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; and 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 the United States District Court for the Southern District of West Virginia at Charleston

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BRIEF OF *AMICUS CURIAE* NATIONAL WILDLIFE FEDERATION, WATERKEEPER ALLIANCE, INC. AND RIVERKEEPER, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

Amici National Wildlife Federation ("NWF"), Waterkeeper Alliance, Inc. ("Waterkeeper"), and Riverkeeper, Inc. ("Riverkeeper") comprise a coalition of nationwide advocacy groups committed to protecting the quality of the Nation's waters.[1] NWF is one of the nation's oldest and most respected non-profits dedicated to protecting wildlife and habitat. NWF's nationwide federation of state and territorial affiliate organizations and nearly six million members and supporters work to protect our waters for today and future generations. Since its founding, NWF has advocated to protect the Nation's waters by implementing and defending the Clean Water Act through its campaigns and strategic litigation. Plaintiff-Appellee West Virginia Rivers Coalition is NWF's West Virginia Affiliate.

Waterkeeper is a not-for-profit corporation dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper is comprised of 328 Waterkeeper Member Organizations and Affiliates that are working in 35 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of

[1] No party's counsel authored any part of this brief, and no party or person other than *amici*, 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).

individual supporting members that live, work and recreate in waterways across the country–many of which are severely impaired by pollution and in need of TMDLs to restore their beneficial uses. The federal Clean Water Act is the bedrock of Waterkeeper Alliance's work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its member and affiliate organizations and individual supporting members, and to protect the people and communities that depend on clean water for their survival. The interests of Waterkeeper's members in clean water for drinking, recreation, fishing, economic growth, and food production will be injured if the states and EPA are allowed to avoid meeting their legal obligations under the Clean Water Act, including their obligations to develop and implement TMDLs are for all impaired waterways in a timely manner.

Riverkeeper is a not-for-profit organization dedicated to protecting the ecological, recreational, commercial and aesthetic qualities of the Hudson River and its watershed and tributaries, including the waters around New York City, many of which are impaired and require TMDLs. Riverkeeper's members share a deep commitment towards the protection of the water quality and rich ecosystems of these waters. Its members use these waters for a variety of purposes, including recreational and commercial fishing, swimming, boating, hiking, and additional aesthetic enjoyment from its natural beauty and

biodiversity. In order to protect waterways from degradation and misuse, Riverkeeper on behalf of its members enforces and facilitates others' enforcement of federal environmental laws, including the promulgation of TMDLs where necessary. These interests are injured by the impaired water quality, which often makes the waterways unusable, and TMDLs are vital to the improvement of water quality standards.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *amici* respectfully request leave to file this brief in support of the Plaintiffs-Appellees. Counsel for *amici* have consulted with counsel for the other parties. Counsel for Plaintiffs-Appellees have consented to the filing of this brief, and counsel for Defendants-Appellants do not oppose such filing. Although *amici*'s request is unopposed, we seek this Court's permission to file this amicus brief.

SUMMARY OF ARGUMENT

When Congress enacted the Clean Water Act in 1972, it recognized that technology standards and water quality based effluent limitations alone would not guarantee that all water bodies would meet water quality standards designed to protect beneficial uses. *See* 33 U.S.C. § 1313(d). Accordingly, Congress required states to create pollutant load limits from both point and nonpoint sources that would be approved by the EPA Administrator, otherwise known as Total Maximum Daily Loads or TMDLs. Congress "believed that this information is needed for planning and enforcement." 118 CONG. REC. 33,755 (1972). More importantly, Congress "expect[ed] that the States and the Administrator will be diligent and make these studies in a timely fashion." *Id.*

More than a decade later, states still had not created TMDLs as the Clean Water Act Section 303 required, and the EPA had failed to take any action to hold states accountable. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, WATER POLLUTION: MORE EPA ACTION NEEDED TO IMPROVE THE QUALITY OF HEAVILY POLLUTED WATERS, GAO REPORT TO THE CHAIRMAN: SUBCOMMITTEE ON REGULATION AND BUSINESS OPPORTUNITIES COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES (Jan.1989) (concluding that EPA had virtually no TMDL program at all); *Kingman Park Civic Ass'n v. U.S. E.P.A.*, 84 F. Supp. 2d 1, 5 (D.D.C. 1999) (collecting cases). It took a citizen suit, *Scott v. Hammond*,

employing the constructive submission theory to finally break the impasse and get the TMDL program on track. 741 F.2d 992 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). Under this doctrine, when it becomes clear that a state is failing or, as here, simply refusing to create a TMDL, such refusal operates as a constructive submission of "no TMDL," triggering the Administrator's duty to make a decision to either accept or deny the submission.

The constructive submission doctrine is well settled law. Since *Scott v. Hammond*, at least seventeen courts have considered and either applied or approved of the doctrine. The constructive submission doctrine is critical to the structure and purpose of the Clean Water Act because it provides citizen advocates a way to hold states and EPA accountable for meeting their Clean Water Act obligations. While initially used to challenge states' wholesale failure to create TMDLs, the constructive submission doctrine applies to a state's refusal to create a TMDL for an individual impairment. Application of the constructive submission doctrine is especially important in cases like this where the state has enacted a law that in effect places a moratorium on the submission of TMDL's for a category of impaired waters pending more studies. This despite the fact that Congress made it clear that "scientific uncertainty" was not to be used as an excuse to delay establishing TMDL's and included a "margin of error" to account for the inevitable

uncertainties. *See* Oliver A. Houck, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 58 (2002).

Constructive submission doctrine cases have been the impetus for dozens of states across the country "drafting…thousands of TMDLs which the EPA has described as 'the technical backbone' of its approach to cleaning the Nation's waters." *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 291 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1246 (2016) (citing EPA Office of Water, TMDL Program Draft TMDL Program Implementation Strategy § 1.2 (1996)).

Finally, the decision in this case also has important implications for improving and maintaining the water quality that is key to West Virginia's growing recreation economy, which provides new opportunities for small businesses at a time when the state's coal economy is shrinking.

ARGUMENT

I. THE CONSTRUCTIVE SUBMISSION DOCTRINE IS WELL SETTLED LAW.

The Clean Water Act compels both states and the EPA to abide by strict, date-certain deadlines for submitting and implementing TMDLs. Section 303(d) initially required states to submit TMDLs for all impaired waterways within their states by June 26, 1979 and to update those submissions from "time to time" as water segments were added to the impaired waters list. 33 U.S.C. § 1313(d)(2); 43 Fed.Reg. 60,662 (Dec. 28, 1978) (identifying pollutants under section 304(a)(2)(D)). States largely ignored this deadline until the 1990s and early 2000s. *See* Oliver A. Houck, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 51 (2002).

Frustrated by states' failure to comply with the statutory mandate, concerned citizens took legal action to compel the states to begin creating cleanup plans for impaired waters. Indeed, "the entire concept of water quality standards regulation . . . exploded out of its slumber by a series of citizen suits compelling federal and state action." Oliver Houck, *Clean Water Act & Related Programs*, SB52 ALI-ABA 241, 243 (1997).

Numerous federal courts have applied the constructive submission doctrine. Several courts have applied the doctrine to the facts, while other courts have recognized the doctrine's validity but declined to apply it to the facts. In short, not

only is the constructive submission doctrine well settled law, it has been central in compelling compliance with the Clean Water Act's mandatory TMDL process.

A. Six Federal Courts Have Applied the Constructive Submission Doctrine to Compel Action by EPA in the Face of Recalcitrant States.

At least six courts have applied the constructive submission doctrine to ensure that "recalcitrant states [do not] short-circuit the Clean Water Act and render it a dead letter." *Am. Canoe Ass'n, Inc. v. U.S. E.P.A.*, 30 F. Supp. 2d 908, 921 (E.D. Va. 1998).[2] In *Scott*, the problem was Indiana and the other Great Lakes States failed to create TMDLs to address *e. coli* pollution in Lake Michigan. *Scott*, 741 F.2d at 994. EPA took the position that it had no authority to compel the states to act. *Id.* at 997. Faced with this stalemate, the Seventh Circuit observed: "[W]e think it unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of the states to act." *Id.* The court ultimately concluded that "[s]tate inaction amounting to a refusal to act should not stand in the way of successfully achieving the goals of federal anti-pollution policy." *Id.* at 998.

[2] *American Canoe* also rejected the reasoning in the one case to have held that the EPA has discretion to determine when constructive submission has occurred. *See id.* at 920–21 (rejecting *Nat. Res. Def. Council, Inc. v. Fox*, 30 F. Supp. 2d 369, 377 (S.D.N.Y. 1998), which held that it lacked jurisdiction to find a constructive submission under the Clean Water Act's citizen suit provision).

Since *Scott*, federal courts in Virginia, Alaska, the District of Columbia, Louisiana, and Washington have applied the constructive submission doctrine. A Virginia district court in held that the constructive submission doctrine also applied to Virginia's failure to include all impaired water bodies and pollutants on its 303 (d) list, mandating corrective action by EPA. *Am. Canoe Ass'n, Inc.*, at 919. A district court in Alaska held that the EPA had a mandatory duty to promulgate TMDL lists upon Alaska's eleven-year programmatic failure to submit TMDLs to the EPA. *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wa.1991), *aff'd*, *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994). The D.C. district court held that the District of Columbia's eighteen-year failure to submit TMDLs was constructive submission that no TMDLs were necessary. *Kingman Park Civic Ass'n.*, 84 F. Supp. 2d at 4–7.

Likewise, a district court in Louisiana applied the constructive submission doctrine with reference, not to whether a state has done anything at all, but to how far the state has to go to complete its TMDLs. *Sierra Club v. Clifford*, No. 96-0527, 1998 WL 1032129, 2–3 (E.D. La. Sept. 22, 1998). Most recently, a district court in Washington held that the state's failure to prepare a TMDL for an impaired waterbody was a constructive submission of no TMDL for that waterbody. *Sierra Club v. McLerran*, No. 11-1759, 2015 WL 1188522, *7 (W.D. Wash. Mar. 16, 2015).

B. Other Federal Courts Have Acknowledged the Constructive Submission Doctrine's Validity Even Where It Was Found Not to Apply on the Facts Presented.

Eleven courts recognized the constructive submission doctrine while ultimately concluding that it did not apply on the facts presented. In several of these cases the courts proceeded to find that the EPA's failure to set deadlines for completing TMDL's was arbitrary and capricious in violation the Administrative Procedure Act. The following table includes a complete case list.

Case	**Discussion of Constructive Submission**
Las Vegas v. Clark, 755 F.2d 697, 703–04 (9th Cir.1985)	Declining to apply constructive submission doctrine because there was no claim that the waterbody at issue was water quality limited.
Sierra Club, N. Star Chapter v. Browner, 843 F. Supp. 1304, 1312 (D. Minn.1993)	"A state's failure to develop adequate TMDLs should not thwart Congress' purposes"; EPA's "duty to act following prolonged state inaction is . . . mandatory."
Nat. Res. Def. Council, Inc. v. Fox, 909 F. Supp. 153, 158 (S.D.N.Y. 1995)	TMDLs are key to "creating cohesive water-quality-based limitations"; "failure to submit TMDLs for water quality-limited segments" triggers EPA's nondiscretionary duties.
Idaho Sportsman's Coal. v. Browner, 951 F. Supp. 962, 966–68 (W.D. Wash. 1996)	Rejecting EPA's proposed TMDL schedule for "extreme slowness" and failure to address "the full list of Idaho WQLSs."
Sierra Club v. Hankinson, 939 F. Supp. 865, 868 (N.D. Ga. 1996)	Constructive submission applies to state's failure to submit TMDLs determinations "over a long period of time."
Friends of the Wild Swan, Inc. v. U.S. E.P.A., 130 F. Supp. 2d 1184, 1191 (D. Mont. 1999)	Constructive submission applies when EPA "fails to approve any submissions of . . . TMDLs" before a lawsuit is brought.
Nat. Res. Def. Council, Inc. v. Fox, 93 F. Supp. 2d 531, 542 (S.D.N.Y. 2000)	Constructive submission doctrine "ensure[s] that EPA will ultimately bear a mandatory duty to act . . . if a state refuses to act."

Case	**Discussion of Constructive Submission**
Sierra Club v. U.S. E.P.A., 162 F. Supp. 2d 406, 418 n. 18 (D. Md. 2001)	Recognizing the doctrine applies when a state has "flatly chosen not to act."
Hayes v. Whitman, 264 F.3d 1017, 1023 (10th Cir. 2001)	Constructive submission applies "when the state's actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody."
San Francisco Baykeeper v. Whitman, 297 F.3d 877 (9th Cir. 2002)	Agreeing with the interpretation and application of the doctrine by the Tenth Circuit in *Hayes.*
Am. Littoral Soc'y v. U.S. E.P.A., 199 F. Supp 2d 217, 241 (D. N.J. 2002)	Constructive submission requires proof that a state "entirely failed" to act.

II. THE CONSTRUCTIVE SUBMISSION DOCTRINE IS CRITICAL TO ACCOMPLISHING THE REMEDIAL GOALS OF THE CLEAN WATER ACT.

A. The Constructive Submission Doctrine Allows Citizens to Hold States Accountable for Meeting their Clean Water Act Duties, which is Consistent with Congressional Intent.

Without the constructive submission doctrine, states would be free to simply ignore the mandate to create TMDLs for all impaired waters under the Clean Water Act. *See Scott* at 998 (The Clean Water Act would be "wholly ineffective" if a state's refusal to act would not trigger any EPA action); *Kingman Park Civic Ass'n at* 6–7 ("it strains credulity to posit that Congress meant for the EPA to stand passively aside for more than a decade after [the passage of the Act] while states flagrantly violated their statutory mandates."). Other circuit courts have acknowledged that states cannot stop progress towards clean water through inaction. *See Miccosukee Tribe of Indians v. U.S. E.P.A.*, 105 F.3d 599, 602–03

(11th Cir.1997) (articulating principle that a state may not evade EPA review of water-quality standards by simply refusing to reduce its decision to formal submission); s*ee also Envtl. Def. Fund v. Costle*, 657 F.2d 275, 295 (D.C.Cir.1981) (admonishing, "to approve or disprove such identification, prioritization, and load limits within the requisite statutory framework and time limits," and to "heed the statutory deadlines in the future.").

Congress created the Clean Water Act's citizen suit provision as a tool to ensure compliance with the Act. 118 CONG. REC. 33,717 (1972) (Statement by Senator Bayh that "citizen suits . . . are a very useful additional tool in enforcing environmental protection laws."). The constructive submission doctrine is consistent with Congressional intent. Indeed, citizens' group litigation and the constructive submission doctrine are responsible for implementing TMDL programs across the nation. *See, e.g.*, Dianne K. Conway, *TMDL Litigation: So Now What?* 17 VA. ENVTL. L.J. 83, 84 (2017); James R. May, *The Rise and Repose of Assimilation-Based Water Quality, Part I: TMDL Litigation*, 34 ENVTL. L. REP. 10247, 10247 (2004); Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. 10,391 (1997); Jennifer Ruffolo, *TMDLs: The Revolution in Water Quality Regulation*, CAL. RESEARCH BUREAU (April 1999).

As renowned Clean Water Act scholar Oliver Houck noted, EPA's arguments against constructive submission lead to the "anomalous conclusion that EPA intervention is called for in response to *inadequate* state performance, but not in response to *no* state performance." *See* Oliver A. Houck, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 51 n. 32 (2002). As many courts have found, EPA cannot reconcile this interpretation with the text, purpose, or spirit of the Clean Water Act. Accordingly, the doctrine is a necessary and appropriate tool to ensure compliance.

B. Congress Intended that TMDLs Would be the Primary Mechanism for Addressing Both Point and Nonpoint Sources of Pollution in Complex Water Systems.

TMDLs are a critical component of the Clean Water Act's approach to ensure the Nation's waters are fishable, swimmable, and drinkable. While states use the National Pollutant Discharge Elimination System permitting system to control water pollution from point sources discharging into healthy waters, that system alone does not set a path for recovery for impaired waters. For impaired waters, TMDLs allocate pollution capacity among point sources, nonpoint sources, future growth, and a margin of safety. This plan not only helps regulators address hard-to-control nonpoint sources, but provides a fair plan to allocate pollution loads and an achievable path to clean water. When creating TMDL requirements in 1972, Congress "believed that this information is needed for planning and

enforcement." 118 Cong. Rec. 33,755 (1972); *see also Nat. Res. Def. Council, Inc. v. Fox*, 909 F.Supp. 153, 157 (S.D.N.Y. 1995) (TMDLs are necessary for "creating cohesive water-quality-based limitations").

Particularly with complex systems, unconventional pollutants, TMDLs have demonstrated they are one of the only effective ways to improve water quality. Moreover, where nonpoint sources, like agriculture, are a significant source of the pollutant causing the impairment, a TMDL provides virtually the only regulatory tool under the Clean Water Act to address nonpoint sources of an impairment.

III. THE CONSTRUCTIVE SUBMISSION DOCTRINE APPLIES TO INDIVIDUAL WATERBODIES.

EPA contends that the constructive submission doctrine only applies where a state has done virtually nothing to comply with the statutory mandate to establish TMDL's—in other words an utter programmatic failure—and does not apply where a state has unjustifiably refused to implement TMDLs for specific water bodies or as here an entire category of waters contaminated by industrial discharges. *See* EPA Br. at 25–29. This interpretation ignores the plain language of the Clean Water Act and the cases interpreting it. None of the constructive submission cases conclude that there can be no constructive submission for anything less than a complete programmatic failure to promulgate TMDLs.

On the contrary, the constructive submission doctrine applies to a state abandoning its statutory obligation with respect to a single impairment for a

waterbody, just as it applies to a state's failure to adopt any TMDLs. The Clean Water Act's plain language requires states to create, and the EPA to review, a TMDL for *each* impairment of each water segment within the state. 33 U.S.C. § 1313(d)(1)(C) ("Each State shall establish for the waters identified [on the impaired waters list]. . . the total maximum daily load, for those pollutants . . . "); *id.* at § 1313(d)(2) (describing EPA obligations with respect to each "identification and load," not with respect to the TMDL program generally). Nowhere does the Clean Water Act merely require states to establish a TMDL program.

Courts have commented that constructive submission applies when a state "clearly and unambiguously express[es] a decision to submit no TMDL *for a particular impaired waterbody.*" *Hayes*, 264 F.3d at 1024. Similarly, in the seminal case on this issue, the Seventh Circuit reversed the dismissal of a complaint, expressly holding that the doctrine could be applied to a single waterbody, Lake Michigan. *Scott*, 741 F.2d at 996–97. Likewise, the Western District of Washington recognized that a constructive submission occurs "only when a state has clearly and unambiguously abandoned its obligation to produce a TMDL or TMDLs." *Sierra Club v. McLerran*, 2015 WL 1188522 at *7. The court acknowledged that a state's ability to prioritize which TMDLs it prepares first does not allow a state to avoid creating difficult TMDLs by perpetually delaying their creation. *Id.*

The Clean Water Act imposes clear obligations on states and the EPA to produce individual TMDLs for all impaired waterbodies in the state. The constructive submission doctrine applies both to programmatic failures and to a state's failure to create a TMDL for a particular impairment. The EPA cannot allow West Virginia to indefinitely avoid this obligation with respect to some waterbodies by continuing to work on other, unrelated categories.

IV. THE CONSTRUCTIVE SUBMISSION DOCTRINE HAS LED TO MEASURABLE IMPROVEMENTS IN THE NATION'S MOST POLLUTED WATERWAYS.

A. Virginia, Louisiana, Alaska and the District of Columbia All Created Robust TMDL Programs as a Direct Result of a Citizen Suit Using the Constructive Submission Doctrine.

Virginia failed to create TMDLs for impaired waterbodies for nearly twenty years after the Clean Water Act's statutory deadline. Following *American Canoe*, 30 F. Supp. 2d 908 (E.D. Va. 1998), Virginia's TMDL program grew dramatically; by 2017 the Commonwealth adopted TMDLs to address over 1500 impairments. *See Virginia Water Quality Assessment Report, Virginia Cumulative Number of TMDLs*, U.S. ENVTL. PROTECTION AGENCY, (2017), https://ofmpub.epa.gov/waters10/attains_state.control?p_state=VA#APRTMDLS (last visited Sept. 1, 2017).

Sierra Club challenged Louisiana's failure to create TMDLs in *Sierra Club v. Clifford*, No. 96-0527, 1998 WL 1032129 (E.D. La. Sept. 22, 1998). Louisiana now has TMDLs addressing 762 impairments. *See Louisiana Water Quality*

Assessment Report, Louisiana Cumulative Number of TMDLs, U.S. ENVTL. PROTECTION AGENCY (2017), https://iaspub.epa.gov/waters10/attains_state.control?p_state=LA (last visited on August 29, 2017).

Likewise, *Kingman Park Civic Ass'n*, 84 F. Supp. 2d 1 (D.D.C. 1999), and *Alaska Center*, 762 F. Supp. 1422 (W.D. Wa.1991), spurred the District of Columbia and Alaska to adopt TMDLs addressing 435 and 66 impairments, respectively. *See* . *Alaska Water Quality Assessment Report, Alaska Cumulative Number of TMDLs*, U.S. ENVTL. PROTECTION AGENCY (2017), https://iaspub.epa.gov/waters10/attains_index.control?p_area=AK#APRTMDLS (last visited on Sept. 1, 2017); *See District of Columbia Water Quality Assessment Report, D.C. Cumulative Number of TMDLs*, U.S. ENVTL. PROTECTION AGENCY (2017), https://iaspub.epa.gov/waters10/attains_state.control?p_state=DC (last visited on Sept. 1, 2017).

B. The Constructive Submission Doctrine Has Led To Dozens Of Settlements Establishing Reasonable Schedules To Complete TMDLs.

Not all citizen action using the constructive submission doctrine to compel states to create TMDLs ended in a court order. Between 1998 and 2002 alone, at least 24 states established TMDLs because EPA had been compelled to enter into consent decrees requiring EPA to establish those TMDLs if the states failed to do so. Oliver A. Houck, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY,

AND IMPLEMENTATION 283 (2002); *see also* James R. May, *The Aftermath of TMDL Litigation: Consent Decrees and Settlement Agreements*, CLEAN WATER ACT: LAW AND REG., ALI-ABA 157–59 (Oct. 26, 2005); Nina Bell, *TMDLs at a Crossroads: Driven by Litigation, Derailed by Controversy?*, 22 PUB. LAND & RESOURCES L. REV. 61, 63 (2001).

To take one example, as of 1999, California had not adopted any TMDLs for impaired waterways in Los Angeles and Ventura County watersheds. Heal the Bay and Santa Monica Baykeeper (now Los Angeles Waterkeeper) sued EPA for failing to address impairments in over 100 waterbodies in these watersheds. *Heal the Bay v. U.S. E.P.A.*, Case No: 4:98-CV-04825 (N.D. Cal. 1998). To settle Heal the Bay's lawsuit, the EPA established a thirteen-year compliance schedule for all the named pollutants and waterbodies. *See* Press Release, U.S. Envtl. Protection Agency, U.S. E.P.A. Settles Suit, Addresses L.A., Ventura Watershed Pollution (Jan. 1, 1999), *available at* https://archive.epa.gov/epapages/newsroom_archive/newsreleases/d2a0ac07e5aad50b852570d8005e12f9.html. As of 2017, California has established 69 TMDLs for various pollutants and distinct waterways as a direct or indirect result of this litigation. *See* L.A. Reg'l Water Quality Control Bd., *TMDL List*, CAL. ENV'T PROTECTION AGENCY, www.swrcb.ca.gov/losangeles/water_issues/ programs/tmdl/tmdl_list.shtml (last visited Sept. 1, 2017).

Similarly, in Pennsylvania, a lawsuit that included a claim of constructive submission of TMDLs for waterways impaired by acid mine drainage settled with a consent decree. The consent decree included the process for establishing TMDLs, scientific methods of calculation, monitoring and reporting requirements, and a recognition that EPA had responsibility for creating TMDLs. *Id.* at 164–66 (6-8). EPA took ultimate responsibility, through distinct schedules, for establishing TMDLs for waters impaired by acid mine drainage. *Id*. at 164 (6); *see also* TMDL for streams impaired by acid mine drainage in Kiskiminetas-Conemaugh River Watershed https://www.epa.gov/sites/production/files/2015-09/documents/kiskireport.pdf

V. WEST VIRGINIA'S GROWING OUTDOOR ECONOMY RELIES ON CLEAN WATER.

A. The New River Gorge Exemplifies the Importance of Clean Water To Boost West Virginia's "New" Economy.

While the coal industry was once a king to West Virginia's economy, the New River Gorge and its National Park has saved the communities that a now-languishing coal industry left behind. Mike Walker, *Fayetteville's New Life in New River Gorge Ecotourism*, PORTERBRIGGS.COM, http://porterbriggs.com/fayettevilles-new-life-in-new-river-gorge-ecotourism/ (last visited Sept. 1, 2017).

In addition to its hiking trails and wildlife viewing, New River Gorge has some of the best whitewater rafting and rock climbing in eastern North America.

Id. These attractions, once relatively unknown, now make New River Gorge a sought after destination for adventure enthusiasts.

In 2012, non-local recreational visits accounted for 68% of total visits in the New River Gorge. Cecelia Mason, *Two National Parks Boost West Virginia's Economy*, W. VA. PUB. BROADCASTING (Mar. 3, 2014), http://wvpublic.org/post/two-national-parks-boost-west-virginias-economy#stream/0. These visitors spent over $40 million and created 605 jobs in the hospitality, food service, recreation, and transportation sectors, greatly impacting the quality of life in the area. Robin Snyder, *Economic Impacts of National Parks in Southern West Virginia*, NAT'L PARK SERV., https://www.nps.gov/neri/learn/news/economic-impacts-of-national-parks-in-southern-wv.htm (last visited Sept. 1, 2017). West Virginia's Department of Tourism has latched onto this trend and markets the "Wild, Wonderful West Virginia," highlighting all the natural attractions that bring in out-of-staters, including those offered in the New River Gorge. WEST VIRGINIA DEPARTMENT OF TOURISM, HTTPS://GOTOWV.COM (last visited Sept. 1, 2017).

West Virginia has an enormous opportunity for growing revenue from National Park visitation, which nationwide was $18.4 billion in 2016 alone, as it currently ranks only 33rd in the nation for National Park visitation. U.S. DEP'T OF THE INTERIOR, NPS 2017/1421, 2016 NATIONAL PARK VISITOR SPENDING EFFECTS

(2017); Cecelia Mason, *Two National Parks Boost West Virginia's Economy*, W. VA. PUB. BROADCASTING (Mar. 3, 2014), http://wvpublic.org/post/two-national-parks-boost-west-virginias-economy#stream/0; Charles Sims, *Economic Expenditure and Use Data on Whitewater Boating Activity*, http://www.trailsrus.com/whitewater/econreports/EconomicExpeditiuresandUseDataonWhitewaterBoatingActivity.docx (last visited Sept. 1, 2017) (The average per person expenditures per trip to the New River Gorge National River is approximately $19.94.). Indeed, amusement and recreation industries rank in the top ten industries with the greatest anticipated growth in West Virginia by 2024. WORKFORCE WEST VIRGINIA, 2015 ECONOMIC REVIEW (2015), *available at* http://lmi.workforcewv.org/EconomicReview/WV_Economic_Review_2015.pdf.

Potential economic growth is not limited to merely adventure-based tourism. As West Virginia small business owner Carroll C. Bassett, President of Ezebreak LLC noted, "West Virginia has a tremendous opportunity to attract creative, innovative small businesses," but that opportunity depends on "clean water, outdoor recreation and natural beauty found on our treasured public lands." Carroll C. Bassett, *Your Views*, CHARLESTON GAZETTE-MAIL, October 13, 2014 at 5A.

B. West Virginia's Tourist Economy Depends on Clean Water.

Tourists will only come to West Virginia if it protects its waterways. In the wake of the Elk River chemical spill, local businesses saw a huge drop in out-of-state tourism a drop that Charleston boutique owner Nancy Ward called "unprecedented." Shawnee Moran, *Charleston-based coalition empowers small, mid-sized businesses*, CHARLESTON GAZETTE-MAIL, Aug. 6, 2014. Jeni Burns, owner of Ms. Groovy's Gourmet Catering and the co-founder of the West Virginia Sustainable Business Council, discussed the importance of clean water after the spill noting "not all regulations are burdensome. What is burdensome is having to close your business because your water is contaminated and you can no longer use it . . . I'd bet money that the good people of West Virginia, who work the earth, want clean drinking water for their families, livestock and their communities." Jeni Burns, *Everybody I Know Wants Clean Drinking Water*, CHARLESTON GAZETTE-MAIL, OCT. 19, 2014.

CONCLUSION

The constructive submission doctrine is an important tool for citizen advocates to hold states and EPA accountable for creating TMDLs for impaired waterbodies. Without the doctrine, states would be free to indefinitely postpone creating politically unpopular TMDLs. The constructive submission doctrine is especially important in cases like this where the state has enacted a law that in

effect places a moratorium on the submission of TMDL's for a category of impaired waters pending more studies. The doctrine is well settled law and applies to individual impairments. Applying the constructive submission doctrine here is important because West Virginia's growing tourism economy relies on clean water.

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Respectfully submitted,

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No. 17-1430 **Caption:** Ohio Valley Envtl. Coalition et al. v. Pruitt et al.

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(s) Patrick Parenteau

Party Name National Wildlife Federation, et al

Dated: Sept. 1, 2017

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I certify that on September 1, 2017, I electronically filed the foregoing brief of Amicus Curiae National Wildlife Federation 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/ Patrick Parenteau
Patrick Parenteau

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