IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WYOMING OUTDOOR COUNCIL, et. al. Plaintiffs, vs. CAROL M. BROWNER, et al., Defendants. WYOMING ASSOCIATION OF CONSERVATION DISTRICTS, et. al., Intervenors.	)	Case No. 97-CV-0140-D

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' Cross Motions for Summary Judgment. The Court, having reviewed the materials submitted in support and in opposition, and being otherwise fully advised FINDS and ORDERS as follows:

BACKGROUND

The Plaintiffs, Wyoming Outdoor Council and other environmental organizations, initiated this case against the Environmental Protection Agency (EPA), the EPA administrator, Carol Browner in her official capacity, and the regional EPA administrator, Jack McGraw, in his official capacity. Plaintiffs requested this Court to compel the EPA to perform statutory duties required by section 303(d) of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et. seq.* Plaintiffs challenge the EPA on two claims. First, the failure to perform a mandatory duty under 33 U.S.C.

§ 1313(d)(2). The second claim maintains that the EPA took action that was arbitrary and capricious and that its inaction was unlawfully withheld or unreasonably delayed, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(1) and (2).

In November of 1997, thirty parties, collectively known as the Wyoming Association of Conservation Districts, were granted leave to intervene in this action. However, their cross-claims have become moot and accordingly were dismissed by their own motion.

Several motions are now before this Court: (1) EPA's cross-motion for summary judgment; (2) Plaintiffs' cross-motion for summary judgment; and (3) Plaintiffs' appeal from Magistrate Judge Beaman's Order granting EPA's Motion to Strike Plaintiffs' expert report.

The Clean Water Act

The Clean Water Act (CWA) establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This program tries to achieve this goal by the reduction and eventual elimination of pollutant discharge into our waters. Among other provisions, the CWA, 33 U.S.C. §§ 1251-1376, requires the State of Wyoming to implement its own programs that protect this state's waters. *Id.* at § 1313. "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C § 1251(b). Within this broad limitation, the CWA requires Wyoming to use a two pronged approach to restore and protect its waters. First, the Act requires states to adopt, apply,

and enforce technology-based limits on "point source" discharge through the issuance of "National Pollution Discharge System" (NPDES) permits. *See* 33 U.S.C. §§ 1311(b) and 1342(a). For a number of years the primary emphasis in water pollution prevention was on the technology-based controls which resulted in a dramatic decrease in water pollution. As the decrease became noticeable, emphasis turned to the second prong – water quality standards.

Water Quality Limited Segments and Total Maximum Daily Loads

A water quality standard requires the designation of a particular use for a body of water (e.g. cold water fisheries), and water quality standards to sustain those uses. 33 U.S.C. § 1313(c). The state must then "identify those waters within its boundaries for which the effluent limitations required by [section 301(b)(1)] are not stringent enough to implement any water quality standards applicable to such waters." *Id.* at § 1313(d)(1)(A). These impaired bodies of water which are called water quality limited segments (WQLSs) are ranked by priority "taking into account the severity of the pollution and the uses to be made of such waters." *Id.* Pollution limits commonly known as "total maximum daily loads" (TMDLs)[1] are then supposed to be

[1] A TMDL is defined as:

> [A] written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant. TMDLs may be established on a coordinated basis for a group of waterbodies in a watershed. TMDLs must be established for waterbodies on Part 1 of the list of impaired water bodies and must include the following eleven elements: (1) The name and geographic location of the impaired waterbody; (2) Identification of the pollutant and the applicable water quality standard; (3) Quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards; (4) Quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load

developed for each pollutant impairing each WQLS. *Id.* at § 1313(d)(1)(C). In short, a TMDL establishes the "maximum daily discharge of pollutants [point source and non-point source] into a waterway" that will not violate the state's water quality standards. *Hayes v. Whitman,* 264 F.3d 1017, 1018 (10th Cir. 2001) (quoting *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984)). The WQLS list and TMDLs are then submitted to the EPA administrator for approval which triggers certain mandatory EPA duties. *See* 33 U.S.C. § 1313(d)(2). These duties require that the EPA must review the State's submission within thirty days. *Id.* at § 1313(d)(2). If the lists are approved, they are incorporated into the State's water management plan. If, however, the EPA disapproves, the EPA is required to create suitable WQLS lists and TMDLs compatible with the state's water quality management plan within thirty days from the date of disapproval. *Id.* at § 1313(d)(2).

The CWA further requires each state submit their respective WQLS lists and TMDLs no later than 180 days from the date the EPA published a list of pollutants suitable for a TMDL calculation. *Id.* This list was published on December 28, 1978. Thus, each state was required to

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> from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards; (5) Identification of source categories, source subcategories or individual sources of the pollutant; (6) Wasteload allocations; (7) Load allocations; (8) A margin of safety; (9) Consideration of seasonal variations; (10) Allowance for reasonably foreseeable increases in pollutant loads including future growth; and (11) An implementation plan.

40 C.F.R. § 130.2(h) (2002). This Court recognizes that this regulation expired on September 3, 2002, and only uses the definition for guidance.

submit lists on or before June 26, 1979.[2] In addition, the CWA requires states to submit revised WQLSs and TMDLs to the EPA "from time to time." *Id.* In 1992, the EPA promulgated regulations that required states to submit these revised lists on every even year. 40 C.F.R. § 130.7(d)(1) (1992). These various statutory and regulatory requirements provide the framework to resolve the issues presented before this Court.

Wyoming's WQLS and TMDL Efforts

In 1992, Wyoming submitted its first formal section 303(d) list for EPA approval. After EPA approval of the 1992 list, Wyoming Department of Environmental Quality (DEQ) submitted lists again in 1994 and then in 1996. The 1996 list identified approximately 364 WQLSs requiring TMDLs. This list included a priority ranking, it identified the pollutants causing or expected to cause water quality violations, and it identified waters targeted for TMDL development over the next two years.

On November 14, 1996, Wyoming formally submitted 2 TMDLs for Clear Creek to the EPA for approval. On December 9, 1996, a complaint for declaratory and injunctive relief was filed by the Plaintiffs. On December 11, 1996, the EPA formally approved Wyoming's TMDL Clear Creek submissions. During the next year, Wyoming submitted and EPA approved 92 additional TMDLs. Although the Plaintiffs argue that these submissions were inadequate, they

[2] There can be no doubt that the EPA's enforcement of the TMDL program has been, as one court noted, "negligent at best." *See San Francisco Baykeeper, Inc. v. Browner*, 147 F.Supp. 2d 991, 999 (N.D. Cal. 2001). The EPA administrator even has conceded this laxity. *Id.* However, past compliance is not at issue in this case, but rather the record of the 1996 and present compliance.

do not contest that the first Wyoming TMDL was submitted on November 14, 1996. *(See* Plaintiffs' Statement of Undisputed Facts ¶ 2.)

After the 1996 approvals, Wyoming DEQ adopted a Work Plan which sets forth DEQ's objective to hire and train seven full time "equivalents" for the remaining WQLSs on the 1996 list within ten years. The Work Plan also established a monitoring program to verify which waters should be added to or deleted from future § 303(d) lists, and it provides support for the development of future TMDLs. (*See* Wyoming DEQ TMDL Workplan.). Since then, Wyoming submitted and EPA approved the 1998, 2000, and 2002 WQLS lists and many more TMDLs.

STANDARDS OF REVIEW

Summary Judgment

"By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

The trial court decides which facts are material as a matter of law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement . . . . [W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* at 248; *see also Carey v. United States Postal Serv.*, 812 F.2d 621,

623 (10th Cir. 1987). The relevant inquiry is "whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 623. In considering a party's motion for summary judgement, the court must examine all evidence in the light most favorable to the non-moving party. *Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981). However, "[w]hen a motion for summary judgement is made and supported as provided in [Rule 56], an adverse party may not rest upon mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

Administrative Procedure Act

"Judicial review of agency action through the citizen-suit provision is governed by the Administrative Procedure Act (APA)." *Coalition for Sustainable Resources, Inc. v. United States Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001). The APA defines "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'

HRI, Inc. v. E.P.A., 198 F.3d 1224, 1236 (10th Cir. 2000) (quoting *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (citations omitted)).

A reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Within this context, the Court will set aside an agency's factual findings only if they are unsupported by substantial evidence. "The substantial evidence standard does not allow a court to displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Trimmer v. United States Dep't. of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999)).

The arbitrary and capricious standard of review is a narrow one. *Board of County Comm'rs v. Isaac*, 18 F.3d 1492, 1496 (10th Cir. 1994). The Court must consider whether the agency's decision was based on a consideration of relevant factors and whether there was a clear error of judgement, but the Court can not substitute its judgement for that of an agency. *Id.* at 1496-97; *see also Lamb v. Thompson*, 265 F.3d 1038, 1046 (10th Cir. 2001).

> An agency's decision will be deemed arbitrary and capricious if the agency . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lamb, 265 F.3d at 1046 (internal quotations and citations omitted). While an agency's interpretation of its own regulations is entitled to substantial deference, it can not be the product of a decision making process deemed arbitrary or capricious, or lack factual support. *Olenhouse*

v. Commodity Credit Corp., 42 F.3d 1560, 1576-77 (10th Cir. 1994). In this context, if an agency action is deemed invalid, a court can only remand the matter to the agency for further proceedings, or compel agency action that has been unlawfully withheld or unreasonably delayed. *Alaska Ctr. for the Env't v. Browner.*, 20 F.3d 981, 986-87 (9th Cir. 1994).

DISCUSSION

EPA's Mandatory Duty and "Constructive Submission"

Plaintiffs allege that "EPA's failure to identify and prioritize all of the WQLSs in Wyoming on the State's behalf constitutes failure of EPA to perform mandatory duties" under CWA § 303(d)(2) (Compl. ¶ 49), and "EPA's failure to establish TMDLs for Wyoming's WQLSs constitutes a failure by EPA to perform a non-discretionary duty" under CWA § 303(d)(2) (Compl. ¶58). This Court holds that Wyoming's submission and EPA's approval of the 1996 WQLS list and subsequent TMDLs did not trigger EPA's nondiscretionary duty to create a 303(d) list pursuant to 33 U.S.C. § 1313(d)(2) under the "constructive submission" theory.

Section 1313(d)(2) provides in pertinent part:

> The Administrator shall either approve or disapprove such identification and load not later then thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate then into its current plan under subsection (e) of this section. 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* and upon such identification and establishment the

State shall incorporate them into its current plan under subsection (e) of this section.

(emphasis added). This statute is silent, however, as to the EPA's obligations if a state fails to make the required submissions. *Alaska Ctr. for Env't*, 762 F.Supp. 1422, 1425 (W.D. Wash. 1991). As a result of this congressional silence, many courts began to recognize theories that would implement Congress' intent behind the CWA, i.e., to protect and restore this Nation's waters.

The "constructive submission" theory was first recognized in *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984). Briefly, this theory proposes that if a state fails to submit TMDLs over a long period of time, this failure could constitute a "constructive submission by that state of no TMDLs." *Id.* at 996. This theory, since its recognition, has generated a tremendous amount of litigation around the country, which has provided this Court with a number of precedents. This Court feels that the recent case from this circuit, *Hayes v. Whitman,* 264 F.3d 1017 (10th Cir. 2001), is particularly instructive.

In *Hayes,* the United States Court of Appeals for Tenth Circuit encountered issues similar to the issues presented by the instant case concerning the establishment of Oklahoma's TMDLs. In that case, the court held that the constructive submission theory was inapplicable. The court quoted the *Scott* case, "the district court may order the EPA to proceed as if the states had submitted proposals of no TMDLs *unless the EPA promptly comes forward with persuasive evidence indicating that states are, or will soon be, in the process of submitting TMDL proposals*

. . . ." *Id.* at 1023 (emphasis in the original) (quoting *Scott*, 741 F.2d at 997 n.11). The court in *Hayes* continued, "if a state has submitted or soon plans to submit TMDLs for its impaired waterbodies, the constructive-submission theory would be factually inapplicable." *Hayes*, 264 F.3d at 1023.

As the court in *Hayes* noted, the decision to narrowly construe the constructive submission theory is consistent with a number of other courts that have encountered similar litigation.[3] Accordingly, the analysis for this Court is whether Wyoming's actions "clearly and unambiguously express a decision to submit no TMDL for a particular waterbody." *Hayes*, 264 F.3d at 1024.

In *Hayes*, Oklahoma failed to submit any TMDLs before 1994, and by 1997 the EPA had only approved somewhere between three and twenty-nine arguably inadequate TMDLs. *Id.* at 1022. In addition, Oklahoma only established a schedule to complete 1400 TMDLs over the next decade. The Tenth Circuit held that in light of the TMDL attempts, as inadequate as they may

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[3] *See San Francisco Baykeeper, Inc. v. Browner*, 147 F.Supp. 2d 991, 1002 (N.D. Cal. 2001)(no EPA duty to act when some WQLS lists and TMDLs were submitted and California was working to bring their TMDL program into compliance); *see also Sierra Club v. Hankinson*, 939 F.Supp. 865, 872 (N.D. Ga. 1996)(constructive submission analysis inappropriate when there were some TMDL submissions even though the submissions were inadequate); *Natural Resources Defense Council v. Fox*, 93 F.Supp.2d 531, 539 (S.D.N.Y. 2000)(EPA decision not to intervene upheld because of a Memorandum of Agreement establishing an eight year TMDL submission schedule and the fact that New York submitted numerous proposed TMDLs during the lawsuit). *Cf. Kingman Park Civic Ass'n v. EPA*, 84 F.Supp.2d 1, 6 (D.C. 1999)("An eighteen-year failure to calculate and submit [any] TMDLs constitutes a constructive – if not outright – determination that no TMDLs are necessary."); *Alaska Center for Environment*, 762 F.Supp. at 1427 (Alaska constructively submitted no TMDL because it failed to submit, over a period of a decade, even one TMDL).

have seemed, the evidence did not support the application of the constructive submission theory. *Id.* at 1024.

In the case at bar, Wyoming submitted, at a minimum, two TMDLs on November 14, 1996, and arguably eighty TMDLs on the following day. (*See* Zander Dep. at Ex. 14; Beach Dep. at Ex. 4). On December 9, 1996, this action was filed. Shortly thereafter, EPA formally approved Wyoming's TMDLs. By 1997 Wyoming submitted and EPA approved approximately ninety-two TMDLs. Wyoming DEQ also developed a Work Plan to establish TMDLs for all of the remaining WQLSs and a monitoring program to evaluate the existing and potential impaired bodies of water. (Wyo. DEQ Work Plan (Beach Dep. Ex.1)).

Like the court in *Hayes*, this Court cannot find that Wyoming has "clearly and unambiguously" expressed a decision to submit no TMDL for a particular impaired waterbody. At the very least, Wyoming DEQ submitted two TMDLs in 1996, many more in the following years, and has developed a Work Plan for establishing additional WQLS lists and TMDLs. Wyoming's efforts, although arguably inadequate at the beginning, do not justify the application of the constructive submission theory as contemplated in *Scott*. Consequently, the EPA did not violate its mandatory duty to implement and promulgate WQLS lists and TMDLs under 33 U.S.C. § 1313(d)(2).

Administrative Procedure Act

Paragraph 50 of the Plaintiffs' Complaint alleges "EPA's *failure to identify and rank all*

of the WQLSs in Wyoming on the State's behalf constitutes agency action unlawfully withheld or unreasonably delayed, and is agency action that is contrary to law, arbitrary and capricious, an abuse of discretion, and contrary to the facts before the agency, in violation of the APA, 5 U.S.C. § 706(1) and (2)." (Emphasis added.) The Plaintiffs also include an almost identical paragraph alleging the same with regard to TMDLs. (Compl. ¶ 59.) Thus, Plaintiffs' APA claims are premised on the same EPA inaction as that alleged in support of their CWA claims.

The issue presented here is whether Plaintiffs may assert both a CWA § 303(d)(2) nondiscretionary duty claim under the CWA citizen suit provisions *and* APA claims based on the same alleged inaction. This issue was addressed by the Tenth Circuit Court of Appeals in *Hayes:*

> The only APA challenge explicitly made in the complaints was to the EPA's failure to fulfill its nondiscretionary duty to develop its own TMDLs after Oklahoma's constructive submission of no TMDLs. This argument duplicates the one Plaintiffs brought under the Clean Water Act citizen-suit provision. Because review of Plaintiffs' claim *is* available under the Clean Water Act, it is not subject to review under the APA. *See* 5 U.S.C. § 704 (limiting APA review to "final agency action for which there is no other adequate remedy in a court"); *Bowen v. Massachusetts*, 487 U.S. 879, 903, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.") . . . . Thus, we hold that this APA claim should be dismissed because it duplicates Plaintiffs' Clean Water Act claim . . . .

Hayes, 264 F.3d at 1025.[4]

Plaintiffs did not address this issue of duplicative claims under both the CWA and APA. Rather, relying on *Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency*, 130

[4] The Plaintiffs in *Hayes* had raised APA claims under § 706(2)(A) and § 706(1). 264 F.3d at 1022.

F.Supp.2d 1184 (D. Mont. 1999), Plaintiffs contend that the EPA's failure to step in and promulgate and implement TMDLs where Wyoming has failed to do so and continues to fail to act is arbitrary and capricious, and constitutes agency action unreasonably delayed. However, in *Friends of the Swan*, the court determined that, like here, the plaintiffs' APA § 706(1) claim was premised upon the same operative facts as the CWA claim; therefore, the claim was not legally viable for the same reasons that the court rejected the plaintiffs' CWA claim.[5] With respect to their arbitrary and capricious claim under § 706(2), the *Friends of the Swan* plaintiffs had directly challenged the EPA's approval of Montana's 1998 submission. *Id.* at 1192. Because the Plaintiffs' Complaint in this case does not attack the EPA's approval of Wyoming's submissions, that issue is not before this Court. Therefore, Plaintiffs' APA claims must be dismissed in accordance with the holding in *Hayes, supra*.

Plaintiffs' Expert Report

Plaintiffs appeal the Magistrate Judge's decision to strike Dr. Jack Douglas Smith's expert report and declaration. This Court, as stated above, finds that there is no mandatory duty under the constructive submission theory. Additionally, Plaintiffs have not contested the

[5] Plaintiffs Friends of the Wild Swan, Inc. and other environmental organizations brought an action under the CWA citizen-suit provisions, alleging that the EPA breached its mandatory duty under section 303(d) of the CWA to identify Montana's WQLSs and develop corresponding TMDLs. 130 F.Supp.2d at 1190. The court ruled that "[b]ecause Montana submitted lists of WQLSs and TMDLs to the EPA before the suit began, lists that were approved by the EPA, the constructive submission theory does not impose an affirmative duty upon the EPA to identify Montana's WQLSs and TMDLs." *Id.* at 1191.

adequacy of the WQLSs and TMDLs with their APA claim, but rather the failure of the EPA to identify and rank all of the WQLSs and promulgate TMDLs on Wyoming's behalf. Thus Plaintiffs have not carried their burden of demonstrating that the Magistrate's decision was clearly erroneous.

A non-dispositive order made by a Magistrate is reviewed by this Court under a clearly erroneous or contrary to law standard of review. *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir. 1988). This standard requires a court to affirm the order, unless this Court is left with a definite and firm conviction that a mistake has been committed. *Id.* at 1464. Plaintiffs argue that the Magistrate's order constitutes a dispositive motion and is thus subject to a *de novo* standard of review, citing *Ocelot Oil Corp.*, 847 F.2d at 1461-62. Plaintiffs are mistaken in their interpretation. In *Ocelot Oil Corp.* the court held, "the striking of pleadings with prejudice, whether as a discovery sanction or for some other reason, constitutes the involuntary dismissal of an action within the meaning of 636(b)(1)(A)." *Id.* at 1463. In that case, because the striking ultimately resulted in an involuntary dismissal, the order became dispositive. The case at bar, however, differs factually in that the Magistrate's order striking the Plaintiffs' expert report only limits the evidence the Plaintiffs can present, not whether the action can be brought. *See McHugh v. Apache Corp.*, 1991 WL 16495, at *2 (D.Colo. 1991). Thus, the Magistrate's order was not a voluntary dismissal of a claim and is considered non-dispositive. Accordingly, this Court reviews the order under a clearly erroneous standard.

Plaintiffs argue that the case *Sierra Club v. Hankinson*, 939 F.Supp. 865 (N.D. Ga. 1996), establishes that approval of inadequate TMDLs can trigger the EPA's mandatory duty and therefore Dr. Smith's report can be admitted as a component of their citizen suit. Plaintiffs further contend that the Magistrate's decision that *Hankinson* was not controlling was clearly erroneous. This Court disagrees. The court in *Hankinson* held that inadequate TMDL submissions violated the APA. *Id.* at 867. The court continued by noting that although submission of inadequate TMDLs did not trigger a constructive submission, the EPA violated the CWA by not promulgating their own TMDLs. *Id.* at 872. "The Court finds that EPA's failure to disapprove of Georgia's inadequate TMDL submissions was 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." *Id.* at 872. Building on that reasoning, Plaintiffs contend that an expert report noting the deficiencies in a TMDL approval would bolster a citizen suit CWA claim, thus the report is admissible. The key to this argument, however, is whether the holding in *Hankinson* can be followed. As the Magistrate's decision indicates – *Hankinson* is not controlling in this case.

The Defendant's brief notes that the court in *Hankinson* did not give any reasoning when it broadly proclaimed that the EPA was in violation of the CWA for the inadequate approvals and that such a decision contradicts the holding that there was no constructive submission. The Court agrees with the Defendants, this contradiction can not be reconciled with any existing case

law. Quite simply, an inadequate approval does not constitute a disapproval under 33 U.S.C § 1313(d)(2). Inadequate approvals can be challenged on their merits under the APA, and if a court discovers an APA violation, the correct remedy is a remand. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988)(quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). However, an inadequate approval does not violate the CWA. The court in *Hankinson* was mistaken – a violation of the APA does not trigger the EPA's mandatory duty under the CWA. The court should have remanded the inadequate approvals rather than creating new mandatory duties. Thus, the Magistrate's decision that Dr. Smith's report would not help establish a mandatory duty violation is not clearly erroneous. Furthermore, the order striking the expert report did not adjudicate the merits of the Plaintiffs' claim, but rather recognized that the expert report is only relevant in the context of an APA violation. As the APA states, the Court can only consider the record before the EPA at the time of the decision. Thus, the only issue remaining is whether the Magistrate's decision not to supplement the administrative record was clearly erroneous.

The Magistrate's order correctly determined that Dr. Smith's report should not be added to the record. As a general rule, an APA violation must be limited to a review of the administrative record. Plaintiffs wish to add Dr. Smith's report to the record by contesting this well established rule by arguing under various exceptions. In *Franklin Savings Ass'n v. Office of Thrift Supervisions*, 934 F.2d 1127, 1137 (10th Cir. 1991), the court acknowledged three

situations where deviation from the general rule is permissible: (1) Where the administrative record fails to disclose the factors considered by the agency; (2) where background information is necessary to illuminate whether the agency considered evidence contrary to its position; or (3) where information is necessary to explain technical terms or complex subject matter. The Magistrate, in denying this "supplementation," concluded that "the primary purpose of Dr. Smith's report is to attack the EPA decision to approve TMDLs and not aid this Court's understanding of the various issues involved." (Magistrate's Order at ¶ 10.) This Court agrees; the substance of the Plaintiffs' expert report does not supplement the record, rather it reviews each of the legal elements of a TMDL and offers an opinion as to why the legal elements are not met. Dr. Smith's report does not provide reasoning the EPA failed to disclose, background information, nor does it explain complex subject matter or technical terms. In other words, Dr. Smith's opinions merely serves as evidence that EPA's approval was in violation of the APA. Plaintiffs have not brought a claim contesting the decision to approve Wyoming's WQLSs and TMDLs, and even if this was the issue before the Court, the report could not be considered. As stated above, a court can only review agency decisions "in light of [the] evidence before [the agency] and determine whether the agency's reasoning has been sufficiently adduced." *New Mexico Envtl. Improvement Div. v. Thomas*, 789 F.2d 825, 830 (10th Cir. 1986). To allow the report into the record and to consider Dr. Smith's opinions would violate the prevailing principle that courts should not substitute their judgement for that of an agency. *City of Albuquerque v.*

Browner, 97 F.3d 415, 424 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997). Accordingly, the Magistrate's decision to strike Plaintiffs' expert report is not clearly erroneous.

THEREFORE, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Summary Judgment is **DENIED**; it is further

ORDERED that Magistrate Judge Beaman's order granting the EPA's Motion to Strike Plaintiffs' expert report is **AFFIRMED.**

DATED this 28th day of March, 2003.

United Stated District Judge