

The Honorable Ricardo S. Martinez

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**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' MOTION FOR
SUMMARY JUDGMENT AND
OPENING BRIEF**
(ORAL ARGUMENT REQUESTED)

For Consideration January 27, 2018

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1
2 Plaintiffs Columbia Riverkeeper, *et al.*, hereby move for summary judgment on Claims
3 One and Two of their Complaint (Dkt. # 1), holding Defendants Scott Pruitt and the U.S.
4 Environmental Protection Agency (jointly, "EPA") in violation of the Clean Water Act and/or
5 Administrative Procedure Act, and compelling Defendants to issue a long-overdue temperature
6 "total maximum daily load" ("TMDL") required by the Clean Water Act. The TMDL, essentially
7 a pollution budget for the Columbia and lower Snake Rivers, would address high water
8 temperatures that violate Washington and Oregon's water quality standards, thereby harming
9 threatened and endangered salmon and steelhead.

10 Summary judgment is appropriate under Rule 56 as Plaintiffs' claims involve no genuine
11 dispute of material fact, and Plaintiffs are entitled to judgment as a matter of law. This Motion is
12 supported by Plaintiffs' Opening Brief below and by the accompanying Declarations of Miles
13 Johnson (and attached exhibits), Lauren Goldberg, Kristin Lee, Kevin L. Lewis, James Linwood
14 Laughy, F.S. Buck Ryan, Glen H. Spain, and Joel Kawahara.¹ This Motion is also supported by
15 the pleadings and documents on file with the Court and such other matters as may be brought
16 before the Court prior to the decision.

OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

17
18 Plaintiffs Columbia Riverkeeper, *et al.* ask this Court to end nearly 17 years of delay by
19 ordering EPA to issue a temperature TMDL required under the Clean Water Act ("CWA"), 33
20 U.S.C. § 1313(d)(2). The TMDL would address human-caused warm water temperatures in the

21 _____
22 ¹ Plaintiffs have Article III standing to bring this action. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 168–69
23 (2000); *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–86 (9th Cir. 1994) ("*ACE IIF*"). As detailed in the
24 Declarations, Plaintiffs are non-profit environmental and fisherman organizations located in the Pacific Northwest
and West Coast. Plaintiffs' members care deeply about and depend on Columbia and Snake River salmon and
steelhead and are directly injured by EPA's unlawful refusal to issue the temperature TMDL to address heat-caused
fish kills. A court order compelling EPA to promptly complete the TMDL will help redress those injuries.

1 Columbia and lower Snake Rivers that regularly violate state water quality standards, stressing or
2 killing imperiled salmon and steelhead.

3 In a 2000 Memorandum of Agreement (“MOA”) with Washington and Oregon, EPA
4 committed to produce a temperature TMDL for the mainstem Columbia and lower Snake Rivers
5 in those states. EPA issued a draft of the temperature TMDL in 2003. But instead of finalizing
6 the nearly complete draft, EPA suspended its work on the TMDL. Now—almost 17 years after
7 agreeing to produce the TMDL—EPA still has not issued the TMDL.

8 Meanwhile, temperature problems persist in the Columbia and Snake Rivers, harming
9 imperiled salmon and steelhead and the Pacific Northwest fishing industries, communities, and
10 ecosystems that rely on these fish. Further, EPA expects climate change to worsen water
11 temperature problems. This proved true in the summer of 2015, when the rivers were so warm
12 for so long that around 250,000 adult sockeye salmon died in the Columbia and Snake Rivers
13 while trying to migrate upstream to spawn.

14 EPA’s failure to issue the temperature TMDL violates the CWA. Through the MOA and
15 other actions, Washington and Oregon clearly and unambiguously indicated that they do not plan
16 to issue the temperature TMDL. This constituted a “constructive submission” of “no TMDL”
17 which triggered EPA’s mandatory duty under the CWA, 33 U.S.C. § 1313(d)(2), to swiftly issue
18 the temperature TMDL for the states, and this Court should now order EPA to issue the TMDL.
19 *See Alaska Ctr. for Env’t v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991) (“*ACE P*”
20 (finding Alaska made a constructive submission and ordering EPA to promulgate TMDLs).

21 EPA’s 17-year delay in fulfilling its commitment to issue the temperature TMDL also
22 violates the Administrative Procedure Act (“APA”), which requires agencies to address matters
23 presented to them in a reasonable time, 5 U.S.C. § 555(b), and authorizes judicial relief to
24 compel agency action “unlawfully withheld” or “unreasonably delayed.” 5 U.S.C. § 706(1); *In re*

1 *Pesticide Action Network*, 798 F.3d 809, 813–14 (9th Cir. 2015) (finding EPA’s 8-year delay
2 unreasonable and ordering EPA to act in less than 3 months).

3 To correct these violations, the Court should order EPA to complete and issue the
4 temperature TMDL within—at most—one year. Due to EPA’s delay and inaction, no pollution
5 budget exists to bring the Columbia and lower Snake Rivers into compliance with temperature
6 water quality standards, harming Plaintiffs and pushing imperiled Pacific Northwest salmon and
7 steelhead closer to extinction.

8 THE CLEAN WATER ACT AND TOTAL MAXIMUM DAILY LOADS (TMDLs)

9 In 1972, Congress passed the CWA “to restore and maintain the chemical, physical, and
10 biological integrity of the Nation’s waters” and to attain “water quality which provides for the
11 protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. § 1251(a).

12 TMDLs are essential to effectuating these goals. TMDLs are the CWA’s primary
13 mechanism for fixing polluted waterbodies. *See* 33 U.S.C. §§ 1311, 1313; *San Francisco*
14 *BayKeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002). Under CWA Section 303, states
15 designate “uses” of each waterbody (such as drinking, swimming, or salmon migration) and
16 establish “water quality standards” designed to protect each use from pollution, including excess
17 temperature. 33 U.S.C. § 1313(a)–(c). Each state periodically submits lists to EPA of all
18 waterways in that state that fail to meet water quality standards. 33 U.S.C. § 1313(d)(1). This list
19 is often referred to as a state’s “303(d) list” or list of “impaired waters.”

20 CWA Section 303(d) requires a TMDL for every impaired water. 33 U.S.C. § 1313(d). A
21 TMDL is essentially a pollution budget, restricting each source of pollution to the “level
22 necessary to [meet] the applicable water quality standards with seasonal variations and a margin
23 of safety.” *Id.*, § 1313(d)(1)(C). TMDLs identify the sources of pollution in a waterway,
24 calculate the level of permissible pollution, and allocate daily pollution limits for each source.

1 *See San Francisco Baykeeper*, 297 F.3d at 880.

2 The CWA calls for swift action to create TMDLs. Initially, states were to develop and
3 submit their first TMDLs to EPA within 180 days. 33 U.S.C. § 1313(d)(2). Thereafter, states
4 have been required to submit TMDLs to EPA from “time to time” as the states revise their lists
5 of impaired waters. *Id.* EPA must approve or disapprove each TMDL within 30 days of
6 submission. *Id.* If EPA disapproves a TMDL for not meeting minimum CWA requirements, EPA
7 must issue a substitute TMDL for the state within 30 days. *Id.*

8 The CWA is silent as to what should happen if a state decides not to submit a required
9 TMDL. *San Francisco Baykeeper*, 297 F.3d at 880. To address this oversight, courts developed
10 the “constructive submission” doctrine. *See id.* at 883. This doctrine provides that, if a state
11 decides not to submit a TMDL, EPA and courts proceed as though the state had submitted an
12 invalid TMDL: EPA must fulfill its mandatory CWA duties to disapprove the TMDL and
13 prepare a substitute TMDL. *See id.* As this Court recently confirmed, a constructive submission
14 occurs when a state has “clearly and unambiguously indicated that it will not produce a particular
15 TMDL.” *Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 at *7 (W.D. Wash.
16 Mar. 16, 2015) (“*Sierra Club*”).

17 STATEMENT OF UNDISPUTED MATERIAL FACTS²

18 **I. Protecting Salmon And Steelhead From Warm Temperatures Under The CWA.**

19 Warm water harms salmon and steelhead in a variety of ways. Ex. 7, p. 19. Adult salmon

20 _____
21 ² The following undisputed facts are drawn from EPA and other public documents, as explained in the
22 accompanying Declaration of Miles Johnson. All exhibits cited here are to Exhibits attached to the Johnson
23 Declaration. Because Plaintiffs’ Claim One arises under the CWA citizen suit provision, and Claim Two alleges
24 unreasonable delay under APA Section 706(1), there is no Administrative Record for the Court to review and
Plaintiffs may properly seek summary judgment based on the materials presented with this motion. *See San
Francisco BayKeeper*, 297 F.3d at 886; *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 560 (9th Cir. 2000)
(review of an unreasonable delay claim “is not limited to the record as it existed at any single point in time, because
there is no final agency action to demarcate the limits of the record”).

1 have difficulty migrating upstream when water temperatures approach 68°F. Ex. 8, p. 34.
2 Salmon migration stops altogether when water temperatures reach 72–73°F. Ex. 8, p. 34; Ex. 3,
3 pp. 14–15. Salmon that have stopped or slowed their migration, and languish for days or weeks
4 in warm water, begin dying from stress and disease. Ex. 14, pp. 22–24; Ex. 3, p. 16.

5 To protect salmon and steelhead migration, Washington and Oregon wrote (and EPA
6 approved) CWA water quality standards proscribing that the daily maximum water temperature
7 in the mainstem Columbia and lower Snake Rivers not exceed 68°F. *See* Ex. 22, pp. 11, 29–31,
8 35.³ In 2003, EPA also developed CWA guidance for temperature water quality standards
9 specifically to protect “the vulnerable coldwater salmonids in the Pacific Northwest.” Ex. 4, p.
10 10. EPA’s guidance cited 68°F as the maximum temperature for salmon and steelhead migration.
11 *Id.* at 30.

12 Because many segments of the Columbia and Snake Rivers frequently exceeded the
13 states’ temperature water quality standard during summer months, in 1998 Washington and
14 Oregon included both rivers on their CWA § 303(d) lists of impaired waters. Ex. 22, pp. 10, 24.
15 Both rivers remain on the states’ 303(d) lists, requiring a TMDL, because the rivers still
16 routinely exceed 68°F. *See, e.g.*, Ex. 28, p. 1.

17 **II. The 2000 MOA And EPA’s Commitment To Issue The TMDL.**

18 On October 16, 2000, EPA, Washington, Oregon, and Idaho entered into a Memorandum
19 of Agreement (“MOA”) regarding the creation of TMDLs for temperature and dissolved gas on
20 the Columbia and lower Snake Rivers. *See* Ex. 15. In the MOA, EPA expressly committed to
21 “produce [a] TMDL for temperature for the Snake/Columbia Mainstem.” *Id.* at 7.

22 On September 4, 2001, Washington wrote EPA to “clarify that our expectation and desire

23 ³ The temperature water quality standards for the Columbia and Snake Rivers in that were in effect in 2003 are
24 displayed in Table S-1 of the Draft TMDL. Ex. 22, p. 11. Oregon’s and Washington’s temperature standards have
been modified since then, but still require that daily maximum temperatures not exceed 68°F. *See* OAR 340-041-
0028(4)(d); WAC 173-201A-200, Table 602.

1 is that EPA both lead the development of and issue the TMDLs for temperature in Washington.”
2 Ex. 18, p. 1 (emphasis in original). On October 4, 2001, Oregon similarly wrote to EPA
3 “requesting that EPA not only develop, but also issue the temperature TMDL in the State of
4 Oregon.” Ex. 20, p. 1.

5 EPA agreed to issue the TMDL and explained that, “at the request of the states of Oregon
6 and Washington, EPA will be doing the technical analysis and issuing the temperature TMDLs
7 for the Columbia/Snake River Mainstem in Oregon and Washington”. *See* Ex. 21, p. 1.

8 On February 12, 2003, Washington and Oregon jointly wrote to the U.S. Council on
9 Environmental Quality confirming the states’ continued expectation that EPA would issue the
10 temperature TMDL. *See* Ex. 23, p. 1. In March 2003, EPA reaffirmed its commitment to issue
11 the TMDL. *See* Ex. 24, p. 1.

12 **III. EPA’s 2003 Draft Temperature TMDL.**

13 Following the 2000 MOA, EPA started working on the TMDL right away. EPA prepared
14 an April 2001 Work Plan, which included a schedule to complete the TMDL within less than a
15 year and a half. Ex. 17, p. 2. EPA planned to issue a draft TMDL for public comment in
16 February 2002 and the final TMDL in July or August 2002. *Id.*

17 In July 2003, EPA released a “Preliminary Draft of the Columbia/Snake Rivers
18 Temperature TMDL” (hereinafter “Draft TMDL”). *See* Ex. 22. The Draft TMDL advised that
19 EPA planned to issue an updated draft TMDL within a few months, and “when th[at] draft is
20 released to the public, it will go through a 90 day public comment period. After considering
21 public comments and making changes to the proposed TMDL as appropriate, EPA will issue a
22 Final [] TMDL.” *Id.* at 6.

23 **IV. EPA’s Failure To Complete The TMDL.**

24 After releasing the Draft, EPA suspended its efforts and still has not issued the TMDL.

1 An internal EPA document indicated that EPA “worked extensively on a draft TMDL until late
2 2003” but since then “work has been suspended due to disagreements among federal agencies at
3 national headquarters level.” Ex. 25, p. 1.

4 Despite the lack of meaningful progress over the last 14 years, EPA continues to
5 acknowledge both its commitment to issue the TMDL and the TMDL’s critical importance. In a
6 February 20, 2007, letter to the U.S. Army Corps of Engineers, EPA stated: “EPA has long
7 emphasized the importance of water temperature improvements in [the] Columbia and Snake
8 River system as critical for salmon protection efforts. As you are aware, EPA is responsible for
9 developing the temperature TMDL for the mainstem portions of the Columbia and Snake
10 Rivers.” Ex. 26, p. 1.

11 Spurred by this litigation, EPA recently sent a letter to Washington, Oregon, and Idaho
12 requesting that they “immediately begin discussions designed to enable renewed effort on the
13 Columbia/Snake temperature TMDLs.” Dkt. # 18-1 at p. 1. While EPA states that it remains
14 committed to the MOA, the letter makes clear that EPA does not plan to issue the TMDL any
15 time soon. Instead of updating the nearly completed Draft TMDL—which could be done within
16 months—EPA’s letter proposes spending “several years” trying to weaken the states’
17 temperature water quality standards before EPA returns to work on the TMDL. *Id.* at 5.

18 **V. Temperature Problems Persist, Harming Imperiled Fish.**

19 Since 2000, water temperature problems have persisted and are projected to worsen with
20 climate change. *See* Ex. 5, p. 5. Climate change, and the resulting high water temperatures, “will
21 have a significant negative effect on the listed populations of endangered or threatened species”
22 of fish in the Columbia River basin. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184
23 F.Supp.3d 861, 873 (D. Or. 2016) (“*NWF*”).

24 Indeed, climate change already appears to be harming salmon and steelhead in the

1 Columbia basin. The *NWF* court cited numerous examples of recent fish kills from high water
2 temperatures. *Id.* at 914. In 2015, warm water in the Columbia and Snake Rivers killed about
3 250,000 adult sockeye salmon. Dkt. # 12 at ¶ 3. Nearly all—96 percent—of the endangered
4 Snake River sockeye migrating upstream in 2015 died while still in the mainstem Columbia and
5 lower Snake Rivers. Ex. 9, p. 3. In response to this “dramatic loss” of sockeye, EPA noted that
6 “[t]he need to lower water temperatures becomes more critical as the Pacific Northwest Region
7 continues to address and mitigate climate change.” Ex. 12, p. 1.

8 While the sockeye die-off made headlines in 2015, sockeye are not the only species
9 suffering from warm water. Adult summer Chinook salmon also died at record rates in 2015,
10 coincident with the high water temperatures. Ex. 10, p. 1. Warm water also has a “consistent
11 negative impact” on steelhead migration. Ex. 11, p. 1. As EPA explained in a letter discussing
12 the summer 2015 water temperature crisis, keeping the Columbia and Snake Rivers below 68°F
13 in late June and July is not only important for sockeye, but would also benefit adult summer
14 Chinook and steelhead survival. Ex. 12, p. 2. And because warm water also harms juvenile
15 salmon and steelhead (“smolts”) migrating down the Columbia and Snake Rivers, EPA
16 acknowledged that addressing high temperatures and providing cooler water would benefit
17 juvenile salmon and steelhead migrating during that period. *Id.*

18 This year, Snake River summer steelhead returns were predicted to be among the lowest
19 ever, and the actual numbers of returning steelhead are even lower—to the point that the 2017
20 run has “collapsed.” Laughy Decl., ¶ 22. The Idaho Department of Fish and Game recently took
21 the unprecedented step of prohibiting anglers from keeping any Snake River steelhead in 2017.
22 Ryan Decl., ¶ 11. It is too soon to say what role river temperatures are playing in 2017’s
23 disturbingly low steelhead return. However, the river temperature at Ice Harbor Dam (the
24 furthest-downstream dam on the Snake River) rose above 68°F in early July 2017 and remained

1 well above that level for the entire month.⁴ Warm summer water temperatures are likely making
2 a very bad situation even worse for Snake River steelhead in 2017.

3 Overall, Columbia and Snake River salmon and steelhead runs remain in perilous shape.
4 *See NWF*, 184 F.Supp.3d at 869–72, 876–77, 879–82. Several populations have gone extinct, Ex.
5 2, pp. 7–8, and 13 Columbia and Snake salmon and steelhead stocks are listed as “endangered”
6 or “threatened” under the federal Endangered Species Act. *NWF*, 184 F.Supp.3d at 879. The
7 *NWF* court explained, “[r]ecent data shows that the[se] listed species remain in a precarious
8 state.” *Id.* Sixty-five percent of these remaining populations are at “high risk” of extinction,
9 while only 6.5 percent are considered “viable” or “highly viable.” *Id.* at 879–80.

10 ARGUMENT

11 **I. EPA’s Failure To Issue The TMDL Violates The Clean Water Act.**

12 As explained above, a state makes a TMDL “constructive submission” to EPA under the
13 CWA when the state has “clearly and unambiguously indicated that it will not produce a
14 particular TMDL.” *Sierra Club*, 2015 WL 1188522 at *7. Once a constructive submission
15 occurs, EPA has a mandatory CWA duty to disapprove the constructively submitted TMDL
16 within 30 days and to issue a TMDL within 30 more days; and if EPA fails to take these steps,
17 the courts can order EPA to prepare a TMDL under the CWA. *Id.*; *ACE I*, 762 F. Supp. at 1429.

18 As expressed in the 2000 MOA, and confirmed by the other correspondence recounted
19 above, Washington and Oregon unequivocally informed EPA that they would not issue any
20 temperature TMDL for the Columbia and lower Snake Rivers. Those actions constituted a
21 constructive submission, triggering EPA’s duty to issue a substitute TMDL. But EPA has failed
22 to issue the TMDL, violating the CWA.

23 _____
24 ⁴ *See* University of Washington’s “Columbia River DART” website,
http://www.cbr.washington.edu/dart/wrapper?type=php&fname=rivermg_1503445399_743.php (last visited Aug.
22, 2017).

1 A. Washington And Oregon Made Constructive Submissions.

2 In *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), the Seventh Circuit first held
3 that EPA has a duty to develop TMDLs when states fail to submit required TMDLs. *Scott*
4 involved a CWA citizen suit against the EPA for failure to issue TMDLs for pollutants
5 discharged into Lake Michigan, after Illinois and Indiana failed to submit any TMDLs. *Id.* The
6 court rejected EPA’s argument that Congress did not intend to establish a statutory duty on EPA
7 when a state failed to act, finding it “unlikely that an important aspect of the federal scheme of
8 water pollution could be frustrated by the refusal of states to act.” *Id.* at 997. *Scott* held that a
9 state’s “prolonged failure may amount to the constructive submission by that state of no
10 TMDLs,” triggering EPA’s mandatory duties under CWA § 1313(d)(2). *Id.* at 996.

11 The constructive submission doctrine is followed by the Ninth Circuit. *See, e.g., San*
12 *Francisco Baykeeper*, 297 F.3d at 883 (addressing constructive submission doctrine, but finding
13 it inapplicable on a statewide basis where a state submitted some TMDLs and established a
14 schedule for completing remaining TMDLs); *ACE I*, 762 F. Supp. at 1429 (finding “Alaska has
15 effectively created a ‘constructive submission’ [by submitting] no TMDLs over the past eleven
16 years” and ordering EPA “to initiate its own process of promulgating TMDLs”).

17 In *Sierra Club*, this Court recently reaffirmed that EPA has a non-discretionary CWA
18 duty to act when a state “clearly and unambiguously” indicates it is not producing a particular
19 TMDL, even if the state is producing other TMDLs. 2015 WL 1188522 at *5–*8. Agreeing with
20 *Sierra Club*, other courts have concluded that a constructive submission can occur with respect
21 to a particular TMDL. *See Las Virgenes Municipal Water District v. McCarthy*, No. 3:15-0271,
22 2016 WL 393166, *7 (N.D. Cal. Feb. 1, 2016); *Ohio Valley Environmental Coalition v.*
23 *McCarthy*, No. 3:15-0271, 2017 WL 600102, *15 (S.D.W. Va. Feb. 14, 2017) (“*OVEC*”).

24 This year in *OVEC*, a CWA citizen suit cases against EPA, the court found the state made

1 a constructive submission of specific TMDLs to EPA. 2017 WL 600102 at *18. The court held
2 that West Virginia’s “statements that it will not be producing biological impairment TMDLs and
3 its failure to produce a credible plan to comply with its CWA duties [was] a constructive
4 submission of no biological impairment TMDLs.” *Id.* at *13.

5 Similarly here, the record shows that Washington and Oregon are not producing
6 temperature TMDLs for the Columbia and lower Snake Rivers. By signing the 2000 MOA,
7 which provided that “EPA will produce” the temperature TMDL (Ex. 15, p.7), the states made a
8 constructive submission of “no TMDL”. Confirming this constructive submission, Washington
9 and Oregon each wrote to EPA in fall 2001 to clarify and request that EPA would issue the
10 TMDL, not the states. *See* Exs. 18 & 20.

11 Further confirming this constructive submission, EPA agreed to the states’ requests and
12 took substantial steps from 2001 through 2003 to conduct studies and prepare the Draft TMDL.
13 *See* Ex. 22. EPA’s words and actions from 2000 through 2003 show EPA knew, clearly and
14 unambiguously, that Washington and Oregon did not intend to prepare the temperature TMDL;
15 and EPA accepted the duty to do so itself.

16 B. EPA Failed To Perform Its Mandatory CWA Duty To Issue The TMDL.

17 Washington and Oregon’s constructive submission triggered EPA’s mandatory duty to
18 review the TMDL within 30 days and issue a substitute TMDL within 30 more days. *See* 33
19 U.S.C § 1313(d)(2). EPA has failed to perform these duties. Despite entering into the MOA in
20 2000, and issuing the Draft TMDL in July 2003, EPA has yet to issue a final TMDL.

21 Nothing has changed over the last 14 years since EPA suspended its efforts. The 2000
22 MOA remains in effect. And while the Columbia and lower Snake Rivers remain impaired due to
23 high temperatures, neither Washington nor Oregon are working on temperature TMDLs. In fact,
24 Washington’s and Oregon’s schedules for completing TMDLs do not include temperature

1 TMDLs for the mainstem Columbia and lower Snake. *See* Exs. 27 & 28. Rather, the states
2 continue to represent that they are waiting for EPA to issue the TMDL. *See* Exs. 29 & 30.

3 EPA's recent August 10, 2017 letter (Dkt. # 18-1) only confirms EPA's clear
4 understanding that Washington and Oregon do not intend to produce the TMDL, and that the
5 states are waiting for EPA to do so. While EPA now proposes that the states agree to modify the
6 MOA, even if the states agree to do so—which appears unlikely—this would not affect the
7 constructive submission. EPA's letter does not propose that the states produce the TMDL; rather
8 EPA avers that it “remains interested in pursuing” the MOA's framework. *Id.* at 5. That
9 framework calls for EPA—not the states—to produce the TMDL. Ex. 15, p. 7.

10 Accordingly, a constructive submission has occurred, but EPA has failed to undertake its
11 mandatory duty to issue a temperature TMDL under the CWA, 33 U.S.C. § 1313(d)(2). The
12 Court should thus enter summary judgment for Plaintiffs on their First Claim. *See ACE I*, 762 F.
13 Supp. at 1429; *Sierra Club*, 2015 WL 1188522 at *7.

14 **II. EPA Also Committed Unreasonable Delay In Violation Of The APA.**

15 By failing for 17 years and counting to issue the promised temperature TMDL, EPA also
16 violated the Administrative Procedure Act (“APA”) under Plaintiffs' Second Claim.

17 The APA imposes a duty on federal agencies to complete matters presented to them
18 within a reasonable time, 5 U.S.C. § 555(b), and empowers federal courts to “compel agency
19 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Under APA Section
20 706(1), courts may order an agency to take an action if the agency “failed to take a *discrete*
21 agency action that it is *required* to take.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64
22 (2004) (“*SUWA*”) (emphasis in original). *See also Vietnam Veterans of Am. v. Cent. Intelligence*
23 *Agency*, 811 F.3d 1068 (9th Cir. 2016) (affirming district court granting claims to compel
24 discrete, required agency action under APA § 706(1) to notify and provide medical care to

1 veterans).

2 Courts use the so-called “*TRAC* factors” to determine whether a required agency action is
3 unreasonably delayed, following *Telecommunications Research and Action Center v. Federal*
4 *Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984) (“*TRAC*”). See *Biodiversity Legal*
5 *Found. v. Badgley*, 309 F.3d 1166, n.11 (9th Cir. 2002) (*TRAC* factors apply where there is no
6 firm statutory deadline); *In re Pesticide Action Network.*, 798 F.3d at 813–14 (applying *TRAC*
7 factors to 706(1) claim, finding EPA’s 8-year delay in responding to rulemaking petition
8 unreasonable, and ordering EPA to take action in less than 3 months). The *TRAC* factors include
9 whether Congress indicated the speed at which it expects the agency to proceed, the nature and
10 extent of the interests impacted by the delay, and the effect of expediting delayed action on
11 competing agency priorities. *TRAC*, 750 F.2d at 80; *Independence Mining Co. v. Babbitt*, 105
12 F.3d 502, 507 (9th Cir. 1997).

13 As set forth below, issuing the temperature TMDL is a discrete agency action that EPA
14 was required to take, and EPA’s 17-year delay so far in issuing the TMDL is unreasonable under
15 the *TRAC* factors. Accordingly, the Court should also grant Plaintiffs summary judgment under
16 their Second Claim.

17 A. Issuing The TMDL Is A Discrete, Required Agency Action

18 The first prong from *SUWA* requires that the agency action to be compelled be discrete.
19 The discrete action limitation prohibits plaintiffs from bringing “broad programmatic attacks”
20 requiring “pervasive oversight by federal courts,” rather than challenges to specific agency
21 actions. 542 U.S. at 64, 67. In *SUWA*, the Supreme Court offered examples of discrete agency
22 action that can be compelled, including “the failure to promulgate a rule or take some decision
23 by a statutory deadline.” *Id.* at 63.

24 Issuing a TMDL is a discrete agency action, akin to promulgating a rule or order. In a

1 constructive submission case, the Ninth Circuit described EPA’s issuance of TMDLs as “the
2 performance of a precise duty.” *ACE III*, 20 F.3d at 986 (emphasis added). EPA guidance spells
3 out how to issue TMDLs. *See* Ex. 1. The detailed Work Plan that EPA prepared when it began
4 working on the temperature TMDL identifies specific steps and timelines for producing a final
5 TMDL. *See* Ex. 17. After releasing the Draft TMDL, EPA stated that it would complete a few
6 more specific steps and issue a final TMDL in a matter of months. Ex. 22, p. 6. Thus, Plaintiffs
7 have not mounted a broad programmatic attack against EPA; rather, Plaintiffs seek to compel
8 EPA to perform a discrete action that EPA knows it must complete.

9 EPA’s failure to issue the TMDL also satisfies the second prong from *SUWA*: that the
10 agency must be “required” to take the action at issue. In *SUWA*, the Supreme Court explained
11 that required actions include actions mandated by statute and by agency rules with the force of
12 law. 542 U.S. at 65. Additionally, language in agency documents can create binding
13 commitments that satisfy *SUWA*’s required action prong. *Id.* at 71. *See also Biodiversity Legal*
14 *Foundation v. Norton*, 295 F.Supp.2d 1, 13–14 (D.D.C. 2003) (holding agency was required to
15 act where it committed to take action in agency document).

16 Here, EPA made a binding commitment to produce the TMDL in the MOA. Ex. 15, p. 7.
17 EPA doubled down on its promise to issue the TMDL by creating a work plan with specific steps
18 and timelines to produce the TMDL and by spending significant time and resources drafting the
19 TMDL—all the while representing to the states, other government and tribal officials, and the
20 public that EPA was working to fulfill its commitment in the MOA to produce the TMDL. *See*
21 Exs. 17, 21, 22, and 24. Even after suspending work on the TMDL in 2003, EPA has maintained
22 that it remains committed to someday issuing the TMDL. *See* Ex. 26; *see also* Dkt. # 18-1.

23 Under similar circumstances, the court in *Otter Project v. Salazar*, 712 F.Supp.2d 999
24 (N.D. Cal. 2010), found “required” agency action under *SUWA*. The agency (U.S. Fish and

1 Wildlife Service, or “FWS”) had taken steps—including preparing several drafts of the action—
2 that showed the agency made a commitment to take action (to make a “failure determination”).
3 *Id.* at 1005–06. The court found the “act of engaging in the drafting process itself demonstrates
4 FWS’s own understanding that it was under a duty to make a failure determination.” *Id.* at 1005.
5 The court also found “on numerous occasions, FWS made public statements indicating its intent
6 to complete the failure determination, which themselves may constitute commitments binding
7 the agency to take further action,” *id.*, including “public statements to the effect that the
8 determination would be finalized in the near future.” *Id.* at 1006.

9 *Otter Project* is in accord with two other district courts within the Ninth Circuit that
10 found, in dicta, that agency acts and statements demonstrated a commitment rising to the level of
11 required action under *SUWA*, even though neither statute nor regulation explicitly required the
12 action. In *Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241(E.D. Cal. 2006),
13 the court found that agency statements in the record of decision for a land use plan appeared to
14 constitute a binding commitment under *SUWA*. Because the agency in *Soda Mountain* “went out
15 of its way to make clear it was committing to a certain process”, the court found that
16 “withdrawing from that ‘compact with the public’ would appear to subject the agency to suit
17 under § 706(1).” *Id.* at 1260.

18 Similarly, in *Friends of Animals v. Sparks*, 200 F.Supp.3d 1114 (D. Montana 2016), the
19 court found that BLM made a binding commitment to act that could satisfy *SUWA*’s required
20 action prong where “BLM went out of its way to make clear it was committing to a certain
21 process” in a record of decision and other agency documents. *Id.* at 1125.

22 Here, through the MOA, other actions, and statements, EPA committed to issuing a
23 temperature TMDL, making the TMDL required agency action subject to a claim for
24 unreasonable delay.

1 B. EPA's 17-Year Delay Is Unreasonable

2 Applying the *TRAC* factors, EPA's multi-year delay in issuing the final temperature
3 TMDL is also unreasonable and actionable under the APA.

4 The extreme length of EPA's delay alone is unreasonable. "[A] reasonable time for
5 agency action is typically counted in weeks or months, not years." *In re Am. Rivers*, 372 F.3d
6 413, 419 (D.C. Cir. 2004) (emphasis added), *citing Midwest Gas Users Ass'n v. FERC*, 833 F.2d
7 341, 359 (D.C. Cir. 1987) ("a reasonable time for an agency decision could encompass months,
8 occasionally a year or two, but not several years or a decade") (quotation omitted). *See also The*
9 *Fund for Animals v. Norton*, 294 F.Supp.2d 92, 113 (D.D.C. 2003) ("a five-year delay smacks of
10 unreasonableness on its face") (emphasis in original). Nearly 17 years ago, EPA committed to
11 produce the TMDL. EPA's 17-year delay is a far cry from weeks or months typical for
12 reasonable agency action, extends way beyond a year or two which is "occasionally" reasonable,
13 and is more than three times longer than a five-year delay that "smacks of unreasonableness on
14 its face." *See id.*

15 The unreasonableness of EPA's delay is even more apparent given the short timeframes
16 in the CWA for issuing TMDLs. CWA Section 303(d) required states to prepare the first TMDLs
17 within 180 days. 33 U.S.C. § 1313(d)(2). After disapproving any TMDL, the CWA requires EPA
18 to issue a substitute TMDL within 30 days. *Id.* Based on these timelines, courts have consistently
19 recognized that Congress intended TMDLs to be developed quickly. *See Scott*, 741 F.2d at 998
20 (Congress intended TMDLs to be established "promptly"); *Idaho Sportsmen's Coal. v. Browner*,
21 951 F.Supp. 962, 967 (W.D. Wash. 1996) ("Congress prescribed early deadlines for the TMDL
22 process"; those deadlines can be interpreted to mean "months and a few years, not decades.").

23 EPA's own schedule for completing the TMDL further highlights the unreasonableness
24 of EPA's delay. In its 2001 Work Plan, EPA adopted a schedule to create and issue the TMDL in

1 about a year and a half. Ex. 17, p. 2. The schedule called for EPA to issue the final TMDL within
2 5 to 6 months of releasing the draft TMDL. *Id.* And although EPA released a draft in July 2003,
3 now—14 years later—EPA has yet to issue the final TMDL.

4 The consequences of EPA’s delay have been severe. The 13 species of threatened and
5 endangered Columbia and Snake River salmon and steelhead “remain in a precarious state.”
6 *NWF*, 184 F.Supp.3d at 879. The *NWF* court documented two instances in 2013 where warm
7 water temperatures were primarily responsible for killing significant numbers of four different
8 stocks of threatened or endangered Columbia or Snake River salmonids. *Id.* at 914. And in 2015,
9 warm water killed roughly 96 percent of the endangered Snake River sockeye salmon migrating
10 up the Columbia and lower Snake Rivers. Ex. 9, p. 3. In response to that catastrophe, EPA
11 admitted that such problems are likely to get worse due to climate change and that action to
12 address high water temperatures is critical to protecting salmon and steelhead. Ex. 12, p. 1.

13 Very similar interests were at issue in *In re American Rivers*, where the court found
14 unreasonable delay. 372 F.3d at 418–20. The plaintiffs petitioned the Federal Energy Regulatory
15 Commission (“FERC”) to take steps to protect threatened and endangered fish in the Snake River
16 basin from the impacts of hydroelectric dams. *Id.* at 414. The court found FERC’s 6-year delay
17 in responding to plaintiffs’ petition unreasonable and ordered FERC to act within 45 days to end
18 the agency’s “marathon round of administrative keep-away.” *Id.* at 414, 420.

19 EPA cannot claim that higher priorities justify its nearly 17-year delay. TMDLs are
20 critical to achieving the CWA’s goals; EPA is tasked with achieving these goals; and EPA’s
21 failure to issue such an important TMDL cannot be squared with the CWA. *See The Fund for*
22 *Animals*, 294 F.Supp.2d at 114 (National Park Service’s failure to act could not be squared with
23 the statutory scheme requiring it to protect National Parks). Moreover, EPA has consistently
24 asserted that addressing high temperatures through the CWA to help protect and restore

1 Columbia and Snake River salmon and steelhead runs, and the benefits these fish confer to
2 Pacific Northwest fishermen and ecosystems, is a very high priority. For example, in its August
3 10, 2017 letter, EPA stated: “The Columbia and its fishery are an invaluable resource that must
4 be restored and protected.” Dkt. # 18-1 at p. 6. And because of EPA’s substantial work on the
5 TMDL to date, the remaining work should not unduly impact any other EPA priorities.

6 Finally, EPA’s August 10, 2017, letter highlights the unreasonableness of EPA’s delay to
7 date and suggests that the delay will continue for at least “several years” more unless this Court
8 intercedes. *See* Dkt. # 18-1 at p. 5. While EPA suggests that it is restarting work on the TMDL,
9 the letter provides no clear plan or specific deadline. To the contrary, the letter makes clear that
10 EPA intends to delay many years more, at least, before it expects to complete the TMDL. *Id.* The
11 Ninth Circuit has held that this kind of ambiguous plan to possibly take action does not cure an
12 agency’s unreasonable delay. *See In re Pesticide Action Network*, 798 F.3d at 811 (“EPA’s
13 ambiguous plan to possibly issue a proposed rule nearly nine years after receiving the
14 administrative petition is too little, too late.”).

15 For these reasons, the Court should find that EPA has committed unreasonable delay in
16 violation of the APA and enter judgment for Plaintiffs on their Second Claim.

17 **III. The Court Should Order EPA To Issue The TMDL Within One Year.**

18 Based on the legal violations above, the Court should order EPA to issue the temperature
19 TMDL swiftly and by a date certain, in no case later than one year. Both the CWA and APA
20 provide the Court with authority to issue such an order. *See* 33 U.S.C. § 1365(a)(2) (authorizing
21 courts “to order the Administrator [of the EPA] to perform” a nondiscretionary duty); 5 U.S.C. §
22 706(1) (courts “shall [] compel agency action unlawfully withheld or unreasonably delayed”).

23 A. EPA Should Be Ordered To Issue The TMDL By A Date Certain.

24 The Supreme Court has held that the citizen suit provision of the CWA authorizes a

1 district court to “order the relief it considers necessary to secure prompt compliance with the
2 [CWA].” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). As this Court has
3 explained, with respect to enforcing the CWA’s requirements regarding TMDLs, “[t]he
4 responsibility of the court is to ensure prompt and attentive adherence to the mandate of the
5 CWA.” *Alaska Ctr. for the Env’t v. Reilly*, 796 F.Supp.1374, 1379 (W.D. Wash. 1992) (“*ACE*
6 *II*”), *aff’d*, *ACE III*, 20 F.3d at 986–87.

7 Similarly, the APA vests the Court with broad equitable authority to compel EPA to cure
8 EPA’s unlawful failure to act and unreasonable delay. 5 U.S.C. § 706(1). As this Court has
9 explained, “Federal courts have often found it necessary to order administrative agencies to take
10 particular steps, and to do so by specified times.” *Seattle Audubon Soc’y v. Moseley*, 798 F.Supp.
11 1494, 1497 (W.D. Wash. 1992) (citing *Abramowitz v. EPA*, 832 F.2d 1071, 1078–79 (9th Cir.
12 1987); *Alaska Ctr. for the Env’t v. Reilly*, 796 F.Supp.1374 (W.D. Wash. 1992); *Sierra Club v.*
13 *Ruckelshaus*, 602 F.Supp. 892, 898–99 (N.D. Cal. 1984)).

14 Here, EPA has avoided its CWA duties and its commitments under the 2000 MOA. By
15 undertaking studies and drafting the TMDL, EPA had already accomplished most of the work
16 needed for the TMDL by 2003. *See* Ex. 22. But EPA has failed to take the final steps for 14
17 years and counting, and EPA now offers only ambiguous plans to spend at least “several years”
18 more before working on the TMDL. Dkt. # 18-1, p. 5. It is thus vital that the Court end this
19 prolonged delay by ordering EPA to issue the TMDL by a date certain. Only a court order will
20 remedy EPA’s longstanding legal violations and ensure that EPA complies with its CWA duties.

21 B. EPA Should Issue The TMDL Within One Year At Most.

22 Congress set short, explicit timelines for EPA to review (30 days) and issue TMDLs
23 (another 30 days). 33 U.S.C § 1313(d)(2). Thus, the Court could order EPA to issue the TMDL
24 within 60 days.

1 Plaintiffs recognize that EPA may assert it needs more than 60 days—but the Court
2 should not accept vague plans to spend several more years on the process. Rather, the Court
3 should allow EPA up to one year at most to complete the TMDL, if the Court finds that the
4 agency cannot feasibly complete it within a shorter time. Other CWA cases from this Court
5 support this requested relief.

6 In *Idaho Sportsman’s Coalition v. Browner*, 951 F.Supp. 962 (W.D. Wash. 1996), this
7 Court rejected a proposed schedule for EPA to issue TMDLs in Idaho over the course of several
8 years because the schedule was “so slow as to defeat the CWA’s goals.” *Id.* at 967. The Court
9 also rejected EPA’s argument that, because Idaho’s 303(d) list was expected to change, it could
10 put off scheduling the completion of certain TMDLs until later; the Court ordered EPA to issue a
11 full schedule within six months. *Id.* at 967, 969.

12 In *Idaho Conservation League v. Browner*, 968 F.Supp. 546 (W.D. Wash. 1997) (“*ICL*”),
13 this Court ordered EPA to take an action under the CWA—similar to issuing a TMDL—within
14 60 days. EPA had disapproved water quality standards submitted by Idaho, and EPA’s CWA
15 duty to “promptly” prepare substitute water quality standards was triggered. *Id.* This Court held
16 that EPA’s seven-month failure to promulgate substitute standards violated the agency’s
17 mandatory duty and ordered EPA to issue substitute standards within 60 days. *Id.* at 549.

18 The remedy in *ICL* is in line with other cases brought under the APA and other
19 environmental laws. *See, e.g., In re Pesticide Action Network*, 798 F.3d at 813–14 (ordering EPA
20 to respond to rulemaking petition in less than 3 months); *In re American Rivers*, 372 F.3d at 420
21 (ordering action within 45 days to end “marathon round of administrative keep-away”); *Sierra*
22 *Club v. Ruckelshaus*, 602 F.Supp. 892, 898–99 (N.D. Cal. 1984) (ordering EPA to issue final
23 Clean Air Act standards within 90 days); *Sierra Club v. Gorsuch*, 551 F.Supp. 785, 789 (N.D.
24 Cal. 1982) (ordering EPA to propose Clean Air Act emission standard within 180 days).

1 The record shows that EPA has already done much, if not most, of the required work by
2 preparing the 2003 Draft TMDL. The plight of salmon and steelhead imperiled by high water
3 temperatures in the Columbia and Snake Rivers is dire and expected to worsen. EPA has
4 chronically violated the CWA, and its own commitment in 2000, by refusing to finalize the
5 temperature TMDL. To remedy these long-standing violations, and adhere to the intent and letter
6 of the CWA, the Court should now impose a strict deadline of not more than one year for EPA to
7 issue the final TMDL.

8 **CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully pray that this Court grant them summary
10 judgment and order EPA to issue a temperature TMDL for the Columbia and lower Snake Rivers
11 within not more than one year.

12 RESPECTFULLY SUBMITTED this 30th day of August, 2017.

13 By: */s/ Bryan Hurlbutt*

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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