

Pace-of-TMDL Litigation Is Back: Judges in Two District Courts Have Endorsed Using Constructive Submission Doctrine on Individual Water Segments

James Meinert[◊]

I. Introduction

The Clean Water Act (“CWA”) has significant teeth for requiring point source polluters to monitor and reduce pollution from their facilities. If a state fails to operate a stringent enough point source permitting program, the federal government steps in and does it for them. In contrast, reducing nonpoint sources of pollution relies on state-initiated watershed planning activities, which are only implemented by voluntary best management practices encouraged along by federal grant funding. If a state makes little progress on the initial watershed pollution assessment activities, the U.S. Environmental Protection Agency (“EPA”) generally cannot step in and operate the program for them. Similarly, the CWA’s citizen suit provision gives individuals and environmental groups significant power to challenge point source polluters, but for nonpoint sources of pollution, citizens can generally only bring judicial review at a few sparse checkpoints where EPA has a non-discretionary duty to review state activity submitted to the agency. If a state structures its activities to delay, or even avoid, hitting these checkpoints for submitting work to EPA, nonpoint source pollution can go unaddressed for decades. For a few years a novel legal theory called “constructive submission doctrine” spurred nonpoint source regulatory activities across the country. That theory fizzled out 20 years ago, but now its back!

In the 1980s and 1990s, a wave of creative litigation placed an additional checkpoint for judicial review *because* little or no activity was occurring to regulate nonpoint sources of pollution. The litigants argued that state non-action was tantamount to a “constructive submission” to EPA that no regulation was needed. EPA then had to approve the no-action determination or disapprove and regulate on behalf of the state. After widespread initial success with these lawsuits, judges stopped allowing constructive submission lawsuits, leading one environmental law professor to declare the theory dead in 2003.¹ In 2015 and 2017, two federal district court judges revived the theory by applying it to specific water segments and specific pollutants, when previously courts had only considered the theory for a state’s entire nonpoint source program—constructive submission litigation is back.

Constructive submission lawsuits were used in nearly every state in the 1980s and 1990s to accelerate the development of total maximum daily loads (“TMDLs”). TMDLs are a planning document at the core of nonpoint source regulation. TMDLs numerically allocate pollution contributions among various sources and provide the framework for reducing total pollution. By forcing states to move forward with TMDL development, these lawsuits gave some teeth to the nonpoint sections of the statute. However, in the late 1990s and early 2000s, courts started limiting the constructive submission theory to situations where a state had truly taken no action in developing a TMDL program. By the late 1990s, all states could point to some kind of TMDL

[◊] J.D., 2017, University of Minnesota Law School; M.P.H., 2017, University of Minnesota School of Public Health; B.A., 2010, Grinnell College.

¹ See James R. May, *The Road to Perdition: The Demise of TMDL Litigation*, in CLEAN WATER ACT: LAW AND REGULATION 317, 319 (ALI-ABA Course of Study Nov. 5-7, 2003).

activity and the theory seemed dead. In the past two years, the U.S. District Courts in the Western District of Washington and the Southern District of West Virginia have, for the first time, held that a state's inaction on a particular water segment and particular pollutant could be a constructive submission triggering EPA's duty to review and bringing the activity under judicial scrutiny. In both cases, the judges allowed these arguments even when the state-wide program was otherwise robust and active. In many states there are particular pollutants, or particular water bodies that are difficult to regulate, whether due to the sheer quantity of sources or the allocation of political power in the state. For these waters and pollutants where state environmental agencies seem to be making no progress towards addressing nonpoint source pollution, there is now a litigation strategy for compelling action. If this theory holds, a second wave of TMDL litigation and activities may be about to breakout across the country.

Part II of this article presents the difference between point source and nonpoint source regulation and the framework for how a functional nonpoint source program operates. Part III provides an overview of constructive submission litigation, how the theory arose and developed. Part IV outlines the two recent constructive submission lawsuits and discusses how they constitute a new development and revival for the theory.

II. Water Pollution from Point and Nonpoint Sources

The current statutory scheme of the Clean Water Acts was created by the Federal Water Pollution Control Act of 1972.² When the CWA was passed, enormous water bodies like Lake Erie had been declared biologically dead, and if a person merely fell off a boat in an urban American river, they would likely need medical treatment.³ Before the CWA, 70% of industrial discharges were completely untreated.⁴ Through decades of rigorous application of the point source permitting program, many rivers and lakes can now support wildlife and recreation. However, state water quality assessments still show that about 54% of rivers and about 71% of lakes are impaired for their designated uses (meaning pollution levels are higher than the applicable water quality standard).⁵ Today's impairments are largely caused by nonpoint source pollution,⁶ with agricultural runoff alone responsible for an estimated 70% of impairments to rivers and streams.⁷ The U.S. Government Accountability Office has noted that given the small number of impaired water bodies that have actually been restored through grant funding, "it

² Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2016)).

³ James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012, 5:20 AM), http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.html.

⁴ William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, J. ENERGY & ENVTL. L., Winter 2013, at 25, 25.

⁵ *National Summary of State Information*, U.S. ENVTL. PROTECTION AGENCY, http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last updated May, 26, 2017).

⁶ The leading cause of impairment for rivers and the second leading cause for lakes is agricultural pollution from pathogens, sediment, and nutrients. *Id.*

⁷ Duke K. McCall, III, *Clean Water Act*, in ENVIRONMENTAL LAW HANDBOOK 329, 357 (Thomas F.P. Sullivan ed., 22d ed. 2014).

would take longer than 1,000 years to restore all the water bodies that are now impaired by nonpoint source pollution.”⁸

a. Point Source Versus Nonpoint Source Regulation

The CWA creates a two-part system for improving water quality in the United States. In section 301, the act prohibits, until permitted, “discharge of a pollutant” to a “navigable water” from a “point source.”⁹ In section 303, the act creates a scheme to encourage the states to regulate all other forms of pollution—generally, nonpoint sources.¹⁰

Point sources of pollution must receive a permit that sets the required pollution control technologies or operational parameters before they can discharge to a jurisdictional water.¹¹ Depending on the source industry or activity, either specific technologies are required based on best practices in the industry, or a general set of best management practices must be followed.¹² After the required technology is determined, additional limitations may be built into permissible emissions levels if the receiving water is already impaired with the pollutant above applicable water quality standards.¹³

Regulation of nonpoint sources begins with a requirement for states to identify all waters where pollution levels exceed an applicable water quality standard. States are only required to promulgate water quality standards “from time to time . . . as appropriate.”¹⁴ But, upon promulgation, the standards must be submitted to EPA for review.¹⁵ When effluent limitations on point sources of pollution “are not stringent enough to implement any water quality standard applicable to such waters,” the state is required to identify the water segment on a list and rank the severity of pollution given the use(s) of the water.¹⁶ This “impaired waters” list must also be submitted to EPA for review. Once a water segment is on the impaired waters list for a specific pollutant, the state “shall establish . . . the total maximum daily load” of the pollutant the water can receive and meet the water quality standard “with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.”¹⁷ At each of these stages—the water quality standard, the impaired waters list, and the TMDL—the state must submit the final document to EPA, and EPA has thirty or sixty days to approve or disapprove the state submission.¹⁸ When EPA disapproves

⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-80, CHANGES NEEDED IF KEY EPA PROGRAM IS TO HELP FULFILL THE NATION’S WATER QUALITY GOALS 2 (2013).

⁹ 33 U.S.C. § 1311(a); *see also id.* § 1342 (regulating discharges from point sources); *id.* § 1344 (regulating discharges of dredge or fill material); *id.* § 1362(12) (defining “discharge of a pollutant” to mean “any addition . . . from any point source”).

¹⁰ *Id.* § 1313(a)–(d).

¹¹ *See id.* § 1311(a).

¹² *See id.* § 1311(b)(1)(A)–(B) & 1311(b)(2)(A).

¹³ *Id.* § 1311(b)(1)(C).

¹⁴ *Id.* § 1313(c)(1).

¹⁵ *Id.* § 1313(c)(2)(A).

¹⁶ *Id.* § 1313(d)(1)(A).

¹⁷ *Id.* § 1313(d)(1)(C).

¹⁸ *See id.* §§ 1313(c)(3)–(4), 1313(d)(2).

of a state submission it has an affirmative duty to promulgate an adequate version for the state to use.

b. Nonpoint Source Programs, TMDLs, and BMPs.

The CWA does not require states to implement a binding regulatory program to reduce nonpoint sources of pollution.¹⁹ For water segments that lack point source polluters—whose permits can be restricted to bring the whole segment within the TMDL—the CWA does not require states to take actions to move these nonpoint pollution impaired waters off the impaired waters list.²⁰ Instead of a regulatory strategy with enforceable mechanisms, EPA and the states must try to reduce pollution from nonpoint sources through a series of voluntary best management practices and grant programs to encourage development and implementation.²¹ Only a few states have developed separate enforceable regulatory mechanisms under state law to create liabilities for nonpoint source polluters.²²

In recognition of the enforcement gap for nonpoint sources in the listing and TMDL process, Congress added section 319 to the CWA in 1987 to require that states identify best management practices (BMPs) to control nonpoint source pollution, and create a program to implement the BMPs.²³ States were given until 1998 to create assessment reports identifying BMPs, and then federal funds were supposed to be available for programs to achieve voluntary uptake of the BMPs.²⁴ If a state does not submit BMP assessment reports or a program plan, the state cannot receive federal assistance grants,²⁵ and EPA is supposed to create reports and plans for the state.²⁶ Since 1999, Congress has been appropriating about \$200 million a year in section

¹⁹ See *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 415 F.3d 1121, 1124–25 (10th Cir. 2005) (“While the CWA requires states to designate water standards and identify bodies of water that fail to meet these standards, nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources.” (internal quotations omitted)).

²⁰ *Id.*; see *TMDL Implementation: Pollutant Source Control Mechanisms*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/wqs-tech/supplemental-module-listing-impaired-waters-and-developing-tmdls> (last updated Mar. 1, 2017) (“TMDLs are not self-implementing under Section 303(d) There is no federal enforcement program for control of nonpoint source pollution. Nonpoint source controls are primarily implemented through State/Tribal and local nonpoint source management programs. Some of these State/Tribal or local programs have regulatory enforcement authority.”).

²¹ ENVTL. LAW INST., *PUTTING THE PIECES TOGETHER: STATE NONPOINT SOURCE ENFORCEABLE MECHANISMS IN CONTEXT 1* (2000), <http://www.eli.org/sites/default/files/eli-pubs/d10-05.pdf> (“[N]onpoint control methods include planning, technical assistance, promotion of voluntary best management practices (BMPs), funding of cost-share mechanisms, and public funding of stream buffers. But these assistance-oriented approaches have not succeeded in preventing pollution of the nation’s rivers and streams.”).

²² *Id.* (“Gradually, states are turning to enforceable mechanisms—including discharge prohibitions, direct enforcement of water quality standards, pollution abatement orders, required operating practices, nuisance and misdemeanor prosecutions, and civil and administrative penalties—to supplement other approaches.”).

²³ Water Quality Act of 1987, Pub. L. No. 100-4, § 316(a), 101 Stat. 52, 52–61 (1987).

²⁴ 33 U.S.C. § 1329(a)–(b).

²⁵ *Id.* § 1329(h)(1).

²⁶ *Id.* § 1329(d)(3).

319 grants to the states. Although by 2011, of the 33,000 waterbodies with primarily nonpoint source pollution and for which TMDLs had been calculated, EPA's grants had led to delisting of only 355 waterbodies from impaired waters lists.²⁷ Furthermore, states have identified nearly 70,000 TMDLs that still need to be developed.²⁸

III. Constructive Submission Litigation

The implementation of BMP programs and the calculation of TMDLs can be a difficult political processes often requiring states to prioritize pollution reduction in sectors that otherwise have no federal requirements. Upon passage of the 1972 CWA, EPA was to publish a list of pollutants suitable for TMDL calculation,²⁹ and then states had 180 days³⁰ to submit TMDLs for their impaired waters list. The agency published its list in December 1978,³¹ but few states took action, and most made little progress through the 1980s and early 1990s.³² In 2000, a federal judge observed that “the TMDL program was consciously neglected by EPA until recent years.”³³

Under the CWA citizen suit provision, there are only two parties that can be sued for alleged violations of the act, “any person” polluting in violation of an effluent limitation in a permit,³⁴ or the Administrator of EPA for failure “to perform any act or duty . . . which is not discretionary.”³⁵ Within the nonpoint source regulatory scheme, EPA's only nondiscretionary duty is to approve or disapprove of an impaired waters list or TMDL within thirty or sixty days of its submission. For years, it seemed that states could simply never submit a TMDL and without an EPA nondiscretionary duty in sight nobody could compel a state to submit one. In 1984, the Seventh Circuit Court of Appeals first found such a nondiscretionary duty for EPA. In *Scott v. City of Hammond*, an individual used the CWA citizen suit provision to challenge inaction that was resulting in raw sewage flowing into Lake Michigan and causing summer beaches closures in Chicago.³⁶ The court reasoned that if the state had not submitted a TMDL for agency review after the original 1979 deadline passed, it “raises the possibility that the states have determined that TMDL's for Lake Michigan are unnecessary.”³⁷ The court held that

²⁷ U.S. ENVTL. PROT. AGENCY, A NATIONAL EVALUATION OF THE CLEAN WATER ACT SECTION 319 PROGRAM 1 (2011), <https://www.epa.gov/sites/production/files/2015-09/documents/319evaluation.pdf>.

²⁸ Edward B. White & Natalia Minkel-Dumit, *Nonpoint Source Pollution Control*, in THE CLEAN WATER ACT HANDBOOK 193, 200 (Mark A. Ryan ed., 3d ed. 2011).

²⁹ 33 U.S.C. § 1314(a)(2)(D).

³⁰ *Id.* § 1313(d)(1)(C).

³¹ Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978).

³² *See, e.g.,* Am. Canoe Ass'n Inc. v. U.S. Env'tl. Prot. Agency, 30 F. Supp. 2d 908, 913 (E.D. Va. 1998) (“In the nearly twenty years that have elapsed since the 1979 deadline, Virginia has never submitted a TMDL or TMDTL for any of its waters, and EPA has never established any TMDL or TMDTL for any of Virginia's waters.”).

³³ *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 539 (S.D.N.Y. 2000).

³⁴ 33 U.S.C. § 1365(a)(1).

³⁵ *Id.* § 1365(a)(2).

³⁶ 741 F.2d 992 (7th Cir. 1984).

³⁷ *Id.* at 997.

“prolonged failure” to submit a TMDL “may amount to the constructive submission by that state” that no TMDL is necessary.³⁸

Following the opinion in *Hammond*, thirty-nine constructive submission lawsuits were filed against EPA in thirty-five states.³⁹ Twenty-seven of those cases resulted in court approved consent decrees or settlement agreements that EPA would establish TMDLs if the state did not meet a prescribed and judicially enforceable schedule. As of 2013, EPA had fulfilled its obligations under consent decrees in eleven states (Ala., Ariz., Cal., Del., Ga., Haw., Kan., Nev., N.M., Ohio, Tenn.) and had outstanding consent decree obligations in sixteen states (Alaska 2 TMDLs; Ariz. 180 TMDLs; Cal. 109 TMDLs; D.C. 70 TMDLs; Fla.; Iowa 200 TMDLs; La. 1151 TMDLs; Miss. 104 TMDLs; Mo. 174 TMDLs; Mont.; Ore. 1153 TMDLs; Pa. 575 TMDLs; Va.; Wash. 38 TMDLs; W. Va. 540 TMDLs).⁴⁰

Constructive submission cases have been successful in establishing a legal duty for EPA to promulgate TMDLs. However, courts only clearly embrace the theory where states have not submitted any TMDLs, and many courts will not find an EPA duty when states have submitted some TMDLs or are otherwise making progress.⁴¹ In a lawsuit over New Jersey’s program, a judge noted that “the standard for constructive submission is stringent, requiring both that a state submit *no* TMDLs *and* have *no* plan to remedy that total failure.”⁴² In 1992, EPA promulgated regulations defining the statutory requirement for submitting impaired waters lists and TMDLs “from time to time”⁴³ as meaning every two years.⁴⁴ While many states continued to ignore these deadlines through the 1990s, today, it cannot be claimed a state has not made any progress.

States and EPA can avoid losing these lawsuits merely by making *some progress* towards listing waters and promulgating a few TMDLs. Even if state and federal agencies can be compelled to develop a TMDL, courts have declined to find the statute goes beyond a duty to calculate the TMDL and have held there is no concomitant duty to then establish TMDL

³⁸ *Id.* at 997–98.

³⁹ *Summary of Litigation on Pace of TMDL Establishment*, U.S. ENVTL. PROT. AGENCY, [<http://web.archive.org/web/20150905120040/http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/lawsuit.cfm>] (last updated Sept. 11, 2013).

⁴⁰ *Id.*

⁴¹ *See* *Hayes v. Whitman*, 264 F.3d 1017, 1022–24 (10th Cir. 2001) (holding constructive submission only applies when “The state’s actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody,” and holding as few as three TMDL submissions was adequate to defeat constructive submission); *Sierra Club v. Hankinson*, 939 F. Supp. 865, 867, 872 n.6 (N.D. Ga. 1996) (finding no constructive submission because Georgia submitted two TMDLs after litigation was commenced, even though neither submission met CWA requirements, and at the current pace Georgia would take over 100 years to make necessary submissions).

⁴² *Am. Littoral Soc’y v. U.S. Env’tl. Prot. Agency Region*, 199 F. Supp. 2d 217, 241 (D.N.J. 2002) (emphasis in original).

⁴³ 33 U.S.C. § 1313(d)(2).

⁴⁴ Surface Water Toxics Control Program and Water Quality Planning and Management Program, 57 Fed. Reg. 33,040, 33,049 (July 24, 1992) (codified at 40 C.F.R. pt. 130.7(d)(1)).

implementation plans.⁴⁵ In a 2013 assessment of TMDL implementation, it was noted that while states have developed nearly 50,000 TMDLs, mostly due to consent decree schedules, only a small fraction had made any progress towards implementation.⁴⁶

IV. The Re-Birth of Constructive Submission Litigation.

a. Sierra Club v. McLerran Applies Constructive Submission Doctrine to an Individual TMDL.

In 2015, the Sierra Club argued that a prolonged delay by Washington State over a TMDL for PCBs in the Spokane River constituted a constructive submission that no TMDL was needed for these pollutants on this river segment.⁴⁷ Based on precedent, it could have been assumed the court would throw out the constructive submission theory as Washington State operated a generally robust state-wide program, under which 1,372 TMDLs had been promulgated since 1999.⁴⁸ The court held as a threshold matter that an EPA duty can arise based on constructive submission of a particular TMDL just as it can for a whole state program.⁴⁹ In this case, the court then evaluated the history of this individual TMDL and found as a matter of fact that Washington had not made a constructive submission that no PCB TMDL was necessary.⁵⁰

Washington listed the Spokane River as impaired for PCBs in 1996, conducted a PCB TMDL assessment in 2003 and 2004, and in 2006 published a TMDL “Water Quality Improvement Plan” labeled “Draft.”⁵¹ The state finalized the draft document in 2011 under the title “Spokane River PCB Source Assessment” and without a section from the draft that had discussed TMDLs.⁵² Concurrent with publication of the final “Source Assessment” document, the state established a “Task Force” to implement a toxics reduction plan. In announcing the task force, the state claimed it was “not currently planning to develop a PCB TMDL with wasteload allocations, but this is still a potential tool for the future.”⁵³ The Sierra Club promptly sued the state alleging the state had abandoned the TMDL when it established the task force and stopped putting resources towards finalizing the TMDL. The Sierra Club characterized this abandonment as a constructive submission that no TMDL is necessary, thus triggering an EPA duty to approve or disapprove of the submission.⁵⁴

⁴⁵ See, e.g., *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002) (finding a TMDL implementation plan is not a required element of promulgating a TMDL, and reversing a district court order that EPA must establish implementation plans in connection with TMDLs mandated by a prior consent decree).

⁴⁶ GOV’T ACCOUNTABILITY OFFICE, *supra* note 8, at 62–63.

⁴⁷ *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at *4 (W.D. Wash. Mar. 16, 2015).

⁴⁸ *Id.* at *7.

⁴⁹ *Id.*

⁵⁰ *Id.* at *9.

⁵¹ *Id.* at *2.

⁵² *Id.* at *3.

⁵³ *Id.* at *3–4.

⁵⁴ *Id.* at *4.

Washington argued that it operates a robust state-wide TMDL program, and that the state has ample discretion to prioritize resources among different TMDLs.⁵⁵ The court declined to adopt either argument. First, the court noted that the state’s continued development of TMDLs in its state-wide program was “relevant but not dispositive in a case concerning failure to submit a particular TMDL.”⁵⁶ Second, the court reasoned that a judicial order to complete a particular TMDL would not violate the state’s general autonomy to prioritize among various TMDL projects.⁵⁷ The court then combined these two conclusions with the basic CWA principle that underlies the *Scott* line of cases—that a state should not be able to frustrate the CWA through inaction:

[A] state’s discretion to prioritize TMDLs over other TMDLs does not remove its ultimate obligation to produce a TMDL for each water pollutant of concern in every 303(d) water segment. In light of this statutory obligation, it would be absurd for the Court to hold that a state could perpetually avoid this requirement under the guise of prioritization; such an administrative purgatory clearly contravenes the goal and purpose of the CWA.⁵⁸

The court concluded that “EPA has a non-discretionary duty to act when a state clearly and unambiguously abandons *a particular TMDL*.”⁵⁹

The court then applied this law to the facts of the Spokane River PCB TMDL. The court concluded that the state’s proffered reasons for delay—data gaps and consultation deficiencies—were sufficient to defeat a finding of constructive submission and the state’s actions “did not clearly and unambiguously indicate its intent to abandon the PCB TMDL.”⁶⁰ Based on these factual findings, the court dismissed Sierra Club’s CWA claims. However, the court did order the state to set a timeline for finalizing the TMDL and held that EPA violated the APA when it approved the “Task Force as an alternative to the TMDL development, . . . [and] extend[ing implementation] over an indefinite period of time without adequate assurances that a TMDL will result.”⁶¹

b. Ohio Valley Env’tl. Coal., Inc. v. McCarthy Applies Constructive Submission Doctrine to a Group of TMDLs for Specific Pollutants.

In 2017, a district court across the country followed the reasoning in *McLarren*—that a state could constructively submit individual TMDLs and trigger an EPA duty. But in contrast, this second court then concluded that the state’s actions did constitute a constructive submission. This follow-on case is the first where a court ordered EPA under a constructive submission theory to either agree that no TMDL was necessary, or step into the state’s shoes and promulgate the TMDL.⁶² In this second case, environmental groups challenged West Virginia’s failure to

⁵⁵ *Id.* at *7.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at *5 (emphasis added).

⁶⁰ *Id.* at *9.

⁶¹ *Id.* at *12.

⁶² *Ohio Valley Env’tl. Coal., Inc. v. McCarthy*, No. 3:15-0271, 2017 WL 600102, at *11 (S.D.W. Va. Feb. 14, 2017) (“[The state] has constructively submitted no TMDLs for biologic impairment to EPA, triggering EPA’s duty to approve or disapprove of the submission.”).

ever promulgate a TMDL for biological impairment from ionic toxicity—despite listing waters for such impairment since at least 2006. Litigation began in 2012 when the state decided to stop “issuing TMDLs addressing biologic impairment regardless of the cause,” whether from ionic toxicity or otherwise.⁶³

In 2010, West Virginia and EPA began a “pilot TMDL for ionic toxicity.” In 2012, the state legislature attempted to block any regulation based on ionic impairment by passing a law to prevent use of the existing methodology for assessing ionic impairment.⁶⁴ Without a valid methodology, the state notified EPA it would stop assessing biological impairments and withdrew from the pilot TMDL program.⁶⁵ EPA partially disapproved West Virginia’s 2012 impaired waters list and EPA conducted the biologic impairment assessments for the state on both the 2012 and 2014 lists.⁶⁶ West Virginia otherwise continued TMDL activities for other pollutants. However, the state agency did not devote any resources or make any plans for developing a new methodology for biologic impairment.

The old biologic impairment TMDLs were not deleted from agency documents, instead the timelines for TMDL development were set as “to be determined.”⁶⁷ The state did not label its suspension of activities as an affirmative determination of no duty to assess or regulate biologic impairment from ionic toxicity. Instead, the state claimed that it would develop TMDLs “as soon as practicable” after a new methodology was promulgated and the state said in 2012 that it “[e]xpected to develop a new methodology in a year’s time.”⁶⁸ However, the state agency did not initiate the development of a new methodology, which under West Virginia rulemaking procedures requires legislative review and is at least a two to three year process.⁶⁹

The District Court followed *McLerran* in characterizing earlier constructive submission suits as “programmatically challenges,” and characterizing this suit as a challenge to individual TMDLs. In looking to the facts in this case, the court observed that “WVDEP is not obliged to produce a TMDL immediately upon the addition of a body of water to a 303(d) List, but it must at least have a plan to complete it.”⁷⁰ The Court acknowledged that the state claimed in its 2014 303(d) list that TMDLs for biologically impaired streams would be completed between 2020 and 2025.⁷¹ However, the Court concluded that the state’s inaction was incompatible with the stated timeframe given the various regulatory and programmatic activities necessary to complete a TMDL in West Virginia. The Court concluded the state’s inaction amounted to a constructive submission:

⁶³ *See id.* at *4.

⁶⁴ *Id.* at *5.

⁶⁵ *Id.* at *5–6 (“WVDEP Secretary Randy Huffman sent a letter to EPA Region III terminating West Virginia’s participation in the pilot project, claiming passage of Senate Bill 562 (“SB 562”) precluded WVDEP from continuing to use WVSCI to determine biologic impairment and therefore WVDEP could not continue to develop a TMDL using WVSCI.”).

⁶⁶ *Id.* at *7.

⁶⁷ *Id.*

⁶⁸ *Id.* at *7–8.

⁶⁹ *Id.*

⁷⁰ *Id.* at *12.

⁷¹ *Id.* at *11.

In light of WVDEP's statements that it will not be producing biological impairment TMDLs and its failure to produce a credible plan to comply with its CWA duties, it has made a constructive submission of no biological impairment TMDLs that triggered EPA's duty under the CWA to approve or disapprove of the submission.⁷²

Along with this ruling, the Court ordered EPA to approve or disapprove of the West Virginia constructive submission within thirty days of the order.⁷³

V. Conclusion

The constructive submission theory creates a checkpoint where EPA has a duty to review inaction within a state's nonpoint source program. This checkpoint allows citizens to bring lawsuits to spur state action on assessing and regulating pollution. The theory initially arose because states were failing to take meaningful action on nonpoint source pollution and thus thwarting the purpose and goals of the Clean Water Act. By the late 1990s and early 2000s, all states had made sufficient progress on their nonpoint source programs that constructive submission theories could not be used to challenge entire TMDL programs. In 2015 and 2017, the theory returned to relevance when two federal district court judges applied the theory to individual TMDLs. Constructive submission is once again a valuable litigation theory to bring state inaction on nonpoint source pollution under judicial scrutiny.

⁷² *Id.* at *13.

⁷³ *Id.* at *19.