IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

OHIO VALLEY ENVIRONMENTAL COALITION, INC.; SIERRA CLUB; WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.; & WEST VIRGINIA RIVERS COALITION;	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 3:15-cv-00271**
GINA MCCARTHY, Administrator, United States Environmental Protection Agency, & SHAWN M. GARVIN, Regional Administrator, United States Environmental Protection Agency, Region III,	)	**EPA'S MEMORANDUM OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT**
Defendants.	)	

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INTRODUCTION AND SUMMARY

Defendants United States Environmental Protection Agency, et al., (collectively "EPA"), oppose Plaintiffs' motion for summary judgment and cross-move for summary judgment on all claims for relief in this case. Because review is limited to the administrative record, resolution of this case is appropriate through summary judgment.

The West Virginia Department of Environmental Protection ("DEP") has a robust program for establishing total maximum daily loads ("TMDLs") throughout West Virginia under the Clean Water Act ("CWA"). A TMDL sets the maximum amounts of a pollutant that sources can discharge into a waterbody and still meet applicable water quality standards. Over the past eleven years, DEP has established more than 4,000 TMDLs, and it is continuing to develop others for impaired waterbody segments. In the course of developing TMDLs, the need for additional information or revised methodologies may arise, requiring that those TMDLs be deferred or assigned a lower priority until a later time when needed information will be available and the State can develop the TMDLs consistent with its efforts to develop other TMDLs within its borders.

This is the situation here. DEP transmitted to EPA six separate reports between 2009 and 2014 that submitted 1,546 distinct TMDLs for almost 1,000 separate waterbodies in six different watersheds within West Virginia: Upper Ohio South, Dunkard Creek, Lower Kanawha River, Elk River, Monongahela River, and West Fork River watersheds. EPA reviewed and approved those 1,546 TMDLs.

In the course of working on these TMDLs, DEP identified certain waters as biologically impaired due to ionic toxicity. Ionic toxicity results from the presence of excessive amounts of dissolved solids (e.g., mineral salts) in a waterbody and can cause biologic impairment by adversely impacting aquatic life. While DEP explained that it had sufficient information

regarding instream ionic toxicity levels and their effects on benthic macroinvertebrates to identify the waters as impaired, it lacked sufficient information about which particular dissolved solids (*e.g.*, chlorides, sulfates, potassium, magnesium, etc.) caused the ionic stress, and their associated impairment thresholds and their sources, to establish a defensible TMDL. Accordingly, DEP explained that it was deferring submission of these TMDLs pending development of the necessary information and that the waters would remain on the list of impaired waters required by the CWA, known as the Section 303(d) list. DEP "agree[d] that TMDLs must be developed for all 303(d) listed impairments" (A.R. WF River Doc. 33 at 89) and that it would develop a plan for completing the deferred TMDLs. DEP also explained that it would have to develop a new assessment methodology for developing these ionic toxicity TMDLs, in accordance with a new West Virginia law (Senate Bill 562 (SB 562)). Thereafter, in response to comments from EPA and environmental groups, DEP established a schedule, ranging between 2020 and 2025 depending upon the particular watershed, when it would establish these deferred TMDLs. Supp. A.R.WV 303(d) Lists Doc. 52 & 53.

Plaintiffs contend that under either an "actual submission" or "constructive submission" theory (Claims 1 and 2 of Plaintiffs' Amended Complaint), DEP's deferral of the TMDLs for ionic toxicity constitutes a submission of "no" such TMDLs (i.e., a State determination that none will ever be developed), and, therefore, that EPA has a mandatory duty under the CWA to disapprove that "actual submission" or "constructive submission" and establish these deferred TMDLs itself. Section I of this brief explains that Plaintiffs have not established standing regarding their claims for many of the TMDLs for which they request relief. Section II explains that the State's deferral, and subsequent rescheduling, neither actually nor constructively renounced its obligation to submit those TMDLs in the future. Moreover, the legal theories Plaintiffs rely upon cannot be used to usurp the State's ability to set TMDL priorities and timing.

In their third through eighth claims for relief, Plaintiffs inappropriately attempt to bootstrap their challenges to EPA's acknowledgment of the State's deferral onto EPA's approvals of the 1,546 TMDLs for other pollutants that DEP submitted for the waterbodies within the six watersheds. Although each of EPA's approvals of the 1,546 TMDLs constitutes a final agency action as the individual approved TMDL reviewable under the Administrative Procedure Act ("APA"), Plaintiffs do not challenge any of the approved TMDLs. Instead, they challenge EPA's acknowledgment of the State's deferral. Section III below demonstrates that EPA does not approve State TMDL priority rankings or schedules, and EPA's acknowledgment of the States' deferral constitutes neither an "approval" under the CWA nor final agency action within the meaning of the APA. Accordingly, claims three through eight must be dismissed. But even if EPA's acknowledgment of the State's deferral were judicially reviewable, EPA's action should be upheld. Section IV demonstrates that the CWA does not, as Plaintiffs' contend, require that State's submit all TMDLs for a particular waterbody or watershed simultaneously. Moreover, the reasons the State deferred issuing the TMDLs for ionic toxicity – the need for additional information and the development of a new assessment methodology – were reasonable. Accordingly, summary judgment should be entered for EPA.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). States are primarily responsible for achieving these goals. *Id.* § 1251(b).

A. The NPDES Permit Program

The CWA's central regulatory features are established by the National Pollutant

Discharge Elimination System ("NPDES") permit program. 33 U.S.C. § 1342(a)(1); 40 C.F.R. §122.44(a), (d)(1). Pollutant discharges from point sources into waters of the United States are prohibited unless in compliance with CWA requirements, such as compliance with an NPDES permit. 33 U.S.C. § 1311(a). If the conditions of a permit are violated, they may be enforced by the United States, or any interested person, including a State. *Id.* § 1319. Since 1982, West Virginia has been authorized to administer the NPDES permitting program. 47 Fed. Reg. 22363 (May 24, 1982); *see* 33 U.S.C. § 1342(b).

NPDES permits control water pollution from point sources by means of two different overarching strategies. The first, the "technology-based" approach, reduces pollution by requiring dischargers to achieve specified restrictions on the quantities, rates, and concentrations (known as "effluent limitations") based on specific process-based controls. 33 U.S.C. §§ 1311, 1314, 1316-17, 1362(11). The CWA requires EPA to develop and promulgate national technology-based regulations establishing minimum levels of wastewater treatment for categories of industrial sources. During the 1970s and 1980s, EPA gave priority to developing the new technology-based regulations, which EPA and the states implemented through the new NPDES permit program. *See Environmental Defense Fund, Inc. v. Costle,* 636 F.2d 1229 (D.C. Cir. 1980). EPA has thus issued technology-based regulations for more than 50 major categories of industrial dischargers, including the coal mining point source category. 40 C.F.R. Pts. 405-471.

B. TMDLs

While the initial emphasis was on technology-based effluent limitations, the CWA also directs that NPDES permits include limits sufficiently stringent to implement applicable water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(vii)(A). States, with federal approval and oversight, adopt water quality standards ("WQS") for each particular waterbody or waterbody segment within their boundaries. 33 U.S.C. § 1313(a), (b) & (c)(1). A

WQS identifies (1) the "designated uses" for a particular waterbody (e.g., public water supply, support of aquatic life, and/or recreational uses) and (2) a "water quality criterion" expressed as a level (e.g., a pollutant-specific concentration and/or a narrative condition) that must not be exceeded so that the waterbody can support those uses (e.g.iron concentrations necessary for aquatic life). *Id.* § 1313(c)(2); 40 C.F.R. § 131.3(i). Several water quality standards may apply to the same waterbody segment. EPA either approves a State's proposed water quality standards or, if it disapproves, promulgates standards for the State. *Id.* § 1313(c)(3).

After adoption and approval of water quality standards, CWA Section 303(d) directs the States to identify, and prioritize water-quality-limited segments ("WQLSs"), i.e., the individual water segments that do not or are not expected to meet applicable water quality standards even after implementation of technology-based effluent limitations. *Id.* § 1313(d)(1)(A) & (B); 40 C.F.R. §§ 130.2(j) & 130.7(b)(1). EPA's regulations specify that the States submit their WQLSs in lists (known as "Section 303(d)" lists) to EPA for approval or disapproval on a biennial basis. 40 C.F.R. § 130.7(d)(7). If EPA disapproves, it must identify the WQLSs to be added within 30 days from the date of disapproval. 33 U.S.C. § 1313(d)(2).

States are to develop a TMDL for each impaired waterbody and the particular pollutant for which that waterbody is impaired. 33 U.S.C. § 1313(d). TMDL development requires States to identify the maximum amount of pollutant "loading", *i.e.*, quantity of a particular pollutant, that the impaired waterbody can receive from all sources and still meet the relevant water quality standard. *Id.* § 1313(d)(1)(C); 40 C.F.R. § 130.2(e). Each TMDL must, among other things: (1) be designed to meet the applicable water quality standard for which it is established; (2) include, as appropriate, both wasteload allocations from point sources and load allocations from non-point sources; (3) consider the impacts of background pollutant contributions; (4) consider seasonal variations; (5) include a margin of safety; and (6) be subject to public participation. *Id.*

§§ 130.7, 130.7(c)(1), 130.2(g)-(i). Developing a TMDL typically requires a significant amount of technical analysis, and may take years to complete once initiated depending, among other things, upon the information and studies required. Once a State submits a TMDL to EPA, the CWA directs EPA to approve or disapprove that TMDL within 30 days of submittal. If EPA disapproves a particular TMDL, EPA must establish a federal TMDL for the WQLS within 30 days of the Agency's disapproval. 33 U.S.C. § 1313(d)(2).

TMDLs function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri,* 291 F.3d 1123, 1129 (9th Cir. 2002). Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits and/or by establishing nonpoint source controls. *Sierra Club v. Meiburg,* 296 F.3d 1021, 1025 (11th Cir. 2002). Thus, TMDLs form a basis for further State actions with respect to particular pollutant discharges. Regardless of whether a TMDL has been established, State-issued NPDES permits must include effluent limits as stringent as necessary to meet water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(vii)(A). Under the CWA, the absence of TMDLs does not prevent NPDES permitting authorities from otherwise assuring that point source discharges do not cause or contribute to exceedances of water quality standards.

C. State Schedules and Approaches to Developing TMDLs

States are required to establish a priority ranking for WQLSs that are typically submitted together with their Section 303(d) lists, 33 U.S.C. § 1313(d)(1)(A). The ranking is used to prioritize TMDLs for development. *Id.* § 1313(d)(1)(C). In establishing a priority ranking, States must consider the severity of the pollution and the uses of the listed waterbody. *Id.* § 1313(d)(1)(A). Beyond these two statutory factors, States retain considerable discretion and may consider other factors when prioritizing and scheduling TMDLs, including: vulnerability of particular waters; recreational, economic, and aesthetic importance of particular waters;

restoration potential; degree of public interest and support; State or national policies and priorities; technical considerations, such as the complexity of the impairment; availability of adequate data and models; and implementation of watershed-based permitting programs or basin planning cycles. *See, e.g.*, 57 Fed. Reg. 33040, 33,044-45 (July 24, 1992); A.R. EPA TMDL Guid. Doc. 6 at 3. The State's schedule is to identify those WQLSs targeted for TMDL development in the next two years. 40 C.F.R § 130.7(b)(4) & (d)(1).

Although States typically submit their priority rankings of WQLSs together in the same document that transmits their Section 303(d) lists, EPA does not approve or disapprove the substance of these rankings. *See* 33 U.S.C. §§ 1313(d)(1)(A) & (d)(2). Moreover, if a WQLS on a 303(d) list subsequently achieves the water quality standard for which it is impaired, it may be removed from the next Section 303(d) list and thus a TMDL is no longer required. 40 C.F.R. §§ 131.7(b)(1) & 130.2(j).

The CWA does not require States to develop and submit TMDLs to EPA on any particular timeframe, stating instead that after the first submittal, States should submit TMDLs to EPA "from time to time," i*d.* § 1313(d)(2), "in accordance with the priority ranking." *Id.* § 1313(d)(1)(C). In 1997 Guidance, EPA recommended that States normally plan to establish TMDLs for all WQLSs on their 1998 Section 303(d) lists and subsequent lists within eight to thirteen years of the initial listing, but recognized that shorter or longer times may be needed depending on specific factors and circumstances. A.R. EPA TMDL Guid. Doc. 6 at 3.

The Act provides States with broad latitude to determine how to best organize an approach that efficiently and effectively considers the applicable factors and establishes priorities for developing and completion of TMDLs. In this regard, States have discretion to employ a rotating basin or other watershed schema, or a pollutant-by-pollutant focus, when prioritizing and developing TMDLs. *Id.* at 2. Thus, for example, a State may strive to develop

and establish all TMDLs for different pollutants for the same waterbody at the same time, or they may elect to establish together several different TMDLs for the same pollutant for different waterbodies.

II. FACTUAL BACKGROUND

A. West Virginia's Section 303(d) Program

DEP's 1996 Section 303(d) list included 51 "priority" WQLS and 469 mine drainage impacted WQLS. A.R. WV 303(d) Doc.1. DEP subsequently submitted, and EPA approved and/or disapproved, as appropriate, 303(d) lists in 1998, 2002, 2004, 2008, 2010 and 2012. A.R. WV 303(d) Docs. 3, 5, 9, 11, 13, 15, 17 and 20. As DEP has continued to assess the numerous waterbody segments throughout West Virginia, it has added additional WQLS to its 303(d) lists. On April 13, 2015, DEP submitted to EPA its 2014 Section 303(d) list, which identifies 1,157 WQLSs for TMDL development. Supp. A.R.WV 303(d) Lists Docs. 52-# 61.

In 1995, the lead plaintiff in this current case and others sued EPA alleging, among other things, that a constructive submission of no TMDLs had occurred for West Virginia, thereby triggering EPA duties to disapprove that submission and to establish all the TMDLs then required based on West Virginia's 1996 Section 303(d) list. *Ohio Valley Environmental Coalition v. Browner*, Nos. 2:95-0529 & 2:96-0091 (S.D. W.Va.). The case was resolved by a consent decree, whereby either DEP would undertake an aggressive TMDL development program or EPA would do it if DEP did not. *Id. (*entered on July 9, 1997). Since entry of that consent decree, DEP has devoted significant resources to TMDL development, and has established a robust program for developing and submitting TMDLs to EPA. Since 2004, EPA has approved over 4,000 TMDLs submitted by DEP. Supp. A.R.WV 303(d) Lists Doc. 55. DEP anticipates developing and submitting over 400 TMDLs between now and 2019 for a variety of waterbodies and pollutants. Supp. A.R.WV 303(d) Lists Doc. 53. The Administrative Record in

this case amply documents DEP's robust TMDL output and its continued commitment to develop TMDLs.

B. DEP's Watershed Cycle for TMDL Development and EPA's Approval of TMDLs Submitted for Waters in the Six Watersheds

Although not required to do so, DEP generally utilizes a watershed approach as an organizational tool to efficiently develop and submit TMDLs to EPA:

> The DEP's TMDLs are developed according to the Watershed Management Framework cycle. The framework divides the state into 32 major watersheds and operates on a five year, five-step process. The watersheds are divided into five hydrologic groups (A - E). Each group of watersheds is assessed once every five years. . . . The TMDL process begins in the first year of the cycle with pre-TMDL sampling and public meetings in the affected watersheds. The data is compiled and TMDL development begins in year two of the cycle. In the third year, TMDL development continues and the TMDL is drafted. The TMDL is finalized in the fourth year. In the fifth year of the cycle, TMDL implementation is initiated through the NPDES permitting process and efforts toward limiting nonpoint source loading.

A.R. WV 303(d) Doc. 20 at 32. Thus, each year DEP typically conducts some phase of TMDL development work in each of West Virginia's 32 major watersheds, and it typically establishes TMDLs in each of these watersheds every five years.

Although it is not always possible based upon the circumstances, "WVDEP's TMDL development program has historically attempted to comprehensively address all streams and all impairments in a particular watershed simultaneously." This typically includes a 48-month TMDL development process involving "an extensive data generating and gathering effort . . . intended to produce scientifically valid TMDLs." A.R. Dunkard Doc. 39 at 77; A.R. Upper Ohio Doc. 39 at 72.

DEP's TMDL development work in the six watersheds at issue in this lawsuit does not all operate on the same cycle. In six separate reports sent by DEP to EPA from 2009 to 2014, DEP submitted 1,546 TMDLs for almost 1,000 different waterbodies or waterbody segments in

six different watersheds: the Upper Ohio South, the Dunkard Creek, the Lower Kanawha River, the Elk River, the Monongahela River, and the West River watersheds. Specifically, included within the six referenced reports DEP submitted to EPA are: 6 TMDLs for selenium; 911 TMDLs for iron; 50 TMDLs for aluminum; 18 TMDLs for chloride; 56 TMDLs for pH; 2 TMDLs for manganese; 503 TMDLs for fecal coliform bacteria. A.R. Upper Ohio Doc. 39; A.R. Dunkard Doc. 39; A.R. Elk River Doc. 26; A.R. Lower Kanawha Doc. 25; A.R. Monongahela River Doc. 32; A.R. WF River Doc. 33.

EPA reviewed these TMDL submissions, as required by 33 U.S.C. § 1313(d)(2), and approved the submitted TMDLs on September 24, 2009, September 30, 2009, May 17, 2012, April 23, 2012, April 2, 2014, and July 29, 2014. A.R. Upper Ohio Doc. 37 & 38; A.R. Dunkard Doc. 37 & 38; A.R. Elk River Docs 24 & 25; A.R. Lower Kanawha Doc. 23 &24; A.R. Monongahela River Doc. 29 & 30; A.R. WF River Docs 30 & 31.

C. DEP's Deferral of TMDLs for Ionic Toxicity for Waterbodies in the Six Watersheds.

1. Identification of Ionic Stress as a Biologic Impairment Stressor

West Virginia has established numerous water quality criteria to support designated uses of West Virginia waters. Most of West Virginia's criteria are numeric expressions of concentration of particular pollutants. *See* W.Va. Code R § 47-2, Appendix E, Table 1. In addition, West Virginia has a narrative water quality criterion that, as applied to aquatic life, in pertinent part prohibits:

> [m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life; ... [and] . . . [a]ny other condition ... which adversely alters the integrity of the waters of the State . . . ; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

Id. §§ 47–2–3.2, –3.2.e, –3.2.i.

Since 2002, DEP has utilized the West Virginia Stream Condition Index ("WVSCI") to identify biologically impaired waters based upon a direct measurement of a waterbody's biological condition. *See, e.g.,* A.R. WV 303(d) Doc. 17 at 14-15. Thus, when DEP identifies waters on its Section 303(d) list as biologically impaired, it does not necessarily know the impairing pollutant or pollutants. Accordingly, prior to developing TMDLs, DEP performs extensive monitoring and conducts a "stressor identification" to identify the impairing pollutants. *See, e.g.,* A.R. WV 303(d) Doc. 17 at 14-15.

In accordance with this process, DEP conducted a pre-TMDL stressor identification analysis for biologically impaired waters in the Dunkard Creek and Upper Ohio South watersheds. That analysis identified organic enrichment, ionic toxicity, sedimentation, metals toxicity, pH, or metals flocculation as the impairing stressors in biologically impaired streams in those watersheds. A.R. Dunkard Doc. 39 at 14; A.R. Upper Ohio Doc 39 at 16. DEP found that many of the biological impairments caused by these forms of pollution could be properly addressed by the use of a surrogate TMDL for a different pollutant. A.R. Upper Ohio Doc. 39 at 16-17; A.R. Dunkard Doc. 39 at 15.

For those waters where the identified impairing stressor was ionic toxicity, DEP did not identify a surrogate pollutant for which it could develop a TMDL. Ionic toxicity is not the result of a single substance, but rather the cumulative effect of a number of dissolved solids (salts) or component ions. Some of the waters impaired by ionic toxicity were also impaired by chlorides, which are component ions that contribute to ionic toxicity. Chlorides are governed by a separate numeric water quality criterion in West Virginia. Accordingly, DEP established TMDLs for these waters based upon the numeric criterion for chlorides. While DEP noted that this approach would likely reduce the ionic toxicity biological impairment, AR Dunkard Creek Doc. 39 at 15 & 77, DEP did not use these chloride TMDLs as surrogates for ionic toxicity TMDLs, because

DEP could not make a technical conclusion that the chlorides TMDLs would fully resolve the ionic toxicity biological impairment. DEP also noted the strong presence of sulfates (another component ion) in some waters likely played a role in the ionic toxicity. A.R. Upper Ohio Doc. 39 at xi & 17; A.R. Dunkard Doc. 39 at x, 15 & 77-78)).

DEP conducted a similar process and analysis for the waterbodies in the other watersheds at issue in this case. A.R. Elk River Watershed, Doc. 26 at 19-25; A.R. Lower Kanawha, Doc. 25 at 19-26; A.R. Monongahela River Watershed, Doc. 32 at 17-24; A.R. West Fork River Watershed, Doc. 33 at 18-24.

2. DEP's Decision to Defer Issuing TMDLs for Ionic toxicity

DEP did not submit ionic toxicity TMDLs to EPA at the time it submitted TMDLs for other pollutants for the waters in the Dunkard Creek and Upper Ohio South watersheds, explaining that, due to the current lack of necessary information, development of those TMDLs would be deferred. DEP concluded that "[t]here is insufficient information available regarding the causative pollutants and their associated impairment thresholds for biological TMDL development for ionic toxicity *at this time*." *Id.* (emphasis added). DEP therefore explained that it was "deferring" development of ionic toxicity TMDLs for those waters. A.R. Upper Ohio Doc. 39 at 17; A.R. Dunkard Doc. 39 at 15. In response to comments, DEP explained these data gaps and uncertainties, in detail, which include concerns that:

> WVDEP lacks the water quality and source data necessary to use total dissolved solids in a reference reach approach … [; that] pre-TMDL monitoring efforts are being expanded to address this shortfall . . . . [; that] the ionic strength and constituent make-up of the background and the various point and nonpoint sources existing in the watershed may have dissimilar toxic impacts to the benthic community . . . [; that t]he normalization . . . associated with TMDLs based upon total dissolved solids or specific conductance may incorrectly target pollutant reductions from non-problematic sources . . . [; and that specific, described efforts are ongoing that] may provide more concrete TMDL endpoints for ionic stress biological impairment than currently available . . . .

A.R. Upper Ohio Doc. 39 at 72-73; A.R. Dunkard Doc. 39 at 77-78. It thus explained that it would be "prudent to delay TMDL development (as afforded by USEPA guidance) to allow their consideration." *Id.* At the same time, DEP "recognize[d] that the deferral of TMDLs cannot be indefinite," A.R. Upper Ohio Doc. 39 at 73; A.R. Dunkard Doc. 39 at 78, and explained that it would "cooperate" with EPA to develop a plan "that will be pursued to ensure the timely development of the deferred TMDLs." *Id.* Accordingly, DEP retained those impaired waters on the Section 303(d) list to ensure their completion in the future.

DEP also concluded that additional information was needed to develop TMDLs for ionic toxicity for the waters in the Elk River and Lower Kanawha watersheds. A.R. Elk River Doc. 26 at 23; A.R. Lower Kanawha, Doc. 25 at 22-23.

To address DEP's need to develop more information before establishing TMDLs for ionic toxicity, EPA and DEP jointly began work to develop pilot TMDLs for ionic toxicity for the Monongahela and Upper Kanawha watersheds. This included, beginning in 2010, work by EPA's contractor, Tetra Tech, Inc. A.R. 1st & 2nd Claims Docs. 3, 4 and 5, and an expenditure of over $400,000 of EPA contract funds. DEP and EPA devoted significant resources, over a prolonged period of time, considering numerous technical issues for developing these pilot TMDLs. Notwithstanding these efforts, additional technical information was still needed before the TMDLs could be established.

D. Enactment of SB 562 for a New Assessment Methodology

In 2012, West Virginia enacted a new law designated Senate Bill ("SB") 562. A.R. WV 303(d) Doc. 45 (text of statute). This law requires that DEP, among other things, establish through rules a new methodology replacing WVSCI for assessing biological impairments for West Virginia's narrative water quality standards. This involves consideration of how aquatic biological communities are evaluated. For example, comments by a Plaintiff in this case and

EPA urged DEP to replace WVSCI and use the Genus Level Index of Most Probable Stream Status ("GLIMPSS") instead to measure the aquatic biological community. *E.g.,* A.R. Upper Ohio Doc. 39 at 71; Supp. A.R.WV 303(d) Doc. 51-01 at 2-3. GLIMPSS utilizes genus-level data and accounts for seasons and geography, and is understood to have a finer (and more accurate) resolution. Supp. A.R.WV 303(d) Doc.5 at 2-3. Because the analysis to develop a TMDL target, called the endpoint, and to generate allocations to achieve that endpoint, necessarily depend upon how the aquatic biological community is measured, a change in the methodology measuring the aquatic biological community likely would alter TMDL endpoints and allocations. A.R. 1st & 2nd Claims Doc. 38 at 1. A TMDL using a superseded methodology would be of limited use for purposes of implementation.

In response to a comment received in connection with the TMDLs in the West Fork River watershed, DEP explained the impact of S.B. 562 on ionic toxidity TMDLs, as follows in pertinent part:

> DEP agrees that TMDLs must be developed for all 303(d) listed impairments but disagrees that the presented TMDLs [for waterbodies in the West Fork River watershed] are made invalid by the omission of TMDLs for the subject biological impairments. Additionally, DEP does not interpret 40 CFR 130.7(c)(1)(ii) as mandating concurrent TMDL development for all impairments.
>
> Prior to the passage of SB 562, DEP and EPA were implementing the TMDL development plan for "ionic stress" biological impairments referenced in the comments. * * * TMDL development has been paused with the passage of SB 562 because it potentially changes the basis for determining impairment and requires a new assessment methodology to be presented to the West Virginia Legislature prior to its implementation.
>
> The Clean Water Act and its implementing regulations do not prescribe an exact time frame between initial 303(d) listing and TMDL development. Biological impairments for which TMDLs have not been developed, including, but not limited to those in the West Fork River watershed, will remain on the 303(d) list. DEP recognizes the long time periods of 303(d) listing for some of the impairments and will develop TMDLs as soon as practicable after the accomplishing SB 562 requirements.

A.R. WF River Doc. 33 at 89-90. Consistent with SB 562, DEP has been working to develop a new assessment methodology that effectively assesses biological impairment across a broad range of stressors.

E. DEP's 2014 303(d) List Prioritizing the Deferred TMDLs for Ionic Stress

In its 2012 Section 301(d) list, DEP did not set a date for completing ionic toxicity TMDLs for the waters within the six watersheds at issue in this case. Rather, in view of the uncertainty S.B. 562 introduced into further TMDL development, DEP cited the dates for completing these TMDLs as "TBD - To be determined. TMDLs will be developed as soon as practicable after the effective date of rules enacted pursuant to Senate Bill 562." *See* A.R. WV 303(d) Doc. 20 at List pages 4, 8, 9, 10, 11, 44, 50.

After reviewing DEP's draft 2014 303(d) list, EPA and Plaintiffs submitted comments recommending that DEP establish dates by which it planned to complete the deferred TMDLs. Supp. A.R.WV 303(d) Lists Doc. 51-01 at 4 & Doc. 52 at 31. In response, and consistent with its rotating watershed approach for developing TMDLs, DEP included in its final 2014 Section 303(d) list submitted to EPA projected dates for completing TMDL development for the deferred TMDLs ranging from 2020 to 2025, depending upon the watershed. Supp. A.R.WV 303(d) Lists Doc. 52 at 31 & Doc. 53 at 15, 16, 39, 40, 41, 43, 49-54.

STANDARD OF REVIEW

I. EPA FINAL AGENCY ACTION MUST BE UPHELD UNLESS PLAINTIFFS ESTABLISH IT IS ARBITRARY AND CAPRICIOUS

The CWA citizen suit provision allows suits to be brought in district court against the "the Administrator [of EPA] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). Such claims are available only where Congress has imposed by statute a

clear-cut, mandatory duty for EPA to act in the statute. S*ee Monongahela Power Co. v. Reilly,* 980 F.2d 272, 276 & n.3 (4th Cir. 1992). With certain exceptions not relevant here, review of "final agency actions" by EPA under the Clean Water Act is available, if at all, under the Administrative Procedure Act ("APA") and its deferential standard of review.

Under the APA, agency action must be upheld unlesst is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under this standard is narrow, and a court may not substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Under this standard an agency's factual determinations are entitled to substantial deference. *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992). "[S]o long as the agency 'provide[s] an explanation of its decision that includes a rational connection between the facts found and the choice made,' its decision should be sustained." *American Whitewater v.* Tidwell, 770 F.3d 1108 (4th Cir. 2014) (citation omitted). Even an agency decision "of less than ideal clarity" may be upheld by the court "if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins.*, 463 U.S. 29, 43 (1983)). Further, when examining agency scientific findings made within an area of an agency's technical expertise, a reviewing court must be at its most deferential. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989).

II. JUDICIAL REVIEW IS LIMITED TO THE ADMINISTRATIVE RECORD AND RESOLVED THROUGH SUMMARY JUDGMENT.

In a case such as this, judicial review is limited to the administrative record prepared by the agency for its decision. *Overton Park,* 401 U.S. at 419-20; *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). The Parties have stipulated that review in this case will be based on the administrative record. Dkt. No. 25. Because review is limited to the

administrative record, resolution through summary judgment is proper. *Adams v. United States*, 318 F.2d 861, 865 (9th Cir. 1963). The district court "is not required to resolve any facts in a review of an administrative proceeding. . . . [T]he 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." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED ORGANIZATIONAL STANDING FOR ALL WATERBODY SEGMENTS WITHIN THE SIX WATERSHEDS FOR WHICH DEP HAS DEFERRED ISSUING TMDLS FOR IONIC TOXICITY

To establish standing Plaintiffs must show (1) an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the injury is fairly traceable to the defendant's challenged conduct; and (3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). To achieve representational standing, and organization must, among other things, demonstrate that at least one of its members would have standing to sue in his or her own right. *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003). To establish injury-in-fact, "a plaintiff need only show that he used the affected area, and that he is an individual for whom the aesthetic and recreational values of the area [are] lessened" by the defendant's activity. *Piney Run Preservation Ass'n v. County Com'rs of Carroll County, MD*, 268 F.3d 255, 263 (4th Cir. 2002) (internal quotation marks omitted; modification in original).

Beyond assertions in their Amended Complaint, Plaintiffs have not submitted a declaration with their Motion for Summary Judgment that asserts an injury-in-fact in any waterbody within the Monongahela River watershed at issue in this case. Further, while Plaintiffs' Amended Complaint purports to seek relief as to 179 streams in Appendix A and 396

streams in Appendix B, their declarations allege that certain individuals satisfy the injury-in-fact requirement only as to approximately 50 individual waterbodies. Of these 50 waterbodies, Plaintiffs have submitted declarations alleging certain members satisfy the injury-in-fact requirement as to only a very small number (less than a dozen) of streams in five of the six watersheds that form the basis of their Amended Complaint and Motion for Summary Judgment. Accordingly, Plaintiffs lack standing to bring any of their claims for relief regarding any waterbodies except as to those waterbodies in the referenced footnote. For those seven waterbodies, EPA does not contest Plaintiffs' standing. To the extent Plaintiffs assert an injury in fact in their declarations regarding waterbodies outside the six referenced watersheds, as discussed below, the Amended Complaint does not include claims for relief for such waters.

II. DEP HAS NOT MADE AN ACTUAL OR CONSTRUCTIVE SUBMISSION RENOUNCING ITS OBLIGATION TO SUBMIT TMDLS ADDRESSING IONIC TOXICITY FOR WATERS IN THE SIX WATERSHEDS.

A. Regardless of How the Actual and Constructive Submissions Theories are Construed, Neither Actual Nor Constructive Submissions of No TMDLs Have Occurred.

Plaintiffs invoke the nondiscretionary duty prong of the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2), to argue in Section I of their brief that an "actual" – as opposed to a "constructive" – submission of "no TMDLs" by a State triggers CWA nondiscretionary duties for EPA to establish TMDLs in lieu of the State. Br. at 13-17. Plaintiffs next argue in the alternative, in Section II of their brief, that there has been a "constructive submission" of "no TMDLs" because Plaintiffs interpret DEP as having "clearly and unambiguously demonstrated that it has no intention of developing" the deferred TMDLs for ionic toxicity, Pl. Br. at 17-21.

Neither the statute, nor case law, nor commonsense supports Plaintiffs' formulation of the actual and constructive submission theories. *See* Sections II.B.1 & C.1 below. The Court,

however, need not decide the validity and precise contours of these theories because here DEP has neither actually nor constructively renounced its obligation to complete ionic toxicity TMDLs for the waterbodies at issue. Quite the opposite. DEP has retained on its Section 303(d) list the waters where TMDLs have been deferred, it has expressly acknowledged "that TMDLs must be developed for all 303(d) listed impairments," A.R. WF River Doc. 33 at 89, and that "the deferral of TMDLs cannot be indefinite." A.R. Upper Ohio Doc. 39 at 73; A.R. Dunkard Doc. 39 at 78. In fact, DEP has established and submitted to EPA its 2014 priority ranking for these deferred TMDLs, setting projected dates for completing the deferred ionic toxicity TMDLs at issue in this case. Supp. A.R.WV 303(d) Doc. 52 at 31 & Doc. 53 at 15, 16, 39, 40, 41, 43, 49-54.

As explained (*supra* at 12-14), the State initially deferred issuing TMDLs for ionic toxicity in the Upper Ohio South, Dunkard Creek, Lower Kanawha River, and Elk River watersheds because "[t]here was insufficient information available regarding the causative pollutants and their associated impairment thresholds for biological TMDL development for ionic toxicity." A.R. Lower Kanawha Doc. 25 at 22-23; A.R. Elk River Doc. 26 at 23. Following enactment of SB 562 by the West Virginia legislature, DEP also determined that TMDL development should be deferred until it can establishe TMDLs based upon the new assessment methodology required by SB 562: "[D]evelopment has been *paused* with the passage of SB 562 because it potentially changes the basis for determining impairment and requires a new assessment methodology to be presented to the West Virginia Legislature prior to its implementation." A.R. WF River Doc. 33, at 90 (emphasis added). As explained *supra* at 13-14, because the analysis to develop a TMDL necessarily depends upon how the aquatic biological community is measured, a change in the methodology measuring the aquatic biological community likely would alter the TMDL developed.

DEP's use of terms such as "pause," "defer," and "suspend" conveys only a temporary delay and reprioritization, not express or implied renunciation of DEP's obligations, and DEP's identification of projected dates for their completion confirms and fully resolves this issue. Indeed, DEP set these dates in response to comments by EPA and Plaintiffs in this case. Supp. A.R.WV 303(d) Doc. 51-01 at 4; Supp. A.R.WV 303(d) Doc. 52 at 31 & 53 at 15, 16, 39, 40, 41, 43, 49-54. In sum, DEP cannot be said to have expressly and unambiguously renounced its obligation to ever submit those TMDLs. While Plaintiffs may not agree with the dates selected by DEP for completing these TMDLs, that disagreement cannot create an actual or constructive submission under any rationale formulation of those legal theories. Thus, regardless of the validity or precise elements of an actual or constructive submission theory, the facts here readily demonstrate that neither has occurred.

B. DEP Has Not Actually Submitted "No" TMDLs for Ionic toxicity

1. There is No Support for Plaintiffs' Formulation of an Actual Submission Theory

Plaintiffs quote out of context isolated portions from footnote 18 in *American Canoe Ass'n v. EPA,* 54 F. Supp. 2d 621, 628 n.18 (E.D. Va. 1999), to manufacture a theory that when a State "'communicate[s] expressly to EPA prior to a scheduled deadline that it would not or could not comply with the schedule,'" Br. at 16 (quoting footnote 18 of *American Canoe),* "it constitutes," Br. at 16 (plaintiffs' words), an actual submission. Plaintiffs then rely upon isolated portions of the record, which they misconstrue, to argue that three statements by DEP constitute the express statement that it would submit no TMDLs. *Id.*

There is no basis in law or logic for Plaintiffs' legal theory. First, *American Canoe* is not an actual submission case, and the language Plaintiffs quote refers to the basis for and interpretation of a consent decree, not the CWA. After the *American Canoe* Court found that

Virginia failure to submit no TMDLs at all (or at most one TMDL) throughout the entire State over a nearly 20-year period constituted a constructive submission, 54 F.Supp. 2d at 624 & n.8, the Parties negotiated, and the court entered, a consent decree that expressly provided that if Virginia failed to establish TMDLs according to a schedule specified in the consent decree, then EPA would be required to do so. *Id.* Upon rejecting arguments by intervenors that the decree should not be entered, the court in footnote 18, *id.* at 628 n.18, merely described the basis for and operation of the consent decree, not a free-standing "actual" submission theory of "no TMDLs" under the CWA.

Unlike the judicially enforceable consent decree schedule in *American Canoe*, the CWA does not create an enforceable schedule for TMDL development. As explained *infra* at 36-38, Section 303(d)(1)(A) of the CWA, 33 U.S.C. § 1313(d)(1)(A), and the relevant case law afford States great discretion in setting their own schedule for the order and timing by which they develop and submit TMDLs to EPA. *See also Hayes v. Whitman,* 264 F.3d 1017, 1024 (10th Cir. 2001) (the "constructive-submission theory is not designed to challenge the timeliness or adequacy of the state's TMDL submissions . . . ."); *Sierra Club v. Browner,* 843 F. Supp. 1304, 1314 (D. Minn. 1993) ("the Act does not set deadlines for the development of a certain number of TMDLs."). Thus, even assuming an actual submission of "no" TMDLs could occur in theory, applying that theory to a particular subset of TMDLs while the State is working to develop other TMDLs is highly problematic. It would, at a minimum, require that the State clearly and unambiguously say, expressly, that it will never submit the particular TMDLs at issue. And even then, given a State's discretion to set its own TMDL schedule, an actual submission of "no" TMDLs may not occur if the State is working to develop other TMDLs to which the State assigns a higher priority.

Plaintiffs contend that a preliminary exchange of emails set a goal of 2013 for TMDL

development. Even apart from Plaintiffs' mischaracterization of the documents they rely upon,[1] their argument is inapposite because, unlike the judicially enforceable, consent decree schedule in *American Canoe,* there is no such enforceable schedule applicable to the deferred TMDLs at issue here. Moreover, the fact that a State may have changed its priorities and delayed development of specific TMDLs in light of new information and circumstances does not violate any CWA-mandated schedule. And as discussed above, after having deferred issuing the relevant TMDLs for ionic toxicity, DEP has established a schedule for completing those TMDLs. *Supra* at 15.

Plaintiffs also misplace their reliance on *Sierra Club v. McLerran*, Civ. No. 11-CV-1759-BJR, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015), *appeals filed,* Nos. 15-35380, 15-35381, 15-35382 (9th Cir.), to support their actual submission theory. That case involved only whether a constructive – not an actual – submission occurred, and the Court found that a constructive submission had not occurred, even though the TMDL at issue had not been completed for nearly 20 years and the State had not yet scheduled a date for its completion. *Id.* at *10. Moreover, Plaintiffs (at 17) quote dicta in that decision stating that "a state that has publicly indicated, as Plaintiffs claim [the Department of] Ecology has, that it will not produce a specific TMDL has violated its statutory obligations with respect to that TMDL, no matter how robust its program otherwise is." *McLerran, supra,* at * 7. The context makes clear, however, that the Court's was not, as Plaintiffs suggest, referring to the situation where particular TMDLs have been deferred

[1] Plaintiffs (Br. at 8 & 16) mischaracterize an attachment to an email from an EPA employee to several other EPA and WVDEP employees that included a "draft list of bulleted action items" for further discussion after an initial meeting. A.R. 1st & 2nd Claims Doc. 14-00 & 14-01. The attached document, after first calling for further discussion, states only in relevant part that: "Schedule dates for ionic strength TMDLs included in draft 2010 IR. Goal will be to have all completed at end of 2013." *Id.* Doc. 14-01. This isolated email does not set a schedule, let alone an enforceable deadline.

and reprioritized to a later date, but rather where a State publically renounces its obligation to produce the TMDL at issue. *Id.* Finally, the constructive submission standard enunciated in *McLerran* fully undermines the theory Plaintiffs' posit for an express, actual "no" submission of DEP's merely deferred and rescheduled TMDLs. *Id.* at * 7. The *McClerran* Court explained that "[a] constructive submission occurs only when a state has clearly and unambiguously abandoned its obligation to produce a TMDL or TMDLs. * * * It does not occur merely because a state has prioritized one TMDL over another."

2. Plaintiffs Have Mischaracterized the Relevant Facts, Which Do Not Constitute an Actual Submission of No TMDLs

None of the three statements Plaintiffs identify from its search of the record reflect an express, or implied, renunciation by DEP of its obligation to establish the deferred TMDLs. Plaintiffs' contention that DEP's plan to "postpone" ionic toxicity TMDLs must be construed in light of words on a slide in a PowerPoint presentation: "Do Nothing!" (A.R. 1st & 2nd Claims Doc. 103-01 at 9; Plaintiffs' Br. at 15 & 20) mischaracterizes that slide. The slide was prepared by EPA's contractor, not DEP, and it is the ninth of forty-two slides in a presentation titled "WV Ion TMDL Endpoint Analysis" that was part of joint efforts by EPA and DEP to establish pilot ionic toxicity TMDLs. The slide is entitled "Environmental Covariates," a statistical concept. A.R. 1st & 2nd Claims Doc. 103-01 at 7. On its face, the slide refers to a decision not about whether to establish TMDLs for ionic toxicity, but rather a decision about how to address possible environmental covariates (i.e., "do nothing" about the covariates) when determining the TMDL endpoint. The remainder of the presentation discuss various specific covariates and confounding factors, and the final slide discusses what further analysis may be needed. A.R. 1st & 2nd Claims Doc. 103-01 at 42.

The second and third statements identified by Plaintiffs likewise fail to establish actual

submissions of no TMDLs. These statements consist of DEP's explanation that work on ionic toxicity TMDLs would be "suspended" due to the passage of SB 562. A.R. Monongahela River Doc. 32 at viii; A.R. West Fork River Watershed, Doc. 33 at viii. Even standing alone, the term "suspended" does not mean abandoned, but connotes a temporary stoppage. And DEP's use of that word in context, in the same sentence, makes this unmistakably clear: "WVDEP has also suspended biological impairment TMDL development pending receipt of legislative approval of the new assessment methodology." A.R. Monongahela River Doc. 32 at viii.; A.R. WF River Doc. 33 at viii (emphasis added). Similarly, in response to comments on the ionic toxicity TMDLs in the West Fork River watershed, DEP explained that: "TMDL development has been paused with the passage of SB 562 because it potentially changes the basis for determining impairment and requires a new assessment methodology to be presented to the West Virginia Legislature prior to its implementation." A.R. WF River Doc. 33 at 90 (emphasis added).

Nothing in these statements remotely suggests that DEP has abandoned, expressly or otherwise, these TMDLs for ionic toxicity. Indeed, DEP is proceeding to develop the necessary new assessment methodology that, once approved, would be a basis for identifying TMDL endpoints. Moreover, as already explained, DEP in its 2014 Report has prioritized these TMDLS, setting a schedule for when they will be completed.

Plaintiffs argue that, just as EPA determined it should add impaired waters to DEP's 2012 Section 303(d) list when DEP declined to do so because of SB 562, the Court should find that EPA should establish ionic toxicity TMDLs. Plaintiffs' simplistic comparison is wholly inapt, ignoring fundamental legal and factual differences between the listing of impaired waters and establishment of TMDLs. Determining whether to identify a waterbody as impaired requires an evaluation of whether "existing and readily available" data indicates that waterbody is meeting its applicable water quality standards. *See generally* A.R. West Virginia 303(d) Lists

Doc. # 20 at 13-18 & Doc. # 23; 40 CFR 130.7(b)(5). TMDL development begins *after* impairment has been determined. A glance at the summary of the technical work provided in any of the TMDL reports at issue in this case demonstrates that TMDL development involves a different set of activities, requiring far greater data and information, technical analysis and policy judgment, and resource investment. In the Section 303(d) list context, EPA made a reasonable technical determination that there was sufficient existing information to identify impairments and took action. Moreover, because Section 303(d) lists are developed by the State and submitted to EPA every two years, 40 C.F.R. § 130.7(d)(1), DEP had the opportunity to reassess EPA's impairment determinations upon completing the new methodology pursuant to SB 562. With respect to TMDLs, DEP explained that existing information was simply not adequate to complete ionic toxicity TMDLs for these waters and that development of the new methodology pursuant to SB 562 was likely to impact how TMDLs would be developed, warranting their deferral. In contrast to the every-two-year listing cycle, States are required to submit TMDLs only "from time to time," 33 U.S.C. § 1313(d)(3), "in accordance with the priority ranking," *id.* § 1313(d)(1)(C), and thus States possess significant discretion in prioritizing which and when particular TMDLs are to be developed.

Given these factors, and the flexibility afforded States to make prioritization decisions, DEP's TMDL deferral decision is precisely the type of technical judgement by an expert agency that is entitled to significant deference. Similarly, EPA's approach here – determining that it had a reasonable basis to add waters to the State's 303(d) list, but that the State's deferral decision in the wholly different TMDL development context did not constitute an actual, or constructive, submission requiring EPA approval or disapproval – is rational and warrants deference. In sum, EPA's action to list waters in West Virginia's 2012 Section 303(d) list in no

way suggests that there has been an actual, or constructive, submission of "no" TMDLs.[2] If anything, EPA's action on the 2012 303(d) list shows that where EPA in its legal and technical judgment determined it was appropriate to act, it did so without any need for court intervention.

Plaintiffs' actual submission claim, built upon their misreading of *American Canoe Ass'n*, and mischaracterizations of the record, is legally and factual flawed, and should be dismissed.

C. There Has Not Been a Constructive Submission of "No" TMDLs for Ionic toxicity

1. The Act and Case Law Do Not Support Invocation of the Constructive Submission Theory on the Facts Here.

DEP has a robust TMDL program, and it has submitted 1,546 TMDLs for nearly 1,000 separate waterbodies in the six watersheds at issue in this case. In this context Plaintiffs' invocation of the constructive submission theory -- to dictate the priority and timing of when a narrow subset of TMDLs (those addressing ionic toxicity) that have not yet been completed -- depends on a novel, and untenable, reading of the CWA and the applicable caselaw that would expand the constructive submission theory well beyond the limited circumstances in which it applies. The constructive submission theory is inapplicable where, as here, the State has a robust

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[2] The decision in *Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993), illustrates this disconnect in Plaintiffs' argument:

> The EPA has disapproved Minnesota's most recent WQLS list [i.e., 303(d) list] and has developed its own . . . . Minnesota has identified TMDLs that it believes should receive the highest priority, it has initiated work on developing those TMDLs, and has implemented some TMDLs. Although Minnesota and the EPA may not be implementing TMDLs as quickly as plaintiffs would like, the Act does not set deadlines for the development of a certain number of TMDLs. The Act instead requires the development of TMDLs 'in accordance with the priority ranking' of the WQLS list. 33 U.S.C. § 1313(d)(1)(C). A finding of a constructive submission of no TMDLs would therefore be inappropriate on this record.

TMDL program, has already established thousands, though not all, TMDLs, and has expressly acknowledged its obligation to complete the remaining TMDLs.

The Ninth Circuit explained in *San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002), that the doctrine was created by the courts to address the narrow situation in which a State has submitted no TMDLs at all for a prolonged period of time, *id.* at 881 (i.e.,"a complete failure by a state to submit TMDLs"), and this State inaction is "construed as a constructive submission of no TMDLs, which in turn triggers the EPA's nondiscretionary duty to act." *Id.* The theory is thus necessarily narrow, applicable "only when 'the state fails to submit any TMDLs and has no plans to remedy this situation.'" *Baykeeper*, 297 F.3d at 882 (quoting *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984)). Accordingly, in *Baykeeper,* the Ninth Circuit concluded that California's actions, having submitted at least eighteen TMDLs and having a plan for the rest "preclude any finding that the state has 'clearly and unambiguously' decided not to submit any TMDLs." *Id.* at 883

The *Scott v. City of Hammond* case concerned TMDLs for all of Lake Michigan, and it arose in a context where two States, Illinois and Indiana, submitted no TMDLs at all over a prolonged period. 741 F.2d at 996-97. In that circumstance the Court decided only that it was possible for a constructive submission to occur. *Id.* The Court explained constructive submission requires a finding "that the states have determined not to submit TMDL proposals," *Id.* at 997 n.11, which would not be the case if there are "reasons . . . which may justify the states' failure to submit TMDL's" or if "the states are, or will soon be, in the process of submitting TMDL proposals or that some factor beyond the scope of the complaint has made TMDL submissions impracticable" *Id.*

In *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001), the Court concluded that the constructive submission theory "is necessarily a narrow one," *id.* at 1024, and that it may occur

"[o]nly upon this determination that the states' inaction was so clear as to constitute a 'constructive submission' of no TMDLs." *Id.* at 1023. The State's decision to renounce its obligation must be "clearly and unambiguously express[ed]" by its actions, *id.* at 1024, but where the State "has submitted a number of TMDLs and is making progress toward completing about 1500 TMDLs over a twelve-year period . . . a constructive-submission claim is not viable." *Id.*

In sum, at least three key elements must adhere before courts will find a constructive submission. First, a State's abandonment of its obligation to submit TMDLs must be widespread and prolonged, and it must be clear and unambiguous. Second, it must be clearly established that the State has no intention or plan of ever remedying that situation. Third, a necessary corollary of these requirements is that the constructive submission theory is not available as a means to alter or challenge a State's priorities by which particular TMDLs should be established. *Hayes*, 264 F.3d at 1024 (the "constructive-submission theory is not designed to challenge the timeliness or adequacy of the state's TMDL submissions . . . ."). *See also Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D.Minn.,1993) (claims that some TMDLs will not be established quickly enough does not create a constructive submission because "the Act does not set deadlines for the development of a certain number of TMDLs.").

Plaintiffs contend that the district court in *McLerran*, 2015 WL 1188522, rejected EPA's interpretation that constructive submission is a narrow theory. But as already noted, in that case the court found that a constructive submission had not occurred where a TMDL had not been established for nearly 20 years and the State had not yet set a schedule for its completion. *Id.* at *10. That court's dicta, discussing hypothetical circumstances in which the theory might apply, are simply beside the point. Moreover, in *McLerran*, the court found that a lack of adequate information to develop the relevant TMDL precluded a finding of constructive submission, i*d.* at

*10, and that a constructive submission "does not occur merely because a state has prioritized one TMDL over another." *Id.* at *7.

In sum, there is no support for Plaintiffs' attempt to use the constructive submission theory to prioritize a particular subset of TMDLs above all others. To rule otherwise would allow an actual, or constructive, submission theory to dictate a State's schedule for issuing particular TMDLs, thereby usurping State authority, disregarding the CWA's "from time to time" and "priority" setting language, and opening the courts to lawsuits whenever a party is dissatisfied with a State's pace or priority setting for establishing particular TMDLs.

2. A Constructive Submission Has Not Occurred for the Relevant TMDLs.

Even were the Court to apply the constructive submission theory to the TMDLs at issue here, no constructive submission has occurred. DEP has an ongoing, robust program for establishing TMDLs, having submitted over 4,000 TMDLs to EPA since 2004. For the waters within the six watersheds at issue here, DEP has most recently established 1,546 TMDLs and plans to establish more TMDLs in the future for these and other waters. *See* Supp. A.R.WV 303(d) Doc. 53. And for the particular ionic toxicity TMDLs at issue here, DEP fully explained why those TMDLs should be deferred, and has established projected completion dates. Although developing the required rules and new assessment methodology required by SB 562 has taken DEP longer than it initially anticipated, that process is well underway.

These circumstances do not form the basis for finding a constructive submission of no TMDLs. Even where States have submitted far fewer TMDLs, the courts have declined to find a constructive submission. *See Baykeeper*, 297 F.3d at 882-83 (and citing cases). And where the theory has been found to apply, the State has submitted no TMDLs at all, or only a very few, over a prolonged period of time and had no intention of remedying that situation. *E.g., Kingman Park Civic Ass'n v. EPA*, 84 F. Supp. 2d 1, 6 (D.D.C. 1999) ("An eighteen-year failure to

calculate and submit any TMDLs constitutes constructive – if not outright – determination that no TMDLs are necessary."); *Alaska Center for the Environment v. Reilly*, 762 F. Supp. 1422, 1426-27 (W.D. Wash. 1991) (failure to submit any TMDL for over ten years was constructive submission).

Plaintiffs rely upon the same mischaracterization of documents to support their constructive submission claim as their actual submission claim, and for the reasons already discussed those assertions lack merit. Plaintiffs further argue that DEP may in the future delist some waters as impaired for ionic stress based upon the new assessment methodology it is preparing, that this is DEP's true intent, and that this possibility constitutes a constructive submission. Because Section 303(d) lists are submitted every two years, the listing status of waterbodies may change based upon new information or analyses. And when they do change, EPA's approval or disapproval of such actions, 33 U.S.C. § 1313(d)(2), is subject to judicial review. Plaintiffs' speculation does not support a finding of constructive submission of no TMDLs. Plaintiffs' constructive submission claim has no basis in law or fact and should be dismissed.[3]

[3] Were the Court to find an actual or constructive submission of "no" TMDLs, Plaintiffs are still not entitled to the remedy they seek. Plaintiffs request that the Court order EPA to develop and establish the deferred TMDLs. The CWA citizen suit provision, however, limits the remedy to "order[ing] the Administrator to perform [the nondiscretionary] act or duty," 33 U.S.C. § 1365(a), here a remand to EPA to approve or disapprove the constructive submission. Only if the Administrator disapproves the constructive submission is the EPA Administrator under a duty to establish a TMDL. *Hayes*, 264 F.3d at 1023; *Scott*, 741 F.2d at 997. Accordingly, imposing a schedule on EPA to establish an ionic stress TMDL is not an appropriate remedy. *See also American Canoe Ass'n v. EPA,* 30 F. Supp. 2d at 922 & n.17 ("the appropriate remedy . . . would appear to be an order directing EPA to approve or disapprove Virginia's constructive submission").

D. Plaintiffs Requested Relief for Their First and Second Claims, Regarding Waters Other than Those Impaired by Ionic Toxicity in the Upper Ohio South, Dunkared Creek, Lower Kanawha, Elk River, West Fork River, and Monongahela River Watersheds, Should be Dismissed.

In addition to not establishing standing, or an actual or constructive submission of "no" ionic toxicity TMDLs, a significant portion of the relief Plaintiffs' request– their request for an order compelling EPA to issue TMDLs for any biologically impaired waters (other than those waters impaired by ionic stress in the six referenced watersheds) – should be dismissed for two additional reasons. First, Plaintiffs' first and second claims for relief in their First Amended Complaint plead claims for relief only with regard to waters within the six referenced watersheds based upon their ionic toxicity. While Plaintiffs request an order compelling EPA to issue TMDLs for an additional 17 waterbodies identified in Appendix A to the Amended Complaint, in the Coal River, Upper Kanawha, and Gauley River watersheds, the Amended Complaint alleges no specific factual allegations or claims for relief regarding those waters. Nor does Plaintiffs' motion for summary judgment assert any claims or argument with respect to DEP's actions constituting an actual or constructive submission for these waters. Thus, even had such claims been pled in the complaint, because Plaintiffs fail to raise such argument in their ,motion for summary judgment, they are now waived and should be dismissed, given that Plaintiffs agreed that this case would be resolved by summary judgment, Joint Report of Rule 26(f) Conference, at 2 (Dkt, No. 25). *See, e.g.,Wild Bainbridge v. Mainlander Services Corp.* 544 F. Supp. 2d 1159, 1167 (W.D. Wash. 2008).

Similarly, the factual allegations in the Amended Complaint and the arguments asserted in Plaintiffs' motion focus exclusively on waters identified as impaired for ionic toxicity. While Plaintiffs request relief as to 396 waters identified in Appendix B of the Amended Complaint, Plaintiffs do not assert either in the Amended Complaint or in their motion for summary judgment that any of the Appendix B waters are biologically impaired due to ionic toxicity. Nor

do Plaintiffs make any arguments regarding these waters in their Summary Judgment Motion. This request for relief, therefore, should be dismissed. *Id.* Finally, to the extent Plaintiffs infer that DEP failed to establish TMDLs for biological impairments other than those caused by ionic toxicity, the record in this case demonstrates otherwise. For example, DEP resolved biological impairments caused by organic enrichment, sedimentation, aluminum toxicity, and pH toxicity through TMDLs for surrogate parameters for 64 waters in the West Fork River watershed. A.R. West Fork River Doc. 33 at 22-24.

III. BECAUSE PLAINTIFF'S THIRD THROUGH EIGHTH CLAIMS DO NOT CHALLENGE FINAL AGENCY ACTION, THIS COURT LACKS AUTHORITY TO REVIEW THEM AND SHOULD DISMISS THOSE CLAIMS

Plaintiffs' frame their third through eighth claims for relief as APA challenges to EPA's approval of 1,546 TMDLs completed by the State for such pollutants as selenium, iron, aluminum, manganese, chlorides, pH, and fecal coliform for nearly 1,000 waterbodies within the six watersheds. Plaintiffs, however, take no issue with the TMDLs EPA has approved. Rather, under the guise of challenging these final agency actions under the APA, Plaintiffs re-state their discredited challenge to the State's deferral of ionic toxicity TMDLs until a later time. As set forth above, the State's deferral of those TMDLs does not constitute an actual or constructive submission requiring action by EPA. Similarly, EPA's approval of the submitted TMDLs does not constitute a final agency action by EPA on the deferrals and thus is not judicially reviewable. Petitioners may not obtain judicial review of EPA's mere acknowledgment of the deferral by bootstrapping their challenge to distinct EPA approvals of 1,546 TMDL submissions.

A. Standard for Determining Whether Agency Action Is Final

Judicial review under the APA is limited to "final agency action." 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other

adequate remedy in a court are subject to judicial review."). If the challenged agency action is not final, as is the case here, the Court lacks authority to review it. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 857 & 862 (4th Cir. 2002). Finality is a "threshold question[]" that determines whether judicial review is available. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006).

The Supreme Court has explained that, with regard to finality, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Two conditions must be satisfied for agency action to be "final." *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process" and "must not be of a merely tentative or interlocutory nature." Id. (citation omitted). Second, the agency action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (citation omitted).

This finality requirement is necessarily assessed on an issue-by-issue basis, because an action may be final as to a particular issue or problem but not another. *E.g. Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 638 (6th Cir. 2004) (interpreting the same opinion letter as final for one issue in the case, but not final for another). "A decision by an agency to defer taking action is not a final action reviewable by the court." *American Petroleum Institute v. EPA*, 216 F.3d 50, 68 (D.C. Cir. 2000). There also is no final agency action in an analogous situation where an agency issues some, but not all, regulatory action in an area, because "an agency's failure to regulate more comprehensively [than it has] is not ordinarily a basis for concluding that the regulations already promulgated are invalid." *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 287 (D.C. Cir. 1988). "Likewise, an agency's pronouncement of its intent to defer or to engage in future rulemaking generally does not constitute final agency action reviewable by

this court." *In re Bluewater Network*, 234 F.3d 1305, 1313 (D.C. Cir. 2000). It is thus a well-established tenent of administrative law that an agency's decision to defer the completion of a particular regulatory action is not final agency action and thus not subject to judicial review.

B. EPA's Acknowledgment of the State's Deferral of TMDLs Addressing Ionic Stress Neither Concluded the Decisionmaking Process Nor Established Rights or Obligations.

EPA's acknowledgment that the State has deferred the completion of ionic stress TMDLs is but one step taken by EPA, and the DEP, within the broader scope of these agencies' ongoing efforts to ensure that the outstanding TMDLs for the relevant waterbodies are ultimately submitted by the State and reviewed by EPA. Although Plaintiffs disagree with the State's deferral decision, this step does not mark the "consummation" of the State's proceedings to complete those particular TMDLs. And EPA's acknowledgment of the State's deferral neither concludes EPA's oversight of the State's development of these TMDLs nor does it constitute EPA's final action to approve or disapprove those TMDLs once completed by the State. The deferral of the TMDLs and EPA's acknowledgment is at best an interlocutory step in the ongoing TMDL process, and thus not subject to review. See Bennett v. Spear, 520 U.S. at 177-78.

The situation here is similar to that in *Portland Cement Association v. EPA*, 665 F.3d 177 (D.C.Cir.2011) (per curiam), where environmental groups challenged EPA's failure to regulate greenhouse gases from cement facilities as part of a final action that established standards for other pollutants from cement plants. *Id.* at 182. In its explanation of its action, EPA stated that it did "not yet have adequate information about greenhouse gas emissions to set a standard," and that it was "working towards a proposal for greenhouse gas standards," which it would issue

after obtaining additional information. *Id.* at 184. The D.C. Circuit held that this deferral was not final agency action and thus was not subject to judicial review,[4] because these "explicitly tentative and conditional statements—which expressed certainty only as to EPA's decision to continue the process of studying greenhouse gases" could not "possibly be considered 'final.' " *Id.* at 193. Here, DEP's decision to defer ionic toxicity TMDL development is likewise a decision to continue the process of obtaining additional information and, thus, does not constitute final agency action. By the same token, EPA's mere acknowledgment of that deferral is non-final.

Moreover, DEP's deferral, and EPA's acknowledgment of that deferral, has not fixed or changed legal obligations. *See Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). For this reason, just as "[a] decision to defer has no binding effect on the parties or on EPA's ability to issue a ruling in the future." *Am. Petroleum Inst.*, 216 F.3d at 69, EPA's acknowledgment of that deferral has no binding effect.

Plaintiffs raise a number of reasons why they disagree with the State's deferral of the particular TMDLs at issue and EPA's acknowledgment of that deferral. That Plaintiffs disagree, however, does not make that deferral and EPA's acknowledgment of it a final agency action, and it does not establish a right to judicial review at this time.

C. The Discretion Afforded States to Set Their Priority Ranking for Developing TMDLs Confirms that EPA's Acknowledgment of the State's Deferral Does Not Constitute Final Agency Action

DEP's decision to defer development of certain TMDLs constitutes nothing more than a

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[4] The Clean Air Act provides for judicial review in the courts of appeals of "final agency action," 42 U.S.C. § 7607(b), incorporating the finality requirement of the Administrative Procedure Act. *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 224 (4th Cir. 2001).

modification to its priority ranking, a matter that the CWA has left to the discretion of the States. Although the CWA requires that States establish a priority ranking for completing TMDLs, EPA is not required to approve that prioritization or the State's schedule. The CWA requires that "[e]ach State shall identify those waters within its boundaries . . . * * * [and] establish a priority ranking for such waters," 33 U.S.C. § 1313(d)(1)(A), for purposes of developing TMDLs. *Id.* § 1313(d)(1)(C). The Act, however, requires that each State submit "from time to time" to EPA, for review and approval, only "the waters identified and the loads established" – that is, each of the particular waterbodies listed as impaired and each of the TMDLs that a State completes. *Id.* § 1313(d)(2). Thus, the CWA is specific and clear: EPA must review only the Section `303(d) list (the "waters identified") and the TMDLs (the "loads established"). Conspicuously absent from Section 303(d)(2) is any mention of EPA approval or disapproval of States' priority rankings for establishing TMDLs. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally-presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

Accordingly, the courts that have reviewed this question have agreed that EPA is not required to review and approve the particular priority ranking States establish for TMDL development. The court in *Potomac Riverkeeper, Inc. v. EPA*, No. 04-3885, 2006 WL 890755, at *10 (D. Md. 2006), explained that "there is no provision that requires EPA to approve or disapprove a state's priority rankings." *Id.* at 10 (footnote omitted). Although in dicta, the district court in *Sierra Club, Inc. v. Leavitt*, 393 F. Supp. 2d 1263, 1273 (N. D. Fla. 2005), *aff'd and rev'd in part; judgment vacated in relevant part,* 488 F.3d 904 (11th Cir. 2007), also declined to intervene and second-guess a State's projected TMDL schedule, because EPA is not required to approve or second-guess the State's particular priority ranking for completing

TMDLs.[5] *See also* A.R. EPA 303(d) List Guidance Doc. 8 at 63 ("EPA will review the priority ranking but will not take action to approve or disapprove it.") (setting out EPA guidance on priority ranking).

This discretion afforded by the CWA for States to set their own priority for developing TMDLs, coupled with Congress' decision not to require EPA review and approval of those scheduling decisions, reflects an intent to give States the flexibility they need in establishing TMDLs. In the course of TMDL development, facts and circumstances will inevitably change, information may prove unavailable and require additional investigation, and competing demands on limited resources among competing TMDL projects may arise. An opportunity for judicial review simply does not arise whenever these or other relevant factors prompt a State to adopt one TMDL schedule over another, or to modify its schedule by deferring and rescheduling certain TMDLs.

Plaintiffs should not be permitted to accomplish through the backdoor -- alleging EPA's acknowledgment of the State's deferral is a final agency action -- what they cannot do directly through the front door in a challenge to DEP's prioritization decisions.

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[5] Specifically, the district court explained in pertinent part that:

> No requirement is present that EPA approve the [States'] rankings. Importantly, in its Decision Document, while the EPA specifically approves or disapproves [the State's] decision to list, not list, or delist waters, the section discussing prioritization does not "approve" or "disapprove" [the State's] ranking; it merely concludes that Florida did, in fact, rank its waters and set a TMDL schedule accordingly.

Leavitt, 393 F.Supp.2d at 1273. On appeal, the Eleventh Circuit concluded that plaintiffs did not actually challenge the State's priority ranking for completing TMDLs, and thus the court of appeals did not address that issue and vacated district court's summary judgment on that claim. 488 F.3d at 917-18. Nevertheless, the district court fully examined, and properly addressed, this issue.

IV. EVEN IF EPA'S ACKNOWLEDGMENT OF THE STATE'S DEFERRAL CONSTITUTED FINAL AGENCY ACTION, THAT ACTION SHOULD BE UPHELD

A. Plaintiffs' Challenges Regarding DEP's Deferrals of TMDLs for Ionic toxicity for Waters in the Lower Kanawha River, Elk River, and Monongahela River Watersheds are Barred Because Plaintiffs Failed to Raise their Concerns During the Relevant Administrative Proceedings.

It is "inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved." *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994); *see First Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1088 89 (4th Cir. 1969). Thus, a plaintiff challenging agency action is barred from raising issues that it could have raised in comments at the appropriate time, but failed to do so. *Pleasant Valley Hosp.*, 32 F.3d at 70.

Plaintiffs had the opportunity to, but did not submit comments to DEP regarding DEP's statements in its draft reports deferring ionic toxicity TMDLs for waters in the Lower Kanawha River, the Elk River, and the Monongahela River watersheds. Plaintiffs, therefore, are barred from challenging EPA's alleged approvals of those deferrals for those three watersheds (Plaintiffs' Fifth, Sixth and Seventh Claims for Relief). That Plaintiffs raised their concerns regarding deferrals in other watersheds, in those separate administrative proceedings, does not cure the bar applicable here. If anything, it underscores that their claims regarding these watersheds are waived.

B. EPA Reasonably Construes the CWA to Preserve State Discretion to Submit Some TMDLs for a Particular Waterbody or Waterbodies First While Deferring The Submittal of Other TMDLs for Those Waters for Another Time

Plaintiffs contend that EPA's alleged final action approving the State's deferrals should be set aside because, "[b]y undertaking the TMDLs for the streams at issue, DEP committed

itself to develop TMDLs for the waters as a whole," and that this alleged requirement that all TMDLs for waterbodies be established simultaneously applies "as a matter of law." Pl. Br. at 38. Plaintiffs' interpretation is inconsistent with the terms of the CWA, EPA's regulations, and the caselaw, and adopting it would represent a significant and counterproductive departure from the discretion States and EPA need to efficiently and effectively prioritize TMDL development.

1. The Act, Relevant Regulations and the Case Law Support EPA's Interpretation that States Are Not Required to Submit All TMDLs for a Particular Waterbody Simultaneously

Under the CWA, each TMDL is designed to address the permissible loading for a particular waterbody for only a single pollutant. Because a waterbody may be listed as impaired on a State's 303(d) list for multiple water quality standards, multiple TMDLs addressing different pollutants may be necessary for the same waterbody. But in each circumstance, each TMDL still addresses only a specific pollutant. Nothing in the Act, EPA's regulations, or the caselaw requires that States submit all TMDLs for the same waterbody simultaneously.

EPA resolved this issue when it set out the basic operation of the TMDL program in binding regulations promulgated in 1985, where EPA confirmed that a TMDL consists of loads of a single pollutant, rather than multiple pollutants to a particular waterbody. For example, EPA initially proposed for comment a definition of "TMDL" as follows: "– The total loadings of pollutants and natural background for a receiving water which will meet all applicable water quality standards." 47 Fed. Reg. 46,671/col. 3 (Oct. 19, 1982) (proposed § 130.2 Total maximum daily load (TMDL)). A commenter raised a concern that this proposed language might be construed as requiring a single TMDL to allocate multiple pollutants. EPA accordingly clarified its regulations, as follows:

> One commenter suggested that the definition of TMDL was not clear because referring to "total loadings of pollutants" implies that a TMDL should cover several pollutants. We revised the definition to clarify that a single TMDL covers only one specific pollutant or one property of pollution, for example, acidity, biochemical oxygen demand, radioactivity, or toxicity. Thus, more than one TMDL may be required for a segment where there may be violations of more than one criterion in the applicable [water quality standards].

50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). Thus, in the final definition of TMDL, EPA clarified and resolved this issue by omitting the phrase "total loadings of pollutants" and making other corresponding changes. Id. at 1780. In this manner, EPA established that each TMDL addresses only one pollutant for the applicable water quality standards for a particular waterbody. EPA's interpretation of its own regulation is controlling. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (the agency's interpretation must be given "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'")

Because Plaintiffs have not in their complaint challenged EPA's regulations, they cannot challenge them now. And even had they pled a challenge to EPA's regulations, such a challenge is time-barred. 28 U.S.C. § 2401(a).

Moreover, EPA's interpretation is reasonable and supported by the CWA text and caselaw and should thus be upheld. Under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), unless Congress "has directly spoken to the precise question at issue," *id* at 842, "the question for the court is whether the agency's answer [to an ambiguous statutory provision] is based on a permissible construction of the statute." *Id.* at 843. If the statute is susceptible to more than one interpretation, the court must accept the interpretation chosen by the agency if it is reasonable. *Id.* at 845.

The courts have long understood that a TMDL is a waterbody-specific and pollutant-specific calculation. *See, e.g., San Francisco Baykeeper v. Browner,* 146 F. Supp. 2d 991, 995

(N.D. Cal. 2001), *aff'd*, 297 F.3d 877 (9th Cir. 2002) ("The TMDL calculation must be made on a waterbody-specific and a pollutant-specific basis wherever a pollution problem has been identified and other regulatory approaches are not resolving the problem"); *see Sierra Club v. Meiburg,* 296 F. 3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of *that* pollutant in *the* waterbody to which *that* TMDL applies") (emphasis added).

EPA's interpretation is reasonable, consistent with the Act and deserves deference under Chevron. Certainly nothing in the Act precludes EPA's interpretation, and Plaintiffs have failed to demonstrate otherwise.

In addition, nothing in the CWA's text or context requires that all TMDLs for a particular waterbody be established simultaneously. As explained, the Act requires only that States establish TMDLs "from time to time," 33 U.S.C. § 1313(d)(2), "in accordance with the priority ranking," *id* § 1313(d)(1)(C), and then requires only that the State's prioritization for TMDL development take into "account the severity of the pollution and the uses to be made of such waters." *Id.* § 1313(d)(1)(A). The reference to pollution and uses of the waters, together with discretion to submit TMDLs "from time to time" affords States the flexibility to consider each pollutant separately within the same water (i.e., the specific waterbody segment) when setting their priorities and establishing TMDLs. Likewise, EPA's longstanding guidance for prioritizing and scheduling TMDL development, discussed *supra* at 6-7, also anticipate that States may consider the different pollutants and TMDLs for the same waterbody, and each of their different circumstances, including the need for information. This further confirms that State's need not establish all TMDLs for a single waterbody at the same time.

Finally, the caselaw fully supports EPA's interpretation. In *Dioxin/Organochlorine Center v. Clarke,* 57 F.3d 1517 (9th Cir. 1995), the plaintiff criticized a TMDL approved by EPA for a particular waterbody because EPA did not at the same time consider other chemical

pollutants that may impact that same waterbody. *Id.* at 1526. The Court definitively rejected this argument, explaining that "[n]othing in the Clean Water Act requires TMDLs to be established for all pollutants at once." *Id.* at 1524.

To be sure, States have discretion to establish several or even all TMDLs for the same waterbody simultaneously for different pollutants, just as States may elect to proceed on a pollutant-by-pollutant basis. These matters, however, are left to a State's discretion, allowing the State to decide how it may best utilize its limited resources to address the relevant factors based upon the different circumstances that arise, including a situation like that facing DEP, where additional information is needed and a new assessment methodology is being developed. Thus, the fact that DEP has established several TMDLs addressing different pollutants for the same waterbody does not create a statutory requirement that all TMDLs for that waterbody be established together.

Accepting Plaintiffs' interpretation would also lead to absurd and highly counterproductive results. Under such an interpretation, States would be prohibited from establishing *any* TMDLs for a waterbody until they had sufficient information to establish *all* TMDLs for that waterbody. This would mean that where concerns exist with information gaps, needed updates in assessment approaches, or other relevant factors that require deferring the completion of one TMDL for a waterbody, or a type of TMDL for waterbodies in a watershed, a State could not establish any TMDLs for those waters. Such a result would be counterproductive to the Act's basic purposes and would delay the environmental benefits to be gained from issuing many TMDLs that are otherwise ready for development.

2. Plaintiffs Provide No Support for Their Interpretation

Plaintiffs (at 35-39) form their argument almost entirely by quoting, out of context, isolated snippets of the decision in *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210,

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(D.D.C. 2011). Contrary to Plaintiffs' suggestions, the question whether TMDLs must be prepared for all pollutants in a single waterbody simultaneously simply was not presented to the *Anacostia Riverkeeper* court. To the contrary, that court considered only a single TMDL for a single pollutant in a waterbody, the Anacostia River. 798 F. Supp. 2d at 213. (In fact, TMDLs for other pollutants had been prepared at different times for that waterbody.) The issue in *Anacostia Riverkeeper,* however, concerned only whether, for the particular TMDL and particular pollutant at issue, all designated uses for that waterbody in the applicable water quality standards (i.e., the standards for the pollutant at issue), must be considered when setting that TMDL. Based upon the record in that case, the Court concluded that they must be. *Id.* at 228-45; *see also id.* at 234 n.19 (clarifying in a hypothetical the narrow issue resolved, which concerned only a TMDL for a particular pollutant). This case, therefore, provides no support for Plaintiffs' theory that because one or more TMDLs have been establish for certain waterbodies, DEP was required to either establish all TMDLs for those waterbodies at the same time, or delay establishing all TMDLs for those waterbodies.

C. The Step-At-a-time Doctrine Supports the State's Deferral and EPA's Acknowledgment of It

Even were the Court to accept Plaintiffs' "all or nothing" TMDL interpretation, that would not be a basis to disregard the State's deferral of TMDLs for ionic toxicity or overturn EPA's response to it. In order to adapt to the realities of a given situation, agencies are often required to regulate in steps in order to achieve Congressional directives, as the Supreme Court has explained:

> Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at

> them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. *Cf. SEC v. Chenery Corp.* 332 U.S. 194 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.").

Massachusetts, 549 U.S. at 524.

In particular, when a lack of resources, adequate information or existing technical expertise makes it difficult for an agency to achieve its full regulatory mandate in accordance with statutory time requirements, it may accomplish that task in a stepped process. *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 478 (D.C. Cir. 1998); *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1010 (D.C. Cir. 2002) (allowing the agency to regulate in stages in order to address "unresolved technical issues"); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) ("[A]gencies have great discretion to treat a problem partially [and a court] would not strike down [agency action] if it were a first step toward a complete solution."). An incremental regulatory approach is particularly appropriate "against a shifting background in which facts, predictions, and policies are in flux." *Nat'l Ass'n of Broadcasters v. FCC,* 740 F.2d 1190, 1210 (D.C. Cir. 1984).

Given DEP's reasons for the deferral, its unquestionable progress issuing other TMDLS throughout the State, including the waterbodies in the watersheds at issue here, and its schedule for the deferred TMDLs, DEP's approach and EPA's acknowledgment of it is permissible under the step-at-a time doctrine.

D. Even If EPA's Acknowledgment of DEP's Deferral Were Final Agency Action, that Acknowledgment was Reasonable and Should be Upheld.

1. Upper Ohio South River and Dunkard Creek Watersheds

In response to comments expressing dissatisfaction with DEP's decision to defer TMDLs for ionic toxicity for streams in the Upper Ohio South River and Dunkard Creek watersheds, DEP stated in relevant part:

> The biologically impaired streams with ionic stressors pose several TMDL development challenges at this time. * * *
>
> Although WVDEP would prefer to develop TMDLs that are based upon the toxic effect of a causative pollutant, the potential viability of developing TMDLs using a cumulative measure of ionic strength (specific conductance/total dissolved solids) is recognized. The water quality data gaps and scientific uncertainties discussed below are of concern.

A.R. Upper Ohio Doc. 39 at 72-73; A.R. Dunkard Doc. 39 at 77-78. DEP next explained these data gaps and uncertainties, in detail. *Supra* at 12-13 (DEP's explanation). Accordingly, DEP stated that it "believes it prudent to delay TMDL development (as afforded by USEPA guidance) to allow their consideration"; that "WVDEP recognizes that the deferral of TMDLs cannot be indefinite" and that DEP would cooperate with EPA "to ensure the timely development of the deferred TMDLs" and that "WVDEP will consider all viable methodologies to develop the TMDLs, including but not limited to those proposed by the commenter." *Id.*

Plaintiffs ask the Court to substitute their opinion (in the form of an opinion offered during the public comment period by Dr. Bernhardt) for the foregoing technical judgment. Br. at 40-42. Even putting aside the deference owed to expert agencies' technical judgments, Plaintiffs' references to Dr. Bernhard's opinion address only a portion of DEP's concerns, and then do so incompletely. Developing TMDLs is not merely a matter of establishing an instream threshold. EPA's regulations define "total maximum daily load" as the sum of "waste load allocations" and "load allocations." 40 C.F.R. § 130.2(i). Accordingly, TMDL development includes information regarding source contributions. Dr. Bernhard acknowledged this information is needed to develop TMDLs: "'the appropriate course is for WVDEP to identify the specific sources of conductivity for the ionic stress streams and to establish waste load allocations for those sources for total conductivity.'" Pl. Br. at 23 (quoting Plaintiffs' comments). This, however, was precisely the type of information that DEP lacked.

EPA acknowledged DEP's explanation for its deferral, noting that it would "work closely with DEP to develop strategic monitoring plans" needed to develop the deferred TMDLs, and explained that even though a chloride TMDL was established, which "will provide some reductions to address the ionic stress impairment, it is uncertain that the attainment of the chloride water quality criterion alone would resolve the biological impairments." A.R. Upper Ohio Doc. 37 & 38 at 5; A.R. Dunkard Doc. 37 & 38 at 5. EPA was not required to address specifically and resolve the merits of Plaintiffs' comments to DEP when acknowledging the State's decision to defer certain TMDLs to another time. Requiring such a level of scrutiny and explanation by EPA is inconsistent with the CWA, given that EPA does not review and approve State priority ranking decisions. EPA's explanation was reasonable and should be upheld.

2. Lower Kanawha River and Elk River Watersheds

Plaintiffs' (at 42-43) reliance on EPA's March 2011 *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams* (2011 Benchmark), A.R. 1st & 2nd Claims Doc. 189, to challenge EPA's acknowledgment of DEP's TMDL deferral is misplaced. Plaintiffs do not allege they raised these comments on DEP's draft report and deferral statement. As previously explained, Plaintiffs' arguments regarding these watersheds are barred. For the same reason, Plaintiffs' arguments that EPA failed to adequately explain its reasoning must also be rejected.

In any case, the 2011 Benchmark is of only limited relevance to DEP's and EPA's actions in 2012 and 2014. While the 2011 Benchmark presents evidence that there are levels of conductivity associated with ionic toxicity harmful to the benthic macroinvertebrate community, DEP's actions are not inconsistent. Even before the 2011 Benchmark, DEP was identifying waters as impaired by ionic toxicity based on impacts to the benthic macroinvertebrate community. *See, e.g.,* A.R. Dunkard Doc.39 at 12-15; A.R. Upper Ohio Doc. 39 at 14-17.

Furthermore, while the 2011 Benchmark identifies an instream level of conductivity associated with harm to the macroinvertebrate community in certain waters, given the nature of conductivity and the combination of salts that might make up its toxicity, it is appropriate to seek stream-specific and source-specific information on component ionic strength and constituents for TMDL development. Indeed, EPA consulted that document as reference material with its contractor in connection with efforts to develop a pilot ionic strength TMDL, A.R. 1st & 2nd Claims Doc. 189, and significant additional analysis was conducted to identify appropriate ionic toxicity TMDL endpoints. *See* A.R. 1st & 2nd Claims Doc. 38 & 39. In sum, Plaintiffs' claims here are waived, and their reliance on the 2011 Benchmark is a red herring that provides no basis to attack EPA's acknowledgment of DEP's deferral.

3. The Monongahela River and West River Watersheds

In 2012 the West Virginia legislature enacted SB 562, directing DEP to replace its current methodology for assessing the biological health of streams with a new, revised methodology. DEP notified EPA in April 2012 that enactment of SB 562 required that work on biological TMDLs be "postponed" until the new methodology could be developed. A.R. 1st & 2nd Claims Doc. 162. As previously explained, *infra* at 13-14, a different assessment methodology, for example, one that measures the aquatic biological community with a finer resolution, will likely alter the TMDL developed.

In response to DEP's statements in its draft TMDL reports for the Monongahela River watershed, that it was deferring the ionic toxicity TMDLs at issue, EPA commented:

> The draft TMDL states that WV has decided to suspend biological impairment TMDL development pending completion of new regulations as directed by WV SB 562. While SB 562 does not appear expressly to preclude TMDL development, EPA remains hopeful that we can come to agreement on the resumption of the work on these important TMDLs in order to continue progress towards restoration of water quality in the affected impaired streams. To the extent WV is suspending biological impairment TMDL development

> pending adoption of new regulations, presumably including a new assessment methodology, EPA would appreciate WVDEP providing information on the status of regulation development. EPA remains eager to work closely with WVDEP as WVDEP prepares new rules implementing SB 562.

A.R. Monongahela River Doc. 27-01 at 2. In its final TMDL report for the West Fork River watershed, DEP confirmed that "TMDL development has been paused with the passage of SB 562 because it potentially changes the basis for determining impairment and requires a new assessment methodology to be presented to the West Virginia Legislature prior to its implementation." A.R. WF River Doc. 33 at 90. It further explained that the deferred TMDLs for ionic toxicity "will remain on the 303(d) list"; confirmed that TMDLs must be developed for all impairments on the Section 303(d) list; and stated that it "will develop TMDLs as soon as practicable after the accomplishing SB 562 requirements." *Id.* at 89-90.

Plaintiffs contend that the State's enactment of SB 562 is an inadequate basis for deferring TMDL development, that EPA agreed with that position in its comments, and that EPA failed to explain why it added biologically impaired waters to West Virginia's 303(d) list, but allegedly "approved" DEP's deferral of TMDLs. Plaintiffs are incorrect.

As an initial matter, Plaintiffs failed to raise these concerns to DEP regarding the deferred ionic toxicity TMDLs in the Monogohela River watershed, and thus its claims regarding those waters are waived.

In any event, EPA's comments did not, as Plaintiffs contend, object to the State's deferral, or offer a definitive view of the requirements of SB 562. Moreover, as explained *supra* at 24-25, developing a TMDL raises different and more complex issues than merely listing a stream as impaired, and there was no inconsistency in EPA's listing while acknowledging DEP's deferral of TMDLs for ionic toxicity. Nor can EPA be faulted for not providing a fully explanation of the issues Plaintiffs now raise, since Plaintiffs' failed to raise those concerns during the applicable notice and comment period. Even if EPA's acknowledgment of DEP's

deferral was of "less than ideal clarity," on these points, it should be upheld because "the agency's path may reasonably be discerned." *Motor Vehicle*, 463 U.S. at 43. Because EPA's path acknowledging the State's deferral may be reasonably discerned, and was reasonable, it should be upheld.

E. The Margin of Safety Requirement Provides No Basis to Challenge EPA's Acknowledgment of West Virginia's Deferral

Plaintiffs dismiss DEP's explanation that additional information was needed for ionic toxicity TMDL development by pointing to the "margin of safety" component of TMDLs, which, according to Plaintiffs, "takes into account any lack of knowledge." Br. at 45 (quoting portion of 33 U.S.C. § 1313(d)(1)(C)). In this way, Plaintiffs, in effect, ask the Court to issue a declaratory judgment regarding the appropriate contents and sufficiency of a hypothetical "margin of safety" in a yet-to-be established TMDL for ionic toxicity. This, of course, would be inappropriate.

Even so, Plaintiffs' reliance on a TMDL's "margin of safety" component to rebut DEP's explanation for deferring the ionic toxicity TMDLs is misplaced and mischaracterizes the record, the CWA, and the case law. Significantly, Plaintiffs' brief quotes only part of the applicable CWA "margin of safety" provision. As fully stated, a TMDL's "margin of safety" takes "into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C)(emphasis added). *See NRDC v. Muszynski*, 268 F.3d 91, 101-102 (2d Cir. 2001) (upholding EPA's approval of a 10% margin of safety in the amount of phosphorus for a TMDL to account for uncertainty in the relationship between projected phosphorus levels and actual water quality); *Anacostia Riverkeeper,* 798 F. Supp. 2d at 251-53 (incorporating a margin of safety through the use of conservative modeling assumptions). This provision, therefore, provides no support for Plaintiffs' argument that the "margin of safety" can

be stretched to accommodate any lack of information (no matter how much, or how fundamental). *See, e.g., McLerran*, 2015 WL 1188522 at *8 (rejecting a similar "margin of safety" argument because that provision does "not address a lack of knowledge regarding the *source* of the pollutants.") (emphasis in original). Moreover, because the margin of safety concept anticipates providing additional protection (i.e., the margin), it cannot serve as a stand-in for the fundamental lack of information or analyses needed to establish the TMDL in the first place.

Finally, the cases Plaintiffs rely upon are inapposite. In *NRDC v. Fox,* 909 F. Supp. 153 (S.D.N.Y. 1995), the court stated, in dicta, without analyzing the underscored statutory text above, that completing TMDLs with "less than ideal data" may rely upon the "margin of safety" provision. *Id.* at 157. Even then, there is a difference between "less than ideal data" and the absence of fundamental data necessary to establish a TMDL. *Id.* In *Idaho Sportsmen's Coalition v. Browner,* 951 F. Supp. 962 (W.D. Wash. 1996), the court stated generally, again in dicta, that the "margin of safety" provision shows "that a lack of precise information must not be a pretext for delay," *id* at 966. Here, however, DEP did not defer ionic toxicity TMDL development for the waterbodies at issue based on a need for "precise information." Instead, it reasonably deferred those TMDLs until it could develop the methodologies and information about the relevant pollutants and their sources necessary to develop technically sound and defensible TMDLs.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant EPA's cross-motion for summary judgment and deny Plaintiffs' motions for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on February 19, 2016, using the Court's electronic filing system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's system.

/S/ David Kaplan