



303(d) Litigation Highlights (2020-21)

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A globe of Earth is positioned on the left side of the frame, resting on a blue, textured surface that resembles water or a similar material. The globe shows the continents of North and South America. A long, soft shadow is cast from the globe towards the right side of the image. The background is a gradient of blue, darker at the bottom and lighter at the top.

Listing Cases

Recurring Themes in 303(d) List Litigation

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

Public Comments

- 40 C.F.R. 130.7(a): “The process for ... involving the public, affected dischargers, designated areawide agencies, and local governments in [list and TMDL development] shall be clearly described in the State Continuing Planning Process (CPP).”
- In practice, states’ comment processes usually involve publishing a draft list and taking public comment. They include their comment responses in their final list submission to EPA.
- EPA reviews the comments and responses to ensure there is a defensible record to support a states’ assessment determinations.

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



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

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

Black Warrior Riverkeeper, Inc., No. 2:19cv344 (N.D. Alabama) – Lost Creek



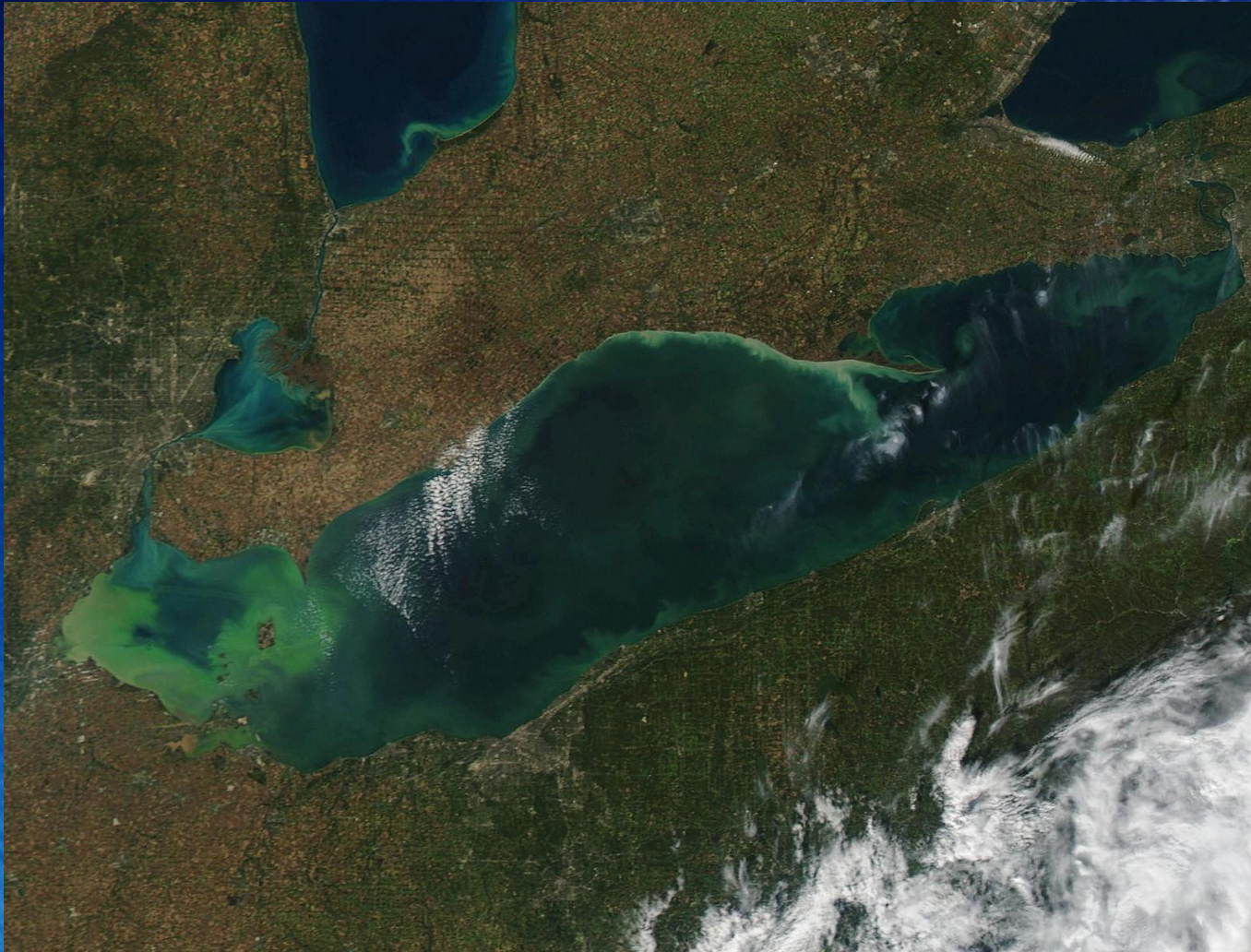
Black Warrior Riverkeeper, Inc., No. 2:19cv344 (N.D. Alabama)

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

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

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

***Envntl. Law & Policy Ctr. v. US EPA, No. 3:19CV295,
2019 WL 5962802 (N.D. Ohio Nov. 13, 2019)***



https://www.michiganradio.org/sites/michigan/files/styles/x_large/public/201804/14873476053_8fd0aa7137_h.jpg

Environmental Law & Policy Center, et al., v. U.S. EPA, et al., No. 3:19-CV-00295 (N.D. Ohio)

- 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 because the State did not evaluate existing data for Lake Erie 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.

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



Photo Credit: Potomac Riverkeeper

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

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

Priority Rankings

- Section 303(d) and 130.7(b)(4) require that “[t]he State shall establish a priority ranking for such waters [on the list], taking into account the severity of the pollution and the uses to be made of such waters.”
- So far, courts have rejected substantive challenges to the prioritization of individual waterbodies (e.g. Segment X should have been a high priority instead of a low priority).
- However, courts have entertained claims that the state failed to “take into account” the statutory factors of “severity of pollution” and “uses to be made.”

Env'tl. Law & Policy Ctr. v. US EPA, No. 3:19CV295, 2019 WL 5962802 (N.D. Ohio Nov. 13, 2019)

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

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TMDL Cases

Constructive Submission

Judicial Constructive Submission Doctrine

- EPA must approve or disapprove TMDLs submitted by states and, if EPA disapproves, EPA must establish replacement TMDLs. CWA 303(d)(2).
- What happens if a state does not submit TMDLs for impaired waters?
- Courts have held that, in certain circumstances, EPA may have an obligation to establish TMDLs when a state does not
 - The rationale being that the state has “constructively” submitted “no TMDL” to EPA, creating a duty for EPA to approve or disapprove the submission of “no TMDL,” and if disapproving, establish a TMDL.
- Courts have found constructive submission to occur where a state has “clearly and unambiguously abandoned” its obligation to submit the TMDL
 - Generally demonstrated by failure to submit over a prolonged period of time (e.g., over 10 years)

Constructive Submission History

- CWA enacted in 1972. States were required to start submitting TMDLs in 1979
- Initially, states developed (and EPA approved) very few TMDLs
- As a result, courts developed the constructive submission theory
 - First articulated in *Scott v. Hammond* (7th Cir. 1984)
- Early constructive submission decisions generally focused on situations where states had submitted very few or no TMDLs over long periods of time (generally at least a decade)

Constructive Submission: State-wide delays on long listed impairments

NWEA v. EPA (W.D. Wash., filed in 2019)

- NWEA litigation alleging constructive submission of no lists of impaired waters by Washington under CWA 303(d) since 2012.
- NWEA subsequently added claims alleging failure to include schedules for submission of TMDLs, as well as constructive submission of no TMDLs for 545 impairments first listed in 1996.
- In 2021, NWEA filed a notice of intent alleging constructive submission of no TMDLs by State of Oregon for more than 2900 impairments first listed in 2012.

Constructive Submission – Extension to Individual Impairments

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

Constructive Submission – Extension to Individual Impairments

Sierra Club v. McLerran (W.D. Wash.)

- At issue was a PCB TMDL for the Spokane River. (This litigation is ongoing.)
- In 2006, Washington State prepared and shared a draft TMDL with EPA and the public. In 2011, the State appeared to suspend work on the TMDL and instead issued a source reduction strategy for PCBs
- Plaintiffs filed suit, alleging EPA must establish the TMDL
- EPA argued that the constructive submission theory should apply only to programmatic failures, not individual impairments
 - EPA argued in part that, to hold otherwise would interfere with the state's discretion to prioritize TMDL development in an otherwise robust program
- The court rejected EPA's arguments, finding a meaningful distinction between prioritization and "clear and unambiguous" abandonment
- However, the court ultimately ruled that, on the facts of the case before it, no constructive submission had yet occurred

Constructive Submission – Extension to Individual Impairments

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

- This case concerned a temperature TMDL for the Columbia and lower Snake Rivers
 - In 2000, EPA, Washington, Oregon, and Idaho signed an MOA which, in part, provided that EPA would “produce” a temperature TMDL for the rivers. In 2003, EPA released a draft TMDL but later suspended work in approximately 2008. Neither Washington nor Oregon had taken any steps towards establishing the TMDL thereafter.
- The Ninth Circuit held that constructive submission theory can apply to an individual impairment
 - “Where a state has failed to develop and issue a particular TMDL for a *prolonged period of time*, and has *failed to develop a schedule and credible plan* for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act.”
- The Ninth Circuit ruled that, on the facts before the court, Washington and Oregon had constructively submitted “no TMDL”

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Challenges to EPA actions on TMDLs

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

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

Oregon Temperature TMDLs – *NWEA v. EPA*, No. 3:12-cv-01751-HZ (D. Or. 2019)

- In 2017, district court held EPA approvals of OR watershed TMDLs unlawful; void *ab initio* because based on invalid “natural condition” temperature criteria (NCC) that “supplanted” BBNC
- Also, court held EPA failed to approve the TMDLs’ natural condition values as new WQS that 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
- In October 2019, court ordered OR and EPA to replace the temperature TMDLs on a rolling schedule between 2023 and 2027.
- All parties initially appealed but then agreed to dismiss appeals subject to short extension of replacement schedule.
- Separately, NWEA has filed new NOI alleging constructive submission for more than 2900 impairments listed since 2012 for which TMDLs not yet submitted.

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

- NGOs challenged EPA's approval of DC bacteria TMDLs
- WQS was expressed as a 30-day geometric mean (126 MPN/100 mL), therefore, TMDLs provided a variable daily max, depending on E. coli discharges on previous 30 days.
- Court Held #1: While a TMDL may lawfully establish different WLAs for different days of a 30-day WQS averaging period, those "known" and "highest possible maximums" must be stated in the TMDL.
- Court Held #2: EPA regulatory language ("[w]hen criteria are met, water quality will generally protect the designated use") (40 C.F.R. 131.3(b)) means only that, when both the numeric and narrative criteria are met, the designated use will be met. It does not mean that, when the numeric criteria are met, the narrative criteria are also met.
- Court vacated EPA's approval of the TMDLs, but vacatur is stayed until November 7, 2021 to allow more time for DC and NGOs to collect data and continue discussions regarding WQS and TMDLs.

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

- NWEA challenged EPA's failure to approve/disapprove 2015/2017 Deschutes TMDL submissions w/in 30 days; Court ordered EPA to act by June 2018.
- EPA approved 26 TMDLs (temperature); disapproved 37 TMDLs (temperature, sediment, pH, bacteria, and DO).
- Subsequently, NWEA challenged EPA's failure to establish 37 replacement TMDLs w/in 30 days; EPA's approval of the 26 temperature TMDLs on several technical grounds; and EPA's failure to disapprove an alleged constructive submission of no TMDLs for Budd Inlet and Capitol Lake.
- EPA established replacement TMDLs in July 2020 and received public comments on these TMDLs.
- In December 2020, NWEA supplemented its Complaint to replace its claim that EPA did not establish the replacement TMDLs w/in 30 days with a claim challenging the replacement TMDLs on numerous technical grounds.
- EPA is in the process of considering public comments on the replacement TMDLs.

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

- In July 2020, Gunpowder Riverkeeper challenged EPA's approval of a PCB TMDL for the Gunpowder and Bird Rivers in Maryland.
- The complaint primarily takes issue with the TMDL not assigning a baseline load or allocation to PCBs from resuspension of bottom sediments – the major source of PCBs in the rivers.
 - The model developed by Maryland treated the water column and sediment as a single system, and exchanges between them as “internal loadings.”
- The complaint alleges that bottom sediment constitutes a nonpoint source and accordingly must be assigned a load allocation
- The complaint alleges that EPA violated a mandatory duty to disapprove a TMDL that fails to meet the requirements of the CWA. The complaint also alleges that EPA's approval violated the APA.
- In October 2020, EPA filed a partial motion to dismiss, directed at plaintiff's mandatory duty claim. The court has not yet ruled.

Chesapeake Bay TMDL implementation - *CBF et al. v. EPA, No. 1:20-cv-2529-CJN (D.D.C.) (ongoing)*

- In September 2020, MD, VA, DC, DE, the Chesapeake Bay Foundation and others filed suit regarding EPA's oversight of PA and NY's implementation of the 2010 Chesapeake Bay TMDL
- As part of the Bay "accountability framework," states submit Watershed Implementation Plans (WIPs) in phases for EPA evaluation. EPA found that both PA and NY's phase III WIPs would fall short of the states' respective nitrogen targets
- Plaintiffs allege that CWA section 117(g) imposes a mandatory duty on EPA and EPA failed to perform that duty
 - EPA, "in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain," among other things, "the nutrient goals of the Chesapeake Bay Agreement"
- Plaintiffs also allege that EPA's "approval" of PA and NY's phase III WIPs violated the APA
- EPA filed a motion to dismiss on November 20, 2020. EPA filed the administrative record on April 27, 2021. Next step is for plaintiffs to either challenge the record or file their opposition to EPA's motion to dismiss

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The Administrative Record

What is the Administrative Record?

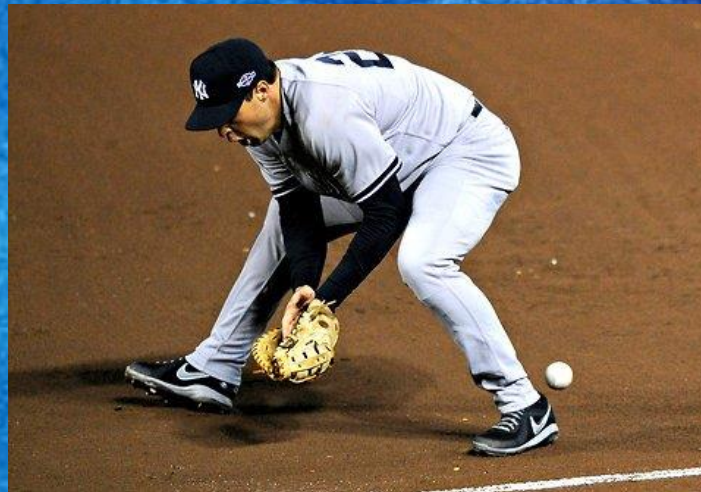
- (1) The collection of documents and information in the agency's files that explains the legal, policy and technical basis for an agency's administrative decision, like establishing or approving/disapproving a 303(d) list or TMDL;
- OR
- (2) A collection of documents and information filed with a court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

What is the Administrative Record?

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

What's the Purpose of the AR

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



Why is an AR Important?

- The APA (5 USC 706) and analogous state laws require that agency actions to be consistent with statutory authority and not “arbitrary and capricious” – decisions must be reasonable.
- The APA provides for judicial review of final federal actions based on “the whole record.”
- The “full administrative record that was before the [decisionmaker] at the time he made his decision.” *Overton Park*, 401 U.S. 402 (1971).
- “Not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 136 (1973). For example – not what the lawyers say³⁵

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

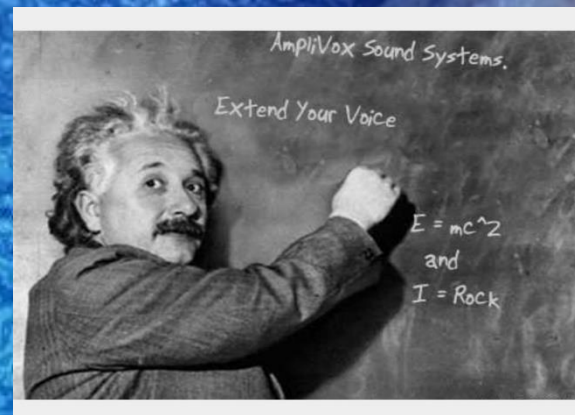
- The impaired and threatened waters still requiring TMDL(s), pollutants causing the impairment, and priority ranking for TMDL development (including waters targeted for TMDL development within the next two years).
- Describe methodology used to develop the List.
- Describe the data and information used 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 Listing and TMDL decisions
- States should explain **why** the list or TMDL decisions are reasonable, and EPA should explain why EPA's approval is reasonable
- Show your work!



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”

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