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.**; and **West Virginia Rivers Coalition**, Plaintiffs-Appellees.

v.

Scott Pruitt, Administrator, United States Environmental Protection Agency, and **Cecil Rodrigues**, Acting Regional Administrator, United States Environmental Protection Agency, Region III, Defendants-Appellants,.

On appeal from the United States District Court for the Southern District of West Virginia, Case No. 3:15-cv-00271 (Chambers, J.)

Federal Defendants-Appellants' Opening Brief

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Statement of Jurisdiction

The district court asserted jurisdiction over the claims brought by Plaintiff-Appellees Ohio Valley Environmental Coalition, Inc. *et al.* at issue in this appeal under 33 U.S.C. § 1365(a)(2) by applying the judge-made doctrine of "constructive submission" discussed below. The district court entered an order resolving all claims and issuing a permanent injunction on February 14, 2017. Memorandum Opinion and Order, Docket No. 87 (Feb. 14, 2017) ("Op.") (App-___–___). The Federal Defendants-Appellants filed a timely notice of appeal on April 4, 2017. The court entered final judgment on May 3, 2017. *Ohio Valley Environ. Coal. v. Pruitt*, No. 3:15-cv-0271 (S.D.W. Va.), Docket No. 102. (App-___). This Court has jurisdiction under 28 U.S.C. § 1291, *see* Fed. R. App. P. 4(a)(2), or, in the alternative, 28 U.S.C. § 1292(a)(1).

Introduction

West Virginia has an obligation under the Clean Water Act (the "Act") to establish "total maximum daily loads" ("TMDLs") for waters that it has identified as not meeting water quality standards. West Virginia has completed thousands of those TMDLs over the past decade. The plaintiffs Ohio Valley Environmental Coalition *et al.* ("OVEC") claim, however, that the State has failed to establish TMDLs for 573 "biologically impaired" waters, and they have focused on the fraction of those waters that are "biologically impaired" by "ionic toxicity."

The State has already established hundreds of TMDLs to address the biological impairment of its waters. It has acknowledged its obligation to complete these "ionic toxicity" TMDLs and has set a schedule to complete them. But the State's efforts have been delayed because ionic toxicity raises difficult scientific and technical questions and because a new State law affects how the State calculates these TMDLs.

Nothing in the Clean Water Act sets any deadline for these TMDLs, and the State has been working on these issues and other TMDLs. Despite that ongoing effort, the district court decided that West Virginia was taking too long, and that it was time for the court to intervene. The district court could not order West Virginia to complete these TMDLs because West Virginia is not a party to this case and may not be sued in Federal court for not establishing TMDLs. Instead, the district court used a theory called "constructive submission" to allow OVEC to sue the U.S. Environmental Protection Agency ("EPA") for West Virginia's alleged failure.

The "constructive submission" theory posits that the courts may sometimes allow plaintiffs to sue EPA for a State's failure to establish TMDLs by relying on the legal fiction that the State has made a "constructive submission" of "*no* TMDLs" to EPA. Once a State submits TMDLs to EPA, the Act has real requirements: EPA must approve or disapprove those TMDLs, and if it disapproves them, establish its own TMDLs. OVEC's claim here is that West Virginia has refused to establish the relevant TMDLs, effectively submitting "no TMDLs" to EPA, and that EPA failed to perform its non-

discretionary duty to approve or disapprove that constructive submission of "no TMDLs."

This Court has not adopted the "constructive submission" theory, and the courts that have applied that theory have done so with great caution and under very narrow circumstances. Those courts all agree that it can only apply where the State's actions "clearly and unambiguously" show that it has decided not to submit TMDLs to EPA. And those courts all agree that if a State is submitting TMDLs and has a plan to complete its remaining TMDLs, that necessarily precludes any finding of constructive submission. This theory is so narrow that, to the best of our knowledge, only one other court has ever made a finding of constructive submission and that in a case where the State failed to submit even a single TMDL for any pollutant in any water for a decade. West Virginia, in contrast, has submitted thousands.

As we discuss below, the district court's decision here was based on a series of legal and factual errors. It overstepped the Article III limits on standing by allowing OVEC to sue regarding 573 biologically-impaired waters when OVEC has alleged that its members use or visit only about 50 of these waters. It issued an injunction that was not narrowly tailored to OVEC's alleged interests by ordering EPA to approve or disapprove the constructive submission of "no TMDLs" for the hundreds of waters in which OVEC's members have no legally-protected interest. And it sharply departed from the holdings of the other courts that have adopted the constructive submission theory by making a finding of constructive submission even though West

Virginia has a robust TMDL program and a plan to complete these TMDLs. For these reasons, and all the reasons discussed below, the district court's decision should be reversed.

Statement of the Issues

1. Did the district court err by finding that OVEC has standing to bring claims addressing all 573 biologically-impaired waters identified in its complaint, when it only alleged that its members have a concrete interest in merely 50 or so of those waters?

2. Did the district court err by issuing an injunction that reaches all 573 of these waters or should it have narrowly tailored that injunction to the approximately 50 waters that OVEC's members allegedly use or visit?

3. For the remaining 50 or so waters that OVEC's members allegedly use or visit, did the district court misapply the "constructive submission" doctrine by finding that West Virginia has "clearly and unambiguously" decided not to establish these TMDLs, notwithstanding that the State has completed thousands of TMDLs since 2004, including hundreds of TMDLs for biological impairment; has expressly acknowledged its obligation to establish these TMDLs; and has a schedule to complete its remaining TMDLs, including those for ionic toxicity?

Statement of the Case

I. The law

A. The Clean Water Act, water quality standards, and lists of impaired waters.

The Clean Water Act requires the States to adopt water quality standards. 33 U.S.C. §§ 1313(a), (b), (c)(1). These standards may set numeric water quality criteria for specific pollutants. *E.g.*, W. Va. Code R. § 47–2-8.15, Appendix E, Table 1. They may also establish "narrative" criteria that describe a desired quality of water. 40 C.F.R. §§ 131.3(b), 131.11(b)(2). West Virginia has adopted narrative water quality criteria, including the following "biological impairment" criteria that are relevant here:

> No sewage, industrial wastes or other wastes present in any of the waters of the state shall cause therein or materially contribute to any of the following conditions thereof . . . [including] . . . [m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life . . . [and] . . . [a]ny other condition . . . which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

W. Va. Code R. § 47-2-3.2, 3.2.e, 3.2.i.

The Act requires each State to identify all of its waters that fail to meet applicable water quality standards (and thus need TMDLs). 33 U.S.C. §§ 1313(d)(1)(A), (B); 40 C.F.R. §§ 130.2(j), 130.7(b)(1). This list of waters is commonly known as the State's "Section 303(d) list," and the waters on that list are commonly called "impaired waters." The Act requires States to submit their Section 303(d) lists to EPA for approval or disapproval, and EPA's

regulations specify that States should submit these lists every two years. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(7).

B. Total Maximum Daily Loads ("TMDLs")

The Act also requires States to develop a planning tool for their impaired waters called a "total maximum daily load" ("TMDL"). 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.7, 130.7(c)(1), 130.2(g)–(i). A TMDL sets the maximum daily load of a particular pollutant that an impaired water may receive from all sources and still meet its water quality standards. *Id*. For example, West Virginia has established a TMDL for iron for the Elk River (a large river) of 9,090.49 pounds per day. JA 488 (App-___).

TMDLs do not, by themselves, restrict the discharge of pollutants. Instead, a TMDL is a planning tool—it identifies the total "load" of a pollutant that an impaired water can receive and then allocates that load among the sources contributing that pollutant. *See, e.g.,* JA 477–86 (App-___–___). In so doing, a TMDL provides the blueprint for future actions by the State and others to restore impaired waters, but does not by itself require any reductions in discharges.

The Act required States to submit their initial TMDLs by June 26, 1979 (180 days after EPA first published a list of pollutants suitable for TMDL development). 33 U.S.C. § 1313(d)(2); 43 Fed. Reg. 60,662 (Dec. 28, 1978). But that initial deadline has now passed, and the Act no longer requires the States to submit TMDLs on any particular schedule, and it does not expressly require EPA to act if the States fail to submit TMDLs. Instead, the Act gives States the

right to set their own priorities for the clean-up of their impaired waters by requiring that States establish a "priority ranking for such waters." 33 U.S.C. § 1313(d)(1)(A). The Act then requires each State to submit its TMDLs "from time to time" and "in accordance with [its] priority ranking." 33 U.S.C. §§ 1313(d)(1)(c), (d)(2). The Act does not authorize the courts to approve or disapprove a State's priority ranking. *See id*. §§ 1313(d)(1)(A), (d)(2). States may weigh technical considerations, including the complexity of the impairment and the availability of data and models, as well as their own State policies, when they set those priorities. *See, e.g.*, 57 Fed. Reg. 33,040, 33,044–45 (July 24, 1992).

Once a State submits a TMDL to EPA, EPA must approve or disapprove that TMDL within 30 days. 33 U.S.C. § 1313(d)(2). If EPA disapproves the TMDL, EPA must establish its own TMDL within 30 days. *Id*.

C. The "constructive submission" of TMDLs

The plain language of the Clean Water Act does not require EPA to do anything if a State does not submit TMDLs. *See id*. § 1313(d)(2). But the Seventh, Ninth, and Tenth Circuits, as well as several district courts, have suggested that a legal theory known as "constructive submission" may compel EPA to act when a State fails to submit TMDLs, under certain limited circumstances. *See, e.g., Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). According to that theory, "if a state fails over a long period of time to submit proposed TMDLs, this prolonged failure may amount to the 'constructive submission' by that state of no TMDLs." *Id*. at 996. The legal fiction that the

State has "submitted" "no TMDLs" would then trigger EPA's mandatory duty to approve or disapprove the constructive submission of those "no TMDLs." *See* 33 U.S.C. § 1313(d)(2). The Act requires EPA to do so within 30 days, and, if it disapproves the constructive submission of "no TMDLs," EPA must establish its own TMDLs within 30 days of that disapproval. *Id*. Courts following this theory have allowed plaintiffs to bring "mandatory duty" citizen suits against EPA for a State's wholesale failure to establish any TMDLs.

The Seventh Circuit invented "constructive submission," and the Ninth and Tenth Circuits have analyzed cases using that theory; this Court has not addressed it. *Scott*, 741 F.2d at 996; *San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001). All of the courts discussing this theory agree that a finding of constructive submission can only be made if a State's "actions clearly and unambiguously express a decision to submit no TMDL." *Hayes*, 264 F.3d at 1024; *see also, e.g., Baykeeper*, 297 F.3d at 882. Those courts also agree that constructive submission may not be used to substitute the court's priorities for the State's. *See, e.g., Hayes*, 264 F.3d at 1024 (cautioning that the "constructive submission theory is not designed to challenge the timeliness or adequacy of the state's TMDL submissions"). As a result of this very high standard, we have identified only one case that has ever made a finding of constructive submission (besides the district court decision on appeal here), *Alaska Center for the Environment v. Browner*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991).

II. The facts

A. West Virginia's TMDLs for biological impairment

West Virginia has a robust TMDL program: since 2004, it has established over 4,000 TMDLs. JA 2852–3001 (App-___–___). The State has submitted nearly 500 TMDLs to EPA since February 2016 and expects to submit at least 180 more by the end of 2019. JA 2789–844 (App-___–___).

West Virginia has found that that some waters in the State are "biologically impaired"—that is, they fail to meet West Virginia's narrative water quality criteria that prohibit "significant adverse impact[s] to the . . . biological components of aquatic ecosystems." JA 2767–8 (App-___–___); *see* W. Va. Code R. §§ 47-2-3.2, 3.2.e, 3.2.i. Historically, West Virginia has made these findings of "biological impairment" using a tool called the West Virginia Stream Condition Index ("WVSCI," pronounced "whivskey"). JA 86 (App-___).

To use WVSCI, the State collects samples of benthic macroinvertebrates (such as insects, snails, clams, and crayfish) from streams and lakes throughout the State. JA 3765 (App-___). It then feeds the results of these samples into WVSCI, which measures the samples in different ways and compares those measurements to a "reference" site reflecting the biological health of the State's least disturbed areas. JA 3768 (App-___). WVSCI converts that analysis into an overall score of biological health on a scale from 0 to 100. Waters that fall below a certain WVSCI score are listed as biologically impaired on the State's Section 303(d) list. The 573 waters at issue in this case are the

biologically-impaired waters identified on the State's Section 303(d) list from 2012. JA 2365–425 (App-___–___).

Once a water is listed as "biologically impaired," West Virginia must develop a TMDL for that water. WVSCI can reveal what waters are impaired, but it does not reveal what pollutants are causing the impairment. JA 3232 (App-___). The "stressor identification" process used to identify those pollutants is complex, but after careful review of the available data, West Virginia has determined that the factors contributing to the biological impairment of these waters include aluminum toxicity, pH toxicity, organic enrichment, sedimentation, and ionic toxicity. *See, e.g.,* JA 90–2 (App-___–___) (West Fork river watershed), 229–355 (App-___–___) (Monongahela River watershed), 435–441 (App-___–___) (Elk River watershed).

B. An example TMDL (Isaacs Creek).

These concepts are illustrated by the work that West Virginia has done to address the biological impairment of a stream known as Isaacs Creek in the West Fork River watershed. West Virginia found that the levels of both iron and fecal coliform bacteria in Isaacs Creek exceed the relevant numeric water quality criteria to protect aquatic life. JA 73, 83 (App-___, ___). West Virginia also found that Isaacs Creek is biologically impaired based on its WVSCI score. JA 91 (App-___). Consequently, West Virginia listed Isaacs Creek as impaired for iron, fecal coliform, and biological impairment in its Section 303(d) list. JA 2995 (App-___).

West Virginia then went to work on its TMDLs for Isaacs Creek. This is no simple task. The State had to identify all of the sources discharging iron into Isaacs Creek, including discharges from mines and run-off from construction sites. JA 92–105 (App-___–___). It also had to identify the sources of fecal coliform, which include sewage treatment facilities, failing septic systems, agricultural run-off from grazing livestock, and the "natural background" contributed by wildlife. JA 107–112 (App-___–___).

West Virginia then plugged all of that information into a detailed mathematical model that simulates the movement of pollutants through the environment, known as the "Mining Data Analysis System" ("MDAS"). JA 112–9 (App-___–___). MDAS is among the most sophisticated models available, JA 68 (App-___), because it simulates not only the hydrology of the watershed but also the complex chemical reactions that occur as reactive pollutants (like iron) move through the environment, JA 113, 116 (App-___, ___). Using MDAS, West Virginia estimated how much iron and fecal coliform would reach Isaacs Creek from sources upstream. *See generally, e.g.,* JA 112–123 (App-___–___). It then used the results of that model to calculate how much iron and fecal coliform those sources could release and still have the stream meet its water quality criteria. JA 120 (App-___).

The State developed TMDLs for iron and fecal coliform based on that analysis. Its TMDL for iron for Isaacs Creek is 22.78 pounds per day. JA 144 (App-___). Its TMDL for fecal coliform is about 40 billion bacteria each day.

JA 152 (App-___). These proposed TMDLs were subject to public notice and comment, JA 157–162 (App-___–___), then sent to EPA for approval.

West Virginia also addressed biological impairment. The State determined that the biological impairment in Isaacs Creek was caused by sedimentation and organic enrichment. JA 91 (App-___). But West Virginia concluded that it did not need separate, additional TMDLs for sedimentation and organic enrichment because the TMDLs for iron and fecal coliform would resolve these issues. Importantly, fecal coliform and organic enrichment have the same "predominant sources" (namely, inadequately treated sewage and runoff from agricultural land uses), so West Virginia concluded that the TMDL for fecal coliform would fully "resolve organic enrichment stress" by "remov[ing] untreated sewage and significantly reduc[ing] loadings in agricultural runoff." JA 90 (App-___).

Similarly, the State found that the TMDL for iron would fully resolve "biological stress from sedimentation" because iron is carried by sediment and implementation of the iron TMDL would result in the needed reductions in sediment. *Id*. Based on this analysis, West Virginia concluded that no additional TMDLs for biological impairment were necessary for Isaacs Creek because the stressors and pollutants causing that impairment would be sufficiently reduced "through the attainment of [these other] numeric water quality criteria." JA 87, 91–92 (App-___, ___–___). Isaacs Creek is not one of the biologically-impaired waters that is the subject of this appeal, but this process illustrates how TMDLs are developed and how TMDLs for pollutants

with numeric criteria may also address biological impairment under the State's narrative criteria.

C. The State's efforts to develop TMDLs for ionic toxicity.

OVEC's briefing in the district court focused on one cause of biological impairment: ionic toxicity. Ionic toxicity is not a specific pollutant, but instead refers to a total concentration of various ionic pollutants, largely dissolved salts, at levels high enough to harm aquatic life. When this litigation began, West Virginia had concluded that ionic toxicity was contributing to the biological impairment of about 177 of the 573 waters at issue in this case. JA 2365–425 (App-___–___).

West Virginia has worked diligently on the difficult scientific and technical questions that must be resolved before TMDLs for ionic toxicity can be established. *See, generally*, JA 3079–3102 (App-___–___). In 2011, West Virginia and EPA began a pilot project to develop TMDLs for biological impairments caused by ionic toxicity in the Upper Kanawha watershed. JA 3214–3242 (App-___–___). West Virginia has also worked to identify the sources of ionic toxicity and to calibrate the MDAS model to simulate the movement of ionic toxicity through the waters of the State. JA 3103–208, 3214–42, 3247–88 (App-___–___, ___–___, ___–___). And West Virginia has continued to develop and submit TMDLs that address biological impairments that are caused by stressors or pollutants other than ionic toxicity. JA 91–2, 263–5, 3689 (App-___–___, ___–___, ___).

West Virginia's efforts to develop TMDLs for ionic toxicity were complicated in 2012 when the West Virginia Legislature passed Senate Bill 562 ("SB 562"). JA 2735–39 (App-___–___). West Virginia has interpreted that statute to mean that the State should no longer use WVSCI alone to measure biological impairment, but should rather develop and use a new assessment tool. JA 3298–99 (App-___–___). West Virginia has begun work on that new assessment tool. JA 86, 3769, 3870–3968 (App-___, ___, ___–___). But the work "has proven to be much more difficult than originally expected." JA 2767 (App-___).

Once SB 562 was enacted, West Virginia suspended its work on ionic toxicity TMDLs for biological impairment under the State's *narrative* water quality criteria pending development of its new assessment tool. JA 66 (App--___), JA 86 (App-___), JA 158 (App-___). West Virginia did not suspend its work on TMDLs for biologically-impaired waters where the cause of the impairment could effectively be addressed using the State's *numeric* water quality criteria (as in the case of Isaacs Creek, discussed above). That means that, despite SB 562, West Virginia has continued to establish hundreds of TMDLs designed to address biological impairments throughout the State's waters.

III. The case

In 2015, OVEC sued EPA, arguing that EPA had violated the Clean Water Act by failing to approve or disapprove West Virginia's "constructive submission" of "no" biological impairment TMDLs for 573 waters. The case

was resolved by the district court in two decisions. In the first, the court held that OVEC had demonstrated standing. Memorandum Opinion and Order (Sept. 9, 2016), Docket No. 81 ("Standing Op.") (App-___–___). In the second decision, the court concluded that West Virginia's actions here constituted a "constructive submission" of "no TMDLs" for all biologically-impaired waters at issue in this case. Memorandum Opinion and Order, Docket No. 87 (Feb. 14, 2017) ("Op.") (App-___–___).

The district court initially ordered EPA to approve or disapprove the constructive submission of "no TMDLs" for all 573 waters by March 17, 2017. The court ultimately extended that deadline until 14 days after this Court ruled on the Federal Defendants-Appellants' motion for stay pending appeal.

The United States moved the district court for a stay pending appeal on April 4, 2017. The district court denied that motion on May 2, 2017. The United States moved this Court for a stay pending appeal on May 8, 2017. This Court denied that motion on May 30, 2017.

EPA took the action required by the district court's order on June 13, 2017, while expressly reserving its right to withdraw or revise that action (or any part of the action) if it prevails in this appeal. Docket No. 107–1 (June 13, 2017) (App-___–___).

Standard of Review

The district court limited judicial review to the administrative record and resolved this case on cross-motions for summary judgment. This Court reviews the district court's decision *de novo*. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*,

556 F.3d 177, 189 (4th Cir. 2009). That *de novo* standard applies to questions of both law and fact. *Id*.

Summary of Argument

The district court's decision should be reversed for two reasons.

First, the district court erred when it held that OVEC had standing to bring claims over all the waters at issue in this case. The district court allowed OVEC to bring claims regarding more than 500 waters, but OVEC claimed an interest in only 50 at most. The district court's decision is not consistent with the principles of standing articulated by the Supreme Court. The court also erred because it entered injunctive relief reaching these more than 500 waters and did not narrowly tailor that relief to protect OVEC's narrow interests.

Second, the district court misapplied the "constructive submission" doctrine. Constructive submission does not apply here because West Virginia has a robust TMDL program and is working to complete the TMDLs at issue in this case. No other court has ever made a finding of constructive submission on facts even remotely like these.

The district court's finding of constructive submission is also based on two important factual errors. The district court found that West Virginia had not developed **any** TMDLs for biological impairment since 2012, but the record demonstrates that the State has actually developed hundreds of such TMDLs and continues to do so. And the district court found that West Virginia has "clearly and unambiguously" decided not to establish TMDLs for

ionic toxicity when the record shows that, to the contrary, West Virginia is working on and has a plan to complete those TMDLs.

Argument

I. The district court erred by holding that OVEC had standing to sue over waters in which it had not alleged a concrete interest.

The declarations submitted by OVEC alleged an interest in at most 50 biologically-impaired waters. Docket Nos. 30-1 through 30-13 (Nov. 20, 2015) and 53 (May 11, 2016) (App-___–___). But the district court's decision—and its consequent injunction—were not limited to those waters. Instead, they reached the 523 additional biologically-impaired waters in which OVEC had alleged no specific interest. The district court reached this result by embracing the theory that OVEC could sue over any biologically-impaired water anywhere in the State because it had alleged an interest in a "representative" number of waters. But that theory violates the fundamental principles of standing articulated by the Supreme Court and should therefore be reversed.

It is black-letter law that OVEC only has standing to bring a claim where there is a threat to its interests: no plaintiff has standing "apart from [a] concrete application that threatens imminent harm to **his interests**." *Summers v. Earth Island Inst.,* 555 U.S. 488, 494 (2009) (emphasis added); *see also Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). Article III of the Constitution allows the courts to "review and revise legislative and executive action" only when doing so is necessary to "redress or prevent actual or imminently-threatened injury to persons." *Summers*, 555 U.S. at 492.

The requirement that plaintiffs show actual or imminent injury ensures that legal questions are decided in a concrete factual context. But it is also essential to protecting the separation of powers within our government. Without this requirement, the courts would be free "to shape the institutions of government" as they saw fit, and that is "not the role of courts, but that of the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). The Supreme Court has warned that if plaintiffs are not held to this requirement, the "distinction between" the branches of government "would be obliterated," *id.* at 350, and the "allocation of power" between the branches would be "significantly alter[ed]" "away from a democratic form of government," *Summers*, 555 U.S. at 493 (citations omitted).

Most importantly, "standing is not dispensed in gross," so the fact that OVEC alleged an interest in **some** of these waters does not give it standing to sue about **other** waters. *Lewis*, 518 U.S. at 358 n.6; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000). The Supreme Court has rejected this kind of "commutative" theory of standing where standing for one claim also grants standing over any other claim with a "common nucleus of operative fact." *DaimlerChrysler*, 547 U.S. at 335, 352. Rather, "a plaintiff must demonstrate standing separately for each form of relief sought." *Id.*

The Supreme Court has also repeatedly confirmed that the requirements of standing apply to environmental plaintiffs like OVEC: a "generalized harm to the . . . the environment will not alone support standing." *Summers*, 555 U.S.

at 494. It was also not enough for OVEC to allege that its interests are "roughly 'in the vicinity'" of an alleged environmental harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992) (quotations omitted); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (holding that requirements of standing are not met when plaintiff alleges harm in same "immense tract of territory"). And it was not enough for OVEC to allege that its interests were part of the same ecosystem. *Lujan v. Defenders of Wildlife*, 504 U.S. at 565.

This Court, too, has rejected the theory that an environmental organization may act as "a roving environmental ombudsman seeking to right environmental wrongs wherever [it] might find them." *Friends of the Earth v. Gaston Copper Recycling Corp.* 204 F.3d 149, 157 (4th Cir. 2000). Like the present case, *Gaston Copper* was brought under the citizen suit provisions of the Clean Water Act. *Id*. at 150. This Court found that the organizational plaintiff had made the required showing of "injury in fact"—but only after confirming that its members were located downstream of the factory and could be affected by the alleged pollution. *Id*. at 158. The *Gaston Copper* plaintiffs, in short, had "produced evidence of actual or threatened injury **to a waterway in which [they] ha[d] a legally protected interest**." *Id*. at 156 (emphasis added).

Thus, as in *Lewis v. Casey*, the fact that OVEC may have had "the right to complain of **one** administrative deficiency" did not "automatically confer[] the right to complain of **all** administrative deficiencies," because then "any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis*, 518 U.S. at 358 n.6. These standing

requirements protect the separation of powers: if the courts "were authorized to remedy **all** inadequacies in [government] administration" whenever "a plaintiff demonstrated harm from one particular inadequacy," then nothing could "prevent[] courts from undertaking tasks assigned to the political branches." *Id*. (emphasis in original). That is exactly what happened here: the district court did not limit itself to the approximately 50 waters in which OVEC asserted a concrete interest, but instead decided that it had the authority to fix the alleged inadequacies that it perceived in West Virginia's TMDL program throughout the State. By doing that, the district court circumvented the requirements of Article III standing and exceeded its constitutionally-assigned role.

OVEC has alleged constructive submission of no TMDLs for 573 separate and distinct waters, and it failed to show that it had any "legally protected interest" in about 523 of these waters. It did not have standing to bring a claim with respect to those 523 waters. *See Sierra Club*, 405 U.S. at 734–35; *Summers*, 555 U.S. at 494 (holding that an environmental plaintiff has no standing to sue "apart from any concrete application that threatens imminent harm to his interests."); *Laidlaw*, 528 U.S. at 181 ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.").

The requirements of standing undoubtedly make it more difficult for OVEC to compel agency action regarding hundreds of separate waters at once and to subject West Virginia's administration of its entire biological TMDL

program to judicial review. *See Lujan*, 497 U.S. at 894 (noting that this "case-by-case approach" is "frustrating" for environmental plaintiffs like OVEC). That is not a flaw; it is essential to the purpose of these requirements, which limit the role of the courts in our government. By allowing OVEC to sue over waters in which it had not even alleged an interest, the district court effectively eliminated "the requirement of concrete, particularized injury in fact," violated the separation of powers, and must be reversed. *See Summers*, 555 U.S. at 496.

The district court based its theory of standing largely on the Ninth Circuit's decision in *Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994). There, the Ninth Circuit held that the plaintiffs had standing to sue over the lack of TMDLs for all three million bodies of water in Alaska because they had alleged an interest in "a representative number of waters." 20 F.3d at 985. This Court has not followed *Alaska Center*, and for good reason. Even if that decision were good law when it was decided in 1994, its application here cannot be reconciled with the Supreme Court's later decision in *Summers,* 555 U.S. at 494. If *Alaska Center* were right and applied here, then OVEC—based on its interest in a "representative" number of waters—could act as "a roving environmental ombudsman" and bring claims regarding any waters in West Virginia, even waters in which it had no interest. Both this Court and the Supreme Court have rejected that result. *See Gaston Copper*, 204 F.3d at 157; *Summers*, 555 U.S. at 494.

In any event, even if the Ninth Circuit's reasoning in *Alaska Center* were correct, that reasoning does not apply here. In that case, the State of Alaska

had not established a single TMDL for any of its impaired waters even after a decade had passed. The Ninth Circuit's entire decision was built on the premise that the violation was state-wide and programmatic and could only be remedied by an injunction encompassing all of the waters of the State. 20 F.3d at 985–86. Indeed, the court flatly refused to enter an injunction dealing with anything less than all of Alaska's waters. An injunction any more narrow, the court concluded, would be "contrary to congressional directive" because it would effectively allow plaintiffs to impose their own priorities on a State's TMDL program, and the Clean Water Act reserves that right to the States. *Id.* at 985.

OVEC's claims here are different from the claims at issue in *Alaska Center*. OVEC did not allege a complete failure of West Virginia's State TMDL program, its claims did not reach all of the State's impaired waters, and it did not seek an injunction encompassing all of the waters of the State. Instead, its claims encompass 573 distinct TMDLs for 573 separate waters. To establish standing for all of those waters, OVEC had to—but did not—demonstrate an interest in each specific water. *See Summers*, 555 U.S. at 495–6. If OVEC had brought a claim challenging the State's failure to establish a single TMDL for a single body of water, or a challenge to an actual TMDL, it would be obvious that it had to demonstrate an interest in that body of water. The fact that OVEC bundled 573 such claims together does not change the requirements of standing, because standing is not "dispensed in gross."

The district court also relied on the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1149, 1155 (10th Cir. 2013). In that case, the Tenth Circuit held that plaintiffs had standing to challenge 39 oil and gas leases, even if they had not demonstrated that every one of the leases would affect their interests, because an environmental plaintiff is not required "to show it has traversed each bit of land that will be affected by a challenged agency action." *Id*. at 1155. Instead, the Tenth Circuit held the plaintiffs had standing to sue as long as their interests were among the interests "affected by a challenged agency action." *Id*. In other words, they had standing as long as their interests fell within the "footprint" of the agency action.

Here, in contrast, OVEC did not challenge final agency action at all, but rather alleged that EPA's failure to act regarding each of these 573 impaired waters violated its mandatory duties. There is no over-arching agency action and thus no "footprint." Each of the TMDLs at issue in this case applies to a different body of water and a different pollutant, and each approval or disapproval would be a separate and distinct agency action. As such, the Tenth Circuit's reasoning in *Southern Utah Wilderness Alliance* does not apply.

Finally, even if OVEC had standing to bring these claims, the district court erred by entering an injunction against EPA for the hundreds of waters in which OVEC had not alleged a particularized interest. Injunctive relief is justified only where a plaintiff is under threat of a "concrete and particularized" injury and the injunction "will prevent or redress the injury." *Summers*, 555 U.S. at 493. The relief must be narrowly "tailored" to the injury.

See, e.g., Consolidation Coal Co. v. Disabled Miners of S. W. Va., 442 F.2d 1261, 1267 (4th Cir. 1971) ("Whenever the extraordinary writ of injunction is granted, it should be tailored to restrain no more than what is reasonably required to accomplish its ends."). The district court did not narrowly tailor this injunction to protect OVEC's alleged interests in about 50 waters, but instead granted a broad injunction that reaches biologically-impaired waters throughout the State. That was error.

The district court was apparently concerned that holding OVEC to the strict requirements of standing would impose a heavy burden on the organization. Standing Op. at 15 (App-___); *see also Alaska Center*, 20 F.3d at 985. But again, that is the point of standing: Article III of the Constitution makes it difficult for OVEC to bring a broad challenge to West Virginia's TMDL program because "it is not the role of courts . . . to shape the institutions of government." *Lewis*, 518 U.S. at 349. OVEC may pursue its concerns with the political branches of government by administratively petitioning EPA or by seeking relief from Congress (or, of course, by seeking relief from the administration or legislature in West Virginia). But the district court erred when it held that OVEC had standing to sue regarding the approximately 523 waters at issue in this case in which OVEC alleged no specific interest, and it erred by issuing an injunction that covers those waters. Its decision should be reversed with respect to those waters and the matter remanded to the district court with instructions to dismiss the suit with respect to those waters for lack of jurisdiction. At a minimum, the matter should be

remanded to the district court so that it may limit its injunction to the approximately 50 waters as to which OVEC has alleged a concrete injury.

II. The district court erred by finding "constructive submission" here.

A. The district court misapplied the doctrine of constructive submission.

For the remaining 50 or so waters where OVEC has alleged facts to support its standing to sue, the district court's decision should be reversed because the Clean Water Act does not impose a mandatory duty on EPA to take any action here. The district court decided that West Virginia had taken too long to establish these TMDLs and that it had the wrong priorities for its TMDL program. But that was not enough to justify a finding of "constructive submission" triggering EPA's mandatory duty to act, even assuming that the doctrine applies to anything less than the complete failure of a State's TMDL program. As we explain below, the standard for a finding of constructive submission is high, and the district court misapplied that standard here.

The Clean Water Act does not require West Virginia to submit its TMDLs to EPA on any particular schedule—only "from time to time" and in accordance with the State's priority ranking. Moreover, the Act does not expressly require EPA to act if West Virginia fails to submit TMDLs. 33 U.S.C. § 1313(d)(1)(c). The Act itself makes no explicit provision for "constructive submission." *See id.* § 1313(d)(1)(c), (d)(2). Though the text of the statute directs the States to submit TMDLs for their impaired waters, it does not authorize citizen suits against the States to compel such action. *See id.* § 1365.

The Act does authorize citizen suits against EPA when EPA has failed to perform a mandatory duty, but the Act does not impose a mandatory duty on EPA to act if a State does not submit a TMDL. *See id*. § 1365(a)(2) (allowing a citizen suit against EPA "where there is alleged a failure of the [EPA] Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator.").

The plain language of the Act, therefore, provides no recourse to the courts if a State does not submit a TMDL. Congress has acknowledged that it is the "primary responsibilit[y] and right[]" of the States to "prevent, reduce, and eliminate" water pollution. *Id*. § 1251(b). The Act gives States broad discretion to set their own priorities for their TMDL programs, and those priorities are not subject to approval by EPA or the courts. Congress, moreover, put strict deadlines and backstops in the Act in many places, but not for the States' TMDL programs. The omission of such provisions suggests that Congress decided that it is not the job of the courts to oversee how States manage their TMDL programs, but that such matters are properly entrusted to the political branches of government. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

Nonetheless, the Seventh Circuit was convinced of a gap in the statute, and it created the theory of constructive submission to fill that gap.[1] *Scott*, 741 F.2d at 997. The Ninth and Tenth Circuits have also applied this theory. *Baykeeper*, 297 F.3d at 881–83; *Hayes*, 264 F.3d at 1022–24.

But because constructive submission is a judge-made doctrine, it is "necessarily a narrow one." *Hayes*, 264 F.3d at 1024. It applies "only when the state's actions **clearly and unambiguously** express a decision to submit no TMDL." *Id*. (emphasis added). It is "not viable" where a State has "submitted a number of TMDLs and is making progress toward completing [other] TMDLs." *Id*. Where a State has submitted TMDLs and "established a schedule for completing its remaining TMDLs," those actions "preclude any finding that the state has 'clearly and unambiguously' decided not to submit any TMDLs." *Baykeeper*, 297 F.3d at 883. In other words, where a State is doing the work required by the Clean Water Act, there can be no justification for constructive submission because there is no threat to "the federal scheme of

[1] The Fourth Circuit has not previously applied the constructive submission doctrine, and it has not addressed whether that doctrine is a valid interpretation of the Clean Water Act. EPA takes no position at this time on whether that doctrine is a valid interpretation of the Act. We submit that it is not necessary or appropriate for this Court to reach that issue in this appeal. Instead, this appeal should be resolved on the narrower ground that, if the constructive submission doctrine does exist, it does not apply to the facts of this case. (As we explain in detail below, West Virginia has actively submitted TMDLs and has simply given a lower priority to the TMDLs sought by the plaintiffs.) By deciding this case on this narrower ground, the Court would leave open for a future case—where the issue has been fully briefed by the parties and decided by the district court—whether the constructive submission doctrine itself is a valid interpretation of the Clean Water Act.

water pollution control." *Scott*, 741 F.2d at 997. This limitation reflects the doctrine's original development as a tool to force action by recalcitrant States that had wholly neglected their duties under the Clean Water Act for lengthy periods of time. This limitation also shows that the doctrine was never intended to allow litigants like OVEC to micromanage a State's TMDL program.

The cases applying constructive submission illustrate just how limited this theory really is: OVEC cites only a single case where a court actually made a finding of constructive submission, and that case involved the State of Alaska's decade-long, state-wide failure to establish even a single TMDL. *Alaska Center*, 762 F. Supp. at 1429. In every other cited case, the courts have refused to find constructive submission, even where a State had not established any TMDLs for up to **20 years**, as long as the States had begun establishing TMDLs and had a schedule to develop the remaining TMDLs.[2]

[2] *See, e.g., Baykeeper*, 297 F.3d at 883 (holding that constructive submission is precluded by submission of 18 TMDLs by California); *Hayes*, 264 F.3d at 1024 (holding that constructive submission is "not viable" where Oklahoma "has submitted a number of TMDLs and is making progress."); *Sierra Club v. McLerran*, No. 11-cv-1759, 2015 WL 1188522 (W.D. Wa. Mar. 16, 2015) (finding no constructive submission); *Potomac Riverkeeper v. EPA*, No. 04-3885, 2006 WL 890755 (D. Md. Mar. 31, 2006) at *15 (finding no constructive submission); *American Littoral Society v. EPA*, 199 F. Supp. 2d 217, 241–43 (D.N.J. 2002) (finding no constructive submission); *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 418 n.18 (D. Md. 2001) (finding no constructive submission); *NRDC v. Fox*, 93 F. Supp. 2d 531, 542 (S.D.N.Y. 2000) (rejecting constructive submission because New York "continues to participate actively and meaningfully in the effort to promulgate TMDLs"); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 968 (W.D. Wa. 1996) (finding no constructive

The courts all agree: if a State has established some TMDLs and is working to complete its remaining TMDLs, those actions "preclude" a finding of constructive submission. *See* fn. 2 *supra*. No court has ever found a constructive submission against a State like West Virginia that has developed and submitted thousands of TMDLs to EPA and has a plan to complete many more (including the outstanding TMDLs that the complaint alleged have been "constructively" submitted).

Moreover, this case is not like *Alaska Center* because it is a case about a State's priorities. In *Alaska Center*, a decade had passed and Alaska had not established a single TMDL and had no plans to do so. Alaska did not and could not argue that it was working on other, higher-priority TMDLs because it was not working on any TMDLs at all. Here, in contrast, West Virginia is working on other, higher-priority TMDLs—it has established thousands of TMDLs since 2004 and expects to establish hundreds more over the next few years, including TMDLs for biological impairment.[3]

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submission); *Sierra Club v. Hankinson*, 939 F. Supp. 865, 872 n.6 (N.D. Ga. 1996) (finding no constructive submission).

[3] The administrative record before the district court shows that West Virginia had plans to complete the rest of these TMDLs between 2017 and 2027 (with the exception of seven waters that it expected to complete by 2031). *See* JA 2791–844 (App. ___–___). After the district court issued its decision, EPA and the West Virginia Department of Environmental Protection ("WVDEP") entered into a memorandum of agreement that schedules the completion of all of these TMDLs by the State by June 30, 2026. Docket No. 107–1 (June 13, 2017). In addition, EPA and WVDEP signed an addendum on July 12, 2017 that identified specific deadlines each year between December 31, 2021 and June 30, 2026 for West Virginia to submit those TMDLs to EPA. In the body

Thus, the fact that West Virginia had not yet established TMDLs for ionic toxicity for these waters is not "clear and unambiguous" evidence that the State has decided that it will never complete those TMDLs. And it is certainly not "clear and unambiguous" evidence that West Virginia has decided not to complete TMDLs for any of the biologically-impaired waters at issue in this case. Instead, it merely shows that West Virginia has deferred starting its TMDLs for ionic toxicity and given them a lower priority—due to their technical complexity and the requirements of SB 562—while it works on other TMDLs.

That is entirely within West Virginia's rights: the Clean Water Act recognizes that States may set their own priorities for their TMDL programs and the clean-up of impaired waters. When setting those priorities, the State must take into account "the severity of the pollution and the uses to be made of such waters," 33 U.S.C. § 1313(d)(1)(A), but it may also consider many other factors, including the economic and aesthetic importance of the waters, their restoration potential, and the degree of public interest and support. *See, e.g.,* 57 Fed. Reg. 33,040, 33,044–45 (July 24, 1992). West Virginia may also weigh technical considerations, including the complexity of the impairment and the availability of adequate data and models. JA 943 (App-___). EPA has explained that it is entirely appropriate for a State to give a lower priority to a TMDL that requires "complex analysis" in order to "allow time to collect

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of this brief, we refer to the plans and dates that were set out in the record before the district court.

necessary information and complete the analysis." *Id.* In short, West Virginia enjoys "considerable flexibility" in establishing priorities for TMDL development. JA 943 (App-___). And the State's priorities are not subject to judicial review. *See* 33 U.S.C. §§ 1313(d)(1)(A), (d)(2); *see also, e.g., Hayes*, 264 F.3d at 1024 (warning that the constructive submission doctrine "is not designed to challenge the timeliness . . . of the state's TMDL submissions").

So even assuming that constructive submission can be applied to something less than the failure of a State's entire TMDL program, OVEC had to show much more than just that West Virginia's efforts to complete these TMDLs have been delayed. It had to show that (1) West Virginia has not established TMDLs for any biological impairment (which is not true), (2) West Virginia has no plans to establish these TMDLs (which is also not true), and (3) West Virginia has not been working on any other, higher-priority TMDLs (again, not true). Only then could West Virginia's actions possibly be said to "clearly and unambiguously express a decision to submit no TMDL." This high standard—and the fact that the Act defers to the States to set their own priorities for their TMDL programs—explains why no other court has ever made a finding of constructive submission on a subset of TMDLs as opposed to the kind of wholesale abdication at issue in *Alaska Center*.

OVEC did not make the required showings here. While West Virginia has not established TMDLs for ionic toxicity yet, it has established TMDLs for other stressors and pollutants that cause biological impairment, as discussed below. West Virginia's delay has not been so long that it "clearly and

unambiguously" proves that the State has decided that it will never submit these remaining TMDLs. The district court concluded that West Virginia had delayed the submission of these TMDLs for at least four years (since the state legislature passed SB 562 in 2012), Op. at 22 (App-___). But that time frame is consistent with EPA's guidance, which generally recommends that States submit TMDLs within eight to 13 years after a waterbody is identified as impaired, and some of the waters at issue here have been identified as biologically impaired for a much shorter time. JA 943 (App-___). And while the courts have never defined exactly the length of agency inaction that would support a finding of constructive submission, the only other case to ever make that finding involved a State that had not submitted any TMDLs at all for a decade. *Alaska Ctr. for the Env't*, 762 F. Supp. at 1429 (10 years); *cf. Kingman Park Civic Ass'n v. EPA*, 84 F. Supp. 2d 1, 2 (D.D.C. 1999) (suggesting that 18 years might justify constructive submission); *Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 921 (E.D. Va. 1998) (suggesting that 20 years might justify constructive submission). Only a handful (about 29) of West Virginia's waters have been listed as biologically impaired for that long, and about 160 of these waters have been listed for only a few years (since 2013). *See* JA 2584–608 (App-___–___).

Most importantly, West Virginia has plans to establish these TMDLs, and it has been working on other, higher-priority TMDLs. These facts absolutely preclude a finding of constructive submission here. *See, e.g., Hayes*, 264 F.3d at 1024 ; *Baykeeper*, 297 F.3d at 883. To the contrary, the courts have held that establishing even a handful of TMDLs is enough to preclude

constructive submission. *Baykeeper*, 297 F.3d at 883 (holding that 18 TMDLs preclude constructive submission); *Hayes*, 264 F.3d at 1022 (holding that 29 TMDLs preclude constructive submission).

By making a finding of constructive submission, the district court necessarily imposed its own priorities on West Virginia's TMDL program, which is plainly impermissible and inconsistent with the constructive submission doctrine. *See Hayes*, 264 F.3d at 1024 (warning that constructive submission "is not designed to challenge the timeliness or adequacy of the state's TMDL submissions"); *Alaska Ctr.*, 20 F.3d at 985 ("It would be contrary to congressional directive to permit individual plaintiffs or a federal court to . . . impose their own prioritization."). Its decision should be reversed.

The district court put a great deal of weight on the Western District of Washington's decision in *Sierra Club v. McLerran*, No. 11-cv-1759, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015) ("*McLerran*"), which also involved a constructive submission claim based on a subset of impaired waters. Op. at 30–1 n.15 (App-___ n.15). *McLerran* actually shows that the district court reached the wrong decision. In that case, the State of Washington prepared a detailed draft TMDL for the Spokane River, but put that TMDL on hold before it was completed because the State lacked adequate information. *McLerran*, 2015 WL at *3–4. The State then decided to work on other TMDLs instead while it used an entirely different regulatory tool to manage pollutants in the river in the interim. *Id*. The State expressly announced that it was "not currently planning to develop [a] TMDL [for the river]." *Id*. at *3.

The plaintiffs in *McLerran* argued that the State's decision and its express statements showed that it had "clearly and unambiguously" decided not to establish this TMDL. *Id.* at *4. But the *McLerran* court rejected that argument and held that "no constructive submission has yet occurred." *Id.* at *7–*9. Thus, in *McLerran*, the State lawfully stopped working on a TMDL while it worked on other aspects of its water pollution problems, and the court found that there was no "constructive submission." West Virginia is doing the same thing: it has "paused" its work on the TMDLs for ionic toxicity while it works on other aspects of this problem (including the new assessment tool identified by SB 562). That is entirely lawful, and it does not show that West Virginia has "clearly and unambiguously" decided not to establish these TMDLs. The district court was distracted by *dicta* in *McLerran* but ignored its holding, which shows that a finding of constructive submission was not appropriate here.

In the end, the district court essentially decided that West Virginia was taking too long and that its priorities were wrong. But nothing in the case law, much less the Act itself, authorized the district court to make those decisions. The district court's application of constructive submission expands the doctrine well beyond the boundaries established by the courts that devised it. West Virginia, not the Federal courts, has the authority under the Clean Water Act to set its own priorities for its impaired waters. 33 U.S.C. §§ 1313(d)(1)(A), (C). And West Virginia has put other TMDLs ahead of the TMDLs for ionic toxicity (while it works on its new assessment tool). The law does not allow the district court to dictate how quickly West Virginia must develop these TMDLs

or the order in which they must be developed. The other courts that have applied constructive submission have cautioned that it cannot be used to challenge a State's priorities or "the timeliness . . . of the state's TMDL submissions." *Hayes*, 264 F.3d at 1024; *see also Alaska Ctr.*, 20 F.3d at 985 ("It would be contrary to congressional directive to permit individual plaintiffs or a federal court to . . . impose their own prioritization.").

As this Court recently warned in the context of the Clean Air Act, the courts are "ill-equipped to supervise" this kind of "continuous, complex" agency process, where the statute gives the agency "considerable discretion" and does not provide the courts with specific "guidelines and procedures" or with "start-dates" or "deadlines." *Murray Energy Corp. v. Administrator, United States Environmental Protection Agency*, No. 16-2432, 2017 WL 2800841 at *4–5 (4th Cir. June 29, 2017). Just as in *Murray*, the Clean Water Act does not give the courts any "start-dates" or "deadline" or "guidelines and procedures" to judge whether West Virginia has made a "constructive submission" of "no TMDLs," and so the standard for a finding of constructive submission must be very high—nothing less than "clear and unambiguous" evidence will suffice.

In short, constructive submission may not be used by plaintiffs like OVEC to push their preferred TMDLs to the front of the line, ahead of the State's other priorities. And the doctrine may not be used to force EPA to establish hundreds of TMDLs for the State of West Virginia, a job that EPA was never meant to do and that the Act entrusts to the State. By applying constructive submission here, the district court interfered with the State's

priorities and undid the careful balance that Congress struck between State and Federal governments. The district court misapplied the constructive submission doctrine, and its decision should be reversed.

B. The district court erred in finding that West Virginia has stopped establishing TMDLs for biological impairment.

The district court also made fundamental factual errors here. The heart of its decision was its finding that West Virginia "has decided not to submit TMDLs for biologically-impaired bodies of water." Op. at 36 (App-___). The court made that finding because it believed that West Virginia had not completed **any** TMDLs for biologically-impaired waters since 2012. Op. at 15 (App-___). Importantly, the district court did not limit this finding to the TMDLs for ionic toxicity—to the contrary, it believed that West Virginia had "stopped issuing TMDLs for **all** biological impairments**, not just ionic toxicity**." Op. at 31 n.15 (App-___ n.15) (emphasis added).

This is simply not true. West Virginia submitted 161 TMDLs to resolve biological impairments in 2014, and it submitted at least another 48 in 2016. JA 91–2, 263–5, 3689 (App-___–___, ___–___, ___). Since 2014, West Virginia has established more than 200 TMDLs that will resolve the biological impairments in more than 100 waters. *Id*. Because the district court ignored the significant distinctions between these biologically-impaired waters and simply lumped them all together, it wrongly found that West Virginia "has decided not to submit TMDLs for biologically-impaired bodies of water." Op. at 36 (App-___). And since that finding was a necessary factual predicate to the

application of constructive submission here, this factual error causes the district court's entire decision to unravel. The actual facts here—that West Virginia has continued to issue TMDLs that address those biological impairments—preclude any finding of constructive submission.

In resolving the motion to stay, the district court tried to sidestep this issue by noting that it had limited the relief in this case to those biologically-impaired waters "for which no TMDL has been developed to address that impairment." Memorandum Opinion and Order, Docket No. 99 (May 2, 2017) at 13 (App-___). But that limitation on the injunction does not change the fact that the court's finding of constructive submission is based on the false premise that West Virginia has "stopped issuing TMDLs for all biological impairments, not just ionic toxicity." Op. at 31 n.15 (App-___ n.15). No other court has made a finding of constructive submission against a state, like West Virginia, that not only has a robust TMDL program and a plan to develop the challenged TMDLs, but that is also making significant progress on the very issues raised by the plaintiffs (that is, biological impairment). This factual error is fatal to the district court's reasoning and its decision.

In short, West Virginia has developed hundreds of TMDLs "for biologically impaired bodies of water" in the last three years, and it continues to work to develop even more. The district court ignored those facts, and its judgment should be reversed.

C. The district court erred in finding that West Virginia is not working on TMDLs for ionic toxicity.

The district court also erred here because it found that West Virginia is "not working on the missing TMDLs at all" and has "no plan to develop" them. Op. at 32 (App-___). Again, that finding is directly contradicted by the record. West Virginia has repeatedly stated that it "agrees that TMDLs must be developed for all 303(d) listed impairments," including biological impairments. *See, e.g.,* JA 157 (App-___). It has committed itself to "develop TMDLs as soon as practicable after . . . accomplishing SB 562 requirements." JA 158 (App-___). It has recognized that "the deferral of TMDLs cannot be indefinite." JA 1153 (App-___). And it has repeatedly denied that it is "unwilling" to carry out these responsibilities. JA 2707 (App-___).

Thus, the record shows that West Virginia has merely "paused" its development of TMDLs for ionic toxicity while it completes the new assessment tool requested by the West Virginia State legislature. In its 2014 Section 303(d) list, West Virginia represented (consistent with its watershed approach to TMDLs) that it plans to complete these TMDLs between 2017 and 2027.[4] JA 2791–2844 (App-___–___).

But the district court rejected West Virginia's statements because it decided that the State and EPA are engaged in a sham. *See, e.g.,* Op. at 23

[4] As discussed above in footnote 3, EPA and the West Virginia Department of Environmental Protection have now entered into a memorandum of agreement that schedules the completion of all of these TMDLs by the State by June 30, 2026. Docket No. 107–1 (June 13, 2017).

(App-___) (claiming that EPA is trying to "disguise" West Virginia's decision not to establish TMDLs), *id.* at 32 (App-___) (finding that West Virginia is working "on something else entirely under the guise of a reprioritization"). There is no evidence in the record, however, that suggests that either West Virginia or EPA is acting in bad faith. Certainly, the district court cited no such evidence; instead, it relied on unsupported inferences and speculation. That was clearly erroneous, and this Court should not affirm that either the State or EPA was acting in bad faith on *de novo* review.

There is nothing underhanded about West Virginia's actions here. The State has been completely transparent about these issues; it has analyzed the effects of ionic toxicity on these waters for years and discussed those effects extensively in its public reports. *See, e.g.*, JA 2332–33, 2767–68, 4201–7, 4471–6 (App-___–___, ___–___, ___–___, ___–___). It has been working for years to solve the complex scientific and technical questions raised by ionic toxicity. Once the West Virginia legislature asked the State to develop a new assessment tool, the State informed EPA that it had decided to pause its work on these TMDLs until that tool could be completed. JA 66–7, 157–9, 3298–9 (App-___–___. ___–___, ___–___). The State has been open about all of this with both the public and EPA. *See id.* And the record confirms that West Virginia is working to develop its new assessment tool. *See generally* JA 3870–3886 (App-___–___).

West Virginia has also explained in some detail the basis for its schedule for these TMDLs. West Virginia develops its TMDLs in a cycle that works

through the State's watersheds on a rotating, five-year basis. JA 2779 (App-___). Once its new assessment tool is complete, the State plans to incorporate the TMDLs for ionic toxicity into that process. JA 2785 (App-___). Based on that cycle, as well as "available resources" and the need for additional data on ionic toxicity, West Virginia represented in its 2014 Section 303(d) list that it plans to complete these TMDLs between 2017 and 2027. JA 2791–844 (App-___–___).

The Clean Water Act recognizes that it is the right of the States to set their own priorities for the clean-up of their impaired waters. The Act does not authorize the courts to approve or disapprove those priorities. *See* 33 U.S.C. § 1313(d)(1)(A), (d)(2). The States may weigh technical considerations, including the complexity of the impairment and the availability of data and models, as well as their own State policies when they set those priorities. *See, e.g.,* 57 Fed. Reg. 33,040, 33,044–45 (July 24, 1992). West Virginia has given its TMDLs for ionic toxicity a lower priority because these impairments are complex and because it is State policy, as set out in SB 562, that a new assessment tool should be developed to measure these impairments. That is not a sham, and it is not unlawful.

In every other reported case, the fact that the State had a plan to complete the challenged TMDLs precluded a finding of constructive submission. *See, e.g., Baykeeper*, 297 F.3d at 883. In addition to the district court's unsupported assertion that West Virginia's plan is a "sham," the district court tried to avoid this precedent by drawing a sharp distinction between the

TMDLs and the new assessment tool: according to the court, the State "is not working on the missing TMDLs at all"; rather, "[i]t is working on an assessment tool." Op. at 32 (App-___). This distinction is not convincing. The assessment tool is part of the development of these TMDLs. Because there is no numeric criterion for ionic toxicity, West Virginia must set the target for those TMDLs based upon an assessment of biological conditions. To do that, it necessarily must use an assessment tool. West Virginia's work on its new assessment tool, therefore, is a component of its work on these TMDLs because that tool will lay the foundation for these TMDLs.

Finally, even if the record supported the district court's findings, that would still not be enough to meet the applicable legal standards. The theory of constructive submission applies only where a State's actions show that it has "clearly and unambiguously" decided not to submit TMDLs. The record here shows no such intent. To the contrary, it only shows that West Virginia's efforts to establish these TMDLs have been delayed. And to the extent that anything in the record supports the district court's analysis, it certainly cannot be said to be "clear and unambiguous." The district court's decision should be reversed because its key factual finding—that West Virginia is "not working on the missing TMDLs" and has "no plan to develop" them—is not true and is not supported by the record.

Conclusion

The district court's judgment should be reversed and the matter remanded for the district court to dismiss the suit in part and enter judgment in

favor of the government on the remaining waters. If the decision is not reversed, the case should be remanded so that the district court may narrowly tailor an injunction based on the actual harms to the plaintiffs.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1430 **Caption:** Pruitt v. Ohio Valley Environmental Coalition, Inc. et al.

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