IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

South River Watershed Alliance, Inc. *
*
Plaintiff, *
*
v. *
*
United States Environmental Protection Agency, *
*
Defendant. *
*
_____

Complaint for Declaratory Judgment
and Relief Setting Aside Agency Action

Nature of Case

1. A Total Maximum Daily Load ("TMDL") calculates the maximum amount of a pollutant allowed to enter a waterbody. The United States Environmental Protection Agency ("EPA") erred by approving the *Total Maximum Daily Load Evaluation for Eleven Stream Segments in the Ocmulgee River Basin for Sediment (6 Fish Community Impacted 5 Macroinvertebrate Community Impacted)* ("Ocmulgee River Basin TMDL").

Jurisdiction

2. This case arises under the Clean Water Act, 33 U.S.C. § 1251 et seq. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (federal defendant), and 5 U.S.C. § 702 (right of judicial review for persons aggrieved by agency action).

Venue

3. Venue is proper in the Northern District of Georgia because EPA's approval of the Ocmulgee River Basin TMDL occurred in this judicial district and the waterbodies are in this judicial district. 28 U.S.C. § 1391(b)(2).

Parties

4. South River Watershed Alliance, Inc. is a Georgia nonprofit corporation.

5. South River Watershed Alliance, Inc. is a Georgia nonprofit corporation dedicated to protecting water quality in the South River watershed, including Intrenchment Creek and Snapfinger Creek. South River Watershed Alliance's members use the South River and Intrenchment Creek and use public lands surrounding these streams

for their aesthetic, scenic, and recreational values. The Ocmulgee River Basin TMDL's wasteload allocations have caused increases in sediment discharges into these streams and have lessened the aesthetic, scenic, and recreational values for South River Watershed Alliance's members, including Jacqueline Echols. The Ocmulgee River Basin TMDL's wasteload allocations have caused construction activities to discharge sediment at levels that exceed the assimilative capacities of the South River, Intrenchment Creek, and Snapfinger Creek. These discharges harm aquatic life.

6. Permits to discharge pollutants from point sources must incorporate TMDL wasteload allocations so impaired streams will eventually meet water quality standards. *See, 40 C.F.R. § 122.44(d).* EPA's approval of the Ocmulgee River Basin TMDL has caused and continues to cause sediment loading to exceed the assimilative capacities of the South River, Intrenchment Creek, and Snapfinger Creek. The increased sediment loading harms fish, macroinvertebrates, and amphibians. Sedimentation eliminates habitat on the stream bottom and increased suspended sediment in the water has harmful effects on aquatic organisms' ability to feed, reducing the

diversity of native fish, macroinvertebrates, and amphibians. Excess sediment because of EPA's approval of the Ocmulgee River Basin TMDL's wasteload allocations is causing mortality, reproductive impairment, and growth impairment of native fish, macroinvertebrates, and amphibians. The increased sediment discharges in the South River, Intrenchment Creek, and Snapfinger Creek diminish the habitat for aquatic species that remain after historic sediment pollution displaced other species.

7. Continuing sediment discharges into the South River, Intrenchment Creek, and Snapfinger Creek also harm South River Watershed Alliance's members by further delaying the time for these streams to be free from sediment that interferes with supporting aquatic life.

8. South River Watershed Alliance, Inc. sues on behalf of its members who are harmed by sediment discharges that exceed these streams' assimilative capacities due to EPA's approval of the Ocmulgee River Basin TMDL's wasteload allocations.

9. These harms would be redressed by an order vacating and setting aside the Ocmulgee River Basin TMDL's wasteload allocations for the South River, Intrenchment Creek, and Snapfinger Creek, and remanding the Ocmulgee River Basin TMDL back to EPA with instructions to recalculate the wasteload allocations so sediment discharges into these streams don't exceed water quality standards and don't harm aquatic life.

Statement of the Claim - EPA's Approval of the Ocmulgee River Basin TMDL Was Arbitrary, Capricious, and an Abuse of Discretion

A. Water Quality Standards and TMDLs

10. The primary objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *33 U.S.C. § 1251(a).*

11. To meet this objective, states must establish "water quality standards" to restore and maintain the chemical, physical, and biological integrity of the nation's waters. *33 U.S.C. §§ 1251, 1313.*

12. Water quality standards designate a use that must be protected for each water body and specify criteria necessary to protect that use. *33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 130.3.*

13. The designated use for each waterbody in Georgia requires water quality that fully protects native aquatic life.

14. Georgia's narrative criteria for aquatic life requires waterbodies to be free from discharges which interfere with the protection of aquatic life. *Ga. Comp. R. & Regs. 391-3-6-.03(5)(c).*

15. The Clean Water Act requires states to: (1) identify surface waters that don't meet water quality standards ("impaired waters"), (2) identify the pollutant causing the impairment, and (3) calculate the maximum pollutant load the water body can assimilate without violating water quality standards. *33 U.S.C. §§ 1313(d)(1)(A), 1313(d)(1)(C); 40 C.F.R. § 130.7.*

16. These pollutant limits are established in TMDLs, which shall be established at levels necessary to attain water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).

17. TMDLs are the sum of: (a) runoff from nonpoint sources and natural background (called "load allocation"), (b) existing and future discharges from point sources (called "wasteload allocation"), and (c) a "margin of safety" to account for any lack of knowledge concerning the relationship between discharge limits and water quality. *33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.2(i), 130.7(c)(1).*

18. TMDLs can be expressed in terms of mass per time or other appropriate measure. *40 C.F.R. § 130.2(i).*

19. "Biota-impaired streams" are streams where sediment has degraded habitat below the level needed to fully support aquatic life.

20. TMDLs for biota-impaired streams set annual "total allowable sediment loads."

21. TMDLs must be reviewed and approved by EPA. *33 U.S.C. §§ 1313(d)(1)(C), 1313(d)(2); 40 C.F.R. § 130.7(d)(2).*

B. Ocmulgee River Basin TMDL

22. The South River, Intrenchment Creek, and Snapfinger Creek are on Georgia's list of biota-impaired streams.

23. EPA approved the Ocmulgee River Basin TMDL, which included TMDLs for the South River, Intrenchment Creek, and Snapfinger Creek.

24. The Ocmulgee River Basin TMDL explained that sediment "settles to the stream bottom and smothers sensitive organisms." *Ocmulgee River Basin TMDL, pp. 35 and 70.*

25. The Ocmulgee River Basin TMDL established "total allowable sediment loads" for the South River, Intrenchment Creek, and Snapfinger Creek.

26. The Ocmulgee River Basin TMDL established total allowable sediment loads of 5524.2 tons per year for the South River, 945.3 tons per year for Intrenchment Creek, and 4373.6 tons per year for Snapfinger Creek. *Ocmulgee River Basin TMDL, Table 26 at p. 58.*

27. The total allowable sediment loads are calculations of the maximum amount of sediment "that can be assimilated" by these streams "without exceeding the applicable water quality criteria; in this case, the narrative water quality criteria for aquatic life." *Ocmulgee River Basin TMDL, p. 51.*

C. EPA Erred by Approving the Ocmulgee River Basin TMDL

i. Wasteload Allocations

28. A TMDL's wasteload allocation must identify the portion of the stream's loading capacity allocated to existing and future point sources. *40 C.F.R. §§ 130.2(f), 130.2(h), and 130.2(i).*

29. The Ocmulgee River Basin TMDL's wasteload allocations excluded point sources that discharge sediment into the South River,

Intrenchment Creek, and Snapfinger Creek.

30. The Ocmulgee River Basin TMDL allocated the entire wasteload allocations for point source discharges into the South River, Intrenchment Creek, and Snapfinger Creek to municipal separate storm sewer systems:

Total Maximum Daily Load Evaluation
Ocmulgee River Basin (Biota Impacted)

April 2017

Table 26. Total Allowable Sediment Loads and the Required Sediment Load Reductions

Stream Segment	Station ID	WLA (tons/yr)	WLA_{sw} (tons/yr)	LA (tons/yr)	Current Total Load (tons/yr)	Total Allowable Sediment Load (tons/yr)	Maximum Allowable Daily Load (tons/day)	% Reduction
Not Supporting Segments - Fish Community								
Caney Fork Creek	WRD 1193	-	338.9	569.4	1079.4	908.2	117.7	15.9%
Peeksville Creek	WRD 50	-	117.1	1775.1	3600.7	1892.2	245.2	47.4%
Swan Creek	WRD 68	-	-	2381.3	2381.3	2381.3	308.6	0%
Tributary to Tussahaw Creek	WRD 40	-	53.6	1183.4	1237.0	1237.0	160.3	0%
Tussahaw Creek	WRD 54	5.5	3023.5	33747.7	44583.4	36776.7	4766.3	17.5%
Wolf Creek	WRD 1127	-	757.2	1109.3	1866.6	1866.6	241.9	0%
Not Supporting Segments - Macroinvertebrate Community								
Intrenchment Creek	EPD 45b-212	-	579.3	365.9	945.3	945.3	122.5	0%
Pughs Creek	EPD 45b-193	-	1427.9	1292.2	2857.9	2720.1	352.5	4.8%
Snapfinger Creek	EPD 45b-201	-	2347.6	2025.9	4373.6	4373.6	566.8	0%
South River	EPD 45b-213	-	3088.1	2436.0	5524.2	5524.2	715.9	0%
Tributary to Gum Branch	EPD 65c-38	-	100.7	470.1	657.4	570.8	15.1	13.2%

Definitions:

Current Total Load - Sum of modeled sediment load and approved waste load allocations (WLA)
WLA - waste load allocation for discrete point sources
WLA_{sw} - waste load allocation associated with storm water discharges from a municipal separate storm sewer system (MS4)
LA - portion of the total allowable sediment load attributed to nonpoint sources and natural background sources of sediment
Total Allowable Sediment Load - allowable sediment load calculated using the target sediment yield and the stream's watershed area
Maximum Allowable Daily Load - total allowable sediment load (annual) converted to a daily figure based on the bankfull sediment transport relationship
% Reduction - percent reduction applied to current load in order to meet total allowable sediment load

31. A municipal separate storm sewer is a system of drains, pipes, and other structures owned by a local government that collects stormwater for conveyance into surface waters.

32. The Ocmulgee River Basin TMDL made two assumptions in concluding that the municipal separate storm sewer systems are the only point sources that will discharge sediment into the South River, Intrenchment Creek, and Snapfinger Creek.

33. First, the Ocmulgee River Basin TMDL assumed that because the Atlanta East Area Combined Sewer System's permit to discharge pollutants into Intrenchment Creek includes no limit for total suspended solids ("TSS"), the combined sewer system is not expected to discharge sediment.

34. Discharge Monitoring Reports for the Atlanta East Area Combined Sewer System disclosed that when the combined sewer system's capacity is exceeded, suspended solids (sediment) are discharged into Intrenchment Creek from two combined sewer overflow facilities.

35. EPA's Decision Document stated that for facilities discharging upstream of impaired streams, TSS data was obtained from Discharge Monitoring Reports where available. *EPA Total Maximum Daily Load Review Document, Eleven Segments in the Ocmulgee River Basin – Sediments, p. 7.*

36. The Ocmulgee River Basin TMDL acknowledged that total suspended solids are monitored and reported for these facilities. *Ocmulgee River Basin TMDL, Table 14, n. 1 at p. 36 and Table 21 at p. 52.*

37. The Ocmulgee River Basin TMDL, however, did not include TSS data from Discharge Monitoring Reports for the Atlanta East Area Combined Sewer System.

38. The Ocmulgee River Basin TMDL wasteload allocation did not include sediment from the Atlanta East Area Combined Sewer System.

39. There was no rational basis to conclude that combined sewer overflows from the Atlanta East Area Combined Sewer System discharge no sediment into Intrenchment Creek.

40. There was no rational basis to conclude that combined sewer overflows from the Atlanta East Area Combined Sewer System cause no sedimentation in Intrenchment Creek.

41. EPA's conclusion that Georgia Environmental Protection Division adequately identified the magnitude of the pollutant sources for Intrenchment Creek was arbitrary, capricious, and an abuse of discretion.

42. The Ocmulgee River Basin TMDL also excluded sediment from construction sites when it stated that the municipal separate storm sewer systems are the only point sources that will discharge sediment into the South River, Intrenchment Creek, and Snapfinger Creek.

43. The Ocmulgee River Basin TMDL assumed that general permits for stormwater discharges from construction sites include conditions to "assure that the storm water runoff from these sites does not cause or contribute sediment to the stream[s]." *Ocmulgee River Basin TMDL, p. 53.*

44. Three general permits authorize construction sites in Georgia to discharge stormwater from point sources into surface waters. (*NPDES General Permits No. GAR100001, No. GAR100002, and No. GAR100003).*

45. The general permits authorize the discharge of sediment and turbidity if best management practices for erosion control are properly designed, installed, and maintained. *General Permits, Parts III.D. and Appendix B*.

46. Best management practices for erosion control reduce — but don't prevent — sediment discharges into streams.

47. The Ocmulgee River Basin TMDL wasteload allocation did not include sediment from construction sites.

48. There was no rational basis to conclude that best management practices for erosion control will prevent the discharge of sediment into the South River, Intrenchment Creek, and Snapfinger Creek.

49. There was no rational basis to conclude that stormwater discharges from construction sites will contribute no sediment to the South River, Intrenchment Creek, and Snapfinger Creek.

50. There was no rational basis to conclude that stormwater discharges from construction sites will cause no sedimentation in the South River, Intrenchment Creek, and Snapfinger Creek.

51. EPA's conclusion that Georgia Environmental Protection Division adequately identified the magnitude of the pollutant sources for the South River, Intrenchment Creek, and Snapfinger Creek was arbitrary, capricious, and an abuse of discretion.

52. EPA's approval of the Ocmulgee River Basin TMDL was arbitrary, capricious, and an abuse of discretion because the wasteload allocations for the South River, Intrenchment Creek, and Snapfinger Creek failed to accurately account for point source loading as required by 40 C.F.R. §§ 130.2 and 130.7.

53. EPA's approval of the Ocmulgee River Basin TMDL was arbitrary, capricious, and an abuse of discretion because the wasteload allocations for the South River, Intrenchment Creek, and Snapfinger Creek are less stringent than required by 33 U.S.C. § 1311(b)(1)(C), 33 U.S.C. § 1313(d)(1)(C), and 40 C.F.R. § 130.7.

ii. Margin of Safety

54. The Ocmulgee River Basin TMDL failed to include an adequate margin of safety as required by 33 U.S.C. § 1313(d)(1)(C) and 40 C.F.R. §§ 130.2 and 130.7(c)(1).

55. The margin of safety required by 33 U.S.C. § 1313(d)(1)(C) and 40 C.F.R. §§ 130.2 and 130.7(c)(1) can be implicit by incorporating conservative assumptions into the TMDL.

56. The findings in the Ocmulgee River Basin TMDL that there will be no sediment discharged into the South River, Intrenchment Creek, and Snapfinger Creek from either the Atlanta East Area Combined Sewer System or construction sites are not conservative assumptions.

57. EPA's Decision Document failed to articulate a satisfactory explanation for why there would be no sediment discharged into the South River, Intrenchment Creek, and Snapfinger Creek from the Atlanta East Area Combined Sewer System or construction sites.

58. EPA's conclusion that the Ocmulgee River Basin TMDLs for South River, Intrenchment Creek, and Snapfinger Creek incorporated an adequate margin of safety was arbitrary, capricious, and an abuse of discretion.

iii. Maintaining Current Total Loads

59. TMDLs shall be established at levels necessary to attain water quality standards with a margin of safety. *33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).*

60. The Ocmulgee River Basin TMDL stated that water quality in the South River, Intrenchment Creek, and Snapfinger Creek would be improved to meet water quality standards by maintaining existing sediment loading rates.

61. To support this claim, the Ocmulgee River Basin TMDL stated it was "likely that the impairment in these segments is due to past land use practices" and that it "is believed that these streams will repair themselves over time if sediment loads are maintained at current levels." *Ocmulgee River Basin TMDL, pp. 70-71.*

62. There was no rational basis to conclude that the South River, Intrenchment Creek, and Snapfinger Creek would be improved to meet water quality standards if sediment loads are maintained at current levels.

63. The "current total load" for the South River increased from 2,621 tons per year to 5,524.2 tons per year between 2007 and 2017. *Compare Ocmulgee River Basin TMDL Table 26 at p. 58 (2017)* with *Total Maximum Daily Load Evaluation for Seventy Stream Segments in the Ocmulgee River Basin For Sediment (Biota Impacted), Table 24 at p. 99 (2007).*

64. The "current total load" for Intrenchment Creek increased from 330.8 tons per year to 945.3 tons per year between 2007 and 2017. *Compare Ocmulgee River Basin TMDL Table 26 at p. 58 (2017)* with *Total Maximum Daily Load Evaluation for Seventy Stream Segments in the Ocmulgee River Basin For Sediment (Biota Impacted), Table 24 at p. 98 (2007).*

65. EPA's Decision Document failed to articulate a satisfactory explanation for why the current total sediment load for these streams would more than double in ten years if the impairment is due to historic land use practices.

66. EPA's Decision Document failed to articulate a satisfactory explanation for why water quality in the South River, Intrenchment Creek, and Snapfinger Creek would improve to meet water quality standards by maintaining current sediment loads.

67. The Ocmulgee River Basin TMDL is not up to the task of improving water quality and aquatic habitat in the South River, Intrenchment Creek, and Snapfinger Creek to meet water quality standards.

68. EPA's conclusion that the loading capacities for the South River, Intrenchment Creek, and Snapfinger Creek were set at levels necessary to attain and maintain water quality standards was arbitrary, capricious, and an abuse of discretion.

69. EPA approved the Ocmulgee River Basin TMDL by sending a letter to Georgia Environmental Protection Division, dated March 21, 2018, with an enclosed copy of EPA's Decision Document (*EPA Total Maximum Daily Load Review Document, Eleven Segments in the Ocmulgee River Basin – Sediments*).

Requested Relief

South River Watershed Alliance, Inc. respectfully requests:

a. A judgment finding EPA's approval of the Ocmulgee River Basin TMDL violated the Clean Water Act, violated the agency's regulations, and was arbitrary, capricious, and an abuse of discretion.

b. An order vacating and setting aside the Ocmulgee River Basin TMDL's wasteload allocations for the South River, Intrenchment Creek, and Snapfinger Creek.

c. An order remanding the Ocmulgee River Basin TMDL back to EPA with instructions to recalculate the wasteload allocations.

d. An award of costs and reasonable attorney fees to South River Watershed Alliance, Inc. under the Equal Access to Justice Act, 28 U.S.C. § 2412.

e. Such other relief to which South River Watershed Alliance, Inc. may be entitled at equity as is just and appropriate, or at law, including under 28 U.S.C. § 2202.

Filed March 20, 2024.

/s/ Jon Schwartz

Jon Schwartz
Ga. Bar. No. 631038
Attorney for Plaintiff South River Watershed Alliance, Inc.

Law Office of Jon Schwartz
1100 Peachtree St., N.E., Suite 250
Atlanta, GA 30309
404-667-3047
jon@jonschwartz.net