No. 18-35982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

ANDREW WHEELER,* in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY
Defendants-Appellant.

**Official defendant automatically substituted pursuant to F. R.App.43(c)(2)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
(District Judge Ricardo S. Martinez)

PLAINTIFFS-APELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen's Associations, and The Institute For Fisheries Resources are each non-profit, tax-exempt organizations. They have not issued any corporate shares; and have no publicly traded corporate parents, subsidiaries, or affiliates.

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INTRODUCTION

As this Court recently recognized, Columbia and Snake River salmon and steelhead runs are in "highly precarious" shape. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 820 (9th Cir. 2018). Hot water temperatures in the rivers—the subject of this action—are among their major threats. In 2015, temperatures rose so high that 250,000 Columbia Basin sockeye salmon died while trying to migrate to their spawning grounds. River temperatures have continued to spike to dangerous levels since then, and are expected to rise higher in the future.

Defendant-Appellant U.S. Environmental Protection Agency (EPA) and other agencies have long recognized the problems posed by high temperatures in the Columbia and lower Snake Rivers. The States of Oregon and Washington included the rivers on their Clean Water Act (CWA) lists of "water quality impaired" streams in the 1990s, which triggered their duties under CWA Section 303(d) to develop, and to submit to EPA for approval or disapproval, "total maximum daily loads" (TMDLs) to address the temperature problems.[1]

Rather than fulfill this duty to submit the temperature TMDL, the States placed the burden on EPA. In 2000, they entered into a Memorandum of Agreement (MOA) with EPA in which the parties agreed that EPA—not the

[1] As EPA notes, there are multiple related temperature TMDLs jointly analyzed for various reaches of the Columbia and Snake Rivers, so for ease of reference they are just called the "temperature TMDL." *See* EPA Br. at 4, n.2.

States—would produce the required temperature TMDL. After performing substantial work and releasing a Draft TMDL for comment in 2003, EPA abandoned the process without any public notice or explanation. Yet the States never picked up where EPA left off. The States have made clear they are not working on the TMDL, and they are still relying on EPA to issue it.

Plaintiffs-Appellees Columbia Riverkeeper *et al*. (Riverkeeper) brought this action to compel EPA to complete the long-overdue temperature TMDL—which is urgently needed in light of the perils Columbia and Snake River salmon and steelhead face. Upon summary judgment, the district court agreed with Riverkeeper that the States' MOA and other communications with EPA, along with many years of inaction on the TMDL, demonstrated that the States "clearly and unambiguously indicated they will not produce a TMDL for these waterways," constituting a "constructive submission of 'no TMDL'," under *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002). *See* October 2018 Order (ER 1–16). The court found this triggered EPA's nondiscretionary duties under CWA Section 303(d)(2) to review the submittal and issue the TMDL. *See id.*

Now EPA argues the district court wrongly required it to establish the temperature TMDL "without the States' participation or consent," relying on a "judge-made theory [with] no basis in the Act," thus allowing Riverkeeper to "influence agency priorities, moving their favored issue to the front of the line."

See EPA Br. at 1–3. The truth is just the opposite. The States have repeatedly advised EPA that the temperature TMDL is a high priority but that EPA must issue it. EPA agreed to do so nearly two decades ago. Enforcing that commitment now hardly infringes into agency priorities, and is consistent with the language of CWA Section 303(d)(2) imposing a nondiscretionary duty upon EPA to do so.

Because the district court's rulings were correct, this Court should affirm, and finally put an end to the nearly two decades of unlawful inaction that has contributed to the demise of Columbia and Snake River salmon and steelhead.

JURISDICTIONAL STATEMENT

EPA states that Riverkeeper only alleged federal jurisdiction under the CWA. *See* EPA Br. at 2. Riverkeeper's complaint in fact raised two claims for relief. SER 77–92.[2] The first is a CWA citizen suit claim alleging EPA violated nondiscretionary duties under CWA Section 303(d)(2); while the second is an APA claim for unreasonable delay under 5 U.S.C. § 706(1). *Id.* The district court had jurisdiction under 33 U.S.C. § 1365(a) (CWA citizen suit) and 28 U.S.C. § 1331 (federal question) to consider both these claims.

EPA contends this Court has jurisdiction under 28 U.S.C. § 1291, but fails to acknowledge that the district court's October 2018 Order did not address the

[2] Contrary to Ninth Circuit Rule 30-1.4(c)(i), EPA's Excerpts of Record (ER) omit Riverkeeper's complaint and other relevant filings. Riverkeeper thus submits its Supplemental Excerpts of Record (SER) so the Court has the full record before it.

second claim under the APA. *See* ER 15–16. The district court thus never entered final judgment under Fed.R.Civ.P. 58. *See* ER 241–49 (district court docket sheet). Presumably EPA means this Court has jurisdiction under the "practical finality" doctrine, because the district court's Order resolved the first claim and entered relief under the CWA. *See, e.g, Elliott v. White Mt. Apache Tribal Court*, 566 F.3d 842, 845-46 (9th Cir. 2009).

ISSUE PRESENTED

Did the district court correctly hold EPA in violation of its nondiscretionary duties under CWA Section 303(d)(2) to review the States' constructive submission of "no TMDL" and, upon disapproving the submission, to issue the TMDL itself based on the States' clear abandonment of their duty to do so?

STATEMENT OF THE CASE

A. The Clean Water Act and Total Maximum Daily Loads.

In 1972, Congress passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a). TMDLs are essential to effectuating these goals, as they are one of the CWA's primary mechanisms for fixing polluted waterbodies. *See Baykeeper*, 297 F.3d at 880.

CWA Section 303 provides that states must designate "uses" of each

waterbody (such as drinking, swimming, or salmon migration) and establish "water quality standards" to protect each use from pollution, including high water temperature. 33 U.S.C. § 1313(a)–(c). The states must submit those standards for EPA review and approval to ensure they meet minimum CWA requirements. *Id.*

Under CWA Section 303(d)(1), states are also required to develop and submit to EPA, for its approval, lists of all waterways that fail to meet the applicable water quality standards. 33 U.S.C. § 1313(d)(1)(A)–(B). This list is often referred to as a "303(d) list" or list of "impaired waters." State lists must include a "priority ranking" of impaired waterbodies based on the severity of their pollution and their beneficial uses. *See* 33 U.S.C. § 1313(d)(1)(A). EPA's CWA regulations require states to submit their 303(d) lists every two years, and direct that 303(d) lists "shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs." 40 C.F.R. § 130.7(b)(4). States are required to develop TMDLs in accordance with this prioritization. 40 C.F.R. § 130.7(b)–(c).

CWA Section 303(d) requires a TMDL for every impaired water. 33 U.S.C. § 1313(d)(1)(C)–(D). A TMDL is essentially a pollution budget, restricting each source of pollution—including both "point sources" and "nonpoint sources"—to the "level necessary to [meet] the applicable water quality standards with seasonal variations and a margin of safety." *Id*. § 1313(d)(1)(C). TMDLs identify the sources of pollution in a waterway, calculate the level of permissible pollution, and

allocate daily pollution limits for each source. *See Baykeeper*, 297 F.3d at 880. "States may then institute whatever additional cleanup actions are necessary, which can include further controls on point and nonpoint pollution sources." *Id.*

CWA Section 303(d) calls for swift action to adopt TMDLs. Initially, states were to develop and submit their first TMDLs to EPA within 180 days. 33 U.S.C. § 1313(d)(2). Thereafter, states are required to submit TMDLs to EPA from "time to time" as they revise their lists of impaired waters, *id.*, which (as noted above) EPA regulations require them to do every two years. 40 C.F.R. § 130.7(b)(4).

At issue here is CWA Section 303(d)(2), which imposes nondiscretionary duties upon EPA to approve or disapprove each TMDL submitted by a state within 30 days; and if EPA disapproves a TMDL for not meeting CWA requirements, EPA must promulgate an adequate TMDL for the state within 30 days. 33 U.S.C. § 1313(d)(2).

Recognizing that these tight deadlines could mean that TMDLs are based on less-than-perfect data, Congress directed that TMDLs include "a margin of safety which takes into account any lack of knowledge." 33 U.S.C. § 1313(d)(1)(C). "In other words, Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving." *Alaska Ctr. for the Env't v. Reilly*, 762 F.Supp. 1422, 1429, n.8 (W.D. Wash. 1991) (*ACE I*) (quoting EPA Chief of the Office of Water Planning, EPA Region X).

B. Since 1998, the Columbia and Snake Rivers Have Been on the States' Impaired Waters Lists Due to High Temperatures That Harm Salmon and Steelhead.

Oregon and Washington identify salmon and steelhead migration and rearing as designated uses of the Columbia and Snake. ER 2–3, 180–81. These species "evolved to take advantage of the natural cold, freshwater environments of the Pacific Northwest." ER 55. Water temperature is thus a critical aspect of their freshwater habitat. *See* SER 70-76 (EPA guidance on temperature standards).

Water temperatures affect salmonid feeding, growth, resistance to disease, reproduction, predator avoidance, and successful migration, all of which are "necessary for survival." ER 55. Increased water temperatures threaten viability not just of individual fish, but of entire populations and species. *Id.* As EPA stated in its 2003 guidance: "Because of the overall importance of water temperature for salmonids in the Pacific Northwest, human-caused changes to natural temperature patterns have the potential to significantly reduce the size of salmonid populations." SER 75. "Of particular concern are human activities that have led to the excess warming of rivers and the loss of temperature diversity." *Id.*

To protect salmon and steelhead migration from harmful water temperatures, Oregon and Washington adopted, and EPA approved, CWA water quality standards establishing daily maximum water temperatures in the mainstem Columbia and lower Snake Rivers. EPA Br. at 10; ER 2. The standards set a

maximum daily water temperature of 68°F. ER 2–3. During specific times of year at specific locations, the standards prescribe even lower maximum temperatures to protect fish. *Id.*

Because the Columbia and lower Snake Rivers regularly exceed the States' temperature standards, both rivers are considered impaired for water temperature and have been included on the States' CWA § 303(d) lists of impaired waters since at least 1998. ER 3–4, 160, 175. As EPA admits, the "States consequently have a statutory obligation under 33 U.S.C. § 1313(d)(1)(c) to submit TMDLs for those waters for EPA's approval, but they have not done so." *See* EPA Br. at 10.

C. From 2000 Through 2003, EPA Committed to Issuing, and Nearly Did Issue, the Temperature TMDL.

On October 16, 2000, EPA and the States of Oregon, Washington, and Idaho entered into a Memorandum of Agreement (MOA) for the promulgation of required TMDLs for both temperature and dissolved gas on the Columbia and Snake Rivers. *See* ER 4–5, 117–33. Under the MOA, the parties agreed that EPA would take the lead in preparing the temperature TMDLs, and the States would prepare dissolved gas TMDLs. *Id.* With respect to the temperature TMDL here (which involves Oregon and Washington, but not Idaho), EPA specifically committed to "produce [a] TMDL for temperature for the Snake/Columbia Mainstem," while those States agreed to "[p]articipate in EPA's temperature TMDL." ER 123, 125.

Following the 2000 MOA, EPA started working on the temperature TMDL and adopted a Work Plan to complete the TMDL in less than a year and a half. ER 134. As the district court noted, the Work Plan provided that EPA would lead development of the temperature TMDL and the States would issue it; but EPA recognized that if it disapproved the States' TMDL, "EPA is required to develop a TMDL to replace the disapproved one." ER 5.

On September 4, 2001, Washington wrote EPA to clarify "that our expectation and desire is that EPA both lead the development of and issue the TMDLs for temperature in Washington." ER 145 (underscore in original). On October 4, 2001, Oregon similarly wrote to EPA "requesting that EPA not only develop, but also issue the temperature TMDL in the State of Oregon." ER 147. In a January 15, 2002 letter, EPA confirmed that it would issue the temperature TMDL. ER 6, 149. The letter stated: "at the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing the temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington." *Id.*

On February 12, 2003, Oregon and Washington jointly wrote to the Council on Environmental Quality confirming the States' continued expectations that EPA would issue the temperature TMDL, not them. ER 6, 231. The States also jointly wrote EPA, indicating they were aware that other federal agencies were raising concerns about the temperature TMDL (discussed further below). ER 231–32. The

States urged EPA to complete the TMDL, saying it is a "high priority for the states." ER 231. In March 2003, EPA reaffirmed its commitment to issuing the TMDL. ER 6–7, 149; SER 58.

In July 2003, EPA released a "Preliminary Draft of the Columbia/Snake Rivers Temperature TMDL" (Draft TMDL). ER 7, 152. The Draft TMDL identified dams on the mainstem Columbia and lower Snake Rivers as the most significant contributors to water quality exceedances. ER 201–02. Dams affect water temperature by altering upstream river flow, geometry, and velocity. ER 198. These alterations cause water behind the dams to increase in temperature more than they would otherwise, and the dams extend the length of time water temperatures are high each year. ER 202.

In the Draft TMDL, EPA noted that, while responsibility for TMDLs usually falls to states, EPA agreed to take responsibility for the TMDL because of the interstate and international nature of the waters, its relationship with tribal trust duties, and the technical expertise required. ER 7. EPA further explained that its "authority to establish TMDLs in response to a state's request is consistent with the larger purpose of [CWA] section 303(d)(2)—to ensure the timely establishment of TMDLs." ER 177. EPA advised that it planned to issue an updated draft within a few months for a 90-day public comment period, and then "EPA will issue a Final [] TMDL." ER 157.

D. By 2004, EPA Quietly Abandoned Work on the TMDL, but the States Never Came Up with a New Plan.

After releasing the Draft TMDL, EPA quietly abandoned its work to issue a final TMDL. ER 7. An internal EPA document indicated that EPA "worked extensively on a draft TMDL until late 2003," but since then "work has been suspended due to disagreements among federal agencies at national headquarters level." ER 233.[3] In February 2007, EPA acknowledged that it remained responsible for development of the temperature TMDL for the mainstem Columbia and lower Snake Rivers. SER 55–57.

Notably, Oregon and Washington never picked up where EPA left off, even though they later became aware EPA was no longer working on the TMDL. In 2011, a Washington Department of Ecology ("Ecology") employee explained: "The Columbia River Temperature TMDL was initiated by EPA in early 2000.

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[3] EPA now contends that "[s]everal stakeholders disputed the accuracy of EPA's model" and that the "States were amending their water quality standards" as reasons why EPA "suspended further work on the TMDL." *See* EPA Br. at 13. But EPA only cites its own August 10, 2017 letter (discussed below) to support these assertions. *Id.* (*citing* ER 236–38). EPA never publicly announced it was halting work on the TMDL in late 2003, and its Opalski declaration confirms EPA took no further public action on the TMDL until Riverkeeper filed this case. ER 25.

Other evidence indicates that opposition from the U.S. Army Corps of Engineers, which operates the four lower Snake River dams, was at least partly responsible for blocking the final TMDL in late 2003. *See* SER 29 (email stating: "EPA had at one time worked on a temperature TMDL for the Columbia but then they dropped the effort about 10 years ago without much explanation of why (rumor was that the Corps had some influence on the decision)").

They did a preliminary draft TMDL in 2003 and at that point it got pulled by EPA Headquarters, probably for political reasons, and has remained dormant." SER 32. In 2013, an Ecology employee quipped: "Hey, when is EPA going to finish that Columbia River Temperature TMDL—the next Ice Age (hah)?" SER 31. In response to federal funding approval for temperature modeling studies in 2015, an Ecology employee asked: "does this mean that EPA will now finish the Columbia River temperature TMDL? Just say yes (hah)." SER 30.

In 2016, Riverkeeper wrote to both Ecology and the Oregon Department of Environmental Quality (ODEQ) to ask whether they were "preparing, or plan[n]ing to prepare, a TMDL for temperature in the Columbia River?" SER 49–50. Neither agency answered that question in the affirmative. *Id.* ODEQ reiterated that EPA remains responsible for preparing the TMDL. SER 49. Ecology explained it would not prepare the TMDL, stating:

> The Environmental Protection Agency was tasked with completing a TMDL for the Columbia and Snake River system almost 15 years ago. Unfortunately that effort became much too political and EPA did not move forward. Because of the significant federal players in such a TMDL I do not think that Washington State is in a position to successfully get a TMDL done. . . .

SER 50.

While the temperature TMDL has languished, Oregon and Washington have continued implementing their TMDL programs for other impaired water bodies and pollutants. *See* EPA Br. at 9–10. These include completing TMDLs for other

pollutants on the Columbia and lower Snake Rivers. For example, the States fulfilled their commitment under the 2000 MOA to complete the dissolved gas TMDL for the Columbia River, and EPA approved that TMDL in November 2002. *See* SER 33.

The States also have maintained their respective priority schedules listing impaired waters and identifying targeted dates of completion for other TMDLs. *See* SER 9–28, 51–54. But neither of the States includes the temperature TMDL for the Columbia and Snake Rivers in their prioritization lists, nor do they provide targeted completion dates for the temperature TMDL. *See* SER 9–24, 52–54 (ODEQ lists); SER 25–28 (Ecology's 2010 TMDL priority list); SER 51 (Ecology's Columbia River TMDL web page). This again confirms that Oregon and Washington are not proceeding with the temperature TMDL, but are still relying on EPA to promulgate it.

E. Temperature Problems Persist, Pushing Columbia and Snake River Salmon and Steelhead Further Toward Extinction.

This Court has repeatedly recognized the imperiled status of Columbia and Snake River salmon and steelhead and their many threats, including from federal dams in the Federal Columbia River Power System (FCRPS). *See Nat'l Wildlife Fed'n,* 886 F.3d at 820-21, 825 (affirming injunctive relief requiring additional water spill over federal dams to benefit fish); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (affirming ruling reversing Biological

Opinion that found "no jeopardy" to salmon and steelhead from FCRPS operations); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782 (9th Cir. 2005) (affirming injunction order but remanding to consider more limited spill injunction).

Thirteen Columbia and Snake salmon and steelhead stocks are listed as "endangered" or "threatened" under the federal Endangered Species Act (ESA) but continue to face severe threats and declining populations. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 184 F.Supp.3d 861, 869–82 (D. Or. 2016). "Recent data shows that the[se] listed species remain in a precarious state." *Id*. at 879. Sixty-five percent of the remaining populations are at "high risk" of extinction, while only 6.5 percent of populations are considered "viable" or "highly viable." *Id*. at 879–80.

As the district court noted, this is due in part to high water temperatures on the Columbia and lower Snake Rivers. ER 1–3, 7–8. Since 1998, when both Oregon and Washington listed both rivers as water quality impaired, elevated water temperatures have persisted and are projected to worsen due to climate change. *Id.*; SER 67–69. Climate change, and the resulting high water temperatures, "will have a significant negative effect on the listed populations of endangered or threatened species" of salmon and steelhead in the Columbia River Basin. *NWF*, 184 F.Supp.3d at 873.

Indeed, climate change already appears to be harming the imperiled salmon and steelhead in the Columbia Basin, as reflected by numerous recent fish kills from high water temperatures. *Id*. at 914. In 2015, some 250,000 adult Columbia Basin sockeye salmon were killed primarily due to unusually warm water in the Columbia and Snake Rivers. ER 7–8. That year, only four percent of endangered Snake River sockeye salmon successfully migrated up the Columbia and lower Snake Rivers. SER 63–66.

F. The Proceedings Below.

On August 15, 2016, Riverkeeper sent then-EPA Administrator Gina McCarthy a sixty-day notice of intent to bring this action over EPA's ongoing CWA violations in not completing the temperature TMDL. SER 35–41. When EPA failed to respond—and did nothing to move forward with the TMDL—Riverkeeper filed the Complaint on February 23, 2017, alleging both CWA and APA violations, naming then-EPA Administrator Scott Pruitt and EPA as defendants. SER 77–92.

The parties jointly proposed cross-motions for summary judgment to address both liability and remedies issues with an agreed briefing schedule, which the district court adopted on June 13, 2017. *See* ER 245 (ECF Nos. 14–15).

On August 21, 2017, EPA moved to stay the briefing schedule (*id.*, ECF No. 18), citing its August 10, 2017 letter to the States suggesting they "immediately

begin discussions designed to enable renewed effort on the Columbia/Snake temperature TMDLs." *See* ER 235 (Aug. letter). But instead of completing the TMDL, EPA proposed spending "several years" on a process to weaken the States' temperature water quality standards. ER 238–39.[4]

In response to EPA's August 2017 letter, Washington expressed reluctance to re-engage on the temperature TMDL until EPA explained its 2003 decision to suspend work on it. SER 33–34. The district court denied EPA's motion to stay briefing on September 5, 2017. *See* ER 246 (ECF No. 30). The parties briefed their cross-motions for summary judgment between August 2017 and January 2018. *See id.* (ECF Nos. 19–29, 31–38).

On October 17, 2018, the district court issued its Order on the parties' cross-motions for summary judgment. ER 1–16. It granted Riverkeeper's motion, and denied EPA's motion, on the first claim under the CWA, and stated that it would not address the APA claim in light of that ruling. ER 16.

After detailing the facts above from the record, the district court rejected EPA's arguments against enforcing CWA Section 303(d), explaining that "the CWA and Ninth Circuit law provide for the constructive submission doctrine to

[4] EPA proposed weakening the standards even though the States emphasized to EPA back in 2003 that completing the TMDL is "high priority" that "will establish a timely foundation for related water quality efforts," and consideration of modifying standards should occur "post-TMDL." ER 231–32.

apply when a state completely fails to issue TMDLs," and "the constructive submission doctrine does apply when a state abandons an individual TMDL." ER 12, 14. It found that the 2000 MOA and subsequent communications between the States and EPA, together with "the sheer number of years that have elapsed," show that the States "clearly and unambiguously indicated that they will not produce" the temperature TMDL. ER 14. "Accordingly, a constructive submission of 'no TMDL' has occurred, but the EPA has failed to undertake its mandatory duty to issue a temperature TMDL under the CWA." ER 14–15.

The district court thus ordered relief based on the timelines in CWA Section 303(d)(2), stating: "EPA has 30 days from the date of this Order to approve or disapprove the constructively submitted TMDL at issue in this case, and 30 days after a disapproval to issue a new TMDL." ER 16. The court acknowledged Riverkeeper's concern that EPA would continue its unlawful delay, but encouraged the parties to "work together" and "avoid further Court action." *Id.*

EPA never sought to "work together" with Riverkeeper. Instead, EPA first moved for an extension of the 30-day deadline to review the constructively submitted TMDL, which the court denied citing EPA's "history of delay." SER 6–8. On November 16, 2018, EPA complied with the first part of the Order, and issued disapprovals of the States' constructive submissions of no temperature TMDL. SER 1–5.

EPA filed its notice of appeal on November 21, 2018. ER 31. It then moved for a stay pending appeal of the second part of the Order directing it to promulgate the TMDL in 30 days, asserting it had undertaken several tasks to complete the TMDL but should not be compelled to finish it on the "compressed time frame" ordered by the district court. *See* ER 21–30.

On November 30, 2018, the district court granted EPA's motion for stay pending appeal. ER 17. Riverkeeper filed a notice of appeal from the stay order and sought expedited hearing. *See* 9th Cir. No. 19-35033. Riverkeeper later voluntarily dismissed its appeal, in an agreement facilitated by the Circuit mediator's office to expedite hearing on EPA's appeal. *See* 9th Cir. ECF No. 19.

STANDARDS OF REVIEW

This Court reviews *de novo* the district court's decision on the cross-motions for summary judgment, applying the same standards used by the district court. *JL Bev. Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1104 (9th Cir. 2016). "We review the district court's conclusions of law de novo, and its factual findings for clear error." *Id.; Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004); *Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1195–96 (9th Cir. 2009).

SUMMARY OF THE ARGUMENT

This Court should affirm because the district court properly found that Oregon and Washington made a constructive submission of the Columbia and

Snake River temperature TMDL, and correctly found EPA violated the CWA by failing to perform its non-discretionary duties under CWA Section 303(d)(2) to review the States' constructive submission and then promulgate the TMDL.

First, the district court was right in rejecting EPA's unfounded legal attacks on Riverkeeper's CWA citizen suit claim to enforce EPA's nondiscretionary duties under CWA Section 303(d). This Court is bound by *Baykeeper* and other Ninth Circuit decisions holding that—based on the text, structure, and purpose of the CWA—a state's complete abandonment of its duty to submit a TMDL can amount to a "constructive submission of no TMDL" that triggers EPA's CWA Section 303(d)(2) nondiscretionary duties, enforceable under the CWA citizen suit provision and consistent with the "clear statement" rule regarding waivers of sovereign immunity.

Second, the district court correctly determined the constructive submission doctrine is not limited to situations where a state fails to submit any TMDLs. Consistent with the express language of the CWA—which requires TMDLs for every impaired waterbody—the constructive submission doctrine applies equally to a state's failure to submit a particular TMDL, or set of TMDLs, as here. If EPA's contrary argument is accepted, states and EPA will be free to shirk their TMDL duties and frustrate the CWA.

Third, the district court correctly concluded that the States made a constructive submission under *Baykeeper*. There is no factual dispute that the States abandoned their duty to prepare the TMDL. Between 2000 and 2003, they repeatedly informed EPA that it must prepared and issue the TMDL, and EPA said it would. EPA prepared the Draft TMDL in 2003, expecting to finalize within months. But EPA then abandoned its work, and the States never acted to proceed with the TMDL themselves. Over fifteen years later, the States have not even placed the temperature TMDL on their priority schedules, and they have no plan or target date for it. It is hard to imagine stronger facts showing a clear abandonment of a state's duty to submit required TMDLs.

Because the district court did not err in its legal or factual rulings, this Court should affirm.

ARGUMENT

I. THE COURT MUST REJECT EPA'S ATTACKS ON THE DISTRICT COURT'S ORDER.

The Court must reject EPA's attacks on the district court's Order requiring EPA to review the States' constructive submissions and promulgate the temperature TMDL itself. Virtually every court that has addressed the issue—including this Court—agrees that, based on the text, structure, and stated purposes of the CWA, a state's abandonment of its duty to submit a TMDL under CWA Section 303(d) can result in a "constructive submission" of no TMDL, which

triggers EPA's non-discretionary duty under 33 U.S.C. § 1313(d)(2) to review the submission and promulgate a TMDL instead. That non-discretionary duty is enforceable in CWA citizen suits, such as this one.

Contrary to EPA's arguments, the Court is bound by its prior decisions adopting the doctrine, as the district court correctly held. Neither did the district court err in enforcing CWA Section 303(d)(2) under the facts of this case.

A. Riverkeeper's CWA Citizen Suit Claim is Proper to Enforce EPA's Nondiscretionary Duties under Section 303(d)(2).

CWA Section 505(a)(2), which Riverkeeper invoked here for its CWA claim, authorizes citizen suits "where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2).

As EPA emphasizes, this Court has adopted a "clear statement" rule to evaluate whether a citizen suit claim may be brought under the CWA and other statutes, reflecting the doctrine that waivers of sovereign immunity are to be narrowly construed. EPA Br. at 18–20.

The clear statement rule requires that "the nondiscretionary nature of the duty must be clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty." *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). As *WildEarth Guardians* further explained:

> We must be able to identify a "specific, unequivocal command" from the text of the statute at issue using traditional tools of statutory interpretation; it's not enough that such a command could be teased out "from an amalgamation of disputed statutory provisions and legislative history coupled with [an agency's] earlier interpretation".

Id., *quoting Our Children's Earth Found. v. E.P.A.*, 527 F.3d 842, 851 (9th Cir. 2008). Contrary to EPA's argument, however, the statutory text of CWA Section 303(d) imposes such specific nondiscretionary duties on EPA here.

As directed in *WildEarth Guardians*, 772 F.3d at 1182, the Court must look to the statutory text and utilize traditional tools of statutory interpretation to determine whether a non-discretionary duty exists. *See also Natural Res. Def. Council v. U.S. EPA*, 542 F.3d 1235, 1250 (9th Cir. 2008) (employing traditional tools of statutory construction to find EPA had nondiscretionary CWA duty).

Here, analysis of EPA's nondiscretionary duties begins with CWA Section 303's requirements for states to establish and revise water quality standards, which EPA must review and approve or disapprove, 33 U.S.C. § 1313(a)–(c); the requirement that states must identify their lists of impaired waterbodies that do not meet the standards and identify priority rankings for them, 33 U.S.C. § 1313(d)(1)(A)–(B); and the further requirement that states must develop TMDLs for every impaired water and submit them to EPA for approval or disapproval, 33 U.S.C. § 1313(d)(1)(C)–(D) & (d)(2).

Within this statutory context, the specific language in CWA Section 303(d)(2) that imposes non-discretionary duties upon EPA is as follows:

> Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1342(a)(2)(d) of this title, for his approval the water identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. *The Administrator shall either approve or disapprove such identification and load [i.e., TMDL] not later than thirty days after the date of submission. . . . If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads* for such waters as he determines necessary to implement the water quality standards applicable to such waters. . . .

33 U.S.C. § 1313(d)(2) (emphasis added).

The statutory language "shall," as emphasized above, along with the specific thirty-day timeframes for EPA to act, impose nondiscretionary duties enforceable under the CWA citizen suit provision and the "clear statement" rule. *See Our Children's Earth,* 527 F.3d at 847 ("When Congress specifies an obligation and uses the word 'shall,' this denomination usually connotes a mandatory command") (citing *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001)). The specific commands here stand in contrast to the "if appropriate" language that *Our Children's Earth* held does not impose a nondiscretionary duty. *Id.* at 848–49 (construing CWA § 301(d), which provides for EPA to revise, "if appropriate," effluent standards during five year reviews).

EPA seeks to go beyond the clear statement rule, however, by conflating its challenge to the district court's jurisdiction with the factual determination of whether a state submission has occurred, triggering these nondiscretionary duties. That factual question—as presented here and in *Baykeeper* and other cases discussed below—is whether the state's prolonged failure to submit required TMDLs under Section 303(d) amounts to an abandonment of that duty.

Through *Baykeeper* and other cases, this Circuit joined the Seventh and Tenth Circuits in adopting the "constructive submission" doctrine to evaluate such claims to determine whether EPA's nondiscretionary duties under Section 303(d)(2) have been triggered. The doctrine comes from the CWA, using traditional tools of statutory interpretation, and is not a judicial creation of a nondiscretionary duty as EPA posits.[5] EPA's attempt to invoke the clear statement rule to challenge the district court's jurisdiction under the CWA thus fails. There is no dispute that CWA Section 303(d)(2) imposes nondiscretionary duties on EPA; the only dispute in this case is whether the district court properly followed *Baykeeper* and found a constructive submission occurred.

[5] Several district courts have rejected EPA's clear statement rule argument in constructive submission cases. *See, e.g.*, *Kingman Park Civic Ass'n v. EPA*, 84 F.Supp.2d 1, 5–7 (D.D.C. 1999); *American Canoe Association v. U.S. EPA*, 30 F.Supp.2d 908, 920–21 (E.D. Va. 1998); *Hayes v. Browner*, Nos. 98-CV-145-BU, 97-CV-1090-BU, 1998 WL 34016834, at *3–*4 (N.D. Okla. 1998). *See also Defenders of Wildlife v. Browner*, 888 F.Supp. 1005, 1008 (D. Ariz. 1995) (explaining constructive submission doctrine satisfies clear statement rule).

B. Because the Ninth Circuit Has Adopted the Constructive Submission Doctrine, This Court May Not Accept EPA's Demand to Jettison it Now.

As quoted above, CWA Section 303(d)(2) requires states to submit TMDLs for EPA's approval or disapproval "from time to time," as they develop them under CWA Section 303(d)(1). If states violate this directive, and forsake their duty to adopt and submit TMDLs to EPA, that does not deprive EPA of its duty to step in and act—nor does it preclude citizen suits to compel EPA to act. As this Court has held, along with the Seventh and Tenth Circuits, such abandonment of a state's duty to submit a TMDL is deemed a constructive submission of "no TMDL," and triggers EPA's nondiscretionary duties to disapprove the submission and issue an adequate TMDL itself under CWA Section 303(d)(2).

As EPA's brief acknowledges, the Seventh Circuit first addressed this situation in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). The plaintiff there alleged EPA unlawfully failed to promulgate TMDLs for one waterbody (Lake Michigan) after Indiana and Illinois failed to submit TMDLs. *Id.* at 994. Employing traditional tools of statutory construction, *Scott* analyzed the text, structure, and stated goals of the CWA, *id.* at 996–98, and held that "if a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the 'constructive submission' by that state of no TMDL's." *Id.* at 996. "[T]hen the EPA would be under a duty to either approve or disapprove the

'submission'," as required by 33 U.S.C. § 1313(d)(2). *Id.* at 997. Scott remanded for the district court to determine whether a constructive submission occurred. *Id.*

The *Scott* court rejected the statutory construction argument EPA makes here. *Id.* That argument is that because there are several instances where the CWA explicitly requires EPA to intercede in when a state fails to act, but no similar provision in Section 303(d), Congress did not intend for EPA to intercede when a state fails to submit a TMDL. EPA Br. at 22–23. In rejecting this argument, the *Scott* court explained that TMDLs are "an important aspect of the federal scheme of water pollution control," and Congress set "short time limits" in Section 303(d). *Id.* at 997. The court, thus, found that "to construe the [CWA] as the EPA urges would apparently render it wholly ineffective. There is, of course, a strong presumption against such a construction." *Id.* at 998.

The Tenth Circuit joined the Seventh Circuit in applying the constructive submission doctrine to evaluate a similar CWA citizen suit claim in *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001). In *Hayes*, the Tenth Circuit reviewed the CWA and *Scott*, and adopted what it described as a "narrow" constructive submission theory, which applies "when the state's actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody." *Id.* at 1024. But the Tenth Circuit found no constructive submission occurred there, because the "uncontradicted evidence is that Oklahoma has

submitted a number of TMDLs and is making progress toward completing about 15000 TMDLs over a twelve-year period." *Id.* at 1024.

EPA argues this Court should overturn the district court because the Ninth Circuit has never adopted the "constructive submission" doctrine as articulated in *Scott* and *Hayes*. *See* EPA Br. at 24–30. To the contrary, the Ninth Circuit has repeatedly considered and approved CWA citizen suits using the constructive submission doctrine under CWA Section 303(d), and the district court rightly adhered to that precedent.

In fact, this Court addressed the constructive submission doctrine soon after *Scott*, in *City of Las Vegas v. Clark County, Nevada*, 755 F.2d 697 (9th Cir. 1984). The Ninth Circuit there recited the Seventh Circuit's holding in *Scott*, but held that EPA's Section 303(d) duties had not been triggered as there was no claim that the waterbody at issue failed to meet water quality standards. *Id.* at 703–04.

The Court next addressed the doctrine in *Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994) (*ACE III*). There, the district court had granted a CWA citizen suit claim alleging Alaska's eleven-year failure to submit TMDLs was a constructive submission enforceable under the CWA and ordered EPA to "initiate its own process of promulgating TMDLs" and other relief. *See ACE I*, 762 F. Supp. at 1429; *Alaska Center for the Environment v. Reilly,* 796 F. Supp. 1374, 1381 (W.D. Wash. 1992) (*ACE II*). *ACE III* held plaintiffs had

standing to bring their CWA citizen suit claim and then upheld the district court's remedy, noting that *Scott* was "cited with approval in *City of Las Vegas*" and reiterating its reasoning. *See* 20 F.3d at 983, 986–87.

EPA downplays both *City of Las Vegas* and *ACE III*. *See* EPA Br. at 28–29. EPA fails to acknowledge that *ACE III* said *Scott* was "cited with approval in *City of Las Vegas*." EPA also incorrectly asserts *ACE III* was just a standing case, ignoring the portion of that opinion where the Court upheld the district court's order that EPA must develop a TMDL schedule for Alaska. *See* 20 F.3d at 987.

Far from unimportant, the *ACE* decisions have been understood to adopt the constructive submission doctrine. In *San Francisco Baykeeper v. Browner*, 147 F.Supp.2d 991 (N.D. Cal. 2001), the district court said:

> The Ninth Circuit in essence affirmed [*ACE I*] in *ACE III*. . . Under the *ACE* decisions, it is established law in this circuit that the EPA has a duty to act if a state does *nothing* with respect to submission of WQLS and TMDL lists, and in such a circumstance a district court can compel the EPA to perform its duties under subsection 303(d)(2).

Id. at 999 (emphasis in original).

The Ninth Circuit affirmed in *San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002). Contrary to EPA's contentions, *see* EPA Br. at 29, *Baykeeper* directly confronted the constructive submission doctrine and adopted it after reasoned consideration, and thus *Baykeeper* is binding here.

In *Baykeeper*, the Court explained that plaintiffs "must prove that EPA has a nondiscretionary duty to establish TMDLs for the State of California. *See* 33 U.S.C. §1365(a)(2) (limiting citizen-suits against EPA to suits alleging EPA has failed to perform a duty 'which is not discretionary')." 297 F.3d at 881. *Baykeeper* thoroughly discussed *Scott* and *Hayes*, plus numerous district court decisions. *Id.* at 881–83. Stating that "[w]e agree with the Tenth Circuit's decision in *Hayes,*" *Baykeeper* held that CWA citizen suit claims are available to enforce EPA's nondiscretionary duties under CWA Section 303(d) when a "state has 'clearly and unambiguously' decided not to submit any TMDL[s]." *Baykeeper*, 297 F.3d at 883 (quoting *Hayes*, 264 F.3d at 1024). Applying that standard to the facts before it, however, *Baykeeper* found no constructive submission because "California has submitted at least eighteen TMDLs and has established a schedule for completing its remaining TMDLs" within 12 years. 297 F.3d at 880, 883.

EPA contends this discussion in *Baykeeper* was dicta, and characterizes *Baykeeper*'s lengthy consideration of the constructive submission doctrine, its decision to follow *Hayes*, and its application of the doctrine as mere "unexamined assumptions." EPA Br. at 28–30. EPA invokes *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003), for the rule on what makes binding law within the Ninth Circuit. *Id.* But EPA omits the final phrase of the rule, and fails to recognize that *Kitzhaber* actually undercuts EPA's argument.

In *Kitzhaber*, Oregon argued a prior decision was not binding on whether a state had waived its sovereign immunity because that issue was not before the court. *See* 328 F.3d at 1186. But the Court "decline[d] to dismiss [its] precedent so lightly" and reaffirmed this Circuit's rule: "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Id., quoting United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (*en banc*).

Far from being "dicta" or "unexamined assumptions," as EPA contends, this Court's reasoned analysis of the constructive submission doctrine was central to the *Baykeeper* decision, and is thus binding. *See Garcia v. Holder*, 621 F.3d 906, 911 (9th Cir. 2010) (distinction made in prior opinion was binding where it "was expressly adopted by the court after reasoned consideration" and related to the "central issue considered").

Moreover, this Court again endorsed the constructive submission doctrine in *City of Arcadia v. U.S. EPA,* 411 F.3d 1103 (9th Cir. 2005). After explaining that EPA has mandatory duties under 33 U.S.C. § 1313(d) to approve or disapprove a state TMDL within 30 days of submission, and to issue its own TMDL within 30 days of a disapproval, *City of Arcadia* reiterated: "EPA is also under a *mandatory duty* to establish a TMDL when a State fails over a long period of time to submit a

TMDL; this 'prolonged' failure can amount to the 'constructive submission' of an inadequate TMDL, thus triggering EPA's duty to issue its own." *Id*. at 1105–06 (quoting *Baykeeper*, 297 F.3d at 880–84) (emphasis added).

Once again, EPA misleadingly downplays *City of Arcadia* as a decision that simply "mentioned" the constructive submission doctrine. EPA Br. at 30, n.4. To the contrary, the municipalities there asserted that EPA lacked authority to approve an individual TMDL submitted by California, after EPA had already established a TMDL when the state previously failed to submit one. *See* 411 F.3d at 1106–07. This Court disagreed, and stated: "It is certainly correct that a State's failure to act may trigger the EPA's duty to establish a TMDL on its own accord." *Id.*

It is, thus, controlling law in this Circuit that a state can make a constructive submission of "no TMDL" and that such submission triggers EPA's nondiscretionary duties under CWA Section 303(d)(2), enforceable by CWA citizen suit. The district court here did not err in following this Court's precedent; and this Court must follow its prior decisions adopting the doctrine.[6]

[6] EPA cites *Nat'l Ass'n of Manuf. v. Department of Defense*, 138 S.Ct. 617 (2018), as an intervening Supreme Court decision that it believes allows this Court to disregard *Baykeeper* and these other cases. *See* EPA Br. at 27–28. EPA is incorrect. The Supreme Court there rejected the government's "practical-effects" test that was "not grounded in the statutory text" of the CWA and the government's "functional interpretive approach" that was "completely unmoored from the statutory text." *See* 138 S.Ct. at 621, 630–32. Here, the constructive submission doctrine is "grounded in the statutory text" of CWA Section 303(d), not "completely unmoored" from it, as explained above.

II. THE CONSTRUCTIVE SUBMISSION DOCTRINE APPLIES TO INDIVIDUAL TMDLs.

EPA's second major argument is that the constructive submission doctrine only applies to statewide TMDL program failures, not to individual TMDLs. *See* EPA Br. at 36–43. Notably, no court has agreed with EPA's argument that the doctrine should not apply to individual TMDLs, and for good reason: the CWA requires a TMDL for every impaired water, 33 U.S.C. § 1313(d)(1)(A)–(C), so there is no principled distinction between statewide TMDL program failures and failures with respect to specific TMDLs. The case law recognizes this reality.

Indeed, individual TMDLs were addressed in *Scott*, where Illinois and Indiana had failed to issue TMDLs for just one waterbody, Lake Michigan. *See Scott,* 741 F.2d at 994. After *Scott*, other early cases involved allegations of statewide TMDL program failures, including in *ACE, Hayes*, and *Baykeeper*. But just because those cases involved statewide failures does not mean they precluded the constructive submission doctrine from applying to individual TMDLs.

EPA wrongly argues that *Hayes* and *Baykeeper* "refused to extend the theory to individual TMDLs." EPA Br. at 34. *Hayes* and *Baykeeper* both found that no statewide constructive submission occurred where the states were issuing TMDLs and had plans in place to eliminate their TMDL backlogs within 12 years. *Hayes*, 264 F.3d at 1024; *Baykeeper*, 297 F.3d at 880, 883. But those analyses of the constructive submission doctrine underscore that it applies to specific TMDLs.

Thus, in *Hayes*, the Tenth Circuit articulated the doctrine as follows: "The constructive-submission theory turns on whether the state has determined not to submit *a required TMDL* for *a given impaired waterbody*." *Hayes*, 264 F.3d at 1023 (emphasis added). *Baykeeper* followed both *Scott* and *Hayes* in articulating a similar standard. *See Baykeeper*, 297 F.3d at 880–84. The Ninth Circuit confirmed this in *City of Arcadia*, where it explained that "EPA is . . . under a mandatory duty to establish *a TMDL* when a State fails over a long period of time to submit *a TMDL*; this 'prolonged' failure can amount to the 'constructive submission' of *an inadequate TMDL*, thus triggering EPA's duty to issue its own." 411 F.3d at 1105–06 (emphasis added) (citing *Baykeeper*).

Only recently—beginning in 2015—have courts considered the issue of whether the doctrine applies to particular TMDLs or just to statewide TMDL program failures. These courts have consistently rejected EPA's argument that the doctrine is limited to statewide failures, even though they have not found a constructive submission on the facts presented.

In *Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522, *6 (W.D. Wash. Mar. 16, 2015), plaintiffs challenged EPA's failure to promulgate a TMDL for the Spokane River, and EPA argued that *Baykeeper* limited the constructive submission doctrine to programmatic, statewide failures. *See* 2015 WL 1188522 at *6. District Judge Rothstein rejected that argument as "absurd" in

light of the "statutory obligation to produce a TMDL for each water pollutant of concern in every 303(d) water segment," and explained that "far from foreclosing the application of the constructive submission doctrine to a particular pollutant or waterbody segment, the *Baykeeper* court cited with approval to *Scott*, which applied the constructive submission doctrine to TMDLs for a particular waterbody segment, Lake Michigan." *Id.* at *6-*7.

Other district courts have reached the same conclusion. *See Ohio Valley Envt'l Coal. v. McCarthy,* No. 3:15-0271, 2017 WL 600102 at *9–10 (S.D. W.Va. Feb. 14, 2017) and *Ohio Valley Envt'l Coal. v. Pruitt,* 2017 WL 1712527 at *4 (S.D. W. Va. May 2, 2017) (constructive submission doctrine "is equally applicable to a single missing TMDL as it is to a programmatic failure"), *reversed on other grounds, Ohio Valley Envt'l Coal. v. Pruitt*, 893 F.3d 225, 229-30 (4th Cir. 2018) (*OVEC*)[7]; *Las Virgenes Municipal Water District v. McCarthy*, C 14-01392 SBA, 2016 WL 393166 at *5-*7(N.D. Cal. Feb. 1, 2016) (constructive submission can occur for an individual TMDL); *Environmental Law and Policy Center v. U.S. EPA*, 349 F.Supp.3d 703, 714 (N.D. Ohio 2018) (*ELPC*)

[7] EPA asserts that the Fourth Circuit in *OVEC* "refused to extend the theory to individual TMDLs." EPA Br. at 34. But the Fourth Circuit overturned the district court's summary judgment ruling based on the factual finding that West Virginia had not made a constructive submission. *See* 893 F.3d at 230–31. The Fourth Circuit did not rule on the validity of the doctrine, stating "we hold that if the constructive submission doctrine were to apply, a decision we do not reach, it would not be satisfied here." *Id.* at 231.

(acknowledging constructive submission can occur in the case of a state's refusal to develop a specific TMDL, stating: "*McLerran*'s reasoning is consistent with the statute's demand that each state 'shall' establish TMDLs for its impaired waters").

The district court here was thus in good company in rejecting EPA's argument and holding the constructive submission doctrine can apply to individual TMDLs. *See* ER 12–14. Indeed, the court was "convinced that the EPA is misconstruing *Baykeeper* by arguing that a 'complete failure by [the states] to submit TMDLs' is required." ER 12 (citing *Baykeeper*, 297 F.3d at 881–82). Given the language of CWA Section 303(d) requiring TMDLs for every impaired waterbody, and the logic and analysis from *Scott*, *Baykeeper*, *City of Arcadia*, and the other cases discussed above, the district court did not err.

III. THE STATES' 20-YEAR FAILURE TO SUBMIT THE TEMPERATURE TMDL, WITH NO CREDIBLE PLAN IN PLACE, IS A CONSTRUCTIVE SUBMISSION.

Finally, EPA challenges the district court's determination that "Washington and Oregon have clearly and unambiguously stated that they will not produce a TMDL for these waterways," thus constituting a constructive submission under *Baykeeper*. *See* ER 14–15.

In making this determination, the district court considered the 2000 MOA "and all the subsequent communications between the states and the EPA," through which the States "rightly or wrongly . . . placed the ball in the EPA's court," along

with the "subsequent 17-year delay" in failing to produce the temperature TMDL. ER 14. The district court found this to be "strong evidence that the states have abandoned any initial step the EPA could possibly be awaiting." *Id.* Moreover, the "[r]ecent communications between the EPA and the states indicates a desire to further delay this process." *Id.*

EPA's objections to the district court's findings largely boil down to complaining that the district court did not view the facts in the record the same way that EPA does. *See* EPA Br. at 44–52. But this Court reviews the district court's factual findings for clear error, *JL Bev. Co.*, 828 F.3d at 1104, and EPA does not contend that disputed questions of material fact precluded the district court's entry of summary judgment. As detailed in the Statement of the Case, above, the district court's factual findings were solidly based on the record, and not clearly erroneous, so this Court must affirm.[8]

[8] EPA also misstates the factual record. For example, after EPA and the States signed the 2000 MOA (which provided that EPA would "produce" the temperature TMDL, but the States would issue it, *see* ER 123, 127) Washington and Oregon wrote EPA to modify the MOA to make clear EPA would issue the TMDL. *See* ER 145–48. EPA now contends that it "ultimately acknowledged the States' request, without either granting it or rejecting it." EPA Br. at 12, *citing* ER 149–51. That is misleading, at best. The January 15, 2002 EPA letter cited here in fact states: "Fourth, at the requests of the states of Oregon and Washington, EPA will be doing the technical analysis *and issuing* temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington." ER 149 (emphasis added). *See also* SER 58 (similar EPA statement). Further confirming EPA granted the States' requests, the Draft TMDL states explicitly that "EPA will issue a Final [] TMDL." ER 157.

Moreover, EPA's attacks fail to address the two factors derived from *Scott* that courts use to determine whether a state has clearly abandoned its obligation to prepare required TMDLs: (1) whether there has been a prolonged failure to submit the required TMDLs; and (2) whether the state has a credible plan in place to cure that failure within a reasonable time. *See Scott*, 741 F.2d at 996 & n.11; *Baykeeper*, 297 F.3d at 882; *OVEC*, 893 F.3d at 230; *ELPC*, 349 F.Supp.3d at 715–16. These factors demonstrate that the district court properly concluded that a constructive submission occurred here. *See* ER 14–15.

A. Two Decades Is a Prolonged Failure.

As explained above, the Ninth Circuit has held that a "prolonged failure" can amount to the constructive submission of an inadequate TMDL, thus triggering the EPA's duty to issue its own." *City of Arcadia*, 411 F.3d at 1105–06; *Baykeeper*, 297 F.3d at 880–84.

It has been over two decades since the States' duty to prepare the temperature TMDL arose. By 1998, both Washington and Oregon placed temperature-impaired segments of the Columbia and lower Snake Rivers on their CWA 303(d) "impaired waters" lists. *See* ER 175. The States' 21-year (and counting) failure to submit the temperature TMDL is thus a "prolonged failure" which has ripened into a constructive submission under Ninth Circuit case law.

The *ACE* litigation illustrates when a "prolonged failure" to submit TMDLs constitutes a constructive submission of "no TMDL." *ACE I* held that "there could hardly be a more compelling case" for finding a constructive submission where Alaska submitted no TMDLs for 11 years. *See* 762 F. Supp. at 1429. The States' delay here—21 years so far—is significantly longer than Alaska's delay in *ACE I*.

Other courts agree this is a prolonged failure. "The tight deadline for submission of TMDLs emphasizes an obvious congressional mandate that TMDLs be established in a matter of years, not decades." *See Friends of the Wild Swan v. U.S. EPA*, 130 F.Supp.2d 1184, 1196 (D. Mont. 1999), *aff'd in part, rev'd in part, and remanded,* 74 Fed.Appx. 718 (9th Cir. 2003).[9] *See also Kingman Park Civic Ass'n v. EPA*, 84 F.Supp.2d 1, 6 (D.D.C. 1999) ("An eighteen-year failure to calculate and submit TMDLs constitutes a constructive—if not outright—determination that no TMDLs are necessary").

B. There Is No Credible Plan To Issue the TMDL Within a Reasonable Time.

Along with the extreme "prolonged failure" here, the record confirms that Oregon and Washington have never had a plan to prepare and submit the temperature TMDL themselves. The States signed the 2000 MOA, which provided

[9] In *Friends of the Wild Swan*, the district court found no constructive submission occurred but ruled in favor of plaintiffs' APA claim against EPA for approving the state's pace of TMDL development, a pace the court found was too slow. 130 F.Supp.2d at 1195–96. This Court affirmed the district court's remedy imposing specific deadlines for establishing TMDLs. 74 Fed.Appx. 718 at *5.

that "EPA will produce" the temperature TMDL, which alone reveals their intent not to prepare the TMDL. ER 123. Confirming that, Washington and Oregon each wrote to EPA in fall 2001 to clarify and request that EPA would issue the TMDL, not them. ER 145, 147. On February 12, 2003, the States wrote to EPA again to confirm their plan that EPA would issue the TMDL. ER 231. EPA released the Draft TMDL in July 2003, which advised that EPA planned to release an updated draft TMDL within a few months, hold a 90-day public comment period, and then EPA would issue the final TMDL. ER 157.

From 2000 to 2003, relying on EPA might have been a credible plan for the States to comply with their duty to prepare the TMDL. But by the end of 2003, EPA abandoned its work on the TMDL. *See* ER 233. Since then—for over 15 years—the States have never come up with a new plan and have simply continued waiting on EPA. This is not a credible plan.

The States never picked up where EPA left off, even though they knew EPA was not working on the TMDL. The record before the Court includes repeated statements in which State personnel acknowledged that EPA was supposed to issue the final TMDL, that EPA had stopped progress on it long ago, and that the States had no plans to take over. *See* SER 29–32, 49–50.

EPA points out the States have "completed many TMDLs since 2003" to argue there has been no constructive submission. EPA Br. at 51. But the

temperature TMDL is not on Washington's or Oregon's mandatory TMDL development schedules, *see* SER 9–28, 51–54, even though the CWA mandates that states "shall" establish priority rankings for all impaired waters. 33 U.S.C. § 1313(d)(1). So while the States submitted other TMDLs to EPA since 2003, and while they have plans to submit more TMDLs according to their priority rankings and target schedules, the temperature TMDL is simply not being addressed through the States' TMDL programs. This undercuts EPA's argument and further proves Oregon and Washington have no credible plan to prepare and submit the TMDL.

EPA also argues there is no constructive submission because the States "acknowledged that TMDL development is 'not optional for either of our States' and that, if EPA withdrew, they 'would still have to develop and promulgate TMDLs for temperature on the Columbia River'." EPA Br. at 49, *citing* ER 231. EPA omits the significant fact that the States made these statements in 2003. *See* ER 231. These statements thus support finding a constructive submission, because they show the States knew full well 16 years ago that if EPA stopped working on the TMDL, they would be obligated to do prepare it themselves. But EPA stopped working the TMDL long ago, and the States never picked up where EPA left off.

EPA tries to negate the constructive submission by claiming it has "re-engaged the States in efforts to complete a temperature TMDL" by reaching out to the States through EPA's August 2017 letter, and since then they have "met

regularly [to] . . . move the TMDL forward." EPA Br. at 51–52. Far from establishing a credible plan to issue the TMDL, however, EPA's August 2017 letter was simply an initial request to start talking. Instead of proposing to pick up where it left off in 2003 and completing the TMDL, EPA's letter sought to "renegotiate the MOA" and change the parties' "roles and responsibilities." *See* ER 239. And rather than set a new target date for EPA (or the States) to complete the TMDL, EPA called for "several years" of further delay to explore weakening the States' water quality standards. ER 239. The States already rejected this approach in 2003, telling EPA to issue the TMDL first. ER 231–32. And Washington expressed reluctance to re-engage on the temperature TMDL until EPA explains its decision to suspend work in 2003. SER 33–34.

The only other information in the record is EPA's Soscia Declaration dated November 3, 2017—after the district court issued its summary judgment decision. The Declaration vaguely states that, since the August 2017 letter, "EPA-State coordination has been ongoing and the States have expressed their willingness to work with EPA on a path forward." ER 36. EPA fails to recognize that willingness to work on a nondescript path is not a credible plan to finally issue the long-overdue temperature TMDL.[10]

[10] EPA also claims in a footnote, without citing anything in the record, that these "efforts" remain active. EPA Br. at 52, n.8. This unsupported assertion again fails to show a credible plan to complete the TMDL by any target date or by any entity.

A target date for completion has been a key factor in many cases where courts have excused states' slow paces for issuing TMDLs. *See*, *e.g.*, *Baykeeper*, 297 F.3d at 880, 883 (schedule would resolve state's TMDL backlog in 12 years); *Hayes*, 264 F.3d at 1024 (same). Here, despite EPA's overture to the States once this litigation was underway, there is no target date for completing the TMDL.

Accordingly, the Court should affirm the district court's conclusion that the States made a constructive submission.

C. EPA's Other Excuses Should Be Rejected.

EPA argues the Court should not find a constructive submission because "TMDLs form only one 'link in an implementation chain'," and nonpoint sources of pollution—federal dams—are the "key cause of elevated temperatures." EPA Br. at 50 (quoting *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002)). EPA misunderstands its own metaphor. If a TMDL is a link in a chain, then the chain is useless without a TMDL. Courts have consistently recognized the importance of TMDLs and the need to create them swiftly to guide future water quality improvements. As one court explained:

> The role of TMDLs in the CWA strategy for improving water quality confirms that they were to be developed quickly. TMDLs provide a basis for developing other pollution control measures where technology-based point source controls prove inadequate. 33 U.S.C. § 1313(d)(1)(A), (C). To serve their intended purpose, they must be available early in the development of a state's program.

Idaho Sportsmen's Coal. v. Browner, 951 F.Supp. 962, 967 (W.D. Wash. 1996).

Similarly, in *ACE III*, EPA attempted to evade its duty to issue TMDLs, arguing the actual quality of Alaskan waters would depend, in part, upon what steps the state takes to address non-point pollution. 20 F.3d at 984. This Court refused to absolve EPA of duty to establish TMDLs, finding EPA's "argument is untenable, because Congress has determined that the relief plaintiffs seek [(issuing TMDLs)] is the appropriate means of achieving desired water quality where other methods, including non-point source controls, have failed." *Id.* The Court added: "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution." *Id.*

EPA's TMDL guidance recognizes "[t]he TMDL program is crucial to success" in cleaning up our nation's polluted waters under the CWA "because it brings rigor, accountability, and statutory authority to the process." ER 39. Such "rigor, accountability, and statutory authority" are long overdue in the Columbia and Snake rivers. The rivers have been on the States' impaired waters list since 1998. Without the TMDL, excessive water temperatures have worsened to the point where they have caused significant fish kills and pushed threatened and endangered salmon and steelhead closer to extinction.

EPA also warns that affirming the district court here would allow states to simply pass off TMDLs to EPA. EPA Br. at 43. But states can do this anyway.

Nothing prevents a state from submitting a clearly inadequate TMDL to EPA, which would trigger EPA's mandatory duty to review the TMDL and issue an adequate one itself. *See* 33 U.S.C. § 1313(d)(2); *ACE I*, 762 F. Supp. at 1428 (noting "a state could submit a TMDL based on a complete lack of credible data").

EPA also claims that finding a constructive submission will interfere with prioritizations within the States' TMDL programs. EPA Br. at 37. Yet the States and EPA have been clear that the temperature TMDL for the Columbia and lower Snake Rivers is critical and a high priority. The States said this to EPA in 2003 when they urged EPA not abandon the TMDL, despite pressure to do so from federal dam management agencies. ER 231–32. EPA is the one interfering with the States' priorities by failing to follow through with its commitment to the States, then doing nothing for over fifteen years, and now trying to renegotiate the 2000 MOA and find a way to further delay the TMDL.

EPA also argues that the "complexity of this situation" cautions against finding a constructive submission, despite the 20 years without a TMDL and no plan to complete it. EPA Br. at 52. Yet EPA already created the Draft TMDL which it could have issued within months. The States, pursuant to the 2000 MOA, issued the Columbia River dissolved gas TMDL. SER 33. Pursuant to another MOA between EPA and Washington, Oregon, and Idaho, EPA prepared and issued a dioxin TMDL for the Columbia, Snake, and Willamette rivers. *See Dioxin/*

Organochlorine Ctr. v. Clarke, 57 F.3d 1517 (9th Cir. 1995). There, EPA released a proposed TMDL and invited public comment in June 1990 and established the final TMDL less than a year later, in February 1991. *Id.* at 1520.

Further, the CWA is clear that TMDLs are to be issued promptly even in face of uncertainty, requiring a "margin of safety" in the TMDL "which takes into account any lack of knowledge." 33 U.S.C. § 1313(d)(1)(C). When it comes to issuing TMDLs, "a lack of precise information may not be a pretext for delay." *Idaho Sportsmen's Coal.*, 951 F. Supp. at 966. "In other words, Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving. No other program has such a strong statutory endorsement for action in the face of an incomplete database." *ACE I*, 762 F.Supp. at 1428, n.8 (quoting EPA).

In summary, the district court correctly followed this Court's precedent in applying the constructive submission doctrine under the facts. This Court should thus affirm the October 2018 Order in all respects.

IV. IF THE COURT WERE TO AGREE WITH EPA, IT SHOULD REMAND FOR THE DISTRICT COURT TO ADJUDICATE RIVERKEEPER'S APA CLAIM.

As noted above, the district court ruled in favor of Riverkeeper on its CWA claim and, thus, did not reach Riverkeeper's alternative APA unreasonable delay claim. ER 16. If this Court were to agree with EPA's challenges to the October

2018 Order and reverse the CWA rulings, it should remand for the district court to address the APA claim and determine whether to order further relief. *See Dodd v. Hood River County*, 59 F.3d 852, 863-64 (9th Cir. 1995) (as a general rule, "a federal appellate court does not consider an issue not passed upon below") (*quoting Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *Golden Gate Hotel Assoc. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir.1994).

CONCLUSION

For the foregoing reasons, Riverkeeper respectfully requests that this Court affirm the district court's October 2018 Order.

Dated: May 10, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiff-Appellees are not aware of any related cases pending before this Court.

Dated: May 10, 2019

/s/ Bryan Hurlbutt
Bryan Hurlbutt

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: May 10, 2019

/s/ Bryan Hurlbutt
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