No. 18-35982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA RIVERKEEPER; IDAHO RIVERS UNITED; SNAKE RIVER WATERKEEPER, INC.; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; and THE INSTITUTE FOR FISHERIES RESOURCES,
Plaintiffs/Appellees,

v.

ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency; and U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants/Appellants.

On Appeal from the United States District Court
for the Western District of Washington,
No. 2:17-cv-289-RSM (Hon. Ricardo S. Martinez)

DEFENDANTS/APPELLANTS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND STATEMENT PURSUANT TO FRAP 35(b)(1)

The Clean Water Act effects a limited waiver of the federal government's sovereign immunity. It authorizes citizen suits against EPA where — and only where — EPA allegedly fails to perform a statutory duty that is "not discretionary" (i.e., *mandatory*). The plain text of the Act imposes *no* mandatory duty for EPA to respond to a State's failure to submit to EPA water quality standards known as a "total maximum daily loads" (or "TMDLs"). But in an attempt to fill a perceived gap in the statute, the judge-made doctrine of "constructive submission" of TMDLs essentially invents a mandatory duty that requires EPA to respond by establishing its own standards at the behest of private parties.

In conflict with decisions of the Supreme Court and of other courts of appeals, the panel here endorsed and expanded this judge-made doctrine. The panel thereby flouted long-standing precedent that a mandatory duty arises only from a "specific, unequivocal command" by statute, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (*SUWA*); that waivers of the federal government's sovereign immunity are strictly construed, *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981); and that the doctrine of constructive submission applies (if at all) only to situations in which a State has submitted *no* TMDLs since 1978, *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984); *Ohio Valley Environmental Coalition, Inc. v. Pruitt*, 893 F.3d 225, 230 (4th Cir. 2018) (*OVEC*). Worse, the panel did so without acknowledging that the statutory text relevant to this *expansion* of the doctrine is even more deferential to States and to

EPA than the specific, date-certain statutory deadline that gave rise to the doctrine in the first instance. In these circumstances, and given the massive wave of citizen-suit litigation certain to follow as a consequence, rehearing en banc is warranted.

LEGAL AND FACTUAL BACKGROUND

A. The Clean Water Act, total maximum daily loads, and "constructive submission"

The Act recognizes that States have the "primary responsibilities and rights to prevent, reduce, and eliminate pollution" in the Nation's waters. 33 U.S.C. § 1251(b). Under Section 303, each State must set water quality standards for each waterbody within its borders and must then identify the so-called "impaired" waters that do not meet applicable water quality standards. *Id.* § 1313(d). The State must then develop a "total maximum daily load" for impaired waterbodies on its list of impaired waters.

A TMDL sets the maximum pollutant load that an impaired water may receive and nevertheless attain and maintain water quality standards. *Id.* § 1313(d)(1)(C); 40 C.F.R. §§ 130.2(g)–(i), 130.7. TMDLs are to be established "in accordance with the [State's] priority ranking" of the impaired waters on its list, which ranking generally identifies waters targeted for TMDL development in the next two years. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(b)(4). Once a State submits a TMDL, EPA "shall either approve or disapprove" that TMDL within 30 days. 33 U.S.C. § 1313(d)(2). If EPA disapproves the TMDL, then it "shall . . . establish" a TMDL within 30 days of the disapproval. *Id.*

The Act required each State to submit its impaired waters list—and its first TMDLs—within 180 days after EPA identified pollutants suitable for TMDL calculations in 1978. *See* 33 U.S.C. § 1313(d)(2). After that first submission, the State need submit TMDLs only "*from time to time*." *Id.* (emphasis added). Crucially, nothing in the text of the Act requires EPA to act if the States fail to submit TMDLs. *See id.*

In 1984, the Seventh Circuit considered a claim that Illinois and Indiana had failed to submit TMDLs within the 180-day deadline. Because the Clean Water Act does not specify how EPA must respond to such a failure, the court perceived a gap in the statute. *Scott*, 741 F.2d at 996. The court filled that perceived gap by approving a theory known as "constructive submission," holding that "if a state fails over a long period of time to submit proposed TMDLs, this prolonged failure may amount to the 'constructive submission' by that state of no TMDLs." *Id.* Such a "constructive" submission would then trigger EPA's statutory obligation to review (and approve or disapprove) the "submission" of no TMDL within 30 days and (if EPA disapproved) to establish the TMDL itself. This Court and other courts of appeals have since considered whether to apply a constructive submission theory to particular factual circumstances. *San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001); *OVEC*, 893 F.3d at 230; *cf. Alaska Center for the Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994) (holding that plaintiffs had standing to raise a constructive submission claim).

Although this Court discussed the theory of constructive submission in *Baykeeper*, it had not until the present case held that a constructive submission had actually occurred. That is because the Court in *Baykeeper* identified only one factual predicate for recognizing a constructive submission: "a *complete failure* by a state to submit TMDLs." *Baykeeper*, 297 F.3d at 881 (emphasis added).

B. Temperature impairment within the Columbia River system

This case concerns so-called "temperature impairment—that is, ambient water temperatures that at times exceed the numeric criteria in state water quality standards—on the Columbia River and the lower Snake River in Washington and Oregon. The Section 303(d) lists submitted to EPA by both States have listed the relevant waters here as impaired due to temperature since the late 1990s. Both States administer robust TMDL programs: through the end of fiscal 2017, Washington had developed and submitted to EPA 1,578 TMDLs, and Oregon had submitted 1,241 TMDLs. Hundreds of TMDLs in each State have addressed temperature impairments.

In 2000, those two States (plus Idaho) and EPA entered into a Memorandum of Agreement, under which EPA agreed to develop a TMDL for temperature in the mainstems of the Columbia and Lower Snake Rivers. The Agreement contemplated that the States would ultimately issue that TMDL, although Washington and Oregon later requested that EPA do so. After producing a draft in 2003, EPA suspended work on the TMDL, and neither of the two States took any further steps to develop or submit that TMDL.

C. Procedural history

Plaintiffs filed suit under 33 U.S.C. § 1365, the Act's citizen suit provision, alleging that the States' inaction constituted a constructive submission, and that EPA therefore had a non-discretionary duty to establish temperature TMDLs, which duty it had failed to discharge. The district court granted partial summary judgment for Plaintiffs and denied EPA's cross-motion for summary judgment. The court held that *Baykeeper* had accepted the validity of the constructive submission doctrine. *See* Exhibit 2 at 12. But the district court went beyond *Baykeeper* to find a constructive submission of these particular TMDLs, even though the States in question have regularly submitted other TMDLs to EPA and administer active TMDL programs. *See id.* at 13-14. Finally, the court agreed with Plaintiffs that the Memorandum of Agreement, followed by 17 years of inaction by the States, "is strong evidence that the states have abandoned any initial step the EPA could possibly be awaiting." *Id.*

The district court ordered EPA to approve or disapprove the "constructively submitted TMDL" within 30 days and, if it disapproved, to issue a new TMDL within 30 days of its disapproval. EPA complied with that order by disapproving the alleged constructive submission, while preserving its arguments for appeal. The district court then granted a stay pending appeal of its order requiring EPA to issue a final TMDL.

EPA appealed. The panel affirmed in an opinion that failed to confront EPA's principal argument: nothing in the text of the Clean Water Act supports the theory of "constructive" submission, and so there is no basis to find a non-discretionary duty

under the decisions of the Supreme Court and this Court. The panel acknowledged that 33 U.S.C. § 1313(d)(2) does not, on its face, impose any duty upon EPA "when a state simply fails to submit a TMDL altogether." Exhibit 1 at 10. The panel held, however, that *Baykeeper* "adopted the constructive submission doctrine to fill this statutory gap." *Id.* The panel next considered and rejected EPA's argument that the case law cabins the constructive submission theory to cases of a State's categorical failure to submit *any* TMDLs. Although recognizing that it was "developed initially" in that context, the panel held that it would be "incompatible with both the mechanics and the purpose of the entire statute" to allow "a state, and by extension EPA, [to] avoid its statutory obligations by a [state's] mere refusal to act." *Id.* at 12-13. Finally, the panel held that, by their inaction, Washington and Oregon have made constructive submissions that EPA must approve or disapprove. *See id.* at 16.

SUMMARY OF ARGUMENT

A non-discretionary duty must be evident from a "specific, unequivocal command" in the statutory text. That rule derives from the narrow construction of waivers of sovereign immunity, which Congress must clearly express. As the panel acknowledged, there is no such command in the text of the Clean Water Act. "On its face," the panel conceded, Section 1313 "is *silent* as to what duties EPA has when a state simply fails to submit a TMDL altogether." Exhibit 1 at 10 (emphasis added). Yet the panel affirmed the district court's order on the ground that the constructive submission theory had been accepted in other cases, including *Baykeeper*. *See id.* at 11.

That was error. Neither *Baykeeper* nor any other decision has ever analyzed—let alone justified—the constructive submission theory under the basic principles of statutory interpretation that apply to mandatory statutory duties and waivers of sovereign immunity. That theory was invented by the Seventh Circuit not because the Clean Water Act unequivocally establishes a duty, but because the court believed that Congress would have wanted one. But at least the Seventh Circuit was considering a context in which *States* arguably had a mandatory duty to submit their first TMDLs within 180 days of a particular date in 1978. *See* 33 U.S.C. § 1313(d)(2). That context disappeared long ago, as States now need submit TMDLs only "from time to time." *Id.* The panel decision here, by accepting and extending that judicial creation without any meaningful textual analysis and unmoored from any meaningful context, directly conflicts with Supreme Court precedent. *Baykeeper* did not compel that result, yet the panel found it instructive and appears to have considered itself bound by precedent. The en banc court is not so bound, and to the extent *Baykeeper* controls this case, it should now be overruled.

Moreover, rehearing is warranted because the issue is exceptionally important. If the panel's decision stands, it will invite a massive wave of citizen-suit litigation that will ultimately result in federal judicial control over the States' administration of their water programs.

ARGUMENT

I. Rehearing is warranted to avoid conflicts with decisions of the Supreme Court, this Court, and other courts of appeals.

A. The constructive submission theory is contrary to controlling precedent.

"It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007). The "limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161 (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). It is therefore "firmly grounded" in Supreme Court precedent that a waiver of sovereign immunity "must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). "Any ambiguities in the statutory language are to be construed in favor of immunity." *FAA v. Cooper*, 566 U.S. 284, 290 (2012).

When a plaintiff seeks to compel a federal agency like EPA to take an action, it is not only the waiver of sovereign immunity that must be strictly construed, but also the alleged non-discretionary duty that forms the basis for the claim. Statutory actions to compel the performance of such a duty are akin to mandamus, which is available only to enforce "a specific, unequivocal command"; "a precise, definite act about which an official had no discretion whatever"; or "a ministerial or non-discretionary act." *SUWA*, 542 U.S. at 63-64 (internal quotation marks and alterations omitted).

This Court has characterized these principles as effectively establishing a "clear statement rule." *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). Interpreting the nearly identical citizen-suit provision in the Clean Air Act, the Court held that "a citizen suit must point to a nondiscretionary duty that is 'readily-ascertainable' and not 'only the product of a set of inferences based on the overall statutory scheme.'" *Our Children's Earth Foundation v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)). The Court "must be able to identify a 'specific, unequivocal command' from the text of the statute at issue using traditional tools of statutory interpretation." *WildEarth Guardians*, 772 F.3d at 1182. The same principles apply here. *See, e.g.*, *Conservation Law Foundation v. Pruitt*, 881 F.3d 24, 28 (1st Cir. 2018); *Askins v. Ohio Dep't of Agriculture*, 809 F.3d 868, 876-77 (6th Cir. 2016).

The fundamental error in the theory of constructive submission here is that the panel decision is *not* based upon a clear statement, but upon a mere judicial inference from statutory silence. The text of the Act does not impose *any* duty on EPA when a State fails to submit a TMDL. Section 1313 provides only that States "shall submit" TMDLs to EPA for approval or disapproval, and that EPA "shall either approve or disapprove" those TMDLs "not later than thirty days after the date of submission." 33 U.S.C. § 1313(d)(2). Finally, the Act provides that EPA must establish a TMDL under specific predicate conditions:

> If the Administrator disapproves such [State-submitted] identification [of impaired waters] and [total maximum daily] load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such [total maximum daily] loads for such waters as he determines necessary to implement the water quality standards applicable to such waters.

Id. The text establishes that EPA "shall" perform a duty to establish a TMDL only "if" an explicitly identified precondition—EPA's disapproval of a State's submission—has already occurred. Conversely, if EPA has not disapproved a State submission, then the duty that is explicitly contingent upon such disapproval is *not* triggered. Under this plain-language interpretation, there is no uncertainty for EPA, States, and the public about whether EPA has a duty to perform.

The silence in § 1313(d)(2) about a State's failure to submit TMDLs contrasts conspicuously with other provisions of the Act that expressly require EPA to act as a backstop. For example, § 1314(*l*)(3) likewise addresses a situation in which EPA must review a State's submission for approval. Under that regime, EPA "shall implement" its own control strategies on one of two express conditions: "a State fails to submit control strategies . . . *or* [EPA] does not approve the control strategies submitted by such State" (emphasis added). *See also* 33 U.S.C. §§ 1313(i)(1), 1313(i)(2), 1329(d)(1), 1329(d)(3) (each providing for EPA to act in the event of a State's failure). Also instructive is the Clean Air Act, which provides for EPA to act if it "finds that a State has failed to make a required submission." 42 U.S.C. § 7410(c)(1). Where Congress includes particular language in one part of a statute but omits it in another, a court

must presume that Congress has acted "intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

In their answering brief, Plaintiffs did not meaningfully respond to EPA's textual argument. And the panel completely ignored it, relying on "our precedent and the case law of other circuits." Exhibit 1 at 11. But this Court in *Baykeeper*, the principal case upon which the panel relied, *rejected* a constructive submission claim on the ground that the State had submitted some TMDLs and had a plan to complete more. *See* 297 F.3d at 883. *Baykeeper* did not address the underlying validity of the constructive submission theory; the government had urged the Court to decide the case on narrower grounds, and the Court did so. Consequently, the Court did not "confront [the] issue germane to the eventual resolution" of the present case or "resolve[] it after reasoned consideration in a published opinion." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (internal quotation marks omitted). Indeed, there is *no* appellate case—in this Court or in any other—that has addressed how the constructive submission theory is sustainable in light of precedent requiring a "clear statement" of a "specific, unequivocal" statutory command. *SUWA*, 542 U.S. at 63-64; *WildEarth Guardians*, 772 F.3d at 1182.

It is true that the purpose of a statute is one of the traditional tools of statutory construction. The panel here reasoned that allowing a "loophole" for States would "defeat the clear objective" of the statute and would be "incompatible with both the mechanics and purpose of the entire statute." Exhibit 1 at 12. But in construing a

mandatory duty, this Court may *not* rely on "a set of inferences based on the overall statutory scheme." *Our Children's Earth*, 527 F.3d at 851. Where a statutory command is evident only when it is "teased out" from "disputed statutory provisions," it is no command at all. *WildEarth Guardians*, 772 F.3d at 1179. Here, Congress's supposed command to EPA is irreconcilable with Congress's actual words: § 1313(d)(2) provides that EPA is subject to a non-discretionary duty only when a State *actually* submits a TMDL. At the very least, that textual interpretation is a plausible one. Under the clear statement rule, therefore, the panel was not free to choose a broader interpretation based on a "constructive"—that is to say, fictitious—submission.

This issue warrants rehearing to maintain the uniformity of this Court's case law and to secure consistency with Supreme Court precedent.

B. The panel endorsed an unwarranted expansion of the constructive submission theory.

Even if, contrary to the statutory text, the constructive submission theory is deemed consistent with the Act, the panel also rejected a narrower basis for reversal that would have been fully consistent with *Baykeeper* and with the holdings of other courts of appeals. In the alternative, therefore, rehearing is warranted to confirm that a constructive submission may be held to occur only based on a State's widespread failure to submit *any* TMDLs.

Courts fashioned the constructive submission theory in the specific historical context of States' widespread failure to take up their duties under the Act at all. *See*

American Farm Bureau Federation v. EPA, 792 F.3d 281, 290-91 (3d Cir. 2015). In the absence of state action, even on the limited set of TMDLs that were subject to an initial statutory deadline, frustrated litigants urged the federal courts to adopt some action-forcing doctrine. The Seventh Circuit supplied the constructive submission theory on the grounds that "more than enough time has passed since Congress prescribed promulgation of TMDL's." *Scott*, 741 F.2d at 998; *see also id.* at 996 n.10 (describing States' failure to meet Congress's initial 180-day deadline).* The impetus behind the *Scott* decision, however, diminished in the 1990s as the States and EPA developed TMDLs by the thousands. *See American Farm Bureau*, 792 F.3d at 291.

This historical context is critical to understanding the development of the constructive submission theory. In *Alaska Center for the Environment*, this Court held that plaintiffs had standing to pursue a constructive submission claim to proceed specifically on the ground that "Alaska had *never* submitted any TMDLs to the EPA." 20 F.3d at 983 (emphasis added). Alaska's total default was essential to the Court's reasoning: it would be "contrary to congressional directive to permit individual plaintiffs or a federal court to deal with only a fraction of the waters" in a State or to "limit[] the scope of an ordered remedy to specific streams." *Id.*at 985. But the panel here accepted the very theory that this Court had held "contrary to congressional

* The Seventh Circuit proceeded as if the only option were to sue *EPA* for violating a fictitious duty. No court has explained why citizens could not sue *States* under state law to compel them to create and submit TMDLs to EPA. *See* Appellants' Opening Brief at 23-24.

directive," holding that a constructive submission could be alleged for specific waters in States that have submitted hundreds of TMDLs as part of ongoing programs.

In *Hayes*, the Tenth Circuit agreed that "[i]f a state has submitted or soon plans to submit TMDLs for its impaired waterbodies, the constructive-submission analysis would be factually inapplicable." 264 F.3d at 1023-24; *accord OVEC*, 893 F.3d at 230. *Baykeeper* relied on that aspect of *Hayes*, exhaustively reviewing the case law that has limited the constructive submission theory to instances of complete State inaction. *See* 297 F.3d at 882-83. Thus, in a statement essential to the Court's holding, *Baykeeper* rejected the constructive submission claim because California's own efforts to submit some TMDLs "preclude any finding that the state has 'clearly and unambiguously' decided not to submit any TMDLs." *Id.* at 883.

These cases show that, even if the constructive submission theory were valid, it would have limits. That theory originated as a way to spur States to action, but it has been cabined—until now—to avoid undue interference with the resource allocation and priorities of States working to meet their obligations. That limitation protects the structure of cooperative federalism that runs throughout the Clean Water Act. But the panel ignored it, instead citing the Tenth Circuit's dictum that EPA has a duty when a State expresses its intent not to submit a TMDL "for a particular impaired waterbody." Exhibit 1 at 14 (quoting *Hayes*, 264 F.3d at 1024). Even if the Court finds that the constructive submission theory has some merit, rehearing is warranted to restore this balance and prevent the panel's unwarranted expansion of that theory.

II. Rehearing is warranted because the case presents an issue of exceptional importance.

Rehearing is also warranted because this case "involves one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1)(B). Even assuming that the constructive submission theory is valid at all, the panel's expansion of that theory has potentially far-reaching consequences for States and EPA. Many thousands of water bodies, such as river and stream "segments," appear on the States' Section 303(d) lists of impaired waters. As States assess more and more waters to determine attainment of water quality, some of those segments remain listed and await TMDL development as State resources permit. Despite the size of this challenge, the States and EPA have largely been effective in steadily establishing TMDLs for impaired waters.

Although the panel here anticipated that its decision would not affect States' ability to prioritize particular TMDLs in this process, *see* Exhibit 1 at 14-15, that rosy prediction is likely to be tested by a new generation of lawsuits. In the past, only a single fact—*whether a State has submitted any TMDLs*—has been sufficient to put EPA on notice of its duty and has allowed courts to evaluate a constructive submission claim. Under the panel's opinion, EPA and the courts will now have to assess the intentions of each State for each of the listed impairments, distinguishing between those delays caused by a State's deliberate choices about priorities or by substantial complexity or scientific uncertainty, and those caused by a State's actual intent not to submit a TMDL. Although past constructive submission cases have generally been

resolved on summary judgment, the expansion of that theory may open both EPA and State officials to discovery about a State's intent in particular cases. All of these possibilities will put State judgments about how to allocate their limited resources under the scrutiny of the federal courts.

Furthermore, the States' and EPA's efforts have often been coordinated, as here, through a memoranda of agreement or other cooperative mechanism. Those intergovernmental memoranda were never meant to be enforceable in court; but under the panel's decision, they may now become a basis for private enforcement efforts by third parties. This is a far cry from a clearly stated "duty under this [Act] which is not discretionary" that is the textual basis for an action under § 1365(a)(2).

Perhaps most significantly, this case also presents a larger issue of exceptional importance: whether a non-discretionary duty may be inferred in a statute where it is not stated as a "specific, unequivocal command." *SUWA*, 542 U.S. at 63. Statutory citizen-suit provisions enable the courts to compel agency action clearly mandated by Congress. The Supreme Court has drawn a bright line between non-discretionary duties that courts may enforce based on the text of a statute and action that Congress left to the agency's discretion. Rehearing is necessary to restore that bright line.

CONCLUSION

For the foregoing reasons, panel rehearing or rehearing en banc should be granted.

Respectfully submitted,

s/ *David Gunter*

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March 4, 2020
90-5-1-4-20886

FORM 11. CERTIFICATE OF COMPLIANCE FOR PETITIONS FOR REHEARING OR ANSWERS

9th Cir. Case Number(s) 18-35982

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,198.

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ *David Gunter*

Date March 4, 2020

EXHIBIT 1

Panel opinion in *Columbia Riverkeeper v. Wheeler*, No. 18-35982 (9th Cir. Dec. 20, 2019)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA RIVERKEEPER; IDAHO RIVERS UNITED; SNAKE RIVER WATERKEEPER, INC.; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; THE INSTITUTE FOR FISHERIES RESOURCES, *Plaintiffs-Appellees*, v. ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ENVIRONMENTAL PROTECTION AGENCY, *Defendants-Appellants*.	No. 18-35982 D.C. No. 2:17-cv-00289-RSM OPINION

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted August 26, 2019
Seattle, Washington

Filed December 20, 2019

Before: Michael Daly Hawkins, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Clean Water Act

The panel affirmed the district court's judgment in favor of environmental groups in a citizen suit under the Clean Water Act ("CWA") brought by environmental groups to compel the Environmental Protection Agency to develop and issue a long-overdue temperature "total maximum daily loads" ("TMDL") for the Columbia and Snake Rivers.

The plaintiff groups claimed that inaction by Washington and Oregon amounted to a constructive submission of no temperature TMDL, thus triggering the EPA's nondiscretionary duty to approve or disapprove the TMDL.

The panel held that a constructive submission will be found where a state has failed over a long period of time to submit a TMDL, and clearly and unambiguously decided not to submit any TMDL. The panel further held that where a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act.

Applying this standard, and viewing the facts in their totality, the panel agreed with the district court that "Washington and Oregon have clearly and unambiguously

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

indicated that they will not produce a TMDL for these waterways," and that as a result, "the EPA has violated the CWA by failing to issue a TMDL for the Columbia and lower Snake Rivers." *Columbia Riverkeepers v. Pruitt*, 337 F. Supp. 3d 989, 998 (W.D. Wash. 2018). The panel held that the constructive submission of no TMDL triggered the EPA's duty to develop and issue its own TMDL within 30 days, which it failed to do, and the EPA must do so now.

COUNSEL

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Bryan Hurlbutt (argued) and Laurence ("Laird") J. Lucas, Advocates for the West, Boise, Idaho, for Plaintiffs-Appellees.

OPINION

McKEOWN, Circuit Judge:

The Columbia and Snake Rivers in Washington and Oregon are home to multiple species of salmon and steelhead trout. These fish are particularly vulnerable to warm water temperatures. This dispute arose when Columbia Riverkeeper and other environmental organizations filed a citizen suit under the Clean Water Act ("CWA") to compel the Environmental Protection Agency

("EPA") to develop and issue a long-overdue temperature "total maximum daily loads" ("TMDL") for the Columbia and Snake Rivers. Columbia Riverkeeper argues that Washington and Oregon's failure to issue this TMDL amounts to a "constructive submission" of no TMDL under the CWA, which triggers mandatory statutory obligations for the EPA. In response, the EPA argues that the constructive submission doctrine does not apply to individual TMDLs, but only to state TMDL regimes as a whole. We take this opportunity to clarify that the constructive submission doctrine applies to this temperature TMDL.

BACKGROUND

I. Statutory Background

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To reduce the discharge of pollutants into navigable waters, the CWA first regulates point-source pollution directly with technology-based permitting requirements. *Id.* §§ 1311(a), 1362(12). When these controls fail to adequately improve polluted waters, the CWA uses a holistic, water-quality based approach. *See id.* § 1313. Under § 1313, states must identify qualifying "water quality limited segments" ("impaired waters") within their borders and rank them in order of priority. A water may be impaired because of a high level of a specific pollutant such as nitrogen, or a condition such as temperature or turbidity. These rankings are referred to as "§ 303(d) lists." Once a state has submitted a § 303(d) list, it must then submit a TMDL to the EPA for approval for each pollutant in each impaired water segment. This TMDL sets the maximum amount of a pollutant that each segment

can receive without exceeding the applicable water quality standard. *Id.* §§ 1313(d)(1)(A), (C).

States are required to send the EPA their initial priority ranking of impaired waters and completed TMDLs within 180 days of the agency's identification of covered pollutants. *Id.* § 1313(d)(2). The EPA published its list of covered pollutants in December of 1978, so the original priority rankings and TMDLs were due in June of 1979. The CWA requires states to update their priority rankings and submit remaining TMDLs "from time to time." *Id.* The EPA "shall either approve or disapprove" a TMDL within thirty days of its submission. *Id.* If approved, the TMDL goes into effect. *Id.* If the EPA disapproves, the agency "shall" produce and issue its own TMDL within thirty days. *Id.* These duties under the CWA are not discretionary. To this end, the CWA authorizes citizen suits in federal court against the EPA if it fails to perform any nondiscretionary duty imposed under the statute. *Id.* § 1365(a).

II. Significance of Temperature in the Columbia and Snake Rivers

The Columbia and Snake Rivers are home to multiple native species of salmon and steelhead trout, but several species have gone extinct, and 65 percent of remaining populations face a high risk of extinction. These species are suited to cold water, and they depend on cold water temperatures for migration and spawning on the Columbia and Snake Rivers.

Water exceeding 68º F is particularly dangerous for salmon and trout. Above this temperature, they have difficulty migrating upstream, and they instead remain downstream where they are more likely to die of disease and spawn with far less frequency. The parties agree that dams

and more than 100 point-source discharges into the two rivers are a primary cause of rising water temperatures, which in recent years have consistently exceeded 68º for much of the summertime salmon and steelhead runs. Temperatures are projected to rise with increased human activity on the rivers, further endangering salmon and trout populations. This situation led Washington and Oregon to include both rivers on their lists of § 303(d) impaired waters.

III. Washington and Oregon's TMDL Programs

Like many states, Washington and Oregon did not immediately satisfy their obligations under the CWA, missing—by years—the June 1979 deadline for initial submissions. In the mid-1990s, both states sent priority rankings to the EPA, noting that numerous segments of the Columbia and Snake Rivers failed to meet temperature quality standards, thus threatening the once-robust salmon and trout populations.

When Washington and Oregon first submitted their § 303(d) lists in the mid-1990s, neither state had developed a functioning TMDL program, and so in 2000 they entered into a Memorandum of Agreement ("MOA") with the EPA. Under the MOA, the EPA would "produce" a temperature TMDL for both the Columbia and Snake Rivers, and the states would have responsibility for issuing that TMDL. The states would then assist the EPA in "significant portions" of implementing the temperature TMDL. In light of the states' inadequate resources and relative lack of expertise, the states and the EPA agreed that the states would retain primary responsibility for producing and issuing the total dissolved gas TMDL that was also incomplete, while the EPA would develop the temperature TMDL in place of the states.

In April of 2001 the EPA prepared a Work Plan to further clarify responsibilities under the MOA, and to set key dates that it planned to meet. The EPA stated that it would develop the temperature TMDL, which the states would then issue. The states would retain sole responsibility for developing and issuing the gas TMDL. With these responsibilities clearly outlined, the EPA set February 1, 2002 as the date it would submit a draft temperature TMDL, with the expectation that a final TMDL would be released in July or August of 2002.

In September and October of 2001, respectively, Washington and Oregon each sent letters to the EPA requesting that the EPA not only develop the temperature TMDL, but also issue it. Both states acknowledged that they would then implement the EPA-produced TMDL. Washington's letter stated that it "would like to clarify that our expectation and desire is that EPA both lead the development of and *issue* the TMDLs for temperature in Washington." (emphasis in original). In a letter to the Columbia River Inter-Tribal Fish Commission in January of 2002, the EPA, consistent with Washington's and Oregon's letters, stated that "at the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington."

In accordance with the MOA and Work Plan, the EPA published a draft temperature TMDL for the Columbia and Snake Rivers in July of 2003, which specified that a final TMDL would be forthcoming after a 90-day public comment period. Due to opposition from other federal agencies, however, the EPA did not take any further steps to develop or issue a final temperature TMDL. Since 2003, no progress has been made on the development of the temperature

TMDL by the EPA or either state, although as late as 2007, the EPA continued to acknowledge that it was responsible for the development of the temperature TMDL in a letter to the U.S. Army Corps of Engineers.

Despite the lack of progress on the temperature TMDL, Washington and Oregon each developed robust TMDL programs. Each state produced and submitted for EPA approval more than 1,200 TMDLs for other pollutants and other bodies of water. However, neither state took further steps to develop or issue the temperature TMDL for the Columbia and Snake Rivers. And while both states have maintained priority rankings with target dates of completion for remaining TMDLs, neither list includes the required temperature TMDL.

IV. District Court Proceedings

In February of 2017, Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Inc., Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources (collectively, "Columbia Riverkeeper") sued the EPA under the CWA's citizen-suit provision, claiming that inaction by Washington and Oregon amounted to a constructive submission of no temperature TMDL, thus triggering the EPA's nondiscretionary duty to approve or disapprove the TMDL. The district court granted Columbia Riverkeeper's motion for summary judgment[1] and ordered the EPA to approve or disapprove the constructive submission within thirty days, and upon disapproval, to issue

[1] The district court declined to rule on Columbia Riverkeeper's claim that the EPA's conduct amounted to unreasonable delay under the Administrative Procedure Act ("APA"). Because we affirm summary judgment under the CWA, we likewise do not address this additional claim.

a final TMDL within thirty days. The EPA disapproved the submission, filed this appeal, and sought a stay of the order requiring prompt issuance of the TMDL. The district court granted the stay pending appeal. After litigation began, the EPA revived development of the temperature TMDL and contacted the states, but the EPA has not developed or issued the temperature TMDL for the two rivers.

ANALYSIS

I. Constructive Submission Under the Clean Water Act

Section 1313(d)(2) of the CWA outlines the nondiscretionary statutory duties at issue in this case:

> Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established . . . . The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan . . . . 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 . . . shall incorporate them into its current plan . . . .

There is no dispute that under this scheme, a state has a nondiscretionary duty to submit to the EPA a TMDL for each of the waters identified on its § 303(d) list. Nor is it disputed that the EPA has a nondiscretionary duty to approve or disapprove this submission within 30 days. If the EPA disapproves the submission, it must develop and issue its own TMDL for the impaired water within 30 days. On its face, however, § 1313(d)(2) is silent as to what duties the EPA has when a state simply fails to submit a TMDL altogether.

In *San Francisco BayKeeper v. Whitman* ("*BayKeeper*"), we adopted the constructive submission doctrine to fill this statutory gap. 297 F.3d 877 (9th Cir. 2002). In *Baykeeper*, we acknowledged that where a state has "clearly and unambiguously" decided that it will not submit TMDLs for the entire state, that decision will be "construed as a constructive submission of no TMDLs, which in turn triggers the EPA's nondiscretionary duty to act." *Id.* at 883, 880. We reaffirmed this principle in *City of Arcadia v. U.S. Environmental Protection Agency*, holding that "[t]he EPA is also under a mandatory duty to establish a TMDL when a State fails over a long period of time to submit a TMDL; this prolonged failure can amount to the constructive submission of an inadequate TMDL, thus triggering the EPA's duty to issue its own." 411 F.3d 1103, 1105 (9th Cir. 2005) (internal quotation marks omitted).

Our precedent accords with the treatment of constructive submission in other circuits. In *Scott v. City of Hammond*, the Seventh Circuit held that "if a state fails over a long period of time to submit proposed TMDL[s], this prolonged

failure may amount to the 'constructive submission' by that state of no TMDL[s]." 741 F.2d 992, 996 (7th Cir. 1984) (per curiam). The Tenth Circuit followed *Scott* in *Hayes v. Whitman* and agreed that though not triggered on the facts before it, a state's failure to submit a TMDL could trigger the EPA's nondiscretionary duty to develop and issue its own TMDL. 264 F.3d 1017, 1024 (10th Cir. 2001).

Taken together, our precedent and the case law of other circuits consistently holds that a constructive submission will be found where a state has "fail[ed] over a long period of time to submit a TMDL," *City of Arcadia*, 411 F.3d at 1105, and "clearly and unambiguously decided not to submit any TMDL[s]." *BayKeeper*, 297 F.3d at 883.

II. Triggering Constructive Submission

The EPA urges us to read this precedent narrowly, reasoning that "at most, EPA's duty to establish a TMDL arises only when a State completely fails to submit any TMDLs for approval." In this case, the EPA argues, Washington and Oregon have submitted more than 1,200 TMDLs, and therefore cannot be found to have clearly and unambiguously decided not to submit any TMDLs. According to the EPA, only where a state has exhibited a wholesale failure to submit any TMDLs for the entire state regime should constructive submission be found under § 1313(d)(2). By contrast, where a state has abandoned a particular TMDL, no constructive submission of that TMDL should be found.

The EPA is certainly correct that the constructive submission doctrine was developed initially in the context of states' wholesale failures to make any progress in the development and issuance of TMDLs. In *BayKeeper*, for example, the plaintiffs argued that California had failed to

issue any TMDLs between 1980 and 1994, and these "failings under the CWA have triggered a duty on the part of the EPA to establish TMDLs *for the entire state*." 411 F.3d at 881 (emphasis added). We therefore were asked to conclude that California had clearly and unambiguously decided to abandon its entire state TMDL program, rather than any individual TMDL. We declined to do so, noting that California had more recently (1) "completed 46 TMDLs for waters on [its] lists," (2) "established a schedule for completing all TMDLs," and (3) "dedicated substantial resources to its TMDL program." *Id.* at 880. California clearly had not abandoned its state-wide TMDL program, and so the EPA's mandatory duty to develop its own TMDL regime for the state was not triggered.

But our holding in *BayKeeper* does not limit the application of the constructive submission doctrine to a wholesale failure by a state to submit any TMDLs. Such a limitation is not supported by either the language and purpose of the CWA or the logic of our case law.

First, we look to the text of § 1313(d)(2). The language of this subsection is clear: "each state shall submit to the Administrator" the applicable TMDL. Congress did not create a discretionary opportunity for states to submit a TMDL for applicable waters or waterways: it created a nondiscretionary obligation to submit each required TMDL. Were a state allowed to avoid submitting a required TMDL by simply failing to do so, it would defeat the clear objective of the CWA by a mere refusal to act.

An interpretation of § 1313 that provides states and the EPA with the opportunity to avoid their statutory obligations is incompatible with both the mechanics and purpose of the entire statute. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of

the Nation's waters," and with the "goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a), (a)(1). That purpose would be dramatically undermined if we were to read into § 1313(d)(2) a loophole by which a state, and by extension the EPA, could avoid its statutory obligations by a mere refusal to act.

This interpretation is bolstered by the expedited timeline mandated elsewhere in the same subsection. The EPA must "approve or disapprove [a TMDL] not later than thirty days after the date of submission" by a state. § 1313(d)(2). And "[i]f the [EPA] disapproves such identification and load, [it] 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 . . . ." *Id.* An interpretation of § 1313(d)(2) that allows the EPA to indefinitely avoid compliance with the requirements of the statute would undermine the clear expediency that Congress mandated throughout the subsection and would be difficult to reconcile with the purpose of the statute.

Our previous treatment of the constructive submission doctrine reflects this interpretation of the CWA. Although the court in *BayKeeper* considered only the question of when a statewide failure to submit any TMDLs constitutes a constructive submission, nothing in that opinion limited the doctrine's application to statewide failures. Rather, it affirmed that § 1313 creates a statutory regime of nondiscretionary duties for both the states and the EPA. *BayKeeper*, 297 F.3d at 881–83. And when we next addressed constructive submission in *City of Arcadia*, we held that "[t]he EPA is also under a mandatory duty to establish a TMDL when a State fails over a long period of time to submit a TMDL." 411 F.3d at 1105 (citing

BayKeeper, 297 F.3d at 880–84). This language contemplates that a state could constructively submit a single, specific TMDL for a body of water or waterway.

This approach is also consistent with other circuits that have addressed this issue. The most thorough examination of this question is found in *Hayes v. Whitman*, where the Tenth Circuit concluded that "[t]he constructive-submission theory turns on whether the state has determined not to submit *a required TMDL for a given impaired waterbody*." 264 F.3d at 1023 (emphasis added). The court went on to explain that constructive submission occurs "when the state's actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody." *Id.* at 1024. Although the Tenth Circuit in *Hayes* declined to find such a clear and unambiguous expression on the facts before it, the court recognized the statute's provision for the constructive submission of a particular TMDL under a different set of facts. *Id.* at 1024.

To be clear, the constructive submission doctrine does not prevent a state from prioritizing the development and issuance of a particular TMDL. *See BayKeeper*, 297 F.3d at 885 ("To interpret [§ 1313(d)(1)(C)] as a requirement of simultaneous submission of the list of polluted waters with the TMDL to correct each polluted water would render meaningless the provision that the TMDLs are to be established in accordance with priority ranking of the listed polluted waters." (internal quotation marks removed)). The CWA itself requires states to "establish a priority ranking" of impaired waters and then develop and issue TMDLs "in accordance with the priority ranking." § 1313(d)(1)(C).

Reading the constructive submission doctrine in this way does not rob states of this ability to prioritize particular TMDLs. Rather, it recognizes a meaningful difference

between affording less priority to a particular TMDL and declining to develop and issue that TMDL at all. Where a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act.

III. Unambiguous Statement of No TMDL by Washington and Oregon

Having clarified the scope of constructive submission, we next consider whether Washington and Oregon have clearly and unambiguously decided not to produce and issue a temperature TMDL for the Columbia and Snake Rivers, which in turn triggers nondiscretionary obligations for the EPA.

Since at least the late-1990s, both Washington and Oregon have recognized the need for temperature and gas TMDLs for the Columbia and Snake Rivers. In 2001, Washington and Oregon asked the EPA to produce the temperature TMDL on their behalf. The EPA agreed that it alone would do so, while Washington and Oregon focused on their overdue gas TMDL. The EPA subsequently acknowledged that it had agreed to develop and issue the temperature TMDL under the MOA. In 2003, pursuant to the MOA and the EPA's own Work Plan, the EPA released a draft TMDL and explained that a final version would be forthcoming after the public comment period. Then, nothing happened.

The EPA shelved its draft, and neither the EPA, Washington, nor Oregon took further steps to develop the temperature TMDL. Since the early 2000s, each state has

developed and issued more than 1,200 TMDLs, including other TMDLs for the Columbia and Snake Rivers. Both states have maintained priority lists with target dates of completion for outstanding TMDLs. Yet the Columbia and Snake Rivers temperature TMDL is conspicuously absent from the priority rankings. The states appear to believe that the EPA is the party responsible for the development and issuance of the TMDL. There is no credible plan to produce or issue this TMDL by the states. The states' continued inaction amounts to a clear "refusal to act" and a "prolonged failure" to produce the temperature TMDL. *BayKeeper*, 297 F.3d at 882, 887 (quoting *Scott*, 741 F.2d at 996–97). This refusal to act is further underscored by the nature of the MOA and the EPA's own Work Plan, which stipulate that the states do not intend to develop the temperature TMDL themselves, and instead understand that the EPA will do so.

Viewing these facts in their totality, we agree with the district court that "Washington and Oregon have clearly and unambiguously indicated that they will not produce a TMDL for these waterways," and that as a result, "the EPA has violated the CWA by failing to issue a TMDL for the Columbia and lower Snake Rivers." *Columbia Riverkeeper v. Pruitt*, 337 F. Supp. 3d 989, 998 (W.D. Wash. 2018).

CONCLUSION

Because Washington and Oregon have conclusively refused to develop and issue a temperature TMDL for the Columbia and Snake Rivers, the EPA is obligated to act under § 1313(d)(2). This constructive submission of no TMDL triggers the EPA's duty to develop and issue its own TMDL within 30 days, and it has failed to do so. The time has come—the EPA must do so now.

AFFIRMED.

EXHIBIT 2

Order on motions for summary judgment in
Columbia Riverkeeper v. Pruitt, No. 2:17-cv-00289-RSM (W.D. Wash. Oct. 17, 2018)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLUMBIA RIVERKEEPER, et al., Plaintiffs, v. SCOTT PRUITT, et al., Defendants.	Case No. C17-289RSM ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the Parties' Cross Motions for Summary Judgment. Dkts. #19 and #31. For the reasons stated below, the Court GRANTS IN PART Plaintiffs' Motion and DENIES Defendant's Motion.

I. BACKGROUND

A. Salmon and Other At-risk Fish of the Columbia and Snake Rivers

The Columbia River is the largest river in the Pacific Northwest, with the Snake River as its largest tributary. The Columbia flows more than 1,200 miles from its source in the Canadian Rockies to the Pacific Ocean. *See* Dkt. #1 at 9. The Snake River forms in Wyoming and flows over 1,000 miles across Southern Idaho, along the Idaho-Oregon border, and through Eastern Washington. Dkt. #1 at 9. The drainage basin of the Columbia and Snake Rivers extends into

seven U.S. states and up into Canada, encompassing an area roughly the size of France. *See* Dkt. #31 at 16-17.

Today, the Columbia and lower Snake Rivers are native habitat to multiple species of salmon and steelhead trout. Dkts. #1 at 9, #19 at 9-11, and #31 at 17. The Columbia River Basin once held the largest salmon populations in the world, with the Snake River historically sustaining at least a third of those salmon runs. *See* Dkt. #31 at 9. However, populations of these salmon and steelhead have since declined, with 13 species or populations in the Columbia and Snake River now being listed as "endangered" or "threatened" under the Endangered Species Act, and several populations having now gone extinct. Dkt. #19 at 11. Currently, 65 percent of remaining populations are listed at "high risk" of extinction, while only 6.5 percent are listed as "viable" or "highly viable." *Id.*

Salmon and steelhead native to the Columbia and Snake Rivers hatch in fresh water and migrate downstream to the Pacific Ocean as juveniles, returning as adults to the same river tributaries to spawn. Dkt. #1 at 9. These fish species are generally suited to cold-water, and depend on cold water temperatures for migration, spawning, and rearing. Dkt. #31 at 17. During their trips up and down the Columbia and Snake Rivers, these salmon and steelhead are particularly vulnerable to harm caused by warm water temperatures, specifically as the water reaches or exceeds 68° Fahrenheit ("F") for extended periods. Dkts. #19 at 6 and #31 at 18. When water temperatures approach 68° F, adult salmon have difficulty migrating upstream, and at 72-73° F, migration stops altogether. *Id*. Salmon that have stopped or slowed in their migration may end up staying in the warm water, where they are at risk of death, disease, decreased spawning productivity, and delayed spawning. Dkt. #27-14 at 23-25.

The parties agree that much of the focus for potential causes of increases in water temperature in both the Columbia and Snake Rivers appropriately lies on the presence of dams and point source dischargers located on both rivers. *See* Dkt. #31 at 17. There are a number of federal and non-federal dams on both rivers, with the federal dams operating for a variety of purposes, including hydroelectric power, flood risk management, navigation, and fish and wildlife conservation. *Id*. In addition, as of 2003, there were around 100 point source dischargers on the two rivers. *Id*.

In recent years, water temperature in the Columbia and Snake Rivers has consistently exceeded 68° F, especially during the summertime salmon and steelhead runs, presenting a problem for the continued survival of those native fish populations. Dkts. #1 at 10 and #19 at 7 and 9-10. Temperature issues are projected to worsen as the effects of human activities and climate change continue to increase water temperatures, negatively impacting the ability of salmon and steelhead to successfully migrate to and from the Pacific Ocean to spawn. *Id*. The presence of these high water temperatures led the states of Washington and Oregon to place and maintain both rivers on their respective Clean Water Act ("CWA") § 303(d) lists of impaired waters. Dkt. #27-22 at 10 and 24.

B. Washington and Oregon States' 303(d) Programs

The State of Washington prepared its first 303(d) list in 1994, placing segments of the Columbia and lower Snake Rivers on that list in 1998. *See* Dkt. #31 at 14-15. Presently, 40 of 77 segments of the Columbia River and 9 of 19 segments of the Snake River are listed as having an impaired water temperature under Washington's current water temperature standards. *Id*. at 15. The current Washington water temperature standards require that temperatures must stay below 60.8-68° F depending upon the time of year, location, and fish present. *Id*.

The State of Oregon first listed segments of the Columbia and lower Snake Rivers on its own 303(d) list in 1996. *Id*. at 16. At present, the entire length of the Columbia River in Oregon is listed as impaired by temperature. *Id*. Oregon's current water temperature standards range from 55.4° F for some fish spawning areas from the months of October to April, to 68° F year-round. *Id*.

Both Washington and Oregon's water temperature standards include "natural conditions criteria" for temperature, which provide that "if the natural temperatures in the water body exceed the numeric biologically-based criteria, then the natural temperatures constitute the applicable temperature criteria for that water body." *Id*. at 15-16. While the Environmental Protection Agency ("EPA") approved both states' natural condition criteria in the past, that EPA approval was overruled in part after litigation in Oregon, and is currently involved in pending litigation in Washington. *Id*.

C. The 2000 Memorandum of Agreement and State-EPA Agreements on TMDL Responsibilities

After both Washington and Oregon listed the Columbia and Snake Rivers on their respective 303(d) lists, the EPA, Washington, Oregon, and Idaho signed a Memorandum of Agreement ("MOA"). Dkt. #27-15. The MOA was signed on October 16, 2000, and outlined a cooperative multi-state and federal approach to address temperature related impairments in the two rivers. *Id*.

The main focus of the MOA was to "document a mutual understanding on the approach and roles among Idaho [Department of Environmental Quality], Washington [Department of Ecology], Oregon [Department of Environmental Quality], EPA Region X, and the Columbia Basin Tribes to complete a total dissolved gas and temperature Total Maximum Daily Load

(TMDL) for the mainstem[1] Columbia and Snake Rivers." *Id.* at 5. Further describing the approach to be taken, the MOA outlines that the EPA "will produce," a TMDL for temperature for the Snake/Columbia Mainstem in cooperation with the States. *Id*. at 8. Each state, under the MOA, is required to produce the TMDL for total dissolved gas ("TDG") in cooperation with the dam operators for their water-ways within their boundaries. *Id*. Additionally, each state is designated to assist the EPA with the production of "significant portions" of the implementation plans for the temperature TMDL, particularly with regards to those sections related to non-point sources. *Id*. at 9.

On April 16, 2001, the EPA prepared a Work Plan designed to outline the key dates associated with drafting and finalizing the TMDL in accordance with the MOA, as well as the roles of the EPA and the States in that process. Dkt. #27-17. In the Work Plan, the EPA outlined that the EPA would take the lead for developing the temperature TMDL, and the States would be responsible for issuing that TMDL. *Id*. at 5. The States, on the other hand, would be solely responsible for taking the lead in developing and issuing the TDG TMDL for their waters. *Id*.

Further, while the EPA "oversees the entire 303(d)/TMDL process with responsibility for approving or disapproving state issued 303(d) lists and TMDLs," under the Work Plan "[i]f EPA disapproves a State TMDL, EPA is required to develop a TMDL to replace the disapproved one." *Id*. The Work Plan set the date for the submission of the draft TMDL at February 1, 2002, and the release of the final TMDL in July or August of 2002. *Id*. at 3.

[1] Mainstem is defined in common-usage as a "main channel," such as, the "main course of a river or stream." *See Definition of Main Stem*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/main%20stem (last visited October 16, 2018).

D. The 2003 Draft Temperature TMDL and Current Developments

On September 4, 2001, Washington State, through its Department of Ecology, wrote to EPA Region X seeking clarification on which agencies would lead, develop, and produce the temperature and TDG TMDLs. Dkt. #27-18 at 2. In that letter Washington sought to clarify its expectations that the EPA would lead the development of, and issue the TMDLs for Washington, so that Washington state could then implement those EPA-issued TMDLs. *Id*. Oregon State submitted its own letter to the EPA on October 4, 2001, echoing the Washington State letter and requesting that the EPA issue the TMDL, so that the state could then implement that EPA-issued TMDL in Oregon. Dkt. #27-20 at 2-3.

In a January 15, 2002, letter written to the Columbia River Inter-Tribal Fish Commission, the EPA responded to a request regarding the status of the TMDLs, indicating that its role in that process was to conduct technical analysis, issue a federal TMDL, and approve or disapprove the TDG TMDLs submitted by Oregon and Washington. Dkt. #27-21 at 2. The EPA letter specially addressed the requests of the two states in defining its actions, stating: "at the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington." *Id*.

Just under one month later, on February 12, 2003, Washington and Oregon wrote a joint letter to the Council on Environmental Quality, a federal executive administrative agency, expressing the understanding of both States that they would be taking the lead on the TDG TMDL, while the EPA would be taking the lead on the temperature TMDL. Dkt. #27-23 at 2. In a March 18, 2003, document entitled "EPA Strategy for Consultation and Coordination with Indian Tribal Government for Completing Mainstem Columbia River and Snake River

TMDLs," the EPA included a section noting that it was currently working in coordination with the states of Oregon and Washington to develop TDG and temperature TMDLs in the Columbia and Snake Rivers. Dkt. #27-24 at 2. The document specifically states, "at the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington." *Id*.

Finally, in July 2003, the EPA released a "Preliminary Draft" of the temperature TMDL for the Columbia and Snake Rivers. Dkt. #27-22. In the draft, the EPA noted that while the responsibility for development of TMDLs generally falls to the States, because of the interstate and international nature of the waters, its relationship with tribal-trust duties, and the technical expertise required, the EPA had agreed to take responsibility in this case. *Id*. at 7. Outlining further steps in the plan toward issuing the final TMDL, the draft states that after being released it would undergo a 90 day public comment period, where, after consideration of public comments and appropriate changes, the EPA would issue the final temperature TMDL for the Columbia and Snake River Mainstem. *Id*.

Since July 2003, the EPA has not issued a final temperature TMDL, indicating in an internal EPA document that the EPA worked "extensively on a draft TMDL until late 2003," with that work then suspended due to disagreements between federal agencies at the national level. Dkt. #27-25 at 2. In a February 20, 2007, letter from the EPA to the U.S. Army Core of Engineers, the EPA acknowledged that it remained responsible for development of the temperature TMDL for the mainstem Columbia and Snake Rivers. Dkt. #27-26 at 2.

Since 2003, the native salmon and steelhead populations of the Columbia and Snake Rivers have continued to be affected by warm water temperatures. In 2015, warm water temperatures in the Columbia and Snake Rivers were responsible for the deaths of roughly

250,000 migrating adult sockeye salmon. Dkt. #12 at 2. Of those migrating salmon, upper Columbia River sockeye had the lowest survival rate in the past six years, and endangered Snake River sockeye had a survival rate of only four percent, down from the 44-77 percent survival rates of the past five years. Dkt. #27-9 at 4. Native steelhead populations have been similarly affected, with predictions on the 2017 run indicating that it had "collapsed," and with the Idaho Department of Fish and Game for the first time prohibiting anglers from taking Snake River steelhead. Dkts. #22 at 5 and #25 at 5.

After the instant litigation had begun, the EPA sent a letter to the states of Oregon, Washington, and Idaho, dated August 10, 2017, requesting a modification of the MOA, so that direct work on the final TMDL could be resumed. Dkt. #18-1 at 2. In its letter, the EPA states that changed circumstances involving technology, natural conditions, and legal challenges to previous EPA and state standards necessitate a modification to the MOA prior to the EPAs ability to issue any final temperature TMDL. *Id*. at 2-7.

II. DISCUSSION

A. Legal Standard for Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep't of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable inferences in favor of the non-moving party. *See O'Melveny & Meyers*, 969 F.2d at 747, *rev'd on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a "sufficient showing on an essential element of her case with respect to which she has the burden of proof" to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Clean Water Act

The Court will address Plaintiffs' Motion for Summary Judgment first. Plaintiffs argue that the EPA has violated the CWA, 33 U.S.C. § 1313(d)(2), by failing to issue a TMDL for the Columbia and lower Snake Rivers. Plaintiffs contend that Washington and Oregon have made a "constructive submission" to the EPA under the CWA by clearly and unambiguously indicating that they will not produce a TMDL. Dkt. #19 at 11 (citing *Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 at *7 (W.D. Wash. Mar. 16, 2015). Evidence of this can be found in the 2000 MOA, which provided that "EPA will produce" the temperature TMDL, *see* Dkt. #27-15 at 7, and subsequent letters to the EPA in the fall of 2001 where Washington and Oregon requested the EPA to issue the TMDL, *see* Dkts. #27-18 and #27-20. Once a constructive submission occurs, the EPA has a mandatory duty under the CWA to disapprove the constructively submitted TMDL within 30 days and to issue a TMDL within 30 more days; if the EPA fails to take these steps, the courts can order the EPA to prepare a TMDL under the CWA. *Id.*; *Alaska Ctr. for Env't v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991) ("*ACE I*"). Plaintiffs assert that the 2000 MOA and the other correspondence above serve as evidence

of this constructive submission, and that the EPA has therefore violated the CWA by failing to issue a timely TMDL.

The EPA argues that the constructive submission theory does not apply here. Dkt. #31 at 25.[2] The agency argues that this judicial theory has been adopted by the Ninth Circuit "only with respect to wholesale programmatic failures by a state to submit any TMDLs." *Id*. (citing *Baykeeper v. Whitman*, 297 F.3d 877, 882 (9th Cir. 2002)). The EPA also cites to *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1190-91 (D. Mont. 1999), *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 967-968 (W.D. Wash. 1996), and several out of circuit cases. *Id*. at 29–30. The EPA argues that finding a constructive submission of a single, particular TMDL "would run counter to the intent of Congress – which allowed states to set priorities – and to the implicit limitations recognized by courts in adopting and applying the theory over the last three decades." *Id*. at 31. The EPA points out that Washington and Oregon have been busy issuing 2,800 other TMDLs during this time period. *Id.* at 32. The EPA further argues that Plaintiffs are citing dicta in *Sierra Club v. McLerran*. *Id*. at 32–33. Citing *Alaska Center for Environment v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994), the EPA states:

> The Ninth Circuit has, therefore, already weighed the question at bar here: whether the constructive submission theory allows individual plaintiffs or interest groups to pick and choose particular TMDLs that they determine are of the highest priority, notwithstanding express statutory language giving state officials the authority to set that prioritization to best advance the interests of all their citizens. The Ninth Circuit concluded that it does not. Because the *McLerran* dicta is at odds with the Ninth Circuit's conclusion that compelling particular TMDLs impermissibly interferes with state prioritization, it must be rejected.

[2] The EPA also argues that the constructive submission theory is a legal fiction, an exercise in judicial lawmaking, contrary to the intent of Congress, and unlawful except as applied in *Baykeeper, infra*. The Court acknowledges these arguments, but will rely on Ninth Circuit precedent permitting the application of this theory. *See City of Arcadia v. U.S. EPA*, 411 F.3d 1103 (9th Cir. 2005); *Sierra Club*, 2015 WL 1188522 at *6.

Id. at 35. The EPA argues that "Plaintiffs have failed to identify a single court that has found a constructive submission triggering EPA's obligations under Section 303(d)(2) as to a particular TMDL." *Id*. at 36. The EPA goes on, "[t]he theory, to the extent it is lawful, is an extraordinary and extra-statutory gloss reserved for only the most egregious instances of state refusal to participate in the Clean Water Act's statutory scheme." *Id*. The EPA also argues that, even if the Court were to apply the constructive submission theory to this case, Plaintiffs' claims fail as a factual matter because "the state's actions [do not] clearly and unambiguously express a decision not to submit TMDLs." *Id*. at 36 (quoting *Baykeeper*, 297 F.3d at 882). The EPA goes through the documents and communications cited by Plaintiffs and detailed above. *Id*. at 36–46. Finally, the EPA argues that "should this Court find merit in Plaintiffs' non-discretionary duty claim, the relief afforded must be limited to an order to approve or disapprove the constructive submissions and may not extend to an order to issue the TMDL." *Id*. at 50. As stated previously, the EPA has a duty under the CWA to disapprove the constructively submitted TMDL within 30 days and to issue a TMDL within 30 more days, only if those deadlines are missed can the Court order the EPA to issue the TMDL

Plaintiffs retort that "every court that has specifically considered this issue has concluded that the [constructive submission] doctrine applies to individual TMDLs." Dkt. #33 at 7. Plaintiffs rely on *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984); *City of Arcadia, supra*; *Hayes v. Whitman*, 264 F.3d 1017, 1023 (10th Cir. 2001); *Sierra Club*, *supra*; *Ohio Valley Envt'l. Coal. v. McCarthy*, No. 3:15-0271, 2017 WL 600102, *9–*10 (S.D. W.Va. Feb. 14, 2017) (*OVEC I*); *Ohio Valley Envt'l. Coal. v. Pruitt*, No. 3:15-0271, 2017 WL 1712527 (S.D. W.Va. May 2, 2017) (*OVEC II*); and *Las Virgenes Municipal Water District v. McCarthy*, C 14-01392 SBA, 2016 WL 393166 (N.D. Cal. Feb. 1, 2016). Plaintiffs say that, despite

"Washington's and Oregon's otherwise-robust TMDL programs," "the temperature TMDL is not on, and has not been on, Washington's or Oregon's mandatory TMDL development schedules" for a reason—the States asked the EPA to prepare and issue the TMDL previously. *Id*. at 14. Plaintiffs argue that the 19-year delay since Washington and Oregon placed temperature-impaired segments of the Columbia and lower Snake Rivers on their CWA 303(d) "impaired waters" lists is itself sufficient evidence of a "prolonged failure" amounting to constructive submission. *Id*. at 15 (citing *City of Arcadia*, 411 F.3d at 1105–06; *ACE I*, 762 F. Supp. at 1429).

The EPA also filed a Reply brief in support of their cross-motion, largely repeating previous arguments. Dkt. #35. The EPA contends that the Ninth Circuit's view on the constructive submission theory is "apparent" and that it "does not allow a plaintiff to compel issuance of a specific TMDL where a state is otherwise engaged in TMDL development and complying with Congress' command that it issue TMDLs 'from time to time.'" Id. at 3–4. The EPA requests supplemental briefing in a footnote. *Id*. at 12 n.4.

Plaintiffs filed a surreply moving to strike the EPA's request for additional briefing. Dkt. #38. The Court agrees that, procedurally speaking, the EPA's request is improperly contained in a reply brief and contrary to the joint litigation schedule. Accordingly, the Court will not consider this request.

The CWA and Ninth Circuit law provide for the constructive submission doctrine to apply when a state completely fails to issue TMDLs. *See Baykeeper, supra*. However, the Court is convinced that the EPA is misconstruing *Baykeeper* by arguing that a "complete failure by [the states] to submit TMDLs" is required. *See Baykeeper*, 297 F.3d at 881–882. The following dicta in *Sierra Club v. McLerran* provides the correct analysis of the instant situation:

> Defendants assert that a constructive submission occurs only when a state produces few or no TMDLs for the whole state over a substantial period of time: If a state has a robust TMDL program, its decision to abandon a particular TMDL does not trigger the EPA's non-discretionary duty. Doc. No. 91 at 27. The Court questions this narrow interpretation of the doctrine for the reasons set forth below.
>
> In making this argument, Defendants rely on *BayKeeper*'s holding and language, which focused on the state-wide TMDL program. This reliance is misplaced. The issue in *BayKeeper* was whether California's failure to produce a significant number of TMDLs constituted a programmatic failure for the entire state. *Id*. at 880–82. Clearly, California's producing several TMDLs and committing to more demonstrates that California had not abandoned its TMDL program. *See id*. However, the question here is whether Washington has abandoned a specific component of its CWA obligations—a question that was not before the *BayKeeper* court and one not resolved by looking to a state's general compliance. Accordingly, the Court finds it insignificant that the Ninth Circuit did not address an issue not raised by the facts of the case. Moreover, far from foreclosing the application of the constructive submission doctrine to a particular pollutant or waterbody segment, the *BayKeeper* court cited with approval to *Scott*, which applied the constructive submission doctrine to TMDLs for a particular waterbody segment, Lake Michigan. *See BayKeeper*, 297 F.3d at 882 (characterizing ruling as "consistent" with *Scott*).
>
> ….
>
> Applying the constructive submission doctrine to individual TMDLs does not invade state prioritization. A constructive submission occurs only when a state has clearly and unambiguously abandoned its obligation to produce a TMDL or TMDLs. *See, e.g., San Francisco BayKeeper*, 297 F.3d at 883; *see also Alaska Ctr. for the Env't*, 762 F.Supp. at 1427(constructive submission when Alaska clearly and unambiguously abandoned its TMDL obligation). It does not occur merely because a state has prioritized one TMDL over another. *See Hayes*, 264 F.3d at 1024.
>
> ….
>
> More importantly, while a state's failure to produce any TMDLs is perhaps the clearest indication that it has abandoned its statutory obligations, the Court finds nothing in the text of the CWA or its

> purpose to support Defendants' contention that a state's abandonment of a specific statutory obligation should be treated differently from a state's wholesale failure. To the contrary, a state's discretion to prioritize TMDLs over other TMDLs does not remove its ultimate obligation to produce a TMDL for each water pollutant of concern in every 303(d) water segment. *See* 33 U.S.C. § 1313(d)(2). In light of this statutory obligation, it would be absurd for the Court to hold that a state could perpetually avoid this requirement under the guise of prioritization; such an administrative purgatory clearly contravenes the goal and purpose of the CWA. 33 U.S.C.A. § 1251(a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").

Sierra Club v. McLerran, 2015 WL 1188522 at 6–7. The Court adopts this analysis and finds that the constructive submission doctrine does apply when a state abandons an individual TMDL.

Turning to the particular facts of this case, the Court agrees with Plaintiffs that the EPA has violated the CWA by failing to issue a TMDL for the Columbia and lower Snake Rivers. Considering the 2000 MOA and all the subsequent communications between the states and the EPA, cited above, the Court concludes that Washington and Oregon have clearly and unambiguously indicated that they will not produce a TMDL for these waterways. Whether rightly or wrongly, they placed the ball in the EPA's court, and the subsequent 17-year delay is strong evidence that the states have abandoned any initial step the EPA could possibly be awaiting. Recent communication between the EPA and the states indicates a desire to further delay this process. The Court agrees with Plaintiffs that there are key factual differences between this case and *Sierra Club v. McLerran*, including an insufficient basis for the states and the EPA to pivot away from issuing a temperature TMDL in 2003 and the sheer number of years that have elapsed in this case. *See* Dkt. #33 at 16–20. Accordingly, a constructive submission of "no TMDL" has occurred, but the EPA has failed to undertake its mandatory duty

to issue a temperature TMDL under the CWA. *See* 33 U.S.C. § 1313(d)(2). The Court will grant summary judgment on Plaintiffs' first claim.

C. Unreasonable Delay under the APA

Plaintiffs next contend that the EPA has violated the Administrative Procedure Act ("APA") by failing to act for over 17 years. Dkt. #19 at 14–20. The Court need not address this claim, having found that the EPA has violated the CWA.

D. Defendant EPA's Cross-Motion for Summary Judgment

Having reached the rulings above, the Court finds it can deny EPA's Motion at this time.

E. Requested Relief

Plaintiffs request that the Court order the EPA to issue a temperature TMDL by a date certain, preferably within one year of this Order. Dkt. #19 at 20 (citing to 33 U.S.C. § 1365(a)(2); 5 U.S.C. § 706(1)). The Court agrees with the EPA that Plaintiffs are limited to the remedy provided under the applicable and specific waiver of sovereign immunity, and that the Court can only order the EPA to perform "any act or duty . . . which is not discretionary with the Administrator." Dkt. #31 at 47 (citing 33 U.S.C. § 1365(a)(2)). The Court thus agrees with the EPA's requested relief, and the applicable law; the EPA thus has 30 days from the date of this Order to approve or disapprove the constructively submitted TMDL, and, if disapproved, 30 days after the disapproval to issue a new TMDL. *See* 33 U.S.C. § 1313(d)(2). The Court does not see how the EPA can approve the constructively submitted TMDL consistent with its obligations under the CWA. Plaintiffs warn the Court that "based on EPA's track record and its August 2017 letter inviting further delay, it is unlikely EPA would take such prompt action and would instead try to further delay critical work on temperature in the Columbia and Snake

Rivers." Dkt. #33 at 37. The Court believes that the parties can and should work together to resolve this issue and avoid further Court action.

III. CONCLUSION

Having reviewed the relevant briefing and the remainder of the record, the Court hereby finds and ORDERS that:

1) Plaintiffs' Motion for Summary Judgment, Dkt. #19, is GRANTED IN PART. The EPA has 30 days from the date of this Order to approve or disapprove the constructively submitted TMDL at issue in this case, and 30 days after a disapproval to issue a new TMDL.

2) Defendant EPA's Motion for Summary Judgment, Dkt. #31, is DENIED.

DATED this 17 day of October, 2018.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE