No. 17-1430

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OHIO VALLEY ENVIRONMENTAL COALITION, INC.; SIERRA CLUB; WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.; WEST VIRGINIA RIVERS COALITION,

Plaintiffs-Appellees,

v.

SCOTT PRUITT, Administrator, United States Environmental Protection Agency; CECIL RODRIGUES, Acting Regional Administrator, United States Environmental Protection Agency, Region III,

Defendants-Appellants.

On Appeal from an Order of the United States District Court
for the Southern District of West Virginia (Hon. Robert C. Chambers)
Civil Action No. 3:15-cv-00271

BRIEF OF NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL MINING ASSOCIATION, AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Joel C. Beauvais
Claudia M. O'Brien
Stijn Van Osch
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
joel.beauvais@lw.com

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Attorneys for Amici Curiae *National Association of Clean Water Agencies, National Mining Association and National Cattlemen's Beef Association*

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INTERESTS OF *AMICI*

The National Association of Clean Water Agencies ("NACWA") is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

The National Mining Association ("NMA") is the national trade association of the mining industry. NMA's members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The National Cattlemen's Beef Association ("NCBA") is the largest and oldest national trade association representing U.S. cattle producers, representing more than 30,000 direct members and more than 175,000 cattle producers and feeders through its state affiliates.[1]

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[1] No party's counsel authored any part of this brief, and no party or person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

Under the Clean Water Act ("CWA"), states must "from time to time" develop and submit to the U.S. Environmental Protection Agency ("EPA") total maximum daily loads ("TMDLs")—pollution budgets consistent with state water quality standards for waterbodies not currently meeting such standards. EPA must approve or disapprove any TMDLs submitted. Since 2004, the State of West Virginia[2] has submitted to EPA over 4,000 TMDLs, including over 500 since February 2016. Although West Virginia has continued to establish TMDLs for several other pollutants, in 2012 it temporarily paused work on TMDLs specifically focusing on "biological impairment" while it establishes an improved assessment methodology to inform such TMDLs. West Virginia is working on this methodology, is addressing biological impairment through scores of TMDLs for other pollutants, and has set a schedule to complete biological impairment TMDLs between 2017 and 2027.

Despite West Virginia's robust program and its commitment to complete biological impairment TMDLs over the next 10 years, the District Court found that the state had "refused" to develop such TMDLs. The Court held this constituted a "constructive submission" of "no TMDLs" for up to 573 waterbodies and ordered EPA to approve or disapprove this "submission" within 30 days.

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[2] The West Virginia Department of Environmental Protection ("WVDEP") is the state agency in charge of developing and submitting TMDLs.

The decision below is patently incorrect and should be reversed for several reasons. First, the "constructive submission" theory on which the decision is based is contrary to the CWA's text, has no basis in the legislative history, is inconsistent with Congress's allocation of authority to the states in the TMDL program, and is unnecessary in light of other mechanisms to prompt action. This Court should expressly reject this theory and reverse on this ground.

Second, even if the "constructive submission" theory were valid in some narrow circumstances, it does not apply on the facts of this case. Courts have held that a "constructive submission" of a TMDL can be found, if at all, only where a state's failure to develop TMDLs is so pervasive and longstanding that it amounts to a "clear and unambiguous statement" that the state refuses to undertake this duty. Indeed, no Court of Appeals has ever found that a constructive submission actually occurred. The few district court decisions that apply the theory involved extreme circumstances: failures to develop *any* TMDLs over a period of eleven to eighteen years, and no plans to do so. In contrast, several federal courts have found *no* constructive submission where states had far less robust programs than West Virginia. The record demonstrates that West Virginia has an active and extensive TMDL program, has stated its intention to develop biological impairment TMDLs and has adopted and submitted to EPA a schedule to do so. West Virginia's decision to temporarily pause work on one type of TMDL while

developing a new methodology and continuing to submit other types of TMDLs is well within the state's discretion. The District Court misread the case law and misapplied it to the facts of this case. If this Court does not reject the constructive submission theory outright, it should reverse on the grounds that the theory, even if valid, would not apply here.

Finally, the District Court erred in failing to give any weight to EPA's expert judgment about West Virginia's management of its TMDL program. TMDL programs are large-scale, technically complex and resource intensive endeavors. Ionic toxicity—one of the key pollutants allegedly causing biological impairments at issue in this case—presents unique challenges because the relevant science is complex, evolving, and unsettled. EPA—the expert agency charged by Congress with oversight of TMDL programs—concluded that West Virginia's management of its program and its actions related to biological impairment did not amount to a "constructive submission" of "no TMDLs." Yet the District Court gave no deference to EPA's judgment, and instead substituted its own views on the science and proper management of the state's program. This error contributed to the District Court's mistaken finding of constructive submission.

Amici's members are frequently subject to TMDLs, and they rely on having a process through which to engage with states and EPA during TMDL development to help ensure that they are based on valid science. A ruling

upholding the constructive submission theory, and the District Court's misapplication of the theory to the facts of this case, would undermine that process and hinder states' and EPA's ability to develop TMDLs grounded in appropriately vetted science and effectively manage TMDL programs.

ARGUMENT

I. THE "CONSTRUCTIVE SUBMISSION" THEORY HAS NO STATUTORY BASIS AND THIS COURT SHOULD REJECT IT

The CWA established a cooperative federalism regime for protecting water quality, under which states have the primary role in defining and implementing water quality objectives. At the federal level, EPA is charged with adopting national, technology-based effluent limitations guidelines governing discharges of pollution from certain categories of point sources, such as wastewater treatment plants and power plants. These limitations are implemented through the national pollutant discharge elimination system ("NPDES") permit program, implementation of which has been delegated to the states in all but a few cases. States are also charged with establishing and implementing water quality standards for their waterbodies, which they accomplish in part through the imposition of water quality-based effluent limitations in NPDES permits and application of technology-based and other CWA requirements. EPA oversees these state programs, pursuant to statutory mechanisms that differ from program to program.

One such program is established by CWA Section 303(d), which requires each state to identify waterbodies within its boundaries for which effluent limitations are insufficient to achieve applicable water quality standards (commonly called "impaired" waters). Section 303(d) requires states to "establish a priority ranking of such waters, taking into account the severity of the pollution and the uses to be made of such waters." 33 U.S.C. § 1313(d)(1)(A). "[I]n accordance with [this] priority ranking," the state must set TMDLs for certain pollutants (identified by EPA as appropriate for this purpose) for the impaired waters. *Id.* § 1313(d)(1)(C). TMDLs identify the total amount (load) of pollutants that can be discharged into a waterbody to achieve applicable water quality standards, and include budget-like allocations of this total load among different point and non-point sources.

When Congress enacted the CWA in 1972, it established an initial deadline for state submission of impaired waters and TMDLs to EPA, and directed states to make further submissions "from time to time" thereafter. Specifically, CWA Section 304(a)(2)(D) required EPA to publish by October 1973 information on pollutants "suitable for maximum daily load measurement," *id.* § 1314(a)(2)(D), a task EPA completed in December 1978. Section 303(d) provides that, no more than 180 days later (*i.e.*, by June 1979), each state was required to submit to EPA a list of its impaired waters and any TMDLs established for those waters. After that,

Section 303(d) requires that "[e]ach State shall submit to [EPA] *from time to time*" any additional waters identified as impaired and any TMDLs. *Id.* § 1313(d)(2) (emphasis added).

Within thirty days after any state submission, EPA must approve or disapprove the state's identification of impaired waters and any TMDLs. *Id.* If EPA approves, the waters and/or TMDLs must be incorporated into the state's overall water quality plan under Section 303(e). *Id.* If EPA disapproves, EPA itself must—within thirty days after disapproval—identify such impaired waters and establish such TMDLs as the agency "determines necessary" to implement applicable water quality standards. *Id.*

At issue in this case is the "constructive submission" theory, an artifice superimposed on Section 303(d) by the Seventh Circuit over thirty years ago in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), and misapplied by the District Court in the instant case. "We believe," the *Scott* court said, "that, if a state fails over a long time to submit proposed [TMDLs], this prolonged failure may amount to the 'constructive submission' by that state of no [TMDLs]." *Id.* at 996. If such a "'constructive submission'" of "no TMDLs" were found, "then the EPA would be under a duty to either approve or disapprove the 'submission.'" *Id.* at 997. This artifice was not based on the statute's text or legislative history, but rather on the Seventh Circuit's views on how best to achieve the CWA's policy

objectives, as it understood them: "We think it unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of states to act." *Id.* Notably, however, the Seventh Circuit remanded the case to the district court, leaving the door open for "evidence indicating that the states are, or will soon be, in the process of submitting TMDL proposals." *Id.* at 997 n.11.

This Court should reject the constructive submission theory, as it has no basis in the CWA's text. The statute is clear: After the initial 1979 deadline for submissions was met, states must submit identifications of impaired waters and TMDLs "from time to time." The CWA provides no mandate or direction as to any deadline, pace or frequency for such submissions. Nor does it prescribe any consequence for perceived delay or default in making such submissions. The constructive submission theory, however, attempts to rewrite the CWA to establish a deadline for action and a remedy for breach that Congress chose not to impose.

The Supreme Court has made clear that courts are not at liberty to "revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). The "last redoubt of losing causes," the Court has underscored, is "the proposition that the statute at hand should be liberally construed to achieve its purposes. That principle may be invoked, in case of ambiguity, to find *present rather than absent elements* that are essential to operation of a legislative scheme;

but *it does not add features* that will achieve the statutory 'purposes' more effectively." *Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) (emphasis added) (citation omitted). Adding elements to Section 303(d)—based on a one-sided view of Congressional purpose—is exactly what the Seventh Circuit in *Scott* and the District Court in this case have done.

As this Court has emphasized, "where Congress knows how to say something but chooses not to, its silence is controlling." *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005) (citation omitted); *see also, e.g., Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996). Congress has shown throughout the CWA—including in other, simultaneously enacted subsections of Section 303 itself—that it knows very well how to establish firm deadlines for state or other action if it chooses to do so. In Section 303(c)(1), for example, Congress provided that states "shall from time to time (*but at least once each three year period beginning with* the date of enactment of the Federal Water Pollution Control Act Amendments of 1972) hold public hearings [regarding water quality standards]." 33 U.S.C. § 1313(c)(1) (emphasis added). Several other provisions of the CWA similarly demonstrate Congress's ability to set specific deadlines. *See, e.g., id.* § 1254(n)(3) ("The Administrator shall submit to Congress, from time to time, reports . . . but at least one such report during any six-year period."); *id.*

§ 1341(a)(1) (prescribing consequences for refusal to act "within a reasonable period of time (which shall not exceed one year)").

Congress has also demonstrated in at least a dozen other provisions of the CWA that it knows how to prescribe consequences for state inaction or delay if it wishes to do so. By way of example, Section 303(b)(1) provides that if a state "fails to submit water quality standards within the times prescribed in [section 303(a)]," EPA "shall promptly prepare and publish proposed regulations setting forth water quality standards" for the state. *Id.* § 1313(b)(1). Many other provisions of the CWA include similarly specific remedies for inaction or delay. *See, e.g.*, *id.* § 1314(*l*)(3) (EPA to act "[i]f a State fails to submit control strategies in accordance with" requirements and deadlines); *id.* § 1329(d)(3) (EPA to act if state "does not submit the report required . . . within the time period specified"); *id.* § 1268(c)(2)(C) (EPA to promulgate standards if states fail to do so); *id.* § 1313(a)(1)-(3) (EPA to promulgate changes if state does not adopt them within 90 days of notification); *id.* § 1313(c)(3); *id.* § 1313(i)(2)(A); *id.* § 1319(a)(2); *id.* § 1341(a)(1); *id.* § 1344(j). Congress established no such requirements or consequences in Section 303(d).

In the absence of any textual basis, the *Scott* court and the District Court below relied instead on their view that, without the constructive submission theory, the CWA's "objectives" would be frustrated. That would not be a valid ground for

rewriting the statute even if true, but in this instance it is also based on a one-sided and mistaken view of Congress's objectives. In enacting the CWA generally and Section 303 in particular, Congress was concerned with preservation of state regulatory authority. The CWA underscores that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities of States" to address water pollution. 33 U.S.C. § 1251(b); *see also* Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation* 14-24 (2d ed. 2002) (discussing congressional focus on state authority under Section 303). Further, the CWA's drafters did not view Section 303(d) as an important driver of action. Senator Muskie, the lead sponsor of the legislation, stated that "[t]he Administrator should assign secondary priority to [Section 303]" and that states likewise should instead prioritize implementation of effluent limitations. 118 Cong. Rec. 33,696 (Oct. 4, 1972). The legislative history therefore provides no indication that Congress intended to silently limit states' authority in the manner implied by the constructive submission theory.

Importantly, TMDLs are a mechanism to implement *state* water quality standards. They implicate land-use decisions related to non-point sources of pollution that the CWA expressly left within the states' sphere of control and are (as discussed at greater length in Section III, *infra*) complex, unwieldy tools that take years or decades to develop and implement. Especially in the case of complex

pollutants and water quality issues, it is critical that states have adequate time and flexibility to develop TMDLs based on appropriately vetted science. It is no surprise, therefore, that Congress left the pace of TMDL development to the states' discretion. By contrast, it is highly unlikely that Congress intended *silently* to enact the deadline and sanctions regime implied by the constructive submission theory, thereby substantially expanding federal authority over states, without any reference in the statute's text or whisper of commentary in the legislative history. *Cf. United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

Finally, to the extent courts are concerned that states may refuse altogether to develop TMDLs, there are other mechanisms through which EPA and citizens can encourage or compel action. EPA has several such mechanisms, including support through federal grants to state water quality programs under CWA Section 106, 33 U.S.C. § 1256. Citizens can challenge EPA approvals of state impaired waters or TMDL lists under the Administrative Procedure Act ("APA"), as Plaintiffs-Appellees did in this case and other plaintiffs have done in similar suits. *See, e.g.*, *Potomac Riverkeeper, Inc. v. U.S. EPA*, No. RDB 04-3885, 2006 WL 890755, at *8, *10 (D. Md. Mar. 31, 2006); *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 534 (S.D.N.Y. 2000), *aff'd sub nom. NRDC, Inc. v. Muszynski*,

268 F.3d 91 (2d Cir. 2001); *Friends of the Wild Swan, Inc. v. U.S. EPA*, 130 F. Supp. 2d 1184, 1192 (D. Mont. 1999); *Am. Littoral Soc'y v. U.S. EPA Region*, 199 F. Supp. 2d 217, 229 (D.N.J. 2002). They can also petition EPA to encourage development of TMDLs and can seek judicial review of the agency's response or unreasonable delay in responding. 5 U.S.C. § 706(1)-(2). They can likewise petition state environmental agencies and may be able to bring unreasonable delay or mandamus actions under state law to compel action. *See, e.g.*, Revised Model State Administrative Procedure Act § 501(d) (2010), http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf (authorizing unreasonable delay claims); *State ex rel. Laurel Mountain/Fellowsville Area Clean Watershed Ass'n, Inc. v. Callaghan*, 418 S.E.2d 580, 585 (W. Va. 1992) (granting mandamus to require WVDEP to address mining site); *Allen v. State of W. Va. Human Rights Comm'n*, 324 S.E.2d 99, 107, 127-28 (W. Va. 1984) (granting mandamus based on agency's "extraordinary delay" in taking required action). It is therefore wrong to suggest that the only means to prompt state action is by rewriting the CWA to create a deadline and remedy that Congress did not enact.

II. EVEN IF THE CONSTRUCTIVE SUBMISSION THEORY WERE A PERMISSIBLE INTERPRETATION, ITS REQUIREMENTS PLAINLY ARE NOT MET HERE

For the reasons set forth above, *Amici* strongly urge this Court to reject the constructive submission theory. But even if the theory were based on a permissible reading of the CWA, it plainly does not apply on the facts of this case. West Virginia has submitted thousands of TMDLs since 2004, including 500 since February 2016, and has a schedule to complete biological impairment TMDLs from 2017 to 2027. Courts have applied the constructive submission theory only in extreme circumstances, and several courts have found there is no constructive submission where the relevant states had substantially less robust programs. There is no basis for concluding that West Virginia has constructively submitted "no TMDLs." This Court accordingly should reverse the decision below.

A. The Constructive Submission Theory is Extremely Narrow, Requiring a Clear and Unambiguous Refusal to Submit TMDLs

No other Court of Appeals, including *Scott,* has actually found a constructive submission, and affirmation of the District Court's decision in this case would be an unprecedented and dramatic expansion of the theory. The Tenth Circuit in *Hayes v. Whitman* concluded that the theory is "necessarily . . . narrow" and that only a state's "clearly and unambiguously" expressed decision to submit no TMDLs could be deemed a constructive submission. 264 F.3d 1017, 1024 (10th Cir. 2001). *Hayes* found no constructive submission where the state had submitted

"somewhere between three and twenty-nine" TMDLs (though plaintiffs claimed that none met the CWA's requirements) and had a plan to submit 1,400 more in the next decade. *Id.* at 1022. The Ninth Circuit in *San Francisco Baykeeper v. Whitman* endorsed the Tenth Circuit's approach, finding no constructive submission where the state had submitted "at least eighteen" TMDLs and had a schedule to complete the remaining TMDLs within 12 years. 297 F.3d 877, 880, 883 (9th Cir. 2002). Even *Scott* did not find a constructive submission; the court held only that the case should not be dismissed for failure to state a claim, and remanded with instructions to the district court "to proceed as if the states had submitted proposals of no TMDL's unless [there is] evidence indicating that the states are, or will soon be, in the process of submitting TMDL proposals." 741 F.2d at 997 n.11.

Likewise, in only a few other cases involving "egregious circumstances" have district courts found that alleged facts could amount to a constructive submission. *See Sierra Club v. U.S. EPA*, 162 F. Supp. 2d 406, 418 n.18 (D. Md. 2001) (citing cases and finding them not applicable as state had made "several TMDL submissions"); *see also S.F. Baykeeper*, 297 F.3d at 882-83 & n.2 (contrasting cases). Those cases involved allegations that states failed to make *any* TMDL submissions for eleven to eighteen years, in violation of the CWA's *initial 1979 deadline* (not the requirement to submit TMDLs "from time to time"

thereafter), and had *no plans* to complete any TMDLs. *See, e.g., Kingman Park Civic Ass'n v. U.S. EPA*, 84 F. Supp. 2d 1, 3, 5 (D.D.C. 1999) (denying EPA motion to dismiss where, eighteen years after 1979 deadline, state had not submitted a single TMDL); *Alaska Ctr. for the Envt. v. Reilly* ("*ACE*"), 762 F. Supp. 1422, 1425, 1429 (W.D. Wash. 1991) (state had not submitted any TMDLs for over ten years and had no plans to establish any); *see also Am. Canoe Ass'n v. U.S. EPA*, 30 F. Supp. 2d 908, 913, 927 (E.D. Va. 1998) (denying EPA motion to dismiss where state had not submitted any TMDLs in nearly twenty years since 1979 deadline). By contrast, several courts have found no constructive submission based on completion of *some* TMDLs and plans to develop more, even where the existing TMDLs and plans were inadequate. *E.g., Sierra Club v. Hankinson*, 939 F. Supp. 865, 871-72 & n.6 (N.D. Ga. 1996); *see also Hayes*, 264 F.3d at 1022.

Notably, the CWA gives states broad discretion to prioritize among TMDLs. Section 303(d) allows each state to "establish a priority ranking" for its impaired waters and to establish TMDLs "from time to time" in accordance with that ranking. 33 U.S.C. § 1313(d)(1)(A)-(C), (d)(2). Courts accordingly have recognized that it would be inappropriate to usurp a state's authority to prioritize among TMDLs. *See Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993) (although the state "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"); *cf. Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at *7 (W.D. Wash. Mar. 16, 2015) (constructive submission "does not occur merely because a state has prioritized one TMDL over another").

And no court has ever found a constructive submission, as the District Court did here, based on failure to develop a particular TMDL or a category of TMDLs. The decisions cited above involved complete, statewide programmatic failures. Even where plaintiffs challenged a failure to submit particular TMDLs, courts reviewed the TMDL program as a whole to understand whether the state exercised its discretion under the CWA to prioritize. *See Hayes*, 264 F.3d at 1024 (discussing TMDLs in terms of "particular impaired waterbodies" but reviewing entire TMDL program); *cf. McLerran*, 2015 WL 1188522, at *7-8 (discussing state program as whole and rationale for reprioritizing and delaying TMDLs at issue).

B. West Virginia Has a Robust TMDL Program and Has Committed to Establishing TMDLs for Biologically Impaired Waterbodies, Including Ionic Toxicity TMDLs

West Virginia plainly has not made a "clear and unambiguous statement" that it is abandoning or refusing to complete TMDLs either generally or for particular waterbodies or pollutants—quite the contrary. The state has completed over 4,000 TMDLs since 2004, including 500 since February 2016, and has addressed biological impairment through hundreds of TMDLs addressing specific

pollutants. It has established a schedule to complete biological impairment TMDLs between 2017 and 2027. JA2791-2844 (2014 303(d) list); *see also* JA2852-3001 (listing developed TMDLs addressing biological impairment).[3] This case bears no resemblance to *Kingman Park*, *ACE*, or *Scott*, where states submitted no TMDLs and had no plans to do so. And West Virginia's program far exceeds those reviewed in *Hankinson*, *Hayes*, and *S.F. Baykeeper*, where states had only submitted a few TMDLs and schedules that plaintiffs alleged were inadequate, yet the courts still found no constructive submission. The decision below is founded on a patent misreading of precedent and misapplication to the facts.

The District Court's analysis reveals several fundamental errors. First, the Court found that West Virginia "has declared that it will not develop TMDLs for biologic impairment." Memorandum Opinion and Order at 32, Dist. Ct. ECF No. 87 ("Dist. Ct. Order"). That is incorrect. While West Virginia stated that it was "pausing" work on biological impairment TMDLs while it develops a supporting assessment methodology, it declared its intent to develop such TMDLs as soon as practicable, set dates for completion of such TMDLs, and continued development of hundreds of other TMDLs—including many that address biological impairment through specific pollutants.

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[3] References to the Joint Appendix ("JA") are references to the Joint Appendix for summary judgment. Dist. Ct. ECF Nos. 65, 69.

The TMDLs at issue in this case are intended to remedy biological impairment, which refers to water quality that harms aquatic organisms to a defined extent, as related to "ionic toxicity," which refers to elevated level of ions (or "salt") in the water that allegedly can cause such impairment in some circumstances. As explained in Section III, *infra*, biological impairment and ionic toxicity present complex technical issues on which the science is evolving and unsettled.

In April 2012, West Virginia informed EPA that—in light of the recent enactment of a state law, SB 562, which required establishment of a new methodology to assess biological impairment—it would "postpone" biological impairment TMDLs (including for ionic toxicity) while developing this methodology. JA3298-99 (2012 WVDEP Letter to EPA). West Virginia communicated to EPA its plans to develop TMDLs "as soon as practicable after the effective date of rules enacted pursuant to [SB 562]." JA2368 (2012 Draft 303(d) List). In 2013, the state restated that it was *not* "unable or unwilling" to carry out its CWA responsibilities. JA2707 (2013 WVDEP Letter to EPA). And in 2015, in response to comments, the state set specific dates for biological impairment TMDL completion such that all biological impairment TMDLs would be completed between 2017 and 2027. JA3046 (2015 Letter from WVDEP to EPA), JA22791-844 (W. Va. 2014 303(d) list); JA3060.

West Virginia stated in 2015 that it was working on its new biological impairment assessment methodology, JA3047, and in 2016 it notified EPA that it continued collecting data to continue that work. Dist. Ct. Order at 16.[4] In 2015 and 2016, West Virginia continued to communicate with EPA regarding its methodology. JA4146-52 (Feb. 2016 emails discussing meeting on draft biological assessment rule); JA4137-43 (Nov.-Dec. 2015 emails discussing EPA comments on draft methods); JA4123-32 (Sept. 2015 emails scheduling EPA-WVDEP call). Meanwhile, West Virginia has submitted scores of TMDLs since 2014 that address biological impairment caused by other pollutants. JA87-92 (West Fork River watershed), JA259-65 (Monongahela River watershed), JA3684-89 (Tygart River).

Yet the District Court dismissed all this evidence without justification. The Court also erroneously concluded that EPA and West Virginia claimed the state was not required to develop biological impairment TMDLs because state law (SB 562) trumps the CWA. Dist. Ct. Order at 28. Neither EPA nor West Virginia has made any such claim. To be sure, SB 562's enactment caused WVDEP to temporarily pause work on biological impairment TMDLs to develop a new assessment methodology. But neither the state nor EPA has ever claimed that this

[4] Citing July 5, 2016 WVDEP Letter to EPA at https://www.epa.gov/sites/production/files/2016-07/documents/wvdep_comments_re_epa_overlist_july_5_2016.pdf

obviates the state's obligations under the CWA. On the contrary, the state has declared its intention to develop the relevant TMDLs and submitted a schedule to do so.

Finally, the District Court mistakenly viewed the constructive submission theory as precluding West Virginia from deferring work on one type of TMDLs while developing others, effectively eliminating the state's clear statutory grant of authority to prioritize. The Court held that the constructive submission theory applies to failures to address a particular waterbody or category of pollutants, primarily citing *Scott* and *Sierra Club v. McLerran*. Dist. Ct. Order at 22, 27 n.12, 31-32. The few district court decisions that found that alleged facts could amount to a constructive submission, however, involved statewide programmatic failures. Although *Scott* involved allegations that states failed to develop TMDLs for Lake Michigan, the Seventh Circuit held only that the case should not be dismissed for failure to state a claim, and the district court on remand could find no constructive submission based on "evidence indicating that the states are, or will soon be, in the process of submitting TMDL proposals." 741 F.2d at 997 n.11. *McLerran* found no constructive submission, underscoring that constructive submission "does not occur merely because a state has prioritized one TMDL over another." *McLerran*, 2015 WL 1188522, at *7.

Regardless, even if constructive submission could be further stretched to cover state decisions about categories of TMDLs, West Virginia has not refused to complete biological impairment TMDLs. It has stated its intention to do so, has a schedule, and is entitled to decide how best to sequence TMDLs in light of available science, methods and resources. The state may not be developing biological impairment TMDLs "as quickly as plaintiffs [or the District Court] would like," *Browner*, 843 F. Supp. at 1314, or in the order they might prefer. But that is not a valid basis for usurping the state's authority to prioritize its program.

The record in this case provides no basis on which to conclude that West Virginia has effectively submitted to EPA a decision that no TMDLs are required. The District Court's decision therefore should be reversed.

III. THE DISTRICT COURT ERRED IN FAILING TO ACCORD ANY DEFERENCE TO EPA, AND IN SUBSTITUTING ITS OWN JUDGMENT AS TO APPROPRIATE MANAGEMENT OF A HIGHLY COMPLEX, TECHNICAL REGULATORY PROGRAM

The District Court compounded its error by failing to give any deference to EPA's judgment that West Virginia had made no constructive submission. TMDL programs are complex, massive enterprises that require allocation of scarce resources to address challenging technical issues. EPA, which is charged by Congress with overseeing these programs, works closely with the states in this

endeavor and is uniquely qualified to evaluate their performance. If courts are to entertain constructive submission claims, they should defer to EPA's expertise.

A. EPA's Expert Judgment With Regard to West Virginia's TMDL Program is Entitled to Deference as a Matter of Law

As this Court has explained, "'[c]ourts are expert at statutory construction, while agencies are expert at statutory implementation.' . . . It is crucial therefore that courts in [a] highly technical arena respect the strengths of the agency processes on which Congress has placed its imprimatur." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 305-06 (4th Cir. 2010) (quoting *Negusie v. Holder*, 555 U.S. 511, 530 (2009)). It is a bedrock principle of administrative law that "[e]specially in matters involving not just simple findings of fact but complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'" *Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)); *see also Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1145 (D.C. Cir. 2013). Those principles govern here, where Congress has made states the primary actors under the complex regulatory regime established by Section 303(d) and has given EPA limited oversight authority. Yet the District Court failed to adhere to them.

Alongside their "constructive submission" claim, Plaintiffs-Appellees brought an APA challenge to EPA's approval of West Virginia's Section 303(d)

list. The District Court rejected the APA claim as "duplicative," but had the court addressed the merits of the APA claim, it would have reviewed EPA's action under the highly deferential "arbitrary and capricious" standard. It makes little sense that EPA's views on the state's program were given no deference at all, merely because Plaintiffs-Appellees also framed their claims in terms of the constructive submission theory. The gravamen of the constructive submission and APA claims is the same and the same standard of review should apply. Here, the District Court erred in giving no deference to EPA's judgment at all, reviewing the highly technical issues presented *de novo*. *See, e.g.*, Dist. Ct. Order at 9-10, 24 & n.10, 33-36.

B. State TMDL Programs Are Large, Technically Complex and Resource-Intensive and States and EPA Need Discretion to Prioritize

The scale and complexity of state TMDL programs is enormous. West Virginia, for example, must evaluate 18 pollutants that may be present in 32 major watersheds that contain thousands of individual waterbodies. *See* JA2758 (WVDEP, 2014 West Virginia Integrated Water Quality Monitoring and Assessment Report); JA2790-844 (2014 Section 303(d) list) (listing over 1,000 impaired entries).

For each separate segment of a waterbody, the state must collect and analyze large amounts of water quality data. *See* JA909-25 (EPA Guidance for 2006

Assessment (July 29, 2005)) (describing methodology, data collection, and data evaluation); JA4541-47 (EPA Guidance on the TMDL Process (1991)) (illustrating steps for TMDL development). States use this data to identify the pollutants in the water, their sources, and their impacts. *Id.*; *see also* Declaration of Helene Drago ¶ 4, Dist. Ct. ECF No. 91-1 ("Drago Decl.") (listing TMDL development steps). To measure biological impairment, for example, a state performs biological assessments and, if the data shows impairment, the state then must collect further data and perform additional analysis to identify the stressor causing the impairment. *See* JA4592 (EPA Stressor Identification Guidance Document (2000)). Such data collection is resource-intensive and time-consuming, and the right data is not always immediately available. *See* Valentina Cabrera-Stagno, EPA, *Developing Effective TMDLs: An Evaluation of the TMDL Process* 2 (2007), https://www.epa.gov/sites/production/files/2015-10/documents/2009_09_09_tmdl_results_29cabrera_wef07_paper7.pdf.

In the present case, West Virginia has a comprehensive strategy to monitor and sample surface waters across the state at various intervals and intensities, collecting data on a rotating watershed basis. It uses this data to perform water quality assessments. JA2760-70 (2014 Integrated Water Quality Report). Before developing TMDLs, the state revisits every listed stream to collect additional data. JA4955 (W. Va. Draft 2014 Section 303(d) List).

TMDLs therefore require substantial time and resources. EPA has long recognized TMDL development can take 8 to 13 years, and court-imposed schedules have allowed up to 20 years. Claudia Copeland, Cong. Research Serv., R42752, *Clean Water Act and Pollutant Total Maximum Daily Loads (TMDLs)* 4-5 (2012), https://fas.org/sgp/crs/misc/R42752.pdf. Resources for TMDL development, moreover, are scarce. It is impossible to collect and evaluate data, develop TMDLs, and implement them for every waterbody and every pollutant at once, and this puts a premium on states' discretion to prioritize among TMDLs. Drago Decl. ¶ 5 (development of TMDL can cost millions of dollars); *see also* Copeland, *supra*, at 17; Cabrera-Stagno, *supra*, at 3.

All of these factors highlight the need for courts to afford deference to EPA's and states' judgment regarding the administration of TMDL programs, including with respect to the timing and sequencing of TMDLs for individual waterbodies as well as categories of TMDLs.

C. The Science of Ionic Toxicity Is Complex, Evolving and Unsettled

In addition to these general issues of TMDL program administration, "ionic toxicity"—on which the Complaint and much of the District Court's decision in this case focus—presents especially complex, novel issues. Ionic toxicity refers to adverse effects on aquatic organisms as a result of elevated concentrations of ions such as sodium or chloride. As explained below, it is emblematic of the scientific

and technical challenges presented by TMDLs for complex pollutants and further underscores the rationale for deference to EPA's judgment in this case.

Focusing on a single EPA study from 2011, the District Court mistakenly treated the science of ionic toxicity as well settled and conclusive, and impugned West Virginia's rationale for delaying development of biological impairment TMDLs. *See* Dist. Ct. Order at 9-10 (citing JA3301 (Benchmark Study)); *id.* at 24 n.10. In reality, however, the science in this area continues to evolve and remains unsettled. In 2011, EPA developed a "benchmark" study addressing dissolved salts that evaluated field data to determine whether increased ion mixtures impacted macrovertebrate species composition in Appalachian streams. But this study includes many important caveats, was never intended to be a conclusive endpoint, and was criticized by scientific commenters. Indeed, EPA subsequently worked for years to develop a novel *draft* field-based methodology intended to help states develop water quality criteria related to ionic toxicity, and it was only made available for public comment in December 2016. 81 Fed. Reg. 94,370 (Dec. 23, 2016).

EPA received over 900 comments on this draft methodology, *see* Docket EPA-HQ-OW-2016-0353, and many underscore the complexity and uncertainty surrounding both the draft methodology, specifically, and the relationship between ionic toxicity and biological impairment, generally. Many commenters highlighted

shortcomings in EPA's assumptions and methods. *See, e.g.*, Comment Letter from Water Env't Fed'n to EPA at 1-3 (Apr. 24, 2017) ("WEF Comments"); Comment Letter from Nat'l Council for Air & Stream Improvement to EPA 2-3, 6-13 (Apr. 24, 2017). For example, commenters pointed out that the use of field observation and statistical modeling does not lend itself to traditional toxicological analysis used in developing aquatic life criteria and TMDLs. Comment Letter from Nat'l Ass'n of Clean Water Agencies 1 (Apr. 24, 2017) ("NACWA Comments"). Additionally, using field data introduces serious confounding factors that must be accounted for before biological effects can be ascribed to conductivity, or conductivity to any particular source. *Id.* at 2; *see also* GEI Consulting Review of EPA's Draft Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity, submitted on Behalf of Nat'l Mining Ass'n 2-1 to 2-6 (Apr. 2017). More traditional, robust scientific studies are needed to understand the role ions play in biology and which ions have which effect. NACWA Comments at 3; *see also* WEF Comments at 2-3.

EPA has not announced whether or when it will finalize its draft methodology. Regardless, it is clear that the science of ionic toxicity is far from settled and that West Virginia's decision to pause development of biological impairment TMDLs while developing a new assessment methodology was a reasonable exercise of its discretion. Further, given EPA's deep substantive

expertise and close collaboration with the state on these issues, the agency was far better positioned than the District Court to evaluate the reasonableness of that decision. The District Court erred in failing to give any weight to EPA's expert views and in finding a constructive submission.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Dated: July 24, 2017

Respectfully submitted,

s/ Joel C. Beauvais
Joel C. Beauvais
Claudia M. O'Brien
Stijn Van Osch
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
joel.beauvais@lw.com

Attorneys for Amici Curiae *National Association of Clean Water Agencies, National Mining Association and National Cattlemen's Beef Association*

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of National Association of Clean Water Agencies, National Mining Association, and National Cattlemen's Beef Association as Amici Curiae in Support of Defendants-Appellants complies with type-volume limits because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 6,496 words, and is proportionately spaced using a roman style typeface of 14-point.

s/ Joel C. Beauvais
Joel C. Beauvais

Attorney for Amici Curiae *National Association of Clean Water Agencies, National Mining Association and National Cattlemen's Beef Association*

Dated: July 24, 2017

CERTIFICATE OF SERVICE

I, Joel C. Beauvais, hereby certify that on July 24, 2017, I electronically filed the foregoing Brief of National Association of Clean Water Agencies, National Mining Association and National Cattlemen's Beef Association as *Amici Curiae* in Support of Defendants-Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

s/ Joel C. Beauvais
Joel C. Beauvais