable water quality standards." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); see also 40 C.F.R. § 130.7(c)(1) and (d)(2).

158. Neither the CWA nor EPA's implementing regulations authorize EPA to regulate the flow of water (including volume, velocity, and flow rate) in, or that may be introduced into, a receiving water because the flow of water, by itself, is not a pollutant.

159. Moreover, neither the CWA nor its implementing regulations expressly authorize EPA to regulate a "surrogate" in the place of a pollutant.

160. EPA violated the CWA § 303(d) and its own implementing regulations, exceeded its authority, and acted in an *ultra vires* manner in establishing the Accotink TMDL because EPA chose to regulate the non-pollutant flow.

COUNT II

EPA's Accotink TMDL Is Unlawful Because EPA Adopted the Flow Requirements in Contravention of Required CWA and APA Procedures

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

162. Agency action, findings, and conclusions must be held unlawful and set aside if taken without observance of procedure required by law. 5 U.S.C. § 706(2)(D). In addition, the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

163. EPA was required to adopt its new “non-conventional,” “model” approach to TMDL regulation of non-pollutant surrogates (including the flow of water) by amending its TMDL regulation, 40 C.F.R. Part 130, in accordance with the public safeguards and requirements of notice and comment rulemaking, 5 U.S.C. § 553, because (a) EPA’s regulations do not provide for regulating flow or other non-pollutants, and (b) for nearly 40 years EPA has interpreted and applied the CWA’s TMDL and NPDES permit programs as not regulating the flow of water. EPA violated the CWA and the APA by failing to engage in rulemaking before addressing flow in a TMDL.

164. EPA violated the CWA by adopting the Numeric Flow Criterion without observance of the procedures required by CWA § 303(c), 33 U.S.C. § 1313(c), for the adoption of water quality standards for a state.

165. EPA violated the APA by adopting the Numeric Flow Criterion, which is a “rule” within the meaning of 5 U.S.C. § 551(4), with force and effect of law, without observance of the public safeguards and requirements of notice and comment rulemaking under 5 U.S.C. § 553.

COUNT III

The Accotink TMDL Is Contrary to Law and Arbitrary and Capricious

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

167. Agency action, findings and conclusions must be held unlawful and set aside if found to be, among other things, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A); *ultra vires*, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, 5 U.S.C. § 706(2)(C); without observance of

procedure required by law, 5 U.S.C. § 706(2)(D); or unsupported by substantial evidence, 5 U.S.C. § 706(2)(E).

168. Even assuming that EPA has the authority to regulate flow as a surrogate, EPA violated the CWA and the APA by establishing a “non-conventional TMDL” with an inferior surrogate, which will lead to higher implementation costs and worse water quality results.

169. EPA violated the CWA and the APA by adopting the Numeric Flow Criterion based on two reference streams that provide an inappropriate basis for regulating Accotink Creek, the parties in the Accotink Creek watershed, and maximum flow rate for discharges.

170. EPA violated the CWA and the APA by failing to determine, or even attempting to determine, the “maximum” loading capacity of the TMDL for Accotink Creek.

171. EPA violated the CWA and the APA by incorrectly and unreasonably determining the acreage and associated obligation for “Reduction to the one-year, 24-hour Flow” for the Plaintiffs.

172. EPA violated the CWA and the APA by failing to take into account stressor pollutants other than sediment and physical changes other than flow to Accotink Creek’s channel and watershed, which have changed materially and irreversibly over time, such that there is no rational basis to conclude that the Accotink TMDL will meet its target of a balanced, indigenous population of benthic organisms simply by reducing stormwater flow.

173. EPA violated the CWA and the APA by unlawfully imposing the inapplicable requirement of 40 C.F.R. § 122.44(d)(1)(vii)(B) that “effluent limits in permits be consistent with ‘the assumptions and requirements of any available wasteload allocation’ in an EPA-approved TMDL” and further establishing that “EPA has the authority to object to the issuance of an

NPDES permit that is inconsistent with WLAs established for that point source.” Accotink TMDL at 8-2 to 8-4.

174. EPA violated the CWA and the APA by leaping to a conclusion as to what was a reasonable TMDL utilizing incorrect soil characteristic mapping data and then never re-examining these conclusions after discovering its patent error.

175. For the reasons stated herein, as well as for all of the reasons set forth in the comments on the Draft Accotink TMDL, which are hereby incorporated by reference, the Accotink TMDL is contrary to law and is arbitrary and capricious, in violation of the CWA and APA.

COUNT IV

The Accotink TMDL Is Void for Vagueness

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

177. A regulation is void for vagueness if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

178. The Accotink TMDL calls for a nearly 50% reduction in stormwater runoff for private property owners in Fairfax County possessing a VSMP permit, however, it fails to define the 24-hour equivalent design storm event from which the reduction must be made.

179. There multiple baselines standards defining the amount of rainfall in a storm event. Whereas Fairfax County DPWES defines a 1-year 24-hour storm event (based on statistical analysis of rainfall data) to be 2.7 inches (as defined in Table 6.19 of the Fairfax County Public Facilities Manual (2011 Edition, pages 6-91), Fairfax DPWES staff has calculated

that the 24-hour equivalent design storm for this Accotink Watershed that achieved the “one-year, 24-hour flow,” as defined in Section 5.4 of the Accotink TMDL to be 1.25 inches.

180. A landowner of reasonable intelligence cannot determine which baseline standard to apply in attempting to reduce its stormwater runoff required under the Accotink TMDL.

181. Furthermore, it is unclear whether the nearly 50% reduction applies to the flow volume or rate during the first 24-hour period of a storm event or if the total volume from a storm event must be reduced by that percentage amount.

182. An ordinary person exercising ordinary common sense cannot determine whether the reductions required under the Accotink TMDL apply to the stormwater of the first 24-hour period of a storm event or to the total volume from the storm event.

183. Consequently, the Accotink TMDL is void for vagueness and unenforceable.

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, as authorized by 5 U.S.C. § 705, to preserve the status and rights of the Plaintiffs and their respective 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 the Plaintiffs’ permits;

2. Declare that EPA’s action in establishing the Accotink TMDL is unlawful because it is in excess of EPA’s statutory authority and *ultra vires*; violates the Clean Water Act and the Administrative Procedure Act; is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; and was adopted without observance of required procedures, including that:

(a) EPA lacks the statutory authority under the CWA to regulate the flow of water in the Accotink TMDL because the flow of water is neither a “pollutant” nor a permissible “surrogate” for a pollutant;

(b) EPA violated the APA and CWA by regulating the flow of water and imposing the Numeric Flow Criterion in the Accotink TMDL without observance of required procedures;

(c) It was arbitrary, capricious, and contrary to law for EPA to base the Accotink TMDL on an inferior “surrogate,” inappropriate reference streams, and incorrect acreage determinations; for EPA to fail to determine the maximum loading capacity of the creek and fail to take into account significant factors other than flow; and for EPA to adopt permitting requirements contrary to the CWA’s “maximum extent practicable” standard;

(d) It was arbitrary, capricious, and contrary to law for EPA to base the Accotink TMDL on inaccurate soil data which drastically overestimates the amount of natural flow reduction through infiltration and then not revise its determinations after discovering its error; and

(e) Establishment of the Accotink TMDL was unlawful for any additional reasons set forth in this Complaint or the administrative record or to be demonstrated to this Court;

3. Declare that the Accotink TMDL is void for vagueness;

4. Vacate the Accotink TMDL or, in the alternative, remand the Accotink TMDL to EPA for reconsideration in light of the Court’s decision;

5. Enjoin EPA from regulating the flow of water via TMDLs and NPDES permits;

6. Enjoin EPA from enforcing, requiring the Commonwealth of Virginia to enforce, or otherwise acting pursuant to the Accotink TMDL; and

7. Grant such other relief as may be necessary and appropriate or as the Court deems just and proper, including all fees and expenses herein incurred.

Dated: October 19, 2012

Respectfully submitted,

**NAIOP Northern Virginia, the Commercial Real Estate Development Association;
National Association of Home Builders; and
Northern Virginia Association of Realtors®**

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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