

## “Forgotten” by the Clean Water Act: The Anacostia River’s Evolving Environmental Justice Problems

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## **“FORGOTTEN” BY THE CLEAN WATER ACT: THE ANACOSTIA RIVER’S EVOLVING ENVIRONMENTAL JUSTICE PROBLEMS**

MADELEINE DWYER\*

### INTRODUCTION

Long known as the District of Columbia (D.C.)’s “forgotten river,” the Anacostia has been seen as a “symbolic division of wealth and race” in the city for generations.<sup>1</sup> The Anacostia also has a legacy as one of the nation’s most polluted rivers due to outdated stormwater management, urban and industrial runoff, and legacy toxic sites causing high levels of contamination.<sup>2</sup>

The Anacostia represents a historic and evolving environmental justice problem.<sup>3</sup> From decades ago when Black children swam in the polluted Anacostia when nearby public pools were segregated,<sup>4</sup> to a 2012 report detailing that, despite official warnings, thousands supplemented their groceries with potentially hazardous fish caught in

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<sup>1</sup> Kalen Breland, *DC’s Anacostia River is a National Model for Sustainable Urban Development*, EARTHDAY.ORG (Mar. 26, 2020), <https://www.earthday.org/d-c-s-anacostia-river-is-a-national-model-for-sustainable-urban-development/>.

<sup>2</sup> See Matthew Powell, Comment: *The Anacostia River: Urbanization, Pollution, EPA Failures, and the Collapse of the Public Trust Doctrine*, 41 U. BALT. L. F. 68, 68 (2010); *Restore the Anacostia River!*, CLEANWATERACTION.ORG, <https://www.cleanwateraction.org/features/restore-anacostia-river> (last visited Sept. 8, 2021).

<sup>3</sup> Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Sept. 8, 2021).

<sup>4</sup> Aaron Wiener, *Reel Talk*, WASH. CITY PAPER (Nov. 8, 2012), <https://washingtoncitypaper.com/article/378064/reel-talk/> (“The Anacostia has been the central artery of Dennis Chestnut’s life since he was a child. Growing up in Hillbrook, he learned to swim in the river, back when public pools were segregated and only a few faraway ones were open to African-Americans.”).

the Anacostia,<sup>5</sup> the river's environmental justice legacy continues even now as the river's water quality starts to improve.<sup>6</sup>

The Anacostia has faced decades of delay and administrative negligence when it comes to sufficiently protecting the river's water quality under the Clean Water Act (CWA).<sup>7</sup> However, infrastructure projects like the Anacostia River Tunnel project, new initiatives to address sediment contamination, and Total Maximum Daily Load (TMDL) programs are starting to effectively address some of the Anacostia's pollution problems.<sup>8</sup> These solutions have environmentalists skeptically optimistic about the river's future, even as significant work still needs to be done, especially to address toxic pollution.<sup>9</sup>

However, with this progress comes new concerns. Communities are worried that the cleaned-up river will also mean higher costs of living, with increased water bills and interest from external developers.<sup>10</sup> Gentrification has been a widespread problem in D.C. generally, and community organizers fear that the cleaner river will mean longtime residents will no longer be able to afford to stay.<sup>11</sup>

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<sup>5</sup> OPINION WORKS, ADDRESSING THE RISK: UNDERSTANDING AND CHANGING ANGLERS' ATTITUDES ABOUT THE DANGERS OF CONSUMING ANACOSTIA RIVER FISH 11 (2012), <https://web.archive.org/web/20170901085830/https://www.anacostiaws.org/fishing> [hereinafter ANGLER RISK REPORT]; Brett Williams, *Gentrifying Water & Selling Jim Crow*, 31 URB. ANTHROPOLOGY & STUD. CULTURAL SYS. & WORLD ECON. DEV. 93, 99 (2002) ("Dogged anglers still supplement their groceries by fishing there.").

<sup>6</sup> 2021 *State of the Anacostia River Full Report*, ANACOSTIA WATERSHED SOC'Y, <https://www.anacostiaws.org/what-we-do/public-policy-advocacy/state-of-the-river-report-card/2021-state-of-the-anacostia-river-full-report.html> (last visited Jan. 6, 2022).

<sup>7</sup> Christopher Norton, *EPA Acted Irresponsibly on Anacostia Pollution: Judge*, LAW 360 (July 5, 2011), <https://www.law360.com/articles/260071/epa-acted-irresponsibly-on-anacostia-pollution-judge>; *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 217 (2011).

<sup>8</sup> *Anacostia River Tunnel Project*, DC WATER, <https://www.dewater.com/projects/anacostia-river-tunnel-project>, (last visited Aug. 26, 2021); 2020 *State of the Anacostia River Full Report*, ANACOSTIA WATERSHED SOC'Y, <https://www.anacostiaws.org/what-we-do/public-policy-advocacy/state-of-the-river-report-card/2020-state-of-the-anacostia-river-full-report.html> (last visited Sept. 8, 2021).

<sup>9</sup> 2021 *State of the Anacostia River Full Report*, *supra* note 6; 2020 *State of the Anacostia River Full Report*, *supra* note 8.

<sup>10</sup> Jeremy Deaton, *The Curse of 'Green Gentrification'*, ECO-BUSINESS (Jan. 26, 2018), <https://caleja.org/wp-content/uploads/2018/02/EcoBusiness.012618.pdf>; Carol O'Cleireacain, *Cleaner Rivers for the National Capital Region: Sharing the Cost*, BROOKINGS: METRO. POL'Y PROGRAM (May 2012), <https://www.brookings.edu/wp-content/uploads/2016/06/0523-washington-dc-clean-water-ocleireacain.pdf>.

<sup>11</sup> Henry Gass, *As Rivers Get Cleanups, Can City Residents Still Afford to Live Nearby*, CHRISTIAN SCI. MONITOR (Apr. 3, 2017), <https://www.csmonitor.com/Environment/Inhabit/2017/0403/As-rivers-get-cleanups-can-city-residents-still-afford-to-live-nearby>.

Environmental justice, as it relates to clean water policy in the Anacostia, is a complex and evolving problem, but innovative solutions are giving surrounding communities new opportunities for the future. Part I of this paper will examine the Anacostia River, its historic and current uses, sources of contamination, and the legacy of the river’s pollution on neighboring communities.<sup>12</sup> Part II of this paper will use the Anacostia’s legal history regarding the CWA to examine how agencies have failed to adequately protect the Anacostia, even when nearby rivers such as the Potomac were making substantial CWA progress.<sup>13</sup> Part III will examine the environmental justice concerns that go along with the Anacostia, discussing both the risks the polluted river poses to surrounding communities through recreational and fishing activity, and future gentrification concerns that often go along with river cleanup initiatives.<sup>14</sup>

This paper will examine policy responses from multiple government agencies and programs involved in water quality protection. This includes the United States Environmental Protection Agency (EPA), which administers the CWA in D.C., D.C.’s Department of Energy and Environment (DOEE), and Maryland’s Department of the Environment (MDE), which administers the CWA in Maryland.<sup>15</sup> However, while the paper will include an overview of all of these decisionmakers, the focus will be on the EPA and D.C.’s responses to the Anacostia and the CWA as the primary policy framework for water quality protection.<sup>16</sup>

## I. OVERVIEW OF THE ANACOSTIA<sup>17</sup>

### A. *Background and History of the Anacostia*

Historians have estimated that long before the area was home to the United States’ capital, Native Americans lived along the Anacostia

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<sup>12</sup> See *infra* Part I.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> D.C. Dep’t of Energy & Env’t, *Anacostia Watershed Trash TMDL*, DC.GOV, <https://doee.dc.gov/publication/anacostia-watershed-trash-tmdl> (Dec. 2, 2011); D.C. Dep’t of Energy & Env’t, *Water Quality*, DC.GOV, <https://doee.dc.gov/service/water-quality> (last visited Sept. 22, 2021); *Clean Water Act 40th Anniversary*, MD. DEP’T OF THE ENV’T, <https://mde.maryland.gov/programs/Marylander/outreach/Pages/CleanWaterAct40th.aspx> (last visited Sept. 22, 2021).

<sup>16</sup> See *infra* Part II.

<sup>17</sup> This section will give a brief overview of the background and history of the Anacostia, the sources of pollution in the Anacostia, the current health of the river, and the demographics of the surrounding area.

River for approximately 10,000 years.<sup>18</sup> Specifically, the Nacotchtank people used the area as a village trading center surrounded by forests and wildlife.<sup>19</sup> When English colonizers displaced the Native populations and occupied the land, they cleared the surrounding forests and used the river for shipping, which eventually led to toxic silt starting to build up along the riverbed.<sup>20</sup> As Washington, D.C. became established as the nation's capital city, the surrounding area's population and the pressure on the ecosystem grew substantially.<sup>21</sup> Settlers dumped human and animal waste into the water, and increasing industrial sites along the Anacostia's shores contributed to the rising environmental damage and sediment pollution.<sup>22</sup>

Today, the 8.5-mile Anacostia River runs between Prince George's County, Maryland, and Hain's Point at the mouth of the Potomac River in Washington, D.C.<sup>23</sup> The urban watershed is home to more than 800,000 people, 43 fish species, and approximately 200 bird species.<sup>24</sup> The Anacostia's "176-square-mile watershed is one of the most urbanized in the country,"<sup>25</sup> and "impervious surfaces now cover more than 25% of the watershed."<sup>26</sup> According to the EPA, the Anacostia also "flows next to communities that suffer some of the region's lowest employment rates, highest poverty rates, [and] poorest health indicators."<sup>27</sup>

The policy framework surrounding the Anacostia is somewhat distinct due to D.C.'s unique federal status, the fact that the Anacostia

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<sup>18</sup> Megan Buerger, *The History of the Anacostia River*, WASH. POST (May 2, 2012), [https://www.washingtonpost.com/local/the-history-of-the-anacostia-river/2012/05/01/gIQA1VuAxT\\_story.html](https://www.washingtonpost.com/local/the-history-of-the-anacostia-river/2012/05/01/gIQA1VuAxT_story.html).

<sup>19</sup> Courtney Kwiatkowski, *Nature, History, and the Rhetoric of Redevelopment Along the Anacostia River* (2016) (M.A. thesis, George Mason University) (on file with the Mason Archival Repository Service, George Mason University); Buerger, *supra* note 18.

<sup>20</sup> Buerger, *supra* note 18.

<sup>21</sup> See *The Anacostia in History*, ANACOSTIA WATERFRONT TRUST (Oct. 15, 2015), <https://web.archive.org/web/20201101085546/https://www.anacostiatruster.org/anacostia-trust/2015/10/15/the-anacostia-in-history>; Kwiatkowski, *supra* note 19, at 24.

<sup>22</sup> *The Anacostia in History*, *supra* note 21; Kwiatkowski, *supra* note 19, at 24.

<sup>23</sup> *Learn the Basics About the Anacostia Watershed*, ANACOSTIA WATERSHED SOC'Y, <https://www.anacostiaws.org/our-watershed/aws-faqs.html> (last visited Oct. 20, 2020).

<sup>24</sup> *Urban Waters and the Anacostia Watershed (Washington, DC/Maryland)*, EPA, <https://www.epa.gov/urbanwaterspartners/urban-waters-and-anacostia-watershed-washington-dcmaryland> (last visited Dec. 10, 2020).

<sup>25</sup> *Crystal Clear: Anacostia Urban Waters Federal Partnership*, NAT'L PARK SERV., <https://www.nps.gov/articles/anacostia-urban-waters-federal-partnership.htm> (last visited Dec. 10, 2020).

<sup>26</sup> *Urban Waters and the Anacostia Watershed*, *supra* note 24.

<sup>27</sup> *Id.*

flows through both the District and Maryland, and because the Anacostia is part of the larger Chesapeake Bay watershed.<sup>28</sup>

Management of the river, along with other public areas in D.C., was the Army Corps of Engineers’ (Corps) responsibility from 1867 to 1925.<sup>29</sup> As early as 1892, the Corps was asked to address the Anacostia’s deteriorating state and “miasmatic swamps” by conducting dredging and filling operations.<sup>30</sup> Since then, the federal government has overseen countless restoration efforts and “beautification” projects throughout the decades with mixed success.<sup>31</sup>

Today, under the CWA, management of the Anacostia falls under multiple local, state, and federal jurisdictions.<sup>32</sup> For example, EPA Region III administers the CWA’s National Pollution Discharge Elimination System (NPDES) program in the District, but MDE is responsible for NPDES permitting in Maryland.<sup>33</sup> Multiple management programs have the District’s DOEE and Maryland’s MDE working together to address river-wide problems.<sup>34</sup> At the same time, other Anacostia initiatives are managed by splitting the Anacostia into Maryland, Upper, and Lower segments.<sup>35</sup>

The Anacostia’s long history of contamination and complicated political management schemes have had lasting impacts on the river and the surrounding communities.<sup>36</sup>

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<sup>28</sup> *The Anacostia in History*, *supra* note 21.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* See also *Beautification: A Legacy of Lady Bird Johnson*, NAT’L PARK SERV., <https://www.nps.gov/articles/lady-bird-johnson-beautification-cultural-landscapes.htm> (last visited Dec. 10, 2020).

<sup>31</sup> *Beautification: A Legacy of Lady Bird Johnson*, *supra* note 30.

<sup>32</sup> Uwe Steven Brandes, *Recapturing the Anacostia River: The Center of 21st Century Washington, DC*, 35 GOLDEN GATE UNIV. L. REV. 411, 426 (2005).

<sup>33</sup> *Anacostia Watershed Trash TMDL*, *supra* note 15; *Maryland NPDES Permits*, EPA (Dec. 2, 2011), <https://www.epa.gov/npdes-permits/maryland-npdes-permits>.

<sup>34</sup> *Anacostia Watershed Trash TMDL*, *supra* note 15.

<sup>35</sup> *2018 State of the Anacostia River Full Report*, ANACOSTIA WATERSHED SOC’Y, <https://www.anacostiaws.org/what-we-do/public-policy-advocacy/state-of-the-river-report-card/2018-state-of-the-anacostia-river-full-report.html> (last visited Dec. 10, 2020) (“[T]he three sections . . . are the Maryland portion of the Anacostia (Section 1: MD Anacostia), the upper half of the Anacostia in the District of Columbia above the East Capitol Street Bridge (Section 2: Upper DC Anacostia), and the lower portion in the District (Section 3: Lower DC Anacostia).”).

<sup>36</sup> *Id.*; *Urban Waters and the Anacostia Watershed*, *supra* note 24.

### B. Sources of Pollution to the Anacostia

The Anacostia River's contamination comes from both its historic uses and current pollution control problems.<sup>37</sup> The current major sources of pollution in the Anacostia are bacteria, polluted runoff, trash, and toxics.<sup>38</sup> This section gives a brief overview of each of these pollution sources.

*Bacteria pollution* to the Anacostia comes from both stormwater runoff and untreated sewage waters.<sup>39</sup> Until recently, untreated sewage was regularly dumped into the Anacostia during high rainfall events due to D.C.'s outdated combined sewage overflow system.<sup>40</sup> While there has been significant progress updating the combined system in recent years,<sup>41</sup> there are still sources of bacteria pollution from wastewater pipes, which are breaking due to age.<sup>42</sup>

*Polluted runoff* gets into the Anacostia when rainwaters in the region cannot soak into the ground and instead travel over hard surfaces such as roads, parking lots, and roofs.<sup>43</sup> When rainwater travels over these nonpermeable surfaces, it picks up dirt, chemicals, oil, grease, nutrients, and more, which eventually wash into the Anacostia.<sup>44</sup> These pollution sources are especially problematic for the Anacostia because it is one of the most urbanized rivers in the country, with more than twenty-five percent of the watershed covered in impervious surfaces.<sup>45</sup>

*Trash pollution* is a somewhat notorious problem in the Anacostia.<sup>46</sup> A *Think Progress* article from 2016 describes how the Anacostia “has been the dumping ground for industry and residents

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<sup>37</sup> *Restore the Anacostia River!*, *supra* note 2.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Combined Sewer System*, DC WATER, <https://www.dewater.com/css> (last visited Dec. 10, 2020).

<sup>41</sup> *See infra* Section II.E.

<sup>42</sup> *Restore the Anacostia River!*, *supra* note 2.

<sup>43</sup> *2019 State of the Anacostia River Full Report*, ANACOSTIA WATERSHED SOC'Y, <https://www.anacostiaws.org/what-we-do/public-policy-advocacy/state-of-the-river-report-card/2019-state-of-the-anacostia-river-full-report.html> (last visited Dec. 10, 2020); *Restore the Anacostia River!*, *supra* note 2.

<sup>44</sup> *EPA Orders D.C. Asphalt Manufacturer to Reduce Polluted Runoff to Anacostia River*, EPA (Apr. 16, 2020), <https://www.epa.gov/newsreleases/epa-orders-dc-asphalt-manufacturer-reduce-polluted-runoff-anacostia-river>.

<sup>45</sup> *Urban Waters and the Anacostia Watershed*, *supra* note 24; *Crystal Clear: Anacostia Urban Waters Federal Partnership*, *supra* note 25.

<sup>46</sup> *See Urban Waters and the Anacostia Watershed*, *supra* note 24 (describing how the “Anacostia turned into one of the most polluted rivers in the country” because industry and residents alike dumped toxic waste into the river across a 140-year period).

alike” for over 140 years.<sup>47</sup> Maryland and D.C. legally declared the Anacostia River “impaired” by trash in 2006.<sup>48</sup> It was the second river in the country to get this designation.<sup>49</sup> A 2008 baseline assessment of trash pollution “estimate[d] that 455,648 pounds of trash enter the [Anacostia] every year.”<sup>50</sup> The study also identified plastic bags, Styrofoam, food wrappers, bottles, and cans among the most prevalent trash pollution in the river.<sup>51</sup>

Trash pollution has many harmful impacts on the river, including choking streams, harming wildlife, and decomposed plastic trash leading to heightened microplastic pollution in the Anacostia.<sup>52</sup> A recent Anacostia Riverkeeper study found microplastics in every single water sample they collected from the Anacostia.<sup>53</sup> This study showcases rising concerns about particle pollution and the accumulation of polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and metals in human and animal bloodstreams.<sup>54</sup> While there is still work to do, there has been some progress when it comes to trash pollution in the Anacostia, including the installation of seven trash traps along the river and plastic bag taxes in the District.<sup>55</sup>

*Toxic pollution* is one of the most concerning and persistent sources of pollution to the Anacostia.<sup>56</sup> Toxic pollution comes from “legacy toxic sites” along the Anacostia, which wash toxic contaminated sediments into the river during rainfall events.<sup>57</sup> Some of the most notable legacy toxic sites include the Washington Navy Yard,

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<sup>47</sup> Alejandro Davila Fragoso, *Toxic Pollution is Still Seeping into the Anacostia River*, THINKPROGRESS (Mar. 29, 2016, 12:00 AM), <https://archive.thinkprogress.org/toxic-pollution-is-still-seeping-into-the-anacostia-river-58ceebcf5022/>.

<sup>48</sup> Alicia Pimental, *Anacostia River to go on Trash Diet*, CHESAPEAKE BAY PROGRAM (Sept. 28, 2010), [https://www.chesapeakebay.net/news/blog/anacostia\\_river\\_to\\_go\\_on\\_trash\\_diet](https://www.chesapeakebay.net/news/blog/anacostia_river_to_go_on_trash_diet).

<sup>49</sup> *Id.*; *Restore the Anacostia River!*, *supra* note 2.

<sup>50</sup> Becky Hammer, *It's Time to Fix the Trash Clean-Up Plan for the Anacostia River*, NAT. RES. DEF. COUNCIL (Oct. 8, 2015), <https://www.nrdc.org/experts/becky-hammer/its-time-fix-trash-clean-plan-anacostia-river>.

<sup>51</sup> *Anacostia Watershed Trash Reduction Plan*, ANACOSTIA WATERSHED SOC'Y (Dec. 2008), [https://doee.dc.gov/sites/default/files/dc/sites/d DOE/publication/attachments/2009.01.29\\_Trash\\_Report\\_1.pdf](https://doee.dc.gov/sites/default/files/dc/sites/d DOE/publication/attachments/2009.01.29_Trash_Report_1.pdf).

<sup>52</sup> Jacob Fenston, *Tiny Bits of Plastic are Causing a Huge Pollution Problem in the Anacostia River*, WAMU 88.5 (Jun. 13, 2019), <https://wamu.org/story/19/06/13/tiny-bits-of-plastic-are-causing-a-huge-pollution-problem-in-the-anacostia-river/>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Will Schick, *By 2025, We Could Fish and Swim in the Once Notoriously-Polluted Anacostia River*, GREATER GREATER WASH. (Dec. 17, 2019), <https://ggwash.org/view/75019/are-we-really-going-to-be-able-to-swim-and-eat-fish-from-the-anacostia-by-2025>.

<sup>56</sup> Fragoso, *supra* note 47.

<sup>57</sup> *Restore the Anacostia River!*, *supra* note 2.

the PEPCO Benning Road Power Plant site, and the former site of Washington Gas Light Company's coal gasification plant.<sup>58</sup> Government agencies have tried various methods to manage the toxic sediment problem in the Anacostia.<sup>59</sup> In some cases, the EPA has led lawsuits attempting to hold former polluters accountable for the pollution they caused to the Anacostia using other environmental statutes like the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>60</sup> Notably, in July 2020, the D.C. government reached a \$52 million settlement with Monsanto to address PCB pollution.<sup>61</sup> Additionally, some sites, such as the Washington Navy Yard, CSX Benning Yard, and the Washington Gas sites have undertaken some cleanup efforts, but they have been limited to land-only initiatives.<sup>62</sup> Some sites also have NPDES permits under the CWA for stormwater outfalls.<sup>63</sup> The DOEE also established the Anacostia River Sediment Project (ARSP) in 2013, which is tasked with studying contamination sources to the river.<sup>64</sup> The ARSP released a Remedial Investigation Report on sediment pollution, including a toxics analysis, and issued an Interim Record of Decision identifying "hot spots" in need of remediation on September 30, 2020.<sup>65</sup> While this ongoing effort to study the toxic pollution in the Anacostia has been a great base for future cleanup action, the 2021 "State of the Anacostia"

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<sup>58</sup> Fragoso, *supra* note 47; PUB. COMMENT PERIOD SCHEDULE FOR ANACOSTIA RIVER SITE, PRESENTATION AT THE LEADERSHIP COUNCIL FOR A CLEANER ANACOSTIA RIVER (2017), [http://www.open-dc.gov/sites/default/files/documents/Public%20Comment%20Schedule\\_030817.pptx](http://www.open-dc.gov/sites/default/files/documents/Public%20Comment%20Schedule_030817.pptx).

<sup>59</sup> *Restore the Anacostia River!*, *supra* note 2.

<sup>60</sup> See, e.g., Erin Fuchs, *Washington Gas To Pay \$730K For River Pollution Cleanup*, LAW360 (Dec. 12, 2011), <https://www.law360.com/articles/292693/washington-gas-to-pay-730k-for-river-pollution-cleanup>.

<sup>61</sup> *2021 State of the Anacostia River Full Report*, *supra* note 6.

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., *Detailed Facility Report, Washington Navy Yard*, Enforcement and Compliance History Online, EPA, <https://echo.epa.gov/detailed-facility-report?fid=110064120838> (last visited Dec. 10, 2020) (showing compliance data for a NPDES Permit issued to the Washington Navy Yard, which is located along the Anacostia River); *Detailed Facility Report, PEPCO, Benning Road Facility AST and Fueling Addition*, Enforcement and Compliance History Online, EPA, <https://echo.epa.gov/detailed-facility-report?fid=110070112528> (last visited Dec. 10, 2020) (showing compliance data for a NPDES Permit issued to the PEPCO Benning Road Facility, which is located along the Anacostia River).

<sup>64</sup> *For a Cleaner Anacostia River- Anacostia River Sediment Project*, D.C. DEP'T OF ENERGY & ENV'T (Sept. 20, 2020), <https://doee.dc.gov/publication/cleaner-anacostia-river-anacostia-river-sediment-project> (providing an overview of the Anacostia River Sediment Project).

<sup>65</sup> Tetra Tech, REMEDIAL INVESTIGATION REPORT, ANACOSTIA RIVER SEDIMENT PROJECT, WASHINGTON DC, ES-1 (DOEE, 2019), [https://www.dropbox.com/s/uz9d22g6aoh8bhc/DOEE\\_ARSP\\_RI\\_Report\\_2019December\\_WithFiguresTables.pdf](https://www.dropbox.com/s/uz9d22g6aoh8bhc/DOEE_ARSP_RI_Report_2019December_WithFiguresTables.pdf); *Anacostia River Sediment Project*, D.C. DEP'T OF ENERGY & ENV'T, <https://restoretheanacostiariver.com/arsp-home> (last visited Jan. 8, 2022).

Report from the Anacostia Watershed Society (AWS) notes that, despite these efforts, “little actual clean-up regarding the toxic sediment in the river has yet to occur.”<sup>66</sup>

### C. Current Health of the River

Together, these historic and existing pollution sources have made the Anacostia dangerously polluted for over a century, but there are recent signs of improvement.<sup>67</sup> Restoration efforts are underway that are steadily changing the Anacostia’s polluted legacy, and some areas are seeing more improvement than others.<sup>68</sup> In its 2021 overall water quality report card, the AWS discussed some of the longer-term water quality trends in the river.<sup>69</sup> The Anacostia received its first “passing grade” in 2018, and since has received passing grades in 2020 and 2021.<sup>70</sup> The 2019 report reflected a failing grade because 2018 was an abnormally wet year, leading to more stormwater and runoff pollution.<sup>71</sup> However, the “passing” 2021 report points to trends in dissolved oxygen, fecal bacteria, water clarity, and other water quality indicators as signs of steady progress in the Anacostia, even with the year-to-year fluctuations.<sup>72</sup> Despite this progress, more work is still needed to address water quality issues in the Anacostia, including illegal dumping, toxic sediment, and more.<sup>73</sup>

### D. Demographics of the Surrounding Area

The Anacostia River has been seen as a “symbolic division of wealth and race” in Washington, D.C.<sup>74</sup> East of the Anacostia River are numerous historic neighborhoods whose populations have had an intricate history.<sup>75</sup> Through the midcentury, these neighborhoods were

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<sup>66</sup> 2021 *State of the Anacostia River Full Report*, *supra* note 6. See *infra* Section II.E.

<sup>67</sup> Fragoso, *supra* note 47.

<sup>68</sup> 2019 *State of the Anacostia River Full Report*, *supra* note 43.

<sup>69</sup> 2021 *State of the Anacostia River Full Report*, *supra* note 6.

<sup>70</sup> 2021 *State of the Anacostia River Full Report*, *supra* note 6; 2020 *State of the Anacostia River Full Report*, *supra* note 8.

<sup>71</sup> 2019 *State of the Anacostia River Full Report*, *supra* note 43.

<sup>72</sup> 2021 *State of the Anacostia River Full Report*, *supra* note 6.

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

<sup>74</sup> Breland, *supra* note 1.

<sup>75</sup> See Brett Williams, *A River Runs Through Us*, 103 AM. ANTHROPOLOGIST 409, 424 (2001) (“People in other parts of the city gloss it as ‘bad,’ and also routinely name the entire area ‘Anacostia,’ although the people who live in the area recognize 27 different neighborhood names.”).

more than 80% white due to racially restrictive covenants.<sup>76</sup> However, as changing policies and development initiatives started in areas west of the river, the makeup of these neighborhoods began to change.<sup>77</sup> In the 1950s, residents west of the river, displaced by “urban renewal” efforts, began moving east.<sup>78</sup> The city rapidly built public housing units in the areas east of the Anacostia to accommodate these new residents, and by the 1960s, the neighborhoods there were home to 85% of Washington, D.C.’s low-income and public housing.<sup>79</sup>

Following this period of relocation, generalized patterns of white flight, along with the Washington Navy Yard shutting down its gun factory in 1964 and the nearby Bolling Air Force Base cutting its workforce, resulted in many white workers and their families leaving these neighborhoods en masse.<sup>80</sup> By the time the 1960s ended, less than 5% of the area was white.<sup>81</sup>

Since then, the neighborhoods east of the Anacostia have been underserved and actively marginalized.<sup>82</sup> In her article *Gentrifying Water and Selling Jim Crow*, anthropologist Brett Williams describes state processes of “policing and incarceration; gutting, starving or privatizing public facilities; promoting highways but not public transportation; and advancing then withdrawing public assistance and public housing” in these communities which “have battered their neighborhoods” for decades.<sup>83</sup>

As of January 2022, the Census Reporter estimates that the population of Ward 8 (the southeast area east of the Anacostia) is 88% Black, 5% White, 4% Hispanic, 1% Two+, and 1% Other; the median household income is \$35,245, and 32.9% of residents live below the

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<sup>76</sup> CHRIS MYERS ASCH & GEORGE DEREK MUSGROVE, *CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION’S CAPITAL* 285 (Chapel Hill: The University of North Carolina Press 2017).

<sup>77</sup> *Id.* at 331.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*; *Washington Navy Yard: A Celebrated Legacy of Service to the Fleet*, NAVAL HIST. & HERITAGE COMMAND (Oct. 2, 2014), <https://usnhistory.navylive.dodlive.mil/2014/10/02/washington-navy-yard-a-celebrated-legacy-of-service-to-the-fleet-2/>.

<sup>81</sup> ASCH & MUSGROVE, *supra* note 76, at 332.

<sup>82</sup> *See, e.g.*, N.Y. L. SCH. RACIAL JUST. PROJECT, *UNSHARED BOUNTY: HOW STRUCTURAL RACISM CONTRIBUTES TO THE CREATION AND PERSISTENCE OF FOOD DESERTS*, 10-11 (2012), [http://digitalcommons.nyls.edu/racial\\_justice\\_project/3](http://digitalcommons.nyls.edu/racial_justice_project/3) (examining the impacts of structural racism and food deserts in southeast D.C.); Williams, *supra* note 5 at 96-97 (describing some of the structural injustices faced by the communities neighboring the Anacostia throughout the past few decades).

<sup>83</sup> Williams, *supra* note 5 at 97.

poverty line.<sup>84</sup> In Ward 7 (the northeast area east of the Anacostia), the Census Reporter estimates the population is 92% Black, 3% White, 3% Hispanic, 2% Two+, and 1% Asian; the median household income is \$45,318, and 26.3% of people live below the poverty line.<sup>85</sup> For reference, as of January 2022, the Census Reporter estimates that the median income for all of D.C. is \$92,266, and 13.5% of all D.C. residents live below the poverty line.<sup>86</sup> In all of D.C., the population is 44% Black, 37% white, 11% Hispanic, 4% Asian, and 3% Two+.<sup>87</sup>

Many areas east of the Anacostia are also food deserts, with limited access to grocery or supermarket locations.<sup>88</sup> Almost half (46%) of D.C.’s food deserts are in Ward 8 alone, with Ward 7 making up an additional 31%.<sup>89</sup> This situation leads to serious health and environmental justice problems when residents look to supplement their groceries with alternative sources, such as fish from the contaminated Anacostia River.<sup>90</sup>

Overall, these demographics and data start to show a persistent connection between the Anacostia’s poor water quality and its impact on the city’s most vulnerable residents.<sup>91</sup>

## II. THE CLEAN WATER ACT AND CLEANUP EFFORTS IN THE ANACOSTIA<sup>92</sup>

The CWA is an “ambitious and comprehensive” federal statute designed to “restore and maintain the chemical, physical, and biological

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<sup>84</sup> *Ward 8, DC*, CENSUS REPORTER, <https://censusreporter.org/profiles/61000US11008-ward-8-dc/> (last visited Jan. 3, 2022).

<sup>85</sup> *Ward 7, DC*, CENSUS REPORTER, <https://censusreporter.org/profiles/61000US11007-ward-7-dc/> (last visited Jan. 3, 2022).

<sup>86</sup> *Washington, DC*, CENSUS REPORTER, <https://censusreporter.org/profiles/16000US1150000-washington-dc/> (last visited Jan. 3, 2022).

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

<sup>88</sup> Christina Sturdivant, *Report: More Than 11 Percent of D.C. is a Food Desert*, DCIST.COM (Mar. 15, 2017), <https://dcist.com/story/17/03/15/food-desserts-latest/>.

<sup>89</sup> *Id.*

<sup>90</sup> See *infra* Section III.B; Williams, *supra* note 5, at 99 (“Dogged anglers still supplement their groceries by fishing there.”).

<sup>91</sup> See generally Randy Smith, *Food Access in D.C. is Deeply Connected to Poverty and Transportation*, D.C. POL’Y CTR. (2017), <https://www.dcpolicycenter.org/wp-content/uploads/2019/10/Food-deserts-Randy-Smith-2017.pdf> (showing connections between poverty, transportation, and food deserts). See also Williams, *supra* note 5, at 97-100 (describing the complex relationship between the Anacostia and the residents of neighboring communities).

<sup>92</sup> This section will give an overview of the CWA, its history and statutory framework, and caselaw surrounding its application to the Anacostia River with an emphasis on the TMDL programs established within the watershed.

integrity of the Nation’s waters.”<sup>93</sup> The CWA specifically lists a goal of achieving water quality that is “fishable” and “swimmable.”<sup>94</sup> However, despite the requirements of the CWA and the Anacostia’s clear need for comprehensive restoration, government agencies have shown a consistent and decades-long failure to take the steps required to protect the Anacostia under the CWA, causing further harm to the surrounding area’s marginalized communities.<sup>95</sup>

### A. Statutory Framework

The CWA sets up a two-step process for protecting water quality for the nation’s waterways.<sup>96</sup> The first step requires the EPA to “establish and enforce technology-based limitations on individual discharges into the country’s navigable waters from point sources.”<sup>97</sup> A point source is defined as “any discernible, confined and discrete conveyance” which pollutants can be discharged from.<sup>98</sup> The EPA manages point source pollution using a national permitting program.<sup>99</sup> For sources that do not come from a specific conveyance or pipe, such as runoff or stormwater, the CWA’s authority is less pronounced.<sup>100</sup> For these “non-point sources,” agencies must turn to “step two” of the CWA.<sup>101</sup>

Step two involves state governments establishing comprehensive water quality goals for all intrastate waters.<sup>102</sup> These goals are set by “designating the use or uses to be made of the water and by setting criteria that protect the designated uses.”<sup>103</sup> For example, D.C.

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<sup>93</sup> Kingman Park Civic Ass’n v. EPA, 84 F. Supp. 2d 1, 1-2 (D.D.C. 1999) (quoting 33 U.S.C. § 1251(a)).

<sup>94</sup> *Statute and Regulations Addressing Impaired Waters and TMDLs*, EPA, <https://www.epa.gov/tmdl/statute-and-regulations-addressing-impaired-waters-and-tmdls> (last visited Dec. 10, 2020).

<sup>95</sup> *Anacostia Riverkeeper v. Jackson (Anacostia Riverkeeper I)*, 798 F. Supp. 2d 210, 213 (D.D.C. 2011).

<sup>96</sup> *Id.* at 214.

<sup>97</sup> *Id.* (citing 33 U.S.C. §§ 1311 & 1314).

<sup>98</sup> 33 U.S.C. § 1362.

<sup>99</sup> 33 U.S.C. § 1342. States can take over the permitting process if the EPA deems their programs sufficient. *Id.* § 1342(b).

<sup>100</sup> *Anacostia River Keeper I*, 798 F. Supp. 2d at 214-15.

<sup>101</sup> *Id.* at 215.

<sup>102</sup> 33 U.S.C. § 1313. As a note, when discussing “state” responsibilities under the CWA, this paper will use the word “state” for consistency, although these responsibilities also apply to the District of Columbia. *See* 33 U.S.C. § 1362 (defining the term “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands”).

<sup>103</sup> 40 C.F.R. § 131.2.

designated the Anacostia for “recreational, aesthetic, and navigational uses,” while Maryland has designated its portions of the river for “recreation, fishing, and protection of aquatic life.”<sup>104</sup> Based on these designated uses, state governments set water quality criteria “expressed as constituent concentrations, levels, or narrative statements.”<sup>105</sup> These criteria must also be approved by the EPA.<sup>106</sup> Once the criteria are set and approved, the state government must monitor their waters and identify any waters that do not meet the set water quality standards for their designated use.<sup>107</sup> These waters are considered “impaired” and put on an “impaired waters list” or “303(d) list,” which must be updated by the state every two years.<sup>108</sup>

When a waterbody is listed on a state’s 303(d) list, the CWA requires that the state create a Total Maximum Daily Load (TMDL) to address the impaired state.<sup>109</sup> A TMDL specifies the daily amount “of particular pollutants the entire water body can take on while still satisfying all water quality standards.”<sup>110</sup> This includes pollution from both point and non-point sources.<sup>111</sup>

Notably, one waterway can be impaired for multiple pollutants; this means the state is either required to develop multiple TMDLs for each pollutant that is impairing the waterway or develop a single TMDL that addresses multiple pollutants.<sup>112</sup> Once a state establishes a TMDL program, section 303(d)(2) of the CWA requires that the Administrator approve it or establish proper pollution loads herself if she deems the state’s plan is insufficient.<sup>113</sup>

After the TMDL is established and approved, it is up to the state to enforce, reflecting the flexibility and broader cooperative federalism

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<sup>104</sup> Nat. Res. Def. Council v. EPA (*NRDC I*), 301 F. Supp. 3d 133, 138 (D.D.C. 2018).

<sup>105</sup> 40 C.F.R. § 131.3(b).

<sup>106</sup> 33 U.S.C. § 1313(c)(3).

<sup>107</sup> 33 U.S.C. § 1313(d)(1)(A).

<sup>108</sup> 40 C.F.R. § 130.7; *Overview of Listing Impaired Waters under CWA Section 303(d)*, EPA, <https://www.epa.gov/tmdl/overview-listing-impaired-waters-under-cwa-section-303d> (last visited Sept. 24, 2021).

<sup>109</sup> *Anacostia Riverkeeper v. Jackson (Anacostia Riverkeeper I)*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011). See 33 U.S.C. § 1313(d).

<sup>110</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 210, 216. See 33 U.S.C. § 1313(d).

<sup>111</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 216 (“In addition to setting a maximum daily level of pollution, EPA regulations require TMDLs to allocate contaminant loads among point and non-point sources of pollution.”).

<sup>112</sup> *Overview of Total Maximum Daily Loads (TMDLs)*, EPA, <https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls> (last visited Dec. 10, 2020).

<sup>113</sup> 33 U.S.C. § 1313(d).

goals of the CWA.<sup>114</sup> While “TMDLs are not self-implementing instruments,” they serve as an “informational tool utilized by EPA and the States to coordinate necessary responses” to both point source and non-point source pollution and protect the “whole health” of the waterbody.<sup>115</sup>

While this framework promotes flexibility and cooperation between federal and local governments, the approach can quickly fall apart if state and local agencies are not responsive and actively monitoring, listing, and setting criteria for their waterways.<sup>116</sup> Lack of enforcement initiatives has also been a common criticism of the CWA generally.<sup>117</sup> The management of the Anacostia has highlighted these issues.<sup>118</sup>

*B. Decades-long Resistance to Set TMDLs in D.C.—The Kingman Park Case*

As of 2020, the District has listed the Anacostia as impaired for Algae, Bacteria and other Microbes, Low Oxygen, Metals, Murky Water, Nitrogen and/or Phosphorus, Oil and Grease, PCBs, Pesticides, Toxic Organic Chemicals, and trash and has twenty-eight different TMDLs in place throughout the river to address these impairments.<sup>119</sup> However, it took a very long time to get any TMDL program established for the Anacostia in D.C., despite its notoriously polluted state and risk to the surrounding community.<sup>120</sup>

When it was first passed, the CWA imposed certain statutory deadlines on states to designate waters and create water quality criteria.<sup>121</sup> Due to some delay in identifying pollutants on the EPA’s end, D.C.’s “duty to submit TMDL calculations . . . did not arise until

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<sup>114</sup> “Question and Answers” on the Long-Term Vision for Assessment, Restoration, and Protection under the Clean Water Act Section 303(d) Program, EPA, [https://www.epa.gov/sites/production/files/2015-07/documents/acwa\\_qa.pdf](https://www.epa.gov/sites/production/files/2015-07/documents/acwa_qa.pdf) (last visited Dec. 10, 2020); *Anacostia Riverkeeper v. Wheeler (Anacostia Riverkeeper II)*, 404 F. Supp. 3d 160, 164 (D.D.C. 2019).

<sup>115</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 216 (quoting *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002)).

<sup>116</sup> Victor B. Flatt, *Spare the Rod and Spoil the Law: Why the CWA Has Never Grown Up*, 55 ALA. L. REV. 595, 597, 599 (2004).

<sup>117</sup> *Id.* at 596 (“[A] law is only as good as its enforcement, and there have been across-the-board difficulties with the enforcement of the CWA.”).

<sup>118</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 213.

<sup>119</sup> *How’s My Waterway? Anacostia, Washington, District of Columbia*, EPA, <https://mywaterway.epa.gov/community/Anacostia/overview> (last visited Jan. 19, 2022).

<sup>120</sup> *Kingman Park Civic Ass’n v. EPA*, 84 F. Supp. 2d 1, 4 (D.D.C. 1999).

<sup>121</sup> 33 U.S.C. § 1314.

June 28, 1979.”<sup>122</sup> However, “until 1994, [D.C.]’s response to its 303(d) obligations was absolute silence and intransigence.”<sup>123</sup> In “plain disregard” of their duties under the CWA, “neither the District nor the Agency lifted a finger to address any concerns, whether related to excess sediments . . . or other contaminants, for nearly two decades.”<sup>124</sup>

In 1994, the District started to submit 303(d) lists and update the list every two years as required by the statute; however, each of the District’s submissions was late.<sup>125</sup> Even then, “the District continued to ignore its TMDL obligations” by never submitting a single TMDL for review until a citizen group, the Kingman Park Civic Association, filed suit under the CWA’s citizen suit provision and compelled it to do so.<sup>126</sup> D.C. submitted its first TMDL plan for the Hickory Run Waterway four months after the citizen group filed suit.<sup>127</sup>

In *Kingman Park Association v. EPA*,<sup>128</sup> the court ruled that the District’s “consistent, longstanding failure to submit TMDL calculations can be construed as a submission that calls forth the Administrator’s nondiscretionary duties under [section] 303(d)(2).”<sup>129</sup> The District and the EPA entered into a consent decree whereby the District agreed to submit 303(d) lists and develop TMDLs for its waters.<sup>130</sup>

*C. Failure to Establish Adequate TMDLs to Protect the  
Anacostia—Friends of the Earth I & II and Anacostia  
Riverkeeper v. Jackson Cases*

The *Kingman Park* ruling gave the District the push it needed to start developing TMDLs for its waters, but that was not the end of the struggle to get comprehensive water quality management for the Anacostia under the CWA.

As the District started to create TMDLs for its 303(d) listed waterways and pollutants, it created more problems for itself by failing

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<sup>122</sup> *Kingman Park*, 84 F. Supp. 2d at 3 (quoting *Env’t Def. Fund, Inc. v. Costle*, 657 F.2d 275, 295 (D.C. Cir. 1981)).

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

<sup>124</sup> *Anacostia Riverkeeper Inc. v. Jackson (Anacostia Riverkeeper I)*, 798 F. Supp. 2d 210, 213 (D.D.C. 2011).

<sup>125</sup> *Kingman Park*, 84 F. Supp. 2d at 3.

<sup>126</sup> *Id.* at 3-4. See also 33 U.S.C. § 1365(a)(2).

<sup>127</sup> *Kingman Park*, 84 F. Supp. 2d at 3-4.

<sup>128</sup> 84 F. Supp. 2d 1 (D.D.C. 1999).

<sup>129</sup> *Id.* at 2.

<sup>130</sup> *Anacostia Riverkeeper, Inc. v. Jackson (Anacostia Riverkeeper I)*, 798 F. Supp. 2d 210, 218 (D.D.C. 2011).

to create adequate TMDL programs under the CWA.<sup>131</sup> In the initial TMDLs it created, the District relied on annual rather than daily load limits.<sup>132</sup> The District used this annual load limit calculation for the TMDL it developed for sediment in the Anacostia, which was approved by the EPA in 2002.<sup>133</sup>

In 2004, advocates brought another citizen suit challenging the validity of the TMDL in *Friends of the Earth v. EPA (Friends I)*, stating the approved TMDL was not enough to maintain set water quality standards and that the District had impermissibly used annual instead of daily limits.<sup>134</sup> Although the District Court initially ruled in favor of the EPA, stating the annual load calculations were reasonable, the D.C. Circuit Court reversed the *Friends I* decision on appeal in *Friends II*.<sup>135</sup> The *Friends II* court ruled that the CWA was unambiguous in requiring daily loads.<sup>136</sup> Therefore, the District's proposal and the EPA's approval of a TMDL with annual loading calculations went against the statute and failed to ensure the protection of the Anacostia under the CWA.<sup>137</sup>

Following *Friends II*, the EPA coordinated a joint effort to develop a single TMDL for both Maryland and D.C. to address sediment pollution in the Anacostia.<sup>138</sup> Maryland and the District published a draft proposal for the TMDL on April 6, 2007.<sup>139</sup> The Anacostia Riverkeeper, a local environmental nonprofit, submitted several comments expressing concern that the newly proposed TMDL still did not do enough to meet established water quality standards set for the river.<sup>140</sup> Specifically, environmentalists were concerned that the TMDL only addressed underwater vegetation growth and did not protect the Anacostia's designated recreational and aesthetic uses.<sup>141</sup> When the agencies submitted the TMDL and the EPA approved it in June 2007, the environmental advocates believed that the agencies failed to address the concerns raised in their comments.<sup>142</sup> In response, the Anacostia

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*; *Friends of Earth v. EPA (Friends II)*, 446 F.3d 140, 142 (D.C. Cir. 2006) (holding that the Clean Water Act unambiguously requires daily loads instead of annual loads).

<sup>133</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 218.

<sup>134</sup> *Friends of the Earth v. EPA (Friends I)*, 346 F. Supp. 2d 182, 186-87 (D.D.C. 2004).

<sup>135</sup> *Friends II*, 446 F.3d at 142.

<sup>136</sup> *Id.* at 142, 148.

<sup>137</sup> *Id.* at 148.

<sup>138</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 213.

<sup>139</sup> *Id.* at 219.

<sup>140</sup> *Id.*

<sup>141</sup> *Court Gives D.C., Maryland One Year to Develop New Anacostia Pollution Limits*, EARTH JUST. (July 26, 2011), <https://earthjustice.org/news/press/2011/court-gives-d-c-maryland-one-year-to-develop-new-anacostia-pollution-limits>.

<sup>142</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 220.

Riverkeeper filed suit under the CWA and the Administrative Procedure Act.<sup>143</sup>

The resulting District Court Opinion by Chief Judge Royce C. Lamberth was a strong condemnation of the local governments and EPA:

The CWA was enacted in light of severe threats to the Nation’s navigable waters, and it was intended to spur immediate action by both federal and state authorities. Yes [sic.] despite the Act’s *command* that States identify and develop TMDLs for implemented waters, the District and EPA spent 20 years *ignoring* these obligations and fighting attempts to compel them to act. Then, despite the Act’s unmistakable requirement to develop a total maximum *daily* load for each pollutant, EPA and the District spent the next 7 years insisting that they need only develop *annual* loads. And now, despite the Act’s clear instruction that each TMDL set levels necessary to implement *all* applicable water quality standards, EPA and the District—now joined by Maryland—have spent the last 4 years arguing that they need only pay attention to *some* of those standards. The Court will not countenance such conduct . . . .<sup>144</sup>

The court gave the EPA one year to develop new pollution limits for sediment in the Anacostia.<sup>145</sup> The District and Maryland revised the sediment TMDL for the Anacostia River, and on July 25, 2012, the EPA approved the revised TMDL.<sup>146</sup>

This decades-long ordeal reflects just *one* of the Anacostia’s many mandatory TMDL programs.<sup>147</sup> A similar process is now

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

<sup>144</sup> *Anacostia Riverkeeper v. Jackson (Anacostia Riverkeeper I)*, 798 F. Supp. 2d 210, 253 (D.D.C. 2011).

<sup>145</sup> *Federal Court Gives EPA One-Year to Develop New Pollution Caps for ‘Dirty’ Anacostia River*, BLOOMBERG L. (July 27, 2011, 12:00 AM), <https://www.bloomberglaw.com/document/X2I80GPS000000>.

<sup>146</sup> *Final TMDLs Approved by EPA: Anacostia River*, MD. DEP’T ENV’T, [https://mde.maryland.gov/programs/water/tmdl/approvedfinaltmdls/pages/tmdl\\_final\\_anacostia\\_sediment.aspx](https://mde.maryland.gov/programs/water/tmdl/approvedfinaltmdls/pages/tmdl_final_anacostia_sediment.aspx) (last visited Dec. 12, 2020).

<sup>147</sup> *Anacostia Riverkeeper I*, 798 F. Supp. 2d at 213 (asserting that “neither the District nor the Agency lifted a finger to address any concerns, whether related to excess sediments and TSS or other contaminants, for nearly two decades . . .”).

underway for the Anacostia's trash TMDL.<sup>148</sup> In *National Resources Defense Council v. EPA*, for example, environmentalists successfully argued that the Anacostia's trash TMDL was improperly based on the minimum amount of trash that had to be *taken out* of the Anacostia, instead of limiting the amount of trash that *could enter* the Anacostia, which is required under the CWA.<sup>149</sup> This case has continued in court, with the latest opinion dated September 2020.<sup>150</sup>

Environmentalists have also challenged the Anacostia's bacteria TMDL, successfully claiming that the TMDL failed to actually "establish true maximum loads" and failed to "achieve all applicable water quality standards" for e. coli in *Anacostia Riverkeeper v. Wheeler*.<sup>151</sup>

Together, these many lawsuits illustrate a story of persistent negligence and delay when it comes to adequately protecting the Anacostia under the CWA. While environmental advocates have brought lawsuits attempting to hold government agencies accountable for the sediment, trash, and bacteria TMDLs so far, it is clear a lot of work still needs to be done before the Anacostia can be considered fit for its designated uses or "fishable" and "swimmable."<sup>152</sup> This established pattern of failure to set adequate standards and implement effective TMDLs also casts doubt on the Anacostia's remaining TMDL programs and the CWA's ability to protect the Anacostia overall.<sup>153</sup>

#### D. *The Clean Water Act's Application in the Anacostia and Potomac Rivers*

The failure to use the CWA to protect the Anacostia effectively is even more stark when compared to the very same governments'

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<sup>148</sup> Nat. Res. Def. Council v. EPA (*NRDC I*), 301 F. Supp. 3d 133, 145 (D.D.C. 2018). See also Nat. Res. Def. Council v. EPA (*NRDC II*), 490 F. Supp. 3d 190, 198 (D.D.C. 2020) (demonstrating that as of September 21, 2020, the EPA, the District of Columbia and Maryland are still developing a plan moving forward concerning trash TMDL in the Anacostia River).

<sup>149</sup> *NRDC I*, 301 F. Supp. 3d at 142.

<sup>150</sup> See *NRDC II*, 490 F. Supp. 3d 190 at 198 (denying "NRDC's motion to set a deadline for final action on remand" and "requir[ing] EPA to submit detailed status reports every three months going forward . . .").

<sup>151</sup> *Anacostia Riverkeeper, Inc. v. Wheeler (Anacostia Riverkeeper II)*, 404 F. Supp. 3d 160, 169 (D.D.C. 2019).

<sup>152</sup> Colleen Grablick, *The Anacostia River is Getting a Glow Up*, DCIST (Oct. 3, 2020), <https://dcist.com/story/20/10/03/dc-anacostia-river-water-pollution/> (arguing that the areas where the Anacostia improved were the "hottest of the hot spot," and environmental agencies such as Riverkeepers "don't expect . . . this interim record of decisions to be all that is needed for the clean up to get us where we need to be for a fishable Anacostia River").

<sup>153</sup> *Id.*

response to the Potomac River, which has been seen as a large CWA success story.<sup>154</sup>

The Potomac is the other major river in D.C., but unlike the Anacostia, the Potomac flows through some of the most affluent areas in the region such as the Georgetown neighborhood; Alexandria, Virginia; and Potomac, Maryland.<sup>155</sup> While the rivers share many management, geographical, and ecological characteristics, overall, the Potomac’s pollution problems “have largely been met with solutions” under the CWA, while the Anacostia seemingly got left behind as the District’s “forgotten river.”<sup>156</sup>

The Potomac and Anacostia’s river cleanup initiatives started similarly with the *Kingman Park* and *Friends of the Earth* cases and the District’s resistance to setting adequate TMDLs based on annual instead of daily pollutant loads.<sup>157</sup> More recently, however, unlike the Anacostia’s progress so far, the Potomac’s restoration has generally been applauded as a CWA success story. American Rivers reports that “[t]hanks to the safeguards of the Clean Water Act, the Potomac is significantly healthier than before and has become a magnet for recreation and an asset to nearby residents.”<sup>158</sup> The Potomac Conservancy, who regularly reports on water quality in the Potomac, has given the river increasingly “good” grades since 2011, going as high as a “B” in 2018 before dropping back to a “B-” in 2020.<sup>159</sup> While there are still pollution concerns in the Potomac regarding bacteria and stormwater runoff, the Potomac is the “only major Chesapeake Bay tributary to achieve short- and long-term nutrient reductions in its headwaters.”<sup>160</sup> In its latest report, the Potomac Conservancy stated that:

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<sup>154</sup> Christopher A. Wood, Opinion, *The Potomac River is an American Success Story, Thanks to the Clean Water Act*, WASH. POST (Sep. 23, 2019), <https://www.washingtonpost.com/opinions/2019/09/23/potomac-river-is-an-american-success-story-thanks-clean-water-act/>.

<sup>155</sup> Powell, *supra* note 2, at 80; Jeff Clabaugh, *9 of the ‘100 Richest Places’ are in the DC Area*, WTOP.COM (Feb. 25, 2020), <https://wtop.com/business-finance/2020/02/9-of-the-100-richest-places-are-in-the-washington-region/>.

<sup>156</sup> Editorial, *A Tale of Two Rivers: Environmental Justice in D.C.*, THE GEORGETOWN VOICE (Apr. 22, 2016), <https://georgetownvoice.com/2016/04/22/a-tale-of-two-rivers-environmental-injustice-in-d-c/>.

<sup>157</sup> See *Kingman Park Civic Ass’n v. EPA*, 84 F. Supp. 2d 1, 3 (D.D.C. 1999) (discussing the District of Columbia’s lack of compliance with its statutory duties under the CWA).

<sup>158</sup> *Potomac: America’s River*, AM. RIVERS, <https://www.americanrivers.org/river/potomac-river/> (last visited Dec. 12, 2020).

<sup>159</sup> *2020 Potomac River Report Card*, POTOMAC CONSERVANCY, <https://potomacreportcard.org/> (last visited Dec. 12, 2020).

<sup>160</sup> *Potomac: America’s River*, *supra* note 158.

Thanks to decades of hard work following the Clean Water Act of 1972, many indicators of the Potomac's health are trending in the right direction. Industrial and agricultural pollution are down, native fish and other animals are returning, and more families than ever are turning to the outdoors for fun and relaxation.<sup>161</sup>

Despite their geographical similarities and their management by the same government agencies, it is clear that the Potomac's water quality issues have received greater attention than the Anacostia's, likely due in large part to the income disparity between the communities surrounding each river.<sup>162</sup>

It is a well-known environmental justice concern that lower-income communities are often left disenfranchised from the political process and more likely to experience poor environmental conditions in their communities.<sup>163</sup> Here, the wealthy community-surrounded Potomac has seen CWA success while the historically lower-income community-surrounded Anacostia has seen consistent neglect, highlighting glaring environmental justice concerns for the Anacostia on a broader scale.<sup>164</sup>

#### *E. Solutions Outside TMDLs—The River Sediment Project and Tunnel Project*

Despite the District's complicated water quality history, there are now several initiatives the District has undertaken to improve water quality in the Anacostia, outside of the CWA's TMDL program. Two examples are the Anacostia River Tunnel and the Anacostia River Sediment Projects.<sup>165</sup> These two examples show that some of the initiatives with the most potential to help the Anacostia's water quality seem to be separate from the TMDL framework.<sup>166</sup> Government

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<sup>161</sup> 2020 Potomac River Report Card, *supra* note 159.

<sup>162</sup> Craig Anthony Arnold, et al., *The Social-Ecological Resilience of an Eastern Urban-Suburban Watershed: The Anacostia River Basin*, 51 IDAHO L. REV. 29, 43 (2019).

<sup>163</sup> Weekend Edition, *The Consequences of Cleaning Up the Anacostia River*, NPR, at 8:07 (May 5, 2018), <https://www.npr.org/2018/05/05/608723599/the-consequences-of-cleaning-up-the-anacostia-river>.

<sup>164</sup> Arnold, *supra* note 162, at 68.

<sup>165</sup> *Frequently Asked Questions - Anacostia River Sediment Project*, D.C. DEP'T OF ENERGY & ENV'T,

[https://doee.dc.gov/sites/default/files/dc/sites/d DOE/publication/attachments/FAQs\\_082119.pdf](https://doee.dc.gov/sites/default/files/dc/sites/d DOE/publication/attachments/FAQs_082119.pdf) (last visited Dec. 12, 2020); *Anacostia River Tunnel Project*, *supra* note 8.

<sup>166</sup> *Frequently Asked Questions - Anacostia River Sediment Project*, *supra* note 165; *Anacostia River Tunnel Project*, *supra* note 8.

officials should consider incorporating these promising projects’ potential to better implement their TMDL programs and coordinate all available resources to increase water quality in the Anacostia.

As noted, combined sewage overflows (CSOs) have historically been a major pollution problem for the Anacostia that TMDLs have consistently struggled to address.<sup>167</sup> In 1987, Congress amended the CWA to add section 402(p), requiring National Pollution Discharge Elimination System (NPDES) permits and pollution control measures for stormwater discharges from industrial activities or municipal wastewater facilities serving a population of 100,000 or more.<sup>168</sup> Despite this requirement, “decades of inaction by local and federal officials” passed without an adequate plan to cut raw sewage pollution in the District.<sup>169</sup> A number of citizen groups represented by Earth Justice challenged the District’s response in court, resulting in a 2003 settlement and consent decree which prompted the District Water and Sewer Authority to begin comprehensive efforts to cut CSO pollution.<sup>170</sup> Since then, the District has made considerable progress in reducing overflow pollution, with one of the largest successes for the Anacostia being the Clean Rivers Project.<sup>171</sup>

This project involves the construction of tunnels to mitigate CSO pollution.<sup>172</sup> The most recent is the Anacostia River Tunnel, which is the second of four planned.<sup>173</sup> The Anacostia River Tunnel is twenty-three feet in diameter and extends 12,500 feet in length from RFK Stadium to the Blue Plains Tunnel at Poplar Point in southeast D.C.<sup>174</sup> The tunnel diverts raw sewage from being discharged by capturing CSOs and delivering them to Blue Plains Advanced Wastewater Treatment Plant for treatment before being discharged into the Potomac.<sup>175</sup>

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<sup>167</sup> See *supra* Part II & Section I.B.

<sup>168</sup> ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 627-28 (Wolters Kluwer, 9th ed. 2021).

<sup>169</sup> Press Release, Earth Just., Settlement Promises Cleaner Waters Around Washington D.C. (June 25, 2003) <https://earthjustice.org/news/press/2003/settlement-promises-cleaner-waters-around-washington-dc>; Press Release, Earth Just., Grps., Citizens, DC Council Member Call for End to Raw Sewage discharge in DC Rivers; WASA Plan Needs Revision (July 24, 2001) <https://earthjustice.org/news/press/2001/groups-citizens-dc-council-member-call-for-end-to-raw-sewage-discharge-in-dc-rivers-wasa-plan-needs-revision>.

<sup>170</sup> See Press Release, Settlement Promises Cleaner Waters Around Washington D.C., *supra* note 169.

<sup>171</sup> *Anacostia River Tunnel Project*, *supra* note 8.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

Since the Anacostia River Tunnel's completion in 2018, "combined sewer overflows to the Anacostia River have been reduced by 90%."<sup>176</sup> Further, officials project CSOs will be reduced by 98% when the project is fully completed in 2022.<sup>177</sup> While the AWS points out that there is still some overflow from eroded pipes in Maryland, these tunnels are a huge step to address bacterial and CSO pollution in the Anacostia.<sup>178</sup> It is unclear how or if this tunnel project fits in or works with the overall TMDL programs under the CWA, as the TMDL is not mentioned on the tunnel project site, and the tunnel is not mentioned in the TMDL documents on the DOEE site.<sup>179</sup> However, it is clear that this tunnel will vastly decrease the amount of bacterial and stormwater pollution to the river, thereby helping the District meet daily pollution limits.<sup>180</sup>

Another project outside the CWA's scope but connected to the Anacostia's recovering water quality is the Anacostia River Sediment Project (ARSP) mentioned in Section I.B of this paper.<sup>181</sup> The ARSP aims to address sediment pollution in the Anacostia, especially those contaminated with toxics like PCBs, PAHs, dioxins, heavy metals, and pesticides.<sup>182</sup> It is also not clear if or how the ARSP works with the TMDLs for toxics or sediments created for both the Anacostia and the Potomac.<sup>183</sup> Currently, the ARSP is in a primarily assessment phase; however, an Interim Report Released by the DOEE on September 30, 2020 includes some proposed cleanup measures, including dredging "hot spots" where more toxic pollutants are present.<sup>184</sup>

While advocates have been encouraged by the assessment progress made so far and the potential for future projects, it is important to note that "little actual clean-up regarding the toxic sediment in the

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<sup>176</sup> *Id.*

<sup>177</sup> 2020 *State of the Anacostia River Full Report*, *supra* note 8.

<sup>178</sup> *Id.*

<sup>179</sup> See *Total Maximum Daily Load (TMDL) Documents*, DC WATER, <https://doee.dc.gov/service/total-maximum-daily-load-tmdl-documents> (last visited Aug. 21, 2021) (making no mention of the Anacostia River tunnel project); *Anacostia River Tunnel Project*, *supra* note 8 (making no mention of the TMDL).

<sup>180</sup> See Stephen Hudson, *DC's River Tunnel is Keeping Billions of Gallons of Sewage Out of the Anacostia*, GREATER GREATER WASH. (Aug. 17, 2020), <https://ggwash.org/view/78760/dcs-new-tunnel-is-keeping-billions-of-gallons-of-sewage-out-of-the-anacostia-2>.

<sup>181</sup> See *supra* Section I.B.

<sup>182</sup> *For a Cleaner Anacostia River - Anacostia River Sediment Project*, *supra* note 64.

<sup>183</sup> See *For a Cleaner Anacostia River - Anacostia River Sediment Project*, *supra* note 64 (discussing the ARSP goals, which do not include TMDL goals).

<sup>184</sup> Tim Wheeler, *Anacostia Pollution "Hot Spots" to be Dredged*, CHESAPEAKE BAY MAG. (Oct. 9, 2020), <https://chesapeakebaymagazine.com/anacostia-pollution-hot-spots/>.

river has yet to occur.”<sup>185</sup> This lack of river cleanup work is especially concerning given that toxics pose the largest risk to human health from the Anacostia and create even more environmental justice concerns for the surrounding communities.<sup>186</sup>

### III. ENVIRONMENTAL JUSTICE IMPLICATIONS IN THE ANACOSTIA<sup>187</sup>

The Anacostia presents a past, present, and future environmental justice problem which must be comprehensively addressed for both the river and the surrounding communities to thrive.

#### A. *Past and Present Risks the River Poses to the Community*

While the AWS has highlighted some notable recent successes in improving the Anacostia’s water quality, one particularly large problem remains: toxic pollution, including PCBs.<sup>188</sup> The DOEE has identified that the Anacostia’s most considerable risk to human health is eating fish from the river or touching sediments contaminated by these dangerous compounds.<sup>189</sup> Additionally, agencies listed the Anacostia as impaired by PCBs specifically due to the “elevated levels . . . found in fish tissues.”<sup>190</sup>

Scientists have linked PCB pollution with serious human health risks like increased melanoma rates, liver cancer, gall bladder cancer, and more.<sup>191</sup> While the ARSP is studying these issues, and government agencies have created a joint TMDL for PCBs in the Potomac and the Anacostia, toxics remain one of the most pressing issues the river faces.<sup>192</sup> One reason is that toxics are incredibly hard to address and

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<sup>185</sup> 2021 *State of the Anacostia River Full Report*, *supra* note 6; 2019 *State of the Anacostia River Full Report*, *supra* note 43.

<sup>186</sup> See *Frequently Asked Questions - Anacostia River Sediment Project*, *supra* note 165; Powell, *supra* note 2 at 78.

<sup>187</sup> This section will review the past, present, and future environmental justice concerns the Anacostia River poses on surrounding communities.

<sup>188</sup> See 2019 *State of the Anacostia River Full Report*, *supra* note 43.

<sup>189</sup> *Frequently Asked Questions - Anacostia River Sediment Project*, *supra* note 165.

<sup>190</sup> *Water Quality Success Story - TMDL Program*, D.C. DEP’T OF ENERGY AND ENV’T, <https://doee.dc.gov/service/water-quality-success-story-tmdl-program> (last visited Dec. 12, 2020).

<sup>191</sup> *What are the Human Health Effects of PCBs?*, CLEARWATER NEWS & BULLETINS, <https://www.clearwater.org/news/pcbhealth.html> (last visited Dec. 12, 2020).

<sup>192</sup> Fragoso, *supra* note 47.

measure.<sup>193</sup> While officials and advocates have identified legacy sites that are sources of toxic pollution, it is hard to control toxic sediment pollution due to inadequate policy tools, ongoing remediation efforts and delays,<sup>194</sup> and a general lack of enforcement for CWA violations.<sup>195</sup>

The historic prevalence and lack of progress so far on toxic pollution pose multiple environmental justice problems. For one, the Anacostia has been used by neighboring communities for recreation for decades, putting them at risk of exposure to toxic sediment pollution, as well as other historic pollution sources like bacteria.<sup>196</sup>

Before 1949, when nearby D.C. public swimming pools were segregated, Black children regularly swam in the Anacostia, and continued to do so after pools were desegregated to “avoid harassment from their white neighbors.”<sup>197</sup> Dennis Chesnut, a lifelong Anacostia resident and Executive Director of Groundwork Anacostia River D.C. has described his experiences swimming in the river saying: “Although we had to navigate our way through the Kenilworth landfill to get to the river to swim, we felt that it was well worth it . . . . We felt very free, as children should feel.”<sup>198</sup> Looking back, Mr. Chesnut believes the river “probably wasn’t suitable for swimming, but there was less public information at the time.”<sup>199</sup> Today, while many see the successes like the Anacostia Tunnel Project as a sign that the Anacostia will soon be safe enough to swim, others express concern about the “toxic-laced bottom,” hoping that proposed dredging projects come to fruition and finally make meaningful cleanup progress.<sup>200</sup>

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<sup>193</sup> Timothy B. Wheeler, *Toxics, Long-Ignored, Once Again on Cleanup Radar*, BAY J. (Dec. 2, 2020), [https://www.bayjournal.com/news/pollution/toxics-long-ignored-once-again-on-cleanup-radar/article\\_7647164e-c56d-51d6-83b6-96c0534a470b.html](https://www.bayjournal.com/news/pollution/toxics-long-ignored-once-again-on-cleanup-radar/article_7647164e-c56d-51d6-83b6-96c0534a470b.html).

<sup>194</sup> See 2021 *State of the Anacostia River Full Report*, *supra* note 6 (describing cleanups at the Washington Gas, Washington Navy Yard, CSX Benning Yard sites, but noting that these efforts were “on land only”). See also *Barry Farm Resident Council, Inc. v. U.S. Dep’t of Navy*, No. 96-01450 (HHG), 1997 WL 118412, at \*2 (D.D.C. Feb. 18, 1997) (finding that the Navy and GSA were unlikely to voluntarily act on their own studies to clean up the Anacostia without a mandated court order based on their previous delays over several years).

<sup>195</sup> See Flatt, *supra* note 116.

<sup>196</sup> Rianna Teresa Murray, *An Assessment of Exposure to Pollution by Recreational Users of the Anacostia Watershed: Project Recreate 4-8* (2013) (M.P.H. thesis, University of Maryland) (on file with the Digital Repository at the University of Maryland).

<sup>197</sup> *Get Ready for Swimming in the Anacostia River*, ANACOSTIA WATERFRONT TRUST (Mar. 13, 2019), <https://web.archive.org/web/20201103161629/https://www.anacostiastrust.org/anacostia-trust/2019/3/13/get-ready-for-swimming-in-the-anacostia-river>. See also Wiener, *supra* note 4.

<sup>198</sup> *Acknowledging History: Swimming and the Anacostia River*, ANACOSTIA RIVER POOL (Feb. 1, 2019), <https://www.anacostiariverpool.com/stories/2019/2/1/acknowledging-history-swimming-and-the-anacostia-river>.

<sup>199</sup> Wiener, *supra* note 4.

<sup>200</sup> Wheeler, *supra* note 184.

Another significant risk the Anacostia’s polluted state poses to the surrounding community is through fish contamination.<sup>201</sup> Despite fish consumption being the largest risk the Anacostia poses to human health, a 2012 report detailed that thousands of people supplemented their groceries with potentially hazardous fish caught in the Anacostia despite official warnings.<sup>202</sup> This amounts to almost three-quarters of fishermen eating or sharing the fish they catch in the Anacostia.<sup>203</sup> Additionally, a 2005 angler survey interviewing anglers throughout the region also concluded that “non-White anglers are at a greater risk of exposure to the negative effects of contaminants in fish, although all races participated to some degree in risky behaviors.”<sup>204</sup>

The 2012 study, funded by the EPA, National Oceanic and Atmospheric Administration (NOAA), and several environmental organizations, showed “poor and inconsistent knowledge among anglers and the broader community about the health risks of consuming fish from the Anacostia River.”<sup>205</sup> The study also revealed that many anglers are often approached by people who ask them for their fish because they do not have enough food.<sup>206</sup> NOAA’s Office of Response and Restoration explains, “[t]he community’s apparent lack of access to enough affordable food complicates the task of merely delivering a better message about health risks.”<sup>207</sup> One contributor to the 2012 study, Steve Raabe, further explained, “[h]ow can you tell someone who is hungry *today* not to eat fish that may pose *future* health risks?”<sup>208</sup> These data points make sense considering that 77% of the District’s food deserts are east of the Anacostia.<sup>209</sup>

The contaminated fish consumption problem further highlights the continuing environmental justice problems the communities surrounding the Anacostia face as a result of its continued contamination and inadequate cleanup initiatives to date.

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<sup>201</sup> JOSHUA C. GIBSON & JULIE A. MCCLAFFERTY, CHESAPEAKE BAY ANGLER INTERVIEWS: IDENTIFYING POPULATIONS AT RISK FOR CONSUMING CONTAMINATED FISH IN THREE REGIONS OF CONCERN 1-3 (2005).

<sup>202</sup> *Id.*; ANGLER RISK REPORT, *supra* note 5, at 11.

<sup>203</sup> Off. of Response & Restoration, *Study Reveals D.C. Community Near Anacostia River are Eating and Sharing Contaminated Fish*, NOAA (Nov. 20, 2012), <https://response.restoration.noaa.gov/about/media/study-reveals-dc-community-near-anacostia-river-are-eating-and-sharing-contaminated-fish>.

<sup>204</sup> GIBSON & MCCLAFFERTY, *supra* note 201, at 71 (“This conclusion is further supported by the fishing habits, advisory perceptions, and risk perceptions reported by anglers.”).

<sup>205</sup> ANGLER RISK REPORT, *supra* note 5, at 4.

<sup>206</sup> Off. of Response & Restoration, *supra* note 203.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Sturdivant, *supra* note 88.

*B. Risks a Cleaned Up River Poses to the Community*

While the previous section explored just some of the historic and continuing environmental justice problems the polluted Anacostia poses,<sup>210</sup> many advocates are optimistic about recent progress. As the Anacostia's water quality starts to improve, some environmental justice problems will begin to be addressed. However, many advocates worry that the cleaner water will also bring new problems and attract unwanted development and gentrification, potentially displacing the very communities that worked for decades to clean up the Anacostia.<sup>211</sup>

Experts call this paradoxical phenomenon "ecological gentrification" or "environmental gentrification."<sup>212</sup> Urban Studies Professor Melissa Checker explains: "For historic reasons, often having to do with . . . various forms of institutional racism, people of color have lived around industrial neighborhoods[,] and now that these areas are starting to be environmentally cleaned up due to large urban revitalization initiatives, these communities are starting to be priced out."<sup>213</sup>

This problem is especially pronounced in Washington, D.C., which has had broad gentrification issues on a city-wide scale.<sup>214</sup> A 2017 article on environmental gentrification describes how "[m]ore than 100,000 people have moved into the city since 2000, transforming it from a largely impoverished and crime-ridden city to America's 'coolest' municipality (according to Forbes)."<sup>215</sup> Now, a cleaner Anacostia has developers looking at Wards 7 and 8 as new areas for urban development.<sup>216</sup> Anthropologist Brett Williams explains that "[s]ome argue that activists have spent years cleaning up the river so that developers can ruin it again."<sup>217</sup>

Community advocates see both promise and risk from a cleaner Anacostia.<sup>218</sup> District officials also seem aware of the risk and are taking steps to make sure that environmental gentrification does not displace

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<sup>210</sup> See *supra* Section III.A.

<sup>211</sup> *The Consequences of Cleaning Up the Anacostia River*, *supra* note 163; Jacob Fenston and Tyrone Turner, *Anacostia Rising: What's Next for Washington's 'Forgotten' River*, WAMU 88.5 (Mar. 26, 2018), <https://projects.wamu.org/anacostia-rising/>.

<sup>212</sup> *The Consequences of Cleaning Up the Anacostia River*, *supra* note 163.

<sup>213</sup> *Id.*

<sup>214</sup> Gass, *supra* note 11.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Williams, *supra* note 5 at 100.

<sup>218</sup> See Gass, *supra* note 11.

members of these communities.<sup>219</sup> For example, many groups in the area are working together to make sure communities are “involved in discussions of how development occurs, and that with development come local jobs, business opportunities, and the retention or expansion of affordable housing.”<sup>220</sup> As one organizer and Anacostia resident Latisha Atkins explains:

There are going to be some challenges, but I also think we have a huge opportunity to shape the ward in a way that we want the ward to be shaped . . . . As the saying goes, if you’re not at the table then chances are you’re on the menu.<sup>221</sup>

#### IV. CONCLUSION

Inequality has played a significant part in the Anacostia’s poor CWA legacy, especially compared to the nearby Potomac. The Anacostia’s deficient water quality has been putting the surrounding low-income communities’ health at risk for decades, especially to residents who may use the river for recreation or as a needed food source. While cleanup initiatives, especially under the CWA, have been slow and often inadequate, the recent turnaround of water quality poses even more environmental justice problems such as environmental gentrification.

Overall, the Anacostia’s complex history shows that the river is a historic and continuing source of environmental justice concerns. However, there is hope for the future. Now that effective cleanup initiatives are finally underway, and advocates have identified and are empowered to address these pressing environmental justice concerns, community organizers and government officials have a meaningful opportunity to finally get things right for this long “forgotten” river and its surrounding communities.

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*