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DC District Court Decision Suggests Stricter Pollution Control Standards For The Anacostia River May Be Forthcoming

The DC District Court's July 25, 2011 decision in *Anacostia Riverkeeper, Inc., et al. v. Lisa Jackson, et al.*, repeatedly lambasts the Environmental Protection Agency ("EPA") for its delay in implementing total maximum daily loads ("TMDLs") for the Anacostia River, but ultimately rejects the pollution control plan jointly submitted to EPA by the District of Columbia and Maryland, and approved by EPA in 2007, as arbitrary and capricious and inconsistent with the Federal Water Pollution Control Act of 1972 ("the Clean Water Act" or "CWA"). In rejecting the plan, which called for an 85% reduction in sediment/total suspended solids ("TSS") pollution, the District Court suggests even stricter standards may be required. Permit holders, water and sewer authorities, landowners, developers, and others who may be directly affected by the implementation of a more stringent pollution control plan for the Anacostia River should monitor this situation closely and consider participating in the development of a revised plan.

Facts

DC and Maryland both: (1) designated a variety of uses for the Anacostia River, including water contact recreation (e.g., swimming), aesthetic enjoyment, and protection of aquatic life; (2) included the Anacostia River on their "303(d) list" submissions to EPA, which require states to list all waters within their boundaries that do not currently attain, and based on current pollution controls are not expected to attain, water quality standards applicable to the designated uses; and (3) as a result of that listing, promulgated sediment-related TMDLs, primarily designed to protect submerged aquatic vegetation as well as other plant and animal life.

After approval of the TMDLs by EPA, environmental groups challenged them, primarily on the basis that the TMDLs were not designed to attain and maintain water quality standards applicable to all designated uses, but were solely designed to protect submerged aquatic vegetation.

DC District Court Decision

The District Court held that the obligation to develop TMDLs for the Anacostia River arose as a result of the placement of the waterway on DC and Maryland's 303(d) lists. Although DC and Maryland's 303(d) lists only identified sediment and TSS pollution as detrimental to plant and animal life, the court held that the requirement "to develop a TMDL protective of water quality is an instruction to determine the pollutant load level necessary to safeguard all designated uses." As DC and Maryland's designated uses for the Anacostia River included swimming, recreation and aesthetic enjoyment, EPA's approval of a sediment/TSS TMDL that only expressly considered the effects of sediment and TSS pollution on plant and animal life was held to be arbitrary and capricious and in violation of the Clean Water Act. In so finding, the court rejected the suggestion that EPA could approve "partial-TMDLs," which focus on one designated use (or less than all designated uses) at a time. The court also rejected EPA's argument that consideration of recreational and aesthetic uses was implied and/or contained within the complexities of its analysis of safeguarding aquatic plant and animal uses of the Anacostia River.

Implications

Plaintiffs' challenge to EPA's approval of the pollution control plan for the Anacostia River was successful. Citing what the court referred to as a history of "excessive negligence and unnecessary delay" in cleaning up the Anacostia, the court rejected the current pollution control plan as arbitrary and capricious and inconsistent with the Clean Water Act. Thus, absent a successful appeal or settlement, it is likely the current pollution control plan for the Anacostia River will be replaced by one which sets TMDLs at levels necessary to achieve all applicable water quality standards, not just those which protect aquatic vegetation. Those new TMDL limits, which will address recreational and aesthetic uses of the river, including swimming, presumably will be stricter than the TMDLs rejected by the court, which reduced sediment/TSS pollution by approximately 85%. However, the court did not mandate a specific percentage reduction, or any required methodologies or milestones, so the actual levels of sediment reduction, and how and over what period of time such reduction is achieved, will be determined by DC, Maryland and EPA.

One should expect DC and Maryland, likely working with EPA, to again attempt to develop a single

Anacostia River TMDL for both jurisdictions. Alternatively, it is possible that EPA could reject this approach and develop its own TMDL. Either way, it is likely that more significant restrictions on sediments and suspended solids will be imposed, which will have important implications for public and private NPDES ("National Pollutant Discharge Elimination System") permit holders discharging to the Anacostia, including local water and sewer authorities who intervened in the litigation. In addition, given that TMDLs address point source as well as non-point source pollution, DC and Maryland could require enhanced regulation of storm water in the watershed, lessening and eventual cessation of combined sewer overflows, and other actions. For this reason, permit holders, water and sewer authorities, landowners, developers, and others should become actively involved in the process of revising the TMDL. Involvement in the process, including submission of comments, is typically the best way to have a positive impact and may also be a prerequisite to participation in future legal challenges.

Venable has broad experience assisting clients in navigating the CWA and NPDES permitting process, and negotiating permit terms with federal, state and local authorities. If you would like further information concerning this alert, please contact the authors or another attorney in [Venable's Environmental Practice Group](#).

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