The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

COLUMBIA RIVERKEEPER, et al., Plaintiffs, v. SCOTT PRUITT, et al., Defendants.	No. 2:17-cv-00289-RSM **UNITED STATES' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT** For Consideration January 26, 2018 (ORAL ARGUMENT REQUESTED)

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Pursuant to Federal Rule of Civil Procedure 56, and for the reasons set forth below, the United States, on behalf of Defendants, respectfully moves for summary judgment.

INTRODUCTION

Plaintiffs raise two claims in this matter: first, that the States of Washington and Oregon have clearly and unambiguously expressed their intent not to prepare "total maximum daily loads," or "TMDLs," for temperature in the Columbia and lower Snake Rivers, and therefore EPA has a statutory duty to prepare a TMDL in the States' place; and second, that EPA's agreement to assist the States with the temperature TMDL in a 2000 Memorandum of Agreement created a duty to act that may be compelled under the Administrative Procedure Act as unreasonably delayed. Both contentions fail. Plaintiffs' first claim relies upon a tenuous interpretation of the judge-made theory of "constructive submission," which is inapplicable here. Even if it were, Plaintiffs' assertion that the States have unambiguously abandoned these TMDLs is refuted by the States' longstanding cooperation on efforts to develop and issue the Columbia/Snake River temperature TMDL.[1] Plaintiffs' second claim fares no better. The 2000 Memorandum of Agreement was a voluntary document and did not create a binding commitment with the force of law, as is required for a claim of unreasonable delay. The parties agree that this matter is ripe for decision upon cross-motions for summary judgment. *See* ECF No. 14 at 3. The undisputed facts entitle the United States to be granted summary judgment.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act's Water Quality Program

[1] Because a TMDL can be designed to address multiple impaired waters, or only one, the States' TMDLs (plural) would be developed by EPA as one TMDL (singular).

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The Clean Water Act ("CWA") establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of pollutant discharges. 33 U.S.C. § 1251(a). In service of this goal, the CWA prohibits the discharge of any pollutant, including heat, from a point source into waters of the United States unless that discharge complies with, or is exempt from, the Act's requirements. *Id.* §§ 1311(a), 1362(12). Among other things, the Act provides for the establishment of water quality standards, which identify the particular "designated uses" of a water body along with "water quality criteria" (e.g., a numeric pollutant concentration) that, if met, are designed to protect the designated uses. *Id.* § 1313(c)(2)(A); 40 C.F.R. § 131.3(i). States have primary responsibility for establishing water quality standards, subject to EPA review and approval. *See* 33 U.S.C. § 1313(c)(1)-(3).

Once water quality standards have been established, the CWA directs each state to list waters within the state that do not or will not meet those standards, even after implementation of the Act's separate "technology-based" requirements. *Id.* § 1313(d)(1)(A); *see id.* § 1311(b)(1) (describing technology-based effluent limitations). These waters are referred to as "water-quality-limited segments." In establishing a list of water-quality-limited segments, called the "303(d) List," each state must create a "priority ranking" for the listed waters, "taking into account the severity of the pollution and the uses to be made of such waters." *Id.* § 1313(d)(1)(A). States may weigh technical considerations, including the complexity of the impairment and the availability of data and models, as well as their own state policies, when they set their priority rankings. *See, e.g.*, 57 Fed. Reg. 33,040, 33,044-45 (July 24, 1992). A state's priority lists are not reviewable. *See* 33 U.S.C. § 1313(d)(1)(A) & (d)(2).

Each state must then establish, for water segments on the 303(d) List, a "total maximum

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daily load" of impairment-causing pollutants that can occur in the water body – known as a "TMDL." *Id.* § 1313(d)(1)(C). That "load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety . . . ." *Id.* The total load is then distributed among the various sources contributing to the impairment in the water body, assigning particular pollution budgets to each source or type of source. *See* 40 C.F.R. § 130.2(i). Individual point sources, which are discrete discharge points such as factory drain pipes, receive what are called "waste load allocations." Non-point pollution (like agricultural or stormwater runoff) and natural background sources receive "load allocations." *Id.* Developing a TMDL and associated waste load and load allocations typically requires a significant amount of technical analysis, and may take substantial time to complete depending, among other things, upon the availability of information concerning the sources of pollution and characteristics of the receiving water body.

TMDLs function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). Once a TMDL is established, the state bears primary responsibility for implementing it. 40 C.F.R. § 122.44(d)(1)(vii)(B). Implementation includes developing non-point pollution strategies designed to achieve the TMDL's load allocations and setting pollutant discharge limits – consistent with TMDL waste load allocations – in permits issued to point sources under the National Pollutant Discharge Elimination System ("NPDES") program. 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.44(a), (d)(1)(vii)(B). A given TMDL may address a single type of pollutant impairment in a single water-quality limited segment, or it may address multiple pollutants or segments at once. Likewise, a discharger may have permit limits for one pollutant or for many, with each limit derived consistent with the waste load allocation in a TMDL. Importantly, EPA does not regulate the warming of waters

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behind dams under the CWA discharge permitting program, *see Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); as such, dams are only subject to load allocation targets and do not receive NPDES permits that would impose enforceable effluent limits on their contributions to temperature increases above and below the dam.

Where it is not feasible to achieve water quality standards, however, EPA regulations do allow states to remove or change a designated use that is not an existing use "if the [s]tate conducts a use attainability analysis . . . that demonstrates attaining the use is not feasible because of one of the six factors in this paragraph." *See* 40 C.F.R. § 131.10(g). The six factors include where "[d]ams . . . preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use." *Id.* § 131.10(g)(4).

B. Timing and Review of State Submissions Under Section 303(d)

The states' 303(d) Lists and TMDLs are submitted to EPA for approval or disapproval. 33 U.S.C. § 1313(d)(2). If EPA disapproves a state's 303(d) List, EPA "shall not later than thirty days after the date of such disapproval identify such waters in such [s]tate," that is, issue a 303(d) List with such waters in the state's place. *Id.* If EPA disapproves a TMDL, it likewise must "establish such loads for such waters as [EPA] determines necessary to implement the water quality standards"; *i.e.*, EPA must establish the TMDL itself. *Id.* The CWA initially required states to submit their 303(d) Lists and associated TMDLs for EPA approval within 180 days after EPA's publication of a list of pollutants suitable for TMDL development. *Id.* § 1313(d)(2). Thereafter, the Act only requires that a state submit a new 303(d) List and TMDLs "from time to time." *Id.*

For 303(d) Lists, EPA's regulations specify that the states must submit their Lists on a

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biennial basis. 40 C.F.R. § 130.7(d)(7). For TMDLs, EPA's regulations do not include an analogous submission schedule. Instead, a 1997 EPA guidance document recommends that a state establish TMDLs within eight to thirteen years after a water body first appears on the state's 303(d) List, recognizing that shorter or longer times may be needed depending on specific factors and circumstances. Ex. 1 at 3.[2,3] The guidance also affirms states' broad latitude to determine how to approach TMDL development. For example, a state may elect to focus on completing TMDLs for all pollutants in a single water body, or on completing all TMDLs for a single pollutant across different water bodies. *Id.* at 2.

EPA published its identification of pollutants suitable for TMDL development in December 1978. *See* 43 Fed. Reg. 60,662 (Dec. 28, 1978). For the first several years afterwards, however, EPA and the states were focused on implementing the Act's technology-based requirements, so very few states submitted 303(d) Lists or TMDLs. *See Hayes v. Whitman*, 264 F.3d 1017, 1022 n.4 (10th Cir. 2001) (and citations therein).

C. CWA Citizen Suits and the Constructive Submission Theory

CWA Section 505(a)(2) authorizes citizen suits against EPA for failure to perform a non-discretionary duty. 33 U.S.C. § 1365(a)(2). The CWA identifies two such non-discretionary duties with respect to the establishment and approval of TMDLs: first, EPA must approve or disapprove TMDLs established by a state within thirty days of submission, *id.* § 1313(d)(2); second, where EPA disapproves a state-submitted TMDL, EPA must establish a TMDL itself within thirty days, *id.* To the extent these duties are triggered, they are mandatory for the

[2] "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)," August 8, 1997, U.S. EPA.

[3] Citations to the United States' additional Exhibits are to the document's internal page numbering system.

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purposes of CWA Section 505(a)(2). *Id.* § 1365(a)(2).

The plain language of the CWA does not require EPA to perform either duty if a state does not submit TMDLs in the first place. *See id.* § 1313(d)(2). Because states did not initially comply with their statutory obligation to submit 303(d) Lists and TMDLs, and because a state's refusal to submit any TMDLs over a prolonged period of time could frustrate the Act's statutory scheme, some courts adopted what came to be known as the "constructive submission" theory. The theory holds that the prolonged failure by a state to submit *any* TMDLs may constitute the "constructive" submission of no TMDLs (*i.e.*, that none are necessary), *see S.F. Baykeeper v. Whitman*, 297 F.3d 877, 881 (9th Cir. 2002), triggering EPA's duty to approve or disapprove that submission under the statute. If EPA then disapproved the constructive submission of no TMDLs, its disapproval would trigger the requirement that EPA establish TMDLs for the state.

II. FACTUAL BACKGROUND

A. The State of Washington's 303(d) Program

The State of Washington has a robust program under Section 303(d) of the CWA. Washington prepared its first 303(d) List in 1994, with subsequent 303(d) Lists submitted to and approved by EPA for the 1996, 1998, 2004, 2008, 2010, and 2012 reporting cycles.[4] Washington's most recent 303(d) List was approved by EPA on July 22, 2016.[5] Since October 1, 1995, Washington has completed 1,578 TMDLs.[6] This includes 495 TMDLs that established loads for temperature, as well as three TMDL projects (each including multiple TMDLs) for the

[4] "A History of 303(d) Lists and 305(b) Reports," Wash. Dept. of Ecology, available at: http://www.ecy.wa.gov/programs/wq/303d/History303d.html.

[5] "Current EPA Approved Assessment," Wash. Dept. of Ecology, available at: http://www.ecy.wa.gov/programs/wq/303d/currentassessmt.html.

[6] *See* "Region 10 Summary of State Information," U.S. EPA, available at: https://ofmpub.epa.gov/waters10/attains_region_cy.control?p_region=10#tmdls_by_state.

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Columbia and lower Snake Rivers and 44 TMDL projects in the tributaries to the Columbia and lower Snake that addressed hundreds of impairments.[7] In the last two years alone, EPA has approved Washington's submission of 78 TMDLs. *Id.*

Segments of the Columbia and lower Snake Rivers first appeared as impaired for temperature on Washington's 1998 303(d) List. ECF No. 27-22 at 25.[8] At present, 40 segments of the Columbia River (out of 77) and nine segments of the Snake River (out of 19) are currently listed as impaired for temperature.[9] Washington's current water quality standards for temperature provide that river temperatures must stay below 16-20 degrees Celsius (60.8-68 degrees Fahrenheit), depending on the time of year, location, and species of fish present.[10] Washington's water quality standards also include "natural conditions criteria" for temperature, which provide that if the natural temperatures in the water body exceed the numeric biologically-based temperature criteria, then the natural temperatures constitute the applicable temperature criteria for that water body. *See* Wash. Admin. Code 173-201A-260(1). EPA's approval of these natural conditions criteria in Washington's water quality standards is currently being challenged in *Northwest Environmental Advocates v. EPA*, No. 14-196 (W.D. Wash. filed Feb. 10, 2014).

B. The State of Oregon's 303(d) Program

The State of Oregon also maintains a strong TMDL program. Oregon has submitted

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[7] *See* "Washington Water Quality Assessment Report," U.S. EPA, available at: https://ofmpub.epa.gov/waters10/attains_state.control?p_state=WA&p_cycle=2008.

[8] With the exception of Plaintiff's Motion for Summary Judgment, ECF No. 19 ("Pl. Mot."), citations to ECF entries cite the ECF-designated page number, not the internal numbering. Citations to Plaintiffs' Motion cite the page number identified in the document footer.

[9] "Washington State Water Quality Assessment 303(d)/305(b) List," Wash. Dept. of Ecology, available at: https://fortress.wa.gov/ecy/approvedwqa/ApprovedSearch.aspx.

[10] "Water Quality Standards for Surface Waters of the State of Washington, Chapter 173-201A WAC," revised October 2017, Washington Department of Ecology, at 18, available at: https://fortress.wa.gov/ecy/publications/documents/0610091.pdf.

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303(d) Lists to EPA for the 1996, 1998, 2002, 2004/2006, 2010, and 2012 reporting cycles.[11] EPA partially approved Oregon's most recent (2012) 303(d) List, which Oregon submitted to EPA in November 2014.[12] Since October 1, 1995, Oregon has completed 1,241 TMDLs.[13] Of these TMDLs, 817 addressed temperature; in addition, two TMDL projects have addressed the Columbia and lower Snake Rivers and sixteen TMDL projects have addressed tributaries to the two rivers, addressing hundreds of impairments.[14]

Oregon first identified segments of the Columbia and lower Snake Rivers as impaired for temperature in its 1996 303(d) List; at present the entire length of the Columbia River in Oregon (identified as a single water-quality-limited segment) is listed as impaired for temperature.[15] Oregon's current water quality standards for temperature for the Columbia and Snake Rivers include numeric criteria ranging from 13.0 degrees Celsius (55.4 degrees Fahrenheit) for certain fish spawning areas in October to April, to 20 degrees Celsius (68 degrees Fahrenheit) year round. Or. Admin. R. 340-041-0028. Oregon's water quality standards, like Washington's, also include narrative natural conditions criteria, but EPA's approval of the natural conditions criteria as part of Oregon's standards was invalidated in *Northwest Environmental Advocates v. EPA*, 855 F. Supp. 2d 1199 (D. Or. 2012), and EPA disapproved the criteria upon remand.

C. Temperature Impacts in the Columbia/Lower Snake Rivers

The Columbia River is the largest river in the Pacific Northwest, with a drainage basin

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[11] "Water Quality Assessment," Or. Dept. of Envtl. Quality, available at: http://www.deq.state.or.us/wq/assessment/assessment.htm.

[12] "Oregon's 2012 Integrated Report Assessment Database and 303(d) List," Or. Dept. of Envtl. Quality, available at: http://www.deq.state.or.us/wq/assessment/rpt2012/search.asp.

[13] *See* "Region 10 Summary of State Information," *supra* note 6.

[14] *See* "Oregon Water Quality Assessment Report," U.S. Environmental Protection Agency, available at: https://ofmpub.epa.gov/waters10/attains_state.control?p_state=OR&p_cycle=2006.

[15] *See* "Oregon's 2012 Integrated Report Assessment Database and 303(d) List," *supra* note 12.

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roughly the size of France that extends into seven U.S. states (and Canada), including Washington, Oregon, and Idaho. The Snake River is its largest tributary.[16] The first dam on the Columbia River was built in 1933. The Snake River was first dammed above the confluence with the Clearwater River in the 1800s. ECF No. 27-22 at 37. At present, there are multiple federal and non-federal dams on the lower reaches of the two rivers in Washington and Oregon, *id.*; the federal dams are congressionally authorized for multiple purposes including generating hydroelectric power, flood risk management, navigation, fish and wildlife conservation, water supply for agriculture and municipal and industrial uses, and other purposes.[17] While there are a small number of point source dischargers on the rivers (for example, municipal sewage treatment plants or industrial facilities), as of 2003 there were only around 100 such dischargers in the relevant river area – a small number considering the amount of flow and length of the Columbia and lower Snake Rivers. ECF No. 27-22 at 14.

Both the Columbia and lower Snake Rivers are native habitat for multiple species of salmon and steelhead – including several threatened and endangered anadromous fish species – that migrate downstream to the Pacific Ocean as juveniles and back upstream as adults to spawn. These cold-water fish generally depend on cool temperature ranges for migration, spawning, and rearing. *See* ECF No. 27-4 at 5, 11-12; ECF No. 27-3. There is evidence that, even before construction of the dams, temperatures in the Columbia River periodically exceeded 20 degrees Celsius in late summer, and that temperatures often did so in the Snake River. ECF No. 27-22 at

[16] *See* "Columbia River Basin Dams," U.S. Army Corps of Engineers, available at: http://www.nwd.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/475820/columbia-river-basin-dams/; "The Columbia River System: Inside Story," 2d ed. 2001, Federal Columbia River Power System, at 4, available at: https://www.bpa.gov/power/pg/columbia_river_inside_story.pdf.

[17] *See supra* note 16.

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47; Ex. 2 at 44-48[18]; ECF No. 27-14 at 15-16 & n.6. During such times, migrating fish likely relied on so-called "cold water refugia" along the length of the river, which are areas of a river that are colder than the main river temperature.[19] However, acute or prolonged high water temperatures can stress fish populations and contribute to illness or death. *See* ECF No. 27-14 at 23-25; *see generally* ECF No. 27-3.

Human activities in the watershed have contributed to temperature increases in the Columbia River Basin and to alterations of the seasonal periods of time in which the mainstems of the Columbia and lower Snake Rivers provide optimal temperatures for fish migration and spawning. ECF No. 27-4 at 12-20. While temperature dynamics in the rivers are highly complex and will be the subject of further study in forthcoming modeling efforts, EPA's 2003 preliminary draft TMDL concluded that some dams are substantial contributors to temperature effects in the rivers. ECF No. 27-22 at 11. Point source dischargers also contribute to temperature increases by discharging warm water into the river, but EPA's preliminary draft TMDL found that compared to the influence of the federal dams, these contributions are minimal, if not *de minimis*. ECF No. 27-22 at 13; ECF No. 18-1 at 3. Changes in seasonal weather patterns and rising air temperatures are also playing a significant role in increasing river temperatures over time, accounting for approximately one degree Celsius rise in water temperature since the mid-1960s. Ex. 3 at 14, 16[20]; *see also* ECF No. 27-12 at 2.

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[18] "Application of a 1-D Heat Budget Model to the Columbia River System," May 2001, U.S. EPA.

[19] *See* "Primer for Identifying Cold-Water Refuges to Protect and Restore Thermal Diversity in Riverine Landscapes," 2012, U.S. EPA, at 5-6, available at: https://www3.epa.gov/region10/pdf/water/torgersen_etal_2012_cold_water_refuges.pdf.

[20] Yearsley, J. R. (2009), "A semi-Lagrangian water temperature model for advection-dominated river systems," Water Resources Research, Vol. 45.

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D. State-EPA Cooperation on Temperature Issues in the Columbia/Lower Snake Rivers

Shortly after the first lower Columbia and Snake River segments were listed as impaired for cold water fishery uses due to temperature, EPA and the States of Washington, Oregon, and Idaho signed a Memorandum of Agreement ("2000 MOA"), on October 16, 2000, outlining a multi-state plan to address impairments in the two rivers. ECF No. 27-15. In consideration of EPA's technical expertise at modeling temperature, and the interstate and interjurisdictional nature of the waters (including Tribal waters), the parties agreed that EPA should take responsibility for the technical development of the temperature TMDL for the Columbia and lower Snake Rivers. *Id.* at 5, 8, 10. The States, meanwhile, would assist in that effort and take primary responsibility for total dissolved gas TMDLs, another pollutant affecting cold water fishery uses. *Id.* at 8, 10. After EPA and the States completed technical work on the temperature TMDL, the MOA provided that the States would be responsible for issuing and implementing the TMDL within their individual jurisdictions. *Id.* at 12.

Consistent with the goals expressed in the 2000 MOA, the parties released the "Work Plan for Columbia/Snake Temperature TMDLs" on April 16, 2001, which detailed the tasks assigned to each party in the TMDL development effort. ECF No. 27-17. As explained *infra* at 30-31, the Work Plan affirmed that EPA would have the technical responsibility, with the States providing data, advising on technical and policy decisions, and reviewing and commenting on EPA's conclusions. *Id.* at 7-13. The States remained the "policy lead" for developing numeric targets in their jurisdictions and were expected to assist in the development of the load and wasteload allocations. *Id.* at 11-12. The Work Plan also affirmed that the States would ultimately issue the TMDL. *Id.* at 5, 14.

In the fall of 2001, Washington and Oregon sent letters requesting that EPA not only

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work to develop the TMDL but also issue it on the two States' behalf. ECF No. 27-18 at 2; ECF No. 27-20 at 2. Idaho did not make a similar request. ECF No. 27-19 at 2.

In the meantime, the parties were engaged in their work under the 2001 Work Plan, including monthly meetings beginning in February 2001 "to plan the development of the temperature TMDL effort, agree on technical issues and plan outreach and coordination efforts." ECF No. 27-22 at 28; *see also* ECF No. 27-24 at 3. This effort led to EPA's release, in July 2003, of a Preliminary Draft Columbia/Snake Rivers Temperature TMDL "developed under the guidance of a technical steering committee consisting of EPA, the three States and interested Tribes," and with the participation of the Action Agencies responsible for the operations of federal dams on the two rivers: the Bureau of Reclamation, the U.S. Army Corps of Engineers, and the Bonneville Power Administration. ECF No. 27-22 at 7. The 2003 preliminary draft TMDL provided a first glance of what the parties were proposing with respect to the temperature TMDL. EPA intended to release a draft for public comment later, with a final TMDL following thereafter. *See id.*

Two aspects of the 2003 preliminary draft TMDL were particularly notable. First, the preliminary draft TMDL explained that it was written to account for "water temperature that would exist in the absence of human activities in the rivers." *Id.* At the time, all of the relevant State and Tribal water quality standards allowed for quantification of natural conditions to reflect the natural complexity of the water bodies and the fact that at certain times and locations, water body temperatures could exceed the fixed, biologically-based numeric criteria even under natural conditions. *Id.* at 11-12. The preliminary draft TMDL determined these "natural" conditions through modeling, which could mathematically "remove" the thermal contributions attributable to dams and point sources from the river, *id.* at 38; the preliminary draft TMDL then proposed

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temperature targets and allocations based on that modeling – even where natural temperatures were modeled to be higher than the States' default numeric (*e.g.*, 20 degrees Celsius) water quality criteria. Second, the preliminary draft TMDL explained that the most substantial man-made contributions to temperature increases in the river system were attributable to the federal dams. *Id.* at 13-14. The cumulative contribution of the 108 point sources on the rivers, on the other hand, was "de minimis" in comparison to the effects of the dams and was not large enough, in itself, to cause temperatures to rise above the draft TMDL's temperature limit. *Id.*

In the preliminary draft TMDL, EPA also identified some of the related challenges that would subsequently become roadblocks to that draft's formal publication for public comment. For example, "[w]hile the States of Oregon, Idaho and Washington are taking the lead for TMDL implementation planning, they rely heavily on the [Action Agencies] in developing practical steps to be taken to reduce temperature." *See id.* at 8.[21] The preliminary draft made clear that these implementation questions were being explored at the same time that the draft was being written, and that "no determination has been made as to whether feasible alternatives exist that will ensure attainment of water quality standards." *Id.* at 10. The "next step," the draft explains, would be to "determine what specific operational changes at the dams and point sources of heat along the rivers can be implemented to achieve the TMDL and ultimately achieve water quality standards." *Id.* at 23. But the TMDL recognized that "[i]mplementation planning to achieve temperature improvements at dams will be technically complicated, costly and generally outside Clean Water Act authorities," and that questions about the feasibility of operational changes at

[21] *See also* "Water Quality Plan for Total Dissolved Gas and Water Temperature in the Mainstem Columbia and Snake Rivers," January 2009, U.S. Army Corps of Engineers, available at: https://www.salmonrecovery.gov/Files/Comprehensive%20Evaluation/ACOE_2009_Water-Quality-Plan.pdf.

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the federal dams would have to consider "the ability of the [federal dams] to continue achieving the purposes established by Congress," in addition to technical and economic feasibility. *Id.* The preliminary draft TMDL thus recognized that feasibility issues likely would involve consideration of further regulatory actions, such as use attainability analyses, to account for water quality standards that would remain unachievable in light of the operational limitations associated with the federal dams: "[t]he underlying water quality standards may also need to be revised to strike a balance between competing ecological needs and competing uses and values of the river system." *Id.* at 10.

As the significance of these issues became apparent, direct work on the TMDL was deferred while the parties worked with the Action Agencies to explore conducting use attainability analyses for the federal dams. *See, e.g.*, Ex. 4 at 1-2[22]; Ex. 5 at 1-3[23]; Ex. 6 at 1.[24] In the meantime, EPA provided technical assistance to the U.S. Army Corps on proposed operational changes at the Dworshak Reservoir that introduce cold water into the Clearwater River, which flows into the lower Snake River, for the benefit of salmon migration.[25] Beginning in 2000 and continuing until 2009, EPA also assisted in developing the Corps' Water Quality Plan for Total Dissolved Gas and Water Temperature in the Mainstem Columbia and Snake Rivers ("Corps' Water Quality Plan"), identifying 28 proposed strategies for reducing the dams'

[22] May 4, 2005 Letter from EPA – Region 10, U.S. Army Corps of Engineers, and U.S. Bureau of Reclamation to Stephanie Hallock, Or. Dept. of Envtl. Quality.

[23] May 25, 2006 Letter from Karen L. Durham-Aguilera, U.S. Army Corps of Engineers, to EPA – Region 10, Or. Dept. of Envtl. Quality, and Wash. Dept. of Ecology.

[24] July 12, 2006 Letter from Stephanie Hallock, Or. Dept. of Envtl. Quality, to Colonel Thomas E. O'Donovan, U.S. Army Corps of Engineers.

[25] *See* "Endangered Species Act Section 7(a)(2) Consultation Biological Opinion," May 5, 2008, Nat'l Oceanic & Atmospheric Admin. at PDF pp. 834-35, available at: https://www.salmonrecovery.gov/Files/BiologicalOpinions/2008/2008%20BiOp.pdf; *see also* ECF No. 27-12 at 3.

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contributions to temperature increases in the two rivers.[26] EPA is also studying cold water refugia on the Columbia River.[27] Meanwhile, the States moved forward to fulfill their commitment under the MOA to issue TMDLs addressing total dissolved gases. *See infra* at 32.

In early 2017, EPA resumed direct work to support TMDL development. Decl. of Mary Lou Soscia ("Soscia Decl.") ¶ 5. EPA is updating the computer model used to assess temperature impacts with data and information assembled in the years since EPA developed the model. Ex. 7 at 3.[28] This effort involves gathering river and weather data from 2000-2016 to allow simulation of river temperatures for the full period from 1970-2016; undertaking a significant effort to fill data gaps, format the input data, and troubleshoot the model before it is run; and then running the model to compare its simulated temperatures to measured temperatures. Based on that comparison, the model will be calibrated to improve its accuracy, at which point it will be subject to outside review and – eventually – "accepted" by EPA for use in decision-making. Thereafter, it can be used to run predictive scenarios for TMDL development. *Id.* at 4-5, 9-16. EPA is also engaged in ongoing conversations with other federal agencies, including the Action Agencies, about management of temperatures in the two rivers. Soscia Decl. ¶ 4.

On August 10, 2017, EPA made a formal request to the Directors of the Idaho, Washington, and Oregon environmental agencies to open discussions pursuant to the 2000 MOA to address the changed circumstances since its signing and to modify the MOA in support of "renewed effort" on the TMDL. ECF No. 18-1 at 2. The States' involvement is especially important at this juncture to address intervening changes (such as the invalidation of the Oregon

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[26] *See supra* note 21; ECF No. 27-26.

[27] "Columbia River Cold Water Refuges," U.S. EPA, available at: https://www.epa.gov/columbiariver/columbia-river-cold-water-refuges.

[28] "Quality Assurance Project Plan for RBM10 Model Update," U.S. EPA, August 23, 2017.

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natural conditions criteria) in how the States' water quality standards treat "natural" conditions in the rivers. *Id.* at 4-6. The inability to adjust load allocations to reflect natural conditions might result in a final load that could not be met *even if* all man-made thermal contributions were eliminated, significantly complicating the capacity of a TMDL to apportion pollution targets that are both achievable and protective. *Id.* at 5. Although EPA is prepared to continue technical work to support development of the TMDL, the States have the lead to adjust their water quality standards to include, for example, revised natural conditions provisions or modified designated uses. *See id.*; 40 C.F.R. § 131.20. The States' involvement in cooperative problem-solving on these and other issues is thus crucial to the parties' collective efforts to produce and issue a TMDL to meaningfully mitigate temperature impairment in the mainstems of the Columbia and lower Snake Rivers.

Since EPA's August letter, EPA-State coordination has been ongoing and the States have expressed their continued interest in working with EPA. *See* Soscia Decl. ¶ 6; Ex. 8 at 1.[29] Discussions to date have considered these overarching issues, as well as the appropriate procedural steps to moving both the discussions and TMDL development forward. Soscia Decl. ¶ 6. EPA and the States have also had preliminary discussions about what changes to the MOA might be necessary to accord with current plans, and about the appropriate party or parties to issue a final TMDL. *Id.* On November 14, 2017, EPA and the States intend to discuss a draft work plan for TMDL development. *Id.*

STANDARD OF REVIEW

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact

[29] Letter from Heather R. Bartlett, Washington Department of Ecology, to Michelle L. Pirzadeh, U.S. Environmental Protection Agency – Region 10 (October 9, 2017).

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and that the moving party is entitled to judgment as a matter of law. *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1277 (9th Cir. 2017) (citing *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Assoc.*, 809 F.2d 626, 630-31 (9th Cir. 1987)).

ARGUMENT

I. PLAINTIFFS' "CONSTRUCTIVE SUBMISSION" CLAIM IS UNAVAILABLE AS A MATTER OF LAW AND UNSUPPORTED BY THE FACTS.

A. Plaintiffs' Claims Do Not Fall Within the Constructive Submission Theory.

In Plaintiffs' first claim, they allege that EPA has a non-discretionary duty to issue a temperature TMDL for the Columbia and lower Snake Rivers because Washington and Oregon clearly and unambiguously expressed their intent not to prepare or submit such TMDLs. *See* Compl., ECF No. 1 ¶ 50; Pl. Mot. at 4. Under Plaintiffs' theory, the States' actions constitute "constructive" submissions of "no TMDLs" that have triggered EPA's duties under Section 303(d)(2) of the CWA to review the States' "submissions" and to establish an appropriate TMDL in their place. *See id.*; 33 U.S.C. § 1313(d)(2). Plaintiffs' reliance on the constructive submission theory is misplaced. As a preliminary matter, the United States believes that the constructive submission theory is unlawful because it lacks any basis in the statutory text. In any event, to the extent it can be applied at all, this "necessarily narrow" judicial theory has been adopted by the Ninth Circuit only with respect to wholesale programmatic failures by a state to submit *any* TMDLs. *See Baykeeper*, 297 F.3d at 882. Moreover, both law and policy counsel against extending the theory to particular TMDLs, which would disrupt the statutory scheme and impermissibly intrude on state authority. Here, both Washington and Oregon have robust TMDL programs and have submitted hundreds of TMDLs to EPA. Accordingly, the constructive submission theory is inapplicable.

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1. The Constructive Submission Theory Is Contrary to the CWA and Invalid.

As the Ninth Circuit explained in *Baykeeper*, 297 F.3d at 881-82, constructive submission is not statutory, but is rather a theory created by the Seventh Circuit in *Scott v. City of Hammond*. 741 F.2d 992 (7th Cir. 1984). Under Section 303(d) of the Act, states are required to submit to EPA their lists of water-quality-limited segments and TMDLs to address those segments; upon submission, EPA is required to review and approve or disapprove those submissions. 33 U.S.C. § 1313(d)(2); *Scott*, 741 F.2d at 994-96. The Act initially allowed states 180 days to submit a 303(d) List and corresponding TMDLs with regard to certain specified pollutants. 33 U.S.C. § 1313(d)(2). After that initial submission, the Act only requires that states make submissions "from time to time." *Id.*; *Baykeeper*, 297 F.3d at 881. Moreover, Congress did not authorize citizen suits against states to compel submission of those TMDLs, nor does the CWA include an express right of action to compel EPA to issue TMDLs when states have not done so. *See generally* 33 U.S.C. §§ 1313, 1365; *S.F. Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 1001-02 (N.D. Cal. 2001) ("[The CWA] does not state that the EPA has to act if there is no initial [TMDL] submission."), *aff'd*, in *Baykeeper*, 297 F.3d 877; *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1425 (W.D. Wash. 1991) ("The Act is silent as to the nature of EPA's obligations if a state . . . fails to make any initial submission at all."). Instead, Congress acknowledged that it was the "primary responsibilit[y] and right[]" of the states to "prevent, reduce, and eliminate" water pollution, 33 U.S.C. § 1251(b), and so left to state discretion the prioritization and timing of their TMDL submissions, *id.* § 1313(d)(1)(A) & (d)(2).

In the years after Section 303(d) was enacted, a number of states did not timely submit either 303(d) Lists or TMDLs. *See Nat. Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 539 (S.D.N.Y. 2000) ("*NRDC*") (quoting testimony of EPA Administrator Carol M. Browner). In

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light of state inaction, the Seventh Circuit in *Scott* concluded that, notwithstanding the total absence of any statutory text allowing a party to compel state action, the Act's drafters could not have "intended that the states by inaction could prevent the implementation of TMDLs." *Scott*, 741 F.2d at 997. Thus, the court postulated that in circumstances where "a state fails over a long period of time to submit proposed TMDL's," that failure "may have ripened into a refusal to act" that "would amount to a determination that no TMDL is necessary and none should be provided." *Id.* at 996, 997-98. The *Scott* court remanded the case to the district court with instructions to "determine whether it is in fact the case that [Indiana and Illinois] have determined not to submit TMDL proposals." *Id.* at 997 n.11. On remand, the Seventh Circuit suggested, EPA could be ordered to proceed "as if the states had submitted proposals of no TMDL's" unless "the states are, or will soon be, in the process of submitting TMDL proposals or that some factor beyond the scope of the complaint has made TMDL submissions impracticable." *Id.*

But where the CWA intended to impose upon EPA a duty to act, it did so in clear and unequivocal language. Indeed, Congress plainly understood that state inaction could interrupt the pollution control scheme it had designed and specifically provided for EPA action in the face of state inaction where it felt such a backstop was appropriate. *See* 33 U.S.C. §§ 1314(l)(3), 1329(d)(3). Yet, Congress declined to establish a comparable duty should the states fail to submit TMDLs. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)). The constructive submission theory proposed in *Scott* was thus a legal fiction created to reach a result contrary to the express Congressional statute. *Id.* at 997. As

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other courts have recognized, the Seventh Circuit's reliance on the Act's broad statutory policies to reach this result was, therefore, an "exercise in judicial lawmaking." *Am. Littoral Soc'y v. EPA*, 199 F. Supp. 2d 217, 241 (D.N.J. 2002) (explaining that the constructive submission theory "exist[s] only by judicial gloss on the CWA"). Accordingly, the constructive submission theory itself is unlawful, notwithstanding its application by the Ninth Circuit in *Baykeeper*.[30]

2. Even If Lawful, the Constructive Submission Theory Only Applies Where a State Completely Fails to Submit TMDLs.

This Court need not reach the question of whether the constructive submission theory as a whole is lawful, however, because even if it were, it could not apply here. The constructive submission theory, as devised in *Scott*, was at most a narrow judicial stopgap in circumstances when total state recalcitrance had nullified "an important aspect of the federal scheme of water pollution control." *Id.* at 997. As employed by courts since *Scott*, including the Ninth Circuit in *Baykeeper*, the theory is thus understood to apply only in cases of "a complete failure by a state to submit TMDLs," *Baykeeper*, 297 F.3d at 881, where "'the state's actions clearly and unambiguously express a decision' not to submit TMDLs." *Id.* at 882 (quoting *Hayes*, 264 F.3d at 1024). To apply the theory, a court must find not only that the state has "fail[ed] to submit any TMDLs," but also that the state "has no plans to remedy this situation." *Baykeeper*, 297 F.3d at 882.

As a judicial construction, the Ninth Circuit recognized that application of the doctrine is "necessarily narrow." *Baykeeper*, 297 F.3d at 882 (citing *Hayes*). Indeed, the vast majority of courts considering constructive submission claims have thus found the theory inapplicable –

[30] The United States recognizes that this Court may feel bound by the Ninth Circuit's reasoning in *Baykeeper*. However, because the lawfulness of the constructive submission theory was not squarely briefed or decided in *Baykeeper* – which held only that the theory was unavailable on the facts presented – *Baykeeper*'s recognition of the theory was non-binding dicta. The court did not expressly resolve the legal validity of the theory.

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even where a state had completed only a handful of TMDLs out of the hundreds (or more) required to address its impaired water bodies. In *Baykeeper*, for example, the Ninth Circuit concluded that California's failure to submit *any* TMDLs *for fourteen years* after the Act's initial deadline did not amount to a constructive submission because the state had submitted "at least eighteen TMDLs" since then and had plans to establish the remainder. This "preclude[d] any finding that the state has clearly and unambiguously decided not to submit any TMDLs." *Id.* at 883 (internal quotation omitted); *see also Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1190-91 (D. Mont. 1999) (holding that "the constructive submission theory [was] not applicable" where Montana had submitted only one TMDL, regardless of whether that TMDL was "obviously inadequate"); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 967-968 (W.D. Wash. 1996) (finding no constructive submission where Idaho had completed three TMDLs in seventeen years).

Similar claims have been rejected by courts in the Second, Third, Fourth, Eighth, Tenth, and Eleventh Circuits. *See Hayes*, 264 F.3d at 1024 (rejecting a constructive submission claim where Oklahoma had submitted "a number of TMDLs" and was "making progress" towards completing about 1,500 TMDLs that were still outstanding); *see also, e.g.*, *Am. Littoral Soc'y*, 199 F. Supp. 2d at 241-242 (finding no constructive submission where New Jersey "submitted *some* TMDLs" and explaining that "the standard for constructive submission is stringent, requiring both that a state submit *no* TMDLs *and* have *no* plan to remedy that total failure" (emphasis in original) (citing *S.F. Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d at 1001)); *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 418 n.18 (D. Md. 2001) (concluding that the constructive submission theory was "inapplicable" because Maryland had made "several TMDL submissions" and so it "is not a case where Maryland has flatly chosen not to act"); *NRDC*, 93 F. Supp. 2d at

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538-42 (finding no constructive submission where the state had "formulated and submitted *some* TMDLs" because the theory "arises only in the face of complete nonfeasance by the [s]tate"); *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871-72 & n.6 (N.D. Ga. 1996) (finding no constructive submission where Georgia had completed two of 340 TMDLs in sixteen years, even where its two submissions were "totally inadequate" and where Georgia had "no current plans" to develop the remaining TMDLs); *Sierra Club v. Browner*, 843 F. Supp. 1304, 1308, 1311-14 (D. Minn. 1993) (finding no constructive submission where Minnesota had submitted 43 TMDLs, even where plaintiffs alleged thirteen years of inaction, the state was working on fewer than a dozen additional TMDLs, and the record included a letter "suggesting that [the state agency] refuses to hire or assign personnel . . . to establish TMDLs").

In each instance where a court found that a state's small number of completed TMDLs foreclosed a constructive submission, there were numerous impaired water bodies listed in that state for which a *particular* TMDL was likely necessary. But even so, these reviewing courts declined to find the constructive submission theory satisfied. Indeed, courts appear to have found a constructive submission of "no TMDLs" on only two occasions – and each involved a broad programmatic failure to submit TMDLs. In *Alaska Center for the Environment v. Reilly*, the court found a constructive submission where Alaska failed to submit any TMDLs over ten years and had failed to take the predicate step of identifying water-quality-limited segments. 762 F. Supp. at 1426. The court held that this was "deliberate, silent inaction," *id.* at 1429, observing that Alaska's own reporting "ma[de] no promise to 'attempt' [TMDLs]" going forward, *id.* at 1425. The constructive submission theory was employed much more recently in *Ohio Valley Environmental Coalition v. McCarthy*, where the district court found that West Virginia had "declared that it will not develop TMDLs for biologic impairment," "claiming a state law does

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not permit it to comply with federal directives." No. 15-271, 2017 WL 600102, at *16, 11 (S.D. W. Va. Feb. 14, 2017) ("*OVEC*"). Based on these findings, the *OVEC* court held that the state had made a constructive submission for all biologically-impaired water bodies even though the state had completed thousands of other TMDLs (including TMDLs addressing biological impairment). *Id.* at *11. This novel application of the theory to more than 500 impaired waters across the state – which the United States has appealed to the Fourth Circuit – nonetheless relied on the court's finding of a programmatic decision to cease all work on all TMDLs for biologic impairment.[31]

Unsurprisingly, no court has applied the theory to find a constructive submission of "no TMDLs" for one *particular* TMDL. Doing so 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. In particular, while courts justified adoption of the constructive submission theory as necessary to uphold the basic design of Congress' water quality scheme where states failed entirely to prepare TMDLs, applying the theory to particular TMDLs would turn that scheme on its head. State TMDL programs encompass hundreds, sometimes thousands, of discrete water-quality-limited segments for which TMDLs may be necessary. Recognizing the difficulty of managing such a program, Congress vested the states with authority over how to prioritize, prepare, and submit those TMDLs "from time to time," and declined to provide for Agency and judicial review. *See* 33 U.S.C. § 1313(d)(1)(A) & (d)(2). Notably, Congress placed strict deadlines and backstops in the Act in

[31] In addition, in *Kingman Park Civic Association v. EPA*, the District of Columbia had not submitted a single TMDL in 18 years, which the court determined would be sufficient to represent a constructive submission. 84 F. Supp. 2d 1, 2, 5 (D.D.C. 1999). The court made that ruling in denying EPA's motion to dismiss, however, so it adopted, but did not ultimately apply, the constructive submission theory.

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many other places – but did not do so here. The omission suggests that Congress sought to provide states with broad discretion in managing their TMDL programs and entrusted oversight of those decisions to the political branches of government. *See Russello*, 464 U.S. at 23.

Allowing plaintiffs to compel completion of particular TMDLs would contravene the statutory scheme by subjecting to judicial review state judgments about how to prioritize preparation of hundreds, or perhaps thousands, of necessary TMDLs. Moreover, expanding the constructive submission theory to particular TMDLs necessarily enlists courts to engage in inquiries far beyond the black-and-white assessment called for under the constructive submission theory as originally formulated. Rather than assessing whether a state has failed to submit "any TMDLs" and, if so, whether it is trying or planning to remedy that failure, courts would be drawn into setting regulatory priorities for states and allocating their limited resources. Absent any indication that Congress intended courts to engage in such an imprecise and potentially intrusive review, this court should stop short of expanding the constructive submission theory – a "judicial gloss" on the CWA, *see Am. Littoral Soc'y*, 199 F. Supp. 2d at 241 – to encompass such review.

3. Plaintiffs' Reliance on the *McLerran* Dicta is Unavailing.

Plaintiffs fail to present compelling grounds for deviating from the longstanding application of the constructive submission theory. There is no dispute that Washington and Oregon have robust TMDL programs that would not support a finding of constructive submission under *Baykeeper* or *Alaska Center for the Environment v. Reilly* (or even *OVEC*). The two States have issued more than 2,800 TMDLs between them, including other TMDLs for temperature pollution and other TMDLs for the Columbia and lower Snake Rivers. So to secure relief, Plaintiffs must ask this Court to take the unprecedented step of expanding the constructive

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submission theory to the States' alleged failure to submit a particular TMDL for particular water segments, notwithstanding the States' steady and productive programmatic efforts. Plaintiffs would have this Court ignore the overwhelming consensus of other federal courts in favor of dicta in *Sierra Club v. McLerran*, No. 11-1759, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015), which theorized that a constructive submission could arise with respect to a particular TMDL, though – critically – the court found that no constructive submission had even occurred there. Pl. Mot. at 10. Notably, however, the *McLerran* court's dicta depended on two assertions: first, that *Baykeeper* did not speak to the issue because it was only concerned with "state-wide" failure and, second, that the CWA's protection of state discretion over its priorities is irrelevant because the threshold for a constructive submission is abandonment. Neither assertion warrants expanding the constructive submission theory beyond its longstanding (very narrow) limits – especially where the *McLerran* court explicitly disclaimed any intent to define "the precise contours" of the theory. 2015 WL 1188522, at *8.

First, although the *McLerran* court was correct that *Baykeeper* assessed the alleged failure to submit TMDLs across the entire State of California, the fact that courts only applied the theory to state-wide failures over the first thirty years of its application – denying relief even while implicitly or explicitly accepting that many, many *particular* impairments warranting TMDLs remained unaddressed[32] – is not an indication that courts and plaintiffs were reserving the question of single-TMDL constructive submissions for later consideration. Rather, the fact that courts found no constructive submissions even where numerous particular TMDLs remained

[32] *See, e.g.*, *Hankinson*, 939 F. Supp. at 871 (finding no constructive submission even where the state "has no current plans" to develop more than 300 TMDLs required by the CWA); *Sierra Club v. Browner*, 843 F. Supp. at 1312-13 (finding no constructive submission even where the court was aware of less than a dozen TMDLs underway for more than 400 water-quality-limited segments).

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undeveloped indicates that those courts understood the judge-made theory to be *limited* to circumstances of state-wide failure. Indeed, under the logic of the *McLerran* dicta, the plaintiffs in *Baykeeper* and the other cases cited above were denied relief only because they made the procedural misstep of raising the full scope of missing TMDLs all at once, rather than in hundreds of individual lawsuits. But it would strain credulity to believe the *Baykeeper* court intended relief to be *available* where a state has overlooked a single TMDL but *unavailable* where a state has overlooked hundreds. The Court should reject that logic. Instead, the Court should read *Baykeeper* as reflecting the Ninth Circuit's understanding of the limited scope of the constructive submission theory – a limit that in turn reflects the particular context of state-wide, programmatic failures that gave rise to the theory.

Second, the *McLerran* court ignored the fact that a judicial order compelling completion of a TMDL would *itself* disrupt the state's prioritization of TMDLs. That was the essence of the court's holding in *Alaska Center for Environment v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994), where the Ninth Circuit reviewed the district court's order requiring EPA to issue TMDLs for all impaired Alaska waters in light of Alaska's failure to submit any TMDLs. EPA appealed the remedy on the grounds that it applied to numerous waters for which plaintiffs had failed to establish standing.[33] In upholding the remedy, the Ninth Circuit explained that the district court's ruling could not be "limit[ed] . . . to specific streams of paramount concern to the parties before the court" because doing so would "permit individual plaintiffs or a federal court . . . , in effect, [to] impose their own prioritization upon the EPA." *Id.* at 985. Permitting plaintiffs to impose their own prioritization, the Ninth Circuit reasoned, "would be contrary to congressional

[33] EPA did not appeal the district court's holding that EPA had not performed mandatory duties. *See Alaska Ctr. for Env't v. Browner*, 20 F.3d at 984.

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directive," *id.*, and "unduly interfere with the statutory scheme," *id.* at 986, which gives the states and EPA authority over the prioritization of TMDLs within the state. *See id.* at 985-86.

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.

Plaintiffs' reliance on *OVEC* and *Las Virgenes Municipal Water District v. McCarthy*, is no more successful. While both cited the *McLerran* dicta approvingly, each concerned a broad, categorical failure more akin to the traditional application of the theory in *Baykeeper* and elsewhere than to Plaintiffs' novel construction here. As noted above, the constructive submission in *OVEC* relied on that court's finding that the state had made an affirmative, and publicly announced, programmatic decision to cease work on *all* TMDLs for biologic impairment. *See* 2017 WL 600102, at *11-13. *Las Virgenes*, meanwhile, concerned a consent decree addressing California's failure to submit *any* TMDLs under the jurisdiction of the Los Angeles Regional Board, comprising hundreds of identified water-quality-limited segments warranting TMDLs. No. 14-1392, 2016 WL 393166, at *2 (N.D. Cal. Feb. 1, 2016). That court was not presented with and did not decide any constructive submission claim; rather, it only addressed the question of the theory's application in response to a (procedurally improper) contention that the court had lacked subject matter jurisdiction to enter the decree some seventeen years previous. *See id.* at *6-7 ("The court is not obliged to consider such arguments . .

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. . Nevertheless, the Court will briefly address [them].”). In any event, *Las Virgenes*, like *OVEC*, involved an alleged programmatic abandonment, albeit on a regional rather than state-wide scale. As such, it is a poor analog to Plaintiffs’ claim here.

In sum, 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. This Court should not be the first. The 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. Extending the theory further would create rights under the CWA where Congress provided none and would impede states’ exercise of their granted authority to balance both the specific timing and prioritization of individual TMDLs. Consequently, Plaintiffs first claim should be denied as a matter of law.

B. The States Have Not “Unambiguously Abandoned” a TMDL for Temperature Impairments so There Have Been No Constructive Submissions.

Were this Court to conclude that the constructive submission theory is broad enough to countenance Plaintiffs’ claim, that claim would still fail as a factual matter. As the court recognized in *McLerran*, a constructive submission under *Baykeeper* can only be found where “the state’s actions clearly and unambiguously express a decision not to submit TMDLs.” 297 F.3d at 882 (internal quotation omitted). This is – by intention – an extraordinarily demanding standard, requiring that a plaintiff demonstrate not merely that a state has “fail[ed] to submit any TMDLs” but also that it “has no plans to remedy this situation.” *Id.* Even assuming that the theory could apply to a particular TMDL, the 2000 MOA and EPA-State correspondence upon which Plaintiffs rely do not establish that Washington and Oregon have “clearly and unambiguously *abandoned* [their] obligation to produce a TMDL.” *McLerran*, 2015 WL 1188522, at *7. In fact, these documents demonstrate the opposite. Because the temperature

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TMDL is a cooperative venture between the States and EPA, and because the States remain engaged in that cooperation, neither Washington nor Oregon has "abandoned" the TMDL.

From the first, both EPA and the States recognized the need for a broad, cooperative effort to develop and issue a temperature TMDL for the Columbia and lower Snake Rivers given the size of the river system and the overlapping interests of the States, several Native American tribes, and the agencies comprising the Federal Columbia River Power System. Even predating initial efforts on this TMDL, both Washington and Oregon had expressed an intention that EPA assist in any TMDLs addressing interstate or interjurisdictional waters. *See* Ex. 9 at 16[34]; Ex. 10 at 12.[35] Here, the complexity of overlapping federal, state, and tribal jurisdiction made this TMDL an obvious candidate for such assistance. More significantly, at that time, EPA had developed a customized temperature model of the Columbia and Snake Rivers and had the "in-house" technical expertise to assess the temperature impacts using this tool. ECF No. 27-17 at 7. As such, EPA was the natural candidate to lead in developing the preliminary draft TMDL. These unique conditions prompted Washington, Oregon, and Idaho to sign the 2000 MOA with EPA outlining the parties' interest in coordinating their efforts on development of a temperature TMDL for the Columbia and lower Snake Rivers. As Plaintiffs admit, that MOA "remains in effect" and continues to govern development of the TMDL. *See* Pl. Mot. at 11.

The documented history of the parties' work on this TMDL demonstrates that neither Washington nor Oregon has "clearly and unambiguously" abandoned the TMDL, *Baykeeper*, 297 F.3d at 882, or "refus[ed] to act" and thereby "determin[ed] that no TMDL is necessary" for

[34] Mem. of Agreement between U.S. EPA & Wash. State Dept. of Ecology Regarding the Implementation of Section 303(d) of the Federal Clean Water Act, October 29, 1997.

[35] Mem. of Agreement between U.S. EPA & Or. Dept. of Envtl. Quality Regarding the Implementation of Section 303(d) of the Federal Clean Water Act, February 1, 2000.

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the Columbia and lower Snake Rivers, *Scott*, 741 F.2d at 998. Under the terms of the MOA, the parties are committed to "[a] cooperative venture which recognizes the expertise, jurisdiction, authorities, and efforts of all participants," ECF No. 27-15 at 7, with EPA designated the lead for preparation of the temperature component of the TMDL and tasked with "ensur[ing] coordination of the entire TMDL development effort between all involved parties." *Id.* at 10. Under the MOA, the States accepted lead responsibility for preparing TMDLs to address impairments attributable to "total dissolved gas" – which were issued in 2003 and 2004[36] – and for preparing TMDL implementation plans, and accepted secondary responsibility to "participate" in producing the TMDL for temperature. ECF No. 27-15 at 10. The MOA also specifies that, after EPA has done the work to "produce" the TMDL "in cooperation with [S]tates, Tribes and Federal agencies," *id.* at 8, "[t]he [S]tates will be responsible for issuing the final TMDL, in close coordination with EPA," *id.* at 12. The parties' mutual understanding was that "EPA would only issue a TMDL *unilaterally* if required to do so by the Settlement Agreement(s) particular to each state signing this TMDL." *Id.* at 7 (emphasis added). Rather, "[t]he goal is to have consensus on both the analysis and the implementation plan." *Id.*

These roles are further elaborated in the Work Plan developed shortly after signature of the MOA. The Work Plan affirms that "EPA and the three States have agreed to work together to develop the TMDLs for Temperature and [Total Dissolved Gas] because of the regional significance of the Snake and Columbia Rivers and the complex nature of interjurisdictional TMDLs." ECF No. 27-17 at 5. While the Work Plan reiterates EPA's primary role in developing the TMDL's modeling and allocations, *see id.* at 7-12, it also emphasizes the parties' mutual

[36] "Total Dissolved Gas on the Columbia and Snake Rivers," Wash. Dept. of Ecology, available at: http://www.ecy.wa.gov/programs/wq/tmdl/ColumbiaRvr/ColumbiaTDG.html.

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understanding that the TMDL would continue to be a joint effort: "The parties have agreed to cooperate in the collection of data, making technical and policy decisions, and providing for public participation." *Id.* at 5. With respect to the TMDL for temperature, the Work Plan delineates "five major tasks which together lead to development of the TMDL" and describes the States' role in each, including:

- *Modeling Assessment*: States will "Provide data on NPDES Discharges to the rivers"; "Conduct internal reviews of modeling"; "Support modeling through participation on technical committee"
- *Problem Assessment*: States will "Conduct internal review of the [Problem] assessment"; "Participate on the technical committee"
- *Numerical Targets*: States will "Provide and interpret [water quality standards]"; "Work with EPA on evaluation and comparison of standards"; serve as "Policy lead for developing the numerical targets within their jurisdictions"
- *Loading Capacity and Allocations*: States will "With the tribes and EPA develop the load and wasteload allocations"
- *Public Participation*: States will "Support communication and collaboration on TMDL"

Id. at 7-13. After this work is completed, the Work Plan specifies that EPA will draft the TMDL and the "States will issue the temperature TMDLs as appropriate to each [S]tate." *Id.* at 5.

The parties' initial efforts to implement the MOA were reflected in a preliminary draft TMDL, which EPA publicly released in July 2003. That document identified sources of temperature impairments on the river system at that time, and identified preliminary "allocations" of allowable thermal loading – essentially, pollution budgets – that those sources would receive. *See* ECF No. 27-22 at 58-71. The preliminary draft also describes at length the parties' efforts to coordinate design and implementation of the prospective TMDL and the collaborative work they would need to perform going forward. *See generally id.*; *see also* ECF No. 18-1 at 3-4 (describing the history of the parties' work on the temperature TMDL).

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This federal-state partnership remains the governing framework for developing and completing a TMDL for temperature impairments in the Columbia and lower Snake Rivers. EPA does not dispute that direct work on the TMDL stalled for many years while the parties and other federal agencies grappled with significant challenges. Of particular difficulty were the parties' efforts to determine how to treat impaired water segments affected by dams. Well after the 2003 preliminary draft TMDL, however, EPA continued to explore opportunities to reach consensus on an approach that would allow EPA and the States to resume their work under the MOA and Work Plan. *See, e.g.*, Ex. 4 at 1-2; Ex. 5 at 1-3; Ex. 6 at 1; Ex. 11 at 1-2[37]; Ex. 12 at 1-2.[38]

Other work related to temperature concerns in the river system also continued. For example, EPA provided technical support and modeling to assist the U.S. Army Corps in identifying operational changes to allow releases of cold water from the Dworshak Reservoir located upstream of the Snake River mainstem, and participated in the development of the Corps' Water Quality Plan, which identified numerous other potential actions to reduce temperatures. *See supra* at 14-15. EPA also continued its work to understand and define temperature issues in the river system, including embarking on an ongoing, multi-year effort to identify cold water refugia on the Columbia River for protection and restoration – an effort that will inform future TMDL development. *Id.* The States, meanwhile, continued their efforts under the MOA by issuing the TMDLs for total dissolved gas in 2003 and 2004, while also finalizing hundreds of temperature TMDLs for the Columbia and lower Snake Rivers' tributaries.[39]

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[37] "Draft Agenda for USEPA/USACE/USBR Meeting of 9/25/2007," U.S. EPA, Sept. 25, 2007.

[38] Agenda, "Columbia River Temperature TMDL Meeting," U.S. EPA, March 4, 2008.

[39] *See* "List of TMDLs: EPA Region 10 TMDLs, Temperature," U.S. EPA, available at: https://ofmpub.epa.gov/waters10/attains_impaired_waters.tmdls?p_region=10&p_pollutant_group_id=1035.

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At this time, EPA and the States continue to engage in discussions regarding further implementation of the MOA and their efforts to assist in TMDL development. Soscia Decl. ¶ 6; Ex. 8 at 1 (stating that Washington "is committed to offering our assistance"). As EPA has described, the Agency is updating the model used to develop the 2003 preliminary draft TMDL to incorporate recent data. *See* ECF No. 18-1 at 5. Once that update is complete, EPA "will reevaluate the sources and magnitude of temperature impairments in the study area" as the first step in developing thermal load allocations under the TMDL. *Id.* at 5.

Recent discussions between EPA and the States have focused on the subsequent steps essential to finishing the TMDL and the challenges they present. Soscia Decl. ¶ 6. Some of these challenges remain from the parties' previous efforts in the early and mid-2000s, such as the availability of measures to achieve temperature reductions under a TMDL. Soscia Decl. ¶¶ 4, 6. Other challenges are new – and highlight the intricacy of this specific TMDL. In particular, the 2003 preliminary draft TMDL was written to meet water quality standards that included (or would soon include) "natural conditions criteria," which allowed the TMDL's goal to reflect "the water temperature that would exist in the absence of human activities in the rivers" even where that "natural" temperature was above the numeric criteria. *See* ECF No. 27-22 at 7, 11-12. Since EPA's development of the preliminary draft TMDL, however, EPA's approval of the natural conditions criteria was invalidated in Oregon and remains subject to court challenge in Washington. *See* ECF No. 18-1 at 4; *Nw. Envtl. Advocates v. EPA*, 855 F. Supp. 2d at 1216-18 (invalidating EPA's approval of Oregon criteria); *Nw. Envtl. Advocates v. EPA*, No. 14-196 (W.D. Wash. filed Feb. 10, 2014) (challenge to Washington criteria). Producing an effective TMDL will necessarily entail reaching a mutual understanding with the States on whether the TMDL, or underlying water quality standards, should address "natural" conditions in the river

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system, especially where eliminating man-made contributions may not be enough to meet the numeric criteria in light of that natural variability.[40]

Collectively, the evidence demonstrates the States' longstanding and continued partnership with EPA to advance this challenging TMDL and refutes Plaintiffs' assertion that the States have "clearly and unambiguously abandoned" a temperature TMDL for the Columbia/lower Snake Rivers. *Cf. NRDC*, 93 F. Supp. 2d at 538, 540, 547 (rejecting constructive submission in light of New York's "progress in formulating TMDLs," "good-faith interest in collaborating with EPA to bring the State's TMDL program to completion," and "dedicat[ion of] substantial resources," and where constructive submission would constitute an "inappropriate and potentially counterproductive" "vote of no confidence"). Given the courts' caution in applying the constructive submission theory except where a state's actions are an unequivocal rejection of its statutory role, Washington and Oregon cannot be deemed to have abandoned the TMDL or made constructive submissions here.

In response to this evidence of longstanding and continuing federal-state cooperation on the complex challenges in the Columbia and Snake Rivers, Plaintiffs argue that the States' request that EPA issue the TMDL on their behalf – back in 2001 – manifested their intention to abandon the TMDL. In support, Plaintiffs point first to the MOA itself: "As expressed in the

[40] Plaintiffs claim that EPA's letter seeks to "spend[] 'several years' trying to weaken the [S]tates' temperature water quality standards before EPA returns to work on the TMDL." Pl. Mot. at 7. Plaintiffs' characterization of the letter skews the facts: first, EPA is already at work on technical aspects of TMDL production where it is able, at this time, to take action. ECF No. 18-1 at 5. Second, to move forward, EPA *must* resolve concerns about how to ensure the TMDL can meet the applicable water quality criteria. While one option could be employing duly-enacted statutory mechanisms to adjust temperature standards where appropriate, *see id.*; *see, e.g.*, ECF No. 27-4 at 41-44, no course has been decided. ECF No. 18-1 at 5-6. Plaintiffs may be frustrated that this TMDL presents such challenges but the States' recognition of these challenges hardly suggests that they have "abandoned" the TMDL: addressing these challenges is a *necessary component* of the TMDL.

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2000 MOA . . . Washington and Oregon unequivocally informed EPA that they would not issue any temperature TMDL for the Columbia and lower Snake Rivers." Pl. Mot. at 9. In further support, Plaintiffs cite to the 2001 Letters sent from Washington and Oregon to EPA requesting that EPA issue the TMDL, ECF Nos. 27-18 & 27-20, and to EPA's acquiescence to this request, as evidenced by the Agency's work between 2001 and 2003 to prepare the Draft TMDL. Pl. Mot. at 11. Together, Plaintiffs claim, these facts "show EPA knew, clearly and unambiguously, that Washington and Oregon did not intend to prepare the temperature TMDL; and EPA accepted the duty to do so itself." *Id.* at 11.

On their face, these documents refute Plaintiffs' mischaracterization. As noted above, the MOA embodies both EPA's and the States' understanding that this TMDL would remain a cooperative work product under their joint management, with the States actively engaged in assisting EPA with the numerous technical and policy determinations to be made. ECF No. 27-15 at 8, 10. Although the MOA did reflect the parties' agreement that EPA would take the lead on "produc[ing]" the temperature TMDL in light of interjurisdictional considerations, EPA's modeling expertise, and the significant interests of the federal dam operators, *id.*; *see also* ECF No. 27-17 at 5, 7, Plaintiffs incorrectly read the MOA as saying that Washington and Oregon "would not issue any temperature TMDL" for the rivers. *See* Pl. Mot. at 9. To the contrary, the MOA explains that "[t]he [S]tates will be responsible for issuing the final TMDL, in close coordination with EPA." ECF No. 27-15 at 12. The MOA thus supplies no evidence – let alone clear and unambiguous evidence – that the States intended to "abandon" the TMDL.

In their 2001 Letters, Washington and Oregon requested for the first time that EPA issue a single, all-encompassing TMDL for temperature issues in the Columbia and lower Snake Rivers, rather than having each State break the MOA TMDL work into its constituent parts and

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separately issue the pieces pertaining to its individual waters. *See* ECF No. 27-18 at 2 (calling this a "prudent and more efficient" course); ECF No. 27-20 at 2. Plaintiffs cast this once again as the States' "unambiguous[]" expression of their intent to abandon the TMDL, but the Letters prove otherwise. Washington's letter requesting that EPA be the issuing agency nonetheless describes the MOA as an effort to "collaborate and coordinate on the development of [TMDLs] for temperature and total dissolved oxygen in the mainstem Columbia and Snake Rivers." ECF No. 27-18 at 2. Rather than communicating a "determination that no TMDL is necessary," *Scott*, 741 F.3d at 997, the State reiterated the MOA's identification of "roles and responsibilities for each of the signatory agencies," advised EPA on its view of the proper scope and modeling approach to use in developing the TMDL, and thanked EPA for its "*support* in addressing these serious problems on a very significant and critical river basin." ECF No. 27-18 at 2-3 (emphasis added).

Oregon's letter noted the parties' joint meetings to develop the TMDL and stated that Oregon "appreciated EPA's involvement to date" and "would appreciate EPA continuing its efforts on development of the temperature TMDL." ECF No. 27-20 at 2, 3. Oregon further expressed its belief that "we have arrived at a workable delineation of work effort" between the parties "that will lead to successful development and implementation of meaningful TMDLs." *Id.* at 2. Like the Washington Letter, the Oregon Letter is clear and unambiguous only as to the State's continued investment in the completion of a TMDL and its understanding that – even if EPA became the issuing agency – Oregon was responsible for a portion of the necessary "work effort." *See id.* These facts refute Plaintiffs' suggestion that these Letters were intended to convey the States' abandonment of TMDL efforts.

Furthermore, the States made clear in subsequent correspondence that they continued to

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view the TMDL as a cooperative effort between the States and EPA. *See* ECF No. 27-23 at 2. In a 2003 joint letter to the White House Council on Environmental Quality, the States explained that they were writing to "support EPA's continued involvement in development of a TMDL for temperature on the Columbia River." *Id.* The States described their work on the TMDL as a "collaborative effort" and an "exemplary partnership," noting that the "States and EPA have pledged to work cooperatively" and that the States had "asked EPA to lead development of the temperature TMDL in collaboration with the States." *Id.* at 2, 3. The States further characterized the TMDL as a "high priority" and an "important regional TMDL." *Id.* These statements belie Plaintiffs' suggestion that by 2003, the States had "convey[ed] to the EPA the message that [they had] affirmatively determined not to submit TMDLs for [their] impaired waterbodies." *Hayes*, 264 F.3d at 1023; *see* Pl. Mot. at 11. In fact, although the States made clear they viewed EPA as a "critical" partner in completing this difficult TMDL and would face significant practical difficulties if EPA's participation ended, ECF No. 27-23 at 2, the Joint Letter affirms that the States did not view their request for EPA assistance as having displaced their own authority to issue the TMDLs should EPA decline to do so. Anticipating what would happen "if EPA were to be removed from this effort," the States explained that "[m]ost likely we would take the effort completed to date and attempt to move it forward." *Id.* The States plainly did not believe, as Plaintiffs claim, that they had already "unequivocally informed EPA that they would not issue any temperature TMDL for the Columbia and lower Snake Rivers," Pl. Mot. at 9, and thereby relinquished their authority to EPA by way of a constructive submission.

In any case, Plaintiffs' focus on who issues the TMDL is misplaced. Nothing in the judicial explication of the constructive submission theory places such importance on procedural minutiae surrounding the TMDL. Rather, courts have focused on whether states have refused at a

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fundamental level to engage in TMDL development. The States' and EPA's previous agreement that the TMDL should be issued by EPA as a single, overarching document – rather than split into its constituent, state-specific parts – does not displace the abundant evidence that the States intended to be partners in the effort and remain partners today.

More to the point, EPA's work in advancing the TMDL has proceeded at the States' request and under their authorization. Far from having abandoned this TMDL, the States' decision to enlist EPA's expertise was an effort to *ensure* the completion of the TMDL and was itself an exercise of the States' authority and discretion. It would be a strange contortion indeed to find that in seeking EPA assistance to develop a TMDL, the States had actually manifested their "determination that no TMDL is necessary." *Scott*, 741 F.2d at 998. Moreover, a finding that the States' entry into the MOA constituted a constructive submission would also chill future state-federal cooperation in contravention of the Act's purpose. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective."). States are unlikely to seek assistance in developing difficult or interstate TMDLs if they fear they will be deemed to have surrendered their TMDL authority entirely.

Under these circumstances, which have no analog in the cases Plaintiffs cite, an unprecedented extension of the constructive submission theory would be misguided. The documents Plaintiffs cite fall far short of the "clear and unambiguous" evidence required to warrant application of this "narrow" judicial theory. Instead, they dispute Plaintiffs' theory and illustrate the parties' intent to cooperate on advancing this exceedingly difficult TMDL. While those efforts have taken a long time, and are not over yet, the States should not be deemed to have abandoned a TMDL that is presently proceeding with their authorization and at their

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explicit request. Nor is the constructive submission theory an appropriate vehicle for what is at bottom a challenge to a TMDL's timeliness. *Hayes*, 264 F.3d at 1024 ("[The] constructive-submission theory is not designed to challenge the timeliness or adequacy of the state's TMDL submissions."). In light of the evidence of the States' ongoing cooperation on this TMDL, the Court should decline to accept Plaintiffs' tenuous legal theory and its selective reading of the record, and should reject Plaintiffs' first claim.

C. Plaintiffs Are Not Entitled to the Remedy They Seek.

Even if this Court were to determine that Washington and Oregon have "clearly and unambiguously abandoned" the development of a TMDL for temperature impairments for the Columbia and lower Snake Rivers – representing a constructive submission by each State of "no TMDL" – Plaintiffs' requested remedy is unavailable as a matter law. Plaintiffs seek a court order requiring EPA to complete the temperature TMDL within one year. Compl. at 15, Relief Requested ¶ B; *see* Pl. Mot. at 21 ("[T]he Court should now impose a strict deadline of not more than one year for EPA to issue the final TMDL."). But where a court determines there has been a constructive submission, the only available remedy is to order EPA to perform its non-discretionary duty to approve or disapprove that submission. *See Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 922 & n.17 (E.D. Va. 1998); *OVEC*, 2017 WL 600102, at *18; *cf. Scott*, 741 F.2d at 997.

The CWA's citizen suit provision, under which Plaintiffs bring their claim, permits suits to compel performance of "any act or duty . . . which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). The jurisdiction of reviewing courts is, in turn, limited to "order[ing] the [EPA] Administrator to perform such act or duty[.]" *Id.*; *Baykeeper*, 297 F.3d at 881; *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (reviewing the similar citizen suit provision under the Clean Air Act). Section 303(d)(2) provides that where a

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state submits a TMDL, EPA must, within 30 days, approve or disapprove that submission. 33 U.S.C. § 1313(d)(2). Only if EPA disapproves the submission does CWA Section 303(d)(2) then impose a duty on the Agency to establish a TMDL in the state's place. 33 U.S.C. § 1313(d)(2); *Baykeeper*, 297 F.3d at 881; *see also Hayes*, 264 F.3d at 1023.

But EPA retains discretion as to whether to approve or disapprove the state's submission in the first instance. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 307 (3d Cir. 2015) (noting "EPA's discretion in determining whether to approve a TMDL"); *OVEC*, 2017 WL 600102, at *18; *see Miccosukee Tribe of Indians of Fla. v. United States*, No. 95-0533, 1998 WL 1805539, at *3 (S.D. Fla. Sept. 14, 1998) ("EPA *must* review any new state standards, but has discretion whether to approve or disapprove them"); *Scott*, 741 F.2d at 997; *Kennecott Copper*, 572 F.2d at 1355 (concluding that the comparable Clean Air Act provision "was not designed to . . . permit the court to direct the manner in which any discretion given [EPA] in the performance of those [mandatory] functions should be exercised"). Thus, while courts may compel EPA to take action on a submission, they cannot compel the outcome. *See Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 65 (2004) (holding under a similar provision in the Administrative Procedure Act that "when an agency is compelled by law to act . . . but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be").

Because the substantive decision to approve or disapprove is beyond the courts' jurisdiction, a court cannot simply elide EPA's duty to approve or disapprove a submission with EPA's subsequent *potential* duty to issue a TMDL in the state's place upon disapproval; doing so would arrogate to the courts discretion granted to EPA by Congress. As the court held in *OVEC*, this rule applies whether the submission is constructive or actual. 2017 WL 600102, at *18. In

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OVEC, the court rejected the plaintiffs' request for an order compelling issuance of multiple TMDLs where the court had found a constructive submission. The court explained that it could not "order EPA to produce the TMDLs without EPA first disapproving West Virginia's constructive submission" because that choice is "commit[ted] to EPA's discretion" "once a submission, *or constructive submission*, has been made." *Id.* (emphasis added); *see also Am. Canoe*, 30 F. Supp. 2d at 922 & n.17 ("[T]he appropriate remedy for the plaintiffs' TMDL [complaint] would appear to be an order directing EPA to approve or disapprove Virginia's constructive submission within 30 days[.]").

Indeed, as both *Hayes* and *Scott* affirmed, EPA's decision whether to approve or disapprove a constructive submission would be subject to substantive judicial review outside of the CWA's citizen suit provision. *See Hayes*, 264 F.3d at 1023 ("If the EPA approved the constructive submission – *i.e.*, if it determined for some reason that no TMDLs were needed – then that decision would be subject to judicial review like any other final agency action, presumably under the APA"); *Scott*, 741 F.2d at 997; *see also OVEC*, 2017 WL 600102, at *18 (citing *Scott* and *Hayes*); *Am. Canoe*, 30 F. Supp. 2d at 923 n.17. An order to compel issuance of a TMDL is thus unavailable where a plaintiff alleges that state inaction has ripened into a constructive submission of "no TMDLs." Only after EPA has been given an opportunity to exercise the discretion afforded it by law (and indeed to comply with any subsequent statutory duties) could suit to compel the TMDL itself become ripe.

Plaintiffs here admit that EPA has not yet approved or disapproved Washington's and Oregon's alleged constructive submissions: "Washington and Oregon's constructive submission triggered EPA's mandatory duty *to review the TMDL within 30 days* and issue a substitute TMDL within 30 more days. . . . EPA has failed to perform *these duties*." Pl. Mot. at 11

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(emphasis added); Compl. ¶ 50. Consequently, 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.

II. THE VOLUNTARY STATE-EPA MOA DOES NOT CREATE A DUTY TO ACT, SO PLAINTIFFS CANNOT COMPEL EPA ACTION UNDER THE APA.

Plaintiffs' second claim alleges that the 2000 MOA created a duty for EPA to issue the TMDL and that EPA has "unreasonably delayed" performance of that duty under the Administrative Procedure Act ("APA"). *See* Compl. ¶¶ 53-55. According to Plaintiffs, EPA's agreement to produce the TMDL was a "binding commitment," on which it "doubled down" by issuing the Work Plan and beginning work towards a final TMDL. Pl. Mot. at 14. To compel an action under the APA, however, that action must be "demanded by law." *SUWA*, 542 U.S. at 65. EPA's statements in a voluntary agreement do not create obligations demanded by law; as such, they do not create a duty enforceable under the APA.

The United States agrees with Plaintiffs that to succeed on their second claim, Plaintiffs must establish that EPA has a "duty" to issue the TMDL.[41] *See* Pl. Mot. at 12, 14. Under the APA, a reviewing court has jurisdiction to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1). The Supreme Court has held that "the only agency action that can be compelled under the APA is action legally *required*," *SUWA*, 542 U.S. at 63 (emphasis in original), because

[41] In pleading their APA claim, Plaintiffs cannot rely on EPA's alleged duties under CWA Section 303(d). A plaintiff may only seek review under the APA of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). Accordingly, courts have rejected attempts to enforce CWA duties under the APA, including in TMDL constructive submission suits. *See Hayes*, 264 F.3d at 1025; *OVEC*, 2017 WL 600102, at *18; *see also Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 851 (9th Cir. 1987) ("Where the plaintiffs may otherwise proceed under the citizen suit provision, they should not be allowed to bypass the explicit requirements of the [CWA] established by Congress through resort to . . . the APA.").

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"a delay cannot be unreasonable with respect to action that is not required." *Id.* at 63 n.1. In interpreting *SUWA*, the Ninth Circuit has explained that agency action compelled under the APA must be "unequivocally compelled by statute or regulation," *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1081 (9th Cir. 2015), and "must be pursuant to a legal obligation 'so clearly set forth that it could traditionally have been enforced through a writ of mandamus.'" *Id.* at 1075-76 (citing *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010)); *see also Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221-22 (9th Cir. 2011) ("Even if a court believes that the agency is withholding or delaying an action the court believes it should take, the ability to compel agency action is carefully circumscribed to situations where an agency has ignored a specific legislative command." (quotation omitted)).

Ignoring these descriptions of what Section 706(1) requires, Plaintiffs allege that EPA may be compelled to finish the TMDL under the APA because "EPA made a binding commitment to produce the TMDL in the MOA." Pl. Mot. at 14. Plaintiffs base this claim on a dictum in *SUWA* where the Court suggested that an action called for in a land use plan "may be compelled when the plan merely reiterates duties the agency is already obligated to perform, or *perhaps when language in the plan itself creates a commitment binding on the agency*." 542 U.S. at 71 (emphasis added).[42] Even assuming the Supreme Court had intended to rule on this question, Plaintiffs' claim is unavailing.

According to Plaintiffs, Pl. Mot. at 14, EPA's alleged duty originates in a section of the 2000 MOA addressing the parties' "Conceptual Approach," which states that "EPA will produce: A TMDL for temperature for the Snake/Columbia Mainstem . . . ." ECF No. 27-15 at 8.

[42] Plaintiffs' brief misrepresents the nature of this dicta, citing to *SUWA* for the proposition that "language in agency documents can create binding commitments that satisfy *SUWA*'s required action prong." *see* Pl. Mot. at 14. The Court's supposition was not nearly so definitive.

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But *SUWA* is clear that a statement that an agency "'will' take this, that, or the other action" is not a binding commitment under § 706(1) – "at least absent clear indication" that the agency intended to be legally bound. 542 U.S. at 69. The 2000 MOA lacks any "clear indication" that the parties were speaking with "the force of law." Although the MOA clearly expresses the parties' intent to undertake joint TMDL efforts, it includes no binding language: it does not command that EPA or the States "shall" take any action; it addresses the parties' "Vision" and "Conceptual Approach"; and its purpose is "document[ing] a mutual understanding" between the parties.[43] *See* ECF No. 27-15 at 5, 7-8. The MOA also states that the parties "recognize[] that the ability to meet the commitments in this MOA are dependent on adequate resources." *Id.* at 12. This issue of conditional commitments was explored in *SUWA*, which concluded that even where an agency's plans are only *implicitly* conditioned on "budgetary constraints," that condition prevents suit under Section 706(1). *See* 542 U.S. at 71. Furthermore, the MOA provides that "[a]ny party may withdraw from the MOA" upon notice to the other parties. ECF No. 27-15 at 13. The MOA cannot "legally require" EPA's production of the TMDL where EPA may decline to produce the TMDL upon a simple notice to the other signatories. *Cf. SUWA*, 542 U.S. at 63 (likening Section 706(1) to the mandamus remedy, which was "normally limited" to actions where an official "had no discretion whatever" (quoting *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 46 (1888))). Nor can the MOA "legally require" EPA to produce the TMDL where the States might withdraw their participation, and thus their request for EPA assistance, at any time.

[43] This is in stark contrast to the dictum in *Soda Mountain Wilderness Council v. Norton*, *see* Pl. Mot. at 15, which turned on an agency's affirmative statement that the "document represents [the agency's] commitment to these public desires and *constitutes a compact with the public*." 424 F. Supp. 2d 1241, 1259-60 (E.D. Cal. 2006). No such "binding" language appears in the MOA.

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Notably, although Plaintiffs repeatedly imply that the 2000 MOA "required" EPA to issue the final TMDL, the MOA actually provides for *the States* to issue the TMDL. For example, Plaintiffs assert that "through the MOA, other actions, and statements, EPA committed to issuing a temperature TMDL, making the TMDL required agency action subject to a claim for unreasonable delay." Pl. Mot. at 15. But the terms of the MOA are clear: "The [S]tates will be responsible for issuing the final TMDL, in close coordination with EPA." ECF No. 27-15 at 12. This was reaffirmed in the 2001 Work Plan: "[T]he States will issue the temperature TMDLs as appropriate to each [S]tate." ECF No. 27-17 at 5. Plaintiffs' claim is thus groundless: to the extent EPA has a duty to issue the TMDL, *see* Pl. Mot. at 14, it does not arise from the MOA.

Plaintiffs barely allege and, in any case, fail to present any evidence that EPA documents produced after the 2000 MOA establish a "clear" and "unequivocal" legal obligation to issue the TMDL. The request by Washington and Oregon (but not Idaho) that EPA issue the TMDL in their place was made for the first time in Washington's September 2001 Letter and Oregon's October 2001 Letter. ECF No. 27-18 at 2; ECF No. 27-20 at 2. Those requests were not made pursuant to the 2000 MOA (which did not provide for such requests), but rather pursuant to pre-existing MOAs between EPA and each State concerning TMDL preparation generally. *See* Ex. 9 at 16; Ex. 10 at 12. In their Letters, ECF No. 27-18 at 2; ECF No. 27-20 at 2, the States cited provisions of these pre-existing MOAs that provide that, if requested, EPA "will participate in the development" of TMDLs for "interstate or interjurisdictional waters" "as the lead or other appropriate role as agreed upon by the states, tribes and/or EPA." Ex. 9 at 16; Ex. 10 at 12. But both MOAs included an extensive reservation of rights:

> This Memorandum of Agreement does not constitute an explicit or implicit agreement by [Ecology/DEQ] or EPA to subject itself to the jurisdiction of any federal or State court. Nor shall this Agreement be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by any

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> person or entity against EPA or [Ecology/DEQ]. This Agreement shall not be construed to create any right to judicial review involving the compliance or noncompliance of EPA or [Ecology/DEQ] with this Agreement.

Ex. 9 at 20; Ex. 10 at 14. Under these terms, no duty could have been created by EPA's agreement to issue (rather than just produce) the TMDL pursuant to these two State MOAs. Likewise, neither the 2000 MOA nor the 2001 Work Plan was ever amended to provide that EPA would issue the TMDL – nor was any other allegedly "binding" document signed by the parties to memorialize that agreement.[44]

Plaintiffs rely on *Otter Project v. Salazar*, 712 F. Supp. 2d 999, 1006 (N.D. Cal. 2010), to suggest that a duty could still be surmised here on the basis of EPA's 2003 preliminary draft TMDL and public statements. Pl. Mot. at 14-15. But these factors were not the basis of the court's holding in *Otter Project*. In that case, the court considered whether the Fish and Wildlife Service ("FWS") could be compelled to make a determination that its otter relocation program had failed to achieve its goals. *Otter Project*, 712 F. Supp. 2d at 1001. FWS had begun drafting a failure determination but never finalized it, claiming it had no duty to do so. *Id.* at 1005. The court disagreed, citing *regulations* governing the program that provided specific, time-sensitive benchmarks for its success or failure (for example, specifying that "[i]f, after the first year" certain facts were true, the program had failed). *Id.* at 1004. If FWS were not obliged to apply those benchmarks, the court reasoned, it would render the regulatory text a nullity. And because FWS had promulgated the regulations, the court concluded that FWS had "intended to make the failure determination a required action" – essentially binding itself. *Id.* at 1006. FWS's draft efforts and public statements, however, only added "further weight" to the holding compelled by

[44] EPA does not dispute that it expressed its willingness to issue the TMDL pursuant to the States' request, but EPA's willingness to do so does not mean it is required to do so by law.

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the regulatory text. *See id.* at 1005. There is no such underlying regulation in this case.

Indeed, the presence of an underlying statutory obligation is a common thread across each of Plaintiffs' remaining cases that purportedly have applied the *SUWA* dictum. In *Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1 (D.D.C. 2003), the court considered language in a FWS multi-species recovery plan; the plan was required by law, *see id.* at 13 ("Section 4(f) states that FWS 'shall develop and implement [recovery] plans . . .'"), and the court held that its contents provided sufficient specificity to be enforced. *Id.* In *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1123 (D. Mont. 2016), the court considered agency commitments in a record of decision that had been subject to a public comment process and where federal regulations "require[] [the Bureau of Land Management] to follow through with the commitments it makes in a record of decision." *Id.* Likewise in *SUWA*, the relevant dictum addressed the enforceability of statements in a land use plan that was *itself* required by law. *See SUWA*, 542 U.S. at 59-60; 43 U.S.C. § 1712. In each of these circumstances, the fact that the agency's statements were made pursuant to an underlying statutory obligation provided meaningful evidence that the agencies intended to be bound by them. By contrast, EPA's assistance in producing the TMDL was entirely voluntary, and the Agency was not obligated by statute or regulation to enter the MOA. This divergent context undermines Plaintiffs' assertion that EPA, in contrast to BLM or FWS, believed it was binding itself with the force of law.

Ultimately, as the Supreme Court recognized in *SUWA*, transforming EPA's voluntary efforts to assist the States into binding commitments subject to third-party enforcement would "operate to the detriment of sound environmental management" by incentivizing fewer and less specific federal-state partnerships. *See SUWA*, 542 U.S. at 71-72. Interpreting the MOA as establishing a legal requirement would also have the effect of usurping state authority: casting

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the MOA's terms in stone would fix EPA as the party responsible for the TMDL and remove the States' discretion, should they wish, to withdraw their consent to EPA assistance. Given the Supreme Court's apparent ambivalence about whether a duty may even arise in this circumstance and the lack of "unequivocal" or "clear" evidence that the parties intended the MOA to have the force of law here, the Court should not risk these detrimental impacts to State authority. The Ninth Circuit has recognized that although "§ 706(1) poses an obstacle for parties seeking to compel agency action," *Vietnam Veterans*, 811 F.3d at 1078, the court "ha[s] no authority to compel agency action merely because the agency is not doing something we may think it should do." *Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013) (citing *Hells Canyon*, 592 F.3d at 932). Plaintiffs' evident frustration with the pace of the parties' efforts does not create a duty where the law itself does not. Accordingly, Plaintiffs' second claim should be denied.

CONCLUSION

Even viewed in the light most favorable to Plaintiffs, Plaintiffs' claims are not supported by either law or fact. For these reasons, the United States respectfully requests that this Court grant its Motion for Summary Judgment on all claims, and deny Plaintiffs' Motion.

DATED: November 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2017, I filed the foregoing United States' Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/ Chloe H. Kolman

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