

The Honorable Barbara J. Rothstein

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL
ADVOCATES,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Defendants,

and

CITY OF TACOMA, *et al.*,

Intervenor Defendants.

Case No. 2:21-cv-1637-BJR

**EPA’S CONSOLIDATED BRIEF
(A) IN SUPPORT OF ITS CROSS-
MOTION FOR SUMMARY
JUDGMENT AND (B) IN
OPPOSITION TO PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT**

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INTRODUCTION AND SUMMARY

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2 The Court should grant summary judgment in favor of Defendants United States
3 Environmental Protection Agency, et al., (collectively “EPA”), and deny Northwest Environmental
4 Advocates’ (“NWEA’s”) motion because EPA has no duty under the Clean Water Act (“CWA”) to
5 establish a total maximum daily load (“TMDL”) for Puget Sound.

6 The Washington State Department of Ecology (“Ecology”) has a robust water quality
7 improvement program that includes establishing TMDLs under the CWA. Over the past 25 years,
8 Ecology has established hundreds of TMDLs, including TMDLs within Puget Sound, and it is
9 continuing to develop others for waterbodies that do not meet water quality standards. Despite
10 Ecology’s ongoing TMDL work, many TMDLs remain to be completed. As a result, Ecology has
11 had to make difficult choices in allocating limited resources among competing environmental
12 demands, including which TMDLs Ecology will prioritize and whether to implement interim
13 measures to address pollution in advance of completing a TMDL. Among those many
14 programmatic decisions, Ecology chose to pursue an advance restoration plan to reduce human
15 sources of nutrients that contribute to low levels of dissolved oxygen (“DO”) in Puget Sound. Due
16 to that effort, Ecology reasonably assigned a lower priority to establishing that TMDL. The CWA
17 expressly empowers states to engage in such prioritization, and the record in this case demonstrates
18 that Ecology is investing considerable effort and resources to address low DO conditions in Puget
19 Sound and has not renounced its obligation to establish a TMDL. Accordingly, the absence of a
20 State-submitted TMDL at this time does not constitute Ecology’s “constructive submission” of “no”
21 TMDL that EPA must approve or disapprove under Ninth Circuit precedent.
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25 NWEA invokes the constructive submission theory in an effort to circumvent and undermine
26 State decisions as to how best to protect the environment. By demanding that Ecology prioritize a
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1 DO TMDL for Puget Sound over all other TMDLs and State efforts to improve water quality,¹ and
2 by seeking a court order requiring EPA establish that particular TMDL, NWEA asks the Court to
3 usurp the State’s statutory role and substitute NWEA’s priorities for the State’s reasonable pollution
4 prevention and remediation plans. NWEA is focused on concerns posed by low DO conditions in
5 Puget Sound. There are, however, ongoing efforts to improve DO conditions and reduce other
6 pollutants in Puget Sound and in other impaired waterbodies throughout the State that also require
7 limited State and federal resources. The CWA does not entitle NWEA to cut to the front of the line.
8

9 In Argument §§ I.A–B, we explain that there is no constructive submission here because
10 Ecology has not “clearly and unambiguously” abandoned developing a DO TMDL for Puget Sound.
11 In Argument §§ I.C–D, we rebut NWEA’s contentions to the contrary and explain why a TMDL is
12 not a prerequisite for the State to issue permits with effluent limitations that comply with water
13 quality standards or to otherwise address DO impairment in Puget Sound. In Argument § II, we
14 demonstrate that, even if the Court finds a constructive submission, NWEA is not entitled to the
15 relief it seeks. Finally, in Argument § III, we show why most of NWEA’s declarations and exhibits
16 should be disregarded. Thus, the Court should find in favor of EPA on the merits.
17

18 LEGAL BACKGROUND

19 Congress enacted the CWA “to restore and maintain the chemical, physical, and
20 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress simultaneously
21 “recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights of States . . . to
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24 ¹ NWEA takes for granted that Ecology must create one DO TMDL for all of Puget Sound. But
25 neither the CWA nor EPA regulations require a watershed-based approach to TMDL
26 development. Rather, states have discretion to establish TMDLs by waterbody or watershed,
27 among other approaches. Thus, Ecology has discretion to establish individual DO TMDLs for
individual waterbodies within Puget Sound (and has done so for Budd Inlet). AR_0001506.
Nonetheless, this brief refers to a single DO TMDL for Puget Sound for ease of reference.

1 plan the development and use (including restoration, preservation, and enhancement) of . . .
2 water resources.” *Id.* § 1251(b); *see also Chevron U.S.A. v. Hammond*, 726 F.2d 483, 489 (9th
3 Cir. 1984). In service of this goal and recognition, the Act establishes a systematic approach to
4 water-quality based planning, implemented primarily by the states.

5 **I. Water Quality Standards**

6 Each state sets its own water quality standards consistent with the CWA and EPA’s
7 regulations. *See* 33 U.S.C. § 1313(b)–(c); 40 C.F.R. pt. 131. Water quality standards identify
8 (1) the “designated uses” for each waterbody (e.g., the protection and propagation of fish, and/or
9 recreational uses) and (2) the “water quality criteria” expressed as levels (e.g., pollutant
10 concentrations and/or conditions) to support the designated uses (e.g., oxygen concentrations
11 necessary for healthy fish). 33 U.S.C. § 1313(c)(2). These standards apply to each of the state’s
12 waterbodies or water “segments” and establish for each waterbody or segment one or more
13 designated uses and criteria to protect those uses. *See generally* 40 C.F.R. §§ 131.2–3,
14 131.10–12. States submit their water quality standards to EPA for review, and EPA approves
15 them if they meet the requirements of the CWA, at which point the standards apply to the waters
16 they govern. 33 U.S.C. § 1313(c)(2)(A), (C). If a state’s standard is not consistent with CWA
17 requirements or a revised or new standard is necessary to meet CWA requirements, the CWA
18 authorizes EPA to promulgate revised or new standards. *Id.* § 1313(c)(4).

21 **II. Identifying and Listing Waterbodies that Fail to Achieve Water Quality Standards**

22 Next, states are responsible for assessing their waters and, every two years, submitting to
23 EPA a list identifying the waters for which current pollution controls “are not stringent enough to
24 implement any water quality standard applicable to such waters.” *Id.* § 1313(d)(1)(A); 40 C.F.R.
25 § 130.7(b) & (d). The identified waters are known as “water quality limited segments,” *see* 40
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1 C.F.R. § 130.2(j), or colloquially, “impaired waters,” and the list the state submits to EPA is
2 referred to as the “303(d) list.” *See* 33 U.S.C. § 1313(d)(2).

3 **III. Establishing TMDLs**

4 For water quality limited segments on the 303(d) list, each state must establish a “total
5 maximum daily load” of impairment-causing pollutants that can occur in the waterbody while
6 still meeting water quality standards—known as a “TMDL.” *Id.* § 1313(d)(1)(C). That “load
7 shall be established at a level necessary to implement the applicable water quality standards with
8 seasonal variations and a margin of safety.” *Id.* The state then distributes the total load among the
9 various sources contributing to the impairment in the waterbody, assigning pollution budgets to
10 each source. *See* 40 C.F.R. § 130.2(i). Individual “point sources,” which are discrete discharge
11 points such as factory drainpipes, receive “wasteload allocations.” Non-point source pollution
12 (e.g., agricultural runoff) and natural background sources receive “load allocations.” *Id.*
13 Developing a TMDL and associated wasteload and load allocations typically requires significant
14 technical analysis, and may take substantial time to complete depending on, among other things,
15 the availability of information about the sources of pollution and characteristics or complexity of
16 the receiving waterbody. *See NWEA v. EPA*, 745 F. Supp. 3d 1150, 1178 (D. Or. 2024).

17 TMDLs function primarily as planning devices and are not self-executing. *Pronsolino v.*
18 *Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). A TMDL does not, by itself, prohibit any conduct or
19 require any actions. Instead, each TMDL represents a pollutant budget that the state implements
20 by adjusting pollutant effluent limitations in discharge permits (discussed further below) and by
21 establishing non-point source controls. *Idaho Sportsmen’s Coal. v. Browner*, 951 F. Supp. 962,
22 966 (W.D. Wash. 1996). Thus, TMDLs form the basis for further state actions that may require or
23 prohibit conduct with respect to particularized pollutant discharges. Regardless of whether a
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1 TMDL is in place, states must include in discharge permits effluent limits that are as stringent as
2 necessary to meet water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R.

3 § 122.44(d)(1)(vii)(A); *see also Pronsolino*, 291 F.3d at 1129.

4 States must also establish a priority ranking for TMDL development for water quality
5 limited segments included on their 303(d) lists. 33 U.S.C. § 1313(d)(1)(A). In establishing the
6 priority ranking, states must consider the severity of the pollution and the uses of the listed
7 waterbody. *Id.* § 1313(d)(1)(A). States retain considerable discretion and may consider other
8 factors when they set their priority rankings, including technical considerations, such as the
9 complexity of the impairment, the availability of data and models, and their own state policies.
10 *See, e.g.*, 57 Fed. Reg. 33040, 33044–45 (July 24, 1992).

12 States submit their 303(d) lists and TMDLs to EPA for approval or disapproval. 33 U.S.C.
13 § 1313(d)(2).² If EPA disapproves a state’s 303(d) list, EPA “shall not later than thirty days after
14 the date of such disapproval identify such waters in such [s]tate”—in other words, EPA must
15 identify waters for the state’s 303(d) list. *Id.* If EPA disapproves a TMDL, it likewise must
16 “establish such loads for such waters as [EPA] determines necessary to implement the water
17 quality standards”; i.e., EPA must establish the TMDL itself. *Id.* As amended, the Act only
18 requires that a state submit 303(d) lists and TMDLs “from time to time.” *Id.*

19 States must submit their 303(d) lists on a biennial basis. 40 C.F.R. § 130.7(d). There is no
20 analogous submission schedule for TMDLs. A 1997 EPA guidance document recommends that a
21 state establish a TMDL within 8 to 13 years after a waterbody first appears on the state’s 303(d)
22 list, but recognizes that shorter or longer times may be appropriate depending on the
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26 ² Although states also submit their priority rankings of water-quality-limited segments for TMDL
27 development with their 303(d) lists, EPA does not approve or disapprove the substance of these
rankings. *See* 33 U.S.C. § 1313(d)(1)(A), (d)(2).

1 circumstances. 1997 Guidance at 3.³ The guidance also recognizes that states have broad latitude
2 regarding how to approach TMDL development. For example, a state may elect to focus on
3 completing TMDLs for all pollutants in a single waterbody, or on completing all TMDLs for a
4 single pollutant across waterbodies. *Id.* at 2 And the CWA itself expressly assigns states the
5 responsibility of prioritizing 303(d)-listed waters for TMDL development. 33 U.S.C.
6 § 1313(d)(1)(A).

7 **IV. The NPDES Permit Program**

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9 The National Pollutant Discharge Elimination System (“NPDES”) program is one of the
10 CWA’s key pollution control features. *See* 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.44(a), (d)(1).
11 The discharge of any pollutant from a point source into waters of the United States is prohibited
12 unless authorized by a NPDES permit issued under the CWA. 33 U.S.C. § 1311(a). NPDES
13 permits are issued by EPA or an authorized state. Forty-seven states, including Washington, are
14 authorized to administer the NPDES program under their state laws and regulations, although
15 EPA retains an oversight role. *See id.* § 1342(b); 54 Fed. Reg. 40517 (Oct. 2, 1989).
16

17 NPDES permits include “technology-based” effluent limitations, which are restrictions
18 on the quantities, rates, and concentrations of pollutants based on certain available “technology.”
19 33 U.S.C. § 1311(b)(1)(A). The permits also contain “any more stringent limitation, including
20 those necessary to meet water quality standards” or “required to implement any applicable water
21 quality standard.” *Id.* § 1313(b)(1)(C). NPDES permits, therefore, include limits based both on
22 technology and water quality.
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27 ³ EPA, New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)
at 3 (Aug. 8, 1997) (“1997 Guidance”), <https://perma.cc/BW2Y-T5FE>.

1 Critically, NPDES permits must include limits that are stringent enough to meet standards
 2 even in the absence of a TMDL. *See id.* § 1342(a)(1)(B); 43 Fed. Reg. 60662, 60665 (Dec. 28,
 3 1978) (“Development of TMDLs pursuant to section 303(d) is not a necessary prerequisite to
 4 adoption or enforcement of water quality standards.”); 40 C.F.R. § 122.44(d)(1) (permits must
 5 include any requirements “necessary to . . . achieve water quality standards”). EPA guidance to
 6 permitting agencies explains how to derive water quality-based permit limits, both prior to
 7 establishment of a TMDL and consistent with any applicable TMDL, once established.⁴ Where a
 8 TMDL is not in place, EPA’s guidance recommends that NPDES permits include a facility-
 9 specific allocation. Manual at 6-31 to 6-35.

11 **V. CWA Citizen Suits and the Constructive Submission Theory**

12 CWA section 505(a)(2) waives sovereign immunity and authorizes citizen suits against
 13 EPA alleging failure to perform a non-discretionary duty. 33 U.S.C. § 1365(a)(2). Courts have
 14 found two such non-discretionary duties with respect to the establishment and approval of
 15 TMDLs. First, when a state submits a TMDL for review, EPA must approve or disapprove the
 16 TMDL within 30 days. *See id.* § 1313(d)(2). Second, when EPA disapproves a state-submitted
 17 TMDL, EPA must establish a replacement TMDL within 30 days. *See id.*; *Columbia Riverkeeper*
 18 *v. Wheeler*, 944 F.3d 1204, 1208 (9th Cir. 2019).

20 The plain language of the CWA does not require EPA to perform any duty unless a state
 21 submits a TMDL for review. Nor does the Act authorize EPA to act if a state does not submit a
 22 TMDL that the state is charged with establishing. *See* 33 U.S.C. § 1313(d)(2).⁵ The Ninth
 23

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 25 ⁴ EPA, NPDES Permit Writers’ Manual, Ch. 6, 6-30 to 6-35 (Sept. 2010) (“Manual”),
<https://perma.cc/68G2-BWBW>.

26 ⁵ Section 1313(d)(2) contains no provision comparable to 33 U.S.C. § 1313(c)(4)(B), authorizing
 27 federal promulgation absent a disapproval if the Administrator determines such standards are
 necessary to meet CWA requirements.

1 Circuit, however, has adopted the “constructive submission” theory to require action. Under this
2 judicial construct, courts consider whether a “state’s actions clearly and unambiguously express a
3 decision not to submit TMDLs” and should thus be construed as a submittal of no TMDL, such
4 that EPA must disapprove the non-submittal. *S.F. BayKeeper v. Whitman*, 297 F.3d 877, 882–83
5 (9th Cir. 2002) (cleaned up).

6 The Ninth Circuit has endorsed the constructive submission theory in only two scenarios.
7 First, a *programmatic* constructive submission occurs following a state’s “wholesale failure . . .
8 to submit any TMDLs.” *Riverkeeper*, 944 F.3d at 1209. This scenario occurred in *Alaska Center*
9 *for the Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994), where Alaska “had never
10 submitted any TMDLs to the EPA.” Second, an *individual* constructive submission occurs when
11 a state has “clearly and unambiguously express[ed] a decision to submit no TMDL for a
12 particular impaired waterbody.” *Riverkeeper*, 944 F.3d at 1210 (quoting *Hayes v. Whitman*, 264
13 F.3d 1017, 1024 (10th Cir. 2001)). Such was the case in *Riverkeeper*, where Oregon,
14 Washington, and EPA entered into an agreement stipulating that the States did not intend to
15 develop a TMDL and that EPA would do so in their stead. *Id.* at 1211. No precedent supports
16 finding a constructive submission based on alleged deficiencies in a functioning program absent
17 a clear and unambiguous decision to abandon the TMDLs at issue. *E.g.*, *BayKeeper*, 297 F.3d at
18 883 (California’s submission of 18 TMDLs and its plan to produce more “preclude[d]” finding a
19 constructive submission). *NWEA*, 745 F. Supp. 3d at 1181–82 (no constructive submission
20 despite Oregon’s “fail[ure] to submit certain TMDLs over a long period of time” and its lack of a
21 “concrete plan to remedy that failure”).

22 Moreover, the Ninth Circuit in *Alaska Center for the Environment* emphasized that the
23 constructive submission theory cannot apply to “only a fraction of [a state’s] waters,” because
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1 doing so would effectively allow an individual plaintiff to “impose their own prioritization” on
 2 the state for which TMDLs it should complete first. 20 F.3d at 985. Indeed, the Court reiterated
 3 in *Riverkeeper* the importance of states’ “ability to prioritize particular TMDLs,” finding “a
 4 meaningful difference between affording less priority to a particular TMDL and declining to
 5 develop and issue that TMDL at all.” 944 F.3d at 1210–11 (citing 33 U.S.C. § 1313(d)(1)(C)).

6 **FACTUAL BACKGROUND**

7 **I. The Development of Ecology’s CWA Section 303(d) Program**

8 Ecology prepared its first 303(d) list of water quality limited segments in 1992.
 9 AR_0032428. Ecology subsequently submitted 303(d) lists in 1996, 1998, 2004, 2008, 2010,
 10 2012, 2014–2018, and 2020–2022. AR_0000018. As Ecology has continued to monitor the
 11 numerous waterbody segments throughout Washington, it has added water quality-limited
 12 segments to its 303(d) lists. Ecology’s most recent 303(d) list identified 6,508 water quality-
 13 limited segments for TMDL development.⁶ Ecology devotes significant resources to TMDL
 14 development. To date, Ecology has completed hundreds of TMDLs, *see* AR_0007440–690
 15 (discussing approach and challenges to creating water cleanup plans), including 13 DO TMDLs
 16 for Budd Inlet in Puget Sound. AR_0000725. Ecology is currently working on six additional
 17 TMDL projects in sub-watersheds throughout the State for numerous pollutants, including
 18 temperature, DO, bacteria, and pH. AR_0030976. The Administrative Record in this case amply
 19 documents Ecology’s TMDL output and its continued commitment to developing TMDLs. *E.g.*,
 20 AR_0002104–16, AR_0007440–69.
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26 ⁶ Washington Department of Ecology, Search Candidate Water Quality Assessment,
 27 <https://perma.cc/DH7X-LGYA> (inputting “5” in the category dropdown list, clicking “add,” and
 then clicking “search” generates 6,508 entries).

II. Ecology's Preliminary Work on a DO TMDL for Puget Sound

A. The Nature of DO Pollution in Puget Sound

Aquatic organisms need DO to breathe, and low levels of DO, known as hypoxia, can cause fish and other organisms to move away, weaken, or die. AR_0016537, AR_0016626, AR_0007094. Excess nutrients, such as nitrogen, in waterbodies can lead to excessive plant growth, and when these plants die and decompose, they consume large amounts of DO, contributing to hypoxia. AR_0016537. Both natural and anthropogenic factors may contribute to low levels of DO. AR_0007094–95.

Nineteen segments of Puget Sound were listed as impaired for DO on Washington's 1996 303(d) list, AR_0000003, meaning these segments failed to meet the numeric DO water quality criteria. Since then, as Ecology has continued to gather information on DO levels in Puget Sound, the number of water quality limited segments has increased.⁷ There are currently 179 waterbody segments in Washington's Salish Sea—which includes Puget Sound—that exceed standards for DO and need TMDL(s). AR_0032426, AR_0032435. Approximately 80 percent of the geographic area of Puget Sound is not listed as impaired for DO. AR_0032428. The remaining 20 percent does not meet DO standards from spring through early fall. AR_0011043.

The precise causes of Puget Sound's DO impairment have not always been clear. Monitoring data can identify low concentrations of DO in Puget Sound, but it cannot distinguish whether those concentrations occur due to natural conditions or human sources. AR_0016555, AR_0004245. Many factors cause changes in a waterbody's DO levels, and determining how

⁷ Comparing current assessment units to historical ones is difficult because Ecology has twice changed the way it delineates assessment units since 1996. AR_0000002 n.3. Other indications of water quality show relative stability between 2006 and 2014. AR_0012248.

1 these factors influence DO at specific locations and times is challenging. AR_0007094. Unlike a
2 typical river or stream where water flows one-way down a well-defined channel, Puget Sound is
3 an extremely complex waterbody carved up into inlets, coves, passageways, and underwater
4 ridges. AR_0007095. This geography creates water pockets with different reactions to available
5 nitrogen and other constituents that influence DO. *Id.* Meanwhile, currents—which spin, change
6 directions with tides, and move differently at lower depths—distribute available nitrogen and
7 other constituents throughout Puget Sound. *Id.*

8
9 Determining the causes of low DO in Puget Sound is necessary to distinguish human and
10 natural sources of nutrients and to understand the effect of human nutrient loads, which guides
11 the development of reduction targets. AR_0032430. That work has been scientifically and
12 technically complex. AR_0012203–05. Ecology and the Pacific Northwest National Laboratory
13 have spent years developing the cutting-edge Salish Sea Model. The Salish Sea Model is a three-
14 dimensional circulation and DO model of the Salish Sea (Puget Sound, the Strait of Juan de
15 Fuca, and the Strait of Georgia) used to evaluate DO impacts of human nutrient loads, Pacific
16 Ocean conditions, and population growth, among other stressors, both now and into the future.
17 AR_0016533. The Model established that low levels of DO occur in Puget Sound in large part
18 due to natural conditions, including the inflow of marine water with high nutrients and low DO
19 from the Pacific Ocean. *Id.*; AR_0007094. Exchange of marine water through the Strait of Juan
20 de Fuca is the single largest source of dissolved inorganic nitrogen to Puget Sound, accounting
21 for approximately *88 percent* of nitrogen loading to the Sound. AR_0007094, AR_0012212.

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24 In 2014, Ecology and the Pacific Northwest National Laboratory definitively established
25 that, while natural conditions in Puget Sound alone can cause DO concentrations below the water
26 quality criteria, human contributions can worsen conditions. *See* AR_0016533, AR_0016643–
27

1 44.⁸ In 2019, Ecology and the Laboratory established a more complete estimate of the human
2 impact, AR_0012185—a critical and necessary step to determining how best to address DO
3 water quality concerns in Puget Sound. AR_0012204.

4 **B. Ongoing State Efforts to Reduce Nitrogen and Increase DO in Puget Sound**

5 Ecology has already begun taking measures to address the largest sources of
6 anthropogenic nitrogen loading in Puget Sound: wastewater treatment facilities. These facilities
7 account for approximately 69 percent of human nutrient loading to Puget Sound. AR_0007096.
8 Starting in 2019, Ecology began including nitrogen discharge limits and requirements for
9 nitrogen reduction plans in some NPDES permits for wastewater treatment facilities as they
10 came up for renewal. *City of Tacoma v. Dep't of Ecology*, 3 Wash. 3d 633, 639 (2024). Ecology
11 also created a general permit for 58 wastewater treatment plants that imposed annual nitrogen
12 discharge limits on 27 plants and required each plant to evaluate additional treatment options for
13 future nitrogen reductions. *Id.* at 640. In February 2025, however, the Washington Pollution
14 Control Hearings Board invalidated the general permit “insofar as it is mandatory” and remanded
15 the permit to Ecology. AR_0031639, AR_0031669. In response, Ecology promptly proposed to
16 reissue the general permit with changes to allow facilities to opt in and apply for permit
17 coverage. AR_0032103, AR_0031949. For facilities that do not opt in, Ecology intends to add
18 nitrogen reduction requirements to their individual permits. AR_0032106.
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24 ⁸ To put human contributions in context, the Salish Sea Model shows that human activities cause
25 a relatively small reduction in DO levels, typically between 0.2 to 0.4 mg/L. AR_0012248–49.
26 NWEA cherry-picks a quotation saying that human sources of nitrogen are 2.7 times higher than
27 natural loads. Mot. 4 (citing AR_0017555). That analysis, however, excluded nitrogen from the
Pacific Ocean—which accounts for most total nitrogen loading in the Sound. AR_0017555. The
analysis NWEA cites compared only natural sources discharged from tributaries (referred to as
watersheds) to human sources. *Id.*

1 In June 2025, Ecology released for public comment the Draft Puget Sound Nutrient
2 Reduction Plan (“Nutrient Reduction Plan” or “Plan”), which is a draft advance restoration plan
3 for all of Washington’s waters in the Salish Sea, including Puget Sound. AR_0032411. The Plan
4 proposes total nitrogen loading targets for marine point sources and the 163 watersheds that drain
5 into Puget Sound. AR_0032441–49, AR_0007096. These point source targets will form the basis
6 for numeric water quality-based effluent limitations in future reissuances of NPDES permits for
7 wastewater treatment plants and industrial facilities. AR_0032446, 0032450. The watershed
8 targets will serve as the starting point for developing and implementing water cleanup plans for
9 the watersheds that drain into Puget Sound. AR_0032450. The Plan also describes the tools it
10 will use to achieve nitrogen targets and provides a schedule with measurable milestones to
11 achieve DO water quality standards by 2050. AR_0032433, AR_0032467, AR_0032470–71. The
12 Plan does not purport to replace a TMDL but instead states that “[t]his plan details our [advance
13 restoration plan] approach to meet marine dissolved oxygen (DO) standards which will be
14 implemented *prior to development of a TMDL*.” AR_0032423 (emphasis added).
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17 **C. EPA’s 2024 Assessment of Ecology’s Efforts to Address Puget Sound DO Concerns**

18 In 2024, EPA reviewed Ecology’s efforts and programs to address nutrient loading and
19 their impacts on DO in Puget Sound. *See* AR_0007092–108. EPA observed that “Ecology has
20 taken substantial actions in its modeling, TMDL, NPDES, and Water Quality Standards
21 programs to address [DO] concerns in Puget Sound,” noting that this work has focused on
22 “successfully implementing nutrient controls that will meet water quality standards” for DO.
23 AR_0007106. EPA further observed that, as this work progresses, Ecology has reasonably
24 assigned development of Puget Sound DO TMDLs a low priority compared to other TMDLs.
25 AR_0007092. Nonetheless, EPA noted that “Ecology has committed to completing a TMDL”
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1 and that the Nutrient Reduction Plan will ultimately inform and expedite completion of the
2 TMDL. AR_0007092.

3 STANDARD OF REVIEW

4 A grant of summary judgment is appropriate if it appears, after viewing the evidence in
5 the light most favorable to the opposing party, that there are no genuine issues of material fact
6 and that the moving party is entitled to judgment as a matter of law. *Mayes v. WinCo Holdings,*
7 *Inc.*, 846 F.3d 1274, 1277 (9th Cir. 2017).

8 ARGUMENT

9 I. Washington has not “clearly and unambiguously” abandoned development of a DO 10 TMDL for Puget Sound.

11 The Ninth Circuit has held that a constructive submission occurs in either of two
12 circumstances: first, where a state has programmatically failed to develop *any* TMDLs, thus
13 “clearly and unambiguously express[ing] a decision not to submit TMDLs,” *BayKeeper*, 297
14 F.3d at 882 (internal quotation marks omitted), or; second, where a state has “clearly and
15 unambiguously decided not to produce and issue” a *specific* TMDL or TMDL project,
16 *Riverkeeper*, 944 F.3d at 1211.

17 While EPA recognizes that this Court is bound by Ninth Circuit precedent, it maintains its
18 position that the constructive submission theory of citizen-suit liability has no basis in the text of
19 CWA section 303(d). *See* U.S. Opening Brief, *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204
20 (9th Cir. 2019) (No. 18-35982), 2019 U.S. 9th Cir. Briefs LEXIS 4377. As the Supreme Court
21 has emphasized since the Ninth Circuit endorsed this theory, courts must identify and apply the
22 “single, best meaning” of the relevant statute using “the traditional tools of statutory
23 construction.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). Given the absence
24 of statutory text imposing a nondiscretionary duty on EPA with respect to TMDLs until and
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1 unless a state submits them, the constructive submission theory is not a valid basis for a citizen
2 suit and does not waive sovereign immunity. Nevertheless, as argued below, NWEA’s claims fail
3 for additional reasons.

4 Central to both theories of constructive submission is the concept that the state must have
5 “clearly and unambiguously” abandoned the given TMDL effort. Neither scenario occurs here.
6 NWEA does not argue the first theory—that Ecology has “clearly or unambiguously” refused to
7 develop *any* TMDLs. And it cannot. As detailed above, Ecology has an active TMDL program
8 that has produced 2,392 TMDLs since 1991 and is currently developing six TMDL projects.
9 *Supra* Factual Background § I; AR_0007469.

10 Nor can NWEA succeed on the second theory, as it has failed to establish that
11 Washington has “clearly and unambiguously decided not to produce and issue” a DO TMDL for
12 Puget Sound. *Riverkeeper*, 944 F.3d at 1211. That standard is—by intention—demanding,
13 requiring that a plaintiff demonstrate that a state “do[es] not intend to develop” a particular
14 TMDL. *Id.* The circumstances here fall far short of that bar. Ecology is working to address the
15 DO impairments in Puget Sound, initially via its Nutrient Reduction Plan—which it believes is a
16 “more immediately beneficial and practicable approach to address [DO] impairments in the near
17 term.” AR_0007092. And Ecology has expressed its commitment to establishing a Puget Sound
18 DO TMDL if the Sound remains impaired despite those best efforts. AR_0007109. Accordingly,
19 Ecology has plainly not renounced establishing a Puget Sound DO TMDL, and EPA is therefore
20 not required to establish such a TMDL under NWEA’s constructive submission theory.

21 **A. NWEA misstates the Ninth Circuit’s constructive submission standard.**

22 While NWEA acknowledges that the Ninth Circuit’s standard for constructive submission
23 is clear-and-unambiguous abandonment, Mot. 9, NWEA’s argument section suggests a lesser
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1 standard, Mot. 14. Specifically, NWEA seizes upon the Ninth Circuit’s statement in *Riverkeeper*
2 regarding a state’s failure “to develop and issue a particular TMDL for a prolonged period of
3 time” and failure “to develop a schedule and credible plan for producing that TMDL” to argue
4 that Washington’s purported delay constitutes a constructive submission. *See* Mot. 14 (quoting
5 *Riverkeeper*, 944 F.3d at 1211). But NWEA’s characterization of that passage misses the mark.
6 The Ninth Circuit did not broaden the standard for constructive submission in *Riverkeeper*. In
7 fact, the court was clear that the theory continues to apply only where a state has clearly and
8 unambiguously abandoned a TMDL effort. *Riverkeeper*, 944 F.3d at 1209. The statement NWEA
9 cherrypicked merely illustrates one scenario in which the clear-and-unambiguous-abandonment
10 standard might be met. It does not replace it altogether.

12 Furthermore, the particular context of the TMDL project at issue in *Riverkeeper*—which
13 is absent here—was crucial to the outcome in that case. There, the Ninth Circuit identified three
14 determinative facts in finding a constructive submission: (1) the states asked EPA “to produce the
15 temperature TMDL on their behalf”; (2) the states and EPA entered an agreement stipulating that
16 the states “do not intend to develop the temperature TMDL themselves,” and “instead understand
17 that the EPA will do so”; and (3) the TMDL was “conspicuously absent from the [states’] priority
18 rankings.” *Id.* at 1211. Thus, the Ninth Circuit found that Washington and Oregon “ha[d] *clearly*
19 *and unambiguously indicated that they will not produce a [temperature] TMDL* for these
20 waterways.” *Id.* (quotation omitted) (emphasis added). In other words, giving any particular
21 TMDL a lower priority than others—which NWEA might view as “delaying” that TMDL’s
22 development—does not make a constructive submission. The Ninth Circuit expressly stated that
23 there is “a meaningful difference between affording less priority to a particular TMDL and
24 declining to develop and issue that TMDL at all.” *Id.* This case falls into the former scenario, as
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1 Ecology intends to complete the TMDLs in question at the appropriate time in its prioritization
2 scheme. AR_0002101, AR_0032483.

3 **B. Even under NWEA’s lesser constructive submission standard, there has been no**
4 **constructive submission.**

5 While the controlling constructive submission standard is “clear and unambiguous
6 abandonment,” the facts here do not show a constructive submission even under NWEA’s more
7 lenient standard. That is, Ecology’s decision to assign a lower priority to issuing a DO TMDL for
8 Puget Sound as it proceeds with the Nutrient Reduction Plan does not amount to a failure “to
9 develop and issue a particular TMDL for a prolonged period of time” and a failure “to develop a
10 schedule and credible plan for producing that TMDL.” *Riverkeeper*, 944 F.3d at 1211; *contra*
11 Mot. 14–28. To the contrary, Ecology’s prioritization of a DO TMDL for Puget Sound and the
12 associated timeframe are reasonable in light of Ecology’s broader TMDL development
13 obligations, its use of the Plan as an interim measure, and the complexity of this TMDL project.
14 In addition, Ecology’s own documents reflect that it has a schedule and credible plan for TMDL
15 development and for addressing the DO impairment in Puget Sound. AR_0032467.

17 **1. Ecology’s prioritization of a DO TMDL for Puget Sound is reasonable under**
18 **the facts here and in the context of its TMDL program as a whole.**

19 As NWEA admits, there is no “bright-line rule for what constitutes a ‘prolonged period
20 of time’ in the constructive submission context.” Mot. 14. No such rule exists because there may
21 be valid reasons that “justify the states’ failure to submit TMDL’s and the EPA’s concomitant”
22 inaction. *Scott v. City of Hammond*, 741 F.2d 992, 997 n.11 (7th Cir. 1984); *see also Am. Canoe*
23 *Ass’n v. EPA*, 30 F. Supp. 2d 908, 921 (E.D. Va. 1998) (in some instances, failure to submit
24 TMDLs should “not be construed as a constructive submission . . . , but rather should be
25 understood as a reasonable delay”).
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1 Here, Ecology is producing TMDLs at a reasonable pace. Ecology’s most recent
2 workload assessment estimated that 23 water cleanup projects, including 18 TMDL projects,
3 addressing a total of 670 water quality-limited segments, would be complete or in progress by
4 2027. AR_0007468. A Puget Sound DO TMDL is but one of many TMDLs that Ecology must
5 develop and, to be sure, Ecology has already begun developing TMDLs to address DO concerns
6 in Puget Sound by establishing a DO TMDL for Budd Inlet. Planning and developing multiple
7 TMDL projects is a complex process. *See, e.g., NWEA*, 745 F. Supp. 3d at 1180; *Nat. Res. Def.*
8 *Council, Inc. v. EPA*, 490 F. Supp. 3d 190, 196 (D.D.C. 2020). In that process, states must
9 address “[r]esource constraints [that] compel difficult choices as to which TMDLs should be
10 performed before others.” *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at
11 *6 (W.D. Wash. Mar. 16, 2015). The process’s complexity also requires states to stagger TMDL
12 development rather than producing them all at once—one reason why Congress only required
13 states to submit TMDLs “from time to time.” 33 U.S.C. § 1313(d)(2). For instance, in *Anacostia*
14 *Riverkeeper v. Jackson*, 713 F. Supp. 2d 50, 54–55 (D.D.C. 2010), Washington, D.C., could not
15 begin pollutant monitoring for lower priority TMDLs until it completed monitoring for higher
16 priority TMDLs. Thus, it is “misleading” to look “only at the bare length” of time from when the
17 state lists a waterbody as impaired in evaluating the reasonableness of a state’s timeframe for
18 establishing a particular TMDL. *See id.*

21 Such is the case here: Ecology is obligated to complete thousands of TMDLs in addition
22 to a Puget Sound DO TMDL. And, as Ecology has explained, it lacks “all the data and analysis
23 necessary to immediately and effectively develop a TMDL for nutrients in a system as complex
24 and vast as Puget Sound.” AR_0004778; *see also infra* at 25–27. Nonetheless, once finalized, the
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1 Nutrient Reduction Plan will serve as an interim measure to address DO impairment in advance
2 of a TMDL. *See infra* at 20–23; *see also* AR_0004779.

3 EPA recognized in its 2022–2032 Vision for the Clean Water Act Section 303(d) Program
4 that, as is the case here, “waterbodies may be given a lower priority for TMDL development
5 while other restoration plans are pursued.” AR_0032493. Indeed, *Riverkeeper* reiterated the
6 importance of states’ “ability to prioritize particular TMDLs,” finding “a meaningful difference
7 between affording less priority to a particular TMDL and declining to develop and issue that
8 TMDL at all.” 944 F.3d at 1210–11. Accordingly, Ecology’s decision to accord a Puget Sound
9 DO TMDL a lower priority—while it aggressively pursues a more immediate nutrient-reduction
10 strategy, *see supra* Factual Background § II—is reasonable.

12 NWEA misplaces reliance on a 1997 EPA guidance document to assert that TMDLs
13 should be completed within 10 to 15 years of listing. Mot. 15 (quoting 1997 Guidance). First, the
14 1997 Guidance is a general policy statement that has no legal impact. It does not prescribe
15 requirements for avoiding liability, nor does it impose any obligation or prohibition on regulated
16 entities. *See* 1997 Guidance; *see also Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 252 (D.C.
17 Cir. 2014). Second, while the 1997 Guidance suggests that states typically should issue TMDLs
18 within 8 to 13 years of listing, it recognizes that states may need more time to complete TMDLs
19 “depending on [numerous] State-specific factors.” 1997 Guidance at 3. Many of those factors are
20 present here: the pending Puget Sound DO TMDL project (1) involves a large watershed, (2)
21 requires a complex TMDL, and (3) requires additional monitoring data and modeling. *See id.*

22 Even accepting, *arguendo*, NWEA’s premise that there is a 10- to 15-year timeframe
23 within which a state should issue a TMDL, *see* Mot. 15, the vast majority of the impaired
24 segments of Puget Sound for which a TMDL is necessary are not “overdue” using that
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1 timeframe, Peltier Decl. ¶ 19. Ecology’s Nutrient Reduction Plan addresses all 179 DO
2 impairments in Washington’s waters of the Salish Sea, including Puget Sound. AR_0032450,
3 AR_0032591. Only 19 segments were listed as impaired for DO in 1996, AR_0000003, while
4 other segments appeared on the State’s 303(d) list much later, with some segments appearing
5 fewer than 10 years ago. AR_0000018.

6 In short, Ecology has reasonably prioritized other TMDLs while it works diligently to
7 address Puget Sound’s DO conditions via a Nutrient Reduction Plan. That scenario does not
8 qualify as a constructive submission of no TMDL.
9

10 **2. Ecology has a credible plan for producing a DO TMDL for Puget Sound.**

11 Ecology has devoted substantial resources to understanding the highly complex and
12 technical nature of DO impairment in Puget Sound. The result of that work is the Nutrient
13 Reduction Plan, which will initiate improvements in DO conditions in advance of completing a
14 TMDL. Specifically, the Plan proposes nitrogen targets for point sources and watersheds that
15 drain into Puget Sound, includes a schedule and milestones, prescribes effectiveness monitoring,
16 and includes an adaptive management feedback loop to reprioritize the project for TMDL
17 development if implementation of the plan is ineffective. AR_0032483. Rather than an
18 abandonment of a TMDL, the Plan is Ecology’s plan for producing a DO TMDL for Puget
19 Sound and making meaningful progress in addressing DO impairment in advance of that TMDL.
20

21 Because Puget Sound is a “large” and “complex” waterbody, Mot. 22, the causes of DO
22 pollution in the Sound are only recently understood. Though Ecology found initial segments of
23 Puget Sound to be impaired for DO in 1996, it was not *until 2014* when results from the Salish
24 Sea Model distinguished human contributions of nutrients from natural sources and definitively
25 established that humans contributed to DO impairment. AR_0016644, AR_0016533. And it was
26 not *until 2019* that Ecology published the first Model results, which showed the impact of
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1 reducing nitrogen and carbon discharges from wastewater treatment facilities. AR_0012185.

2 While Ecology has been making steady progress toward investigating the causes of DO pollution
3 and laying the groundwork for a future TMDL, that process takes more time for Puget Sound
4 than for other, less complex and smaller waterbodies.

5 Ecology's Nutrient Reduction Plan sets forth the State's approach to reducing pollution
6 and improving DO conditions based on the modeling and information now available to Ecology.
7 AR_0032423. As NWEA acknowledges, Ecology has conducted "extensive scientific work" and
8 engaged in eight years of public workshops, stakeholder meetings, and public comment periods
9 leading up to the Plan. Mot. 19, 22.

11 The Plan proposes total nitrogen loading targets for the watersheds that drain into Puget
12 Sound and for marine sources, including wastewater treatment plants. Since these plants account
13 for approximately 69 percent of human nutrient loading to Puget Sound, they are a focal point of
14 the Plan. AR_0032441-49, AR_0007096. The point source targets will form the basis for
15 numeric effluent limitations in future NPDES permits for domestic wastewater treatment and
16 industrial facilities, which the State will reissue by 2031. AR_0032446, AR_0032450. The
17 watershed targets, which cover the remaining anthropogenic loadings, will serve as the starting
18 point for developing and implementing water cleanup plans (expected to be TMDLs) for the
19 watersheds that drain into Puget Sound. AR_0032450. The Plan also describes other tools that
20 Ecology will use to achieve nitrogen targets and provides a schedule with measurable milestones
21 to achieve nitrogen targets by 2050. AR_0032433, AR_0032467, AR_0032470-71.

24 Thus, rather than delaying implementation of water quality improvement practices while
25 Ecology completes a TMDL, the Nutrient Reduction Plan, once finalized, will facilitate concrete
26 measures to improve DO concentrations. *See* AR_0000376 ("While TMDLs remain the primary
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1 tool for addressing impaired waters, in certain cases there may be other restoration approaches
2 that may achieve [water quality standards] in the near term.”). The Plan is therefore a
3 “reasonable course[] to reducing pollution in addition to establishing TMDLs.” *McLerran*, 2015
4 WL 1188522, at *10 (citation omitted). Indeed, as this Court has recognized, such plans “may,
5 under some circumstances, represent a reasonable interim measure rather than an abandonment
6 of any future plans to prepare a TMDL.” *Id.* at *8. That is the case here.

7
8 NWEA’s branding of the Nutrient Reduction Plan as a “step away from” or an
9 “abandon[ment]” of a TMDL, Mot. 16, 23, is wholly unsupported by the record. Nor is NWEA
10 correct that the Plan is a “TMDL Alternative.” *Contra* Mot. 22. Indeed, the Plan “details
11 [Ecology’s advance restoration plan] approach to meet marine dissolved oxygen (DO) standards
12 which will be implemented *prior to development of a TMDL.*” AR_0032423 (emphasis added);
13 *see also* AR_0007111 (“Ecology remains fully committed to addressing dissolved oxygen
14 impairments in Puget Sound, including development of a TMDL if our current strategy is
15 unsuccessful in addressing this complex issue.”). And the Plan lays the groundwork for that
16 future TMDL. AR_0032433, AR_0000388. Thus, rather than abandoning a future TMDL,
17 Ecology’s current efforts are an investment toward completing a TMDL. So long as segments of
18 Puget Sound remain on Washington’s 303(d) list, the obligation to complete a TMDL remains.
19 AR_0000387, AR0032423–24. Accordingly, the milestones in the Plan and Ecology’s
20 commitment to develop a TMDL following implementation of interim measures are key
21 components of the State’s schedule and credible plan for a Puget Sound DO TMDL.
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24 Similarly flawed is NWEA’s attempt, Mot. 23–24, to use the Budd Inlet TMDLs as
25 evidence that the Nutrient Reduction Plan “is the predictable next step in Ecology’s decades-long
26 pattern of avoidance when it comes to addressing human nitrogen sources.” Here, NWEA elides
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1 the fact that Ecology has finalized and EPA approved 13 DO TMDLs for Budd Inlet—which is in
 2 Puget Sound—in 2022.⁹ AR_0001507, AR_0000725. Thus, NWEA’s claim that Ecology has
 3 constructively submitted no DO TMDLs for Puget Sound is a fiction.

4 For these reasons, the Nutrient Reduction Plan is a building block to a future TMDL—
 5 not an abandonment of one—and, thus, no constructive submission has occurred.

6 **C. NWEA misstates the role of TMDLs in the CWA permitting scheme.**

7 NWEA alleges that, absent a DO TMDL for Puget Sound, NPDES permits issued by
 8 Ecology for DO discharges into the Sound will be inadequate because they will lack effluent
 9 limitations. Mot. 11–12. This argument is flawed for several reasons.

10 As an initial matter, if NWEA believes Ecology-issued permits are inadequate, the
 11 remedy is to challenge them through the State’s administrative process and court system, rather
 12 than to improperly attempt to adjudicate their adequacy in this case.
 13

14 And even where a TMDL for an impaired water has not yet been established, states still
 15 must—and routinely do—include effluent limits in NPDES permits that are as stringent as
 16 necessary to meet water quality standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1)(B); 40
 17 C.F.R. § 122.44(d)(1)(vii)(A); 54 Fed. Reg. 23868, 23879 (June 2, 1989); 43 Fed. Reg. at 60665.
 18 Those effluent limitations can and often do include numeric thresholds. *Contra* Mot. 11–12, 21.
 19 Indeed, the presence of an approved TMDL may not result in any change in the stringency of a
 20 state’s NPDES permits. Specifically, wasteload allocations in TMDLs may be set equivalent to
 21 existing discharge levels, provided that the existing discharge levels are within the TMDL
 22 loading capacity, which is set at the level necessary to implement the applicable water quality
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 26 ⁹ As Ecology was working on the Budd Inlet TMDL, NWEA filed a constructive submission
 27 claim alleging that the State had “clearly and unambiguously abandoned its obligation to submit
 TMDLs for Budd Inlet.” *See* Compl. ¶ 96, *NWEA v. EPA*, No. 19-2079 (W.D. Wash.).

standards.¹⁰ Furthermore, NWEA inappropriately assumes that the Nutrient Reduction Plan, once finalized, will fail to reduce nitrogen discharges. Ecology, in contrast to NWEA, made no such assumptions and has reached the opposite conclusion based on a rigorous analysis of the Salish Sea Model and its permitting strategy. *See* AR_0007100–05.

Moreover, the fact that NPDES-permitted discharges to Puget Sound do not presently include *numeric* effluent limitations protective of DO conditions is not due to the absence of a TMDL. Rather, the lack of such limitations is largely because Ecology did not have the technical basis to impose numeric permit limits to address DO until 2019—when the Salish Sea Model produced a more robust understanding of human nitrogen contributions to DO in Puget Sound. AR_0012185. Further, most permits for individual wastewater treatment plants to discharge to Puget Sound have not been renewed since 2019 because Ecology instead pursued a general permit strategy, as discussed *supra* at 12.

Finally, NWEA’s argument, Mot. 21, that the final Nutrient Reduction Plan will be deficient because it will lack binding and enforceable wasteload allocations ignores the relationship between the NPDES and TMDL programs. Wasteload allocations are not prerequisites to setting protective limits in NPDES permits; states must include effluent limits stringent enough to meet water quality standards, regardless of the existence of a TMDL. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(vii)(A). Moreover, TMDLs are not self-executing, and wasteload allocations must be translated into effluent limitations in NPDES permits. *Anacostia Riverkeeper Inc. v. Wheeler*, 404 F. Supp. 3d 160, 165 (D.D.C. 2019). That is precisely what Ecology is doing. The Salish Sea Model establishes that certain point sources

¹⁰ EPA, Guidance for Water Quality-based Decisions: The TMDL Process at 20 (Apr. 1991), <https://perma.cc/R9D7-QJK5>.

1 contribute to DO impairments in Puget Sound, and, as required by the CWA, Ecology is taking
2 steps to impose water quality-based effluent limitations on those sources, including a
3 requirement that each source evaluate treatment and financing options to achieve those limits.
4 AR_0032046–48. Those permitting actions are among the measures in the Nutrient Reduction
5 Plan to address nutrient pollution to Puget Sound.

6 In short, a DO TMDL is not a prerequisite for the issuance of adequate NPDES permits
7 issued by Ecology to protect DO conditions in Puget Sound. Ecology has stated that it can and
8 will reissue NPDES permits with effluent limitations that reflect loading targets from the
9 Nutrient Reduction Plan, AR_0032046–48—though, again, neither the Nutrient Reduction Plan
10 nor a TMDL is required for the State to be able to do so. Thus, NWEA’s concerns about the Plan
11 undermining NPDES permitting are unfounded.

12
13 **D. The Nutrient Reduction Plan could not immediately be converted into a TMDL.**

14 Although the Nutrient Reduction Plan reflects significant progress in understanding and
15 addressing low DO conditions in Puget Sound, Ecology could not convert the Plan into a TMDL
16 today. NWEA’s contrary assertion, Mot. 17, ignores multiple critical scientific and regulatory
17 issues that must be resolved before developing a scientifically sound and reasonable TMDL.

18
19 First, even if all human sources of nitrogen were eliminated, Puget Sound *still* would not
20 attain the numeric DO criteria because of low DO caused by natural conditions. *See, e.g.,*
21 AR_0007102, AR_0007110; *see also* AR_0022249 (“[T]he ocean has a significant influence and
22 that influence alone causes the biological criteria to be exceeded.”). Currently, there are only
23 biologically-based numeric criteria for DO applicable to Puget Sound, which quantify the DO
24 necessary to support aquatic life but do not account for natural variability. *See* AR_0007102.
25 Because natural DO concentrations in Puget Sound are often *lower* than the biologically-based
26 numeric criteria, neither Ecology nor EPA has identified a means to develop a scientifically
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1 sound TMDL to achieve the biologically-based numeric criteria. *See id.* EPA disapproved
2 Ecology’s prior natural conditions criteria, and Ecology is engaged in rulemaking to adopt new
3 ones. AR_0007110, AR_0007105–06. That rulemaking is essential to the development of a
4 scientifically sound and reasonable TMDL. *See id.*

5 Second, the Nutrient Reduction Plan does not address all of the elements of a TMDL. For
6 example, while the Plan accounts for the most significant anthropogenic sources of total
7 nitrogen, it does not account for—or “allocate” to—*all* sources as needed for a TMDL to “be
8 established at a level necessary to implement the applicable water quality standards.” 33 U.S.C. §
9 1313(d)(1)(C); 40 C.F.R. § 130.2(f), (i). Among other things, the Plan does not appear to fully
10 address contributions from Canadian sources, atmospheric deposition, and the open ocean
11 boundary. AR_0032449, AR_0032456. Nor does it address certain other required elements of a
12 TMDL such as loading capacity, critical conditions, and a margin of safety. 33 U.S.C.
13 § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). Developing a DO TMDL for Puget Sound that
14 addresses these issues requires considerable effort and cannot be completed in 30 days.
15
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17 Thus, contrary to NWEA’s argument, Mot. 18, the Plan does not provide a “sufficient
18 basis for the required elements of a TMDL.” And, because EPA is the entity tasked by Congress
19 with administering the CWA and approving or disapproving TMDL submissions, 33 U.S.C. §§
20 1251(d), 1313(d)(2), the Court should defer to the Agency’s technical evaluation here.

21 NWEA suggests, Mot. 22, that Ecology can address these scientific and regulatory
22 uncertainties by including a margin of safety in the TMDL; however, NWEA misunderstands the
23 purpose of a margin of safety. Congress specified that a margin of safety accounts for a “lack of
24 knowledge concerning the relationship between effluent limitations and water quality,” and not,
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1 as NWEA appears to suggest, a lack of knowledge regarding the source of pollutants. *See* 33
2 U.S.C. § 1313(d)(1)(C); *McLerran*, 2015 WL 1188522, at *8.

3 NWEA’s attempt, Mot. 17–20, to contrast Puget Sound with *McLerran*, in which this
4 Court concluded that there had not been a constructive submission for the Spokane River,
5 ignores these critical issues. Just as in *McLerran*, significant and legitimate work remains before
6 a scientifically supportable TMDL for Puget Sound could be completed. *See* 2015 WL 1188522,
7 at *8. For example, in *McLerran*, “Ecology did and still does not know the source of 57% of
8 PCB loading in certain parts of the Spokane River.” *Id.* Here, the Nutrient Reduction Plan does
9 not account for all sources and lacks several required regulatory elements of a TMDL. *See supra*
10 at 25–26. As in *McLerran*, significant work remains.

12 Thus, while the Nutrient Reduction Plan is a major step forward in addressing Puget
13 Sound DO, it cannot be immediately converted into a scientifically sound TMDL. In any event,
14 whether the Nutrient Reduction Plan could be made into a TMDL is not at issue here—the
15 question for the Court is whether Ecology has “clearly and unambiguously” abandoned a DO
16 TMDL for Puget Sound, which it has not.

18 **II. NWEA is not entitled to the remedy it seeks.**

19 NWEA requests that the Court order EPA to establish a Puget Sound DO TMDL “within
20 30 days of the Court’s order.” Mot. 29. NWEA’s requested relief is unfounded and impracticable.
21 Even assuming that NWEA were entitled to some relief, the requested relief should be denied.

22 Under the CWA, courts do not grant injunctive relief as a matter of course. *Weinberger v.*
23 *Romero-Barcelo*, 456 U.S. 305, 311 (1982); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 546
24 n.12 (1987). As the Supreme Court explained, “the court [must] ‘balance[] the conveniences of
25 the parties and possible injuries to them according[ly] as they may be affected by the granting or
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1 withholding of the injunction.” *Weinberger*, 456 U.S. at 312; *Amoco*, 480 U.S. at 542. In crafting
2 a remedy, “the court must be careful not to intrude upon the agency’s realm of discretionary
3 decision making.” *Idaho Sportsmen’s Coal.*, 951 F. Supp. at 968.

4 To the extent that the Court determines that some injunctive relief is appropriate here, the
5 CWA citizen suit provision provides that the remedy is limited to “order[ing] the Administrator
6 to perform [the nondiscretionary] act or duty.” 33 U.S.C. § 1365(a). Courts have held that a
7 constructive submission triggers a mandatory duty on the part of the EPA Administrator to either
8 approve or disapprove the constructive submission. *Hayes*, 264 F.3d at 1023. Only if the
9 Administrator disapproves the constructive submission is the Administrator under a duty to
10 establish a TMDL. *Id.*; *see also Scott*, 741 F.2d 997. Accordingly, imposing a schedule on EPA to
11 establish a DO TMDL is not an appropriate remedy. *See Am. Canoe*, 30 F. Supp. at 922 & n.17
12 (“[T]he appropriate remedy for the plaintiffs’ TMDL [complaint] would appear to be an order
13 directing EPA to approve or disapprove Virginia’s constructive submission within 30 days . . .”).
14 Instead, the Court should remand the matter to EPA for action on the constructive submission.
15 Moreover, determination on the purported constructive submission could be challenged by
16 NWEA as final agency action; the Court’s role would be limited to reviewing EPA’s approval or
17 disapproval determination. *Id.*; *Hayes*, 264 F.3d at 1023.

20 Even assuming the Court’s authority extended to ordering EPA to establish a Puget Sound
21 DO TMDL, NWEA has not shown that the injury to it if the requested relief is not granted
22 outweighs the damage to EPA and the public interest if it is. As an initial matter, NWEA fails to
23 show irreparable harm. NWEA contends that the lack of a DO TMDL has resulted or will result
24 in State-issued NPDES permits that lack nutrient limits necessary to achieve water quality
25 standards. As explained *supra* Legal Background § II and Argument § II.B.2.b, such assertions
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27

1 lack any foundation. NPDES permits must require effluent limits that ensure water quality
2 standards will be met, regardless of whether a relevant TMDL has been established. 33 U.S.C.
3 § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(vii)(A). Nor has NWEA demonstrated that the Plan
4 will fail to reduce nutrient discharges or that the relief it seeks would result in any, let alone
5 quicker, nutrient reductions. In contrast, the public interest *will* be harmed by the order NWEA
6 seeks, due to the diversion of resources from equally or more important State or federal TMDL
7 development efforts or other environmental projects.

8
9 If the Court were to conclude that an order requiring EPA to establish a DO TMDL is
10 appropriate, EPA respectfully requests supplemental briefing on the parameters of any such
11 order. In any event, for the reasons set forth above, the Court should not order EPA to comply
12 with NWEA's proposed schedule to establish a DO TMDL within 30 days. While NWEA argues
13 that its schedule is reasonable "because the work has already been done to prepare a technically
14 sound TMDL," Mot. 29, that is emphatically not the case. As discussed above, there are
15 substantive gaps in the Nutrient Reduction Plan that Ecology prepared that would require an
16 extended period of time to address. *See supra* Argument § I.D. In considering the time necessary
17 for EPA to complete such a complex administrative action, the Agency must have sufficient time
18 to develop the necessary information. *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir.
19 1987). Additional time spent on any such TMDL before it is adopted may well ensure earlier, not
20 later, implementation "by decreasing the risk of later judicial invalidation and remand to the
21 agency." *Id.* at 798–99.

1 In short, even if NWEA were to prevail under a constructive submission theory, it would
2 not be entitled to any of the injunctive relief it seeks.

3 **III. Most exhibits to the Hawley declaration and most allegations in the Bell, Peltier, and**
4 **Bresler declarations are inadmissible and should be disregarded.**

5 The Court should disregard most of the exhibits to the Hawley declaration and the
6 testimony in the Bell, Peltier, and Bresler declarations due to inadmissibility. *See Beyene v.*
7 *Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Most of the exhibits to the Hawley
8 declaration are irrelevant and therefore inadmissible. *See Fed. R. Evid.* 402. The distant history
9 of Washington’s TMDL program, such as that referenced in the Hawley exhibits, is not relevant
10 to whether a constructive submission has occurred *now*. *See, e.g., Sierra Club*, 162 F. Supp. 2d
11 406, 418 (D. Md. 2001); *BayKeeper*, 297 F.3d at 883. Most of the testimony in the Bell, Peltier,
12 and Bresler declarations likewise is inadmissible. And all three declarations contain inappropriate
13 legal arguments. *See King Cnty. v. Rasmussen*, 299 F.3d 1077, 1082 (9th Cir. 2002). The Bell
14 declaration even expressly states that its purpose is to show why “a court order is necessary.”
15 Bell Decl. ¶ 2. Other testimony is inadmissible due to lack of foundation or personal knowledge,
16 (e.g., Bell Decl. ¶ 12, Peltier Decl. ¶ 19), improper lay opinion (e.g., Peltier Decl. ¶ 12), and
17 hearsay (e.g., Peltier Decl. ¶ 7). The Court should deny NWEA’s attempts to make an end-run
18 around the Court’s page limits.
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20

21 **CONCLUSION**

22 The Court should grant EPA’s summary judgment motion and deny NWEA’s motion.
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