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The Rise and Repose of Assimilation-Based Water Quality, Part I: TMDL Litigation

by James R. May

The Clean Water Act (CWA) is designed to "protect and maintain" the "chemical, physical[,] and biological integrity" of the nation's waters.[1] How to get there? Three steps. First, establish water quality standards (standards) to make sure each state water body is safe and clean enough to use for its common purpose, such as drinking, fishing, swimming, and boating. Second, require point sources to implement categorical engineering solutions to reduce pollutants in effluent discharge. Third, where these solutions are not sufficient to ensure compliance with standards for receiving water, use site-specific ones. How? Determine how much pollution a water body can assimilate before it no longer meets standards. Calculated day to day across the seasons and allowing for a margin of safety, we call this a total maximum daily load (TMDL). Then apportion the TMDL among sources, both point and nonpoint. Results? Water safe and clean enough for common uses such as fishing, swimming, boating, drinking, and commerce.

Given the limits of technology-based approaches, TMDLs have become the CWA's linchpin. The U.S. Congress intended for states and the U.S. Environmental Protection Agency (EPA) to set TMDLs beginning in 1974. It didn't happen. EPA promulgated rules in 1979, but thereafter, still no luck. In 1984, a federal court of appeals found a state's "prolonged failure" to set a TMDL for an impaired water amounted to a "constructive submission" of no TMDL, which EPA was duty bound to approve or disapprove. Seeking clarity and programmatic relevance, EPA amended its TMDL rules in 1985, and again in 1992.

Still, TMDLs were to water quality what the Y2K bug was to world disruption: talk aside, little impact. Most states ignored the TMDL program. Others tendered lip service. Some confused or conflated it with programs implementing mixing zones and "water quality-based effluent limitations." None implemented it. EPA instituted a sort of "don't ask, don't tell" policy with the states.

This changed inexorably in the early 1990s. First in the Pacific Northwest, then in every Mid-Atlantic state and Georgia, Louisiana, and New York, and then throughout the nation, citizens began to sue EPA to get TMDL action. Most of the time, citizens argued state TMDL inaction triggered EPA's duty to step in. Some sued EPA to make programmatic changes to state monitoring, water quality, and integrating continuing planning process (CPP) programs and to comply with the Endangered Species Act (ESA) along the way.[2]

The legal carnage is befitting Henry VIII. Since 1992, citizens have filed nearly 40 suits in 38 states to force EPA to implement the TMDL program.[3] The aftermath is bracing: 1 federal advisory committee, 1 new TMDL rulemaking since withdrawn and another proposed, 2 administrations tied up in knots over TMDLs, 4 attempts at legislative usurpation, at least 6 CPPs, 10 EPA guidance and interpretive documents, a dozen congressional hearings, nearly 30 consent decrees and settlements forcing EPA action, 50 states that now claim a TMDL program, hundreds of public hearings, more than 8,000 TMDLs and challenges thereto, and the discovery of 20,000 waters previously thought to comply with water quality standards that do not. And perhaps more than 100,000 hours of attorney time, and millions of words about a simple concept: root out the dirty waters and make them safe and clean.

Oh, I almost forgot. One last number: zero. That's the number of once impaired waters documented as now meeting a standard once violated, owing to the implementation of a TMDL.

Zero.

This is the first of three Articles about TMDLs. This Article chronicles the role of litigation in propelling the TMDL program and identifies 10 lessons. Part Two will examine how TMDL consent decrees and settlements continue to push EPA and the states forward. Part Three will discuss the extent to which the TMDL program is cleaning up the nation's dirty waters.

The recent spoils of a decade of intense TMDL litigation reveal a program with spare bark and no bite. Ten lessons reveal that some of the news is good, but far more is dubious, for TMDL enthusiasts. First, the U.S. Court of Appeals for the Ninth Circuit upheld EPA's interpretation of CWA §303(d) to include all impaired waters. Thus, states still need to have their §303(d) lists include waters impaired by point sources, nonpoint sources, or a combination of the two (blended waters).

Second, regardless of legal theory (constructive submission, mandatory duty, arbitrary and capricious, abuse of discretion, unreasonable delay, etc.), the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Tenth Circuit, and lower courts in Maryland, New Jersey, and New York, declined to order EPA to step in to set TMDLs. The Ninth Circuit upheld a court order for EPA to

Jim May is an Associate Professor of Law at Widener University in Wilmington, Delaware. Professor May was lead counsel in cases involving monitoring, listing, total maximum daily loads (TMDLs), continuing planning processing, Endangered Species Act, and related issues in Delaware, Maryland, New Jersey, Pennsylvania, and Virginia, and is counsel for amici in the national TMDL rulemaking litigation. The assistance of Jim Stuhltrager, the Mid-Atlantic Environmental Law Center in Wilmington, Delaware, and the research of Susan Mack, Widener Law School 2001, are acknowledged with gratitude.

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

2. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

3. *See generally* U.S. EPA, *Total Maximum Daily Loads*, *at* http://www.epa.gov/owow/tmdl/ (last visited Jan. 13, 2004).

set TMDLs where Wyoming's program showed little progress but threw out a citizen suit where northern California showed little more.

The net result is not encouraging to those enforcing §303(d). The standard for ordering EPA to comply is nearly insurmountable, requiring both: (1) an explicit refusal by a state to take *any* TMDL action; and (2) unreasonable EPA delay in declaring such refusal a "constructive submission" of no TMDLs. Not surprisingly, no state is so bold as to declare the intent to refuse to participate in the TMDL program, and EPA has many reasons for delay. Thus, despite the hype and one favorable opinion out of the U.S. Court of Appeals for the Eighth Circuit, the constructive submission doctrine and related theories appear moribund.

Third, the U.S. Court of Appeals for the Eleventh Circuit held that neither §303(d) nor the consent decree in the Georgia TMDL case require EPA to ensure TMDLs have implementation plans.

Fourth, the U.S. Court of Appeals for the Second Circuit upheld EPA's interpretation that TMDLs do not have to be expressed in daily loads, and that an annual load may suffice. It also upheld EPA's approval of margins of safety on a TMDL-by-TMDL basis. Federal and state courts elsewhere upheld TMDLs without exception. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held whether an EPA-approved or -established TMDL complies with the Act is for district courts to decide. The Eleventh Circuit decided a TMDL does not count toward a milestone in a consent decree unless it really is a TMDL.

Fifth, federal courts in Maryland and New Jersey cases upheld EPA rationales for approving state §303(d) lists of impaired waters: (1) delisting previously listed waters if the state "considers" but elects not to list the water; or (2) omitting arguably impaired waters when there is a lack of "quality assured data." Yet courts in Hawaii and New Jersey reversed and remanded EPA list approvals when presented with irrefutable evidence of impairment. With lists due biennially, further litigation developments in this area are likely.

Sixth, federal courts in Maryland and New Jersey held that EPA's TMDL and listing decisions are not "rules" implicating notice-and-comment rulemaking under the Administrative Procedure Act (APA).[4] Most state courts deciding the same issue resulting from state agency action reach the same result.

Seventh, the court in a Maryland TMDL case ordered EPA to approve or disapprove a CPP for Maryland. Circumstantial evidence is not sufficient to show EPA has met this duty. Given the elevated role EPA now maintains that CPPs have in implementing TMDLs, they also could prove an active litigation area.

Eighth, courts in Maryland and New Jersey TMDL cases agreed EPA's TMDL and listing decisions trigger the ESA's consultation requirements. Post-decisional consultation, however, seems sufficient. Absent EPA national policy to subject §303(d) decisions to ESA §7 requirements, this area could engender further litigation.

Ninth, courts in California and New Jersey TMDL cases did not deviate from the general principle that absent good cause or bad faith, discovery in TMDL cases is limited to the administrative record. The court in the Maryland TMDL case, however, ordered EPA to complete the record to include all documents the Agency directly or indirectly considered, including e-mails. It also rejected EPA's use of the deliberative process and joint defense privilege.

Last, EPA resolved TMDL litigation in a dozen states by entering into consent decrees to backstop TMDL development. The Eleventh Circuit held citizen-plaintiff's who monitor compliance with consent decrees and discover transgressions are potentially eligible for attorney fees. The U.S. Court of Appeals for the Fourth Circuit and the Fifth Circuit dismissed industry appeals of consent decrees in the Missouri and Virginia TMDL cases due to lack of standing or ripeness.

The denouement of so much litigation that focused on TMDL efforts augers in a "seismic shift from the offense to the defense."[5] The next act in the Shakespearean tragedy the TMDL program has become is likely to be played out more often in state courtrooms.[6]

The existing and operative 1992 TMDL rules, and their respective juridical pronouncements, remain paramount. The mega-challenge to EPA's suspended July 2000 TMDL rule was in turn suspended until March 2003 to allow EPA to consider revisions to the rule.[7] In 2002, EPA changed the rules of the game. First, it announced plans to propose a new rule that gives the states even more leeway over listing and TMDL decisions by shifting TMDL implementation almost entirely to whatever water quality management plans a state may have developed under its CPP.[8] Second, it complicated the TMDL program by proposing rules allowing for pollutant trading. Last, it officially withdrew the 2000 rules without proposing new ones. The consequence of so much backtracking is a TMDL program in shambles.

Nearly the only aspect of the TMDL program left standing is the 1992 TMDL rules. Most TMDL case law involves the 1992 rules; thus these cases warrant renewed scrutiny.

Background[9]

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical[,] and biological integrity of the nation's waters."[10] The goal of the CWA is to eliminate "the discharge of pollutants into the navigable waters," and in the interim, to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[11] The passage

4. 5 U.S.C. §§500-596.

5. *See* Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 ELR 10385, 10403 (Apr. 2002).

6. *See* Linda A. Malone, *The Myths and Truths That Threaten the TMDL Program*, 32 ELR 11133 (Sept. 2002) ("One inevitable truth emerges—the only insurmountable problem with the TMDL program is the lack of political will, at both the state and federal levels, to implement it.").

7. American Farm Bureau Fed'n v. Whitman, No. 00-1320 (D.D.C. July 18, 2000). *See* Houck, *supra* note 5, at 10404 ("it is likely that the Agency will, in the end, concede most if not all of the industry complaints").

8. *See* Malone, *supra* note 6, at 11135.

9. For a thorough, insightful discussion of the statutory genesis and regulatory implementation of the TMDL program, see Oliver A. Houck, The Clean Water Act TMDL Program: Law, Policy, and Implementation (Envtl. L. Inst., 2d ed. 2002).

10. 33 U.S.C. §1251(a).

11. *Id*. §1251(a)(1) and (2).

of the CWA "marked the ascendancy of water-quality control to the status of a major national priority."[12]

To achieve these ends, §303 of the CWA requires the establishment and implementation of water quality standards (WQS).[13] Under §303, states are required to establish WQS subject to review and approval by EPA.[14] The U.S. Supreme Court has described the achievement of WQS as one of the CWA's "central objectives."[15]

Section 303(d)(1) of the CWA requires every state to identify every segment of the waters within its boundaries that do not meet or are not expected to meet applicable WQS even after the imposition of best practicable technology-based effluent limitations, secondary treatment standards for publicly owned treatment works, and controls on thermal discharges.[16] EPA refers to these impaired waters as water quality limited segments (WQLS).[17]

Following its identification of impaired waters, states must determine the maximum tolerable pollution so that pollutant loading in an impaired water body does not, taking into account seasonal variations and allowing an ample margin of safety, exceed the WQS established for the water body. Section 303(d)(1)(C) requires states to develop the limits or TMDLs.[18] In its simplest term, a TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet WQS, and an allocation of that amount to the point and nonpoint sources of that pollutant.

Once states complete the above steps, they are to submit the list of WQLS and TMDLs to EPA for review. Section 303(d)(2) states: "Each State shall submit to the Administrator . . . for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection."[19] EPA either must approve or disapprove the list of WQLS and TMDLs. If EPA disapproves, EPA must promulgate a new list of WQLS or TMDLs within 30 days.[20]

Thus a recap of 10 lessons learned from TMDL litigation follows.

1. The TMDL Program Applies to Waters Impaired by Nonpoint Sources

The TMDL program aims to clean up waters that are, or are likely to become, dirty. The first step in the process of cleaning up waters is for states to identify, or "list," its "impaired waters." Among the myriad issues the listing process raises is whether the §303(d) list includes waters impaired by nonpoint sources. On the one hand, §303(d) addresses "any water" not meeting standards, and the Act aims to "develop and implement" "programs for the control of nonpoint sources of pollution . . . to enable the goals [of the CWA] to be met through the control of both point and nonpoint sources of pollution."[21] On the other hand, although §303(d) clearly addresses point sources (requiring listing of waters that do "not meet or which is not expected to meet" an applicable WQS even after the application of technology-based effluent limitations required by §§301(b) or 306), it does not specifically address nonpoint source pollution, while another aspect of the Act, §319, does.

The stakes are huge. Nearly three in four listed waters (15,000 of 20,000) are impaired due at least in part to nonpoint pollution. The principal sources of polluted runoff are agricultural, silvicultural, and construction practices, which are responsible for nearly 90% of the pollution discharged into the nation's waters.

In a watershed decision affirming §303(d) applies to all impaired waters, the Ninth Circuit upheld EPA's interpretation that §303(d) must include waters impaired by point sources, nonpoint sources, or a combination of the two. In *Pronsolino v. Nastri* (*Pronsolino II*),[22] the Ninth Circuit upheld a lower court's holding that the TMDL program applies to waters that do not meet water quality standards solely because of nonpoint sources of pollution, and by extension, to blended waters. In *Pronsolino v. Marcus* (*Pronsolino I*),[23] EPA set a TMDL to reduce sediment loadings from silvicultural and agricultural runoff into the Garcia River, a water listed on California's §303(d) list as impaired by sediment. Implementing the TMDL, California's Department of Forestry issued Pronsolino a timber harvesting permit that required erosion and other controls to reduce sediment loadings. Pronsolino challenged EPA's authority to set the underlying TMDL, arguing §303(d) does not apply to waters impaired solely by nonpoint sources. Pronsolino maintained nonpoint sources of pollution are only subject to §319's voluntary program.[24]

The district court disagreed, holding "[n]o substandard river or water was immune [from §303(d)] by reason of its sources of pollution."[25] First, turning to the language of §303(d), the court found both the listing and TMDL preparation requirements of §303(d) apply to waters impaired solely by nonpoint sources.[26] Moreover, the term "pollutant" specifically includes "sediment, regardless of whether it comes from a point source or a nonpoint source."[27]

The court extended its reasoning to waters impaired by both point and nonpoint sources, with the exception of those for which effluent limitations alone were sufficient to achieve WQS.[28]

12. Monongahela Power Co. v. Marsh, 809 F.2d 41, 45-46, 17 ELR 20422 (D.C. Cir. 1987).
13. 33 U.S.C. §1313.
14. *Id*. §1313(a).
15. Arkansas v. Oklahoma, 503 U.S. 91, 105, 22 ELR 20552 (1992).
16. 33 U.S.C. §§1313(d)(1)(A) and (B).
17. 40 C.F.R. §130.7(b)(1) and (2).
18. 33 U.S.C. §1313(b)(1)(C).
19. *Id*. §1313(d)(2).
20. *Id*.
21. *Id*. §1251(a)(7).
22. 291 F.3d 1123, 1132-33, 32 ELR 20689 (9th Cir. 2002) (Pronsolino II).
23. 91 F. Supp. 2d 1337, 1338, 30 ELR 20460 (N.D. Cal. 2000) (Pronsolino I).
24. *Id.*
25. *Id.* at 1356.
26. *Id.* at 1346-47. ("[O]nly those [waters] redeemable through the imposition of state-of-the-art technology on point sources . . . were expressly excused from the [§303(d)] list.").
27. *Id.* at 1352. As the court noted, EPA identifies "'all pollutants, under proper technical conditions, as being suitable for the calculation of total maximum daily loads.'" *Id.* at 1354 (citing 43 Fed. Reg. 42303 (Sept. 20, 1978)). "Proper technical conditions" means "'the availability of analytical methods, modeling techniques and databases necessary to develop a technology defensible TMDL.'" 91 F. Supp. 2d at 1354 (citing 43 Fed. Reg. at 42303).
28. 91 F. Supp. at 1347 (finding waters impaired "regardless of pollution source . . . were included in the universe for which listing and

Second, the court held Pronsolino's position ill-served the remainder of §303. Essential to the court's ruling was the belief that failing to include waters impaired by nonpoint sources would necessarily impede achievement of WQS, the CWA's "central objective."[29] The court viewed TMDLs as a necessary step in the achievement of §303(c) WQS, regardless of pollutant source. It observed §303(d) provides the "required engineering data" that must be "incorporated" into water quality management plans developed pursuant to the CPP.[30]

Third, the court ruled construing §303(d) to include all impaired waters best protects state interests. The CWA left to the states to decide which land management practices to adopt to mitigate nonpoint source pollution.[31] But without TMDLs, states are unable to "evaluate and develop land-management practices to mitigate nonpoint-source pollution."[32]

Last, the court held nothing in §319 preempts, conflicts, or duplicates the listing and loading requirements of §303(d).[33] To the contrary, the court noted just as TMDLs must be incorporated into water quality plans under the state's CPP, TMDLs are needed for the planning required under §319.[34] Therefore, §303(d) is consistent with §319's aims.[35]

The Ninth Circuit affirmed, holding §303(d) applies "whether a water body receives pollution from point sources only, nonpoint sources only, or a combination of the two."[36] The Ninth Circuit found EPA's reading of §303(d) to be consistent with the statutory structure, purpose, language, and intent of the CWA.[37] With a contrary interpretation, the Ninth Circuit reasoned: "[I]t would be impossible to implement the applicable [WQS]."[38] The standard of review would not have affected the outcome.[39]

2. EPA Has No Duty to Establish TMDLs Unless a State Explicitly Refuses to Do Anything and EPA's Delay in Responding Is Not Unreasonable

States must determine the TMDL of pollutants impaired waters can withstand before no longer meeting standards.[40] EPA must approve or disapprove state TMDLs and set the TMDL itself within 30 days of disapproval.[41]

What to do when a state either does not set TMDLs or sets them at too slow a pace? Some early cases held prolonged state inaction is tantamount to a state decision to make a "constructive submission" of no TMDL, a submission thus subject to EPA review.[42]

Notwithstanding early promise, the "constructive submission doctrine," has largely run its course in the TMDL context. Regardless of whether the constructive submission doctrine is viable in theory, more recently most courts have refused to apply it unless: (1) a state expressly refuses to do anything; and (2) EPA's delay in responding is unreasonable. Not surprisingly, in the last 18 months, the Ninth and Tenth Circuits, and courts in Maryland, New Jersey, New York, and elsewhere, save one, have not found a set of facts suitable to apply the doctrine or its vestiges. In more or less reverse sequential order, what follows is the latest on this issue.

In *San Francisco Baykeeper v. Whitman*,[43] the Ninth Circuit affirmed a lower court's refusal to invoke the constructive submission doctrine unless a state "clearly and unambiguously" indicates refusal "to submit any TMDLs and has no plans to remedy the situation."[44] In the Ninth Circuit's view, California's establishment of "some" TMDLs, coupled with its dedication of "substantial resources" to the development of its TMDL program, precludes the use of the constructive submission doctrine.[45] Because California had completed more than 46 TMDLs as of the decision, agreed to a memorandum of agreement (MOA) with EPA to complete all TMDLs within 12 years, and allotted $7 million to TMDLs annually, the court found no indicia of an intent to do nothing.[46] Therefore, the Ninth Circuit held the constructive submission theory did not apply.[47]

TMDLs were required"). The Court explained the relationship between the technology and water quality-based portions of the Act:

> The [CWA] superimposed the technology-driven mandate of point-source effluent limitations [on the preexisting water quality driven statutory scheme]. To assess the impact of the new strategy on the monumental cleanup task facing the nation, Congress called for a list of the unfinished business expected to remain even after application of the new cleanup strategy. In calling for such a list, it was unnecessary to reference nonpoint pollution. Any polluted waterway—whether its sources were point, nonpoint or a combination—had to be listed if it would not be cleansed by the new approach.

Id. at 1347.

29. *Id.*
30. *Id.* at 1346-47. ("To have excluded the large number of rivers and waters polluted solely by agricultural and logging runoff would have left a chasm in the otherwise 'comprehensive' statutory scheme.").
31. *Id.* at 1355.
32. *Id.* at 1347, 1355:

> California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. California is also free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests. Although such steps might provoke EPA to withhold federal environmental grant money, California is free to run the risk.

33. *Id.* at 1352.
34. *Id.* at 1354.
35. *Id.*
36. Pronsolino v. Nastri, 291 F.3d 1123, 1132-33, 32 ELR 20689 (9th Cir. 2002), *petition for cert. denied*, 123 S. Ct. 2573 (2003).
37. *Id.* at 1135-40.
38. *Id.* at 1139. ("There is no statutory basis for concluding that Congress intended such an irrational regime.").
39. *Id.* at 1132-33. The court denied appellants' motion for rehearing en banc. *See* Susan Bruninga, *Farm Groups Seek Rehearing of Case Allowing TMDLs for Polluted Waters*, 33 Env't Rep. (BNA) 1658 (2002). The Court denied appellant's petition for certiorari.
40. 33 U.S.C. §1313(d)(1).
41. *Id*. §1313 (d)(2).
42. *See, e.g.*, Scott v. City of Hammond, 741 F.2d 992, 14 ELR 20631 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422, 21 ELR 21305 (W.D. Wash. 1991) (granting partial summary judgment), 796 F. Supp. 1374, 22 ELR 21204 (W.D. Wash. 1992) (granting injunctive relief), *aff'd sub nom.* Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 24 ELR 20702 (9th Cir. 1994).
43. 297 F.3d 877, 2002 U.S. App. LEXIS 14394, at *10, 32 ELR 20772 (9th Cir. July 17, 2002).
44. *Id*. at *13.
45. *Id.* at *6.
46. *Id.* at **10-13.
47. *Id*. The Ninth Circuit also held that a state does not need to submit a TMDL for an impaired water concurrent with that water's inclusion on the §303(d) list. *Id.*

San Francisco Baykeeper capped a series of recent federal decisions in Maryland, New Jersey, and New York that under similar reasoning did not apply the constructive submission doctrine or otherwise order EPA to step in and set TMDLs for a recalcitrant state. First, the court in *American Littoral Society v. U.S. Environmental Protection Agency*[48] applied a tougher "constructive submission" standard than *San Francisco Baykeeper*. It observed that "the constructive submission doctrine is an exercise in judicial lawmaking, existing only by judicial gloss on the CWA."[49] The court held it only applies when a plaintiff can prove: (1) "both that a state submit no TMDLs *and* has no plan to remedy that total failure"; and (2) EPA's corresponding delay in response is unreasonable.[50]

Meeting this standard seems all but impossible. To prove a state lacks *any* plan to implement *any* TMDL, plaintiffs must demonstrate a state "entirely failed" to act, or has "flatly chosen not to act" based on the record EPA assembles.[51] Worse still, the court conflates this standard with that for determining whether an EPA failure to step in is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," and by extension, whether that failure may be "unreasonably delayed."[52] In other words, CWA and APA claims seem to suffer the same fate regardless of circumstance.

The court thus had no trouble finding New Jersey had not "totally failed" to act.[53] It felt comforted by the state's submission of at least one TMDL, coupled with proposed program rules on TMDLs, a performance partnership agreement "presumedly" discussing TMDL commitments, and an unenforceable New Jersey/EPA MOA to perform TMDLs within 15 years.[54]

TMDLs developed prior to filing vitiate a constructive submission claim. In *Hayes v. Whitman*,[55] the Tenth Circuit affirmed a lower court decision finding that Oklahoma submitted TMDLs, which EPA approved, before the lawsuit was filed; therefore, a constructive submission of "no TMDLs" had not occurred. The circuit court held the constructive submission theory "applies only when the state's actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody."[56] Finding "uncontradicted evidence . . . that Oklahoma has submitted a number of TMDLs and is making progress toward completing about [1,500] TMDLs over a [12]-year period," it held "a constructive submission claim is not viable."[57]

Second, in *Sierra Club v. U.S. Environmental Protection Agency* (*Maryland II*),[58] the court held EPA's decision not to step in and establish TMDLs in Maryland was not an abuse of discretion. Applying nearly the same legal standard it used earlier to dismiss the "constructive submission" claim, the court concluded it was not an abuse of discretion for EPA "to leave TMDL implementation in the hands of Maryland."[59] In the earlier action, the court held an EPA decision *not* to set TMDLs in Maryland satisfied the requirement that it "approve or disapprove" TMDLs, thus vitiating the constructive submission doctrine.[60]

Following commencement of the action in 1997, EPA approved 3 TMDLs, agreed to an MOA with a 12-year schedule for Maryland to set loads for the balance of the state's 250 WQLS, and issued a decision that "EPA does not believe it is necessary at this time to develop TMDLs for the State of Maryland." The court held these developments amounted to an "approval" of Maryland's program, thus discharging any duty to approve or disapprove Maryland's TMDL submissions, whether constructive or not.[61] Instead, the court found, EPA's decisions were ripe for "abuse of discretion" review under the APA, paving the way for *Maryland II*.[62]

Third, the serpentine path in the New York TMDL case ended with the court deciding EPA's delay in setting TMDLs was neither "arbitrary" nor "unreasonable" under the APA.[63] In an earlier decision, the court accepted the validity of the "constructive submission" doctrine, and held state subjective "plans" to develop TMDLs was immaterial.[64] However, the court denied the motions for summary judgment because a triable issue of fact existed regarding whether TMDLs had been created by the state and "whether they were adequate under 33 U.S.C. §1313(d)(2) to prevent the triggering of the EPA's duties by a constructive submission."[65]

The court in *Natural Resource Defense Council, Inc. v. Fox* (*NRDC II*)[66] dismissed plaintiffs' constructive submission claim, concluding it is within EPA's discretion to deter-

48. 199 F. Supp. 2d 217, 238-42 (D.N.J. 2002).
49. *Id.* at 241.
50. *Id.* (emphasis in original).
51. *Id*. (citations omitted).
52. *Id*.
53. *Id.* at 242.
54. *Id*. The court decided the matter under the "constructive submission" theory even though it had already dismissed this claim. *See* American Littoral Society v. EPA, 1999 U.S. Dist. LEXIS 23044, at **10-11 (D.N.J. 1999) (ALS I) (following Natural Resource Defense Council, Inc. v. Fox, 30 F. Supp. 2d 369, 29 ELR 20592 (S.D.N.Y. 1998) (NRDC II) to hold EPA's decision whether to establish TMDLs in the face of inaction by the states was discretionary and, therefore, outside the scope of citizen suit enforcement). In *ALS I*, the court instead invited further proceedings under plaintiffs' alternative claims that EPA's failure to set TMDLs in New Jersey was "unreasonable delay" under the APA. *Id.* at **17-18.
55. 264 F.3d 1017, 1023 (10th Cir. 2001).
56. *Id.* at 1024.
57. *Id*. The circuit court dismissed plaintiffs' corresponding APA claims for EPA "unlawfully withholding" TMDL efforts because review of this claim was available, even when it proved unsuccessful, under the CWA's citizen suit section. *Id.* at 1027. Last, the circuit court upheld the lower court's discretion to refuse to allow plaintiffs to amend by adding additional APA claims. *Id.*
58. 162 F. Supp. 2d 406 (D. Md. 2001) (Maryland II).
59. *Id.* at 409.
60. Sierra Club v. EPA, No. 97-3838, slip op. at 20 (D. Md. Sept. 13, 2000) (Maryland I).
61. *Id.* at 20 (duty discharged by EPA "clearly indicating its approval of the actual submissions, Maryland's decision not to submit other TMDLs at this time, and the state's schedule for developing TMDLs").
62. *Id.* at 21.
63. Natural Resource Defense Council, Inc. v. Fox, 93 F. Supp. 2d 531, 30 ELR 20493 (S.D.N.Y. 2000) (NRDC III).
64. Natural Resource Defense Council, Inc. v. Fox, 909 F. Supp. 153, 157-58, 26 ELR 20732 (S.D.N.Y. 1995) (NRDC I).
65. *Id.* at 158.
66. 30 F. Supp. 2d 369, 377, 29 ELR 20592 (S.D.N.Y. 1998) (NRDC II) ("EPA has at least some discretion to determine at what point it is appropriate to deem state inaction a 'constructive submission' meriting intervention.").

mine whether and when a constructive submission has occurred. The court cited the lack of any express requirement in the statute for EPA to deem state inaction a constructive submission by any particular date and concluded that "inference upon inference" would be required to determine a precise date for EPA to exercise this implied duty to act in the face of inaction.[67] Instead, the court concluded EPA's duties regarding submission and approval of TMDLs is discretionary subject to APA review.[68]

In *NRDC III*, the court held EPA's actions were neither arbitrary nor unreasonably delayed. The court ruled EPA deciding not to deem a constructive submission of no TMDLs is not an abuse of discretion unless a state "refuses" to act.[69] The court then concluded New York had not "refused" to act.[70] The court cited as instructive New York's cooperation in satisfying its §303(d) listing and TMDL obligations, though admittedly the state's efforts only began in "earnest" after the lawsuit was filed.[71] The court also was swayed by future plans between EPA and the state to develop a substantial number of TMDLs and evidence that the state had submitted some TMDLs and "dedicated substantial resources to the problem."[72] In addition, the court cited evidence the "TMDL program is in a state of flux," that new TMDL regulations were under consideration, and that EPA's current belief was that "the states reasonably require a total of 8 to 13 years to complete their TMDL development."[73]

Furthermore, the court concluded that EPA's decision to maintain a partnership and work with the state rather than declare a constructive submission was reasonable.[74] It observed: "[P]laintiffs are wrong to suggest that the court may punish defendants for any past inadequacies by interfering with EPA's presently acceptable oversight of the TMDL program."[75] The court refused to extend the "sense of temporal urgency" in the specific CWA deadlines to the judge-made "constructive submission" approach.[76]

Last, the court was unconvinced of the relationship between the delay in developing TMDLs and harm to public health.[77] Hence, it was skeptical that justice delayed was justice withheld.[78] In addition, the court found the TMDL development schedule established by EPA and the state was reasonable.[79] Hence, the court found no reason to impose "intrusive equitable relief."[80]

Exceptions exist when a state has done or is doing nothing. First, in *Kingman Park Civic Ass'n v. U.S. Environmental Protection Agency*,[81] the court refused to dismiss the action under the constructive submission doctrine when the District of Columbia had not submitted any TMDLs prior to commencement of the action. Plaintiffs sued to force EPA to disapprove the District of Columbia's constructive submission of no TMDLs and to establish TMDLs.[82] The District of Columbia had failed to submit any TMDL to EPA for approval in 18 years, and only submitted its first TMDL four months after the plaintiffs submitted their notice of intent to file suit.[83]

In rejecting EPA's motion to dismiss, the court held that "a state's consistent, longstanding failure to submit TMDL calculations can be construed as a submission that calls forth the Administrator's nondiscretionary duties under §303(d)(2) [of the CWA]."[84] It concluded "[a]n eighteen-year failure to calculate and submit TMDLs constitutes a constructive—if not outright—determination that no TMDLs are necessary."[85]

The court rejected EPA's argument that, while it had a nondiscretionary duty to impose TMDL limits on states that submit incomplete or inadequate TMDLs, it has no duty to act if a state *never* submits a TMDL.[86] The court held "a state

67. *Id.* at 375-76.

68. *Id.* at 377.

69. *Id.* at 538 ("EPA's 'deeming duty' arises only in the face of complete nonfeasance by the State; i.e., in order to declare a constructive submission of inadequate TMDLs, EPA must conclude that the State is ignoring its TMDL obligation entirely.").

70. *Id.* at 542:

> Despite New York's understandably slow pace in the face of EPA's early neglect of the TMDL program, the record amply supported EPA's conclusion that New York has not in the past "refused," and is not presently "refusing," to act in furtherance of the TMDL program mandated by the CWA . . . . [S]o long as New York continues to participate actively and meaningfully in the effort to promulgate TMDLs . . . the State has not "refused" to act, and EPA therefore is under no duty to declare a "constructive submission" of inadequate TMDLs by New York.

71. *Id.* at 539.

72. *Id.* at 539-40.

73. *Id.* at 540.

74. *Id.* at 545.

75. *Id.* at 548

76. *Id.* at 545 ("[I]t is not unreasonable for EPA to conclude that getting the job done right is preferable to getting it done quickly.").

77. *Id.* at 545-46.

78. *Id.* at 547 (finding requiring EPA to intervene would "interfere with EPA's ability to order its own priorities and allocate its resources"). The court explained EPA's long-standing noncompliance was immaterial to the claim:

> As the Court's sole power in this context is to require EPA to conform its present conduct to the law, EPA's past noncompliance is irrelevant to the question of agency's *present* compliance, and to whether the Court will grant the narrow relief prescribed by the Court . . . . Plaintiffs did not, and could not, acquire rights by virtue of EPA's past failings, and the Court cannot, accordingly, provide any relief that goes beyond ensuring EPA's present compliance with statutory mandates.

Id. at 536.

79. *Id.* at 547.

80. *Id*. The court admonished EPA that it "should not read this Opinion as inviting endless delay of the New York TMDL program . . . . The Court reminds both sides that the courthouse doors remain open, should defendants fail to require the State's substantial compliance with the timetable set forth in the MOA [between EPA and New York establishing a TMDL development schedule]." *Id.* at 549.

81. 84 F. Supp. 2d 1, 3, 30 ELR 20017 (D.D.C. 1999).

82. *Id*. ("So important is Section 303(d) to the CWA's overall structure that Congress compelled both the states and EPA to abide by strict, date-certain deadlines for submitting and implementing the TMDLs" and incorporate them into the state's water quality management plans under §303(e).). The court dismissed plaintiffs' APA claims, finding them duplicative of the claims under the citizen suit provision of the CWA that the court had accepted as valid. *Id.* at 9.

83. *Id.* at 3.

84. *Id.* at 2.

85. *Id.* at 6.

86. *Id.* at 5-7:

> To interpret "submission" in the excessively literal manner that EPA advocates is entirely unreasonable. Although EPA's briefs are long on literalism, they are conspicuously short on reconciling their interpretation with the structure of the CWA and Congress' intent . . . . [B]y enacting Section 303(d)(2), Congress has already made the policy choice of depriving the agency of all discretion over when it must approve or disap-

cannot immunize itself from the CWA's important TMDL provisions through the simple expedient of refusing to submit TMDL calculations to the EPA."[87] The case settled by consent decree.

Second, in *Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency* (*Wild Swan III*),[88] the court turned aside the state of Montana's challenge to the court's order for EPA to backstop TMDLs for nearly 900 waters. The case capped plaintiff's multi-year effort to have EPA develop TMDLs for Montana's 900 impaired waters. In *Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency* (*Wild Swan I*),[89] after rejecting application of the constructive submission doctrine and unreasonable delay claims,[90] the court held EPA acted arbitrarily and capriciously when it failed to disapprove Montana's submission of only 130 TMDLs for the approximately 3,000 it needed.[91]

In the subsequent remedy ruling, the court refused to remand the matter to EPA for further proceedings because EPA continued to insist that it was not required to consider the pace at which TMDLs are submitted in deciding whether to approve a state's submission.[92] In *Wild Swan II*, the court refused to "create an escape hatch in the heart of the Act whereby both the State and the federal agency could frustrate Congressional imperatives simply by refraining from action."[93] Thus, the court set a May 5, 2007, deadline for completion of "all necessary TMDLs" for all WQLS.[94]

The state of Montana moved to stay the order pending appeal, objecting primarily to the requirement that TMDLs be developed for WQLS before any new or increased discharge permits are issued to point sources on those segments.[95] In denying the request for the stay in *Wild Swan III*, the court explained: "To require the State to develop TMDLs before it issues new or increased-discharge permits is to require the State to proceed in the fashion it should have proceeded had it complied with the law for the past twenty-eight years. A requirement to abide by the law is not an 'injunction.'"[96]

Moreover, rejecting the state's contention it would suffer irreparable harm if the order were not stayed, the court pointed out that the state had not completed a single TMDL in the year since the court rendered its summary judgment decision.[97] The court thus held the order to be in the public interest.[98]

In the face of inadequate state action, the Ninth Circuit upheld *Wild Swan III* and the notion district courts may order EPA to modify inadequate lists and set TMDLs.[99]

Decisions to order EPA to intervene should be based on the court's—and not a special master's—considered judgment. The Fifth Circuit reversed the district court's adaptation of a 1998 "Report of Special Master" recommending EPA submit a schedule for establishing TMDLs for all of Louisiana's impaired waters.[100] The Fifth Circuit was unconvinced a congested docket, the complexity of issues, and the extensive amount of time required for a trial constituted "exceptional conditions" that justified referring the merits to a special master.[101] The case settled by consent decree.

3. EPA Has No Duty to Ensure TMDLs Have Implementation Plans

A pressing question is whether TMDLs must include plans for implementing them; TMDLs not implemented are futile. Thus far, the answer is no.

The Act specifically contemplates TMDLs be implemented. As the Court noted, §303 "contain[s] provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources."[102]

Section 303(d) is silent, however, about whether the TMDL itself must include implementation plans. In general, TMDLs must be established at a level necessary "to implement" WQS, and be "incorporated" into water quality

prove a state's TMDL submission. In light of this choice, it is implausible that Congress would wish to preserve EPA's discretion over establishing TMDLs when a state has essentially decided that no TMDLs are necessary.

87. *Id.* at 6. While the Court accepted the plaintiffs' constructive submission argument, it rejected the claim that EPA's disapproval of a single TMDL submitted by the District of Columbia triggered EPA's nondiscretionary duty to establish TMDLs for every WQLS in the District of Columbia. *Id.* at 8-9.

88. 130 F. Supp. 2d 1207, 1210-11 (D. Mont. 2000) (Wild Swan III).

89. 130 F. Supp. 2d 1184, 1190 (D. Mont. 1999) (Wild Swan I).

90. The plaintiffs claimed EPA's failure to identify Montana's WQLS and develop TMDLs constituted agency action unlawfully withheld or unreasonably delayed in violation of APA §706(1). The court rejected this claim for the same reason it rejected the citizen suit claim: EPA's approval of the state's 1992 §303(d) list and one TMDL in 1996 cured EPA's original failure to act and mooted any duty to act between 1979 and 1992 under the constructive submission theory. *Id.* at 1192 ("For agency action to be unreasonably delayed or unlawfully withheld, there must be a duty imposed upon an agency to undertake a particular action," a duty that is presumably met when a state submits a TMDL, and EPA approves it.).

91. *Id.* at 1195-96 (EPA "fail[ed] to meet the CWA's requirement that states promptly develop TMDLs for the WQLSs they identify . . . . The tight deadline for submission of TMDLs [in the CWA] emphasizes an obvious congressional mandate that TMDLs be established in a matter of years, not decades.").

92. Friends of the Wild Swan, Inc. v. EPA, 130 F. Supp. 2d 1199, 1201 (D. Mont. 2000) (Wild Swan II) ("On the contrary, the Clean Water Act requires the EPA to consider pace. . . . A TMDL must be developed quickly if it is to be useful in 'implement[ing] the applicable water quality standards.'").

93. *Id.* at 1202.

94. *Id.* at 1202.

95. Friends of the Wild Swan, Inc. v. EPA, 130 F. Supp. 2d 1207, 1210-11 (D. Mont. 2000) (Wild Swan III).

96. *Id.* at 1211.

97. *Id.* ("Even when it has the fullest possible range of discretion, the State seems unable to act. These facts indicate that it is Plaintiffs, and the general public, who will suffer irreparable harm if a stay is granted.").

98. *Id.* at 1213 ("[t]he public interest is best served by prompt action, even any meaningful action, on the part of the State and EPA to comply with the law's charge. A stay is not in the public interest. . . . Granting a stay would, in effect, condone the State's continued dereliction of duty.").

99. Friends of the Wild Swan v. EPA, 2003 WL 21751849 (9th Cir. July 8, 2003).

100. Sierra Club v. Browner, 257 F.3d 444 (5th Cir. 2001).

101. *See* Sierra Club v. Clifford, No. 96-0527, 1998 U.S. Dist. LEXIS 16031 (E.D. La. June 16, 1998) (Report of Special Master); Sierra Club v. Clifford, No. 96-0527, 1998 U.S. Dist. LEXIS 15841 (E.D. La. Sept. 22, 1998) (order adopting Report of Special Master and ordering EPA to file with the court within 90 days a reasonable schedule for establishing TMDLs for waters on Louisiana's §303(d) list, and to provide the Special Master with the administrative record for its most recent approval of Louisiana's §303(d) list so the Special Master could consider whether EPA's approval of the list was arbitrary and capricious or contrary to law); Sierra Club v. Clifford, No. 96-0527 (E.D. La. Oct. 1, 1999) (order granting summary judgment for plaintiffs on listing claims).

102. Arkansas v. Oklahoma, 503 U.S. 91, 100, 22 ELR 20552 (1992) (citing 33 U.S.C. §1313(d)).

management plans (WQMPs).[103] WQMPs are designed to "implement" standards.[104] In particular, states must ensure permits implement TMDLs. National pollutant discharge elimination system (NPDES) permits may not cause or contribute to noncompliance with standards in the permit issuing or other states.[105]

EPA has the authority to require TMDLs have implementation plans. But if this authority lays fallow, may EPA approve or establish TMDLs lacking implementation plans? The answer thus far seems to be "yes."

The Eleventh Circuit recently held EPA does not need to ensure TMDLs have implementation plans. In *Sierra Club v. Whitman* (*Georgia III*),[106] the court held neither a 1997 consent decree nor the CWA requires EPA to ensure TMDLs have implementation plans and reasonable assurances of achieving standards. The district court entered the consent decree in 1997 for EPA to establish TMDLs for impaired waters in Georgia within seven years.[107] In response to Sierra Club's subsequent motion to enforce the decree, the district court ordered EPA to establish TMDLs for eight waters Georgia had removed from its list,[108] and gave the state additional time to develop implementation plans for TMDLs already established.

Two years after entry of the decree, only 1 of the 124 impaired waters governed by the decree complied with standards.[109] Dissatisfied, plaintiffs moved the district court to re-open the decree and compel EPA to develop TMDL implementation plans and assurances.[110] Sierra Club believed that to have TMDLs without implementation plans renders the process mere "academic exercises." It argued EPA knew implementation was part of the decree and urged the district court to exercise its "authority under the Consent Decree to adjust the obligations of the parties in furtherance of the goals of the decree."[111] Alternatively, Sierra Club asserted that 1991 and 1997 EPA guidance documents, as well as EPA regulations and the CWA itself, contemplate implementation plans.[112] EPA argued neither the decree nor the CWA requires them to implement TMDLs.[113] EPA also urged the court to allow Georgia voluntarily to provide implementation plans by April 19, 2001, a process the state had agreed to undertake.[114]

The lower court deferred ruling to give the state time to complete development of implementation plans, as it had promised EPA it would do.[115] Thereafter, Georgia submitted implementation plans for each of the 124 impaired waters governed by the consent decree, and EPA then moved to dismiss plaintiffs' implementation argument as moot. Persuaded Georgia's plans were inadequate, however, the court held "TMDL implementation plans are required [of EPA] by the Consent Decree," and ordered EPA to "ensure" Georgia's implementation plans were adequate.[116]

The Eleventh Circuit reversed. In *Georgia III*, the Eleventh Circuit determined: (1) the court below modified the decree; and (2) the modification was an abuse of discretion.[117] First, the court held the district court's actions modified the decree because "the decree as written and entered did not require EPA to prepare implementation plans for the TMDLs [and this requirement would] change[ ] the legal relationship of the parties by changing the command of the earlier injunction."[118] Second, there was neither "a significant change either in factual conditions or in law," nor was "the proposed modification [ ] suitably tailored [any] changed circumstance."[119] Thus, the circuit court concluded, the lower court's action constituted a modification that abused its discretion.[120]

State litigation surrounding TMDLs looms large. For example, a court in California voided a permit that required "no-net loading" if no TMDL were set for dioxins by 2012 "because [it is] not a numeric limit" as required by the CWA.[121] A court in Texas decided that the city of Waco's challenge to the potential issuance of future permits for confined animal feeding operations so long as they did not worsen the "status quo," but before the state set a TMDL for affected streams, was ripe.[122]

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103. 33 U.S.C. §1313(d)(2).

104. 40 C.F.R. §130.6.

105. 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §§122.4(d), 122.44(b)(1), 122.44(d). *See Arkansas*, 503 U.S. at 106 ("301(b)(1)(C) expressly identifies the achievement of state WQS as one of the Act's central objectives. The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal."); Sierra Club v. Hankinson, 939 F. Supp. 872, 873 (N.D. Ga. 1996); U.S. EPA, TMDL Program Implementation Strategy (1997); and U.S. EPA, Guidance for Water Quality-Based Decisions: The TMDL Process (1991) (also available from the ELR Guidance & Policy Collection, ELR Order No. AD03550).

106. 296 F.3d 1021 (11th Cir. 2002) (Georgia III).

107. Sierra Club v. Hankinson, No. 1:94-cv-2501-MHS, slip op. at 3 (N.D. Ga. Sept. 29, 2000) (Georgia II). October 1997 Consent Decree modified an earlier 1996 Consent Decree that ordered TMDL establishment within five years.

108. The district court concluded that the consent decree required EPA to establish the eight contested TMDLs, despite the fact that Georgia had removed the eight listed waters from its 2000 §303(d) list. *Id.* at 6 ("Removing the waters from the 2000 list does not remedy the violation of the Consent Decree's requirements regarding the TMDLs that were to be established in 1997. EPA cannot avoid its obligations to establish TMDLs by having listed waters removed from subsequent lists."). The court noted that EPA already had established TMDLs for similarly impaired waters in another state, and EPA conceded they would be "fairly simple" to establish. *Id.*

109. *Id.* at 11.

110. *Id.* at 7-12.

111. *Id.* at 8.

112. *Id.*

113. *Id.* at 7, 9.

114. *Id.* at 10.

115. *Id.* at 12.

116. *Id.*

117. 296 F.3d at 1021.

118. *Id.* at 1023 (internal citation omitted).

119. *Id.* at 1024 ("Clean water may have been Sierra Club's motivation, its reason for bringing the lawsuit to begin with, but the bargain it struck with EPA which produced the consent decree was much more limited.").

120. The Eleventh Circuit's ruling is likely to have little, if any, practical impact. Prior to the ruling, EPA announced it had incorporated "implementation strategies" into Georgia's TMDLs. *See* Susan Bruninga, *Georgia TMDLs Have Implementation Plans, Despite EPA's Claim They Are Not Required*, 33 Env't Rep. (BNA) 637 (2002).

121. Communities for a Better Env't v. State Water Resource Control Bd., No. 319575 (Cal. Super. Ct. July 19, 2002).

122. City of Waco v. Texas Nat'l Resource Conservation Comm., 2002 Tex. App. LEXIS *3231 (May 9, 2002). *Cf.* Lowes v. Vermont Agency of Nat'l Resources (Vt. Envtl. App. Bd. 2002) (conservation organizations challenge to Vermont Water Resources Board issuance of final decision granting Lowes' permit to discharge stormwater into impaired Potash Brook, a tributary of Lake Champlain, finding discharge would not exacerbate existing impairment).

4. EPA Has Wide Discretion to Approve TMDL Content

TMDLs are the "total" "maximum" "daily" "load" to "achieve" standards, accounting for a "margin of safety," and "seasonal variations."[123] TMDLs are the sum of individual "wasteload allocations" for point sources and "load attributions" for nonpoint and natural sources of pollution.[124]

Courts have given EPA wide latitude to interpret §303(d) and approve TMDL content that do not seem consistent with the section's operative terms. In *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency* (*NRDC IV*),[125] the U.S. Court of Appeals for the Second Circuit largely upheld the lower court's decision that EPA approval of a TMDL with an annual load and 10% margin of safety is not arbitrary and capricious. First, notwithstanding the language of §303(d) (requiring "daily loads"), the circuit court ruled the "overall structure and purpose" of the CWA allowed EPA to approve a TMDL with annual phosphorus loads for New York City's drinking water reservoirs.[126] The circuit court, however, remanded to EPA "to justify how the annual period of measurement takes seasonal variations into account" for the approved phosphorus TMDL.[127]

Second, the circuit court upheld EPA's approval of New York's use of a 10% margin of safety, even though neither EPA nor the state provided a scientific or mathematical justification for the margin.[128] Last, the circuit court deferred to EPA's choice of what was the proper underlying WQS to implement.[129]

Similarly, the court in *Wild Swan I* rejected challenges to 129 TMDLs.[130] The court found that the TMDLs included both wasteload allocations and load allocations, although: (1) the load allocations could not be "precisely determined" due to data and technical limitations; (2) the state considered seasonal variation by calculating TMDLs for different seasons of the year and different environmental conditions; and (3) the TMDLs provided a margin of safety because they were based on a "semi-worst case condition of low flow."[131]

The court also approved of "explicit or implicit" pounds per day limitations in most of the TMDLs and found that the "averaging periods used in calculating [the] pounds per day limitations appear[ed] reasonable."[132] It agreed that for some TMDLs "a mass per time designation was inappropriate due to the type of pollutant, such as temperature or fecal coliform bacteria."[133]

Challenges to state TMDLs are likely to be even less successful.[134] EPA can approve state-submitted TMDLs that differ from those EPA has already set for the same pollutant.[135]

Challenges to EPA approval and establishment of TMDLs are to be made at the district court level. In *Friends of the Earth, Inc. v. U.S. Environmental Protection Agency*,[136] plaintiff petitioned the D.C. Circuit to review in the first instance EPA's approval of TMDLs for the upper and lower Anacostia River. The court denied the petition, finding TMDLs—set under §303 of the Act—are not EPA "approving or promulgating any effluent limitation or other limitation" under §301(a) subject to direct appellate review under §509.[137]

5. EPA Has Nearly Unbridled Discretion to Approve State Delisting and Omission Decisions Unless Plaintiffs Provide Quality Assured Data

Recent cases in Hawaii, Maryland, Montana, and New Jersey demonstrate the reluctance of judges to overturn EPA's approval of a state §303(d) list unless either plaintiffs produce data accepted as quality assured or a state provides no support for a listing decision.

An impaired water is one that does "not meet or which is not expected to meet an applicable WQS even after the application of technology-based effluent limitations required by sections 301(b) or 306, and for which controls on thermal discharges are not stringent enough to assure protection and propagation of indigenous shellfish, fish and wildlife."[138]

The "listing" process is arduous and imperfect. Prior to listing, states must "establish appropriate monitoring methods and procedures (including biological monitoring) necessary to compile and analyze data on the quality of waters . . . ."[139] At the risk of losing federal funding, monitoring programs must "include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data."[140]

For listed waters, states must identify the use designated for each segment listed, the applicable WQS for that use, the actual water quality for that segment, the pollutant causing the impairment, and the cause of the impairment.[141] Before making listing decisions, states must "assemble and evaluate all existing and readily available water quality-related data and information,"[142] and describe the methodology and data and information used, and provide a rationale for any decision not to use existing and readily available water qual-

123. 33 U.S.C. §1313(d)(1).

124. 40 C.F.R. §130.7.

125. 268 F.2d 91, 32 ELR 20203 (2d Cir. 2001) (NRDC IV).

126. *Id.* at 98 ("We believe . . . the term 'total maximum daily load' is susceptible to a broader range of meanings.").

127. *Id.* at 99.

128. *Id.* at 103 ("As long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.") (internal citation omitted).

129. *Id.* at 101 ("EPA's determination that New York can formulate its TMDL for phosphorus using an aesthetic criterion" is reasonable).

130. 130 F. Supp. 2d at 1184.

131. *Id.*

132. *Id.* at 1195.

133. *Id.* The court also found no fault with the state submitting TMDLs that were not in conformance with the §303(d) priority designations, that is, for low priority WQLS, because the TMDLs were necessarily developed as part of the process for issuing a point source discharge permit. *Id.*

134. San Francisco Baykeeper v. California State Water Resources Control Bd., 33 ELR 20206 (Cal. Ct. App. May 28, 2003) (substantial evidence to uphold lower court's finding that mass limit for mercury in NPDES permit complies with state antidegradation policy).

135. City of Arcadia v. EPA, 265 F. Supp. 2d 1142 (N.D. Cal. 2003) (trash).

136. 333 F.3d 184 (D.C. Cir. 2003).

137. *Cf.* Environmental Protection Info. Ctr. v. Pacific Lumber Co., 266 F. Supp. 2d 1101 (N.D. Cal. 2003) (EPA rule classifying silvicultural activities as nonpoint sources, same result).

138. 33 U.S.C. §1313(d)(1); 40 C.F.R. §130.2(j).

139. 40 C.F.R. §130.4(a).

140. 33 U.S.C. §1256(e); 40 C.F.R. §130.4(b).

141. 33 U.S.C. §1313(d)(1)(A); 40 C.F.R. §130.7(b)(1).

142. 40 C.F.R. §130.7(b)(5).

ity-related data and information, and any other reasonable information EPA requests.[143]

Despite finding plaintiffs had standing to pursue their listing claims,[144] except for five waters impaired by toxins, the court in the New Jersey case dismissed all challenges to EPA's approval of the state's 1998 list because the state provided "good cause" to exclude waters.[145] The court sanctioned New Jersey's "rationale" to omit waters absent "quality assured data" showing ongoing impairment.[146] Thus, the court upheld EPA's approval despite the omission of 25 waters on New Jersey's §319 Nonpoint Source Impairment Report ("based on the supplementation of preliminary information with subsequent intensive data"), as well as 30 waters from its §304(*l*) Toxics Hot Spots "long list" ("[i]nsofar as waters listed under section 304(*l*) due to toxics impairment are concerned, the long list merely duplicates the final short and mini lists").[147] Nonetheless, the court granted plaintiff's motion for summary judgment to add five toxic hot spots EPA had "inadvertently" omitted from New Jersey's 1998 list.[148]

The court also upheld EPA's approval of listing omissions despite New Jersey's withholding of data and information showing impairment of antidegradation and thermal standards.[149] The court noted plaintiffs had not produced "evidence," presumably "quality assured data," of ongoing violations of either thermal standards ("plaintiffs have failed to identify any §316(a) waters that are impaired or threatened by thermal discharges") or antidegradation requirements.[150]

Similarly, the court in *Maryland II* rejected plaintiffs' challenge to EPA's approval of Maryland's list, citing a lack of empirical information proving omitted waters failed to meet water quality standards.[151] Unless *plaintiffs* produce "evidence" to the contrary, the court held states do not need to list waters identified as: (1) impaired on a state's §305(b) Water Quality Inventory if "there is no data showing actual impairment . . . or that existing pollution controls are insufficient"; (2) "toxic hot spots," without "evidence that any of the omitted waters remain impaired"; (3) impaired by federal agencies, if the state provides an "adequate explanation"; or (4) violating thermal or antidegradation WQS where plaintiffs did not identify impaired waters.[152] As plaintiffs did not produce independent evidence the contested waters currently did not meet standards, the court dismissed the claim.

Thus plaintiffs' burden to show impairment is a heavy one. In *Wild Swan I*, the court declined to overturn EPA's approval of Montana's 1998 §303(d) list despite the omission of 83 streams plaintiffs identified as impaired during the public comment period.[153] In the court's view, EPA's decision should be upheld if the state provides a "reasonable basis" not including the segments.[154] As plaintiffs' data was not in a readily usable form and required the state to collect additional data, the court upheld EPA's approval.[155] The court also rejected plaintiffs' challenge to the list's priorities,[156] public process,[157] and contention EPA has a duty to assess the quality of state waters.[158]

The court also decided that a state's submission of an inadequate list does not trigger any CWA mandatory duties for EPA. Instead, the court ruled, any challenge to a list approval should be pursued under the APA.[159]

A reversal is warranted when a state provides no basis for delisting previously listed waters. In *Hihiwai Stream Restoration Coalition v. Whitman*,[160] the court found EPA's approval of Hawaii's 1998 list arbitrary and capricious. The court ruled EPA should not have approved Hawaii's 1998 list after Hawaii removed most of the waters it listed in 1996 without producing new supporting data or information.[161] Compelling to the court was that Hawaii's 1998 list, which identified only 10 impaired waters, was based on identical data used for the 1996 EPA approved list, which identified 69 impaired waters.[162] EPA approved the 1998 list based on the state's unsubstantiated representation that "too little quantitative information is available for most waters to base

143. *Id*. §130.7(b)(6).

144. "The present case is not one in which an organization's members allege stigmatic injury in the form of members' mere knowledge that waters are polluted." American Littoral Soc'y v. EPA, 199 F. Supp. 2d 217, 232-33 (D.N.J. 2002) (listing specific injuries).

145. *Id*. at 232.

146. *Id.* at 234.

147. *Id.* at 236.

148. *Id.* at 236 n.11 and accompanying text.

149. *Id.* at 237.

150. *Id.* at 238. ("Because EPA's decision is presumed valid and Plaintiffs bear the burden of overcoming this presumption, Plaintiff's failure to provide any evidence to support their position provides no basis for reversal.").

151. 162 F. Supp. 2d at 406.

152. *Id.* at 414-16.

153. 130 F. Supp. 2d at 1191, 1193.

154. *Id.* at 1193-94 ("Although states are required to 'assemble and evaluate' all existing and readily available data and information in developing lists of WQLSs, a state can discount or reject certain data and information as long as it provided a reasonable basis for doing so.") (citing 40 C.F.R. §§130.7(b)(5), 130.7(b)(6)(iii)).

155. *Id.* at 1193-94.

156. Plaintiffs complained several streams with native trout should have been designated "high priority," and the failure to do so showed nonpoint source pollution was not properly considered. *Id.* at 1194 ("States are required to consider the severity of the pollution in the waterbody and the beneficial uses offered by the waterbody in assigning priority rankings to waterbodies."). Because the state had ranked some cold water fisheries as high priority, and explained in response to public comments that it considered the health of native fisheries in the prioritization process, the Court found EPA's approval of the priority ranking was not arbitrary and capricious. *Id*.

157. The court rejected plaintiffs' contention EPA acted arbitrarily and capriciously in approving the §303(d) list, alleging Montana had inadequately responded to comments plaintiffs had submitted during the public comment period. *Id.* at 1194-95. ("Although EPA regulations require states to 'involve' the public in the process of identifying WQLSs, the regulations do not specifically require states to respond to every comment they receive from the public.").

158. The plaintiffs maintained that EPA's approval of the §303(d) list and TMDLs was arbitrary and capricious because of inadequate monitoring and assessment. *Id.* at 1192. The court, however, held "neither the CWA nor the EPA regulations require a state to assess all of its waterbodies before making a submission of WQLSs." *Id.* at 1193. The lists only need to reflect "existing and readily available water quality-related data and information." *Id.* (citing 40 C.F.R. §130.7(b)(5)).

159. *Id.* at 1191. The court rejected the argument that EPA had unlawfully withheld or unreasonably delayed agency action, and EPA's approval of the 1998 §303(d) list was arbitrary and capricious because of its failure to identify all of Montana's impaired waters, failure to include certain segments on the list, failure to consider the effect of nonpoint source pollution on cold water fisheries, failure to adequately respond to public comment, and inadequate TMDL content. *Id.* at 1187.

160. No. 00-00477 (D. Haw. Sept. 5, 2001).

161. *Id*. at 10.

162. *Id*. at 12.

listing decision [sic] on quantitative decision criteria."[163] Noting Hawaii's "assessments were replete with information indicating that the waters were polluted," the court was not persuaded by a 10-page EPA explanation of the basis for its approval.[164]

EPA's role is more than one of oversight. The court refused to accept EPA's position that the Agency's role reviewing lists "is one of oversight . . . merely to ensure that the State is properly exercising its discretion," and that the court's "role here is merely to pay substantial deference to the EPA's decision, who in turn pays substantial deference to the State's decision."[165] To the contrary, the court reasoned, it could not "ignore what has become clear evidence of either an arbitrary decision, or a capricious error."[166] The court remanded EPA's approval back to the Agency "to *carefully* reconsider Hawaii's submitted 1998 §303(d) list, and to do so consistently with the law . . . so that remand here is not a hollow remedy."[167]

State courts may prove the laboratory for listing issues. A state administrative law judge upheld a Florida rule that allowed a two-step process for listing impaired waters.[168] The rule allows the state to place "potentially" impaired waters on a "planning list," but not have the waters "verified" for listing under §303(d) until after the state evaluates the underlying data.[169]

The West Virginia Court of Appeals found the state Environmental Control Board exceeded its authority when it reviewed and overturned the Virginia Department of Environmental Protection's inclusion for biological impairment of the Upper Blackwater River, reasoning such a challenge should instead be to EPA's approval of the TMDL.[170]

6. EPA TMDL and Listing Decisions Do Not Trigger Notice-and-Comment Rulemaking

EPA's actions do not trigger notice-and-comment rulemaking under the APA. The court in *Maryland II* found EPA's decision to approve or disapprove lists and TMDLs is not a "rule" triggering "notice-and-comment" rulemaking under §553 of the APA.[171]

7. EPA Must Approve or Disapprove a State Continuing Planning Process

EPA must approve or disapprove a CPP for each state. Given CPPs are used to "implement" TMDLs and other aspects of the Act, CPP content is important. It is too early to tell how much discretion EPA's review is due, although it is subject to an increasing level of scrutiny and legal challenge.

To integrate all of the activities required by §303, states are required to develop and implement a CPP as a means of ensuring water quality standards are implemented. Originally due in 1973, states must submit CPPs to EPA for approval or disapproval.[172] EPA may not delegate any CWA permit program to any state that does not have an EPA approved CPP.[173]

A recent case in Maryland underscores EPA's mandatory duty to approve or disapprove CPPs for each state. The court in *Maryland II* held EPA had never approved or disapproved a CPP for Maryland and ordered it to do so within 90 days.[174] It rejected EPA's reliance on circumstantial evidence (the preamble to the 1985 TMDL rule) to prove it had performed this duty.[175]

After initial approval of the CPP, EPA must "from time to time review each state's approved planning process for the purpose of insuring that the planning process is at all times consistent with the CWA."[176] The CPP must, inter alia, describe the process for establishing TMDLs, implementing standards, and identifying permit violators.[177]

That TMDLs need not include implementation plans raises the stakes of litigation surrounding CPP content. A recent case challenging EPA's approval of West Virginia's CPP due to shortfalls in TMDL process and standards implementation will address matters of first impression in this area.[178]

8. EPA TMDL and Listing Decisions Trigger ESA Consultation

EPA's TMDL activities are subject to ESA §7 "consultation" requirements. The ESA requires each federal agency "consult" with the Secretary of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to "insure that any action authorized, funded, or carried out by such agency" does not jeopardize any endangered or threatened species or "result in the adverse modification of the species' critical habitat," unless the federal agency has been granted an exemption in accordance with the ESA.[179] "Conferral" is required for any agency action that is likely to jeopardize the continued existence of a species that is proposed to be listed as threatened or endangered, or destroy or adversely modify the proposed critical

163. *Id.* at 13.
164. *Id.* at 16.
165. *Id.* at 13.
166. *Id.* at 12-13.
167. *Id.* at 20 (emphasis in original).
168. Lane v. Department of Envtl. Protection, No. 01-1332 RP (Fla. Dep't of Admin. Hearings May 13, 2002).
169. *Id.*
170. Monongahela Power Co. v. Virginia Dep't of Envtl. Protection, 2002 W. Va. LEXIS 129 (Sup. Ct. App. W. Va. July 1, 2002). *Accord* Missouri Soybean Ass'n v. Missouri Clean Water Comm., 2002 Mo. App. LEXIS 49 (W.D. Ct. App. Mo. Jan.15, 2002); *cf.* City of Rehoboth v. Delaware Dep't of Nat'l Resources & Envtl. Control, 2000 Del. Super. LEXIS 73 (Del. Envtl. Hearing Bd. Feb. 29, 2000) (finding state environmental appeals board had jurisdiction to hear challenge to TMDL set for Inland Bays in southern Delaware).
171. 162 F. Supp. 2d at 420 ("it is only the actual development of the list or load that is rule making"). *Accord* American Littoral Soc'y v. EPA, 199 F. Supp. 2d 217 (D.N.J. 2002). Some state courts have thus far reached the same conclusion. *See, e.g.*, Missouri Soybean Ass'n v. Missouri Clean Water Comm'n, 102 S.W.3d 10 (Super. Ct. Mo. 2003) (upholding decision that listing Missouri and Mississippi Rivers not rule subject to state APA requiring notice, opportunity for comment, and fiscal note). *Cf.* ASARCO v. State, 69 P.3d 139 (Sup. Ct. Idaho 2003) (holding TMDL is a rule subject to state APA).
172. 33 U.S.C. §1313(e)(1).
173. *Id*. §1313(e)(2); 40 C.F.R. §130.5(c).
174. 162 F. Supp. 2d at 421.
175. *Id.*
176. 33 U.S.C. §1313(e).
177. *Id*. §1313(e)(3); 40 C.F.R. §130.5(b)(3).
178. American Canoe Ass'n v. EPA, No. 01-447 (S.D. W. Va. awaiting ruling on competing motions for summary judgment).
179. 16 U.S.C. §1536(a)(2).

habitat of the threatened or endangered species.[180] Triggering action includes approval of impaired waters lists, TMDLs, and standards.[181]

Recent cases in Maryland and New Jersey confirm EPA's decisions that TMDLs, lists, and WQS are subject to §7 of the ESA's "consultation" requirements. The court in *Maryland II* held EPA had failed to comply with ESA §7 requirements prior to approving Maryland's WQS and §303(d) submissions, ordered EPA to comply, and demanded future adherence.[182] Though assuming ESA §7 applied, the court in the New Jersey case dismissed as moot plaintiffs' ESA claim five years into the litigation after EPA finally initiated consultation with the FWS and the NMFS.[183]

9. Discovery Is Limited to the Administrative Record Absent Good Cause, but the Record Must Be Complete

Barring unusual circumstances, courts are hesitant to allow discovery outside of the administrative record in TMDL cases to "supplement" the record, though discovery to "complete" the record is more likely. In *San Francisco Baykeeper* and *American Littoral Society*, the courts repeatedly turned asunder plaintiffs' efforts to conduct discovery outside the record and to strike unsubstantiated, layered hearsay statements EPA added to its TMDL record virtually at will.[184]

In *American Canoe Ass'n v. U.S. Environmental Protection Agency* (*ACA II*),[185] EPA moved for a protective order limiting discovery to the administrative record. The plaintiffs had sought extra-record discovery, including interrogatories, requests for admissions, and requests for production of documents.[186] The court determined that judicial review of CWA and ESA citizen suit claims is limited to the administrative record in most circumstances, just as APA claims are so limited.[187] The court imposed this limitation because the citizen suit provisions themselves provide no standard for judicial review, and legal authority holds "uniformly" that the standard of review governing CWA and ESA citizen suits is the APA standard of review.[188] As a result, the court held "discovery in plaintiffs' CWA and ESA citizen suits are properly limited to APA record review."[189]

Nevertheless, the court recognized some circumstances could justify expanding the record or permitting discovery, including "a failure in the record to explain administrative action as to frustrate judicial review, the agency's reliance on materials or documents not included in the administrative record, or the need to supplement the record to explain or clarify technical terms or other difficult subject matter included in the record."[190]

Courts have, however, ordered *completion* of the record when EPA acts beyond the pale. The U.S. District Court for the District of Maryland ordered additional discovery and production after rejecting EPA's varied attempts to shield information from the record. The court in *Sierra Club v. U.S. Environmental Protection Agency* (*Maryland I*)[191] granted plaintiffs' motion to compel e-mails, communications with Maryland, and other withheld materials. The court ordered EPA to review and either produce relevant e-mail messages ("[r]eviewing hundreds of e-mail documents is not unduly burdensome upon the federal agency and, without reviewing the documents, the EPA is without persuasive grounds to argue that the messages are not relevant"), or identify withheld e-mails on a privilege log.[192] The decision enforced an earlier order that EPA complete the log to include "all documents and materials directly or indirectly considered by the agency regarding the merits of agency action."[193]

The court in the Maryland case also rejected EPA's assertion of both the deliberative process privilege ("EPA's communications with a state government entity are not afforded an exemption under the deliberative process privilege because they are not internal communications") and joint defense privilege (finding communications with Maryland were "prepared in the ordinary course of EPA's business").[194] Last, the court ordered EPA to produce "all reasonably segregable factual material in *any* privileged document."[195]

10. EPA Settled by Consent Decree a Dozen More TMDL Cases; Industry Challenges to Consent Decrees Either Lack Standing or Are Not Ripe

Since 1997, EPA has resolved TMDL litigation in 15 states by entering into federal judicial consent decrees to backstop TMDL development over a period of time varying in length from 1 to 13 years for cases in Hawaii (1 year, partial), the District of Columbia, Georgia, and Montana (7 each), Delaware and Iowa (9), Arkansas, Louisiana, Missouri, Montana, and Tennessee (10), Pennsylvania and Virginia (12), and Southern California and Florida (13).[196] EPA has entered into consent decrees or settlement agreements to establish TMDLs in 12 other states, in whole or part.

Citizen-plaintiffs who monitor compliance with consent decrees and discover transgressions are potentially eligible for attorney fees. In *Sierra Club v. Hankinson*,[197] the Eleventh Circuit upheld the lower court's granting of attorneys

180. *Id*. §1536(a)(4).

181. Sierra Club v. EPA, 162 F. Supp. 2d 406 (D. Md. 2001) (Maryland II); American Littoral Soc'y v. EPA, 199 F. Supp. 2d 217 (D.N.J. 2002).

182. 162 F. Supp. 2d at 423 ("EPA is to abide by the ESA in any future actions it may take in regard to Maryland's duties under the Clean Water Act.").

183. 199 F. Supp. 2d at 244-48.

184. San Francisco Baykeeper v. Browner, 2002 U.S. App. LEXIS 14394, at **21-22 (9th Cir. July 17, 2002) (allowing EPA submission of unreviewable "Program Review Document"); *American Littoral Soc'y*, 199 F. Supp. at 228-29 (allowing EPA submission of numerous extra-record EPA affidavits reporting results of telephone conversations with unnamed sources allegedly explaining New Jersey's TMDL plans).

185. 46 F. Supp. 2d 473, 474, 29 ELR 21315 (E.D. Va. 1999) (ACA II).

186. *Id.*

187. *Id.* at 475-77.

188. *Id.* at 475-76.

189. *Id.* at 477.

190. *Id.*

191. No. 97-3838 (D. Md. Sept.13, 2000) (Maryland I).

192. *Id.* at 28.

193. *Id.* at 30.

194. *Id.*

195. *Id.* at 32 (emphasis in original).

196. Office of Water, U.S. EPA, *TMDL Litigation by State*, *at* http://www.epa.gov/owow/tmdl/lawsuit1.html (last visited Jan. 5, 2004).

197. No. 03-11263 (11th Cir. Dec. 5, 2003).

and expert fees for monitoring, and seeking to enforce noncompliance with, an underlying consent decree. The court held review of the content of specific TMDLs did not exceed the scope of the decree.

The Eighth and Fourth Circuits rejected on procedural grounds industry challenges to consent decrees in the Missouri and Virginia TMDL cases. Most recently, the Eighth Circuit threw out an industry appeal to a consent decree on ripeness grounds.[198] In *American Canoe Ass'n v. U.S. Environmental Protection Agency* (*Missouri I*),[199] the court denied EPA's motion to dismiss plaintiffs' claims: (1) EPA had improperly approved the 1998 §303(d) list and had failed to exercise its mandatory duty to promulgate an acceptable §303(d) list in the state's place[200]; and (2) EPA had a mandatory duty to promulgate TMDLs for impaired waters when the state failed to do so. The court held that EPA's final approval of the 1998 §303(d) list submitted by Missouri did not moot the case, adopting the reasoning in *American Canoe Ass'n, Inc. v. U.S. Environmental Protection Agency* (*ACA I*).[201] The court in *Missouri I* also followed *ACA I* in holding that the court had subject matter jurisdiction to force the defendants to act on the §303(d) list and promulgate TMDLs under a "constructive submission" theory.[202] Thus, the court ruled plaintiffs' constructive submission claim survived dismissal.[203]

The court entered a consent decree to settle the case over Intervenor Missouri Soybean Association's opposition. The association maintained there is a lack of sufficient data and information to deem various waters as impaired for TMDL development on the decree's operative list, including the Missouri and Mississippi Rivers. The association was concerned about what it considered the inevitable regulatory burden the decree would have on its members who discharged into listed waters. Nevertheless, the district court entered the decree, and the association appealed.

The Eighth Circuit found the appeal was not ripe and dismissed it without prejudice.[204] The court held association members would not be affected until TMDLs were established and implemented.[205] Regardless, speculative loss in property values was not sufficient hardship to warrant judicial intervention.[206]

Similarly, the Fourth Circuit threw out industry's challenge to a consent decree for lack of standing in *Virginia Ass'n of Municipal Wastewater Agencies v. American Canoe Ass'n* (*ACA IV*).[207] Intervenor Virginia Association of Municipal Wastewater Agencies (VAMWA) opposed the entry of a consent decree with an 11-year schedule for establishing TMDLs for impaired Virginia waters.[208] VAMWA asserted that without a judicial or EPA finding of constructive submission of no TMDLs, the consent decree violates regulatory requirements that EPA set the TMDL submission schedule in consultation with the commonwealth of Virginia.[209] In addition, VAMWA claimed EPA is without authority to establish TMDLs in Virginia's place if Virginia fails to comply with the TMDL schedule in the consent decree.[210]

The court in *ACA IV* found that EPA regulations do not require the state and EPA jointly to determine every particular of the TMDL submission schedule.[211] Because Virginia entered into a MOA that defined the "overarching schedules" for TMDL development, and the MOA schedule was "merely refined by the consent decree," the court concluded that Virginia participated sufficiently in the process.[212] In addition, the court rejected VAMWA's assertion that as long as Virginia made some incremental progress toward developing and submitting TMDLs for its waterways, EPA could not step in and establish TMDLs in its place.[213] The court observed that under VAMWA's interpretation, "the requirements of the CWA could easily be rendered a dead letter by state subterfuge and recalcitrance."[214]

The court also found the consent decree was fair to third parties because it provided for the normal public notice-and-comment procedures for proposed TMDLs and during the biennial §303(d) listing process.[215]

VAMWA appealed, challenging both the jurisdiction of the court to enter an order for EPA to comply, EPA's authority to submit to a court order constraining its discretionary authority, and various listing and TMDL obligations.[216] Plaintiffs opposed jurisdiction on standing and ripeness grounds. Plaintiffs first argued VAMWA had failed to carry its burden to prove standing. VAMWA had not submitted any evidence demonstrating injury-in-fact, causation, redressability, how its objectives were germane to the association's purposes, or why its challenge did not need to be brought by individual members of the association.[217] In the alternative, plaintiffs contended VAMWA's opposition was not yet ripe because VAMWA's issues were not fit for review and withholding review would not impose a hardship to VAMWA or its members.

Following full briefing on the merits, the Fourth Circuit summarily dismissed the appeal without elaboration on

198. American Canoe Ass'n v. EPA, 289 F.3d 509, 32 ELR 20700 (8th Cir. 2002) (Missouri II).

199. No. 98-1195-CV-W-SOW-ECF (W.D. Mo. June 11, 1999) (Missouri I).

200. The state of Missouri submitted a list of 169 WQLS in 1998, which EPA approved. *Id.* at 4. The American Canoe Association and Sierra Club claimed the list was underinclusive, while the Missouri Soybean Association claimed it was overinclusive. *Id.* at 5.

201. 30 F. Supp. 2d 908, 917-19, 29 ELR 20383 (E.D. Va. 1998) (ACA I).

202. *Missouri I*, slip op. at 6-7 (citing *ACA I*, 30 F. Supp. 2d at 921 n.14). In chastising EPA for making the same legal arguments that had already been denied by the Virginia court, the court expressed concern "that the EPA would make arguments that not only lack legal merit, but also lack common sense." *Id.* at 9.

203. *Id.* at 7.

204. *Missouri II*, at 513.

205. *Id*.

206. *Id.*

207. No. 99-1981 (4th Cir. Mar. 23, 2000) (ACA IV).

208. American Canoe Ass'n v. EPA, 54 F. Supp. 2d 621, 625, 29 ELR 21474 (E.D. Va. 1999) (ACA III).

209. *Id.* at 625.

210. *Id.*

211. *Id.* at 628.

212. *Id.*

213. *Id.* ("EPA clearly has the authority to construe Virginia's failure to comply with the decree's TMDL schedule, if such failure should occur, as a constructive submission of no TMDLs [and promulgate its own TMDLs].").

214. *Id.*

215. *Id.* at 629.

216. Virginia Ass'n of Municipal Wastewater Agencies v. American Canoe Ass'n, No. 99-1981 (4th Cir. Mar. 23, 2000) (ACA IV).

217. *Id.*

218. *Id*. (Order dismissing VAMWA's appeal for "lack of standing").

standing grounds.[218] Thus, to date, courts have turned aside all industry attacks to consent decrees.

Conclusion

The purpose of the CWA is to restore the health of dirty waters and keep clean ones healthy. To meet these objectives, impaired waters must be identified and TMDLs set and implemented for them. No such luck.

A brief recap of 10 lessons learned about TMDL litigation. There's more bad news than good for CWA enthusiasts, but the good goes first. Relatively benign TMDL rules EPA promulgated in 1992 still govern. Section 303(d) addresses all impaired waters, whether affected by point or nonpoint sources or a combination of the two. A TMDL does not count toward a milestone in a consent decree unless it really is a TMDL. EPA is currently under court order to set TMDLs as needed in 20 states, and in one-half dozen more to improve lists and CPPs and to conduct ESA consultation. Citizen-plaintiffs who monitor compliance with consent decrees and discover transgressions are potentially eligible for attorney fees. Courts have turned asunder all industry appeals of consent decrees. EPA TMDL decisions must include all documents the Agency directly or indirectly considered, including e-mails, and are not subject to the deliberative process and joint defense privilege.

Then there's the rest. Regardless of legal theory, courts are reluctant to order EPA to step in to set TMDLs. The standard for ordering EPA to comply is nearly insurmountable, requiring both: (1) an explicit refusal by a state to take *any* TMDL action; and (2) unreasonable EPA delay in declaring such refusal a "constructive submission" of no TMDLs. Courts have found §303(d) does not require EPA to ensure TMDLs have implementation plans, thus setting an empty table. Moreover, "total maximum daily loads" do not have to be total, maximum, daily, or even loads. Impaired waters need not be so identified or can be delisted for dubious reasons, including when a state merely "considers" but elects not to list the water. None of it is subject to APA notice-and-comment rulemaking, and absent good cause or bad faith, discovery in TMDL cases against EPA is limited to the administrative record EPA assembles to support its decision.

Given the overall lack of TMDL implementation, the hope for the TMDL program returns from whence it started: policing consent decrees. The impact of TMDL consent decrees is the subject of Part II of this series.

So much for the folderol. It took a decade of litigation to get the program on the road. But it's not a road leading to compliance and implementation. Thirty years on, and despite years of fits and starts in regulation, litigation and judicial opprobrium, no water yet has been documented to meet standards because of the TMDL program. Without change of course, the TMDL program is on a road to perdition.