

Ninth Circuit compels EPA to issue a temperature TMDL for the Columbia and Lower Snake Rivers after state inaction

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Salmon and other fish in the Columbia and Lower Snake Rivers need cold water to survive. The U.S. Court of Appeals for the Ninth Circuit recognized as much in December 2019, when it compelled the U.S. Environmental Protection Agency (EPA) to develop and issue a long-overdue temperature total maximum daily load (TMDL) for the rivers. Plaintiffs Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources filed suit against EPA in [*Columbia Riverkeeper v. Wheeler*](#), 944 F.3d 1204 (9th Cir. 2019) (*Riverkeeper*). These fishing and environmental plaintiffs argued that, due to Washington and Oregon's long-term failures to submit a temperature TMDL under the Clean Water Act (CWA), EPA had a nondiscretionary duty to reject the "constructive submission" of no TMDL and issue the temperature TMDL directly. The district court and Ninth Circuit both agreed.

Columbia and Snake Rivers' temperature pollution and TMDL efforts

The CWA rests in part on a cooperative federalism model that requires that each state establish a list of impaired waters that do not meet water quality standards. 33 U.S.C. § 1313(d). States must create TMDLs for pollutants in each impaired water body and submit those TMDLs to EPA for approval. 33 U.S.C. § 1313(d)(1)(C), (d)(2). TMDLs identify the maximum quantity of a pollutant a waterbody can receive on a daily basis before violating the water quality standard. Such pollutants can include physical factors, like temperature or turbidity. Once a state submits a TMDL to EPA, EPA must then approve or disapprove of it within 30 days. If EPA disapproves, the CWA requires EPA to develop and issue its own TMDL within 30 days. 33 U.S.C. § 1313(d)(2).

The Columbia and Lower Snake Rivers are home to multiple species of salmon and steelhead trout, and these [fish rely on cold water for every stage of their life cycles](#). Water exceeding 68° F means disease or death for salmon and trout; under these warm conditions, salmon become susceptible to decreased or delayed spawning activity, disease, and premature death. Due to excessively warm water temperatures, Washington and Oregon placed the Columbia and Snake Rivers on their respective lists of impaired waters in the mid-1990s.

In 2000, Washington, Oregon, and EPA established a cooperative approach for creating necessary TMDLs for the Columbia and Snake Rivers, including a temperature TMDL. In a Memorandum of Agreement and Work Plan, EPA agreed to develop a temperature TMDL for the Columbia and Snake Rivers. EPA released a preliminary draft of a temperature TMDL in July 2003, pending a 90-day public comment period and publication of the final TMDL. However, due to internal disagreements between federal agencies, the comment period elapsed and EPA never published a final temperature TMDL. As of 2007, EPA continued to acknowledge its responsibility for the TMDL in a letter to the U.S. Army Corps of Engineers, which regulates major dams and their operations on the Columbia and Snake Rivers and is subject to temperature limits in the TMDL.

Over the course of two decades, Washington and Oregon failed to draft and submit a temperature TMDL for the Columbia and Snake Rivers. This was in part due to their reliance on EPA's statements that it would both develop and issue the TMDL. The EPA's action stalled entirely, however, when it received opposition from other federal agencies after publishing the draft TMDL.

In the interim, warm temperatures in the rivers kept rising. In 2015, over half the total run of sockeye salmon perished due to warm water temperatures, and water temperatures are projected to continue rising. In recent years, water temperatures in both rivers have consistently exceeded 68° F throughout the summer months. Then, in 2017, environmental plaintiffs in *Riverkeeper* filed suit to compel EPA to issue the temperature TMDL.

The constructive submission doctrine applies to individual TMDLs

The District Court for the Western District of Washington accepted the arguments of the environmental plaintiffs and held that EPA violated the CWA by failing to issue a temperature TMDL for the Columbia and Lower Snake Rivers. Central to the district court's decision in *Riverkeeper* was the "constructive submission" doctrine, which the Ninth Circuit first adopted in [*San Francisco Baykeeper v. Whitman*](#), 297 F.3d 877 (9th Cir. 2002). Under this doctrine, when a state fails to develop a TMDL for a long period of time, a court interprets the state's inaction as a "constructive submission" of no TMDL. *Id.*

On appeal to the Ninth Circuit, EPA argued that the doctrine of constructive submission applied only to situations where there was a statewide failure to implement a TMDL program. The Ninth Circuit rejected this argument, citing [*City of Arcadia v. U.S. EPA*](#), 411 F.3d 1103 (9th Cir. 2005) (*Arcadia*). In *Arcadia*, the Ninth Circuit stated that EPA has a mandatory duty to establish an individual TMDL when a state, over a long period of time, failed to submit one. If the Ninth Circuit held otherwise, the purpose of the CWA "would be dramatically undermined," as the legal scheme would permit a state to "avoid its statutory obligations by a mere refusal to act." *Riverkeeper*, 944 F.3d at 1210.

The Ninth Circuit thereby affirmed the district court and expressly applied the constructive submission doctrine, holding that Washington and Oregon’s long-term failure to submit a temperature TMDL constituted a constructive submission of no TMDL. The Court denied a petition for rehearing and a suggestion of *en banc* consideration in March 2020.

***Riverkeeper’s* implications and consequences**

Riverkeeper is significant due to the Ninth Circuit’s unequivocal adoption and articulation of the constructive submission doctrine. The Ninth Circuit in *Riverkeeper* held that, when a state has failed over a long period of time to submit a TMDL, and the state has “clearly and unambiguously” decided not to submit one, the court will find constructive submission of no TMDL. Similarly, failing to develop a schedule and credible plan for producing the long-overdue TMDL constitutes constructive submission.

In the long-term, the doctrine may require EPA to develop additional TMDLs where a state has failed to act and demonstrably does not intend to develop a particular TMDL. However, *Riverkeeper* will most likely not open the courtroom doors to litigants. Instead, the court’s fact-intensive inquiry is more likely to encourage states in the Ninth Circuit to schedule the development of necessary TMDLs and establish a credible plan for their creation. Otherwise, the EPA’s statutory obligation to consider a TMDL directly may be triggered.

The most important result of *Riverkeeper* is what the Ninth Circuit ordered: a temperature TMDL for the Columbia and Lower Snake Rivers. EPA issued the TMDL on [May 18, 2020, and is currently considering public comment on the TMDL](#). The EPA’s analysis shows that the controversial Lower Snake River dams, and certain Columbia River dams, are the main causes of human-induced temperature problems. *See id.* at 43 (“EPA’s analysis . . . shows that the dam impoundments have a greater temperature impact than point sources and tributaries.”). For example, the four Lower Snake River dams raise the water temperature between 1.3 and 5.8° Fahrenheit from July to October—often causing or significantly contributing to violations of the water quality standards. *Id.* at 47–50. The TMDL contains load allocations for these problem dams, and, in coming years, the TMDL should guide efforts to restore Columbia River basin fisheries.