Friends of the Earth v. United States Environmental Protection Agency:

A Battle for the Proper Forum to Protect the Nation's "Forgotten River"

Estie Manchik

Friends of the Earth v. Environmental Protection Agency explores two important jurisdictional questions that help clarify the Clean Water Act's Judicial Review Provision. The case was brought as a challenge to the Environmental Protection Agency Administrator's approval and establishment of Total Maximum Daily Loads (TMDLs) standards, which are used to help control water pollution levels, for the Anacostia River. The central issue for the District of Columbia Circuit Court was whether appellate courts have original jurisdiction to hear such a case. First, the court held that there is original appellate jurisdiction only for those actions by the EPA Administrator that are specifically enumerated in the CWA's Judicial Review Provision. As a consequence, the court held that federal circuit courts may not directly review the Administrator's acts of establishing or approving TMDLs. This Note argues that the holding is proper because it maintains the plain language interpretation of the statute, promotes judicial economy, and provides uniformity among the circuit courts on this issue. However, this Note concludes that Congress should amend the Judicial Review Provision to provide for direct circuit court review of the EPA Administrator's establishment or approval of TMDLs. This amendment would uphold the goals Congress intended to achieve.

Copyright © 2004 by the Regents of California.

* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2005; B.A. University of North Carolina at Chapel Hill, 2001. I would like to thank Professor Bob Infelise, Deborah Keeth, and the editing staff at ELO for their invaluable comments and assistance on this Note. I would also like to express my gratitude to Ben Kus and my family for their continued guidance and encouragement.

531
with the Judicial Review Provision, in addition to upholding the broader policy goals of the CWA and the court system in general.

Introduction .................................................................................................................. 533

I. The Clean Water Act: Background Principles ............................................................... 536
   A. The Purpose of the CWA and the Role of TMDLs .................................................. 536
   B. Original Appellate Court Jurisdiction and the CWA ......................................... 538

II. *Friends of the Earth v. EPA*: Establishing Maximum Pollution Levels for a Dirty River .................................................................................................................. 538

III. The D.C. Circuit Court's Analysis of the Two Primary Issues Properly Led the Court to Transfer the Case to the District Court .......................................................................................... 540
   A. Issue One: Whether Circuit Courts Have Original Jurisdiction to Review Only Those EPA Actions Specifically Enumerated in the CWA's Judicial Review Provision .............................................................. 540
      1. The Scope of an Appellate Court's Original Jurisdiction Under the CWA’s Judicial Review Provision .................................................................................................................. 540
      2. The FOE Court Held that Circuit Courts are Limited to Review of Enumerated Provisions .................................................................................................................. 542
      3. The FOE Court Relied on Principles of Statutory Interpretation and Persuasive Authority .................................................................................................................. 543
   B. Issue Two: Whether a TMDL is an Effluent Limitation or Other Limitation Under the Effluent Limitations Provision .............................................................................................. 546
      1. FOE's Argument for Direct Appellate Review ......................................................... 546
      2. Analysis of the D.C. Circuit's Holding that a TMDL is Not an Effluent Limitation or Other Limitation Under the Effluent Limitation Provision .............................................................. 549
         a. The Court Refused to Depart From Circuit Court Precedent .................................. 549
         b. The Court Recognized the Statutory Distinction between References to Effluent Limitations .................................................................................................................. 551
         c. The Court Noted Sections of the CWA That FOE's Interpretation Would Render Unnecessary ........................................................................................................... 551
         d. The Court Rejected FOE's Arguments for Reliance on PUD No. 1 ....................... 552
         e. The Court Rejected FOE's Argument for Reliance on D.C. Circuit Precedent ........ 553
         f. Summary of the Appropriateness of the Court's Decision ...................................... 554
IV. Recommendation: Congress Should Amend the Judicial Review Provision to Include Establishment or Approval of TMDLs

A. The Proposed Amendment Would Uphold the Legislative Intent of the Judicial Review Provision

B. The Proposed Amendment Would Uphold the Purpose of the Judicial Review Provision and CWA

C. On Balance, Policy Arguments Weigh In Favor of the Proposed Amendment

1. Policy Arguments Weighing Against the Proposed Amendment

2. Rebuttal to Policy Arguments Weighing Against the Proposed Amendment

3. Arguments in Favor of the Proposed Amendment

Conclusion

INTRODUCTION

Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act\(^1\) (CWA or Act), to help protect our nation's water quality from being degraded by pollution.\(^2\) The Act's primary approach to protecting water quality is through national technology standards for direct sources of pollution discharge.\(^3\) However, if the technology-based standards are not sufficient to achieve the water quality desired, the Act also provides for water-quality-based regulations.\(^4\) These regulations require that states:

- identify waters that remained polluted after the application of technology standards,
- determine the total maximum daily loads (TMDLs) of pollutants that would bring these waters up to grade,
- and then allocate these loads among discharge sources in discharge permits and state water quality plans. If the states did not do it, the [Environmental Protection Agency] would.\(^5\)

In essence, where technology-based standards have failed to sufficiently clean the water, states must determine the maximum amount of acceptable pollution and distribute permits to polluters accordingly.

---

1. 33 U.S.C. §§ 1251-1387 (2000). To aid the reader, statutory provisions are referred to by their United States Code section numbers rather than the section numbers in the original Act.
2. See CWA's stated objective (33 U.S.C. § 1251(a)) and goals (33 U.S.C. § 1251(a)(1)-(2)).
4. Id.
5. Id. at 5.
Currently, despite existing technology standards, almost 40% of the nations’ waters do not meet water quality standards. Thus, TMDLs, which stipulate the maximum quantity of pollutants that can be discharged into a body of water without violating the water quality standards, play a critical role in addressing the remaining pollution. The TMDL program helps abate pollution that would otherwise remain unregulated.

The Administrator of the Environmental Protection Agency (EPA) is responsible for establishing TMDLs when a state has failed to do so. Additionally, the Administrator is responsible for approving or rejecting the TMDLs established by the states. An Administrator who rejects a state’s TMDL must determine the allowable pollution loads that will achieve the water quality standards. Thus, the Administrator must make important decisions about appropriate pollutant levels for specific bodies of water. Because of the inherent tension between protection of natural resources and waste disposal needs underlying such a decision, stakeholders, such as polluters and environmental organizations representing citizens who utilize the bodies of water, occasionally challenge the Administrator’s decisions in federal court.

In Friends of the Earth v. Environmental Protection Agency, Friends of the Earth (FOE) brought a challenge in the D.C. Circuit Court of Appeals to the EPA Administrator’s approval and establishment of two TMDLs for the Anacostia River. FOE is an environmental membership organization dedicated to preserving the nation’s natural resources, such as the Anacostia River. The Anacostia River is located in the District of Columbia, and it is used by FOE members for recreational and aesthetic purposes. However, many consider the river to be severely polluted. Believing that the TMDLs approved and established by the EPA would

6. Id. at 6.
9. HOUCK, supra note 3, at 5-6.
10. HOUCK, supra note 3, at 5.
12. Id.
not achieve the water quality standard for the Anacostia River, FOE sued the EPA, seeking review of the Administrator's decisions.\footnote{Certificate, \textit{supra} note 14, at 2-3.}

Although the effectiveness of the TMDLs was the basis of the suit, the main issue in the case, and the central topic of this Note, is jurisdiction. Federal courts are courts of limited jurisdiction. For cases involving the CWA, the Act's Judicial Review Provision specifies which regulatory decisions can be directly reviewed in federal courts of appeal.\footnote{33 U.S.C. § 1369 (2000).} Normally, suits over TMDLs are brought in federal district courts and then later reviewed in the circuit court if appealed. In this case, FOE sought review of the TMDL decisions directly in the D.C. Circuit Court of Appeals. The EPA argued that the D.C. Circuit lacked original jurisdiction to review the case.\footnote{Friends of the Earth v. EPA, 333 F.3d 184, 185 (D.C. Cir. 2003).} The court agreed with the EPA, holding that it lacked jurisdiction.\footnote{\textit{Id.}}

This Note addresses the scope of original appellate jurisdiction granted by the CWA and the functions it serves. It begins in Part I with a brief overview of the relevant parts of the CWA, including the goals of the Act and the background principles of establishing TMDLs. Part II then gives an introduction to \textit{Friends of the Earth v. Environmental Protection Agency}. Part III covers the two primary issues in the case—whether circuit courts' jurisdiction is limited to EPA actions specifically enumerated in the CWA's Judicial Review Provision, and if so, whether establishing or approving TMDLs fits within the provision. This section begins by exploring FOE's motivation for direct review of the Administrator's establishment or approval of TMDLs, focusing on factors such as judicial economy and consistency in decision making. This section then continues by explaining the court's reasoning in holding that it lacked jurisdiction and asserting that the decision was proper because it upholds the plain meaning of the Judicial Review Provision, promotes judicial economy, and provides uniformity among the circuit courts. Finally, Part IV concludes with a recommendation that Congress amend the Judicial Review Provision to include jurisdiction over the EPA Administrator's act of establishing or approving a TMDL. This section illustrates how such an amendment would uphold the legislative intent and purpose of the Judicial Review Provision. The amendment would also uphold the goals of the CWA, eliminate fragmentation in the TMDL review process, and promote judicial economy and national uniformity.
I. THE CLEAN WATER ACT: BACKGROUND PRINCIPLES

A. The Purpose of the CWA and the Role of TMDLs

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."21 The CWA seeks to achieve this goal in two ways: a technology-based approach and a water-quality-based approach.22 The technology-based approach places restrictions on the amount of pollutants discharged from point sources (such as sewage plants and industrial facilities23) into various bodies of water.24 These restrictions are known as effluent limitations.25 The water-quality-based approach requires each state26 to set water quality standards for its waters.27 These standards lay out the water quality criteria that will be necessary to maintain the designated uses for a body of water.28 A body of water's designated uses can include public water supply, fish and wildlife habitat, recreational, agricultural, and/or industrial purposes as well as use for navigation.29 Naturally, certain uses, such as public water supply, require stricter water quality criteria than other uses, such as industrial purposes. The water quality standards established by each state are subject to review by the EPA Administrator to ensure that they fulfill the requirements of the Act and achieve at least the minimum level of water quality desired.30

Under the CWA, if the effluent limitations are not sufficient to achieve the water quality standards for a body of water, the state must identify and "establish a priority ranking for such waters" based on the amount of pollution in the water and designated uses for the body of water.31 For these priority waters, the state must then establish TMDLs that will achieve the water quality standard.32 The TMDLs specify the maximum quantity of pollutants that can be discharged into a body of water per day without violating the water quality standards, accounting for seasonal variations and a margin of safety.33 In other words,

22. Friends of the Earth, 333 F.3d at 185-86.
23. Examples of point sources suggested by Introduction to the Clean Water Act, supra note 8.
25. Id.
26. For the purposes of the CWA, the District of Columbia is considered a state. § 1362(13).
27. § 1313(a)-(c).
30. § 1313(c)(3)-(4).
31. § 1313(c)(1)(A).
32. § 1313(d)(1)(A), (C).
establishing a TMDL requires identifying pollutant sources and then "calculating and implementing reductions of concentrations of pollutants from each source needed for water quality."  

The priority list and the TMDLs are subject to EPA approval. The provision of the CWA that governs this is 33 U.S.C. § 1313(d)(2), hereinafter the "Water Quality Standards Provision." This provision provides in relevant part that "[e]ach State shall submit to the Administrator... for his approval the waters identified and the loads established... The Administrator shall either approve or disapprove such identification and load." This provision clarifies that it is the duty of the state to establish a total pollution "load"—or permissible maximum level of pollutants that can be released into a body of water per day—for bodies of water whose quality is below the applicable water quality standard.

These determinations must then be submitted to the EPA Administrator for approval. If the Administrator disapproves of the TMDL established by the state, the Administrator must establish a TMDL that meets the water quality standard. The goal of this process is to regulate pollution from all sources so that the polluted body of water can be restored to the quality necessary for its designated use. A recent study revealed that 21,000 bodies of water in this country do not meet the water quality standard. Thus, TMDLs, which have only recently been widely implemented, play an important role in helping to clean up our nation's waters.

Stakeholders occasionally challenge the Administrator's decision to approve or establish a TMDL. For instance, a corporation might believe that the TMDL is more stringent than necessary, or as in this case, an environmental group might believe the TMDL is too lenient and will not achieve the water quality standard. The stakeholders can sue the EPA to

34. Mary E. Christopher, Time to Bite the Bullet: A Look at State Implementation of Total Maximum Daily Loads (TMDLs) Under Section 303(d) of the Clean Water Act, 40 WASHBURN L.J. 480, 487 (2001); see 33 U.S.C. § 1313(d).
36. Id.
38. 33 U.S.C. 1313(d)(2).
39. Id.
40. Christopher, supra note 34, at 484.
42. HOUCK, supra note 3, at 1 (explaining that TMDLs were not employed until the 1990s, when citizens suits employed them in order to control nonpoint source pollution); James Boyd, The New Face of the Clean Water Act: A Critical Review of the EPA's New TMDL Rules, 11 DUKE ENVTL. L. & POL'Y F. 39, 43 (2000).
force a review of the TMDL. The following subsection discusses the available legal fora for such challenges, in particular the guidelines for original appellate court jurisdiction under the CWA.

B. Original Appellate Court Jurisdiction and the CWA

The CWA’s Judicial Review Provision, 33 U.S.C. § 1369, specifies actions by the EPA Administrator that may be reviewed directly by the federal courts of appeals.43 This provision gives the court of appeals authority to directly review the approval or promulgation of discharge restrictions that are expressly listed in the statute,44 including: effluent limitations or other limitations under § 1311, the Effluent Limitations Provision; § 1312, the Water Quality Related Effluent Limitations Provision; § 1316, the National Standards of Performance Provision; and § 1345, the Disposal or Use of Sewage Sludge Provision.45

II. FRIENDS OF THE EARTH V. EPA: ESTABLISHING MAXIMUM POLLUTION LEVELS FOR A DIRTY RIVER

The Anacostia River flows from Bladensburg, Maryland, to Washington, D.C.46 The river is so severely polluted by trash, nutrients, toxins, and sediment that it is known to the people in the surrounding communities as “the Forgotten River.”47 The pollution in this river is caused primarily by stormwater runoff and untreated sewage.48 These pollutants make it unsafe to swim in, or eat the fish of, the Anacostia.49 In fact, the Anacostia River was “bestowed with the dubious distinction of being one of the ten most polluted rivers in the country.”50

In 2001, the pollution levels in the Anacostia River exceeded the water quality standards established by the District of Columbia.51 Therefore, as provided under the Water Quality Standards Provision,52

46. Cleaning Up., supra note 16.
47. Id.
48. Id.
49. Id.
51. Friends of the Earth v. EPA, 333 F.3d 184, 187 n.6 (D.C. Cir. 2003) (noting that the Anacostia River had been classified for the following beneficial uses: primary contact recreation (Class A); secondary contact recreation and aesthetic enjoyment (Class B); protection and propagation of fish, shellfish and wildlife (Class C); protection of human health related to consumption of fish and shellfish (Class D); and navigation (Class E); see also, Opening Brief of the Petitioner Friends of the Earth, at 4-5, [hereinafter Petitioner’s Brief], available at http://www.foe.org/new/releases/1102foebriefanacost.pdf.
the District of Columbia was required to establish TMDLs for the Anacostia. In that same year, the District established a TMDL addressing the Biochemical Oxygen Demand (BOD) standard, which the EPA approved. In 2002, the EPA established a TMDL addressing the District's turbidity standard.

As these TMDLs were being established, stakeholders such as FOE paid close attention to the decision-making process. FOE is a membership organization headquartered in Washington, D.C. and dedicated to preserving the nation's natural resources. FOE's members use the Anacostia River for recreational and aesthetic purposes, but their ability to enjoy the river for these purposes is impaired by the poor water quality. FOE sees the TMDL program as an opportunity for states to clean and care for waters like the Anacostia River. Thus, when the BOD and turbidity standard TMDLs were established for the Anacostia River, FOE was concerned because the organization believed that these TMDLs were not sufficient to achieve the water quality standards. Consequently, FOE sued the EPA in the D.C. Circuit Court of Appeals under the CWA's Judicial Review Provision, seeking review of these TMDL decisions.

In response, the EPA defended the TMDLs, arguing that the loads established were sufficient to protect the river. The EPA also made a critical jurisdictional argument: that the court of appeals lacked original jurisdiction to review the approval and establishment of TMDLs. Ultimately, the court agreed with the EPA, holding that Congress only intended specifically-enumerated activities by the EPA Administrator to receive direct review under the CWA, and that the establishment of

---

53. *Friends of the Earth*, 333 F.3d at 186-87.
54. *Id.* at 187.
55. *Id.*
57. *Who We Are*, *supra* note 14; Certificate, *supra* note 14, at 2. FOE maintains that the availability of clean air and water is one of the most important factors Americans consider in choosing where to live. Christopher, *supra* note 34, at 508-509.
63. *Friends of the Earth v. EPA*, 333 F.3d 184, 185 (D.C. Cir. 2003); see also Respondent's Brief, *supra* note 62, at 14-29. The case is currently in preparation for review in the district court.
approval of TMDLs was not one of those activities. Finding that it had no jurisdiction to review the agency action, the court transferred the case to the district court for review under the judicial review provisions of the Administrative Procedure Act (APA). The following section provides a more detailed look at the issues the court considered in determining the scope of original appellate jurisdiction under the CWA.

III. THE D.C. CIRCUIT COURT’S ANALYSIS OF THE TWO PRIMARY ISSUES PROPERLY LED THE COURT TO TRANSFER THE CASE TO THE DISTRICT COURT

The parties’ claims and arguments raised several issues. Although the court addressed FOE’s claim as a whole, rather than dealing with each issue individually, this Note divides the issues for the sake of clarity. The first is whether circuit courts of appeals have original jurisdiction to review only those EPA actions which are specifically enumerated in the CWA’s Judicial Review Provision. If so, the second issue is whether a TMDL is an effluent limitation or other limitation under the Effluent Limitations Provision, a provision that is enumerated in the Judicial Review Provision. This section will explain the D.C. Circuit’s holdings on these two issues, and will also evaluate and discuss the court’s reasoning and the basis for its holdings.

A. Issue One: Whether Circuit Courts Have Original Jurisdiction to Review Only Those EPA Actions Specifically Enumerated in the CWA’s Judicial Review Provision

1. The Scope of an Appellate Court’s Original Jurisdiction Under the CWA’s Judicial Review Provision

The first issue in this case is whether a federal appeals court has original jurisdiction under the CWA’s Judicial Review Provision to review only those EPA actions which are specifically enumerated in the Judicial Review Provision. In FOE, the EPA Administrator’s approval and establishment of the BOD and turbidity TMDLs, respectively, were

64. Friends of the Earth, 333 F.3d at 185.
66. Petitioners also raised the issue of whether the EPA acted unlawfully or arbitrarily in its establishment and approval of these TMDLs. Although this issue is clearly key to FOE’s position that the TMDLs are not sufficient to achieve the District’s water quality standards, this issue will not be addressed by this Note. The court did not address this issue either, as it transferred the case to the district court rather than reaching a verdict on the merits.
68. See Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1310 (9th Cir. 1992).
actions under the Water Quality Standards Provision. This provision is not explicitly enumerated in the statute as eligible for direct review in the appellate court. 

Despite this, FOE argued that because the Administrator's actions in approving the TMDLs fell within the "plain scope" of the Judicial Review Provision, the court of appeals had jurisdiction in this case.

Although FOE did not explicitly state its reasons for preferring review in the court of appeals in its brief, it is likely the result of a practical desire to limit the costs of litigation. If FOE filed suit in the district court, and the decision by that court was unfavorable, FOE would plan on appealing. The standard of review of the EPA's action is the same in either court. Additionally, the district court decision receives no deference from the court of appeals—the court of appeals will review the case de novo. Thus, practical, financial, and judicial economy reasons support FOE's attempt to bypass the district court and go straight to the court of appeals for a final judgment.

FOE might also prefer the court of appeals because there is a general conception that appellate courts are more familiar with "APA review standards and the limitation of judicial review to an administrative record" than are district courts. Thus, appellate courts are more likely to apply those rules consistently. Court-acknowledged policy arguments in favor of direct APA review in the courts of appeals also exist. These arguments include that direct appellate jurisdiction would carry out the legislative intent and judicial purpose of the Judicial Review Provision, and would promote the policy goals of eliminating fragmentation of review and encouraging national uniformity of standards for water quality. A more in-depth analysis of the merits of original appellate jurisdiction for an Administrator's approval or promulgation of a TMDL can be found in Part IV.

---

70. 333 F.3d at 188; 33 U.S.C. § 1313(d)(2).
72. Friends of the Earth, 333 F.3d at 187.
73. See generally Petitioner's Brief, supra note 51, at 13-22.
75. Interview with Christopher Vaden, Department of Justice Attorney (Nov. 25, 2003).
76. Id.
77. Id.
79. See generally notes 177 to 212 and accompanying text.
80. See generally notes 177 to 212 and accompanying text.
2. The FOE Court Held that Circuit Courts are Limited to Review of Enumerated Provisions

The court held that courts of appeals do not have original jurisdiction to directly review the Administrator’s approval or establishment of a TMDL under the Water Quality Standards Provision. In its attempt to resolve the issue of whether circuit courts are limited to review of the enumerated statutory provisions of the Judicial Review Provision, the court used two primary bases for its reasoning. First, the court ascertained that the specific listing of provisions that are eligible to receive direct review, combined with the omission of the Water Quality Standards Provision, creates “considerable difficulty in establishing jurisdiction in this court.” Where the statute is complex and specific, as is the Judicial Review Provision, the party seeking such review bears a heavy burden of establishing that he comes within its scope. In other words, for the court to exercise jurisdiction over a matter not included in a statute that clearly identifies the court’s realm of jurisdiction, the court would likely require controlling or persuasive authority indicating that the court had jurisdiction, as well as a convincing theory of statutory interpretation. In the court’s view, FOE did not overcome this heavy burden.

Second, the court relied on persuasive authority from other circuits, reasoning that “[t]he courts of appeals have consistently held that the express listing of specific EPA actions in [the Judicial Review Provision] precludes direct appellate review of those actions not so specified.” Based on this reasoning, the court established a rule that federal courts of appeals have original jurisdiction to review only those actions by the EPA Administrator which are specifically enumerated in the CWA’s Judicial Review Provision. The court found that because the Administrator’s action was an act under the Water Quality Standards Provision, a provision that is not included in the list of actions reviewable by the

82. Id. at 188 (citing Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 514 (2d Cir. 1976) and Original Honey Baked Ham Co. v. Glickman, 172 F.3d 885, 887 (D.C. Cir. 1999)).
83. See generally id., 333 F.3d at 188 (citing Bethlehem Steel Corp., 538 F.2d at 514) (holding that the “appellate court lacked jurisdiction to review EPA action, taken pursuant to section 1313, partially approving New York’s thermal water quality standards.”) and Original Honey Baked Ham Co. of Ga., 172 F.3d at 887 (“A statute listing the things it does cover exempts, by omission, the things it does not list.”)).
84. Friends of the Earth, 333 F.3d at 189, 193.
85. Id. at 189 (quoting Baton Rouge v. EPA, 620 F.2d 478, 480 (5th Cir. 1980) (“courts of appeals have jurisdiction for direct review only of those EPA actions specifically enumerated in 33 U.S.C. § 1369(b)(1).”).
86. Id.
courts of appeals under the Judicial Review Provision, the action could not be reviewed directly in the court of appeals.\(^7\)

3. The FOE Court Relied on Principles of Statutory Interpretation and Persuasive Authority

The court in this case relied on basic principles of statutory interpretation and persuasive authority in determining the scope of the CWA's Judicial Review Provision. The FOE Court and its sister circuits employed the textualist approach to statutory interpretation, examining the statutory text itself.\(^8\) Under this approach, courts rely on a "plain meaning" interpretation of the statute.\(^9\) In other words, "[i]f language is plain and unambiguous, it must be given effect."\(^{10}\) This section discusses the ways in which plain meaning principles were used to interpret the CWA's Judicial Review Provision in other circuit court opinions relied upon by the FOE Court. This Note asserts that the interpretation of the CWA Judicial Review Provision in FOE is consistent with that of most of the other circuits that have addressed the issue.\(^{11}\)

_**Longview Fibre Co. v. Rasmussen**_ addressed the exact issue in the present matter: jurisdiction in the court of appeals for approval of a TMDL established under the Water Quality Standards Provision.\(^{12}\) In

---

87. *Id.* at 193.

88. Starting with an examination of the statutory text involves "more focused, concrete inquiries, typically with a more limited range of arguments." WILIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 804-05 (3d ed. 2001).

89. *Id.* at 670 (explaining that "[t]hree different theoretical approaches have dominated the history of American judicial practice: *intentionalism,* . . . *purposivism,* . . . and *textualism,* in which the interpreter follows the 'plain meaning' of the statute's text.").


91. See, e.g., Longview Fibre Co. v. Rasmussen, 980 F.2d 1307 (9th Cir. 1992); Bethlehem Steel Corp. v. EPA, 538 F.2d 513 (2d Cir. 1976); Baton Rouge v. EPA, 620 F.2d 478 (5th Cir. 1980); Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 266 F. Supp. 2d 1101 (N.D. Cal. 2003); see also Heaton v. Moore, 43 F.3d 1176 (8th Cir. 1994). On the other hand, several cases have held that appellate courts have original jurisdiction to review an Administrator's approval or promulgation of regulations other than effluent limitations guidelines if the regulations are closely related to limitations under §§ 1311 and 1316. See, e.g., Va. Elec. & Power Co. v. Costle, 566 F.2d 446 (4th Cir. 1977) (holding that the regulations issued by the Administrator were entitled to jurisdiction in the Court of Appeals even though they were issued under § 1326(b) because they were so closely related to the effluent limitations and new source standards under §§ 1311 and 1316 that review should not be divided between the courts). See also Annot., Availability of Court of Appeals Review, Under § 509(B)(1)(E) of Federal Water Pollution Control Act (33 U.S.C.A § 1369 (B)(1)(E)), of Action by Administrator of Environmental Protection Agency in Approving or Promulgating Effluent and Other Limitations, 62 A.L.R. Fed 906, sec. 3 (2000).

92. *Longview*, 980 F.2d at 1310 (holding that the court of appeals lacked jurisdiction over approval of a TMDL under 33 USC § 1313(d)(2) of the Water Quality Standards Provision).
Longview, the Ninth Circuit used a plain meaning interpretation and found that it did not have jurisdiction to review the issuance of TMDL limitations.93 The court held that effluent limitations or other limitations were only reviewable under the Judicial Review Provision if they were approved or promulgated under those sections specifically enumerated in the provision.94 Since the issuance of TMDL limits was under the Water Quality Standards Provision, which is not enumerated in the Judicial Review Provision, the Ninth Circuit held that it lacked jurisdiction to review the action.95

Both the Longview and FOE Courts applied the canon of statutory interpretation "expressio unis est exclusio alterius,"96 which means "expression of one thing excludes another."97 Applying this canon, the Longview court reasoned that the explicit enumeration of some sections in the Judicial Review Provision leads to the conclusion that Congress intended to exclude those sections not mentioned, such as the Water Quality Standards Provision.98 The FOE Court acknowledged the Longview decision on this point and noted its agreement with that court's reasoning.99 The court explained that this logic "undermine[s] FOE's broad reading of [the Judicial Review Provision]."100

The Judicial Review Provision was interpreted in this narrow way as early as 1976 in Bethlehem Steel Corp. v. EPA.101 There, the Second Circuit held that the courts of appeals did not have authority to review the approval of state water quality standards under a different subsection of the Water Quality Standards Provision.102 The court reasoned that if "Congress had so intended, it could have simply provided that all EPA action under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others."103 The FOE court cited this decision in support of its conclusion that federal courts of appeal only have jurisdiction over actions specified in the Judicial Review Provision.104

The Fifth Circuit has also held that its jurisdiction is limited to those actions specifically enumerated in the Judicial Review Provision. In

93. Id.
94. Id. at 1311.
95. Id. at 1314.
96. Id. at 1312.
98. 980 F.2d at 1313-14.
99. Friends of the Earth, 333 F.3d at 189-90.
100. Id. at 190.
101. 538 F.2d at 514.
102. Id. at 518.
103. Id. at 517.
104. Friends of the Earth, 333 F.3d at 189.
Baton Rouge v. EPA, the court found that it did not have jurisdiction to review the EPA Administrator's decision not to veto a permit issued under a state National Pollutant Discharge Elimination System (NPDES) program. The Administrator's decision was made pursuant to § 1319, a provision not among those actions enumerated in the Judicial Review Provision. The Fifth Circuit reasoned that the specificity of the Judicial Review Provision and the absence of § 1319 in the list of actions available for direct appellate review precluded a finding of jurisdiction in that case. The court in FOE also relied on this persuasive authority in arriving at its conclusion on this issue.

The above reasoning shows the concurrence among the D.C., Ninth, Second, and Fifth Circuits that original appellate jurisdiction under the Judicial Review Provision is limited to only those actions specifically enumerated. The use of basic principles of statutory interpretation by these circuit courts provides strong support for their conclusion. It is widely recognized that a plain meaning interpretation is so foundational that it should be the first step of the statutory interpretation process. By concluding that where Congress has made a specific list excluding the action in question, such action is not eligible for review, the court has refrained from confounding the meaning of the statute. This rule minimizes confusion about what actions are subject to direct appellate review, and avoids creating a "slippery slope" whereby actions similar to those listed are included based on their similarity, although they are not enumerated.

Interpreting statutes consistently with their plain meaning has important consequences on a broader level. Regulated entities responsible for following the statutes will be better able to interpret them, which clarifies and simplifies compliance. The same benefits apply to enforcement of the statute because a plain meaning

105. 620 F.2d 478.
106. Id. at 480.
107. Id. at 480.
108. Id. at 480.
109. Friends of the Earth, 333 F.3d at 189.
110. ESKRIDGE, supra note 88, at 804-05 (explaining that arguments based on the statutory text will be more persuasive to an interpreter than arguments on statutory purpose.) See also, Nicholas S. Zeppos, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 TEX. L. REV. 1073 (1992).
111. Cf. Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313-14 (9th Cir. 1992) ("A regulatory scheme so complex and difficult to construe forces anyone engaging in productive activity touched by the process to hire a horde of lawyers, in order to find out what must be done to comply and to defend legitimate interests in the regulatory process. Those with [substantial sums of money] may be unable to do business, because they cannot afford the required overhead for legal assistance. We can tell from the briefs and arguments in this Clean Water Act case that tremendous resources in time and money and considerable legal skill have gone into finding out the proper address for an appeal, an activity which does not keep water clean and does not process wood pulp.")
interpretation makes it easier for the enforcement agency or citizen group to determine the applicable statute of limitations and judicial review requirements. Plain meaning interpretation also promotes judicial economy by preventing parties from wasting precious judicial resources by interpreting such provisions too broadly or narrowly and thus filing in the wrong court.

B. Issue Two: Whether a TMDL is an Effluent Limitation or Other Limitation Under the Effluent Limitations Provision

1. FOE's Argument for Direct Appellate Review

If the circuit courts of appeals have original jurisdiction to review only those EPA actions which are specifically enumerated in the Judicial Review Provision, then the next issue is whether a TMDL is an effluent limitation or other limitation “under” the Effluent Limitations Provision, a provision that is enumerated in the Judicial Review Provision. FOE argued that TMDLs do constitute “effluent limitations or other limitations under” the Effluent Limitations Provision, and thus deserve direct appellate review. FOE based its claim on a plain meaning interpretation of the Judicial Review Provision and the Effluent Limitations Provision, as well as on Supreme Court and D.C. Circuit precedent.

The Effluent Limitations Provision states that

In order to carry out the objective of this Act there shall be achieved...not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance...required to implement any applicable water quality standard established pursuant to this Act.

To determine whether a TMDL is a limitation under this provision, FOE referred to descriptions of TMDLs in the Water Quality Standards Provision. The provision states that a TMDL applies to “those waters...for which the effluent limitations required by [specific subsections of the Effluent Limitations Provision] are not stringent

112. The EPA did not deny that a TMDL constitutes an “effluent limitation or other limitation” within the meaning of the Judicial Review Provision. Friends of the Earth, 333 F.3d at 188 n.10 (citing Respondent’s Brief, supra note 62, at 14-29); see Longview, 980 F.2d at 1310 (“EPA concedes that [a] total maximum daily load is an effluent limitation.”). 33 U.S.C. § 1369(b)(1)(E) allows courts of appeals to review EPA actions “in approving or promulgating any effluent limitation or other limitation under section 1311,1312, 1316, or 1345 of this title.”

113. Friends of the Earth, 333 F.3d at 188.
114. Id. See also Petitioner’s Brief, supra note 51, at 15-18.
116. Friends of the Earth, 333 F.3d at 189; Petitioner’s Brief, supra note 51, at 15-16.
enough to implement any water quality standard applicable to such waters.” 118 Additionally, the provision requires that a TMDL “shall be established at a level necessary to implement the applicable water quality standards.” 119 Hence, in FOE’s view, TMDLs constitute a “more stringent limitation, including those necessary to meet water quality standards.” 120 Consequently, FOE interprets the reference to “effluent limitations or other limitations under the [Effluent Limitations Provision]” broadly enough to include the type of water quality standards established with a TMDL.

FOE argued that its conclusion that the Effluent Limitations Provision is broad enough to encompass actions under the Water Quality Standards Provision is consistent with the analysis in the United States Supreme Court decision in PUD No. 1 v. Wash. Dep’t of Ecology. 121 At issue in that case was whether it was permissible under the CWA Certification Provision 122 for a state authority to include minimum stream flow requirements as a condition to its water quality certification. 123 The Supreme Court found that such requirements were permissible under certain circumstances. 124 In coming to this conclusion, the Court explained its interpretation of the relationship between the Effluent Limitations Provision and the Water Quality Provision as follows:

Although [the Water Quality Provision] is not one of the statutory provisions listed in [the Certification Provision], the statute allows states to impose limitations to ensure compliance with [the Effluent Limitations Provision] of the Act... [The Effluent Limitations Provision], in turn, incorporates [the Water Quality Provision] by reference. As a consequence, state water quality standards adopted pursuant to [the Water Quality Provision] are among the “other limitations” with which a State may ensure compliance through the [Certification Provision] certification process. 125

FOE applied the Supreme Court’s reasoning in PUD No. 1 to the facts at hand, arguing that “like [the Certification Provision], [the Judicial Review Provision] expressly references [the Effluent Limitations Provision] which in turn, incorporates [the Water Quality Standards Provision] by reference.” 126 Therefore, FOE argued, the approval of
TMDLs is incorporated by the Effluent Limitations Provision and falls within the Judicial Review Provision.

FOE relied on D.C. Circuit precedent as providing additional support for their conclusion. FOE cited *Natural Resources Defense Council v. EPA*, in which the D.C. Circuit found that it had jurisdiction over challenges to EPA Consolidated Permit Regulations (CPR). 127 There, the court reasoned that original appellate jurisdiction would prevent fragmentation of review in this area, in which review of the CPR would take place in a district court while review of a permit issued under the CPR would take place directly in the court of appeals. 128 This "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits...but would have no power of direct review of the basic regulations governing those individual actions." 129 Thus, the court found that a practical interpretation of the statute led to the conclusion that CPRs were an "effluent limitation or other limitation," and thus were subject to direct review in the court of appeals. 130

Applying this reasoning, FOE argued that a finding that the court lacked direct appellate jurisdiction would "lead to the same kind of 'perverse' result as in *NRDC,*" because the court of appeals would have jurisdiction over the discharge permits established based on the TMDL, but would have no jurisdiction over the establishment or approval of the TMDL itself. 131 This situation potentially could create an additional problem: if the review were to take place in different courts, challenges to the TMDL and the discharge permit could be occurring simultaneously. 132 FOE urged the court to follow its own precedent on this issue by once again interpreting the Judicial Review Provision with an eye toward practicality. 133

FOE also relied on *American Iron and Steel Institute v. EPA*, in which the D.C. Circuit Court held that review of an EPA water quality guidance document required under the Great Lakes Provision of the CWA 134 was within the scope of the appellate court's jurisdiction. 135 Like the Water Quality Standards Provision, the Great Lakes Provision was

---

128. *Id.* at 405-06 (quoting E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 136 (1977)).
129. *NRDC*, 673 F.2d at 405-06 (quoting *du Pont de Nemours*, 430 U.S. at 136).
130. *NRDC*, 673 F.2d at 407.
131. Petitioner's Brief, *supra* note 51, at 17 (noting that "because Clean Water Act permitting authority has not been delegated to the District, EPA retains responsibility for issuing § 402 permits addressing discharges to the District's waters.")
132. *Id.*
133. *Id.*
135. 115 F.3d 979, 986 (D.C. Cir. 1997).
not enumerated in the Judicial Review Provision. The court reasoned that the Great Lakes Provision directs the EPA to disseminate a guidance document, which instructs specified parties to adopt requirements under the Effluent Limitations Provision. The court concluded that because the Effluent Limitations Provision is enumerated in the Judicial Review Provision, it had jurisdiction over the portion of the guidance document containing effluent limitations, and ancillary jurisdiction over other parts of the guidance document. If jurisdiction could be based on this tenuous connection, FOE argued that the court also had jurisdiction over the approval or establishment of TMDLs, an action more closely related to the enumerated Effluent Limitations Provision.

2. Analysis of the D.C. Circuit's Holding that a TMDL is Not an Effluent Limitation or Other Limitation Under the Effluent Limitation Provision

The D.C. Circuit found various grounds for rejecting FOE's arguments. This subsection discusses the five primary reasons for the court's decision and explains why these were generally correct.

a. The Court Refused to Depart From Circuit Court Precedent

The court noted that a finding upholding FOE's interpretation that a TMDL is an effluent limitation or other limitation under the Effluent Limitations Provision would require the court to depart from "firmly established circuit precedent" as well as the plain language and structure of the Act. It refused to do so. Thus, an action taken under the Water Quality Standards Provision cannot be considered to be an effluent limitation or other limitation under the Effluent Limitations Provision.

The court primarily relied upon the Ninth Circuit decision in Longview, which specifically rejected the argument that the Effluent Limitations Provision encompasses the Water Quality Standards Provision limitations such as TMDLs. As noted supra, Longview employed the statutory interpretation principle expresion unis est exclusio alterius. The D.C. Circuit applied this canon, reasoning that the clear

137. Amer. Iron & Steel Inst., 115 F.3d at 986.
138. Id.
140. Id.
141. 980 F.2d 1307.
142. Friends of the Earth, 333 F.3d at 189.
143. 980 F.2d at 1310.
text of the Judicial Review Provision plainly excludes actions under the Water Quality Standards Provision.¹⁴⁴

The court came to the proper conclusion on the plain meaning interpretation argument. Although FOE's interpretation and reasoning is compelling,¹⁴⁵ plain meaning interpretations counsel that "a statute cannot go beyond its text."¹⁴⁶ Thus, where the Judicial Review Provision specifically lists the Effluent Limitations Provision and not the Water Quality Standards Provision, the statute should not be interpreted to include sections that are not listed. FOE's interpretation that TMDLs are "under" the Effluent Limitations Provision attempts to sidestep the expressio unis principle. The court properly avoided the use of semantics—incorporating the Water Quality Standards Provision "under" the Effluent Limitations Provision—as the basis for direct review. Maintaining a more commonly understood interpretation where only those provisions listed receive direct review helped prevent complicating the statute.

The court also relied on Longview's reasoning that because the Effluent Limitations Provision makes only an "oblique reference" to the Water Quality Standards Provision in a timetable for achievement of objectives, the argued interpretation should be rejected.¹⁴⁷ The Ninth Circuit thus determined that this reference was insufficient to warrant appellate review of Water Quality Standards Provision actions under the Effluent Limitations Provision.¹⁴⁸ The D.C. Circuit reiterated this reasoning.¹⁴⁹

The D.C. Circuit's reliance upon the Ninth Circuit's reasoning on this issue was sound. Although the text in the Effluent Limitations Provision might seem to encompass TMDLs under the Water Quality Standards Provision, the Water Quality Standards Provision is never explicitly referenced.¹⁵⁰ Congress frequently cross-referenced different provisions in the CWA and could have done so here if it intended the Water Quality Standards Provision to be encompassed in the Effluent Limitations Provision.¹⁵¹ Again, the court's conclusion was correct because it was based on a plain meaning interpretation. Even if the language could be interpreted to include this provision, this is not the

¹⁴⁴ Friends of the Earth, 333 F.3d at 189.
¹⁴⁵ See Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1310 (9th Cir. 1992) (acknowledging the "practicality of the petitioner's argument").
¹⁴⁶ Llewellyn, supra note 90 (quoted in Singer, supra note 90, at 135).
¹⁴⁷ Friends of the Earth, 333 F.3d at 189 (citing Longview, 980 F.2d at 1312).
¹⁴⁸ Id.
¹⁴⁹ Id.
¹⁵¹ See, e.g., § 1369(b)(1).
clearest and most obvious interpretation, and where the meaning is clear, it should be followed.

b. The Court Recognized the Statutory Distinction between References to Effluent Limitations

In rejecting FOE's interpretation, the D.C. Circuit called attention to sections of the CWA which "differentiated between [the Effluent Limitations Provision] effluent limitations and [the Water Quality Standards Provision] effluent limitations." For example, the court referred to a subsection of the NPDES Provision, which states:

In the case of effluent limitations established on the basis of [subsections of the Effluent Limitations Provision] or [subsections of the Water Quality Standards Provision], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with [a subsection of the Water Quality Standards Provision] of this title.

The court once again relied on Longview in concluding that "even where [the] Congress regarded a [Water Quality Standards Provision] device as an 'effluent limitation,' nevertheless it did not regard it as the same thing as a [Effluent Limitations Provision] effluent limitation."

One could interpret the language in the NPDES Provision as illustrating the similarities between effluent limitations in the Effluent Limitations Provision and in the Water Quality Standards Provision. The NPDES Provision combines the Effluent Limitations Provision and the Water Quality Standards Provision and makes them both subject to the same restriction. Nevertheless, the NPDES Provision supports the court's conclusion by illustrating that when making reference to effluent limitations, Congress explicitly referred to both provisions. Thus, Congress could have done the same in the Judicial Review Provision if it truly intended both provisions to be eligible for direct appellate review.

c. The Court Noted Sections of the CWA That FOE's Interpretation Would Render Unnecessary

The court also pointed out sections of the CWA that would be rendered unnecessary under FOE's interpretation of the Effluent

---

152. Friends of the Earth, 333 F.3d at 190 (citing 33 U.S.C. §§1342(o)(1), 1326(e)). See also Respondent's Brief, supra note 62, at 21-22. The court rejected EPA's argument that §1311 applies to only point sources, and that because the scope of TMDLs includes all sources, they should not be considered "effluent limitations under Section 1311." Id.
154. Friends of the Earth, 333 F.3d at 190 (quoting Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1312 (9th Cir. 1992)).
Limitations Provision.\textsuperscript{155} For example, the effluent limitations described in the Water Quality Related Effluent Limitations Provision\textsuperscript{156} would be considered "effluent limitations or other limitations" under the Effluent Limitations Provision according to FOE's interpretation, because they are limitations "necessary to meet water quality standards."\textsuperscript{157} However, the Judicial Review Provision specifically incorporates acts pursuant to the Water Quality Related Effluent Limitations Provision as eligible for direct review.\textsuperscript{158} FOE's interpretation would make the reference to the Water Quality Related Effluent Limitations Provision "duplicative and unnecessary."\textsuperscript{159} The court's rejection of FOE's argument on this point was proper because it followed basic principles of statutory interpretation, affording meaning to each part of the statute and avoiding interpretations that would result in duplicative and unnecessary construction.\textsuperscript{160}

d. The Court Rejected FOE's Arguments for Reliance on PUD No. 1

The D.C. Circuit rejected FOE's argument that it should rely on PUD No. 1, stating that it would not depart from circuit court precedent in reliance on a "single isolated statement" of a Supreme Court opinion.\textsuperscript{161} The court distinguished the Supreme Court reasoning, noting that the Court based its statement that the Effluent Limitations Provision "incorporates" the Water Quality Standards Provision "by reference" on the legislative history of the 1977 CWA amendments.\textsuperscript{162} The court noted that while the Supreme Court's reliance on legislative history in PUD No. 1 was unsurprising since the House Conference Report it cited "involved" the CWA Certification Provision,\textsuperscript{163} which was at issue in that case, this legislative history was not persuasive in the FOE case.\textsuperscript{164} The FOE Court referenced the reasoning in Longview, which found the legislative history irrelevant for determining the scope of the Judicial Review Provision, because it was "not part of the law, was written long after the law was passed, and seems inconsistent with the law passed

\textsuperscript{155} Id.
\textsuperscript{156} 33 U.S.C. § 1312.
\textsuperscript{157} Friends of the Earth, 333 F.3d at 190.
\textsuperscript{158} Id. (citing 33 U.S.C. § 1369(b)(1)(E)).
\textsuperscript{159} Id.
\textsuperscript{160} See, e.g., Colautti v. Franklin, 439 U.S. 379, 392 (1979) (relying on "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").
\textsuperscript{161} Friends of the Earth, 333 F.3d at 192.
\textsuperscript{162} Id. (quoting H.R. Rep. No. 95-830, at 96) ("Section [1313] is always included by reference where section [1311] is listed.").
\textsuperscript{163} 33 U.S.C. § 1341.
\textsuperscript{164} Friends of the Earth, 333 F.3d at 192.
when it was written." Additionally, the D.C. Circuit distinguished the Supreme Court's reasoning on the grounds that it was based on a substantive regulatory provision, rather than a jurisdictional provision.

Although FOE is the first decision to address the scope of the CWA's Judicial Review Provision that takes into account the incorporation statement in PUD No. 1, the D.C. Circuit did not shed any new light on the issue. The basis for the Supreme Court's statement—the relevant legislative history—was already addressed in Longview. The D.C. Circuit's decision on this point was proper because the Supreme Court's interpretation of the Effluent Limitations Provision is easily distinguishable from the interpretation required in this case. However, the court should have done its own analysis instead of relying so heavily on the Longview opinion. The D.C. Circuit's quotation of Longview was inappropriate because it seems to invalidate the legislative history as a whole. Where the Supreme Court has given weight to the legislative history, the court should have refrained from relying on a Ninth Circuit opinion, and instead should have seriously taken into account this controlling authority.

e. The Court Rejected FOE's Argument for Reliance on D.C. Circuit Precedent

In a footnote, the court rejected FOE's reliance on the D.C. Circuit decisions in NRDC v. EPA and American Iron & Steel Institute v. EPA. The court stated that "both decisions involve EPA decisions expressly specified in [the Judicial Review Provision]." The court summarized NRDC v. EPA as "exercising jurisdiction over Consolidated Permit Regulations where EPA promulgated regulations under [the Effluent Limitations Provision]." Regarding American Iron & Steel Institute v. EPA, the court summarized the decision as "exercising jurisdiction over water quality guidance document issued by EPA where (1) [a] portion of guidance document contained effluent limitations under [the Effluent Limitations Provision] and (2) [the] remainder fell within ancillary jurisdiction of the court."

The court's rejection of precedent in its own circuit was too cursory. FOE was likely trying to test the Longview holding in a circuit that had previously indicated the potential for a broader reading of the Judicial Review Provision. The rejection of the relevance of these decisions, and

165. Id. (quoting Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311-12 (9th Cir. 1992)).
166. Id. at 193.
167. Id. at 191, n.15.
168. Id.
169. Id.
170. Id.
the heavy reliance on Ninth Circuit authority, was improper. The court should have addressed its reasoning in *NRDC*, which would suggest that a broad reading would be appropriate here for policy reasons. The court also should have better distinguished *American Iron and Steel Institute*. As noted above, that case did not address actions *directly* under Effluent Limitations Provision, but instead concerned actions *indirectly* under the Provision, like the TMDLs in *FOE*. By dismissing FOE’s arguments about these cases in a footnote, the court prioritized uniformity among the circuits over following its own precedent.

**f. Summary of the Appropriateness of the Court’s Decision**

While the D.C. Circuit’s holding that TMDLs established under the Water Quality Standards Provision are not effluent limitations or other limitations under the Effluent Limitations Provision was proper, some of its analysis was incomplete. The *FOE* Court relied too heavily on the *Longview* decision, which was inappropriate because it was contradictory to similar decisions in its own circuit. Also, the court should have more fully addressed its seemingly broad readings of the Judicial Review Provision in the past. Despite these inadequacies, the decision maintains the plain meaning interpretation of the statute, promotes judicial economy by clarifying that parties wishing to challenge an Administrator’s promulgation or approval of a TMDL should file suit in the district court, and provides uniformity among the circuit courts on this issue.

**IV. RECOMMENDATION: CONGRESS SHOULD AMEND THE JUDICIAL REVIEW PROVISION TO INCLUDE ESTABLISHMENT OR APPROVAL OF TMDLS**

The D.C. Circuit recognized the difficulty of finding the plain meaning of the Judicial Review Provision. The court noted, “It would be too much to say that we construe this confusing statute with confidence. But construe it we must, consoled by the knowledge that if our interpretation of the intent of [the] Congress is incorrect, [the] Congress can easily correct it.”171 This difficulty merits a brief analysis of the Judicial Review Provision’s legislative history, purpose, and policy. The following analysis suggests that although in this case the court’s holding was proper, Congress should amend the Clean Water Act to make the EPA Administrator’s establishment or approval of a TMDL under the Water Quality Standards Provision172 reviewable under the Judicial Review Provision.173 Such an amendment, providing for original

---

171. *Friends of the Earth*, 333 F.3d at 193 (quoting Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 518 (2d Cir. 1976)).
jurisdiction in the circuit court, would uphold the goals that Congress intended to achieve through the Judicial Review Provision, in addition to upholding broader policy goals of the CWA.

A. The Proposed Amendment Would Uphold the Legislative Intent of the Judicial Review Provision

Judicial analysis of the legislative history of the Judicial Review Provision has revealed that “courts have agreed only that the statute is ambiguous, and have disagreed in ‘deciphering the legislative intent from reading scraps and bits of a convoluted legislative history.’”174 However, shortly after the CWA was established, one court held that Congress’ intent in adopting the Judicial Review Provision was to “streamline decision-making and insure prompt high-level judicial review of the enumerated acts of the Administrator.”175 Other federal courts have supported this interpretation.176

Amending the statute to include approval or establishment of TMDLs would uphold the legislative intent to streamline decision-making.177 Including this action for direct review in the appellate courts will promote judicial economy, consequently enabling the decision-making process to be more efficient. Traditionally, the district courts are the primary fora for cases which require extensive fact-finding.178 Additionally, jurisdiction in the district courts, which exist in many cities within each federal judicial circuit, is also useful where it is beneficial to have a variety of venue choices.179 For judicial review of actions such as the approval or establishment of TMDLs, however, the factual development primarily occurs at the agency level, and there is typically no need for a variety of venue choices.180 In these situations, Congress has expressed a preference for review in the court of appeals.181 Because administrative adjudication in the district court is reviewable in the courts

175. Id. at 76 (citing Am. Iron & Steel Inst., 526 F.2d 1027).
177. Shell Oil Co., 415 F Supp 70, 76 (citing American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975)).
179. Id. (explaining that the numerous district courts provide the party with a choice of venue).
180. Natural Res. Def. Council v. EPA, 673 F.2d 400, 405 n.15 (D.C. Cir 1982) (explaining that review in the district courts which have extensive fact-finding mechanisms is not relevant where technical fact-finding is not required, such as when judicial review is concentrated on agency record and policy determinations).
181. Schorr, supra note 178, at 772-774.
of appeals, judicial economy would be preserved by eliminating the
district court level of review, and allowing actions to be brought directly
at the appellate level.\footnote{182} Eventually, the proposed amendment would also
promote high quality decision-making by enabling circuit court judges to
develop expertise in the subject of TMDLs.\footnote{183}

B. The Proposed Amendment Would Uphold the Purpose of the Judicial
Review Provision and CWA

An evaluation of the legislative purpose of the Judicial Review
Provision also supports the proposed amendment. Courts have stated
that the legislative purpose underlying the Judicial Review Provision was
to "vest jurisdiction over discharge regulations in the circuit courts."\footnote{184}
The Administrator's approval or establishment of TMDLs, or the
specification of the maximum quantity of pollutants that can be
discharged without violating water quality standards, clearly falls within
the scope of "discharge regulations." Perhaps one reason that TMDLs
have not been included in the Judicial Review Provision despite its
purpose is that they had been severely underutilized until recently.\footnote{185}
Congress should modify the Judicial Review Provision based on the
evolving role of TMDLs.\footnote{186}

An amendment allowing direct review of the Administrator's
approval or establishment of TMDLs also upholds the broader purpose
of the CWA, "to restore and maintain the chemical, physical, and
biological integrity of the Nation's waters."\footnote{187} As explained above, the
TMDL process requires the EPA and the states to identify waters with
impaired quality, establish the amount of pollution that can be discharged
without exceeding the water quality standard, assign quantities of
permissible pollution to the sources of pollution, and enforce those
allocations.\footnote{188} As a result of this method, which focuses on multiple
pollution sources, "the EPA now touts the TMDLs program as the
'backbone' of its watershed approach."\footnote{189} In relating the role of TMDLs
to the goals of the CWA, one scholar has commented, "the TMDLs
process promotes Congress’s far-reaching goals by filling in gaps and
generally strengthening the [Act’s] regulatory programs."\footnote{190} Thus,
including approval or establishment of TMDLs in the list of actions

\footnote{182}{Id. at 795.}
\footnote{183}{Id. at 794-95.}
\footnote{184}{Shell Oil Co. v. Train, 415 F. Supp. 70, 76 (N.D. Cal. 1976).}
\footnote{185}{HOUCK, supra note 3, at 1; Boyd, supra note 42, at 43.}
\footnote{186}{Id.}
\footnote{187}{33 U.S.C. § 1251(a) (2000).}
\footnote{188}{Wenig, supra note 37, at 93-94.}
\footnote{189}{Id.}
\footnote{190}{Id. at 110.}
eligible for direct appellate review would uphold not only the purpose of the Judicial Review Provision, but also the CWA as a whole.

C. On Balance, Policy Arguments Weigh In Favor of the Proposed Amendment

While there are policy arguments on both sides of the issue, on the whole, they weigh more favorably for a finding of review in the appellate courts. The following subsections cover the arguments against the proposed amendment, a rebuttal to those arguments, and the arguments in favor of the proposal.

1. Policy Arguments Weighing Against the Proposed Amendment

One argument against the proposed amendment was addressed in Longview.191 Longview warns that a "special hazard arises when review is available directly to the court of appeals, because availability of direct review forecloses review in certain enforcement proceedings."192 Pursuant to the Judicial Review Provision, if an action is eligible for direct review, then it "shall not be subject to judicial review in any civil or criminal proceeding for enforcement."193 The Ninth Circuit cited this restriction as a reason not to include the approval or establishment of TMDLs among the actions eligible for direct review.194 It reasoned that maintaining review in the district courts under the APA would avoid inadvertently limiting arguments and would prevent a situation that encourages firms "to petition for review of everything in sight."195

Another policy argument against allowing direct review of TMDLs in the appellate court involves the shorter timeframe for review that this amendment would create. Under the current construction, with review of TMDLs in district court pursuant to the APA, there is a six-year limitations period.196 If circuit courts had jurisdiction in this area, under the Judicial Review Provision, parties would be required to file challenges to the established or approved TMDLs within 120 days of the final action.197 The EPA has expressed concern that this short time frame would require parties to file challenges "before the practical effect of a TMDL would be apparent."198 They attest that, as a result, parties would

191. Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992).
192. Id.
194. Longview, 980 F.2d at 1313.
195. Id. (quoting American Paper Inst. v. EPA, 882 F.2d 287, 289 (7th Cir. 1989).
196. Respondent's Brief, supra note 62, at 29 (citing 28 U.S.C. § 2401(a)).
197. Id.
198. Id.
be "forced to file protective challenges because they cannot be sure of the effects of a given TMDL."^199

The practical implications of the amendment, such as its potential to overburden the courts of appeals, constitute another negative policy implication. The additional volume of cases that the amendment would create for the appellate courts and the courts' ability to handle this load must be taken into account. The EPA has projected that it will approve or establish "thousands of TMDLs across the country over the next several years."^200 The EPA asserts that because there is a high potential for challenges to these actions, district courts are better suited to review TMDL challenges.^201

2. Rebuttal to Policy Arguments Weighing Against the Proposed Amendment

Despite concerns about the shorter statute of limitations that would result under the proposed amendment, as the FOE and Longview cases illustrate, parties such as environmental advocacy organizations as well as some companies producing pollution seem prepared to accept a shorter time frame in order to gain the benefits that come with review in the court of appeals. These stakeholders probably feel that because TMDLs are established in an openly public process, typically involving a notice and comment period prior to approval, they have sufficient notice to work within a shorter time frame. Thus, the EPA's paternalistic argument seems unfounded where the parties they are trying to protect are pushing for review in the appellate forum.

On the other hand, the willingness of the parties in FOE and Longview to accept this shorter statute of limitations may be atypical. A congressional committee should further investigate this issue. If the shorter statute of limitations would present a significant disadvantage to similar parties, Congress should consider creating a special statute of limitations for approval or establishment of TMDLs. Fairness and the time required to truly evaluate the effectiveness of TMDLs might require maintaining the full six year statute as is provided by the APA.

The EPA has expressed some concern about overburdening the appellate courts if review of TMDLs occurred directly in the courts of appeal. Presumably, the EPA's reasoning is based on the premise that review in the numerous district courts will be less burdensome on the federal judiciary than it would be in the smaller number of circuit courts. In essence, the EPA bases this argument on the principles of judicial economy. However, the EPA's reasoning that there is a high potential for

^199. Id.
^200. Id. at 28.
^201. Id. at 29.
challenges to TMDL actions is precisely why judicial economy is best supported by avoiding jurisdiction in the district court. Approval or establishment of TMDLs is admittedly a highly contentious act. Thus, it is likely that the parties who chose to challenge the Administrator's decision will appeal unfavorable decisions by the district courts to the courts of appeals. If the appellate courts will eventually be reviewing the decisions de novo, it is best to avoid unnecessary review at the district court level, and allow review directly in the court of appeals.

3. Arguments in Favor of the Proposed Amendment

One policy argument in favor of expanding the scope of direct appellate review is illustrated by looking at the scope of review in other environmental statutes. Congress has provided the courts of appeals with jurisdiction to review "any . . . final action" taken by the EPA under the Clean Air Act.\(^2\) This broad scope suggests that concerns about mechanical limitations of the courts of appeals would not impede Congress from enacting the proposed amendment. In fact, given the broad scope of direct appellate review under the Clean Air Act, it seems reasonable to expand the courts of appeals jurisdiction under the CWA.

The proposed amendment would also prevent fragmentation of review between the district and circuit courts. It is generally accepted that the Judicial Review Provision enables direct review in the court of appeals for these actions by the Administrator:

(A) the promulgation of standards for the control of the discharge of pollutants;
(B) determinations relating to industrial categories of polluters;
(C) the promulgation of standards for the treatment of toxic pollutants;
(D) determinations with regard to a state NPDES permit program;
(E) the approval or promulgation of discharge restrictions; and
(F) the issuance or denial of any NPDES permit.\(^3\)

As is demonstrated with the decision in FOE, this list excludes the Administrator's approval or establishment of the maximum quantity of pollutants that can be discharged without violating water quality standards. As mentioned above, after approving or establishing a TMDL, discharge permits consistent with that TMDL must be issued.\(^4\) Hence, circuit courts have jurisdiction to review the discharge permits pursuant to subsection (F) of the Judicial Review Provision, but "review of key

\(^2\) Zipp, supra note 44.
\(^3\) Petitioner's Brief, supra note 51, at 17.
water-quality-based limitations incorporated into the permit would proceed (perhaps simultaneously) in district court.\textsuperscript{205} Not only is the distinction arbitrary, but the fragmentation of the judicial review process that it creates "would reinject into water pollution control the cumbersome procedures which the 1972 amendments were designed to eliminate."\textsuperscript{206} This fragmentation could be eliminated if the proposed amendment were enacted.

The Supreme Court recognized that fragmentation of the review process is undesirable in \textit{E.L. du Pont de Nemours & Co v. Train}.\textsuperscript{207} In that case, the court rejected the argument that the Judicial Review Provision's reference to the Effluent Limitations Provision was limited to certain subsections. The court reasoned that such a construction "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to \textit{[the NPDES Provision]}\textsuperscript{208} but would have no power of direct review of the basic regulations governing those individual actions."\textsuperscript{209} Clearly, the Supreme Court has expressed a preference for minimizing fragmentation of the review process. Amending the Judicial Review Provision as proposed would enable both the TMDL itself and the associated discharge permits to be reviewed in the court of appeals.

The proposed amendment also promotes national uniformity of decisions. This "important goal in dealing with broad regulations, is best served by initial review in a court of appeals."\textsuperscript{210} Eliminating the fragmentation of the TMDL process prevents the "substantive inequality and uncertainty" that results when jurisdiction over similar claims is vested in several tribunals.\textsuperscript{211} When environmental regulations are applied consistently in a specific forum, uniform national standards for water quality can be achieved.\textsuperscript{212}

\textbf{CONCLUSION}

\textit{Friends of the Earth v. Environmental Protection Agency} explored the important jurisdictional question of the scope of the Clean Water Act Judicial Review Provision. The D.C. Circuit interpreted this provision narrowly, limiting circuit courts' original jurisdiction to only those EPA actions specifically enumerated by the statute. The court further held that

\begin{itemize}
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} \textit{Shell Oil Co. v. Train, 415 F. Supp. 70, 76 (N.D. Cal. 1976).}
  \item \textsuperscript{207} \textit{430 U.S. 112 (1977).}
  \item \textsuperscript{208} \textit{33 U.S.C. § 1342 (2000).}
  \item \textsuperscript{209} \textit{Du Pont de Nemours, 430 U.S. at 136.}
  \item \textsuperscript{210} \textit{Natural Res. Def. Council v. EPA, 673 F.2d 400, 405 n.15 (D.C. Cir 1982); see also Virginia Elec. & Power Co. v. Costle, 566 F.2d 446 (4th Cir. 1977).}
  \item \textsuperscript{211} \textit{Schorr, supra note 178, at 793.}
  \item \textsuperscript{212} \textit{Id.}
\end{itemize}
a TMDL issued under the Water Quality Standards Provision is not an effluent limitation or other limitation under the Effluent Limitations Provision. Thus, an EPA Administrator’s approval or establishment of a TMDL cannot receive direct review in the courts of appeals. The court's reliance on basic principles of statutory interpretation, persuasive authority, and policy considerations justify this holding. However, the court relied too heavily on persuasive authority and should have more thoroughly addressed Supreme Court and D.C. Circuit precedent.

Although the court's ruling in this case was proper, Congress should amend the CWA's Judicial Review Provision to allow direct appellate review of the EPA Administrator's act of establishing or approving a TMDL under the Water Quality Standards Provision. Amending the Judicial Review Provision in this way will: 1) more closely carry out the legislative intent to “streamline decisionmaking and insure prompt high level judicial review” by enhancing judicial economy; 2) promote the purpose of the Judicial Review Provision to “vest jurisdiction over discharge regulations in the circuit courts” while helping to achieve the broader purpose of the CWA to “restore and maintain” the nations waters; and 3) overcome policy drawbacks such as a shortened statute of limitations by eliminating fragmentation in the TMDL review process and promoting national uniformity in water quality standards.