

2. Columbia Riverkeeper v. Wheeler, 944 F.3d 1204 (9th Cir. 2019)

Columbia Riverkeeper, along with other environmental action groups (collectively, Columbia Riverkeeper),¹ brought action against the Environmental Protection Agency (EPA),² claiming the EPA violated the Clean Water Act (CWA)³ by failing to issue a temperature Total Maximum Daily Load (TMDL) for two interstate rivers, the Columbia and the Snake, after Washington and Oregon allegedly made a constructive submission to the EPA by signaling they would not produce a TMDL. The United States District Court for the Western District of Washington granted Columbia Riverkeeper's motion for summary judgment and ordered the EPA to approve or disapprove the constructive submission within thirty days, and upon disapproval, to issue a final TMDL within thirty days.⁴ On appeal, the Ninth Circuit held that Washington and Oregon made constructive submissions of no temperature TMDL, and therefore the EPA violated the CWA by refusing to issue a TMDL.

TMDLs under the CWA come into play when technology-based point-source pollution controls fail to adequately improve polluted waters.⁵ Under the TMDL program, states must identify qualifying "impaired waters" within their borders and rank them in order of priority. A water may be impaired due to a high level of a certain pollutant or because of a certain condition, such as turbidity. The rankings make up what is referred to as the "section 303(d) lists," and once a state develops its list, it must then submit a TMDL to the EPA for approval for each pollutant in each impaired water.⁶ Upon submission, the EPA then has thirty days to either approve or deny the state's TMDL. If approved, the TMDL goes into effect. If disapproved, the EPA must create and issue its own TMDL within thirty days.

Washington and Oregon listed both the Columbia and Snake Rivers on their impaired water lists for temperature due to the serious threat high water temperature pose to the river's native salmon and trout species, many of which are nearing extinction. In the mid-1990s, Washington and Oregon submitted their 303(d) lists but later entered into a memorandum of agreement (MOA) with the EPA, which assigned the EPA the duty of developing and issuing a temperature TMDL for the Columbia and Snake Rivers, because neither state had a functioning TMDL program. The MOA provided that after the EPA issued the TMDL, the states would then implement it. In accordance with the agreement, the EPA published a draft temperature TMDL for the rivers in July 2003. However, due to opposition from other federal agencies, the EPA never issued a final temperature TMDL.

In February 2017, Columbia Riverkeeper and other environmental groups brought suit against the EPA under the CWA's citizen suit provision, arguing that Washington and Oregon's failure to implement a temperature TMDL amounted to a constructive submission of no temperature TMDL, and therefore the EPA had a duty to approve or disapprove the TMDL. The district court accepted Columbia Riverkeeper's argument of constructive submission and granted its motion for summary judgment, ordering the EPA to issue a final TMDL within thirty days. The EPA appealed. The Ninth Circuit reviewed the grant of summary judgment *de novo*.

The Ninth Circuit first held that constructive submission will be found where a state has failed over a long period of time to submit a TMDL and clearly and unambiguously decided not to submit a TMDL, reasoning that this prolonged failure functionally amounts to an inadequate TMDL, thus triggering the EPA's duty to issue its own. The court also found it persuasive that both the Seventh and Tenth Circuits adopted the constructive submission doctrine.⁷

Next, the Ninth Circuit rejected the EPA's argument that EPA's duty to establish a TMDL arises only when a State completely fails to submit any TMDLs for approval, holding, instead, that where a

¹ Plaintiffs included Columbia Riverkeeper, Idaho Rivers United, Snake Riverkeeper, Pacific Coast Federation of Fishermen's Associations, and The Institute for Fisheries Resources.

² Defendants included Andrew Wheeler, in his official capacity as Administrator of the U.S. Environmental Protection Agency, and the U.S. Environmental Protection Agency.

³ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁴ *Columbia Riverkeeper v. Pruitt*, 337 F. Supp. 3d 989 (W.D. Wash. 2018).

⁵ 33 U.S.C. § 1313.

⁶ *Id.* §§ 1313(d)(1)(A), (C).

⁷ *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984); *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001).

state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, the EPA has a mandatory duty to act. The court explained that an interpretation of the TMDL program that provides states and the EPA with the ability to avoid their statutorily mandated obligations would be contrary to both the mechanics and the purpose of the CWA. Additionally, the court reasoned that the expedited timeline provided for in the same subsection supports its holding because an interpretation of the TMDL program that allows the EPA to indefinitely avoid compliance with the requirements of the statute would undermine the expediency that Congress envisioned. The Ninth Circuit also noted that its holding was consistent with precedent in both the Ninth Circuit, as well as other circuits.

Finally, the Ninth Circuit held that Washington and Oregon clearly and unambiguously indicated that they would not produce a TMDL for the Columbia and Snake Rivers and that the EPA violated the CWA by failing to issue its own TMDL. The Ninth Circuit indicated that because Washington and Oregon have both issued more than 1,200 TMDLs, including other TMDLs for the Columbia and Snake Rivers since 2000, the states would have likely already issued Columbia and Snake temperature TMDLs if they ever planned to do so. Additionally, because neither state has a plan to produce or issue TMDLs for either river, the states' continued inaction amounted to a clear refusal to act and a prolonged failure to produce such TMDLs. The court also noted that the states refusal to act was explained by the MOA, which stipulated that the states did not intend to develop temperature TMDLs for the rivers at issue, but instead that it was the duty of EPA to do so.

In sum, the Ninth Circuit established that constructive submission will be found where a state has failed over a long period of time to submit a TMDL and clearly and unambiguously decided not to submit a TMDL, that constructive submission doctrine is applicable even when a state fails to submit TMDL, that Washington and Oregon clearly and unambiguously indicated that they would not produce a TMDL for the Columbia and Snake Rivers, and that the EPA violated the CWA by failing to issue its own TMDL.