



2010

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## Recommended Citation

Powell, Matthew (2010) "Comment: The Anacostia River: Urbanization, Pollution, EPA Failures, and the Collapse of the Public Trust Doctrine," *University of Baltimore Law Forum*: Vol. 41 : No. 1 , Article 5.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol41/iss1/5>

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## COMMENT

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### THE ANACOSTIA RIVER: URBANIZATION, POLLUTION, EPA FAILURES, AND THE COLLAPSE OF THE PUBLIC TRUST DOCTRINE

By: Matthew Powell

#### I. INTRODUCTION

The Anacostia River is a tidal river that slowly flows for eight and four tenths miles through Prince George's County, Maryland and the District of Columbia before its confluence with the Potomac River, approximately 108 miles upstream from the Chesapeake Bay.<sup>1</sup> The river's watershed covers 176 square miles in eastern Montgomery County, northern Prince George's County, and parts of the District of Columbia.<sup>2</sup> While once home to a bustling deep-water port and thriving ecosystem, the river is now very shallow, except where dredged, and contains some of the most polluted water in the country.<sup>3</sup> The Washington, D.C. metropolitan area is liable for the dramatic changes. Specifically, urban sprawl around the nation's capital led to construction, construction led to an increase in impervious surfaces, impervious surfaces led to an increase in rainwater run-off, increased run-off led to erosion in the tributary area, and the erosion caused continually amounting silt deposits in the river.<sup>4</sup> Furthermore, modern septic systems have not been able to properly cope with the unsanitary discharge of the ever-growing population.<sup>5</sup> In turn, the sewer and septic system's shared pipes overflow during heavy rainfalls, dumping raw sewage mixed with rainwater into the Anacostia River.<sup>6</sup>

Juxtaposed with the Potomac River, the Anacostia has become the ugly duckling of Washington, D.C., largely ignored by the general population and referred to by many as D.C.'s "forgotten river."<sup>7</sup> Several local and national environmental groups support legislation that would

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<sup>1</sup> *Overview*, ANACOSTIA WATERSHED RESTORATION P'SHIP, <http://www.anacostia.net/history/nhistory.html> (last visited Jan. 29, 2011).

<sup>2</sup> *Watershed History*, ANACOSTIA WATERSHED RESTORATION P'SHIP, <http://www.anacostia.net/history/history.html> (last visited Jan. 29, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Cleaning Up the Anacostia River*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/water/pollution/fanacost.asp> (last visited Jan. 29, 2011).

<sup>7</sup> *Id.*

hopefully protect the river.<sup>8</sup> Further, these environmental groups have brought civil lawsuits against the Environmental Protection Agency (“EPA”) in a representative capacity.<sup>9</sup> Despite the river’s reputation for being grossly unsanitary, some members of the general public continue to use and enjoy the river. However, many problems remain unaddressed.

## II. HISTORY

The Anacostia River watershed spans Prince George’s County and Montgomery County, Maryland and the District of Columbia with its major tributaries including the Northwest Branch, Northeast Branch, Sligo Creek, Paint Branch, Little Paint Branch, Indian Creek, and Beaverdam Creek.<sup>10</sup> The tidal river forms at the confluence of the Northwest Branch and the Northeast Branch, the river’s main tributaries.<sup>11</sup> After just over eight miles, the river flows into the Potomac River in the southeast corner of the District of Columbia, 108 miles upstream of the Chesapeake Bay.<sup>12</sup> Prior to modern sewer systems, many small streams also flowed into the Anacostia River, but modern stormwater sewer systems have effectively enveloped these streams.<sup>13</sup>

During his expedition to the New World, Captain John Smith sailed up the Chesapeake Bay, Potomac River, and along the shores of the Anacostia River.<sup>14</sup> He observed the Nanchotank Indians to be a flourishing Native American culture along the blooming and fertile shoreline. In fact, the river is named after the Native American word “anaquash,” meaning a village trading center.<sup>15</sup> Captain Smith found the river to be a highly productive ecosystem overflowing with a wide variety of fish including American and hickory shad, white and yellow perch, red-breasted sunfish, catfish, and herring.<sup>16</sup> He shared this information with other settlers, encouraging European settlement in the mid-Atlantic region and along the Potomac and Anacostia Rivers.<sup>17</sup>

European settlement, however, brought agriculture to the region.<sup>18</sup> The river and most of its tributaries, located in the Atlantic coastal plain,

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<sup>8</sup> Anacostia Watershed Society, <http://www.anacostiaws.org/>; Friends of the Earth, <http://www.foe.org/>, and Earthjustice, <http://www.earthjustice.org/> (last visited Jan. 29, 2011).

<sup>9</sup> See discussion *infra* Part IV B.

<sup>10</sup> Dorcas Coleman, *Anacostia: A Nation’s River*, MD. DEP’T OF NATURAL RES., <http://www.dnr.state.md.us/naturalresource/summer2001/anacostia.html> (last visited Jan. 29, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Watershed History*, *supra* note 2.

<sup>15</sup> *Cleaning Up the Anacostia River*, *supra* note 6.

<sup>16</sup> Coleman, *supra* note 10.

<sup>17</sup> Coleman, *supra* note 10.

<sup>18</sup> Coleman, *supra* note 10.

were surrounded with fertile soil.<sup>19</sup> Settlers through the Civil War cleared much of the forests that had dominated the landscape around the river and its tributaries to grow predominantly corn and tobacco.<sup>20</sup> The river's deep water allowed large, seagoing trading ships to sail upriver to the trading port of Bladensburg located in Prince George's County to pick up shipments, mostly tobacco, for export to England.<sup>21</sup> At its height, the port of Bladensburg was the main port for the nation's capital and one of the largest on the east coast.<sup>22</sup> Yet, the prosperity of tobacco farming and exporting led to the first of many misfortunes for the Anacostia River. As a result of the world's craving for tobacco, the large tobacco plantations continued to expand and clear trees.<sup>23</sup> Draining rainwater eroded top soil from the cleared farmland and flowed into the Anacostia River where it deposited the soil on the river bottom.<sup>24</sup> Consequently, by the middle of the nineteenth century, the soil deposits from top soil run-off rendered the once prosperous port of Bladensburg inaccessible to large trans-Atlantic trading ships.<sup>25</sup> Furthermore, the continued sedimentation formed large mud flats along the banks and bottom of the river, significantly reducing the fish and underwater plant populations.<sup>26</sup>

In response to the river getting shallower, Congress approved funding in 1902 for the U.S. Army Corps of Engineers to dredge parts of the river to repair boat channels along the Washington Navy Yard, a once prominent shipbuilding and naval experimentation center.<sup>27</sup> This further injured the river's fisheries by tearing up established habitats on the riverbed.<sup>28</sup> However, as time would tell, the worst was still on the horizon.

Like the rest of the nation, the Washington, D.C. area went through an urbanization boom followed by a subsequent suburban sprawl.<sup>29</sup> Throughout both of these periods, there were consistent building development and population growth near the Anacostia River and its tributaries.<sup>30</sup> Until the 1930s, the river served as the primary carrier of the city's sewage.<sup>31</sup> In an effort to treat the growing city's sewage, the

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<sup>19</sup> Coleman, *supra* note 10.

<sup>20</sup> Coleman, *supra* note 10.

<sup>21</sup> Coleman, *supra* note 10.

<sup>22</sup> Coleman, *supra* note 10.

<sup>23</sup> Coleman, *supra* note 10.

<sup>24</sup> Coleman, *supra* note 10.

<sup>25</sup> Coleman, *supra* note 10.

<sup>26</sup> Coleman, *supra* note 10.

<sup>27</sup> *Id.*; *History of the Washington Naval Yard*, NAVAL HISTORY & HERITAGE COMMAND, <http://www.history.navy.mil/faqs/faq52-1.htm> (last visited Jan. 29, 2011).

<sup>28</sup> Coleman, *supra* note 10.

<sup>29</sup> Coleman, *supra* note 10.

<sup>30</sup> Coleman, *supra* note 10.

<sup>31</sup> Coleman, *supra* note 10.

city constructed the Blue Plains Wastewater Treatment Plant along the Anacostia River, near its confluence with the Potomac River, in the 1930s. At the time, it was the largest advanced treatment plant in the world.<sup>32</sup>

The city's sewage problem, however, quickly outgrew the plant's capacity. What was once cutting-edge technology now fails to meet the demand, and in turn, contributes to the pollution problem.

The outdated pipelines that feed the Blue Plains Wastewater Treatment Plant carry both rainwater from storm drains and raw human waste from sewer systems.<sup>33</sup> Therefore, during heavy rains, the pipes lack the capacity to handle the volume of water that needs to be treated, resulting in a back-up in the pipes that overflows and dumps rainwater mixed with raw sewage into the river.<sup>34</sup> The Anacostia River is largely tidal, and not nearly as fast moving as the neighboring Potomac.<sup>35</sup> As a result, the sewage overflow and trash carried by rainwater run-off tend to stagnate in the river for days, eventually being taken downriver into the Potomac and the Chesapeake Bay.

Moreover, as evidenced by experimentation and observations in nature, silt deposits destroy fish and plant habitats on the riverbed and shorelines.<sup>36</sup> Silt deposits also increase the turbidity, or level of solids suspended in the water, making the water murkier and less transparent.<sup>37</sup> Murky water further degrades plant life by decreasing the amount of sunlight, which is necessary for photosynthesis, that reaches the plants below.<sup>38</sup> Declining plant populations, in turn, diminish fish habitats and food sources.<sup>39</sup> Impervious surfaces increase the amount of run-off containing the silt and suspended solids by not allowing for proper natural ground filtration.<sup>40</sup>

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<sup>32</sup> Coleman, *supra* note 10.

<sup>33</sup> Coleman, *supra* note 10.

<sup>34</sup> Coleman, *supra* note 10.

<sup>35</sup> Coleman, *supra* note 10.

<sup>36</sup> See *State of the Nation's River 2008: Potomac Stormwater Run-off*, fig. 1, POTOMAC CONSERVANCY, [http://www.potomac.org/site/wp-content/uploads/images/pc\\_fig1\\_lowres.jpg](http://www.potomac.org/site/wp-content/uploads/images/pc_fig1_lowres.jpg) (last visited Jan. 29, 2011); see generally Cherie V. Miller, et al., *Water Quality in the Upper Anacostia River, Maryland: Continuous and Discrete Monitoring with Simulations to Estimate Concentrations and Yields, 2003-2005, 2007-5142* U.S. Geological Surv. Sci. Investigations Rep. 43, 36 (2007), available at <http://pubs.usgs.gov/sir/2007/5142/>.

<sup>37</sup> QUALITY CRITERIA FOR WATER 1986, SOLIDS (SUSPENDED, SETTLEABLE) AND TURBIDITY (1986), ENVTL. PROT. AGENCY, <http://www.epa.gov/waterscience/criteria/library/goldbook.pdf>.

<sup>38</sup> *Id.* at 99.

<sup>39</sup> See *id.*

<sup>40</sup> *State of the Nation's River*, *supra* note 36; Cherie V. Miller, *supra* note 36.

Modern pollutants like Polychlorinated Biphenyls,<sup>41</sup> Chlordane,<sup>42</sup> and Polycyclic Aromatic Hydrocarbons<sup>43</sup> negatively impact the river in a manner similar to that of the silt deposits that have been carried in run-off water since settlers began clearing and farming land.<sup>44</sup> Such chemicals, though some have been banned for almost twenty years due to their carcinogenic properties, have been found in several of the Anacostia River's tributaries, and could be dumped into the river or carried into the river by rainwater run-off.<sup>45</sup> In addition to the impact these and other chemicals can have on human populations, the wildlife in and around the Anacostia River are also affected.<sup>46</sup> Animals have been found to be suffering from cancerous tumors and other ailments, while also carrying toxins which can infect other species.<sup>47</sup>

In an effort to increase use of the river, Maryland and the District of Columbia have conducted limited dredging efforts to deepen parts of the river.<sup>48</sup> Unfortunately, dueling interests have counterproductive effects. Dredging increases boat access to the river, allowing for larger ships to travel farther upriver and smaller crafts like rowing shells to access and use the shallower upstream parts of the river.<sup>49</sup> On the other hand, dredging reduces the ability of fish to spawn and develop and the ability of plants to grow on the banks and bottom of the river.<sup>50</sup> This theoretical effect may be moot, however, because sunlight does not reach the riverbed in very murky water, making plant growth virtually impossible and harming an already reduced fish habitat.<sup>51</sup>

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<sup>41</sup> *The Anacostia River Watershed: Its Dangerous Toxic Pollutant Sources*, ANACOSTIA WATERSHED SOCIETY, <http://www.anacostiaws.org/userfiles/file/ToxinFactsheet.pdf> (last visited Sept. 2, 2010). Banned since 1979, PCBs were commonly used as coolants and lubricants, but they have been linked to causing cancer and immune, reproductive, and nervous system diseases. Also, PCBs are Persistent Organic Pollutants that last a long time in the environment and accumulate in animal and human tissues. *Id.*

<sup>42</sup> *Id.* Chlordane has been banned since 1988 and is a pesticide that was once widely used to treat and control termites. Chlordane is a Persistent Organic Pollutant that builds up in animal and human tissue causing damage to the liver and nervous system. *Id.*

<sup>43</sup> *Id.* Polycyclic Aromatic Hydrocarbons are byproducts of oil and gas combustion and are present in high levels throughout the Anacostia River and some of its tributaries. *Id.* Some forms of Polycyclic Aromatic Hydrocarbons have been found to cause cancer, mutations, and birth defects. *Id.*

<sup>44</sup> *State of the Nation's River*, *supra* note 36; Cherie V. Miller, *supra* note 36.

<sup>45</sup> *The Anacostia River Watershed*, *supra* note 41.

<sup>46</sup> *The Anacostia River Watershed*, *supra* note 41.

<sup>47</sup> *The Anacostia River Watershed*, *supra* note 41.

<sup>48</sup> Richard Hammerschlag, *Anacostia Freshwater Tidal Reconstructed Wetlands*, USGS PATUXENT WILDLIFE RESEARCH CENTER, <http://www.pwrc.usgs.gov/resshow/hammerschlag/anacostia.cfm> (last visited Jan. 29, 2011).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> QUALITY CRITERIA FOR WATER 1986, *supra* note 37.

Today, little remains of the picturesque scene Captain John Smith described almost four centuries ago.<sup>52</sup> Gone is the fully navigable deep-water river.<sup>53</sup> Gone are the overflowing populations of healthy fish and plant life.<sup>54</sup> Gone is the population that subsisted on and lived harmoniously with the river.<sup>55</sup> Instead, the present day Anacostia River is known by many as a foul-smelling and over-polluted sewer of a river with floating islands of trash and populations of tumorous fish.<sup>56</sup> The Anacostia River is by no means alone in being labeling a polluted urban river. It is rare for an urban river to not be polluted in post-industrial revolution America. Still, the Anacostia River is certainly unique in that a major contributor to its problems is human fecal matter.<sup>57</sup> Not surprisingly, the Anacostia River and its tributaries were among the twenty-seven waterways in the District of Columbia and 501 in Maryland identified as impaired waterways in the published 2006 report to the EPA.<sup>58</sup> With the help of caring and dedicated people and proper government regulations, however, the river has made a resurgence and should continue to do so.

### III. THE CLEAN WATER ACT AND THE ENVIRONMENTAL PROTECTION AGENCY

The most substantial government action in the regulation of the nation's waterways came in the form of the Clean Water Act, which was first enacted by Congress in 1977.<sup>59</sup> The Clean Water Act expanded on the Federal Water Pollution Control Amendment of 1972 and was further strengthened by the Water Quality Act of 1987.<sup>60</sup> The Clean Water Act, its forerunners, and its progeny govern "navigable waters,"<sup>61</sup> which has been interpreted to be limited to the waterways that are, in fact, navigable, and not expansive to cover any and all water in the United

<sup>52</sup> *Cleaning Up the Anacostia River*, *supra* note 6.

<sup>53</sup> *See Cleaning Up the Anacostia River*, *supra* note 6.

<sup>54</sup> *See Cleaning Up the Anacostia River*, *supra* note 6.

<sup>55</sup> *See Cleaning Up the Anacostia River*, *supra* note 6.

<sup>56</sup> *See Cleaning Up the Anacostia River*, *supra* note 6.

<sup>57</sup> *See Cleaning Up the Anacostia River*, *supra* note 6.

<sup>58</sup> *Total Maximum Daily Loads Report: Listed Water Information*, ENVTL. PROT. AGENCY, [http://iaspub.epa.gov/tmdl\\_waters10/enviro.control?p\\_list\\_id=MD-02140205-R&p\\_cycle=2006](http://iaspub.epa.gov/tmdl_waters10/enviro.control?p_list_id=MD-02140205-R&p_cycle=2006) (last visited Jan. 29, 2011); *National Summary of Impaired Waters and Total Maximum Daily Loads Information: Watershed Assessment, Tracking & Environmental Results*, ENVTL. PROT. AGENCY [http://iaspub.epa.gov/waters10/attains\\_nation\\_cy.control?p\\_report\\_type=T](http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T) (last visited Jan. 29, 2011).

<sup>59</sup> *See* 33 U.S.C. § 1251(a)-(g) (2010).

<sup>60</sup> Clean Water Act, Pub. L. No. 92-500 (1972); Water Quality Act of 1987, Pub. L. No. 100-4 (1987).

<sup>61</sup> 33 U.S.C. § 1251 (1987).

State's dominion.<sup>62</sup> Specifically, wetlands are not protected under the Clean Water Act, but wetlands may be protected by individual state laws.<sup>63</sup>

#### A. *Point Sources v. Non-Point Sources*

In an effort to improve water quality, the Clean Water Act gave the EPA the authority to impose a permitting system for point sources of pollution.<sup>64</sup> A point source is "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."<sup>65</sup> A point source, however, does not include "agricultural stormwater discharges and return flows from irrigated agriculture."<sup>66</sup> These sources of pollution known as non-point sources remain largely unaddressed by permitting and other types of governmental oversight.<sup>67</sup> In particular, the majority of the pollutants found in the Anacostia River are the result of non-point source pollution, including stormwater run-off, dumping in tributaries, and sewage system overflow from the outdated Blue Plains Wastewater Treatment Plant during heavy rainfalls.<sup>68</sup>

#### B. *The Clean Water Act and the Anacostia*

While not addressing the Anacostia River explicitly, the Clean Water Act does express a great deal of concern for the Chesapeake Bay, of which the Anacostia is an indirect tributary.<sup>69</sup> The Act provides for a Chesapeake Bay Program Office within the EPA to implement and coordinate research and policies to generally improve the water quality and living resources in the Chesapeake Bay ecosystem.<sup>70</sup> Accordingly, the Anacostia River, as a largely polluted tributary of the Chesapeake Bay, should be an area of particular concern. Much public and governmental focus centers on the Chesapeake Bay, which is understandable as it generates a large amount of income for the State of Maryland and the Commonwealth of Virginia. The decline of the Maryland blue crab, oyster, and fish populations has led to a large public

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<sup>62</sup> See *id.*; *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>63</sup> *Rapanos*, 547 U.S. at 742.

<sup>64</sup> 33 U.S.C. § 1362(14) (2008).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *Anacostia River Watershed District of Columbia*, ENVTL. PROT. AGENCY, <http://www.epa.gov/OWOW/NPS/Ecology/chap6ana.html> (last visited Jan. 29, 2011).

<sup>69</sup> See 33 U.S.C. § 1267 (2001).

<sup>70</sup> 33 U.S.C. § 1267(b)(2) (2010).



outcry to clean up the bay, and there is evidence that corresponding efforts have been effective.<sup>71</sup> However, strategies in place regarding the Anacostia River leave much to be desired, and it is an undeniable fact that sewage waste and other pollutants that enter the water in the Anacostia River and its tributaries end up in the Chesapeake Bay, furthering the destruction of the recovering ecosystem.

### C. Total Maximum Daily Loads

Section 303(d) of the Clean Water Act requires states to develop lists of impaired waters that are too polluted to meet the water quality standards set by the state.<sup>72</sup> Moreover, the law requires that states with

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<sup>71</sup> See Henry Fountain, *Oysters Are on the Rebound in the Chesapeake Bay*, N.Y. TIMES, August 5, 2009, § D (Science Desk), at 2; see also *Evaluation of the National Fish and Wildlife Foundation Chesapeake Bay Small Watershed Grants Program*, NAT'L FISH AND WILDLIFE FED'N, vi-vii (August 2007), <http://www.nfwf.org/AM/Template.cfm?Section=Search&template=/CM/ContentDisplay.cfm&ContentFileID=2377>; *NOAA Reports Bay's Crab Population Rebounds but Juvenile Numbers Remain Low*, NOAA (July 7, 2009), [http://www.noaa.gov/news.noaa.gov/stories2009/20090707\\_crabs.html](http://www.noaa.gov/news.noaa.gov/stories2009/20090707_crabs.html).

<sup>72</sup> *Impaired Water and Total Maximum Daily Loads*, ENVTL. PROT. AGENCY, <http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/index.cfm> (last visited Jan. 29, 2011); 33 U.S.C. § 1313(d)(1) (2010), which states:

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards 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.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall

such troubled waters establish priority rankings for bodies of water on the aforementioned list and develop Total Maximum Daily Loads (“TMDLs”) for the waters.<sup>73</sup> The EPA defines a TMDL as a “calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.”<sup>74</sup> In the United States, leading causes of waters being deemed “impaired waters” include pathogens, mercury, metals, nutrients, organic enrichment and oxygen depletion, sediment, turbidity, pesticides, and heat deposits.<sup>75</sup>

In addition to many other requirements, the EPA has codified its regulations governing the TMDL program in 40 CFR § 130.7 entitled “Total maximum daily loads (TMDL) and individual quality-based effluent limitations,” but these regulations leave nearly all responsibility to the states in a regulatory regurgitation of the Clean Water Act.<sup>76</sup> The

include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

*Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Impaired Waters and Total Maximum Daily Loads*, *supra* note 72.

<sup>75</sup> For a more detailed list of causes and numbers of each cause or impairment, see *National Summary of Impaired Waters and TMDL Information*, ENVTL. PROT. AGENCY, [http://iaspub.epa.gov/waters10/attains\\_nation\\_cy.control?p\\_report\\_type=T#causes\\_303d](http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T#causes_303d) (last visited Jan. 29, 2011).

<sup>76</sup> 40 C.F.R. § 130.7 (c) (2009) states:

(c) Development of TMDLs and individual water quality based effluent limitations.

(1) Each State shall establish TMDLs for the water quality limited segments identified in paragraph (b)(1) of this section, and in accordance with the priority ranking. For pollutants other than heat, TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS 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. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.

(i) TMDLs may be established using a pollutant-by-pollutant or biomonitoring approach. In many cases both techniques may be needed. Site-specific information should be used wherever possible.

(ii) TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section. Calculations to establish TMDLs shall be subject to public review as defined in the State CPP.

(2) Each State shall estimate for the water quality limited segments still requiring TMDLs identified in paragraph (b)(2) of this section, the total maximum daily thermal load which cannot be exceeded in order to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the

EPA burdens each state with identifying waterways that qualify as troubled waters.<sup>77</sup> Each state must maintain data on these waterways and report to the EPA regarding the status of the waters.<sup>78</sup> Furthermore, each state must establish TMDLs for the water quality by a pollutant-by-pollutant or biomonitoring approach to “attain and maintain the applicable narrative and numerical WQS [water quality standard] 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,” and the “critical conditions for stream flow, loading, and water quality parameters.”<sup>79</sup> Finally, the EPA requires each state to submit the “list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development” to the Regional Administrator for the EPA every two years for the Regional Administrator’s approval.<sup>80</sup>

#### IV. PUBLIC EFFORTS TO MAINTAIN AND RESTORE THE ANACOSTIA RIVER

In recent years, many national environmental groups have added the Anacostia River to their lists of waterways in need of improvement. Specifically, Earthjustice and Friends of the Earth have demonstrated a great deal of interest in the river’s cleanliness and governmental regulatory efforts aimed at benefitting the river. As large environmental lobbyists and litigators, these groups have been able to successfully represent the river on behalf of citizens who claim that their public trust rights have been infringed upon by pollution.

Additionally, the Anacostia Watershed Society, at times in conjunction with the Chesapeake Bay Foundation, has worked diligently since 1987 to improve the condition of the river.<sup>81</sup> Environmental efforts culminated in the signing of the Anacostia Restoration Agreement on

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normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in the identified waters or parts thereof.

*Id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.* § 130.7(c)(2)-(d)(1).

<sup>79</sup> *Id.* § 130.7(c)(1).

<sup>80</sup> *Id.* § 130.7(d)(1).

<sup>81</sup> *Historical Changes of the Watershed*, ANACOSTIA WATERSHED RESTORATION P’SHIP, <http://www.anacostia.net/history/history.html> (last visited Jan. 29, 2011).

May 10, 1999 by the mayor of the District of Columbia, governor of Maryland, and county executives of Prince George's and Montgomery counties.<sup>82</sup> The agreement listed six specific achievable goals of: (1) dramatically reducing pollutant loads, such as sediment, toxins, other nonpoint inputs, and trash, delivered to the tidal river and its tributaries to meet water quality standards and goals; (2) protecting and restoring the ecological integrity of the Anacostia River and its streams to enhance aquatic diversity, increase recreational use, and provide for a quality urban fishery; (3) restoring the natural range of resident and anadromous<sup>83</sup> fish to historical limits; (4) increasing the natural filtering capacity and habitat diversity of the watershed by sharply increasing the acreage and quality of tidal and non-tidal wetlands; (5) protecting and expanding forest cover throughout the watershed and creating a continuous riparian forest buffer adjacent to its streams, wetlands, and rivers; and (6) increasing citizen and private business awareness of their vital role in both the cleanup and economic revitalization of the watershed, and increasing volunteer and public-private partnership participation in watershed restoration activities by 2010.<sup>84</sup> Each goal was specifically detailed and intended to contribute to the overall quality of life in, on, and around the river. In addition, each goal sought to improve the neighboring population's public trust rights and enjoyment of the river. According to the Anacostia Watershed Society, however, it quickly became clear that the goals were not going to be achieved.<sup>85</sup>

#### A. *Lack of Attention – Environmental Justice*

Environmental Justice is a movement advocating the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>86</sup> The Anacostia River is of particular interest to the environmental justice movement due to the large minority population that lives in the areas surrounding the river.<sup>87</sup>

The controversy surrounding the Klamath River, located in northern California and southern Oregon, highlights the environmental justice

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<sup>82</sup> *Anacostia Restoration Agreement*, ANACOSTIA WATERSHED RESTORATION P'SHIP, <http://www.anacostia.net/AWRP/agreement.htm> (last visited Jan. 29, 2011).

<sup>83</sup> Anadromous fish are fish that migrate upstream, typically from salt water to fresh water, for breeding purposes. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (Merriam-Webster Inc., 9th ed. 1986).

<sup>84</sup> *Anacostia Restoration Agreement*, *supra* note 82.

<sup>85</sup> See *General Restoration Progress*, ANACOSTIA WATERSHED RESTORATION P'SHIP, <http://www.anacostia.net/restoration.html> (last visited Jan. 29, 2011).

<sup>86</sup> *Environmental Justice*, ENVTL. PROT. AGENCY, <http://www.epa.gov/oecaerth/environmentaljustice> (last visited Jan. 29, 2011).

<sup>87</sup> *Id.*

issue of minority populations effected by river pollution.<sup>88</sup> The Klamath River and its tributaries make up what used to be over 300 miles of productive salmon spawning habitat, still relied on by rural Native American tribes for subsistence.<sup>89</sup> Four dams built over the past ninety years, in combination with pollution from industry, agriculture, mining, road building, and poor forestry, have reduced the river to a remnant of what it once was.<sup>90</sup> Federally-licensed hydroelectric plants and dams have blocked the traditional salmon spawning routes and produced toxic algae that have been measured at levels up to four thousand times the limit that the World Health Organization considers a moderate risk to human health.<sup>91</sup> Native American tribes brought suit against PacifiCorp, a large utility company that generates 164 megawatts of energy from the Klamath River, and the United States of America, alleging that the hydroelectric power plants violated the tribes' rights under various treaties and the Federal Power Act.<sup>92</sup> The court granted summary judgment against the tribes, which was upheld on appeal, highlighting the difficulty of establishing disputed facts and entitlement to a remedy in this environmental issue.<sup>93</sup>

Historically, wealthier citizens and communities have had a greater impact on environmental policy.<sup>94</sup> Whether this can be attributed to a greater interest in the environment or greater political power is up for debate, but evidence demonstrates that the Anacostia River has suffered tremendously while other rivers have received effective funding for maintenance.<sup>95</sup> Although the Potomac River is much faster moving, and thus less susceptible to pollution, it has received more attention in

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<sup>88</sup> *Environmental Justice and the Klamath River Community*, KLAMATH RIVERKEEPER <http://www.klamathriver.org/environmentaljustice.html> (last visited Jan. 29, 2011).

<sup>89</sup> *See The Klamath River Watershed*, KLAMATH RIVERKEEPER, <http://www.klamathriver.org/watershed.html> (last visited Jan. 29, 2011); *see also Klamath Riverkeeper's Projects & Campaigns*, KLAMATH RIVERKEEPER, <http://www.klamathriver.org/Projects.html> (last visited Jan. 29, 2011).

<sup>90</sup> *See The Klamath River Watershed*, *supra* note 89.

<sup>91</sup> *Klamath Dams and Toxic Algae*, KLAMATH RIVERKEEPER, <http://www.klamathriver.org/dams-algae.html> (last visited Jan. 29, 2011); *Klamath Riverkeeper's Projects and Campaigns*, *supra* note 89.

<sup>92</sup> *Klamath Tribes of Oregon v. PacifiCorp*, 268 F. App'x. 575, 576 (9th Cir. 2008) (citing *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511-12 (9th Cir. 2005) (*en banc*)) (*cert. denied* 129 S. Ct. 109 (2008)).

<sup>93</sup> *Id.*

<sup>94</sup> *See Environmental Justice*, ENVTL. PROT. AGENCY, <http://www.epa.gov/oecaerth/environmentaljustice/> (last visited Jan. 29, 2011).

<sup>95</sup> *See Press Release: Congress Approves Funding for Potomac River*, THE NATURE CONSERVANCY (Nov. 2, 2009), available at <http://www.nature.org/wherework/northamerica/states/maryland/press/press4263.html>; *see also Anacostia River Watershed District of Columbia*, ENVTL. PROT. AGENCY, <http://water.epa.gov/type/watersheds/archives/chap6ana.cfm> (last visited Jan. 29, 2011).

cleanup efforts than its neighbor and tributary, the Anacostia River.<sup>96</sup> One possible reason is that the Potomac River flows through the affluent areas of Georgetown, Alexandria, and downtown Washington, D.C.<sup>97</sup> Meanwhile, the Anacostia River runs through poor areas of Prince George's County, Maryland and the District of Columbia.<sup>98</sup> One seemingly illogical factor in this discrepancy is that the Anacostia flows into the Potomac, so any pollutants in the Anacostia drift into the Potomac for the 108 miles before the Potomac flows into the Chesapeake Bay, another body of water with a great deal of public support and funding.<sup>99</sup>

### *B. Litigation - Private Groups Suing the Environmental Protection Agency*

At first blush, one might wonder how private environmental groups have standing to challenge EPA regulations regarding the rivers that flow through the nation's capital. Courts have generally allowed representative standing to an organization whose members are injured.<sup>100</sup> Specifically, Earthjustice, Anacostia Riverkeeper, Potomac Riverkeeper, and other environmental groups have successfully argued that they are representative of their members who use and enjoy the river.<sup>101</sup>

<sup>96</sup> *Id.*

<sup>97</sup> *The Potomac River Guide*, RIVER EXPLORER, <http://www.riverexplorer.com/> (last visited Jan. 29, 2011).

<sup>98</sup> See *Anacostia River Watershed District of Columbia*, *supra* note 95.

<sup>99</sup> See generally CHESAPEAKE BAY FOUNDATION, <http://www.cbf.org/Page.aspx?pid=1000> (last visited Jan. 29, 2011).

<sup>100</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

<sup>101</sup> See Complaint for Declaratory and Injunctive Relief at ¶ 4, *Anacostia Riverkeeper and Friends of the Earth v. Stephen L. Johnson, Administrator, Env'tl. Prot. Agency* (D.D.C. Jan. 15, 2009), available at [http://www.earthjustice.org/library/legal\\_docs/anacostia2009complaint.pdf](http://www.earthjustice.org/library/legal_docs/anacostia2009complaint.pdf); Complaint for Declaratory and Injunctive Relief at ¶ 5, *Anacostia Riverkeeper, Friends of the Earth, and Potomac Riverkeeper v. Johnson* (D.D.C. Jan. 15, 2009), available at [http://www.earthjustice.org/library/legal\\_docs/anacostia-potomac2009complaint.pdf](http://www.earthjustice.org/library/legal_docs/anacostia-potomac2009complaint.pdf).

Plaintiffs are each membership organizations with members and staff residing in the District of Columbia, Maryland, Virginia, and other states, including members who use and enjoy the District of Columbia waters at issue herein for boating, observation from their banks, and their other uses. Plaintiffs' members and staff regularly patrol the waters at issue to protect against unlawful pollution or use of the waters. Plaintiff's members suffer recreational, professional, and aesthetic injury from water quality impairments afflicting those waters, including impairments from fecal coliform bacteria, organics, metals, pH, and total suspended solids. The acts and omissions of EPA alleged herein cause injury to Plaintiffs' members by prolonging these impairments, thereby adversely affecting members' use and enjoyment of these waters. The physical well-being as well as recreational, aesthetic, and environmental interests of Plaintiffs' members have been and continue to be adversely affected by the actions

Moreover, the EPA's actions and omissions adversely affect their members' use and enjoyment of the river.<sup>102</sup> Therefore, the environmental groups are not suing the EPA for their own interests, but rather on behalf of their injured members.<sup>103</sup> While this argument may be fairly circular, courts have not rejected recent attacks for lack of standing. Similar to the rationale behind class action suits, individual citizens would have a great deal of difficulty attacking individual EPA regulations on their own without the resources of a larger environmental group.

Somewhat related to the issue of standing is the matter of jurisdiction. A predecessor to the case of *Friends of the Earth v. EPA*<sup>104</sup> was filed in the United States Court of Appeals for the District of Columbia Circuit, but the court dismissed that case because it lacked jurisdiction.<sup>105</sup> The United States Court of Appeals for the District of Columbia Circuit held that "original jurisdiction over EPA actions not expressly listed in section 1369(b)(1)<sup>106</sup> lies not with us, but with the district court."<sup>107</sup> The Clean Water Act provides for review of several types of specific actions against

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of EPA described herein. Granting the requested relief would redress the injuries described above.

Complaint for Declaratory and Injunctive Relief at ¶ 5, *Anacostia Riverkeeper, Friends of the Earth, and Potomac Riverkeeper v. Johnson, supra*; see also *Anacostia Riverkeeper, Inc. v. Jackson*, 2010 U.S. Dist. LEXIS 51440 (recognizing Plaintiff as a party with interests).

<sup>102</sup> See *supra* note 99 and accompanying text.

<sup>103</sup> Complaint for Declaratory and Injunctive Relief, *Anacostia Riverkeeper, Friends of the Earth, and Potomac Riverkeeper v. Johnson, supra* note 101.

<sup>104</sup> 446 F.3d 140 (D.C. Cir. 2006).

<sup>105</sup> *Friends of the Earth v. EPA*, 333 F.3d 184 (D.C. Cir. 2003).

<sup>106</sup> 33 U.S.C. § 1369(b)(1) states:

(b) Review of Administrator's actions; selection of court; fees  
 (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

*Id.*

<sup>107</sup> *Friends of the Earth*, 333 F.3d at 189.

the EPA in the United States Court of Appeals for the jurisdiction, but the United States District Court has jurisdiction over the many challenges that do not fall into the list of actions to be brought in the Court of Appeals.<sup>108</sup> Therefore, Earthjustice, Friends of the Earth, and other representatives of the Anacostia River have filed complaints against the EPA regarding TMDL regulations in the United States District Court for the District of Columbia.<sup>109</sup>

Ironically, private groups frequently bring suit against the EPA based on allegations that the agency has failed or is continuing to fail to properly abide by the Clean Water Act and its own subsequent regulations. In 2002, Earthjustice and Friends of the Earth filed a lawsuit alleging that the EPA was improperly regulating the amount of pollutants flowing into the Anacostia River.<sup>110</sup> According to the Anacostia Watershed Society, a private group with the mission to protect and restore the river and its watershed by “cleaning the water, recovering the shores, and honoring the heritage,”<sup>111</sup> about two billion gallons of a mix of storm water and untreated human waste flows into the river each year.<sup>112</sup> In addition to this contamination, the Clean Water Act and subsequent EPA regulations in 1997 allow limited “Total Maximum Daily Loads” for certain pollutants to be dumped into the river from permitted point sources.<sup>113</sup> Nevertheless, the EPA approved permits on seasonal and annual bases.<sup>114</sup> Arguing that the approved permits were in accordance with the Clean Water Act and the EPA regulations, the EPA argued that the word “daily” in “Total Maximum Daily Loads” was ambiguous.<sup>115</sup> Friends of the Earth and the Anacostia Watershed Society argued vehemently against this interpretation.<sup>116</sup> The environmental groups pointed out that seasonal or annual averages would allow more pollutants into the river over the course of a year than a daily allocation.<sup>117</sup> The court quickly rejected the EPA’s argument because the plain meaning of “daily” and common sense clearly indicated that “daily” meant “per

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<sup>108</sup> See 33 U.S.C. § 1369(b)(1).

<sup>109</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, *Anacostia Riverkeeper, Friends of the Earth, and Potomac Riverkeeper v. Johnson*, *supra* note 101; Complaint for Declaratory Relief and Injunctive Relief, *Anacostia Riverkeeper, Inc., and Friends of the Earth v. Johnson*, *supra* note 101.

<sup>110</sup> *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

<sup>111</sup> *About AWS, ANACOSTIA WATERSHED SOCIETY*, <http://www.anacostiaws.org/about> (last visited Jan. 29, 2011).

<sup>112</sup> Ray Rivera & Elizabeth Williamson, *Anacostia Pollution Limits Tightened*, WASH. POST, April 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/25/AR2006042502006.html>.

<sup>113</sup> *Friends of the Earth*, 446 F.3d at 144.

<sup>114</sup> *Id.* at 143.

<sup>115</sup> *Id.* at 143-44.

<sup>116</sup> *Id.* at 143.

<sup>117</sup> Rivera & Williamson, *supra* note 112.



day.”<sup>118</sup> The EPA also maintained that seasonal or annual load permits were more practical, easier to implement and regulate, and more environmentally friendly.<sup>119</sup> Even if those arguments may have been true, the court held the EPA liable to the plain meaning of its own regulation and required dumping limits to be based on days rather than seasons or years.<sup>120</sup>

Conversely, the United States Court of Appeals for the Second Circuit held that TMDL limits can be set on a non-daily basis.<sup>121</sup> The Natural Resources Defense Council, an environmental protection group, brought suit against the EPA for alleged violations of the Clean Water Act caused by EPA-approved phosphorus TMDLs that were based on annual loads.<sup>122</sup> The TMDLs covered nineteen reservoirs that provided New York City’s drinking water.<sup>123</sup> The court expressed its intent to give deference to the agency’s regulations and found sufficient evidence to allow annual, not daily, loads.<sup>124</sup> In doing so, that court seemingly neglected the plain meaning of “daily” in the Clean Water Act.<sup>125</sup> The national discrepancy over the meaning of “daily,” while decided correctly regarding the Anacostia River, does not bode well for national water quality efforts.

More recently, Earthjustice, on behalf of Friends of the Earth, Anacostia Riverkeeper, and Potomac Riverkeeper, challenged EPA-approved pollution caps for sediment, bacteria, metals, and other major pollutants in the Anacostia and Potomac Rivers under the Clean Water Act.<sup>126</sup> The first of two lawsuits alleged that the EPA must correct several remaining pollution limits that are only based on average annual loads, rather than daily loads as ordered by the court’s previous ruling in 2006.<sup>127</sup> Since that ruling, the EPA has continued to allow fifteen

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<sup>118</sup> *Friends of the Earth*, 446 F.3d at 144.

<sup>119</sup> *Id.* at 145.

<sup>120</sup> *Id.* at 142.

<sup>121</sup> *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 94 (2d Cir. 2001).

<sup>122</sup> *Id.* at 95-96.

<sup>123</sup> *Id.* at 95.

<sup>124</sup> *Id.* at 98-99.

<sup>125</sup> *Compare* 33 U.S.C. § 1313(d) (2000) (statutory text of Clean Water Act defining maximum daily load), *with Muszynski*, 268 F.3d at 98-99 (holding that maximum daily load did not literally mean daily).

<sup>126</sup> *Groups Fight for Stronger Cleanup Standard for Anacostia and Potomac Rivers*, EARTHJUSTICE (Jan. 15, 2009), <http://www.earthjustice.org/news/press/2009/groups-fight-for-stronger-cleanup-standards-for-anacostia-and-potomac-rivers.html>; *Complaint for Declaratory and Injunctive Relief, Anacostia Riverkeeper, Friends of the Earth, and Potomac Riverkeeper v. Johnson*, *supra* note 95.

<sup>127</sup> Raviya Ismail, *Groups Fight for Stronger Cleanup Standard for Anacostia and Potomac Rivers*, EARTHJUSTICE (Jan. 15, 2009), <http://www.earthjustice.org/news/press/2009/groups-fight-for-stronger-cleanup-standards-for-anacostia-and-potomac-rivers.html>; *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

existing limits that are contrary to the ruling of the United States Court of Appeals for the District of Columbia Circuit that “daily” in TMDLs under the Clean Water Act and the EPA’s implementation regulations truly means “per day.”<sup>128</sup> According to the plaintiffs in this lawsuit, allowing anything but daily limits endangers the safety of the people interacting with the river.<sup>129</sup> Furthermore, a second lawsuit attacked the EPA’s approval of limits on discharges of sediment and suspended solids into the Anacostia River and requested declaratory and injunctive relief.<sup>130</sup> Although the EPA mandated some daily limits for the pollutants in accordance with the previous court decision in *Friends of the Earth v. EPA*,<sup>131</sup> the EPA’s approved limits allow “more than half of the 7,000-ton annual limit to be dumped into the river during a single day’s heavy rainfall.”<sup>132</sup> Moreover, authorizing such a deluge of water and pollutants into the river in a short period of time neglects a chief source of the river’s deterioration – silt deposits.<sup>133</sup> The deposit of silt on the river’s bottom and shorelines has been a major problem since Europeans began clearing and farming the land and has only gotten worse with the rise of impervious surfaces surrounding the river. Earthjustice argues that the current EPA-sanctioned limits allow “approximately 40,000 tons of silt dumped into the Anacostia each year, clogging the eight-mile river and choking the life from its waters.”<sup>134</sup>

Despite the commendable litigation efforts, the seemingly elusive problems caused by silt deposits, sewage overflow, and human pollution continue. Furthermore, the interpretational inconsistencies between courts evidence a systemic and national problem in addressing pollution in the nation’s already struggling rivers.<sup>135</sup>

### C. Dispute Over Plastic Bag Legislation

Unbeknownst to most citizens, plastic bags from grocery, convenience, and retail stores end up in the Anacostia River, accumulating to block small tributaries and killing birds, fish, and plants.<sup>136</sup> The destructive nature of seemingly mundane and innocuous

<sup>128</sup> Ismail, *supra* note 127; *Friends of the Earth*, 446 F.3d 140 (D.C. Cir. 2006).

<sup>129</sup> Ismail, *supra* note 127.

<sup>130</sup> Complaint for Declaratory and Injunctive Relief, 2, 11-12, *Anacostia Riverkeeper and Friends of the Earth v. Johnson*, *supra* note 101.

<sup>131</sup> 446 F.3d 140 (D.C. Cir. 2006).

<sup>132</sup> Ismail, *supra* note 127.

<sup>133</sup> Ismail, *supra* note 127.

<sup>134</sup> Ismail, *supra* note 127.

<sup>135</sup> Compare *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006), with *Natural Resources Defense Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). See also *supra* text accompanying notes 106-23.

<sup>136</sup> David Alpert, *Get plastic bags out of the Anacostia*, GREATER GREATER WASHINGTON (Feb. 12, 2009), <http://greatergreaterwashington.org/post.cgi?id=1690>.

plastic bags is not limited to the District of Columbia's polluted river. Rather, it is a national and international problem. So much so, in fact, that many European countries have enacted legislation that charges fees for plastic bags in grocery and retail stores.<sup>137</sup> Ireland enacted a plastic bag fee and saw a 94% reduction in bag use within a year.<sup>138</sup> Similarly, in the United States, many retail and grocery chains already charge shoppers a nominal fee for every bag.<sup>139</sup> When IKEA, a Swedish home products retailer,<sup>140</sup> began charging customers for bags, usage fell 97% in the first year alone.<sup>141</sup> Based on this evidence, many private groups have been lobbying and petitioning local governments, including Baltimore City, for similar government-sponsored legislation.<sup>142</sup>

However, like every issue, there are opposition voices. In particular, representatives of the poor argue that the poor will be disproportionately impacted by a tax on plastic bags, even if it were five cents, while people of means will be less affected and more likely to adapt by using reusable shopping bags.<sup>143</sup> Additionally, food banks complain that their patrons would unduly suffer from any tax levied on the distribution of plastic bags.<sup>144</sup> To the contrary, others feel that a five cent tax would not go far enough, and advocate a twenty-five or fifty cent fee to deter the use of plastic bags, and promote the use of environmentally friendly reusable bags.<sup>145</sup> Such advocates feel that any arguments against the tax on plastic bags are part of a "race-baiting and class-baiting" strategy designed to evoke support for politicians from poorer minority groups.<sup>146</sup>

Meanwhile, the American Chemistry Council discredits the accusations of attempts to draw support based on socioeconomic groups. The council maintains that a tax on plastic bags is unjustified, "not the best way to clean up the Anacostia," and that the tax would have a "disproportionate affect [sic] on those least able to pay."<sup>147</sup> While both

<sup>137</sup> *Id.*

<sup>138</sup> Frank Convery et al., *The most popular tax in Europe? Lessons from the Irish plastic bag levy*, 38 ENVTL. & RESOURCE ECON. 1, 7 (Sept. 1, 2007) (discussing the nature of the Irish plastic bag levy), available at [http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/study\\_the-most-popular-tax-in-Europe-2007.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/study_the-most-popular-tax-in-Europe-2007.pdf).

<sup>139</sup> Alpert, *supra* note 136.

<sup>140</sup> *History*, IKEA, [http://www.ikea.com/ms/en\\_US/about\\_ikea/the\\_ikea\\_way/history/index.html](http://www.ikea.com/ms/en_US/about_ikea/the_ikea_way/history/index.html) (last visited Jan. 29, 2010).

<sup>141</sup> Alpert, *supra* note 136.

<sup>142</sup> See, e.g., *Protect the Anacostia River Cleanup Fun*, GREATER GREATER WASHINGTON, <http://www.trashfreeanacostia.com> (last visited Jan. 29, 2011).

<sup>143</sup> See Nikita Stewart, *Bill to Charge Consumers For Bags Prompts Debate*, WASH. POST, Apr. 2, 2009, at B04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040103556.html>.

<sup>144</sup> See *id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

sides of the argument raise valid issues and concerns, the use of plastic bags and, more importantly, the lack of proper disposal or recycling by a vast majority of the population, remain as major causes of pollution and wildlife loss in the Anacostia River.<sup>148</sup> A particular group of people may be adversely affected by any legislation, but that does not make the legislation any less needed or proper to achieve a societal goal. In addition, advocates of the poor could promote the use of reusable bags to minimize the tax's impact on those who can least afford it.

To date, the Anacostia River Clean Up and Protection Act of 2009, which bans the use of disposable non-recyclable plastic bags and assesses consumers a five cent fee per recyclable paper or plastic bag used at retail establishments, was signed into law in Washington, D.C. by Mayor Fenty in July 2009.<sup>149</sup> The act went into effect in 2010 and promotes the use of reusable bags by allowing a customer to receive a credit of five cents for each reusable bag he or she provides, which should also have a greater positive impact on poorer consumers who use reusable bags.<sup>150</sup> The proceeds of the tax are divided with the retailer retaining one cent of the fee, and the remaining four cents from each bag going toward a fund for the cleanup of the Anacostia River.<sup>151</sup> Therefore, the impetus for the fee is clear. Time will tell, however, if such legislation has an appreciable impact on the environment or is merely an annoyance for those who forget their reusable bags at the store and an excessive levy on those who are struggling to make ends meet.

## V. CONCLUSION

While private action against misdirected EPA permits and regulations is praiseworthy and necessary for the preservation of the once majestic river, greater and more underlying problems remain. Moreover, such actions are decidedly a waste of personal, environmental, and governmental resources. Instead of painstaking litigation and court orders requiring conformance to ever-changing standards, the EPA and private environmental groups should focus on mutual cooperation and mediation to reach the same end results without bringing costly lawsuits in already overburdened court systems. Most importantly, taxpayer and donor money could be spent focusing on the actual causes of the pollution rather than lawsuits to treat pollution after the fact. Many of these efforts

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<sup>148</sup> *See id.*

<sup>149</sup> *Anacostia River Clean Up and Protection Act of 2009*, COUNCIL OF THE DISTRICT OF COLUMBIA (July 6, 2009), <http://dccouncil.us/lims/legislation.aspx?LegNo=B18-0150&Description=ANACOSTIA-RIVER-CLEAN-UP-AND-PROTECTION-ACT-OF2009.&ID=22118>, enacted as D.C. Code §§ 8-102.01 to 8-102.07 (2010).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

are embodied in the goals expressed in the Anacostia Restoration Agreement,<sup>152</sup> but they have not been pursued as diligently as is necessary.

For example, the sewer system in the District of Columbia and its suburbs is outdated. The fact that it cannot handle rainwater and sewage during several rainfalls each year, resulting in untreated fecal matter being dumped into the Anacostia River, is egregious. Washington, D.C., and its Maryland and Virginia suburbs that share the sewer systems, should be required to invest in a modern wastewater treatment plant that can handle the water and sewage flows during heavy rainfalls. Alternatively, the system should be overhauled to limit the amount of rainwater that gets into the sewer system or direct rainwater through different pipes. With less rainwater flowing into the sewers, significantly less stress would be put on the current wastewater treatment plant. There are hefty overhead costs for either suggestion, but such costs are necessary. The result would be a much cleaner and safer river with a resurgence of plant life and wildlife, an increase in human use and enjoyment of the river, and positive downstream effects in the Potomac River and Chesapeake Bay.

Since much of the non-point source pollution in the Anacostia River is purely trash, which is generally recyclable, state and local governments and private groups should continue to promote widespread recycling programs. Continued community outreach and cleanup programs can have a large impact on the amount of this trash that ends up in the river. Likewise, because much of this trash flows from tributaries, Maryland and the District of Columbia should continue to construct natural or minimally invasive trash barriers, replicating the successful system in the Sligo Creek tributary.<sup>153</sup> These barriers allow trash to congregate in easily collected pockets rather than flow into the larger river without impeding the natural flow of the river and its tributaries.

In terms of socioeconomic concerns, the mere fact that the river runs through largely poor and minority populated communities does not help to raise resources to improve the quality of the river. However, at least before the recent economic turmoil, the areas in the District of Columbia surrounding the Anacostia River were a hotbed of development including Nationals Park, nearby high-priced condominiums and office buildings, and the National Harbor hotel, retail, residential, dining, and entertainment complex. The developments focused on being waterfront property and relied on the further improvement of the Anacostia River.

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<sup>152</sup> *Anacostia Restoration Agreement*, *supra* note 82.

<sup>153</sup> Michael Neibauer, *Sligo Creek Fix First Step in Reviving Anacostia River*, WASH. EXAMINER, Nov. 28, 2008, [http://www.washingtonexaminer.com/local/112808\\_Sligo\\_Creek\\_fix\\_first\\_step\\_in\\_reviving\\_Anacostia\\_River.html](http://www.washingtonexaminer.com/local/112808_Sligo_Creek_fix_first_step_in_reviving_Anacostia_River.html).

Clearly, such attractions are not going to be appealing if there is a foul smell emanating from the nearby river or islands of trash floating with the tide. In the poorer, less modern areas that border the Anacostia River, there continues to be a need for community outreach to raise and address existing concerns about the river. Much has been done recently to create and restore existing parks along the river, but, as with many poor urban areas, a pervasive lack of concern for the environment seems to remain. This lack of concern can be remedied by community action and involvement. Additionally, people will invest more time and effort in a river that shows promise and hope to be as flourishing and bountiful as it once was. Unfortunately, if interest in the river and its cleanliness subsides, it is likely that the once pristine river will be reduced to an eight mile long open sewer with floating islands of trash and cancerous wildlife, if any remains at all.