The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLUMBIA RIVERKEEPER, IDAHO RIVERS UNITED, SNAKE RIVER WATERKEEPER, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and THE INSTITUTE FOR FISHERIES RESOURCES, Plaintiffs, v. SCOTT PRUITT, *et al*. Defendants.	No. 2:17-cv-00289-RSM **PLAINTIFFS' COMBINED RESPONSE/REPLY BRIEF ON CROSS MOTIONS FOR SUMMARY JUDGMENT** For Consideration January 26, 2018 (ORAL ARGUMENT REQUESTED)

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

TABLE OF CONTENTS

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

INTRODUCTION

EPA's response brief (Dkt. # 31) raises unfounded legal and factual arguments that do not refute the showing made by Plaintiffs Columbia Riverkeeper *et al.* in their opening brief (Dkt. # 19) that EPA has unlawfully failed and refused to complete the temperature TMDL for the Columbia and lower Snake Rivers for over 14 years. The Court should enter summary judgment for Riverkeeper and order EPA to issue the TMDL within one year.

EPA first asks this Court to disavow the Clean Water Act constructive submission doctrine, or to limit the doctrine's applicability to situations where a state fails to produce any TMDLs. These arguments can be easily rejected. The constructive submission doctrine is controlling law in the Ninth Circuit. *San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002). And every court that has considered the issue—including this Court—has held that the doctrine applies to individual TMDLs, not just statewide failures. *See*, *e.g., Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015); *Ohio Valley Envtl. Coal. v. McCarthy*, No. 3:15-0271, 2017 WL 600102 (S.D. W.Va. Feb. 14, 2017).

Next, EPA argues no constructive submission occurred because Washington and Oregon have not absolutely ruled out the possibility of ever resuming work on the TMDL. This is an impossible standard and is not what this and other courts have required to find a constructive submission. The States made their intentions clear through the 2000 MOA and their 2001 letter requests to EPA that they wanted EPA to issue the TMDL. This was a constructive submission. Since then, the States have made no plans to produce the TMDL on their own—even though EPA indefinitely suspended its work on the TMDL in 2003. Now, it has been 19 years since the States were first required to prepare the TMDL, and the States' "prolonged failure" to submit the TMDL also supports finding a constructive submission. Thus, the Court should grant summary judgment on Riverkeeper's Clean Water Act claim.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

In response to Riverkeeper's APA § 706(1) unreasonable delay claim—which the Court needs to address only if it finds no constructive submission—EPA does not contest that its delay in issuing the TMDL has been extreme and continues to severely impact the Columbia and Snake Rivers, their fisheries, and the people who depend on them. Instead, EPA incorrectly argues that *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*) only allows the Court to compel unreasonably delayed action when the agency is required to act by statute or regulation. The Ninth Circuit has recognized, under *SUWA*, that agency action can also be compelled when an agency makes a binding commitment through agency plans, policies, or other actions. *See Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), *vacated on other grounds on rehearing en banc,* 678 F.3d 1013 (9th Cir. 2012). Through its MOAs with the States, the publicly-released 2003 Draft TMDL (stating "EPA will issue" the TMDL soon), and other documents and statements, EPA made a binding commitment to issue the TMDL which the Court can enforce under the APA.

EPA also raises policy concerns, arguing that ordering EPA to issue the TMDL will interfere with state TMDL prioritization and will frustrate cooperative efforts between states and EPA to develop TMDLs. These concerns do not support EPA's arguments here. The temperature TMDL has always been a "high priority" for Washington and Oregon (*see* Dkt. # 27-23 at 2),[1] and EPA expressly agreed to issue the temperature TMDL long ago at the States' requests. By failing to follow through on its promise, EPA is the one interfering with the States' priorities.

In light of EPA's recalcitrance, the Court should grant summary judgment to Riverkeeper and order EPA to issue the long-overdue temperature TMDL within one year.

[1] For exhibits and other documents already before the Court, Riverkeeper cites to the ECF docket number and the ECF page number. For exhibits submitted with the 3rd Declaration of Miles Johnson (filed herewith), Riverkeeper cites to internal exhibit page numbers.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

ARGUMENT

I. THE COURT SHOULD REJECT EPA'S INVITATION TO ABANDON THE CONSTRUCTIVE SUBMISSION DOCTRINE.

A. The Constructive Submission Doctrine Is Settled Law And Plays A Critical Role In Cleaning Up Our Nation's Polluted Waterways.

EPA attacks the constructive submission doctrine, asking this Court to reject decades of Clean Water Act case law and disregard settled precedent in the Ninth Circuit and this District. *See* Dkt. 31 (EPA Br.) at 25–28. The Court should reject EPA's plea to abandon the constructive submission doctrine. As Judge Rothstein correctly stated in the 2015 *Sierra Club* decision, "The Ninth Circuit expressly adopted the constructive submission doctrine in *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002)." *Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522, *6 (W.D. Wash. Mar. 16, 2015).

The Ninth Circuit endorsed the constructive submission doctrine again in *City of Arcadia v. U.S. EPA*, 411 F.3d 1103 (9th Cir. 2005). After explaining that EPA has mandatory duties under the Clean Water Act to approve or disapprove a state TMDL within 30 days of state submission, and to issue its own TMDL within 30 days of a disapproval, the Ninth Circuit reiterated: "The EPA is also under a mandatory duty to establish a TMDL when a State fails over a long period of time to submit a TMDL; this 'prolonged' failure can amount to the 'constructive submission' of an inadequate TMDL, thus triggering the EPA's duty to issue its own." *Id.* at 1105–06 (quoting *San Francisco BayKeeper* at 880–84). The constructive submission doctrine is thus the law in this Circuit, which this Court must follow.

Furthermore, the constructive submission doctrine plays a critical role in carrying out the Clean Water Act's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Clean Water Act requires TMDLs for all "impaired" waters—waters that are too polluted to meet state water quality

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

standards. *See* 33 U.S.C. § 1313(d). A TMDL identifies pollution sources and sets limits on those sources. *See San Francisco BayKeeper*, 297 F.3d at 880. When implemented, TMDLs reduce pollution and bring the water body back into compliance with water quality standards. *Id.*

It was because of the important role TMDLs play that the Seventh Circuit first employed the constructive submission doctrine in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). The *Scott* court recognized that the Clean Water Act was silent as to what happens when a state fails to submit a TMDL; however, the Seventh Circuit found it "unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of states to act," so the court put the duty on EPA. *Scott*, 741 F.2d at 997.

EPA recognizes the importance of TMDLs. In its 1997 guidance, "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)," EPA explained that it wants to "rapidly increase the development and implementation of [TMDLs]" and "strongly support[s] the TMDL program" because "to achieve clean water everywhere . . . we must continue to build capacity to identify remaining problem areas and fix each problem on a watershed-by-watershed basis. The TMDL program is crucial to success because it brings rigor, accountability, and statutory authority to the process." *See* Dkt. # 32-1 at 2.

Such "rigor, accountability, and statutory authority" are long overdue in the Columbia and lower Snake Rivers. EPA was supposed to issue the temperature TMDL a decade and a half ago. 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. *See* Dkt. # 19 (Pls.'Br.) at 9–11. The Court should reject EPA's invitation to ignore governing law and thereby allow the States and EPA to continue circumventing the Clean Water Act's clear and critical mandate for a temperature TMDL.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

B. Courts Agree: The Constructive Submission Doctrine Applies To Individual TMDLs.

The Court should also reject EPA's argument that the constructive submission doctrine applies only to programmatic challenges to a state's TMDL program. *See* Dkt. # 31 (EPA Br.) at 28–32. EPA claims that applying the doctrine to an individual TMDL is a novel expansion. *Id.* Yet every court that has specifically considered this issue has concluded that the doctrine applies to individual TMDLs.

In fact, the first constructive submission case concerned specific TMDLs, not a statewide failure. When the Seventh Circuit first applied the constructive submission doctrine in *Scott*, EPA had failed to issue TMDLs for pollutants in just one waterbody—Lake Michigan—after Illinois and Indiana failed to do so. *Scott*, 741 F.2d at 996–97.

After *Scott*, the initial constructive submission cases involved allegations of statewide failures. *See*, *e.g.*, *San Francisco BayKeeper*, 297 F.3d at 881; *Alaska Ctr. for Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991) (*ACE I*). Those courts, therefore, did not address the doctrine's applicability to individual TMDLs. But even during that period, courts followed *Scott* and used language confirming that the doctrine would apply to individual TMDLs. For example, in *City of Arcadia*, the Ninth Circuit articulated the constructive submission doctrine as follows: "The 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 the EPA's duty to issue its own." 411 F.3d at 1105–06 (emphases added) (citing *San Francisco BayKeeper*, 297 F.3d at 880–84). The Tenth Circuit discussed the doctrine similarly: "The constructive-submission theory turns on whether the state has determined not to submit a required TMDL for a given impaired waterbody." *Hayes v. Whitman*, 264 F.3d 1017, 1023 (10th Cir. 2001) (emphases added).

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Recently, moreover, three courts specifically considered whether the doctrine applies to particular TMDLs or only to programmatic challenges to a state's TMDL program. All three courts agreed that the doctrine applies to individual TMDLs too, rejecting the same arguments that EPA makes here.

First, in the *Sierra Club* case before this Court, EPA argued that *San Francisco BayKeeper* limited the doctrine to programmatic, statewide failures. *See* 2015 WL 1188522 at *6. Judge Rothstein rejected EPA's argument, explaining 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.* EPA also argued—as it does again here—that allowing constructive submission claims to proceed with respect to individual TMDLs impermissibly interferes with state authority under the Clean Water Act to prioritize TMDL development. Judge Rothstein rejected that argument as "absurd," explaining:

> [W]hile a state's failure to produce any TMDLs is perhaps the clearest indication that it has abandoned its statutory obligations, the Court finds nothing in the text of the CWA or its purpose to support [EPA's] contention that a state's abandonment of a specific statutory obligation should be treated differently from a state's wholesale failure. To the contrary, a state's discretion to prioritize TMDLs over other TMDLs does not remove its ultimate obligation to produce a TMDL for each water pollutant of concern in every 303(d) water segment. *See* 33 U.S.C. § 1313(d)(2). In light of this statutory obligation, it would be absurd for the Court to hold that a state could perpetually avoid this requirement under the guise of prioritization; such an administrative purgatory clearly contravenes the goal and purpose of the CWA.

Id. at *7.

Second, EPA tried these arguments again in the *Ohio Valley Environmental Coalition* (*OVEC*) litigation in West Virginia, where the court rejected them twice. In its summary judgment decision, the court held: "The doctrine is equally applicable to a single missing TMDL

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

as it is to a programmatic failure." *Ohio Valley Envt'l. Coal. v. McCarthy*, No. 3:15-0271, 2017 WL 600102, *9–*10 (S.D. W.Va. Feb. 14, 2017) (*OVEC I*). In its subsequent decision denying EPA's motion for stay pending appeal, the court reaffirmed this holding and rejected EPA's argument that the holding interferes with the state's TMDL program. *See Ohio Valley Envt'l. Coal. v. Pruitt*, No. 3:15-0271, 2017 WL 1712527 (S.D. W.Va. May 2, 2017) (*OVEC II*).

> [T]he CWA requires states to develop a TMDL for each impaired body of water in that state's boundaries. [33 U.S.C.] § 1313(d)(1)(C). It does not require states to have a TMDL program, robust or otherwise. *See id.* Moreover, the CWA requires EPA to review individual TMDLs, not to review whether a state has a TMDL program that produces some, but not all, TMDLs. § 1313(d)(2). The state's duty to produce discrete TMDLs for each impaired body of water is clearly stated in the CWA. § 1313(d)(1)(C). Given the clear directives in the CWA, it makes little sense to argue that a state has a duty to produce a TMDL for each impaired body of water, but where it has produced large numbers of TMDLs and stated that it cannot produce others, it no longer has a duty produce the TMDLs that it refuses to produce.

Id. at *4. "Put succinctly, a state has a duty to produce a TMDL for each impaired body of water; if it does not, EPA has a duty to act; if EPA refuses to act, a court must faithfully enforce the CWA to compel EPA to act." *Id.* (citing *San Francisco BayKeeper*, *Scott*, and *ACE I*). As in *Sierra Club*, the *OVEC* court rejected EPA's argument that its holding would erode the constructive submission standard and invade states' discretion to prioritize TMDLs. *Id.* at *5.

Finally, the issue of whether the constructive submission doctrine applies to a particular TMDL also arose in *Las Virgenes Municipal Water District v. McCarthy*, C 14-01392 SBA, 2016 WL 393166 (N.D. Cal. Feb. 1, 2016). In *Las Virgenes*, the plaintiff challenged EPA's issuance of a particular TMDL in California. *See id.* at *3. EPA issued the TMDL under a consent decree in an earlier case alleging the constructive submission of TMDLs in the Los Angeles region. *Id.* at *7. Plaintiff argued EPA lacked authority to issue the TMDL under the consent decree, because the earlier constructive commission case did not allege a programmatic, statewide failure in California. *Id.* at *5–7. Rejecting plaintiff's argument, the court concluded

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

that a constructive submission can occur for a particular TMDL. *Id.* at *7.

EPA tries to distinguish *OVEC* and *Las Virgenes* by arguing those cases were like the "traditional" programmatic, statewide failure cases because they involved more than one TMDL. Dkt. # 31 (EPA Br.) at 35. However, EPA made the opposite argument in *OVEC*, arguing that the subset of West Virginia's TMDLs at issue there was not like the traditional statewide failure cases. *See OVEC II*, 2017 WL 1712527 at *4 ("EPA contends that the constructive submission doctrine only applies to a prolonged statewide failure to submit any TMDLs for any body of water," not to "a subset of all TMDLs"). The court should reject EPA's attempt to have it both ways. Furthermore, the reasoning in *OVEC* and *Las Virgenes*, both of which relied on Judge Rothsteins' analysis in *Sierra Club*, clearly applies to a state's failure to submit a single TMDL.[2]

In summary, every court that has specifically considered the issue has reached the same conclusion: the constructive submission doctrine applies to individual TMDLs, and this does not interfere with state TMDL programs.

II. UNDER THE CONSTRUCTIVE SUBMISSION DOCTRINE, EPA IS VIOLATING ITS CLEAN WATER ACT DUTY TO ISSUE THE TEMPERATURE TMDL.

As explained in Riverkeeper's opening brief, through the MOA in 2000, and their letters requests to EPA in 2001, Washington and Oregon explicitly requested that EPA develop and issue the temperature TMDL for the Columbia and lower Snake Rivers. Dkt. # 19 (Pls.' Br.) at 11–14. This was a constructive submission of "no TMDL" by the States, triggering EPA's duty

[2] While the States and EPA proposed preparing a single temperature TMDL for the Columbia and lower Snake Rivers in Washington and Oregon, the TMDL would cover numerous temperature-impaired river segments, each of which is listed separately on Washington's and Oregon's CWA 303(d) lists of impaired waterbodies. *See* Dkt. # 27-22 (Draft TMDL) at 26, Table 1-1 (listing 8 segments in Oregon and 26 segments in Washington impaired by temperature). So, similar to *OVEC*, there are technically many TMDLs at issue here. The States' failure could thus be characterized—in EPA's own term—as a "categorical failure" (Dkt. # 31 (EPA Br.) at 35) to submit any temperature TMDLs for the Columbia and Snake Rivers, not just as the failure to submit a single TMDL.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

to issue one. Confirming a constructive submission, EPA agreed to issue the TMDL and released a Draft TMDL in 2003. Since then, the States have remained clear and unambiguous that they have no plans to produce or submit the TMDL on their own, despite EPA's decision to suspend work on the TMDL 14 years ago. And EPA cannot point to any legitimate reason why the TMDL has been so long delayed and cannot point to a concrete plan to complete the TMDL in the near future. Accordingly, EPA is violating the Clean Water Act.

A. The States' Intent Is Clear: They Asked EPA To Issue The Temperature TMDL And Have No Other Plan To Prepare The TMDL.

A "constructive submission occurs only when a state clearly and unambiguously abandoned its obligation to produce a TMDL or TMDLs." *Sierra Club*, 2015 WL 1188522 at *7 (emphasis in original). In 2000, EPA formally agreed to lead the technical work and "produce" the temperature TMDL. Dkt. # 27-15 (2000 MOA) at 8. In fall 2001, Washington and Oregon both wrote to EPA and asked EPA to develop and issue the temperature TMDL. Dkt. # 27-18 (WA letter to EPA) at 2, Dkt. # 27-20 (OR letter to EPA) at 2. These requests were made pursuant to earlier MOAs that each State entered into with EPA in 1997 regarding their statewide TMDL programs, which allow EPA to issue TMDLs at the States' requests. *See* Dkt. # 31 (EPA Br.) at 53; Dkt. # 32-9 (WA MOA) at 17; Dkt. # 32-10 (OR MOA) at 12. The States were clear and unambiguous that—instead of doing it themselves—they wanted and expected EPA to develop and issue the TMDL. This was a constructive submission.

EPA urges the Court to adopt an impossibly high standard for finding a constructive submission, which would require Riverkeeper to prove that Washington and Oregon have disavowed all intent now and forever to do any work in any way related to the TMDL. *See* Dkt. # 31 at 36–37. That is not what courts require to prove a constructive submission. *See OVEC I*, 2017 WL 600102 at *11–*18 (finding constructive submission where state suspended work on

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

particular TMDLs without concrete schedule or credible plan to issue TMDLs, even though state still intended to issue TMDLs in future); *Sierra Club*, 2015 WL 1188522 at *8–*9 (explaining there can be a constructive submission when a state pivots away from developing a TMDL without "sufficient reasons" for not issuing the TMDL in "near future," but finding no constructive submission where "significant" data and procedural gaps justified state's pivot).

The hypothetical potential for the States to someday decide to work on and submit the TMDL does not erase the constructive submission that occurred in 2000 and 2001 when the States unambiguously indicated they would not produce the TMDL and were waiting for EPA to do so. Furthermore, the States' and EPA's actions and statements after 2001 confirm the existence of a constructive submission.

First, the record unambiguously shows that EPA agreed to the States' requests to issue the TMDL. *See* Dkt. # 27-21 at 2 (EPA 2002 Letter to Fish Commission, stating: "at the requests of Oregon and Washington, EPA will be doing the technical analysis and issuing the temperature TMDL"); Dkt. # 27-24 (2003 EPA Strategy) at 2 (same). EPA then proceeded to model temperature and prepare the July 2003 Draft TMDL. *See* Dkt. # 27-22 (Draft TMDL). The July 2003 Draft TMDL stated "EPA will issue" the final TMDL and indicated EPA expected to do so within months. *Id.* at 7; Dkt. # 27-17 (EPA Work Plan) at 3.

Next, even after EPA suspended work on the TMDL at the end of 2003, the States never picked up where EPA left off. Indeed, the record before the Court includes repeated statements in which State personnel acknowledged that EPA was supposed to finalize the TMDL but had stopped progress on it, with no suggestion that the States would take over. In 2011, for example, a Washington Department of Ecology ("Ecology") employee explained that: "The Columbia River Temperature TMDL was initiated by EPA in early 2000. They did a preliminary draft TMDL in 2003 and at that point it got pulled by EPA Headquarters, probably for political

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

reasons, and has remained dormant." 3rd Johnson Decl., Ex. 1 at 2. In 2013, an Ecology employee quipped: "Hey, when is EPA going to finish that Columbia River Temperature TMDL - the next Ice Age (hah)?" 3rd Johnson Decl., Ex. 2 at 2. In response to a 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)." 3rd Johnson Decl., Ex. 3 at 2. And upon learning of Riverkeeper's 60-day Notice of Intent to Sue in this matter, an Ecology employee remarked: "Fascinating! As I recall from previous years, 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 [U.S. Army] Corps [of Engineers] had some influence on the decision)." 3rd Johnson Decl., Ex. 4 at 2. These statements from Ecology staff confirm the State of Washington's long-standing position that it had no intention to prepare or submit the temperature TMDL.

If Ecology's statements characterizing the TMDL's development were not sufficiently clear, Ecology and the Oregon Department of Environmental Quality ("ODEQ") both spoke directly to this question more recently. In 2016, Riverkeeper asked Ecology and ODEQ in writing whether the States were "preparing, or plan[n]ing to prepare, a TMDL for temperature in the Columbia River?" *See* Dkt. # 27-29 at 2; Dkt. # 27-30 at 2. Neither agency answered that question in the affirmative. Instead, Ecology explained:

> 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 it 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 . . . .

Dkt. # 27-29 at 2. ODEQ, for its part, responded by stating:

> EPA took the lead for technical development of a Columbia/Snake Mainstem Temperature TMDL. The States of Oregon and Washington participated in TMDL

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

> development and requested that EPA issue the Columbia-Snake River Basin Temperature TMDL in our states. However EPA's efforts on the TMDL stalled in 2003.

Dkt. # 27-30, p. 2. Thus, the States were not only clear in the 2000 MOA and 2001 letter requests, but they have not changed their position since—they are still waiting on EPA and have not reassumed their obligation to issue the TMDL. This is a constructive submission.

EPA points to Washington's and Oregon's otherwise-robust TMDL programs to argue there is no constructive submission here. Notably, however, the temperature TMDL is not on, and has not been on, Washington's or Oregon's mandatory TMDL development schedules.[3] The Clean Water Act mandates that states "shall" establish priority rankings for all impaired waters. 33 U.S.C. § 1313(d)(1). But the States have not even put the temperature-impaired Columbia and lower Snake River segments on their priority lists. This is not surprising, since the States asked EPA to prepare and issue the TMDL for them and EPA agreed. The temperature TMDL is simply not being addressed through the States' required TMDL programs, which undercuts EPA's argument and further proves Washington and Oregon abandoned their obligations to prepare and submit the TMDL.

EPA also argues that finding a constructive submission occurred in 2000 (when the States and EPA entered into the MOA), or in 2001 (when the States requested that EPA issue the TMDL under the 1997 MOAs), will discourage states and EPA from cooperating on TMDL development. Dkt. # 31 at 46. EPA's argument ignores the fact that 17 years have passed since the MOA was signed. Holding EPA to the obligation it assumed in 2000 and 2001—at the States' requests—does not interfere with cooperation. To the contrary, ordering EPA to issue the TMDL will promote cooperation by assuring states they can rely on EPA's promises.

[3] *See* Dkt. # 20-27 (ODEQ's most recent TMDL priority list); 3rd Johnson Decl., Ex. 6 (Oregon's 2004 list); 3rd Johnson Decl., Ex. 5 (Washington's 2010 TMDL priority list); *see also* Dkt. # 20-28 (Ecology's Columbia River TMDL web page explains that the temperature TMDL is "delayed" and provides no timeline for re-initiation or completion).

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

B. The States' 19-Year Failure To Submit The TMDL Confirms The Constructive Submission.

It has been around 19 years since the States' duty to prepare the temperature TMDL arose. In 1998, Washington and Oregon placed temperature-impaired segments of the Columbia and lower Snake Rivers on their CWA 303(d) "impaired waters" lists. *See* Dkt. # 27-22 (Draft TMDL) at 25. The States' 19-year failure to submit the TMDL is a "prolonged failure" which has ripened into a constructive submission under applicable case law. This prolonged failure alone supports finding a constructive submission, and it further confirms that the States abandoned their obligation to submit the TMDL.

The Ninth Circuit has articulated 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 the EPA's duty to issue its own." *City of Arcadia*, 411 F.3d at 1105–06 (quoting *San Francisco BayKeeper* at 880–84). This Court's decision in *ACE I* sheds light on when a "prolonged failure" to submit TMDLs constitutes a constructive submission of "no TMDL." The *ACE I* court held that "there could hardly be a more compelling case" for finding a constructive submission where Alaska submitted no TMDLs for 11 years. *See ACE I,* 762 F. Supp. at 1429. The States' delay here—19 years so far—is significantly longer than Alaska's delay in *ACE I*.

EPA's TMDL guidance also supports finding a prolonged failure. In 1997, just before the States listed the relevant Columbia and Snake River segments as impaired due to high temperatures, EPA issued its "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)." Dkt. # 32-1. The guidance called for EPA to work with states to create schedules prioritizing the completion of all required TMDLs. *Id.* at 4–5. EPA provided: "State schedules should be expeditious and normally extend from eight to thirteen years in length." *Id.*

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

at 4. These schedules are for states to complete all of their TMDLs. EPA acknowledged these schedules could be "shorter or slightly longer" depending on a variety of factors. *Id.* at 4 (emphasis added). But EPA added, "once a waterbody is put on a list and a time schedule is specified for completing the TMDLs for that waterbody, the TMDL for that waterbody should generally be completed within that timeframe." *Id.* at 5.

Here, the States are now many years past the normal eight to thirteen years EPA felt was appropriate for States to prepare all of their TMDLs. In addition, the States currently have no plan for issuing the temperature TMDL, and have not even put the temperature TMDL on their TMDL prioritization schedules. This "prolonged failure" to issue the TMDL again supports finding a constructive submission.

C. The Facts Show A Constructive Submission Occurred, Unlike In *Sierra Club*.

As discussed above, in *Sierra Club* Judge Rothstein rejected EPA's arguments that no constructive submission could occur for individual TMDLs. However, Judge Rothstein concluded that no constructive submission of the Spokane River PCB TMDL had occurred, based on the facts in that case. Key factual differences show that a constructive submission occurred here.

In *Sierra Club*, the plaintiff argued that Washington made a constructive submission by "essentially complet[ing] a TMDL and then abandon[ing] the TMDL for an alternate course." *See* 2015 WL 1188522 at *8. Judge Rothstein disagreed, finding Washington's failure to submit a TMDL had not "ripen[ed] into a constructive submission" because the state had "sufficient reasons for not completing the [TMDL]." *Id.* at *7–*8.

Judge Rothstein explained that, when a state's TMDL is essentially complete and ready for submission to EPA, "a last-minute pivot to an illusory alternative may indicate a decision to abandon the TMDL." *Id.* at *8. "By contrast, if information gaps persisted such that Ecology

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

determined that it could not confidently issue a TMDL at any point in the near future, adopting an alternative may, under some circumstances, represent a reasonable interim measure rather than an abandonment of any future plans to prepare the TMDL." *Id.*

In *Sierra Club*, Ecology did not know the source of 57% of PCB loadings in parts of the Spokane River, and after releasing drafts of the TMDL Ecology identified additional studies that were needed. *Id.* at 8–9. Judge Rothstein, therefore, concluded "no constructive submission has yet occurred on the grounds that significant scientific information and procedural gaps remained." *Id.* at *10 (emphasis added).

Here on the other hand, there were no "significant" scientific or procedural gaps in 2003 when EPA suspended work on the TMDL. EPA had already completed temperature modeling and released a Draft TMDL in July 2003, and EPA expected issue the final TMDL within a matter of months. Dkt. # 27-22 (Draft TMDL) at 7; Dkt. # 27-16 at 2–3 (Work Plan). EPA suspended work on the TMDL shortly thereafter—not because of any significant scientific, technical, or procedural gaps in the TMDL, like those Ecology had pointed to in *Sierra Club*. Instead, EPA quietly shelved the temperature TMDL without explanation, but apparently because of interference by other federal agencies that opposed issuance of the TMDL. *See* Dkt. # 27-25 at 2; 3rd Johnson Decl., Ex. 4 at 2; Dkt. # 32-8 at 2 (Oct. 8, 2017 letter from Ecology asking EPA why it suspended work on the TMDL in 2003).

EPA now provides two *post hoc* justifications for pivoting away from the temperature TMDL: (1) EPA's interest in exploring Use Attainability Analyses ("UAAs") to revise water quality standards, and (2) EPA's assistance with U.S. Army Corps Water Quality Plans. *See* Dkt. # 31 (EPA Br.) at 22–23. As explained below, neither was a "sufficient reason," *Sierra Club*, 2015 WL 1188522 at *8, for EPA to suspend work on the TMDL at the end of 2003. And neither justifies EPA's and the States' subsequent 14 years of inaction.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

As to the UAAs, EPA did not need to suspend the TMDL to explore revising the applicable water quality standards, because this could be done later, after issuing the TMDL. In fact, issuing the TMDL first and exploring UAAs later is what EPA had planned from the beginning. In 2003, EPA explained that the TMDL should be created first, and only later "[a]s a last resort"—after undertaking efforts to implement the TMDL—should the States consider conducting any UAAs. *See* Dkt. 29-1 (EPA Letter to Rep. Hastings) at 2. Washington and Oregon agreed with EPA's TMDL-first approach. In a joint letter in 2003, the States asserted that the TMDL is a "high priority" that "will establish a timely foundation for related water quality efforts," and any water quality standards revisions could occur later "post-TMDL." Dkt. # 27-23 at 2–3. Echoing this position, Oregon explained in a 2003 memo on its position on the temperature TMDL that while a UAA may be an option, "it needs to be undertaken after [TMDL] implementation has exhausted all reasonable possibilities, not before" because a "great deal of study (of the type we are suggesting in the [TMDL] Implementation Plan) is required before such a UAA could be submitted to EPA." Dkt. # 29-2 at 3.

Issuing the TMDL first and considering UAAs later is also in accord with the Clean Water Act and EPA guidance for TMDL development, which all call for TMDLs to be developed quickly, even in the face of missing information or changing circumstances, and revised in the future. *See* Dkt. # 27-1 at 27 (EPA guidance endorsing "phased approach" for TMDL creation to issue TMDLs quickly even in the face of uncertainty and revise them later after more information is gathered); 33 U.S.C. § 1313(d) (requiring states to submit first TMDLs within 180 days, and requiring EPA to review all submitted TMDLs within 30 days and to issue substitute TMDLs within 30 days). Thus, there was no reason to indefinitely suspend work on the TMDL based on EPA's interest in exploring UAAs; the UAAs could be explored later.

Furthermore, even if exploring UAAs was a sufficient justification to suspend the TMDL

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

back in 2003, that justification expired long ago when Washington and Oregon rejected EPA's proposal that the states conduct a UAA. *See* Dkt. # 18-1 at 4 (EPA 2017 letter acknowledging "States declined to move forward with UAAs"); Dkt. 32-6, p. 2 (2006 Oregon letter to Army Corps rejecting UAA proposal). After rejecting the UAA proposal around 2006, neither the States nor EPA resumed work on the TMDL.

Turning to EPA's "assistance" with the Corps' Water Quality Plans from 2000 to 2009, this too was not a sufficient reason to suspend work on the TMDL. *See* Dkt. # 31 at 22. Because EPA assisted the Corps from 2000 through 2003—while simultaneously developing the TMDL to near completion—EPA did not need to suspend its ongoing work on the TMDL in order to continue assisting the Corps. Furthermore, EPA cannot point to any meaningful temperature improvements that resulted from the Water Quality Plans. The only results EPA points to is that the Plans identified "28 proposed strategies for reducing the dams' contributions to temperature increases in the two rivers." Dkt. # 31 at 22–23. But these proposed strategies were already identified in 2003 when EPA quit working on the TMDL. *See* 2003 Water Quality Plan, Appendix E (Matrix of 28 temperature strategies).[4] Moreover, EPA expected the proposed strategies to be pursued once the TMDL was in place as part of the TMDL implementation. *See* Dkt. 27-26 (EPA comments on 2007 Water Quality Plan) at 2. The Water Quality Plans, thus, were not a suitable interim measure that justified pivoting away from the TMDL in 2003. And even if they were, EPA stopped assisting with the Water Quality Plans by 2009; yet neither EPA nor the States resumed work on the temperature TMDL then.

Thus, neither the UAA nor the water quality planning processes justify the States' and EPA's pivot away from the TMDL at the end of 2003, much less the 14 years of inaction that followed. In *Sierra Club*, Judge Rothstein explained that a "reasonable interim measure" "may,

[4] Available at http://pweb.crohms.org/tmt/wq/studies/wq_plan/wq200304.pdf.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

under some circumstances" justify pivoting away from a TMDL when a state "could not confidently issue a TMDL at any point in the near future." 2015 WL 1188522 at *8 (emphasis added). Unlike in *Sierra Club*, EPA's and the States' last-minute pivot away from the temperature TMDL here was without "sufficient reason" and supports finding a constructive submission. EPA's pivot was not driven by a lack of scientific confidence. EPA had sufficient information and planned to complete the TMDL within months, and now—14 years later—is well beyond the "near future."

D. *OVEC* Supports Finding A Constructive Submission.

Unlike *Sierra Club*, the *OVEC* court found a constructive submission. In *OVEC*, West Virginia informed EPA that the state would not issue TMDLs for waters suffering from "biological impairment" for the time being but would issue them later (after the state developed a new methodology to determine which waters experienced biological impairment). *OVEC I*, 2017 WL 600102 at *11. Plaintiff filed suit against EPA, arguing West Virginia made a constructive submission of the biological impairment TMDLs. *Id.* at *1. EPA argued no constructive submission occurred because West Virginia had only paused its TMDL work and still planned to issue biological impairment TMDLs. The court found a constructive submission based on the state's failure to move forward using available scientific information, and the state's decision to suspend work on the TMDLs without a "concrete plan" or "credible schedule" in place, even though West Virginia indicated it intended to issue the TMDLs eventually. *See id.* at *11–13. The court explained:

> All of WVDEP's plodding and EPA's appeasement have resulted in an abjuration of WVDEP's and EPA's duties committed to each by the CWA. WVDEP has publically stated that it will not develop TMDLs for biological impairment and has continued to move the goalposts for when it will begin developing them once again. Consequently, WVDEP has constructively submitted no TMDLs for biological impairment to EPA, triggering EPA's duty to approve or disapproved of the submission.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Id. at *11 (emphases added).

The *OVEC* court rejected EPA's argument that no construction submission occurred because West Virginia only postponed or reprioritized the TMDLs for biological impairment and had not unequivocally refused to ever issue them in the future. *Id.* at *11. Even though West Virginia used the terms "pause," "defer," and "suspend" when discussing the TMDLs, and even though West Virginia's 303(d) list had dates for developing the TMDLs, the court still found a constructive submission. *Id.* The court distinguished situations where states "at the very least have a concrete plan to comply with their duties." *Id.* at *12. A constructive submission occurred because: "WVDEP has not produced biological impairment TMDLs since 2012, stated that it cannot produce them, and has not proposed a credible schedule for producing them." *Id.* at *13.[5]

Similarly here, when EPA suspended work on the TMDL, neither EPA nor the States have had a concrete plan or credible schedule. In fact, there has been no schedule or plan for the last at least 14 years. In *OVEC*, West Virginia at least had "moving goalposts" for when it intended to resume work on the TMDLs; whereas here, there has been no goalpost for 14 years.

There is still no goalpost. EPA's recent efforts to discuss the temperature TMDL with the States do not erase the constructive submission. After this litigation was well underway, EPA asked the States to discuss potential plans for resuming efforts related to the TMDL. *See* Dkt. # 18-1 (Aug. 2017 EPA Letter). Far from establishing a concrete plan or credible schedule, EPA's letter is simply an initial request to begin discussions, which proposes "several years" of more delay while EPA explores an alternative (UAAs), even though the States already rejected this idea years ago. *See supra* II.C. And the response to EPA's letter has been lukewarm at best:

[5] This is in accord with *San Francisco BayKeeper,* which found that California's schedule for submitting delinquent TMDLs defeated a constructive submission claim. *See* 297 F.3d at 883. *See also Idaho Sportsmen's Coal. v. Browner*, 951 F.Supp. 962, 967-68 (W.D. Wash. 1996) (finding constructive submission inapplicable because Idaho had submitted three of the missing TMDLs and proposed a schedule for completing the rest).

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Washington expressed reluctance to re-engage on the temperature TMDL until EPA explains its decision to suspend work in 2003. Dkt. # 32-8 (WA Letter to EPA). Thus, instead of adopting a credible plan or concrete schedule to issue the TMDL, EPA only proposes several years of further delay.

In summary, the facts show a constructive submission of "no TMDL" by the States stretching back to 2000 and continuing to this date. Accordingly, the Court should find a constructive submission and enter summary judgment for Riverkeeper on its Clean Water Act claim, enforcing EPA's duty to issue the temperature TMDL.

III. THE APA ALSO GIVES THE COURT AUTHORITY TO COMPEL THE LONG-OVERDUE TMDL.

If the Court finds a constructive submission and orders EPA to complete the TMDL under the agency's Clean Water Act duties, then it need not reach Riverkeeper's second claim for relief under the APA, 5 U.S.C. § 706(1). However, if the Court were to agree with EPA and find no constructive submission, then Riverkeeper has no adequate remedy under the Clean Water Act—which EPA notes is a prerequisite for an APA claim, *see* Dkt. # 31 (EPA Br.) at 50, n.41—and APA § 706(1) authorizes the Court to compel this long-overdue action that EPA promised to complete.

APA § 706(1) authorizes courts to compel agency action that has been unlawfully withheld or unreasonably delayed. As the U.S. Supreme Court set forth in *SUWA*, for a § 706(1) claim to proceed, the agency action to be compelled must be a (1) discrete agency action that (2) the agency is required to take. *See* 542 U.S. at 64. If these requirements are met, the Court considers whether the agency's delay in completing the action has been unreasonable using the *TRAC* factors as a guide, as explained in Riverkeeper's opening brief. *See* Dkt. # 19 at 13.

EPA does not dispute that issuing a TMDL is a discrete agency action, satisfying the first

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

prong of *SUWA*. Nor does EPA argue its delay is somehow reasonable under the *TRAC* factors, which it is not. EPA also does not contest Riverkeeper's showing that EPA's continuing delay has had, and will continue to have, severe impacts on the Columbia and lower Snake Rivers, their imperiled salmon and steelhead, and people throughout the Pacific Northwest and beyond that deeply care about, and depend upon, those iconic fish.

Instead, EPA's only argument is that issuing the TMDL is not a required action under the second prong of *SUWA*. *See* Dkt. # 31 (EPA Br.) at 50–56. That argument is wrong. If the Court's finds no constructive, then it should find in Riverkeeper's favor under the APA, end EPA's foot-dragging, and order the agency to honor its commitment to issue the TMDL.

A. EPA's Commitment To Issue The TMDL Is Enforceable Under The APA.

In a footnote, EPA cites to *San Francisco BayKeeper* to note that Riverkeeper cannot rely on Clean Water Act Section 303(d) as creating a duty to act to support the APA claim. *See* Dkt. # 31 (EPA Br.) at 50, n.41. But that is not Riverkeeper's argument. EPA's APA duty to act here is based on EPA accepting the responsibility to develop and issue the temperature TMDL through its agreements with the States. In *San Francisco BayKeeper*, the plaintiff simply argued that the APA could be used to enforce Section 303(d), even if California had not made a constructive submission, without pointing to any actions or statements by EPA assuming the state's duty to issue the TMDLs. *See* 297 F.3d at 885. Here, by contrast, Riverkeeper has shown that EPA accepted the States' duties to issue the temperature TMDL for the Columbia and lower Snake Rivers based on EPA's express commitments to do so in the 2000 MOA, Draft TMDL, and other documents. Thus, if the Court does not find a constructive submission under Riverkeeper's Clean Water Act claim, it can still find required action and unreasonable delay under APA § 706(1).

In *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), the Ninth Circuit recognized that an agency can create required action under *SUWA* by making a "binding

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

commitment" to take an action pursuant to its statutory authority, such as through the agency's own policies and plans. *Shinseki* explained:

> As the [*SUWA*] Court recognized . . . agencies may be required to take actions not only by Congress, but also by themselves. Agency action "demanded by law . . . includes, of course, agency regulations that have the force of law." [*SUWA*, 542 U.S. at 65]. Even a less formal agency "plan" may "itself create[] a commitment binding on the agency," if there is "clear indication of binding commitment in the terms of the plan." [*Id.* at 69]. Thus we have held that "agencies may be required to abide by certain internal policies," such as their own "internal procedures." *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004)

Id. at 870. The *Shinseki* decision was overturned on other grounds upon rehearing *en banc*, *see* 678 F.3d 1013 (9th Cir. 2012), but this analysis remains valid. Indeed, in *Alcaraz* (cited in the quote from *Shinseki* above), the Ninth Circuit held that, even though the Attorney General had discretionary, not mandatory, authority under statute to "repaper" eligible aliens (to allow them to reapply for cancellation of deportation orders), the BIA may nevertheless be obligated to "repaper" the Alcarazes based on the agency's internal policy and practice. 384 F.3d at 1162. The Ninth Circuit in *Alcaraz* remanded for the district court to consider "whether various memoranda issued by the agency are sufficient to establish a policy to which the agency was bound." *Id.*

As discussed below, district courts have also concluded that agencies can bind themselves, in ways enforceable under APA § 706(1), through agency plans and other documents, statements, and actions—even when neither statute nor regulation explicitly requires the action. *See Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241 (E.D. Cal. 2006); *Otter Project v. Salazar*, 712 F.Supp.2d 999 (N.D. Cal. 2010); *Friends of Animals v. Sparks*, 200 F.Supp.3d 1114 (D. Mont. 2016); *Biodiversity Legal Foundation v. Norton*, 285 F.Supp.2d 1 (D.D.C. 2003).

EPA points to an isolated statement in *Vietnam Veterans of America v. CIA*, 811 F.3d

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

1068 (9th Cir. 2016) to suggest that only duties commanded by statute or regulation can give rise to an enforceable duty to act under APA § 706(1). Dkt. # 31 (EPA Br.) at 51. EPA quoted part of the following sentence from *Vietnam Veterans*: "We recognize that the operation of § 706(1) is restricted to discrete actions that are unequivocally compelled by statute or regulation." 811 F.3d at 1081. But in *Vietnam Veterans*, the plaintiffs argued that a regulation (not anything else) was the source of the Army's duty to act, and the Ninth Circuit interpreted the regulation as providing an unequivocal command for the Army to act. *See id.* at 1076 ("Plaintiffs argue that [the regulation] unequivocally commands the Army to provide former test subjects with current information about their health, and to provide medical care for harm and diseases caused by the experiments. We agree."). The *Vietnam Veterans* opinion thus never addressed whether something other than a statutory or regulatory command, such as an agency plan, policy, or document, can create a binding duty to act. And the *Vietnam Veterans* court never discussed *Shinseki*, *Alcaraz*, or any other cases that found agencies can bind themselves through agency plans, policies, or other documents in which the agency adopts specific commitments.

B. EPA's Agreement To Issue The Temperature TMDL Is A Binding Commitment.

Under *Shinseki*, *Alcaraz*, and the other cases above, EPA assumed the obligation to prepare and issue the temperature TMDL for the Columbia and lower Snake Rivers, and the Court may properly enforce that obligation now under the APA.

Again, acting pursuant to its Clean Water Act responsibilities and authorities, EPA entered into the 2000 MOA, which provides "EPA will produce [a] TMDL for temperature for the Snake/Columbia Mainstem." Dkt. # 27-15 at 7. EPA then proceeded to do just that, taking the lead on temperature modeling and drafting the TMDL. *See* Dkt. # 27-22 (Draft TMDL).

In fall 2001, Washington and Oregon each wrote to EPA, asking EPA to prepare and "issue" the TMDL. Dkt. # 27-18 (WA letter to EPA); Dkt. # 27-20 (OR letter to EPA). These

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

requests were made pursuant to earlier MOAs each state entered into with EPA regarding their statewide TMDL programs, which allow EPA to issue TMDLs at the States' requests. *See* Dkt. # 31 (EPA Br.) at 53; Dkt. # 32-9 (WA MOA) at 17; Dkt. # 32-10 (OR MOA) at 12.

EPA agreed to the States' requests. In January 2002, EPA wrote to the Columbia River Inter-Tribal Fish Commission to provide a status report and "describe EPA's role in this TMDL effort." Dkt. # 27-21 at 2. EPA described its role in no uncertain terms: "at the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Lower Snake River Mainstem in Oregon and Washington." *Id.* (emphasis added). In March 2003, EPA repeated this commitment in its strategy document for tribal coordination regarding the TMDL, stating: "At the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington." Dkt. 27-24 at 2 (emphasis added).

Moving forward with its commitment, EPA completed the temperature modeling (*see* Dkt. # 32-2) and continued working on the TMDL through releasing the July 2003 Draft TMDL. EPA's Draft TMDL was also clear in reaffirming EPA's commitment to issue the TMDL, stating: "After considering public comments and making changes to the proposed TMDL as appropriate, EPA will issue a Final Columbia/Snake Mainstem Temperature TMDL." Dkt. # 27-22 at 7 (emphasis added). Confirming that EPA made this commitment pursuant to its Clean Water Act responsibilities and authorities, the Draft TMDL provided: "EPA's exercise of authority to establish TMDLs in response to a state's request is consistent with the larger purpose of section 303(d)(2)—to ensure the timely establishment of TMDLs." Dkt. # 27-22 at 27.

Through these documents and actions, EPA made the kind of binding commitment that is "required action" enforceable under APA § 706(1). In *Shinseki*, after first determining that

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

agency plans and agency policies and procedures can create required action under *SUWA*, the Ninth Circuit considered whether two agency documents created such an obligation. 644 F.3d at 870. The court found neither document created a binding commitment. *Id.* One document (the Mental Health Strategic Plan) included only "recommendations" and "[n]owhere did the agency commit to binding itself, and we do not find any implied intent to do so." *Id.* The other document (a memorandum) was "an internal administrative communication that lacks the force of law," because it was "merely a charge from a supervisor to his subordinates" and was not like "an internal rule that is officially published within an agency and binding on its employees." *Id.*

Unlike the internal memorandum or the recommendations in the health plan in *Shinseki*, EPA's documents here create a binding commitment. The 1997 MOAs and the 2000 MOA that EPA entered into with the States are formal agreements through which EPA promised to produce and issue the TMDL. EPA acquiesced to the States' letter requests in 2001 to issue the TMDL pursuant to the 1997 MOAs. EPA further demonstrated its commitment by spending years preparing the Draft TMDL, and consistently representing to the States and others that EPA would issue the TMDL, including in the Draft TMDL: "EPA will issue a Final Columbia/Snake Mainstem Temperature TMDL." Dkt. # 27-22 at 7.

There is no doubt that EPA committed to issue the temperature TMDL and that the States and public relied on EPA's commitment. The Court should therefore find EPA made a binding commitment and should grant Rivekeeper's APA claim for unreasonable delay.

C. EPA Misconstrues The Cases Supporting Riverkeeper's APA Argument.

Riverkeeper's opening brief cited four district court cases all finding that an agency can make a binding commitment through its documents, actions, and statements. EPA's attempts to downplay and distinguish these cases are unavailing. *See* Dkt. # 31 (EPA Br.) at 50–56. Each case supports Riverkeeper's argument that EPA's statements and actions agreeing to complete

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

and issue the TMDL give rise to a legally enforceable duty to issue the TMDL under APA § 706(1).

1. *Biodiversity Legal Foundation* Supports Finding An Enforceable Duty.

In *Biodiversity Legal Foundation v. Norton*, 285 F.Supp.2d 1 (D.D.C. 2003), plaintiffs alleged FWS committed unreasonable delay under APA § 706(1) by failing to revise a critical habitat designation for the endangered Cape Sable seaside sparrow. *Id.* at 2. The court found an enforceable duty under APA § 706(1) based on language in an FWS planning document and ordered FWS within 60 days to provide a start date and estimated timeline for revising the critical habitat designation. *Id.* at 2–3.

EPA misreads *Biodiversity Legal Foundation* and asserts the agency action at issue was preparation of a recovery plan which was "required by law." Dkt. # 31 (EPA Br.) at 55 (citing 16 U.S.C. § 1533(f)(1), which provides FWS "shall develop and implement [recovery] plans"). In reality, the agency action at issue in *Biodiversity Legal Foundation* was a revision to a critical habitat designation—not a recovery plan. 285 F.Supp.2d at 2. Unlike the statutory duty to issue a recovery plan under the Endangered Species Act, there is no specific duty under the ESA or its implementing regulations to revise a critical habitat designation. *See* 16 U.S.C. §1533(a)(3)(B) (FWS "may, from time-to-time . . ., as appropriate, revise [the critical habitat] designation" (emphasis added)). Whether to revise a critical habitat designation is left to FWS's discretion. Despite this discretion, the court found FWS had a duty to revise the critical habitat designation at issue based on FWS's commitment to do so in agency documents. *See* 285 F.Supp.2d at 2 ("The Court finds that the ESA grants FWS discretion as to revising a critical habitat designation, but that the APA requires reasonable timeliness once an obligation to undertake a revision attaches").

Specifically, the court relied on FWS's species recovery plan (the "MSRP"), in which

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

FWS had made a finding that the sparrow's critical habitat designation needed to be revised. *Id.* at 13–14. The court held that, despite FWS's discretion under the ESA, this document "can only be seen as a manifestation of FWS's intention finally to revise the critical habitat designation to help save this bird from its near-certain demise." *Id.* at 14.

Similarly here, while EPA initially had discretion about whether to prepare and issue the TMDL, EPA's agreements and behavior accepted the obligation to issue the TMDL, enforceable now under the APA. Finding an action was necessary and expressing an intent to take that action gave rise to an enforceable duty to act in *Biodiversity Legal Foundation*. In the 2000 MOA and 2003 Draft TMDL (and elsewhere), EPA made findings that the TMDL was necessary and explicitly stated it would issue the TMDL. EPA's intent is even clearer than FWS's was, as EPA took substantial steps over three years toward completing the TMDL, including drafting and releasing the Draft TMDL and creating Work Plans and other timelines calling for the TMDL to be complete within months. *See* Dkt. # 27-22 (Draft TMDL); Dkt. # 27-17 (Work Plan).

2. *Soda Mountain* Supports Finding An Enforceable Duty

In *Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241 (E.D. Cal. 2006), the court found the Bureau of Land Management (BLM) made a sufficiently binding commitment in a land use plan to support a § 706(1) claim under *SUWA*. The court first found plaintiffs sought relief under § 706(2)(A), not § 706(1), so *SUWA* did not apply. *Id.* at 1259–60. But the court went on to hold that if *SUWA* applied, then BLM made a binding commitment based on the following language in the agency's land use plan:

> The public impressed upon BLM the desire to consolidate public lands in areas with outstanding recreational opportunities and unusual or imperiled biological resources. Conversely, existing public lands with limited recreational potential and/or commonplace natural resources were identified for disposal. This document represents BLM's commitment to these public desires and constitutes a compact with the public.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Id. at 1260. The court stated: "If this language does not, despite its plain terms, constitute a commitment, then no language would suffice." *Id.* The court added: "It seems clear that the agency went out of its way to make clear it was committing to a certain process, and withdrawing from that 'compact with the public' would appear to subject the agency to suit under § 706(1)." *Id.*

EPA distinguishes *Soda Mountain* simply on the basis that EPA here has not specifically stated it was making a "compact with the public." Dkt. 31 (EPA Br.) at 52, n.43. This ignores the facts showing that EPA "went out of its way to make clear it was committing to a certain process"—to produce and issue the TMDL. EPA entered into the MOA in 2000, acquiesced to the States' requests in 2001, and worked on the TMDL for years, all the while representing to the States and the public that it would issue the TMDL. EPA released the Draft TMDL in 2003, which stated "EPA will issue" the TMDL and expected to do so a few months. By failing to live up to this commitment for 14 years now, EPA subjected itself to an unreasonable delay claim.

3. *Otter Project* Supports Finding An Enforceable Duty.

Otter Project v. Salazar, 712 F.Supp.2d 999 (N.D. Cal. 2010) is another case finding required action. EPA argues that because the duty to act was rooted in FWS regulations, the decision does not help Riverkeeper. *See* Dkt. # 31 (EPA Br.) at 54–55. However, *Otter Project* is not so limited.

In *Otter Project*, plaintiffs alleged that FWS violated the APA by refusing to make a "failure determination" (a determination as to whether a sea otter translocation program had failed) after FWS publicly stated it would complete the failure determination and after FWS engaged in drafting the failure determination. *Id.* at 1000. While the *Otter Project* court found FWS's duty to act was rooted in the agency's regulations, the court made that finding by looking beyond the regulations and considering FWS's actions and public statements. *See id.* at 1005–06.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

The court explained that FWS's actions and statements—even without the underlying regulations—may have been enough to create required action under *SUWA*:

> FWS drafted several failure determinations between the enactment of the regulation in 1987 and the present. Although for reasons as yet unexplained, FWS never completed any of its failure determination drafts, the Court finds that the act of engaging in the drafting process itself demonstrates FWS's own understanding that it was under a duty to make a failure determination. Moreover, on numerous occasions, FWS made public statements indicating its intent to complete the failure determination, which themselves may constitute commitments binding the agency to take further action.

Id. at 1006 (citations and footnote omitted) (emphases added).[6]

Much like FWS in *Otter Project*, EPA publicly stated here that it intended to complete and issue the TMDL, and EPA drafted the TMDL. These statements and actions are sufficient to demonstrate EPA's commitment and subject EPA to an unreasonable delay claim.

4. *Friends of Animals* Supports Finding An Enforceable Duty

In *Friends of Animals v. Sparks*, 200 F.Supp.3d 1114 (D. Mont. 2016), the court considered whether a BLM statement created required action under *SUWA* to recalculate the "appropriate management level" (or AML) for wild horse populations on public land. BLM had stated "the AML will be re-calculated within five years or after the revision to the Billings [Resource Management Plan] whichever comes first." *Id.* at 1120. BLM argued this was merely a goal, not a binding commitment. *Id.* at 1124–25. The court rejected BLM's argument on multiple grounds.

EPA tries to distinguish this case based on the court's finding that the BLM's statement

[6] FWS's public statements were: (1) statements in a 1995 draft evaluation that "a decision regarding success or failure of the program was anticipated in the next year," (2) statements at a 1998 public hearing that the "process of evaluating failure criteria would be commenced," (3) statements in a 2001 draft policy that "including evaluation of the failure criteria developed for the program" would be completed by December 2002, and (4) statements made in prior litigation that "FWS expects to make a decision to continue, modify, or terminate the program by 2002." *Id.* at 1005 n.9.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

was made in a binding Record of Decision (ROD). *See* Dkt. # 31 (EPA Br.) at 55. However, the *Friends of Animals* court went on to find that even if BLM had made this statement in a non-binding land use plan (instead of in the binding ROD), the statement would still have created required action under *SUWA*. *Id.* at 1125 ("If this language does not constitute a commitment, then no language would suffice."). Similar to the *Soda Mountain* court, the *Friends of Animals* court concluded: "It seems clear that BLM went out of its way to make clear it was committing to a certain process," and "[w]ithdrawing from that commitment seems to violate § 706(1) under *SUWA*." *Id.*

Here, EPA used the same kind of language. The Draft TMDL clearly states "EPA will issue" the TMDL. Dkt. # 27-22 at 7. This commitment language in the Draft TMDL and similar EPA language in other public documents, taken together with EPA's MOAs with the States for TMDL development, is a binding commitment like that in *Friends of Animals*.

In summary, if the Court rejects Riverkeeper's constructive submission claim under the Clean Water Act, EPA remains liable for unreasonable delay under APA § 706(1), and the Court should grant summary judgment for Riverkeeper on the second claim for relief and compel EPA to honor its commitment to issue the temperature TMDL.

IV. THE PROPER REMEDY IS TO ORDER EPA TO ISSUE THE TMDL WITHIN ONE YEAR.

Riverkeeper's opening brief asked the Court, upon finding a Clean Water Act constructive submission or APA unreasonable delay, to order EPA to issue the TMDL by date certain, and specifically within one year. Dkt. # 19 at 20–24. Riverkeeper cited multiple cases ordering agencies, including EPA, to take action by a date certain, within years and even months. *Id.* Riverkeeper also showed how the short time frames in the Clean Water Act, and the plight of salmon and steelhead facing warm water temperatures, call for swift action. *Id.* And Riverkeeper

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

explained that EPA has already done substantial work on the TMDL and can complete it within a year. *Id.* EPA does not contest that one year is an appropriate deadline;[7] rather, EPA's only remedy argument is that the Court lacks authority to order EPA to issue the TMDL upon finding a constructive submission. *See* Dkt. # 31 at 47–50.

According to EPA, the Court's sole remedial power is to find there was a constructive submission of "no TMDL" by the States and then to order EPA to decide whether to approve or disapprove the submission. *Id.* This is wrong as a matter of law and is just another delay tactic. As set forth below, the proper remedy upon finding a Clean Water Act constructive submission or APA unreasonable delay is to order EPA to issue the TMDL within one year as Riverkeeper has requested.

First, EPA's remedy argument does not apply to Riverkeeper's APA unreasonable delay claim. In fact, EPA does not even make an APA remedy argument and limits its argument to what remedy the Court should order upon finding a constructive submission. *See* Dkt. # 31 (EPA Br.) at 47–50. The APA explicitly authorizes the courts to "compel action" that has been "unreasonably delayed." 5 U.S.C. § 706(1). Riverkeeper's APA claim is that EPA has unreasonably delayed issuing the TMDL, based on EPA's commitment to do so through the MOA and other documents, actions, and statements. Therefore, upon finding unreasonable delay, the Court should order EPA to issue the TMDL within a time certain, short enough to ensure that EPA completes the process and satisfies its obligation to finalize the Draft TMDL. *See In re Pesticide Action Network*, 798 F.3d 809, 813–14 (finding EPA's 8-year delay unreasonable and ordering EPA to act in less than 3 months).

[7] EPA had 48 pages in its opening/response brief, but did not contest these points. EPA, therefore, waived its opportunity to do so in its reply brief.

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Turning to the Clean Water Act constructive submission claim, this Court also has broad authority to order EPA to issue the temperature TMDL within a specific—and prompt—timeframe, as the prior Alaska TMDL litigation confirms. In *ACE I*, this Court found that Alaska constructively submitted 303(d) lists and TMDLs, and ordered EPA "to initiate its own process of promulgating TMDLs, including any and all necessary steps." 762 F.Supp. at 1429. Over EPA's objections that such remedies "lie[] outside the court's jurisdiction," the Court supplemented its *ACE I* opinion with a mandatory injunction directing how EPA would prepare 303(d) lists and TMDLs throughout Alaska. *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1377, 1381–82 (W.D. Wash. 1992) (*ACE II*). EPA appealed, arguing that the Court's injunction "exceeded its remedial powers" under the Clean Water Act's citizen suit provision, but the Ninth Circuit flatly rejected that argument. *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986–87 (9th Cir. 1994) (*ACE III*).

In upholding the injunctions in *ACE I* and *ACE II*, the Ninth Circuit observed that a "district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Id.* at 986, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The Ninth Circuit concluded by explaining that:

> In enacting environmental legislation, and providing for citizen suits to enforce its directives, Congress . . . [lacks] clairvoyance to foresee the precise nature of agency dereliction of duties that Congress prescribes. When such dereliction occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy.

ACE III, 20 F.3d at 987. The Ninth Circuit's *ACE III* holding confirms that this Court has the authority to order EPA to issue the temperature TMDL within the requested time limit of one year.

In *City of Arcadia v. U.S. EPA*, 411 F.3d 1103 (9th Cir. 2005), the Ninth Circuit reiterated this position: "The EPA is also under a mandatory duty to establish a TMDL when a

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

State fails over a long period of time to submit a TMDL; this 'prolonged' failure can amount to the 'constructive submission' of an inadequate TMDL, thus triggering the EPA's duty to issue its own." *Id.* at 1105–06 (quoting *San Francisco BayKeeper* at 880–84).

Other courts have recognized that *ACE III* affirms district courts' broad remedial authority to set deadlines to compel EPA to take action when it breaches its CWA duties. *See, e.g., Defenders of Wildlife v. Browner*, 888 F.Supp. 1005, 1008 n.7 (D. Ariz. 1995) ("[*ACE III*] rejected EPA's argument that the statute relegates the pace at which TMDLs are to be established entirely to the EPA's discretion and affirmed the district court"); *San Francisco BayKeeper v. Browner*, 147 F. Supp. 2d 991, 999 (N.D. Cal. 2001) ("Under the *ACE* decisions, it is established law in this circuit that the EPA has a duty to act if a state does nothing . . . and in such a circumstance a district court can compel the EPA to perform its duties under subsection 303(d)(2)" (emphasis in original)).

Other courts too have ordered EPA to issue TMDLs as a result of constructive submissions. For instance, the court in *Sierra Club v. Hankinson* ordered EPA to, among other things, "establish TMDLs for all Water Quality Limited Segments ("WQLSs") identified in Georgia's existing and future [303(d)] lists." 939 F.Supp. 872, 873 (N.D. Ga. 1996). And in past constructive submission cases, EPA commonly agreed to consent decrees requiring EPA to produce TMDLs or 303(d) lists within certain timelines. *See*, *e.g.*, *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1339, 1354 (N.D. Cal. 2000) (describing constructive submission suits against EPA that ended in consent decrees requiring EPA to issue TMDLs if states failed); *Am. Canoe Ass'n v. U.S. EPA* (*American Canoe II*), 54 F.Supp.2d 621, 628–29 (E.D. Va. 1999) (EPA entered into a consent decree that clarified when a constructive submission would be deemed to occur and provided subsequent timelines for EPA to issue the TMDLs). *See also Las Virgenes Mun. Water Dist. v. McCarthy*, C 14-01392 SBA, 2016 WL 393166 at *2 (N.D. Cal. Feb. 1,

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

2016) (describing consent decree in constructive submission case where EPA was required to either approve state-submitted TMDLs by specified date or else EPA had to establish TMDLs itself within one year); *Am. Farm Bureau Fed'n v. U.S. EPA*, 984 F.Supp.2d 289, 305–07 (M.D. Pa. 2013) (describing numerous consent decrees that EPA entered into as a result of constructive submission litigation requiring EPA to produce TMDLs in the Chesapeake Bay watershed). This Court would hardly be alone in ordering EPA to issue a TMDL following a constructive submission.

Even if *ACE III* did not control, the three cases that EPA cites—*American Canoe Association v. U.S. EPA*, 30 F.Supp.2d 908, 922 & n.17 (E.D. Va. 1998) (*American Canoe I*); *OVEC*, 2017 WL 600102, at *18; and *Scott*, 741 F.2d at 997—should not be read to suggest that Riverkeeper's relief is unavailable as a matter of law. *See* Dkt. # 31 at 47. Because the *Scott* court reasoned that the states' failure to submit TMDLs raised "the possibility that the states have determined that TMDL's for Lake Michigan are unnecessary," the court gave EPA the opportunity to assess the validity of the states' inaction. *Scott*, 741 F.2d at 997 (emphasis added). This case is easily distinguishable from *Scott* because Oregon and Washington, and EPA, acknowledge that the temperature TMDL is necessary. *See*, *e.g.*, Dkt. # 27-15 (MOA). Second, the *Scott* decision contains no suggestion that that remedy was, as EPA contends, the outer limit of the court's remedial authority under the Clean Water Act's citizen suit provision. *Cf. Scott*, 741 F.2d at 998 ("the CWA should be liberally construed to achieve its objectives—in this case to impose a duty on the EPA to establish TMDL's when the states have defaulted by refusal to act over a long period."). With respect to *American Canoe I*, EPA's argument is based on out-of-context language in a single footnote. *American Canoe I* actually held that an "appropriate remedy" for a constructive submission would be an "order directing EPA to approve or disapprove Virginia's constructive submission within 30 days and, if the submission is

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

disapproved, to proceed to promulgate" TMDLs. *American Canoe I*, 30 F. Supp. 2d at 922 (emphasis added). Finally, the *OVEC* court's remedy decision is, especially under Riverkeeper's facts, a pointlessly technical reading of Clean Water Act Section 303(d)(2) that no court in the Ninth Circuit has ever adopted.

Riverkeeper's requested remedy would not intrude on EPA's discretion. Although *ACE III* settled the issue, EPA contends that the relief Riverkeeper seeks is beyond this Court's authority because it would somehow deprive EPA of its "discretion" to implement the Clean Water Act. *See* Dkt. # 31, pp. 48–49. The "discretion" EPA refers to is whether to approve or disapprove the submittal of "no TMDL." Since 1998, the Columbia and lower Snake Rivers have been listed as impaired waterbodies that, due to excess heat, require a temperature TMDL. Dkt. # 27-22 (Draft TMDL) at 25. There is no basis upon which EPA could approve no TMDL. EPA's implication that it deserves discretion to consider approving an illegal non-TMDL is misguided and disingenuous. *Cf. American Canoe I*, 30 F. Supp. at 922 ("EPA's contention that plaintiffs must petition it to fulfill a duty in which it has been derelict for almost twenty years is disingenuous").

Furthermore, EPA's remedy would only waste time and judicial resources. Simply ordering EPA to review the States' non-existent temperature TMDL submissions would likely result in months, or years, of delay and litigation, all leading back to where this case currently stands—where EPA has a duty to issue the TMDL. If EPA were given the chance to review "no TMDL," the only legal path forward is for EPA to disapprove within 30 days and issue a substitute TMDL within the 30 days required under the Clean Water Act, 33 U.S.C. § 1313(d)(2). However, based on EPA's track record and its August 2017 letter inviting further delay, it is unlikely EPA would take such prompt action and would instead try to further delay critical work on temperature in the Columbia and Snake Rivers. While EPA might prefer to hit

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

the snooze button again on the TMDL process with another round of litigation, this Court's authority is much broader than EPA suggests.

Finally, EPA's remedy argument would needlessly subvert the intent of the Clean Water Act and the purpose of the constructive submission doctrine: to see TMDLs established promptly. *See Scott*, 741 F.2d at 998 ("We cannot allow the states' refusal to act to defeat the intent of Congress that TMDL's be established promptly—in accordance with the timetable provided in the statute.").

Far from being prompt, EPA and the States have already gotten away with 19 years of delay and obfuscation. During this time, warm water temperatures in the Columbia Basin have caused fish kills. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F.Supp.3d 861, 914 (D. Or. 2016). And the Basin's threatened and endangered fish species "remain in a precarious state." *Id.* at 879. In 2015, water temperatures in the Columbia and lower Snake Rivers rose to deadly levels and about 250,000 Columbia Basin adult sockeye salmon died while trying to migrate to their spawning grounds. Dkt. 12 at ¶ 3. In response to this "dramatic loss" of sockeye, EPA noted that "[t]he need to lower water temperatures becomes more critical as the Pacific Northwest Region continues to address and mitigate climate change." Dkt. # 27-12 at 2.

The Court should therefore reject EPA's invitation for further delay and order EPA to issue the TMDL promptly, within at most one year.

CONCLUSION

For the foregoing reasons, the Court should grant Riverkeeper's Motion for Summary Judgment, deny EPA's Motion for Summary Judgment, and order EPA to issue the temperature TMLD promptly, within a date certain, and specifically one year.

//

//

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

RESPECTFULLY SUBMITTED this 13th day of December, 2017.

By: /s/ Bryan Hurlbutt
Bryan Hurlbutt (*pro hac vice*) (ISB #8501)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024 x206
bhurlbutt@advocateswest.org

/s/ Miles Johnson
Miles Johnson (WSBA #50741)
COLUMBIA RIVERKEEPER
111 Third St.
Hood River, OR 97031
(541) 490-0487
miles@columbiariverkeeper.org

Richard A. Smith (WSBA # 21788)
SMITH & LOWNEY, PLLC
2317 East John St.
Seattle WA 98112
(206) 860-2883
richard@smithandlowney.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2017, I electronically filed the foregoing Plaintiffs' Combined Response/Reply Brief On Cross Motions For Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Bryan Hurlbutt
bhurlbutt@advocateswest.org

Chloe H. Kolman
chloe.kolman@usdoj.gov

Miles B. Johnson
miles@columbiariverkeeper.org

Richard Adam Smith
richard@smithandlowney.com

Sarah Ann Buckley
sarah.buckley@usdoj.gov

/s/ Bryan Hurlbutt
BRYAN HURLBUTT

ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024