

## **Columbia Riverkeeper v. Wheeler—No Temperature TMDL**

### **“Constructive Submission” By Oregon and Washington**

The States of Oregon and Washington have never adopted or submitted to the Environmental Protection Agency a temperature total maximum daily load (TMDL) under the Clean Water Act, 33 U.S.C. §§ 1251 to 1388, for the Columbia and Snake Rivers. Nor has EPA promulgated a temperature TMDL. Several environmental groups sued in 2017, claiming that the States’ inaction constituted a “constructive submission” of no temperature TMDL under § 1313(d)(2) that required the EPA to issue one. The district court agreed. *Columbia Riverkeeper v. Pruitt*, 337 F. Supp. 3d 989 (D. Or. 2018). On appeal, the Ninth Circuit affirmed. *Columbia Riverkeeper v. Wheeler*, No. 18-35982, 2019 WL 6974376 (9th Cir. Dec. 20, 2019).

Under § 1313(d)(2), “[s]tates are required to send the EPA their initial priority ranking of impaired waters and completed TMDLs within 180 days of the agency’s identification of covered pollutants.” EPA must approve or disapprove the TMDLs within 30 days of submission. The CWA is silent on the effect of a State not submitting a TMDL. Oregon and Washington recognized in their CWA priority ranking that portions of the Columbia and Snake Rivers did not meet temperature quality standards, “thus threatening the once-robust salmon and trout populations.” In 2000, EPA and the States entered into a memorandum of agreement under which the agency would produce a temperature TMDL and the States would issue it. EPA, however, failed to develop and issue a final temperature TMDL, while the States “each developed robust TMDL programs” under which they “produced and submitted for EPA approval more than 1,200 TMDLs for other pollutants and other bodies of water.” To date, no temperature TMDL exists for the Rivers.

In affirming the district court, the panel noted § 1313(d)(2)’s silence “as to what duties the EPA has when a state simply fails to submit a TMDL altogether” but recognized that the Ninth Circuit had “adopted the constructive submission doctrine to fill this statutory gap” in *San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002), as had other federal circuits. That precedent “consistently holds that a constructive submission will be found where a state has ‘fail[ed] over a long period of time to submit a TMDL,’ ... and ‘clearly and unambiguously decided not to submit any TMDL[s].’” It rejected EPA’s position “that ‘at most, EPA’s duty to establish a TMDL arises only when a State completely fails to submit any TMDLs for approval’” because “[s]uch a limitation is not supported by either the language and purpose of the CWA or the logic of our case law.” The panel stressed that “the constructive submission doctrine does not prevent a state from prioritizing the development and issuance of a particular TMDL” but, instead,

recognizes a meaningful difference between affording less priority to a particular TMDL and declining to develop and issue that TMDL at all. Where a 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, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA’s mandatory duty to act.

Here, the panel found that “Washington and Oregon have clearly and unambiguously decided not to produce and issue a temperature TMDL for the Columbia and Snake River.” It recounted the parties’ prior conduct concerning development of a temperature TMDL and held that “[t]he states appear to believe that the EPA is the party responsible for the development and issuance of the TMDL” and that their “continued inaction amounts to a clear ‘refusal to act’ and a ‘prolonged failure’ to produce the temperature TMDL.” This constructive submission thus “trigger[red] the

EPA's duty to develop and issue its own TMDL within 30 days, and it has failed to do so. The time has come—the EPA must do so now.”

Ninth Circuit Decision Link: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/20/18-35982.pdf>