



# **303(d) Litigation Highlights (2018-19)**

**Prepared by Jim Curtin  
EPA Office of General Counsel  
May 2019**





# Listing Cases

# *Environmental Law & Policy Center v. EPA (N.D. Ohio) – Lake Erie Listing*

- Oct. 20, 2016: Ohio submitted its 303(d) list without an assessment of the open waters of Lake Erie for nutrients/algae.
- May 19, 2017: EPA approved and ELPC sued, eventually moving for summary judgment.
- Jan. 12, 2018: Instead of contesting summary judgment, EPA withdrew its approval, requesting that Ohio assemble and evaluate all data for Lake Erie.
- Apr. 11, 2018: *Envtl. Law & Policy Ctr. v. United States Env'tl. Prot. Agency*, 2018 WL 1740146 (N.D. Ohio)
  - Court expresses its view that EPA's approval was likely arbitrary and capricious and that Lake Erie is likely impaired. Court also voices frustration with EPA for withdrawing the approval in the midst of summary judgment briefing.
  - Court nonetheless agrees that EPA had authority to withdraw the approval and since the approval had been unilaterally withdrawn, there was not currently a dispute before the Court that it could rule on.
  - Court orders EPA to finalize its now incomplete action on Ohio's list within the statutory 30 day period.
- May 11, 2018: EPA notifies the Court that Ohio has identified the open waters as impaired for the recreational use due to algae and EPA has approved.

## Key Listing Data Regulations

- “Each State shall *assemble and evaluate all existing and readily available water quality-related data* and information to develop the list....” 130.7(b)(5)
- But States have the option to provide a “*rationale* for any decision to not use any existing and readily available data and information.” 130.7(b)(6)(iii)
- EPA guidance says the rationale should be “technical,” “case-specific,” and “reasonable.”

# *Environmental Law & Policy Center v. EPA (N.D. Ohio) – Lake Erie Listing Cont’d*

- June 8, 2018: ELPC moves to challenge EPA’s approval of Ohio’s assignment of a low priority to Lake Erie for TMDL development and to bring a constructive submission claim with respect to Lake Erie based in part on statements from Ohio such as “a TMDL still is not necessary for the lake.”
- Oct. 3, 2018: *Envtl. Law & Policy Ctr. v. United States Env’tl. Agency*, 349 F. Supp. 3d 703 (N.D. Ohio)
  - Court upheld EPA’s approval of the list even though Ohio assigned Lake Erie a low priority ranking for TMDL development. The Court explained that while EPA’s regs at 40 CFR 130.7(b)(4) require states to submit a priority ranking, those regs do **“not authorize the U.S. EPA to review or pass judgment on a state’s priority ranking.”**
  - Court also rejected the constructive submission claim observing, first, that Ohio had not definitively declared it would never do a TMDL for Lake Erie and, second, that **“[y]ears of inaction following an impaired listing may reasonably prompt a court to consider whether a state has ‘clearly and unambiguously’ abandoned its TMDL obligations... Months of inaction will not.”** In other words, not enough time had passed since the original listing for the Court to conclude that Ohio had constructively submitted no TMDL.

# *Potomac Riverkeeper, Inc. v. Wheeler*, 2019 WL 1440128 (D.D.C. Mar. 31, 2019) – Shenandoah River Listing

- 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 evaluated the data but chose not to use it, placing some of the segments into Category 3C instead. EPA approved 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

# *Blue Water Baltimore, et al., v. Wheeler* (D.D.C.) – Chesapeake Bay TMDL Delisting

- MD NGOs groups have challenged EPA’s approval of MD’s 303(d) list, which has excluded segments addressed by the Chesapeake Bay TMDL since the 2012 cycle. Plaintiffs argue these segments should not have been delisted because they require additional individual “local” TMDLs outside of the Bay TMDL process.
  - EPA disagrees, and we are awaiting decision from the Court.
- Earlier in the litigation, the Court granted EPA’s motion to dismiss on a preliminary procedural issue (See *Blue Water Baltimore v. Pruitt*, 266 F. Supp. 3d 174 (D. Md. 2017)).
  - Plaintiffs’ original complaint challenged EPA’s approval of the 2012 list (in which the segments had first been delisted). EPA argued that Plaintiffs should have challenged the approval of the 2014 list, which was the most recent approval at the time the Complaint was filed.
  - The Court agreed holding that: “The plaintiffs’ challenges to the EPA’s approval of Maryland’s 2012 Integrated Report are moot because the 2014 Integrated Report superseded the 2012 Integrated Report.”
  - **In sum: each new list approval replaces the prior list approval and challenges to a superseded list are moot.**
- This usually won’t be fatal to a plaintiff’s case. In *Blue Water Baltimore*, the Court allowed Plaintiffs to file an amended complaint challenging the currently operative list.



A globe of Earth is positioned on the left side of the frame, showing continents and oceans. The background is a deep blue with a fine, pebbled texture. A long, soft shadow of the globe is cast across the background towards the right. The text 'TMDL Cases' is centered in the lower half of the image.

# TMDL Cases

# Judicial Constructive Submission Doctrine

- CWA says EPA must establish a federal TMDL if it disapproves a state TMDL. 303(d)(2).
- What happens is no state TMDL submission?
- To fill a gap in the statute, some courts have held that EPA has an obligation to establish TMDLs when a state does not.
- *Scott v. Hammond*, 741 F.2d 992 (7<sup>th</sup> Cir. Aug.1984)(Illinois/Indiana bacteria discharges to Lake Michigan; beach closures)

# Judicial Limits on Constructive Submission

- CS doctrine typically applied where state submitted no TMDLs and has no plans to do any.
- Generally, not applied if there is evidence (even minimal) of past state TMDL activity and plan/schedule to do more.
- *E.g., San Francisco Baykeeper, Inc. v. Browner*, 297 F.3d 877 (9<sup>th</sup> Cir. 2002)(18 TMDLs plus a schedule.

# Constructive Submission and Single Waterbodies

## *Sierra Club v. McLerran (2015)*

- WA prepared draft PCB TMDL for Spokane River
- WA paused TMDL development for more info; meanwhile, WA addressed PCBs through Task Force activities; also established other TMDLs
- District Court found no constructive submission, but said EPA had improperly “approved” Task Force efforts as suitable TMDL alternative
- Court ordered a schedule for TF work completion and endpoint to pursue and finalize TMDL
- Dicta: Court said CS can apply to a single waterbody

## *OVEC v. Pruitt (Fourth Circuit, June 20, 2018)*

- WV had established 4,000+ TMDLs since 2004; 500 since 2016; 180 planned by 2019
- WV established TMDLs for “biologically-impaired” waters but none for “ionic toxicity”
- WV legislature (2012) said no IC TMDLs until new methodology
- WV suspended IC TMDLs; still developed “biologically-impaired” TMDLs
- WV developing new methodology; had plan to complete IC TMDLs
- In 2017, District Court held there was a CS and ordered EPA to approve/disapprove that CS.
- In 2017, EPA “conditionally approved” WV’s CS in light of an EPA-WV MOA promising to complete all TMDLs by 2026.

## *OVEC v. Pruitt, No. 17-1430 (Fourth Circuit June 20, 2018) - Continued*

- On appeal: EPA argued that CS = statewide failure remedy; WV hasn't clearly and unambiguously decided not to submit any IC TMDLs; WV methodology development efforts not a "sham."
- June 2018, Fourth Circuit reversed the District Court and found in favor of EPA and WV.
- Court did not express an opinion on validity of CS doctrine itself, but held that, on the facts before, there had been no CS.
- Court said WV had established at least some TMDLs and had a "credible" plan to produce others, i.e., the MOA.
- The Court said, while there had "not yet" been a CS, "[c]ontinued intransigence" could change that."

**Columbia River Temperature TMDL –  
*Columbia Riverkeeper v. Wheeler, 337 F.Supp.3d 989 (W.D.Wa. 2018)***

- NGO challenged 17-year EPA delay in completing draft TMDL for temperature on the mainstem of Columbia and Lower Snake Rivers.
- In 2000, EPA, Washington, Oregon, Idaho and others entered MOA to develop TMDLs for temperature and total dissolved gas in greater Columbia River basin, with States doing TMDLs for tributaries and for dissolved gas and EPA would “produce” TMDL for temperature on mainstem.
- EPA distributed draft for stakeholder input in 2002, and WA and OR affirmatively requested that EPA issue the TMDL. EPA suspended work shortly thereafter.
- District court expanded application of constructive submission doctrine to specific impairments, found constructive submission had occurred, and ordered EPA to approve or disapprove CS w/in 30 days, then if disapproving, to issue TMDL in 30 days.

## Columbia River Temperature TMDL - *Continued*

- After disapproving CS based on the court's order and without waiving appeal rights, EPA sought and was granted stay of order to establish.
- EPA appealed to the Ninth Circuit.
- EPA is challenging the CS doctrine directly, arguing that the judge-made theory is not supported by statutory text and that the statute does not waive sovereignty immunity to suit. The brief further argues that, even if the doctrine is valid, it applies only in the instance of state-wide default, not to specific impairments. Finally, EPA argues that CS has not occurred on the facts of this case.



**Anacostia River (DC) Trash TMDL –  
*NRDC v. EPA*, 2018 U.S. Dist. LEXIS 54266 (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 followed 2006 D.C. Cir. “daily” load case
- 130.2(i) term “other appropriate measure” means “other appropriate unit of measure”
- Court stayed its vacatur of EPA’s approval so TMDL remains in effect for permitting purposes until replaced either by DC/MD or EPA
- Status report due July 2018

## Potomac River (DC) Bacteria TMDL - *Anacostia Riverkeeper v. EPA* (Decision Pending)

- NGOs challenged EPA approval of DC bacteria TMDL
- EPA argued TMDL need not express a fixed daily cap for bacteria when applicable WQS is expressed as 30-day geometric mean (126 MPN/100ml mean of 5 samples over 30 days)
- TMDLs provide variable daily max, depending on discharge on previous 30 days.
- Daily bacteria spike allowed under 30-day geo mean WQS; consistent with *Anacostia TSS* decision.
- WQS's single sample value of 410 MPN/100ml applies only to "assessing water quality trends" not "attainment status," therefore not to TMDLs

## Oregon Temperature TMDLs – *NWEA v. EPA* (Remedy Pending)

- In 2017, district court held EPA approvals of 10 OR watershed TMDLs were unlawful because based on invalid “natural condition” temperature criteria (criteria struck down in different case *after* TMDL approvals; because NCC “supplanted” BBNC, void *ab initio*)
- Also, court held EPA failed to approve as new WQS the TMDLs’ natural condition values which court said had revised the BBNC
- Also, court held EPA approval of TMDLs triggered ESA consultation because approval changed natural condition criteria that was subject to earlier consultation
- Court also ordered OR/EPA to replace Klamath temperature and Willamette Hg TMDLs by April 2019 – now September and November 2019.
- Parties have briefed remedy (appropriate replacement schedule) and are awaiting court’s decision.

## Deschutes River TMDLs (Oregon) – *NWEA v. EPA* (Ongoing)

- NWEA challenged EPA failure to approve/disapprove 2015/2017 Deschutes TMDL submissions w/in 30 days.
- Court ordered EPA to take final action by June 2018.
- EPA approved 26 TMDLs (temperature); disapproved 37 TMDLs (temperature, sediment, pH, bacteria and DO); took no action on 10 (no longer impaired).
- NWEA challenged EPA failure to establish 37 replacement TMDLs w/in 30 days.
- EPA answer due in July 2019.



# **The Administrative Record**

“Rise and Shine”

# What is the Administrative Record?

- The collection of documents that is the basis for an agency's administrative decision, like establishing or approving/disapproving a 303(d) list or TMDL.
- All documents and materials considered directly or indirectly by the decision maker.
- Includes the state's proposed and final "action" document; public comments or correspondence; responses to comments; EPA's "action" document.

Who makes the Administrative Record?



YOU DO!!!

# 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) requires federal agency actions to be consistent with statutory authority and not “arbitrary and capricious – 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.

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

- “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)

- “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

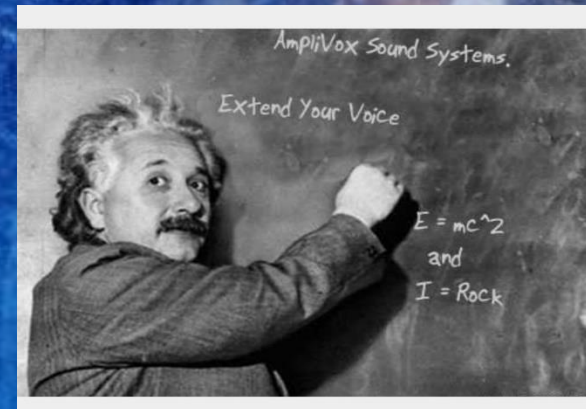
- The impaired and threatened waters still requiring TMDL(s), pollutants causing the impairment, and priority ranking for TMDL development (including waters targeted for TMDL development within the next two years).
- Describe methodology used to develop the List.
- Describe the data and information used 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 List and TMDL decisions
- Don't just repeat what the list or TMDL says
- Explain **why** the list or TMDL is reasonable and, therefore, why EPA's approval is reasonable
- Show your work!



# Go Beyond your “Checklist”

- Don't simply check to see that the list or TMDL contains all the required elements
- Your decision document must also explain **why** each submitted element is adequate/reasonable/sufficient in light of the facts.

# Explain “Why”

- Don't just make 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.

# Conclusion

- Any Questions?
- [Curtin.james@epa.gov](mailto:Curtin.james@epa.gov)