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## Ohio's Avoidance of Total Maximum Daily Load and the Continued Relevance of the Constructive Submission Doctrine

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### Recommended Citation

Ashley Kirk, *Ohio's Avoidance of Total Maximum Daily Load and the Continued Relevance of the Constructive Submission Doctrine*, 8 *Global Bus. L. Rev.* 42 (2019)  
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**OHIO’S AVOIDANCE OF TOTAL MAXIMUM DAILY LOAD AND THE CONTINUED RELEVANCE OF THE CONSTRUCTIVE SUBMISSION DOCTRINE**

Ashley Kirk

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ABSTRACT

This Note examines several provisions of the Clean Water Act (CWA), in particular, Total Maximum Daily Loads (TMDLs), in the context of recent litigation over the State of Ohio’s plan to address Lake Erie water quality. It looks at the role of TMDLs in CWA implementation, and explains Ohio’s response to Lake Erie water quality, asserting that Ohio’s ranking of Lake Erie as a “low priority,” in conjunction with its plan to follow a non-binding international agreement, the Great Lakes Water Quality Agreement, is simply an attempt to create another CWA loophole and avoid TMDL obligations. This Note also considers federal courts’ application of the “constructive submission” doctrine—a finding of constructive submission of no TMDL triggering US EPA oversight—and argues that the doctrine should be applied more broadly as a check on states’ avoidance or slow pace of TMDL promulgation. This Note concludes that an expansion of the doctrine to take states’ priority rankings of impaired waters into account in CWA litigation would better serve the purposes of the Clean Water Act by pushing states to create TMDLs for their most polluted bodies of water.

## I. INTRODUCTION

By the 1970's Lake Erie had developed an international reputation<sup>1</sup> as the “dead” lake.<sup>2</sup> “Dead” because the lake was being used as a dumping ground for industrial waste, agricultural waste, and even human waste.<sup>3</sup> With the passage of federal environmental statutes and regulations, Lake Erie has begun to shake its sickly reputation.<sup>4</sup> But despite this progress, the shores of Lake Erie have once again started (literally) turning green.<sup>5</sup>

Green sludge on the surface of a waterbody is often the result of a harmful algal bloom (“HAB”).<sup>6</sup> HABs occur when there is a combination of excess nutrients, such as phosphorus, and high water temperatures.<sup>7</sup> The shallowest and warmest of the Great Lakes, Lake Erie is especially susceptible to HABs as these conditions, combined with increased phosphorus, are

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<sup>1</sup> Lake Erie's reputation even earned a mention in Dr Seuss' 1971 children's book *The Lorax*, where the book describes a pond of dying fish:

“They'll walk on their fins and get woefully weary,  
in search of some water that isn't so smeary.  
I hear things are just as bad up in Lake Erie.”

DR. SEUSS, *THE LORAX* 52 (Random House: New York) (1971). Dr. Seuss kindly revised this section of his book in the 1980s upon request by Ohio's Stone Laboratory once the Lake's water quality had vastly improved due to extensive clean-up efforts. See Tom Jackson, *How Dr. Seuss and the Lorax helped Lake Erie*, *THE SANDUSKY REGISTER* (March 22, 2012) <http://www.sanduskyregister.com/story/201203220001> (last accessed Dec. 27, 2019).

<sup>2</sup> Michael Rotman, *Lake Erie*, *THE CLEVELAND HISTORICAL SOCIETY* (Sept. 19, 2018), <https://clevelandhistorical.org/items/show/58> (“By the 1960s, Lake Erie had become extremely polluted, in part due to the heavy industry that lined its shores in Cleveland and other cities. Factories dumped pollutants into the lake and the waterways that flowed into it (like the Cuyahoga River). . . . Waste from city sewers made its way into the lake too, as did fertilizer and pesticides from agricultural runoff.”).

<sup>3</sup> *Id.*

<sup>4</sup> Michael Wines, *Behind Toledo's Water Crisis, a Long-Troubled Lake Erie*, *N.Y. TIMES*, (Aug. 5, 2014), at <https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html>.

<sup>5</sup> *Id.* (Most notably in 2014 a large toxic algal bloom formed over Toledo, Ohio's water intake, rendering Toledo's water undrinkable.).

<sup>6</sup> National Oceanic Atmospheric Administration, *What is a Harmful Algal Bloom?* US DEPARTMENT OF COMMERCE (Sept. 19, 2018), <http://www.noaa.gov/what-is-harmful-algal-bloom>.

<sup>7</sup> Kenneth Kilbert, et al., *Legal Tools for Reducing Harmful Algal Blooms in Lake Erie*, 44 *U. TOL. L. REV.* 69 (2012).

perfect for algae to prosper.<sup>8</sup> In 2014, an extremely large algal bloom developed on the surface of the Western Basin of Lake Erie, near Toledo, Ohio, releasing a toxin called microcystin.<sup>9</sup> A resulting “Do Not Drink” advisory for drinking water extracted from the lake meant that 400,000 residents in the Toledo area were without tap water for many days.<sup>10</sup>

One of the legal tools provided by the Clean Water Act<sup>11</sup> (“CWA”) to combat HABs are Total Maximum Daily Loads (“TMDLs”), which act like “pollution budgets.”<sup>12</sup> Under section 303(d) of the CWA, states must submit a list of “impaired” waterbodies to the United States Environmental Protection Agency (“US EPA”).<sup>13</sup> When a state designates a waterbody as “impaired,” the state is then obligated to develop a TMDL for that waterbody.<sup>14</sup> Most states have a significant number of waterbodies on such a list, and are required to create a priority ranking for impaired waters, and then develop a TMDL for impaired waterbodies “in accordance with the priority ranking.”<sup>15</sup>

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<sup>8</sup> *Ohio Sea Grant, Harmful Algal Bloom Q&A and Updates*, THE OHIO ST. UNIV. (Nov. 26, 2018), <http://ohioseagrant.osu.edu/news/2014/a8990> (explaining that as Lake Erie is the shallowest of the Great Lakes, and contains the least water by volume, it is warmer. Indeed, this factor, combined with other factors, such as increased levels of phosphorus leads to higher levels of algae.).

<sup>9</sup> Lauren Coleman, *Message in A Water Bottle: The Call for A Tri-State Tmdl for Western Lake Erie*, 40 WM. & MARY ENVTL. L. & POL’Y REV. 565 (2016).

<sup>10</sup> *Id.*

<sup>11</sup> 33 U.S.C. § 1251 (2011).

<sup>12</sup> Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1050 (2013) (“A TMDL in effect constitutes a pollution budget for a particular waterbody, divided among all nonpoint and point sources of the pollutant.”).

<sup>13</sup> 33 U.S.C. § 1313 (2011). (“Each State shall identify those waters within its boundaries for which the effluent limitations required by... this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.”).

<sup>14</sup> *Id.* (“Each State shall establish for the waters identified in . . . this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies”).

<sup>15</sup> *Id.*

TMDLs are an important component of the larger CWA regulatory regime,<sup>16</sup> and their development can place political pressure on state legislators to regulate polluters who are not explicitly within the scope of CWA regulation – non-point source polluters such as agriculture.<sup>17</sup> This is one of the many reasons states have long avoided developing TMDLs.<sup>18</sup> States have only started implementing TMDLs after litigation pressure by citizen groups.<sup>19</sup>

Over the course of litigation across the US, courts have recognized a procedural doctrine called “constructive submission of no TMDL,” whereby citizens may theoretically force the US EPA, and eventually the states, into action.<sup>20</sup> The US EPA has a non-discretionary duty under section 303(d) to approve or disapprove states’ TMDLs.<sup>21</sup> If a court finds a “constructive

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<sup>16</sup> Kilbert, *supra* note 7, at 41.

<sup>17</sup> Nina Bell, *TMDLs at A Crossroads: Driven by Litigation, Derailed by Controversy?*, 22 PUB. LAND & RES. L. REV. 61, 62 (2001). (“The citizen litigation that jump-started this TMDL program . . . seeks to improve the NPDES [National Pollutant Discharge Elimination System] permits that allow states and EPA to allow industries and municipalities to discharge pollution in their effluent, as well as the efforts to establish so-called best management practices that are used to control the runoff from nonpoint sources. All of these investments in standards and NPDES permits, best management practices and monitoring and data collection, have been a dubious exercise, at best, in the absence of TMDLs.”).

<sup>18</sup> *Id.* at 74.

<sup>19</sup> Kelly Seaburg, *Murky Waters: Courts Should Hold That the "Any-Progress-Is-Sufficient-Progress" Approach to TMDL Development Under Section 303(d) of the Clean Water Act Is Arbitrary and Capricious*, 82 WASH. L. REV. 767, 770 (2007). (“Only a series of federal court cases initiated by environmental groups in the late 1980s and early 1990s have stimulated any action under section 303(d).”).

<sup>20</sup> *Id.* at 777–78 (“Section 303(d) did not contemplate total state inaction. As a result of the states’ inaction, the [TMDL] trigger lay dormant, and the states and the EPA were able to ignore section 303(d) for decades. Courts eventually developed the constructive submission doctrine to remedy this problem.”).

<sup>21</sup> 33 U.S.C. § 1313 (2011). (“The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. . . . If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards.”).

submission” of no TMDL, responsibility then shifts from the state to the US EPA to establish a TMDL, thus forcing action.<sup>22</sup>

Toledo residents and environmental organization, the Environmental Law and Policy Center (“ELPC”), recently filed suit against the US EPA, arguing that it erred in approving Ohio’s response to Lake Erie water quality problems.<sup>23</sup> Ohio is currently avoiding the implementation of TMDL for Lake Erie, and only recently listed Lake Erie as “impaired” on its section 303(d) list.<sup>24</sup> This delay in listing Lake Erie was presumably to avoid triggering TMDL obligations. Ohio has now cited its participation in the Great Lakes Water Quality Agreement (“GLWQA”)<sup>25</sup> as reason to give Lake Erie a “low priority” ranking, thus assigning the need and urgency to develop a TMDL as “low.”<sup>26</sup> Ohio has explicitly stated its intention is to delay development of Lake Erie TMDLs while it waits to see if the GLWQA improves water quality.<sup>27</sup> The ELPC argued that Ohio’s explicit plan to avoid a TMDL for the Open Water of Lake Erie

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<sup>22</sup> *Id.* See also *Ohio Valley Envtl. Coal., Inc. v. Pruitt*, 893 F.3d 225, 230 (4th Cir. 2018) (explaining that while courts have recognized “constructive submission” as a legal doctrine, constructive submissions have rarely been found to have occurred by courts).

<sup>23</sup> *Envtl. Law & Policy Ctr. v. United States Envtl. Agency*, No. 03-17-CV-1514, 2018 WL 4773553, at \*3 (N.D. Ohio Oct. 3, 2018).

<sup>24</sup> *Id.* at \*2.

<sup>25</sup> See *Coleman*, *supra* note 9, at 566. (Interestingly, in 2014 the International Joint Commission – the commission which oversees the GLWQA – released a report where it concluded that “current target levels outlined by the GLWQA for phosphorus loadings into Lake Erie were not sufficient to reduce harmful algal blooms and called for the United States and Canada to jointly set new targets.” In addition, the report recommended the states of Indiana, Michigan, and Ohio undertake a tri-state TMDL to address the phosphorus loading problem. The three states have not followed this recommendation.)

<sup>26</sup> Ohio EPA, *Ohio Integrated Water Quality Monitoring and Assessment Report*, OHIO ENVIRONMENTAL PROTECTION AGENCY, DIVISION OF SURFACE WATER § J3, p.J-10 (2018) (“Ohio is working to address its contribution to the problems in Lake Erie through: nutrient TMDLs on tributaries [not the lake itself]; numerous state initiatives to reduce nutrient loads from Ohio in accordance with the Domestic Action Plan; and active participation on Annex 4 (Nutrients) and other Great Lakes Water Quality Agreement (GLWQA) efforts.”).

<sup>27</sup> *Id.* at J-11.

amounted to a constructive submission of no TMDL.<sup>28</sup> The court, however, while sympathetic to the plaintiff's cause, disagreed there had been a constructive submission.<sup>29</sup> The court's approval of Ohio EPA's expressed intention to delay has effectively created another CWA loophole which allows states to continue to avoid politically unfavorable TMDLs, so long as states designate a waterbody impaired, but assign the waterbody a low priority status.

This Note looks first at the history of HABs in Lake Erie and policy responses to water quality problems, both legal and voluntary, and explains the role of TMDLs. It then addresses Ohio's response to Lake Erie water quality and argues that Ohio's plan to follow the GLWQA is simply an attempt to create another CWA loophole. Next, this Note considers federal courts' application of the constructive submission doctrine and considers whether the doctrine is still relevant. This Note then asserts that the constructive submission is still relevant and argues courts should construe this doctrine more broadly and should consider a state's priority ranking when making constructive submission determinations. Courts should therefore be able to find constructive submissions for particular TMDLs, not just when a state has completely avoided submitting any TMDL. This Note concludes that the CWA cannot be interpreted to allow states to indefinitely avoid establishing TMDLs for their most severely polluted waterbodies.

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<sup>28</sup> *Env'tl. Law & Policy Ctr.*, 2018 WL 4773553, at \*1.

<sup>29</sup> *Id.* (“skepticism about the outcome of the GLWQA approach is not unwarranted. Ohio’s description of what that has entailed and will entail is opaque. . . . The prospect that come 2025 Ohio will conclude that, if such proves to be so, the GLWQA has failed is, at best, worrisome. . . . However, with all that said, plaintiffs have not cited and I have not found any case law basis for finding constructive submission in this case and these circumstances.”).

## II. BACKGROUND

Water quality problems in Lake Erie are certainly not new.<sup>30</sup> HABs are an annually recurring problem.<sup>31</sup> Blooms are caused by excess nutrients entering the waterbody; nutrients often associated with non-point sources such as agricultural run-off (e.g., manure, excess fertilizer, soil erosion, etc), as well as stormwater and wastewater.<sup>32</sup> Harmful effects range from water discoloration to toxins, harming wildlife and poisoning water supplies.<sup>33</sup> The 1970's environmental movement introduced heavy regulation for easily identifiable sources of water pollutants, such as pollutants coming from the pipes of factories or municipal stormwater and water treatment plants.<sup>34</sup> Most of the excess nutrients now entering Lake Erie come from agricultural runoff.<sup>35</sup>

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<sup>30</sup> Coleman, *supra* note 9, at 568.

<sup>31</sup>*Id.* at 568–69.

<sup>32</sup> EPA, *Nutrient Pollution Sources and Solutions*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (Nov. 14, 2018), <https://www.epa.gov/nutrientpollution/sources-and-solutions>.

<sup>33</sup> National Oceanic Atmospheric Administration, *What is a Harmful Algal Bloom?* US DEPARTMENT OF COMMERCE (Nov. 14, 2018), <http://www.noaa.gov/what-is-harmful-algal-bloom> (Nov. 14, 2018) (“Under the right conditions, algae may grow out of control — and a few of these ‘blooms’ produce toxins that can kill fish, mammals and birds, and may cause human illness or even death in extreme cases. Other algae are nontoxic, but eat up all of the oxygen in the water as they decay, clog the gills of fish and invertebrates, or smother corals and submerged aquatic vegetation.”). One of the particularly nasty toxins produced by cyanobacteria — a result of blue-green algae — are microcystins. Microcystins are a neurotoxin that typically cannot be expelled from water by boiling, which severely increased the impact of the Toledo water crisis when this toxin was found in Toledo’s drinking water. *See* Coleman, *supra* note 9, at 568.

<sup>34</sup> These types of easily identifiable pollutants are referred to as “point sources.” *See* Coleman, *supra* note 9, at 569–70 (“Point source pollution involves pollution that enters a water body from a particular source, whether from a pipe, factory, or treatment plant.”).

<sup>35</sup> Donald Scavia et al., *Informing Lake Erie Agriculture Nutrient Management via Scenario Evaluation*, WATER CENTER, UNIV. OF MICH. (2016).

A. *National Framework to Regulate Water Quality*

The CWA provides a national framework to regulate water quality for waterbodies in the United States.<sup>36</sup> The US EPA oversees implementation of the CWA, with states responsible for administration of programs, provided they meet certain conditions.<sup>37</sup> Part of a system of accountability is the § 303(d) CWA requirement for states to submit biennial reports to the US EPA containing a list of waterbodies which fail to meet water quality criteria, and establish a priority ranking.<sup>38</sup> The priority ranking must take “into account the severity of the pollution and the uses to be made of such waters.”<sup>39</sup> US EPA regulation further provides that the agency “shall approve a list developed under [§ 303(d) of the CWA] that is submitted . . . only if it meets the requirements of § 130.7(b).”<sup>40</sup> When a waterbody is listed as impaired, this listing triggers a CWA requirement for the state to establish priority rankings for waters on impaired lists and to develop a Total Maximum Daily Load (TMDL) in accordance with that priority ranking.<sup>41</sup>

Establishing a TMDL entails extensive research and water monitoring to determine the maximum amount of a pollutant that may be allowed to enter a waterbody to ensure the

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<sup>36</sup> See *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (“The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ 33 U.S.C. § 1251(a).”). Such an arrangement between the Federal government and the states has been termed “a program of cooperative federalism.” See also *New York v. United States*, 505 U.S. 144, 167 (1992) (“where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

<sup>37</sup> Olivia Houck, *Federalism, Nutrients, & the Clean Water Act: Three Cases Revisited*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10426, 10427 (2014) (stating that the Clean Water Act is necessarily structured this way to avoid free-rider problems, where some states continue to pollute and yet reap the benefits of the actions of other states working to clean their waterways).

<sup>38</sup> 33 U.S.C. § 1313(d)(1)(C) (2011).

<sup>39</sup> *Id.*

<sup>40</sup> 40 C.F.R. § 130.7(d)(2) (2001).

<sup>41</sup> 33 U.S.C. § 1313(d)(1)(C) (2011).

waterbody meets water quality standards, and a plan to lower pollutants to meet these standards.<sup>42</sup> US EPA regulation defines TMDL as the “sum of the individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background.”<sup>43</sup> The “wasteload allocation” is the “portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution.”<sup>44</sup> Wasteload allocations “constitute a type of water quality-based effluent limitation.”<sup>45</sup> A “load allocation” refers to “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.”<sup>46</sup>

*B. Why are Total Maximum Daily Loads controversial?*

States have a long record of avoiding the TMDL process,<sup>47</sup> mirrored by a history of citizen suit litigation to force action.<sup>48</sup> Why has the TMDL been met with such resistance?

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<sup>42</sup> 40 C.F.R. § 130.7 (2001). (“The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLA/LA and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State’s list of segments identified, priority ranking, and loads established (WLA/LA/TMDLs) to EPA for approval; incorporating the approved loads into the State’s WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP).”).

<sup>43</sup> 40 C.F.R. § 130.2(i) (2001).

<sup>44</sup> *Id.*

<sup>45</sup> 40 C.F.R. § 130.2(h) (2001).

<sup>46</sup> *Id.* § 130.2(g).

<sup>47</sup> Bell, *supra* note 17 at 69. (“because the [TMDL] rules increase the likelihood that TMDLs may successfully cause controls on both point and nonpoint sources, and successfully lead to at least improvements in water quality, if not attainment of standards, the TMDL rule has also provided a basis for political assault on the entire TMDL program.”).

<sup>48</sup> *Id.* at 75 (explaining that states have found numerous ways around CWA TMDL requirements, such as “excluding data because of its age; requiring multiple exceedances of criteria; ignoring the aspects of water quality standards relating to beneficial use, protection and narrative criteria; and ignoring existing data.” These aspects speak to the methodologies of identifying waters which may be placed on a state’s “impaired” list. If the waterbody doesn’t make the list – no TMDL is required. Likewise, environmental organizations and affected members have continuously filed suit in attempts to force agency action.).

Firstly, development of TMDLs require costly monitoring and research programs; activities in which states do not receive additional federal funding to perform when the TMDL requirement is triggered.<sup>49</sup> More to the point, TMDLs provide for allocating pollutants among point-source polluters and non-point source polluters, which comes with the implication that states must regulate non-point source polluters such as agriculture.<sup>50</sup> Additional regulation could result in expensive industry compliance for Ohio's agricultural sector.<sup>51</sup> However, states are not required to actually implement a TMDL once it has been established.<sup>52</sup> If a state fails to enforce the loading limits imposed in the TMDL, it simply risks losing federal grant money.<sup>53</sup> Nonetheless, the prospect of stricter water rules for agriculture has been met with strong industry backlash.<sup>54</sup>

The TMDL process also works in conjunction with the CWA's National Pollutant Discharge Elimination System (NPDES), which regulates point-source discharges through a permitting program.<sup>55</sup> Other stakeholders favor TMDLs because TMDLs provide NPDES permit holders with "the certainty of knowing whether they are causing or contributing to violations."<sup>56</sup>

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<sup>49</sup> Kilbert, *supra* note 7, at 41.

<sup>50</sup> Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1050 (2013).

<sup>51</sup> See David S. Caudill & Donald E. Curley, *Strategic Idealizations of Science to Oppose Environmental Regulation: A Case Study of Five TMDL Controversies*, 57 U. KAN. L. REV. 251, 260 (2009).

<sup>52</sup> Kilbert, *supra* note 7, at 92 ("If a state fails to identify waters or set TMDLs, USEPA must do so. But USEPA itself cannot enforce TMDLs or plans, nor can states be required to enforce TMDLs or plans to regulate nonpoint sources Failure to enforce TMDLs or plans will simply deprive states of grant money.").

<sup>53</sup> *Id.*

<sup>54</sup> David S. Caudill & Donald E. Curley, *Strategic Idealizations of Science to Oppose Environmental Regulation: A Case Study of Five TMDL Controversies*, 57 U. KAN. L. REV. 251, 260 (2009).

<sup>55</sup> EPA, *National Pollutant Discharge Elimination System (NPDES), About NPDES*, UNITED STATES PROTECTION AGENCY (Nov. 11, 2018), <https://www.epa.gov/npdes/about-mpdes>.

<sup>56</sup> Bell, *supra* note 17 at 61.

Municipalities, who are large NPDES permit holders, are investing millions of dollars into stormwater and drinking water infrastructure to comply with permits.<sup>57</sup> Non-point source polluters, however, have been able to avoid similar levels of expensive regulatory compliance while NPDES permit holders pay to alleviate the impact of phosphorus pollution.<sup>58</sup> As a TMDL is the sum of the wasteload allocation, NPDES permit holders (who monitor all of their discharges into waterbodies) will be able to prove whether they are contributing to excess phosphorus, or whether the pollution is coming from non-point sources.<sup>59</sup> TMDLs and the transparency they can provide may put political pressure on state legislatures to regulate *all* polluters (including agriculture) when NPDES permit holders and municipalities—who pay to clean drinking water and stormwater—see they are paying to mitigate the costs of agricultural pollution.<sup>60</sup> Thus, although the CWA does not directly regulate nonpoint source polluters, “it does provide mechanisms that prompt states to address nonpoint source water quality problems within their borders.”<sup>61</sup>

Although a TMDL for Lake Erie may not be the silver bullet guaranteed to clean a green lake,<sup>62</sup> it may gain enough political pressure from NPDES permit holders (i.e., municipalities

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<sup>57</sup> *Envtl. Law & Policy Ctr., et al., Plaintiffs, v. United States Env'tl. Prot. Agency, et al., Defendants*, 2018 (N.D. Ohio) Joint Motion of the City of Toledo and the City of Oregon to Participate as Amici Curiae (“Lake Erie is the source of Toledo’s water. . . . Toledo also has [NPDES] as a regulated point-source under the Clean Water Act within the Western Basin of Lake Erie. After years of litigating with Defendant, the [USEPA], Toledo entered into a consent-decree, which was approved by this Court, to enact a half-billion dollar infrastructure upgrade of its sewer system to reduce the amount of pollution being discharged into the waters of the U.S. . . . The Defendants’ conduct is particularly galling to the Cities because of the costs their citizens and ratepayers have borne and will continue to bear. Toledo is projected to spend \$527 million on the Toledo Waterways Initiative Program by 2020.”).

<sup>58</sup> *Id.*

<sup>59</sup> Bell, *supra* note 17 at 61.

<sup>60</sup> *Id.*

<sup>61</sup> Robin Kundis Craig & Anna M. Roberts, *When Will Governments Regulate Nonpoint Source Pollution? A Comparative Perspective*, 42 B.C. ENVTL. AFF. L. REV. 1, 1 (2015).

<sup>62</sup> Kilbert, *supra* note 69 at 112.

and industries) as well environmentalists to push the state legislature to regulate polluters not currently covered by the CWA.

### *C. The Great Lakes Water Quality Agreement*

International collaboration concerning the Great Lakes has its beginnings with the Boundary Waters Treaty of 1909, which addresses boundary disputes, and created The International Joint Commission to serve as the adjudicating body.<sup>63</sup> The United States and Canada later signed the Great Lakes Water Quality Agreement (“GLWQA”) in 1972, and an amended version in 2012.<sup>64</sup> The GLWQA purports to “facilitate United States and Canadian action on threats to Great Lakes water quality and includes strengthened measures to anticipate and prevent ecological harm.”<sup>65</sup> The GLWQA is implemented through 10 “annexes,” which focus on different aspects of the agreement and are led by binational teams.<sup>66</sup> Annex 4 addresses nutrients.<sup>67</sup> The GLWQA is a voluntary agreement, and as such, states cannot be held legally accountable for failure to act in accordance with the GLWQA.<sup>68</sup>

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<sup>63</sup> *Role of the IJC*, INTERNATIONAL JOINT COMMISSION, <https://www.ijc.org/en/who/role> (last visited Jan. 3, 2020).

<sup>64</sup> EPA, *What is GLWQA?*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/glwqa/what-glwqa> (last visited Jan. 3 2020).

<sup>65</sup> *Id.*

<sup>66</sup> EPA, *GLWQA Annexes*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/glwqa/glwqa-annexes> (last visited Jan. 3, 2020).

<sup>67</sup> Great Lakes Water Quality Agreement of 2012, Annex 4, Canada-U.S., Sept. 7, 2012.

<sup>68</sup> Barry Sadler, *Shared Resources, Common Future: Sustainable Management of Canada-United States Border Waters*, 33 NAT. RES. J. 375, 390 (1993).

*D. How can Litigation Influence TMDL and CWA Enforcement?*

The CWA provides a mechanism for citizen suits to challenge non-discretionary agency actions where there is an alleged “failure of the Administrator to perform any act or duty under [the CWA].”<sup>69</sup> CWA citizen suits of this nature are thus limited to instances such as the US EPA’s duty to approve or disapprove CWA § 303(d) impaired lists, or a states’ submission of a completed TMDL. The US EPA’s statutory duty to approve or disapprove a state’s submission of a TMDL has led to the development of a doctrine called “constructive submission of no TMDL.” This doctrine determines that a state’s inaction where action is required by the CWA is a constructive submission of no TMDL, which the US EPA would have a duty to approve or disapprove within 30 days.<sup>70</sup> The US EPA would of course have to disapprove a “non-TMDL,” a disapproval which then triggers a requirement for the US EPA, rather than the state, to develop a TMDL.<sup>71</sup>

The Administrative Procedure Act<sup>72</sup> (APA) also provides an avenue for parties to file citizen suits in order to influence agencies via litigation. The APA provides citizens with the ability to challenge final agency actions where it is alleged the action is “arbitrary and capricious

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<sup>69</sup> 33 U.S.C. § 1365 (2011). This section of the Clean Water Act also allows citizens to file suit against any person (including government agencies of any level) where there is an alleged violation of an effluent standard or limitation. i.e. when the total maximum daily load is exceeded, or a permit holder discharges more of a pollutant than what is permitted under an NPDES permit.

<sup>70</sup> 33 U.S.C. § 1313(d)(2) (2011).

<sup>71</sup>*Id.* (“If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters”).

<sup>72</sup> 5 U.S.C. § 500 (2001).

and otherwise contrary to law.”<sup>73</sup> This standard of review applies where parties seek to challenge the substance of an agency’s discretionary decision.<sup>74</sup>

*E. What’s Happening in Ohio?*

Despite the 2014 Toledo water crisis, the Ohio EPA has been reluctant to begin a TMDL for the Open Waters of Lake Erie. Ohio’s CWA section 303(d) lists, submitted to the US EPA in 2014 and 2016, have consistently failed to include the Open Waters of Lake Erie as impaired.<sup>75</sup> Lake Erie did not make the list despite these waters, particularly Lake Erie’s Western Basin, where Toledo draws its drinking water, failing to meet Ohio’s regulatory narrative criteria for algae.<sup>76</sup> No “impaired” listing means no TMDL obligation.

Recent litigation filed in the Northern District of Ohio, however, prompted Ohio EPA to amend Ohio’s 2016 list of impaired waters under Section 303(d) of the Clean Water Act.<sup>77</sup> The amendment to the 2016 Integrated Report included the disputed Open Waters areas (called assessment units) to the state’s impaired list: the Western Basin, the Sandusky Bay area, and the Central Basin.<sup>78</sup>

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<sup>73</sup> *Id.* § 706(2)(A) (2011).

<sup>74</sup> *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 995–96 (7th Cir. 1984).

<sup>75</sup> *Envtl. Law & Policy Ctr. v. United States Env’tl. Agency*, No. 03-17-CV-1514, 2018 WL 4773553, at \*2 (N.D. Ohio Oct. 3, 2018) (“Ohio’s 2016 § 303(d) list identified more impaired shoreline assessment units, but explicitly declined to pursue development of the open water assessment units and methods at this time.”).

<sup>76</sup> Ohio’s narrative criteria regarding algae declares that “all surface waters . . . shall be . . . [f]ree from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.” Ohio Admin. Code § 3745–1–04(E).

<sup>77</sup> *Envtl. Law & Policy Ctr.*, 2018 WL 4773553, at \*3 (“Since April 11, 2018, the Ohio EPA has submitted an amended 2016 § 303(d) list, adding three new assessment units for Lake Erie’s open waters, and declaring all three impaired.”).

<sup>78</sup> *Id.*

In May 2018, Ohio EPA released its draft 2018 Water Quality Report, which also includes the Western Basin, the Sandusky Bay area, and the Central Basin areas of Lake Erie on its list of impaired waters.<sup>79</sup> The US EPA approved the final 2018 Water Quality Report on July 9, 2018.<sup>80</sup>

This Section 303(d) listing of the Open Waters of Lake Erie should have triggered the requirement to establish a TMDL for these sections of Lake Erie. But no such Lake Erie TMDLs are planned: Ohio EPA has indicated these waters are “low priority” and has indicated that it is going to delay developing TMDLs because it prefers other methods for cleaning up the Western Basin, namely, the (voluntary) Great Lakes Water Quality Agreement.<sup>81</sup> In its 2018 Integrated Report, Ohio EPA explained its actions with regard to cleaning up the open waters of Lake Erie: continue to operate under the GLWQA, participate in TMDLs for tributaries, “as well as many other actions for Lake Erie.”<sup>82</sup> The Ohio EPA made it clear that it will not be working on TMDLs for the Open Waters of Lake Erie any time soon, despite its designation of the waterbody as impaired.

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<sup>79</sup> See Ohio EPA, *Ohio Integrated Water Quality Monitoring and Assessment Report*, OHIO ENVIRONMENTAL PROTECTION AGENCY, DIVISION OF SURFACE WATER, at § L4, p. L-44 (2018) (includes Ohio’s 303(d) list. Part J of the document explains how the waterbodies were assigned ranking points to determine rankings).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at § J2, p. J-3 (“Binationally, the U.S. and Canada are working together under the GLWQA to address water quality issues in Lake Erie. Ohio EPA is actively participating in TMDLs for tributaries as well as many other actions for Lake Erie outlined in Section J3, so priority for Ohio EPA-initiated TMDLs is assigned a low priority for these waters.”).

<sup>82</sup> *Id.*

*F. Environmental Law and Policy Center et al. v. United States Environmental Protection Agency*

On October 3, 2018, a federal judge granted summary judgment for the US EPA in the case considering Ohio EPA's inaction in addressing Lake Erie water quality.<sup>83</sup> The Environmental Law and Policy Center argued that "the State of Ohio's plainly articulated position constitutes a 'constructive submission' of no TMDL, triggering US EPA's obligation to disapprove such a submission within 30 days pursuant to section 303(d)(2) of the CWA."<sup>84</sup>

The plaintiffs further argued that as Ohio EPA's prioritization of water bodies was included in its 303(d) list, and that as the list was approved by the US EPA, it is reviewable as a final agency action under the APA.<sup>85</sup> The plaintiffs asserted that this meant the US EPA had approved Ohio EPA's plan to follow the GLWQA and delay development of a Lake Erie TMDL.<sup>86</sup>

The court was sympathetic to the plaintiffs' position, but was ultimately unconvinced by either argument.<sup>87</sup> The court disagreed that there had been a final agency action, i.e. that the US EPA had approved Ohio EPA's priority ranking and the designation of the Open Waters of Lake Erie as "low" priority.<sup>88</sup> The court further stated that the "constructive submission" doctrine requires a "state's subsequent and prolonged failure to submit TMDL."<sup>89</sup> That is, the court

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<sup>83</sup> *Envtl. Law & Policy Ctr.*, 2018 WL 4773553, at \*3.

<sup>84</sup> *Envtl. Law & Policy Ctr. v. United States Env'tl. Agency*, No: 3:17CV01514-JGC, Doc #: 59-1.

<sup>85</sup> *Id.* Final agency actions are further reviewable under the Administrative Procedure Act.

<sup>86</sup> *Id.*

<sup>87</sup> *Envtl. Law & Policy Ctr.*, 2018 WL 4773553, at \*7 (N.D. Ohio Oct. 3, 2018).

<sup>88</sup> *Id.*

<sup>89</sup> *Envtl. Law & Policy Ctr.*, 2018 U.S. Dist. LEXIS 170921, at \*25.

determined that the clock on Ohio's delay of TMDL only started when it first listed Lake Erie as "impaired."

### III. THE RELEVANCE OF THE CONSTRUCTIVE SUBMISSION DOCTRINE TO ENSURE EFFECTIVE ENFORCEMENT OF THE PURPOSES OF THE CLEAN WATER ACT

Federal circuit courts have largely embraced "constructive submission of no TMDL" as a legitimate legal theory.<sup>90</sup> Under Section 303(d) of the CWA, the US EPA has a non-discretionary duty to approve or disapprove a state's TMDL submission within 30 days.<sup>91</sup> As the CWA provides for citizen suits to challenge non-discretionary duties, environmental groups and other plaintiffs have attempted to use constructive submissions to force states and/or the US EPA to begin the TMDL process.<sup>92</sup> And courts have defined constructive submissions as occurring where a state's actions "clearly and unambiguously express a decision not to submit TMDLs,"<sup>93</sup> seemingly manifested by "a prolonged failure by a state to submit TMDLs."<sup>94</sup>

Despite being recognized as a valid legal theory, the constructive submission doctrine has been so narrowly construed that federal courts have rarely found a constructive submission to exist in fact.<sup>95</sup> Courts have failed to further define the contours of the constructive submission

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<sup>90</sup> *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 996 (7th Cir. 1984) (recognizing a "prolonged failure of a state to submit a TMDL may amount to the "constructive submission") *see also* *Hayes v. Whitman*, 264 F.3d 1017, 1020 (10th Cir. 2001); *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002).

<sup>91</sup> *Ohio Valley Env'tl. Coal., Inc. v. Pruitt*, 893 F.3d 225, 229 (4th Cir. 2018).

<sup>92</sup> Just as the environmental organizations attempted to do in the recent Toledo Lake Erie case, *Environmental Law and Policy Center v. United States Environmental Protection Agency* No. 03-17-CV-1514, 2018 WL 4773553 (N.D. Ohio Oct. 3, 2018).

<sup>93</sup> *San Francisco BayKeeper*, 297 F.3d at 882 (citing *Hayes*, 264 F.3d at 1024).

<sup>94</sup> *Ohio Valley Env'tl. Coal., Inc.*, 893 F.3d at 229 (citing *San Francisco BayKeeper*, 297 F.3d 877 at 881) (internal quotations omitted).

<sup>95</sup> *See Hayes*, 264 F.3d at 1020 (explaining constructive submission doctrine but finding no constructive submission where the US EPA produced uncontradicted evidence that Oklahoma had submitted "a small number of TMDLs and has a schedule to develop many more TMDLs over the next twelve years.") *see also San Francisco BayKeeper*, 297 F.3d at 883 (finding no submission of no TMDL where California had "submitted at least eighteen

doctrine to answer the question “at what point does a state’s failure to prepare a *particular* TMDL ripen into a constructive submission?”<sup>96</sup> Only one published decision has actually found a constructive submission to have occurred (and thus forced EPA action) since the doctrine was recognized in *Hammond* in 1984, and only where that state completely failed to make any TMDL submissions.<sup>97</sup> Courts have found no constructive submission to exist as long as the state has “done something”<sup>98</sup> about TMDLs, “made some TMDL submissions albeit totally inadequate,”<sup>99</sup> or has not completely “fail[ed] to submit” TMDLs.<sup>100</sup> The bar is so low, the constructive submission doctrine is effectively meaningless. Under this common interpretation, if a state has simply submitted one TMDL, even a “totally inadequate” one, no constructive submission may be found to exist, and the US EPA has no non-discretionary duty to act.

Ironically, courts have explicitly noted that constructive submission of no TMDL “is a necessary doctrine,” as without it, states would simply refuse to promulgate TMDLs and thus frustrate “an important aspect of the federal scheme of water pollution control.”<sup>101</sup> Yet, this is

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TMDLs and has established a schedule for completing its remaining TMDLs” and that “these actions on the part of California preclude any finding that the state has “clearly and unambiguously” decided not to submit any TMDLs.”).

<sup>96</sup> *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at \*7 (W.D. Wash. Mar. 16, 2015) (emphasis added).

<sup>97</sup> *See Alaska Ctr. for the Env’t v. Reilly*, 762 F.Supp. 1422, 1429 (W.D. Wash. 1991), *aff’d sub nom. on other grounds Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981 (9th Cir. 1994).

<sup>98</sup> *San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 1002 (N.D. Cal. 2001), *aff’d sub nom. San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002) (finding no constructive submission of no TMDL as “California and the EPA have both been doing something about TMDLs, albeit not as rapidly as contemplated by the passage of the CWA”).

<sup>99</sup> *Sierra Club v. Hankinson*, 939 F. Supp. 865, 872 (N.D. Ga. 1996) (the court did, however, find the US EPA’s approval of Georgia’s few “inadequate” TMDL submissions to be “arbitrary and capricious in violation of the Administrative Procedure Act and that EPA’s failure to promulgate TMDLs for Georgia violates the Clean Water Act.”).

<sup>100</sup> *San Francisco BayKeeper*, 297 F.3d at 883 (9th Cir. 2002).

<sup>101</sup> *Ohio Valley Envtl. Coal., Inc. v. Pruitt*, 893 F.3d 225, 230 (4th Cir. 2018) (citing *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001)). *See also Scott v. City of Hammond, Ind.*, 741 F.2d 992, 997 (7th Cir. 1984)

exactly what states appear to still be doing. This begs the question: is the constructive submission doctrine only a weapon that courts wield to prevent states from completely avoiding TMDL obligations under § 303(d), or does this doctrine still have relevance once states have started to promulgate TMDLs? If the constructive submission doctrine were in fact only to apply when a state has failed to submit a single TMDL to the US EPA, the doctrine would no longer be applicable after every state had made at least one TMDL submission.

*A. Constructive Submission of TMDL is Still Relevant Despite Other TMDL Litigation.*

A broader interpretation of the constructive submission doctrine is required if the doctrine is to be given any significant meaning, especially in light of other TMDL litigation under the APA. Alongside the constructive submission doctrine, which challenges failure to submit TMDLs, citizen environmental groups have also challenged the pace of states' TMDL development under the APA's arbitrary and capricious standard.<sup>102</sup> In addition to the impaired lists and TMDL requirement, § 303(d) also contains deadlines requiring state and US EPA compliance (and submission of TMDLs) by 1979, with an updated deadline of 1992 promulgated by the US EPA through federal regulations.<sup>103</sup> With both dates now long passed, and the deadlines not met, courts have considered what this part of § 303(d) means for how quickly a state must develop TMDLs.<sup>104</sup> This timing requirement has been interpreted in two ways: (1) an

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("We think it unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of states to act . . . [w]e do not believe that Congress intended that the states by inaction could prevent the implementation of TMDL's.").

<sup>102</sup> Seaburg, *supra* note 19, at 769–70 ("The CWA originally required compliance with section 303(d) in 1979, but neither the states nor the EPA took steps to promulgate TMDLs. Only a series of federal court cases initiated by environmental groups in the late 1980s and early 1990s have stimulated any action under section 303(d). . . . Section 303(d) contains explicit deadlines for compliance by the states and the EPA because Congress intended the states to promulgate TMDLs as quickly as possible to help states achieve water quality standards.").

<sup>103</sup> *Id.* at 777. *See also* 33 U.S.C. § 1313 (2011).

<sup>104</sup> *Id.* at 778.

“any-progress-is-sufficient” approach (i.e., one TMDL is enough); and (2) a more “holistic” approach.<sup>105</sup>

Courts that have followed the holistic approach have determined that Congress anticipated TMDLs would be produced rapidly, considering the tight deadline it imposed when it enacted the CWA amendments.<sup>106</sup> These courts have held the US EPA’s approval of TMDLs is arbitrary and capricious “if the state submitted a limited number of TMDLs when the state needed many [TMDLs] to achieve water quality standards, and when rapid promulgation of TMDLs in the future was unlikely absent assistance from the EPA.”<sup>107</sup>

This litigation considering pace of TMDL development seems to render the constructive submission doctrine unnecessary, especially in circuits where courts have held that states should “promptly submit” TMDLs and that “TMDLs must be developed quickly if they are to serve their intended purpose.”<sup>108</sup> However, courts in some of the circuits who follow this holistic approach have also contemplated the possibility that a constructive submission could occur for a *specific* TDML even where that state has made other submissions, as opposed to many other courts’ conclusion that constructive submissions only occur when a state completely fails to submit a single TMDL.<sup>109</sup> This consideration of whether a constructive submission can occur for

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<sup>105</sup> *Id.* at 781–82.

<sup>106</sup> *Id.* at 782.

<sup>107</sup> *Id.* (“*See, e.g., Hankinson*, 939 F. Supp. at 871–72 (holding that EPA approval of Georgia’s submission of two TMDLs was arbitrary and capricious, despite the state’s goals for rapid TMDL development in the future, because at its current pace it would take Georgia more than 100 years to complete the TMDLs for the 340 impaired waters identified); *Idaho Sportsmen’s Coal. v. Browner*, 951 F. Supp. 962, 966–67 (W.D. Wash. 1996) (holding that EPA approval of Idaho’s submission of three TMDLs was arbitrary and capricious because the state’s proposed schedule for TMDL development would extend the deadline for another twenty-five years.”).

<sup>108</sup> *Friends of the Wild Swan, Inc. v. U.S. E.P.A.*, 130 F. Supp. 2d 1184, 1196 (D. Mont. 1999).

<sup>109</sup> *See, e.g., Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at \*7 (W.D. Wash. Mar. 16, 2015)

a particular TMDL is evidence that the constructive submission doctrine is still relevant despite this parallel litigation considering the pace of TMDL development. The constructive submission doctrine should thus be construed more broadly in the future to encompass particular TMDLs in cases where a state is avoiding development of a TMDL for a specific waterbody.

*B. The Environmental Law & Policy Center. v. United States Environmental Agency Decision has Legitimized Additional Delay Strategies by Ohio to Avoid TMDL and Skirt CWA Mandates.*

Given courts' current interpretations of instances where constructive submission may exist, is it no wonder Ohio's lack of interest in developing Lake Erie TMDLs did not amount to a constructive submission. The Ohio case adds an additional component to state avoidance of TMDL: the factor of Ohio's priority ranking, and low priority ranking of Lake Erie.<sup>110</sup> Currently, a court may not find a constructive submission to have occurred unless a state has significantly delayed submission of a single TMDL. Furthermore, a state may now simply rank its biggest, most expensive and politically difficult pollution problems as "low priority," so long as it hasn't been on the state's § 303(d) list for very long.

Ohio EPA is, further, ignoring its own objective ranking system, where it acknowledges that the Open Waters of Lake Erie should be a priority. To determine its priority ranking for TMDL development, Ohio EPA uses a "priority point" system.<sup>111</sup> Ohio EPA assesses each waterbody on its § 303(d) list, and assigns points depending on the "presence and severity of Human Health impairment, Recreation Use impairment, Public Water Supply impairment and

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<sup>110</sup> *Friends of the Wild Swan, Inc. v. U.S. E.P.A.*, 130 F. Supp. 2d 1184, 1194 (D. Mont. 1999) ("State are required to consider the severity of the pollution in the waterbody and the beneficial uses offered by the waterbody in assigning priority rankings to waterbodies. See 33 U.S.C. § 1313(d)(1)(A). The record shows that Montana's priority ranking took these factors into account.").

<sup>111</sup> Ohio EPA, *Ohio Integrated Water Quality Monitoring and Assessment Report*, OHIO ENVTL. PROT. AGENCY, DIVISION OF SURFACE WATER, at § C7, p. C-29 (2018).

Aquatic Life Use impairment.”<sup>112</sup> The assessment units for the Open Waters of Lake Erie (e.g., the Western Basin, Central Basin, and Sandusky Basin) scored highly according to Ohio EPA’s own ranking (scoring in approximately the top 10% of all “impaired” waters in the state), but still received “low” priority.<sup>113</sup>

Ohio’s assignment of Lake Erie as a low priority has effectively rendered CWA priority ranking language null. Why bother requiring states to create priority rankings in the § 303(d) impaired listing if it has no effect? The priority ranking language demands pollution severity and water uses to be taken into account.<sup>114</sup> It does not include the factors such as non-CWA mechanisms to address water quality, like the GLWQA.<sup>115</sup> To allow states to take other, tangential factors into account, and disregard their own objective ranking system, frustrates the purpose of the CWA. Severity and water uses look at the current state of the waterbody, and its water quality. There is no scope under § 303(d) for consideration of non-CWA measures to address this state of *current* water quality and its uses.<sup>116</sup>

*C. Constructive Submission of No TMDL Should be Expanded to Give Effect to the Purposes of the CWA and Priority Ranking Language of the Statute.*

Given courts’ interpretation of the constructive submission doctrine, citizens have no way to challenge a state or force it to act to clean up its *most* polluted waterbodies – waterbodies such as Lake Erie. Courts should consider a state’s priority rankings when determining whether there

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<sup>112</sup> *Id.* at § C7, p. C-29.

<sup>113</sup> *See Id.* at § L4, p. L44-85 (For example, the Lake Erie Western Basin Open Water (>3m) scored 18<sup>th</sup> highest (equal) on Ohio’s the priority ranking list, out of thousands of impaired waterbodies).

<sup>114</sup> *See* 33 U.S.C. § 1313 (“The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.”).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

has been a constructive submission of no TMDL for a particular waterbody. Courts should not permit states to assign highly polluted waterbodies a low priority within their TMDL rankings for the sole reason that the state is participating in a non-CWA action like the GLWQA.

Courts have acknowledged that states should not be able to “perpetually avoid this [TMDL] requirement under the guise of prioritization.”<sup>117</sup> In *McLerran*, the court held there was no constructive submission of no TMDL by Washington’s environmental department, but did find that a letter issued by the US EPA concerning Washington’s abandonment of a specific TMDL to be “arbitrary and capricious” under the APA.<sup>118</sup> Despite this advancement in *McLerran*, the *Environmental Law & Policy Center* court was unpersuaded that this could occur in Ohio’s case, as the plaintiff had not procured such a letter from the US EPA specifically regarding Lake Erie, even considering Ohio’s clearly articulated intention to delay TMDLs for the Open Waters of Lake Erie in Ohio EPA’s 2018 Integrated Report.<sup>119</sup>

The *Environmental Law & Policy Center* court has required an additional procedural step that would be unnecessary if courts were to more closely scrutinize a state’s priority ranking when considering whether there has been a constructive submission of a particular TMDL. Courts have repeatedly commented that Congress’ use of the word “shall,” throughout the CWA indicates its intent to enforce the language of the CWA and not allow states to avoid CWA

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<sup>117</sup> *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at \*7 (W.D. Wash. Mar. 16, 2015) (noting that “such an administrative purgatory clearly contravenes the goal and purpose of the CWA. 33 U.S.C.A. § 1251(a)(1).” In considering the question of whether constructive submission of no TMDL could be found of a specific TMDL, and at what point would a constructive submission occur, the court ultimately found the state Ecology department “had sufficient reasons for not completing the TMDL”); *see also* Ohio EPA, *Ohio Integrated Water Quality Monitoring and Assessment Report*, OHIO ENVTL. PROT. AGENCY, DIVISION OF SURFACE WATER § J3, p.J-10 (2018).

<sup>118</sup> *Envtl. Law & Policy Ct.r.*, 2018 WL 4773553, at \*7 (explaining *McLerran*).

<sup>119</sup> *Id.* at \*7 (“Here, by contrast, the US EPA did not issue its May 18, 2018 letter in response to plaintiffs’ request for a specific finding approving or disapproving Ohio’s TMDL statements.”).

mandates.<sup>120</sup> If states were required to take priority rankings seriously, and not give arbitrary reasons for low rankings which are not called for by the CWA, a constructive submission could possibly be found where a state refuses to begin TMDL for its most seriously impaired waters.<sup>121</sup> According to Ohio EPA's own priority ranking point system, the Open Waters of Lake Erie should be 18th in line for TMDL development. Thus, courts should find a constructive submission without waiting for a prolonged delay where the state has clearly manifested an intent to delay TMDLs for high priority, highly polluted waterbodies such as Lake Erie.

### III. CONCLUSION

TMDLs are an important component of the CWA, but one which has been continually avoided and ignored by states. This note has argued that Ohio has effectively created a new loophole for states to avoid TMDL responsibility through the CWA's priority ranking of impaired waterbodies. It also discussed how the constructive submission doctrine is still relevant and should be applied to instances of state failure to submit TMDLs for particular waterbodies. To stop states from frustrating the purposes of the CWA, courts should expand the idea of "constructive submission of no TMDL," and include consideration of priority rankings. Such an interpretation of this doctrine would prevent states from avoiding TMDLs for their most polluted and politically difficult waterbodies. Furthermore, a broadening of the constructive submission doctrine would give citizens a way to procedurally respond to lack of action by states, and prompt action to clean up "green" waterbodies like Lake Erie.

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<sup>120</sup> See *e.g.*, *Sierra Club*, 2015 WL 1188522, at \*7.