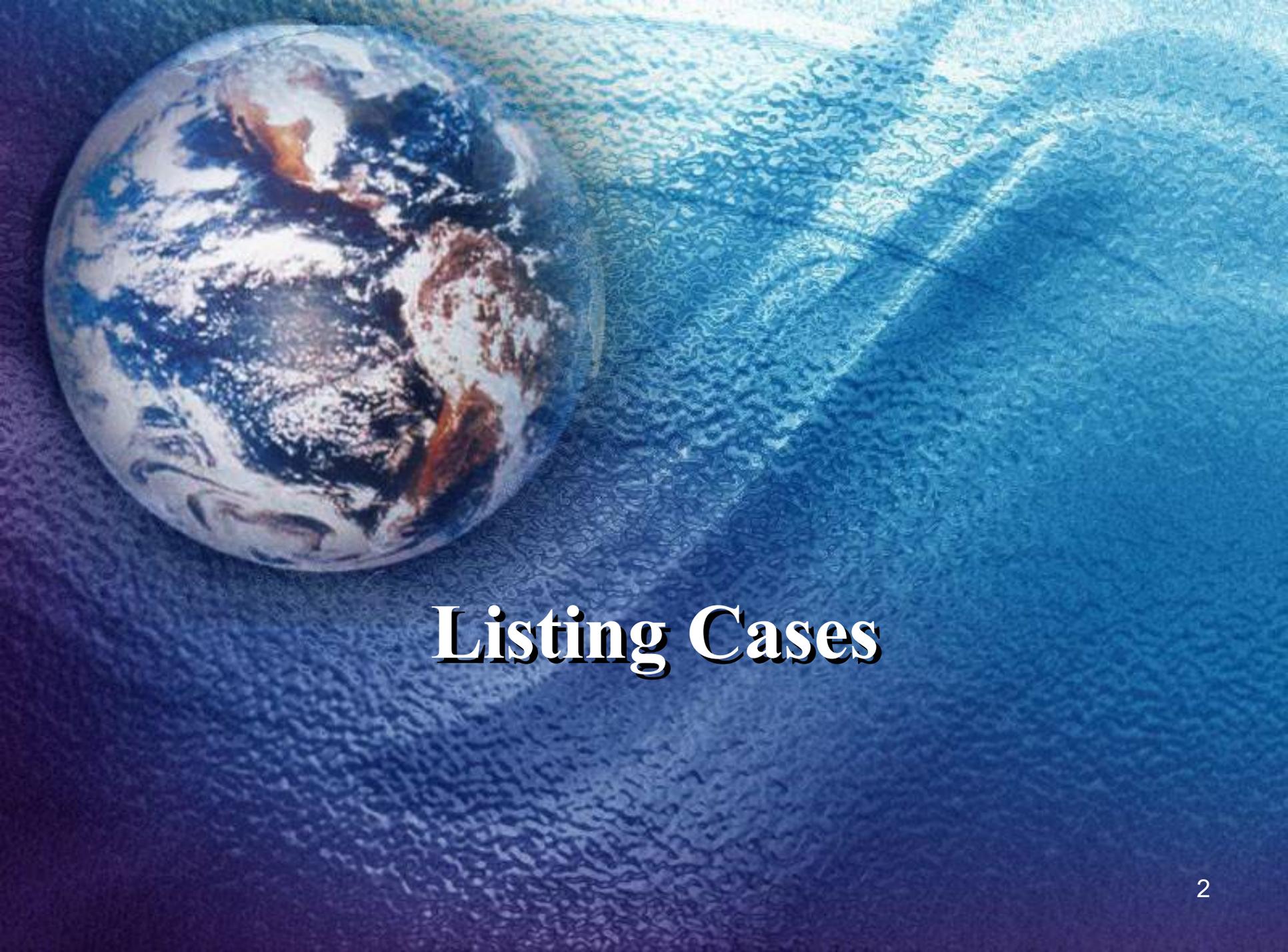


303(d) Litigation Highlights (2021-22)

**Prepared by Tom Glazer, Alec Mullee,
Elise O'Dea, Andrea Priest
EPA Office of General Counsel
June 2022**

A globe of Earth is positioned on the left side of the frame, resting on a blue, textured surface that resembles water or a fine-grained material. The globe shows continents in brown and green and oceans in blue. A long, soft shadow is cast from the globe towards the right side of the image. The background is a gradient of blue, darker at the bottom and lighter at the top.

Listing Cases

Recurring Themes in 303(d) List Litigation

- Response to Public Comments
- Evaluation & Use of Data & Information
- Priority Rankings & Schedules

Public Comments

- 40 C.F.R. 130.7(a): “The process for ... involving the public, affected dischargers, designated areawide agencies, and local governments in [list and TMDL development] shall be clearly described in the State Continuing Planning Process (CPP).”
- In practice, states’ comment processes usually involve publishing a draft list and taking public comment. They include their comment responses in their final list submission to EPA.
- EPA doesn’t act directly on a state’s public process, but it does review and consider the comments and responses as part of the overall submission to ensure there is a defensible record to support a state’s assessment determinations.

*Center for Biological Diversity, et al., v. U.S. EPA,
et al., No. 1:20-cv-00056 (D. Haw.)*



https://s3-us-west-2.amazonaws.com/s3-wagtail.biologicaldiversity.org/images/Plastic_on_beach_2_photo_by_Raftography_Sust_max-800x800.jpg

Center for Biological Diversity, et al., v. U.S. EPA, et al., No. 1:20-cv-00056 (D. Haw.)

- CBD commented on 2016 303(d) list with studies showing the presence of plastics and microplastics in Hawaii waters.
- State response: “At this time, the HDOH-CWB will not list microplastics as a pollutant to state waters as the State does not have a numeric criterion specific to microplastics, or an assessment method to interpret its narrative criteria.” EPA’s approval did not discuss this issue. CBD sued.
- EPA withdrew its approval and requested that HI, within 60 days, “assemble and evaluate all existing and readily available water quality-related data and information related to plastics in Hawai’i waterbodies for which the State received data and information, and submit the results of that evaluation to EPA.” Hawaii submitted a supplemental assessment of the plastic data that did not add anything to the list.
- EPA partially approved (supplementing HI’s rationale) and partially disapproved for two waters violating the trash narrative criterion where the presence of plastic trash was overwhelming.
- CBD was satisfied with this outcome and voluntarily withdrew its lawsuit.

*Black Warrior Riverkeeper, Inc., 2021 WL
927260 (N.D. Alabama, Mar. 11, 2021)*



NATIONAL
LAND
REALTY

Black Warrior Riverkeeper, Inc., 2021 WL 927260 (N.D. Alabama, Mar. 11, 2021)

- Black Warrior Riverkeeper submitted comments critical of Alabama's decision to delist three segments. Riverkeeper raised concerns that (1) AL delisted w/ fewer than the minimum number of samples required by its assessment method; and (2) "Monitoring Summary" documents generated by ADEM, which had previously concluded that two of the segments were impaired for siltation based on elevated TDS.
- ADEM had a detailed response to comments and support for delisting but didn't speak to the specific technical issues Riverkeeper raised.
- EPA approved without further explanation on this issue. Riverkeeper sued.
- The litigation dragged on long enough that EPA received and acted on the state's next 303(d) list. In its approval, EPA addressed Riverkeeper's specific concerns in more detail.
- After briefing, the Court ruled (1) 2020 approval mooted challenge to 2018 approval; (2) EPA's 2020 decision rationale was reviewable; (3) EPA's review isn't bound by the state's assessment method; and (4) EPA adequately explained why the state's shift to TSS was reasonable.

“Assembling,” “Evaluating,” and “Using” Data & Information

- 130.7(b)(5): Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list....
 - States “assemble” data when, through solicitation and other means, they gather all existing and readily available water quality-related data and information. See 2006 IRG, at 30-32.
 - States “evaluate” data when they consider whether and how it should be used to make a WQS attainment status determination, applying reasonable and scientifically sound data evaluation procedures. See 2006 IRG, at 32-37.
- 130.7(b)(6): Each State shall provide documentation... to support the State's determination to list or not to list.... This documentation... shall include at a minimum: (iii) A rationale for any decision to not use any existing and readily available data and information....
 - A state can decide not to “use” data to develop the list if it provides a reasonable, case-specific, & technical “rationale.” See 2006 IRG, at 37.
 - Often related to “good cause” for not listing a segment under 130.7(b)(6)(iv).

Potomac Riverkeeper, Inc. v. Wheeler, 2019 WL 1440128 (D.D.C. Mar. 31, 2019), *aff'd* No. 19-5164 (D.C. Cir. Apr. 28, 2020)



Photo Credit: Potomac Riverkeeper

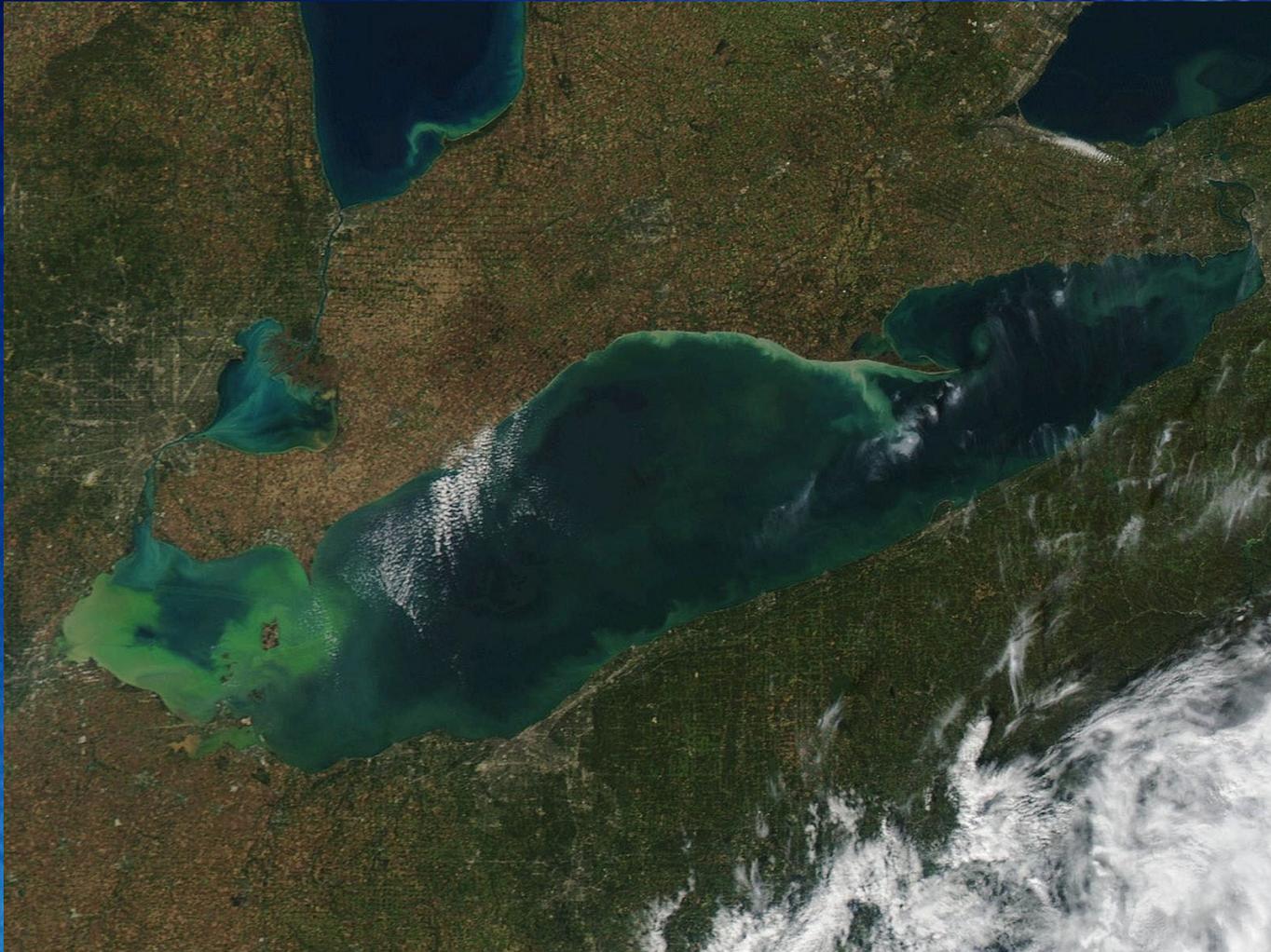
Potomac Riverkeeper, Inc. v. Wheeler, 2019 WL 1440128 (D.D.C. Mar. 31, 2019), *aff'd* No. 19-5164 (D.C. Cir. Apr. 28, 2020)

- Riverkeeper argued that ~250 miles of the Shenandoah River should be listed based on “photographs of algal mats, citizen testimonials outlining concerns over algal growth, algal toxin lab data, and algal bottom cover measurements.”
- Virginia’s submission evaluated the data, identified some technical concerns about its reliability, and placed some of the segments into Category 3. EPA approved (expanding on Virginia’s explanation in its own decision document) and Riverkeeper challenged.
- The Court upheld EPA’s approval, finding that EPA reasonably concluded that Virginia had “evaluated” the data and provided an acceptable “rationale” for its decision not to “use” the data for listing purposes.
- What does “evaluate” mean? 40 C.F.R. 130.7(b)(5)
 - Data and information not “ignore[d]”
 - “[A]ssess the data’s reliability and significance”
 - A record of “collecting, responding to, analyzing, discussing, and acting on” data and information
- What is an acceptable “rationale” for not using data to list? 40 C.F.R. 130.7(b)(6)(iii)
 - Rationale should be “logical”
 - Rationale should set forth “specific shortcomings” in the dataset (not a categorical exclusion like a bright-line cutoff based on data age)
 - Should be grounded in “technical expertise and experience in a complex scientific area”
 - Court would want a “convincing reason” to second-guess EPA’s acceptance of a rationale
- Court of Appeals affirmed, stressing that its decision was narrowly based on the specific record before it at this time.

Priority Rankings & Schedules

- 40 CFR 130.7(b)(4): The 303(d) List “shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs, **taking into account the severity of the pollution and the uses to be made of such waters....**”
 - Also “identify the pollutants causing or expected to cause violations of the applicable water quality standards”
 - And “include the identification of waters targeted for TMDL development in the next two years.”
- 40 CFR 130.7(d)(1): “Schedules for submission of TMDLs shall be determined by the Regional Administrator and the State.”

Envtl. Law & Policy Ctr. v. US EPA,
415 F.Supp.3d 775 (N.D. Ohio Nov. 13, 2019)



Envtl. Law & Policy Ctr. v. US EPA, **415 F.Supp.3d 775 (N.D. Ohio Nov. 13, 2019)**

- Ohio EPA assigned priority points to each impaired waterbody based on a formula that takes into account the “presence and severity of Human Health impairment, Recreation Use impairment, Public Water Supply impairment and Aquatic Life Use impairment.”
- The 2018 IR assigned a large number of priority points to Lake Erie but noted in a separate discussion that “Ohio EPA-initiated TMDLs [are] assigned a low priority for Lake Erie]” because of voluntary pollution control measures in place.
- The Court seized on that language and held that ELPC had adequately stated a claim that Ohio assigned a low priority for TMDL development to Lake Erie without “taking into account” the statutory factors of “severity of pollution” and “uses to be made.”
 - In the Court’s view, the Complaint adequately alleged that there was no “rational connection” between the statutory criteria and the assignment of a low priority.
 - “Because ELPC alleges, not that Ohio EPA should have assigned Lake Erie a higher priority for TMDL development, but that the agency failed to consider the statutory criteria that drive TMDL development, I have authority to review ELPC’s claim.”

***NWEA v. EPA*, No. 3:21-cv-01136-HZ (D. Ore.)
(ongoing)**

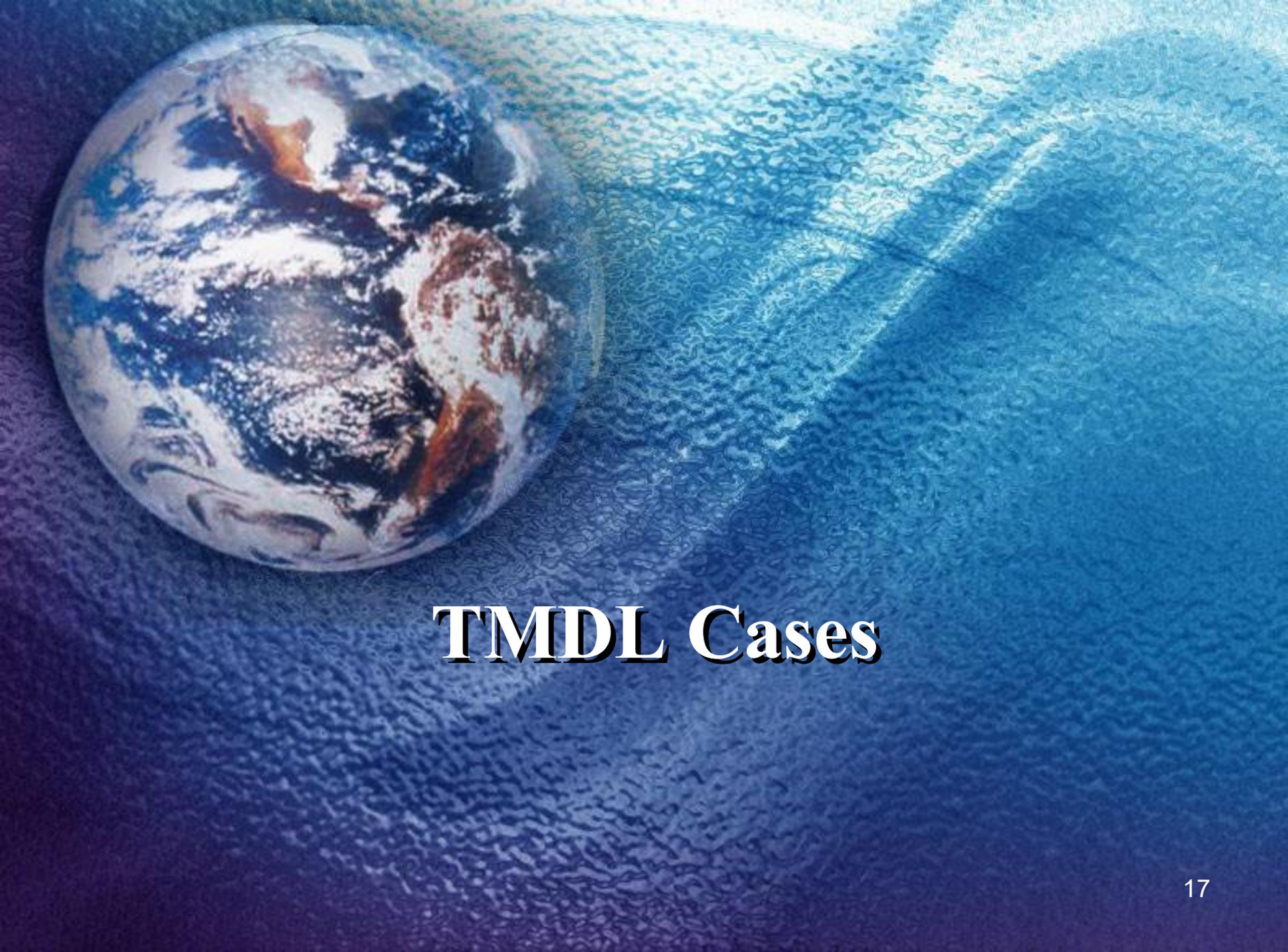


Photo Attribution: Gary Halvorson, Oregon State Archives, via Wikimedia Commons
[https://commons.wikimedia.org/wiki/File:Siletz_River_\(Lincoln_County,_Oregon_scenic_images\)_\(lincDA0071\).jpg](https://commons.wikimedia.org/wiki/File:Siletz_River_(Lincoln_County,_Oregon_scenic_images)_(lincDA0071).jpg)

NWEA v. EPA, No. 3:21-cv-01136-HZ (D. Ore.)

(ongoing)

- OR submitted its 2014-2020 IR to EPA, combining the priority ranking for its 303(d) list and a TMDL submission schedule into a single document.
- EPA approved OR's 303(d) list and acknowledged the TMDL submission schedule.
- Plaintiff sued EPA in District Court, raising 3 claims related to OR's priority ranking and TMDL submission schedule:
 - Claim 1: APA challenge to EPA's alleged approval of priority ranking (not approval of 303(d) list).
 - Claim 2: Claim alleging EPA failed to undertake a non-discretionary duty arising under 40 C.F.R. § 130.7(d)(1) to determine OR's TMDL submission schedule.
 - Claim 3: Claim alleging in the alternative that EPA failed to determine OR's TMDL submission schedule and this failure was an unreasonable delay of agency action under the APA, and was otherwise in violation of the APA as arbitrary, capricious, an abuse of discretion, or not in accordance with law.
- EPA filed partial MTD on these 3 counts, which the court denied.
 - Claim 1: Court found EPA's action constituted a final agency action subject to review and declined to consider the merits in the absence of a full record.
 - Claims 2 & 3: Court found EPA's regulations establish a non-discretionary duty for EPA to determine schedules for submission of TMDLs and otherwise declined to reach the merits of these claims absent a full record.

A globe of Earth is positioned on the left side of the slide, showing continents and oceans. The background is a deep blue with a fine, pebbled texture, resembling water or a textured surface. A bright light source from the top right creates a strong shadow of the globe on the background, extending towards the bottom right.

TMDL Cases

Constructive Submission

Judicial Constructive Submission Doctrine

- By statute, EPA must approve or disapprove TMDLs submitted by states and, if EPA disapproves, EPA must establish replacement TMDLs. CWA 303(d)(2).
- What happens if a state does not submit TMDLs for impaired waters?
- Courts have held that, in certain circumstances, EPA may have an obligation to establish TMDLs when a state does not
 - The rationale being that the state has “constructively” submitted “no TMDL” to EPA, creating a duty for EPA to approve or disapprove the submission of “no TMDL,” and, if disapproving, establish a TMDL

Constructive Submission History

- CWA enacted in 1972. States were required to start submitting TMDLs in 1979
- Initially, states developed (and EPA approved) very few TMDLs
- Courts then developed the constructive submission theory
 - First articulated in *Scott v. Hammond* (7th Cir. 1984)
- Early constructive submission decisions concerned situations where states had submitted very few or no TMDLs over long periods of time (generally at least a decade)
 - Sometimes articulated as the state “clearly and unambiguously” abandoning its TMDL obligation

Constructive Submission – Extension to Individual Impairments

- In recent years, some plaintiffs have attempted to expand the theory to a state's failure to establish a TMDL for a specific impairment of a specific water body, as opposed to statewide programmatic failures
- A few courts have determined that the constructive submission theory can apply to individual impairments. No court yet, when squarely presented with the issue, has ruled the other way
 - *Sierra Club v. McLerran* (W.D. Wash. Mar. 16, 2015))
 - *OVEC v. McCarthy* (S.D.W. Va. Feb. 14, 2017)
 - *Columbia Riverkeeper v. Wheeler* (9th Cir. 2019), *affirming Columbia Riverkeeper v. Pruitt* (W.D. Wash. 2018)

Constructive Submission – Extension to Individual Impairments

Columbia Riverkeeper v. Wheeler (9th Cir. 2019)

- This case concerned a temperature TMDL for the Columbia and lower Snake Rivers
- The Ninth Circuit held that constructive submission theory can apply to an individual impairment
 - “Where a state has failed to develop and issue a particular TMDL for a *prolonged period of time*, and has *failed to develop a schedule and credible plan* for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act.”
- The Ninth Circuit ruled that, on the facts before the court, Washington and Oregon had constructively submitted “no TMDL”

Recent litigation involving constructive submission

NWEA v. EPA, No. 2:19-cv-02079-BJR (W.D. Wash.) (ongoing)

- Plaintiff alleges WA constructively submitted no TMDLs for Budd Inlet and Capitol Lake for multiple pollutants causing impairment.
- Reflects individual impairment claims for specific waterbodies.

NWEA v. EPA, No. 3:21-cv-01136-HZ (D. Ore.) (ongoing)

- Plaintiff alleges that OR constructively submitted approx. 2,467 TMDLs to EPA, encompassing “most remaining WQLS” listed as impaired in OR.
- Complaint acknowledges that OR is developing TMDLs, but asserts that OR “has effectively abandoned its TMDL program” due to duration waters have been listed as impaired without TMDLs being established.
- Blends elements of programmatic and individual impairment claims.

NWEA v. EPA, No. 2:21-cv-01637 (W.D. Wash.) (ongoing)

- Plaintiff alleges WA constructively submitted no TMDLs to address nitrogen pollution in Puget Sound
- Reflects individual impairment claim

Challenges to EPA actions on TMDLs

Anacostia River (DC) Trash TMDL – *NRDC v. EPA*, 301 F. Supp. 3d 133 (D.D.C. 2018)

- Challenge to EPA approval of DC/MD TMDL for trash
- Court held (*Chevron* Step One) terms “maximum” and “load” preclude TMDL expressed as amount of trash captured, prevented from entering, or removed from river
- Court’s rationale followed 2006 D.C. Circuit “daily” load case
- Court stayed its vacatur of EPA’s approval so TMDL remains in effect for permitting purposes until replaced either by DC/MD or EPA
- R3 is working with DC and MD to revise the TMDL

Anacostia & Potomac River (DC) Bacteria TMDLs - *Anacostia Riverkeeper v. Wheeler*, 404 F. Supp. 3d 160 (D.D.C. 2019)

- NGOs challenged EPA's approval of DC bacteria TMDLs
- WQS was expressed as a 30-day geometric mean (126 MPN/100 mL), therefore, TMDLs provided a variable daily max, depending on E. coli discharges on previous 30 days
- Court Held #1: While a TMDL may lawfully establish different WLAs for different days of a 30-day WQS averaging period, those "known" and "highest possible maximums" must be stated in the TMDL
- Court Held #2: EPA regulatory language ("[w]hen criteria are met, water quality will generally protect the designated use") (40 C.F.R. 131.3(b)) means only that, when both the numeric and narrative criteria are met, the designated use will be met. It does not mean that, when the numeric criteria are met, the narrative criteria are also met
- Court vacated EPA's approval of the TMDLs, but vacatur is currently stayed and plaintiffs are seeking an extension to stay

Deschutes River TMDLs (Washington) – *NWEA v. EPA, No. 2:19-cv-02079-BJR (W.D. Wash.)* (Ongoing)

- NWEA challenged EPA's failure to approve/disapprove 2015/2017 Deschutes TMDL submissions w/in 30 days; Court ordered EPA to act by June 2018.
- EPA approved 26 TMDLs (temperature); disapproved 37 TMDLs (temperature, sediment, pH, bacteria, and DO).
- Subsequently, NWEA challenged EPA's failure to establish 37 replacement TMDLs w/in 30 days and EPA's approval of the 26 temperature TMDLs on several technical grounds (in addition to constructive submission claim relating to TMDLs for Budd Inlet and Capitol Lake).
- EPA established replacement TMDLs in July 2020 and received public comments on these TMDLs.
- In December 2020, NWEA supplemented its Complaint to replace its claim that EPA did not establish the replacement TMDLs w/in 30 days with a claim challenging the replacement TMDLs on numerous technical grounds.
- Following public comment, EPA revised replacement TMDLs and transmitted these to WA in August 2021.
- NWEA supplemented its Complaint a second time to challenge revised replacement TMDLs in November 2021.

Gunpowder PCB TMDL - *Gunpowder Riverkeeper v. EPA*, No. 20-cv-2063 (D.D.C.) (ongoing)

- In July 2020, Gunpowder Riverkeeper challenged EPA's approval of a PCB TMDL for the Gunpowder and Bird Rivers in Maryland.
- The complaint primarily takes issue with the TMDL not assigning a load allocation to PCBs from resuspension of bottom sediment – the major source of PCBs in the rivers.
 - The model developed by Maryland treated the water column and sediment as a single system, and exchanges between them as “internal loadings”
 - The complaint alleges that bottom sediment constitutes a nonpoint source and accordingly must be assigned a load allocation
- The plaintiff brought an APA claim and a CWA mandatory duty claim, alleging that EPA violated a mandatory duty to disapprove a TMDL that fails to meet CWA requirements
- In August 2021, the court granted EPA's motion to dismiss the mandatory duty claim. Case put in abeyance shortly thereafter.

A globe of Earth is positioned in the upper left quadrant of the slide. The globe shows continents in brown and green and oceans in blue. The background is a deep blue with a fine, pebbled texture. A bright light source from the top right creates a strong shadow of the globe on the background, extending towards the bottom right.

The Administrative Record

What is the Administrative Record?

- (1) The collection of documents and information in the agency's files that explains the legal, policy and technical basis for an agency's administrative decision, like establishing or approving/disapproving a 303(d) list or TMDL;
- OR
- (2) A collection of documents and information filed with a court in a lawsuit that provides the basis for an agency's administrative decision.

What is the Administrative Record?

- All documents and materials considered directly or indirectly by the decision maker.
- Includes the state's proposed and final "action" document (list or TMDL); public comments or correspondence; responses to comments; EPA's "action"

What's the Purpose of the AR

- To document that the agency considered the relevant statutory and regulatory factors in reaching its decision, did not ignore any of those factors, and did not make a “clear error” in judgment. *Overton Park*, 401 U.S. at 416 (1971).



Why is an AR Important?

- The APA (5 USC 706) and analogous state laws require that agency actions to be consistent with statutory authority and not “arbitrary and capricious” – decisions must be reasonable.
- The APA provides for judicial review of final federal actions based on “the whole record.”
- The “full administrative record that was before the [decisionmaker] at the time he made his decision.” *Overton Park*, 401 U.S. 402 (1971).
- “Not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 136 (1973). For example – not what the lawyers say.
- The alternative to administrative record review is usually DISCOVERY

Judge Lamberth's Anacostia TSS TMDL Decision - 798 F. Supp. 2d 210 (D.D.C. 2011)

- EPA approval of a state TMDL
- “The principal concern on review is whether EPA has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”
- EPA must link fact that TMDL will lead to 85% TSS reduction to choice to approve it because it will achieve WQS.
- A court will “not supply a reasoned basis for the agency’s action that the agency itself has not given.”
- “The problem is that the Decision Rationale does not explain what judgment EPA is exercising, the scientific basis for that judgment, or the reasonable conclusions of that exercise.”
- Rejected “severely qualified opinions” and “quasi-educated guesses.”

Judge Armstrong's Malibu Creek Nutrient/Sediment TMDL Decision – 2016 U.S. Dist. LEXIS 12406 (N.D. Cal. 2016)

- EPA establishment of a TMDL
- “The function of the district court is to determine **whether** or not as a matter of law **the evidence in the administrative record permitted the agency to make the decision it did.**”
- The **record confirms** that EPA made “considerable efforts to quantify background levels of these nutrients, and used that data to define the minimum level of nutrient enrichment that is attainable in the watershed.”
- Court also found that record supported EPA consideration and decisions re natural nutrient sources, invasive species, and modeling.
- “The administrative record provides ample foundation for the EPA’s use of the CSCI model,” describing its development, methodology and application.

Key 303(d) List Elements to Document in the AR

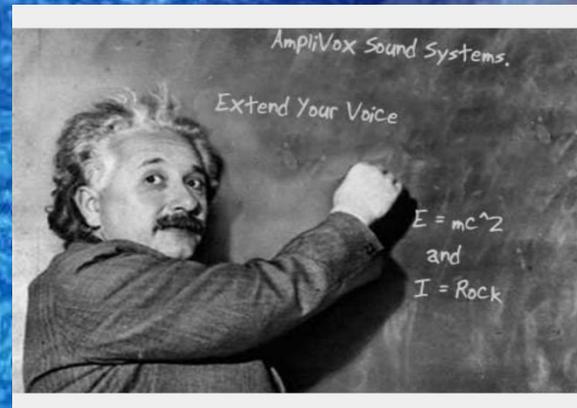
- The impaired and threatened waters still requiring TMDL(s), pollutants causing the impairment, and priority ranking for TMDL development (including waters targeted for TMDL development within the next two years).
- Describe methodology used to develop the List.
- Describe the data and information used to identify waters including a description of the existing and readily available data and information used.
- A rationale for any decision to not use any existing and readily available data and information.
- Any other reasonable information requested by EPA, such as demonstrating good cause for not including a water or waters on the list.

Key TMDL Elements to Document in the AR

- Pollutant load set “at a level necessary to implement the applicable water quality standards” – CWA 303(d)(1)(C); 40 CFR 130.7(c)
- Identification of, and allocation of pollutant load to, all point and nonpoint sources
- TMDL must account for “seasonal variations” in the waterbody, e.g., temperature and flow variations
- TMDL must contain a “margin of safety” to account for uncertainty in data or modeling
- “Reasonable assurance” to prevent over-allocating the total load

Golden Rule for Defensible Lists and TMDLs

- Explain your Listing and TMDL decisions
- States should explain **why** the list or TMDL decisions are reasonable, and EPA should explain why EPA's approval is reasonable
- Show your work!



Explain “Why”

- Avoid merely conclusory statements:
 - “The TMDL provides an adequate MOS.”
 - “The TMDL provides adequate RA.”
 - “The TMDL target will meet WQS.”
- The most important part of your AR is explaining (and supporting with data and facts) **why** these statements are true.

Questions to Ask and Answer for Each Element Under Review

- What is the relevant statutory/regulatory requirement?
- Did the list or TMDL meet the statutory/regulatory requirement?
- What is my basis for saying “yes?”
- Did commenters disagree?
- What is my basis for saying commenters are wrong?

Comment Responses Are Crucial

- Public comments are your best friend; they provide a roadmap to potential litigation.
- Comments identify the issues potential litigants really care about.
- If fully and successfully responded to by the state or EPA, we have an excellent chance of winning any challenge.
- Handled poorly, we are likely to lose.

Administrative Records & Constructive Submission

- When there is an alleged constructive submission of no TMDLs to EPA, what is included in the administrative record?
- Information regarding EPA's knowledge of TMDL development in the state (for programmatic claims) or pertaining to individual TMDLs (for individual impairment claims) is relevant.
- In contrast to affirmative TMDL submissions to EPA, the date of a constructive submission may be indefinite. Further, as constructive submission challenges typically involve alleged EPA *inaction*, there is no clear action closing AR.

Options & Possible Approaches for Developing AR for CS claims

- Develop a rolling administrative record, supplementing throughout litigation when developments occur (including submission of TMDLs).
 - May include documents summarizing EPA’s knowledge of relevant TMDL development.
 - *San Francisco BayKeeper v. EPA*, 297 F.3d 877, 886 (9th Cir. 2002):
 - Reliance on EPA-developed document providing Agency review of the state program was not an abuse of discretion.
 - “As this case concerns agency inaction, there can be no final agency action that closes the administrative record or explains the agency's actions.”
- May confer with parties in litigation to identify records to include.

Conclusion

- Any Questions?
- Glazer.Thomas@epa.gov
- Mullee.Alexander@epa.gov
- ODea.Elise@epa.gov
- Priest.Andrea@epa.gov