



# **303(d) Litigation Highlights (2019-20)**

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

# **Listing Cases**

# Recurring Themes in 303(d) List Litigation

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

# Public Comments

- 40 C.F.R. 130.7(a): “The process for ... involving the public, affected dischargers, designated areawide agencies, and local governments in [list and TMDL development] shall be clearly described in the State Continuing Planning Process (CPP).”
- In practice, states’ comment processes usually involve publishing a draft list and taking public comment. They respond to public comment in their final list submission to EPA.
- EPA’s action may be vulnerable when the record contains little or no response to substantive public comments.

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



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

- CBD commented on State's 2016 303(d) list with various studies showing the presence of plastics and microplastics in Hawaii waters.
- State responded that "At this time, the HDOH-CWB will not list microplastics as a pollutant to state waters as the State does not have a numeric criterion specific to microplastics, or an assessment method to interpret its narrative criteria."
- EPA approved without saying anything further on this issue. CBD sued.
- EPA withdrew its approval and requested that the State, within 60 days, "assemble and evaluate all existing and readily available water quality-related data and information related to plastics in Hawai'i waterbodies for which the State received data and information, and submit the results of that evaluation to EPA, including any supporting documentation and, if appropriate, an assessment of whether the waters are meeting the applicable water quality standards...."
- Case is now stayed pending further action by Hawaii and EPA.

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





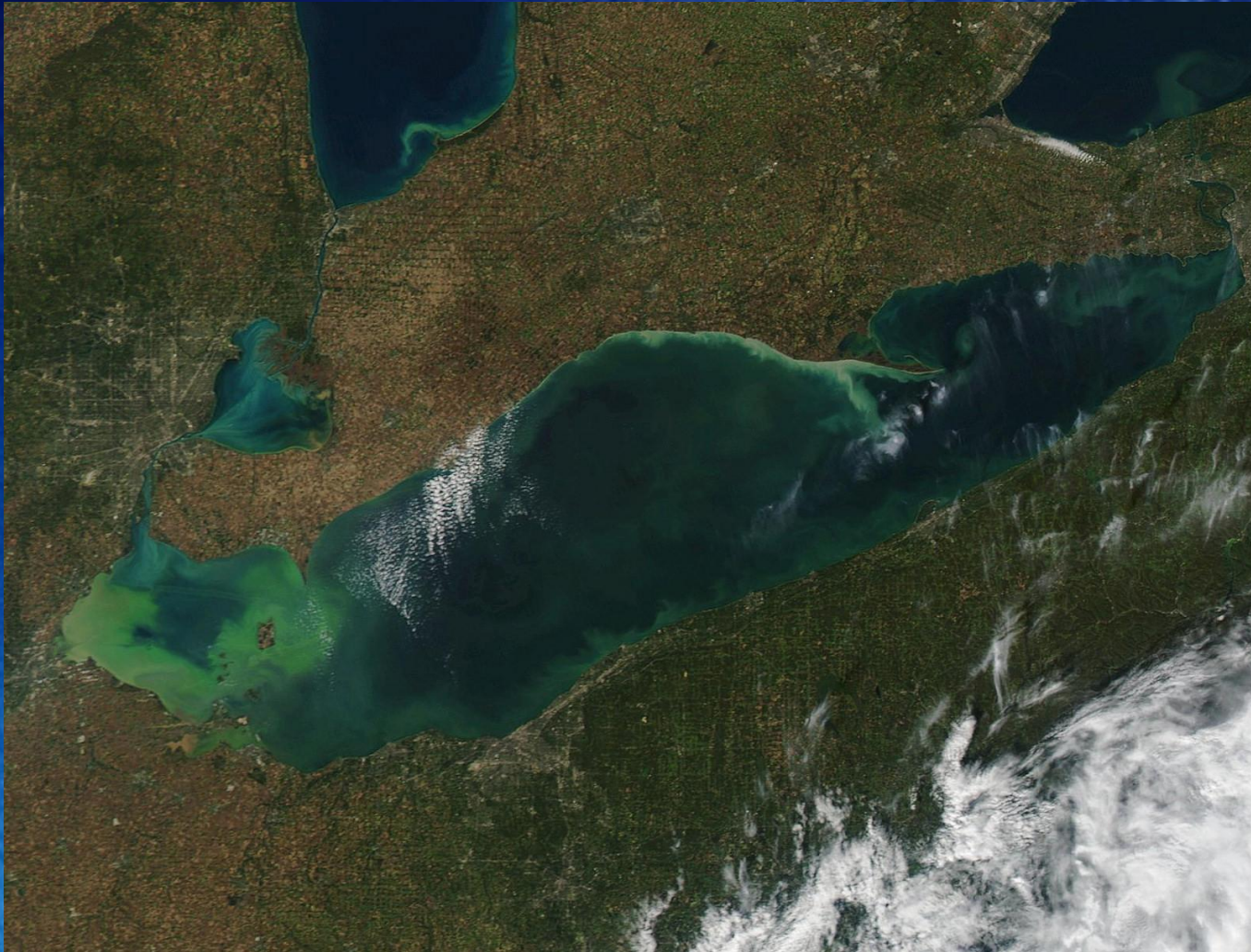
# ***Black Warrior Riverkeeper, Inc., No. 2:19cv344 (N.D. Alabama)***

- Black Warrior Riverkeeper submitted comments critical of Alabama's decision to delist three segments. Riverkeeper raised concerns about (1) "Monitoring Summary" documents generated by ADEM, which had previously concluded that two of the segments were impaired for siltation based on elevated TDS and (2) State's alleged divergence from its assessment methodology for delisting (number of samples).
- ADEM had a detailed response to comments and support for delisting, but didn't speak to the specific technical issues Riverkeeper raised.
- EPA approved without saying anything further on these issues. Riverkeeper sued.
- EPA believed the State's assessment determinations were reasonable, but required further technical analysis in the record, and so we moved for voluntary remand to supplement our record of decision.
- Court delayed a ruling for six months and eventually EPA took a new action on the next list, in which EPA addressed Riverkeeper's specific concerns in more detail.
- Headed for summary judgment briefing.

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

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

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



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

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

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



*Photo Credit: Potomac Riverkeeper*

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

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

# Priority Rankings

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

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

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



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# **TMDL Cases**

# Judicial Constructive Submission Doctrine

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

# Judicial Constructive Submission Doctrine

- CS doctrine generally not applied if there is evidence (even minimal) of past state TMDL activity and plan/schedule to do more.
- *San Francisco Baykeeper, Inc. v. Browner*, 297 F.3d 877 (9<sup>th</sup> Cir. 2002)(18 CA TMDLs plus a schedule).
- *OVEC v. Pruitt*, 893 F.3d 225 (4<sup>th</sup> Cir. 2018)(“not yet” a CS because WV established some TMDLs to mitigate biological impairment and had a “credible” plan to produce others, i.e., an MOA with EPA and schedule; “we cannot conclude that West Virginia has ‘clearly and unambiguously’ refused to submit TMDLs”).

# Constructive Submission, Specific Impairments, Particular Pollutants

## *Sierra Club v. McLerran (W.D. Wash., 2015)*

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

## Columbia River Temperature TMDL –

*Columbia Riverkeeper v. Wheeler*, 337 F.Supp.3d 989 (W.D.Wash. 2018);  
*aff'd* 944 F.3d 1204 (9<sup>th</sup> Cir. 2019); *reh'g denied* (9<sup>th</sup> Cir. 2020)

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

## Columbia River Temperature TMDL - *Continued*

- After disapproving CS based on the court's order and without waiving appeal rights, EPA sought and was granted stay of order to establish.
- EPA appealed to the Ninth Circuit to challenge the CS doctrine directly, arguing the judge-made theory is not supported by statutory text, required standards to waive sovereignty immunity to suit, and federalism principle. Further argues that, even if doctrine is valid, it applies only in the instance of state-wide default, not to specific impairments. Finally, EPA argues that CS has not occurred on the facts of this case.
- The panel rejected each argument, and full 9<sup>th</sup> Circuit rejected EPA request for *en banc* review.
- EPA established TMDL on May 18<sup>th</sup>, comment afterward

# East Fork Armells Creek, MT NOI

- MEIC and Sierra Club allege constructive submission theory applies to TMDLs for various pollutants impairing East Fork Armells Creek, some of which have been on Montana's 303(d) list since 1990.
- Could be 1st post-*Columbia Riverkeeper* lawsuit in the 9<sup>th</sup> Circuit concerning a single-waterbody, and a sign of things to come.
- NOI received 2/25/2020. No compliant filed to date.

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

- Challenge to EPA approval of DC/MD TMDL for trash
- Court held (*Chevron* Step One) terms “maximum” and “load” preclude TMDL expressed as amount of trash captured, prevented from entering or removed from river
- Court followed 2006 D.C. Cir. “daily” load case
- Court stayed its vacatur of EPA’s approval so TMDL remains in effect for permitting purposes until replaced either by DC/MD or EPA
- 2020 NRDC request for one-year deadline for TMDL establishment and discovery against EPA re replacement schedule is pending.



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

- NGOs challenged EPA approval of DC bacteria TMDL
- WQS = 30-day geometric mean: measure amount of *E. coli* in 100 mL of water five times over a 30-day period, multiply those five results by one another, and take the fifth root of that product. The result should not exceed 126 MPN/100 mL.
- EPA: Blue Plains' WWTP "Max daily" load "is not intended—despite its label—to function as a ceiling or limit applicable to discharges.... [b]ut represents an average of the daily maximum loadings expected to occur ... and still achieve the applicable water quality standard."
- Thus, TMDLs provided a variable daily max, depending on *E. coli* discharges on previous 30 days.

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

- Court #1: While a TMDL may lawfully establish different WLAs for different days of a 30-day WQS averaging period, those “known” and “highest possible maximums” must be stated in the TMDL that EPA reviews and approves.
- A TMDL may not be expressed as a “constantly shifting variable that fluctuates based on previous day’s loads.” “[W]inter, spring, summer or fall, the TMDL must still set a maximum daily load known to all.”
- Court #2: Found inadequate legal and record support for EPA’s conclusion that, where there is an existing numeric criterion, it is reasonable to assume that criterion attains the narrative standard and designated uses.
- EPA regulatory language (“[w]hen criteria are met, water quality will generally protect the designated use”) (40 C.F.R. 131.3(b)) means only that, when both the numeric and narrative criteria are met, the designated use will be met. It does not mean that, when the numeric criteria are met, the narrative criteria are also met.

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

- In 2017, district court held EPA approvals of OR watershed TMDLs were unlawful because based on invalid “natural condition” temperature criteria (criteria struck down in different case *after* TMDL approvals; because NCC “supplanted” BBNC, void *ab initio*)
- Also, court held EPA failed to approve as new WQS the TMDLs’ natural condition values which court said had revised the BBNC
- Also, court held EPA approval of TMDLs triggered ESA consultation because approval changed natural condition criteria that was subject to earlier consultation
- In October 2019, court ordered OR and EPA to replace the temperature TMDLs on a rolling schedule between 2023 and 2027.

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

- NWEA challenged EPA failure to approve/disapprove 2015/2017 Deschutes TMDL submissions w/in 30 days; Court ordered EPA to act by June 2018.
- EPA approved 26 TMDLs (temperature); disapproved 37 TMDLs (temperature, sediment, pH, bacteria and DO).
- Subsequently, NWEA challenged EPA's failure to establish 37 replacement TMDLs w/in 30 days; also challenged EPA's approvals on a variety of technical grounds; also challenged EPA's failure to disapprove a constructive submission of no TMDLs for Budd Inlet and Capitol Lake.
- EPA filed answer and administrative record on May 21, 2020.

# Chesapeake Bay TMDL Implementation NOIs

- On May 18, 2020, MD, VA, DC, the CBF and others sent two NOIs threatening to sue EPA for failure to ensure implementation of the 2010 Chesapeake Bay TMDL.
- Main concern is lack of EPA action under TMDL's Accountability Framework to ensure NY and PA fully implement their Phase III Watershed Implementation Plans by 2025.
- NOI claims that Section 117(g) imposes on EPA a mandatory duty to ensure states develop and implement management plans to achieve and maintain goals of TMDL as incorporated in Chesapeake Bay Agreement.

# Gunpowder and Bird Rivers, MD NOI

- Gunpowder Riverkeeper NOI challenged EPA approval of PCB TMDL for the Gunpowder and Bird Rivers in MD.
- NOI takes issue with the TMDL not assigning a baseline load or allocation to PCBs from resuspension and diffusion of bottom sediments (the major source of PCBs in the rivers).
- Model developed by MDE treats water column and sediment as a single system, and exchanges between them as internal loadings.
- NOI letter dated 2/27/2020. No compliant filed to date.



# **The Administrative Record**

Your Turn to “Rise and Shine”

# What is the Administrative Record?

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



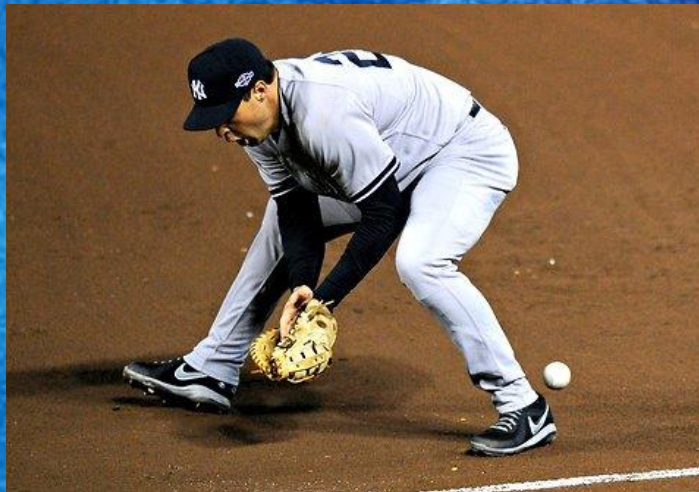
**Who makes the Administrative Record?**



**YOU DO!!!**

# What's the Purpose of the AR

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



# Why is an AR Important?

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

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

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

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

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

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

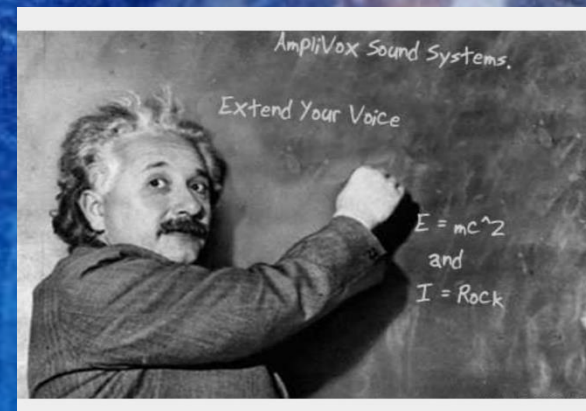
- The impaired and threatened waters still requiring TMDL(s), pollutants causing the impairment, and priority ranking for TMDL development (including waters targeted for TMDL development within the next two years).
- Describe methodology used to develop the List.
- Describe the data and information used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

# Key TMDL Elements to Document in the AR

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

# Golden Rule for Defensible Lists and TMDLs

- Explain your List and TMDL decisions
- Don't just repeat what the list or TMDL says
- Explain **why** the list or TMDL is reasonable and, therefore, why EPA's approval is reasonable
- Show your work!





# Go Beyond your “Checklist”

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

# Explain “Why”

- Don't just make conclusory statements:
  - “The TMDL provides an adequate MOS.”
  - “The TMDL provides adequate RA.”
  - The TMDL target will meet WQS.
- The most important part of your AR is explaining (and supporting with data and facts) why these statements are true.

# Questions to Ask and Answer for Each Element Under Review

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

# Comment Responses Are Crucial

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

# Conclusion

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