

The Honorable Barbara J. Rothstein

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

NORTHWEST ENVIRONMENTAL  
ADVOCATES,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

Defendants,

and

CITY OF TACOMA, KING COUNTY,

Defendant-Intervenors.

NO. 2:21-cv-01637-BJR

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY'S  
AMICUS CURIAE BRIEF IN  
SUPPORT OF DEFENDANTS'  
CROSS-MOTION FOR  
SUMMARY JUDGMENT AND  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

As part of its extensive efforts to address low dissolved oxygen (DO) levels in Puget Sound, the State of Washington, Department of Ecology (Ecology) has exercised its discretion to pursue an advance restoration plan (ARP) called the Puget Sound Nutrient Reduction Plan (PSNRP) before completing numerous Puget Sound DO total maximum daily loads (TMDLs). Ecology made this discretionary decision for three interrelated reasons: (1) Ecology has limited resources and other, high priority Clean Water Act obligations; (2) the obstacles to completing

1 numerous defensible Puget Sound DO TMDLs would unnecessarily delay Ecology’s near-term  
2 efforts to restore Puget Sound’s DO-impaired segments; and (3) an ARP, such as the PSNRP,  
3 is the more immediately beneficial, practicable, and defensible approach for bringing Puget  
4 Sound into compliance with applicable DO water quality standards. Ecology acknowledges—  
5 and has not abandoned—its continuing obligation to complete TMDLs for the DO-impaired  
6 segments of Puget Sound.  
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8 Plaintiff Northwest Environmental Advocates (NWEA) wants Ecology to immediately  
9 abandon the PSNRP in favor of a Puget Sound-wide DO TMDL. To get what it wants, Plaintiff  
10 urges this Court to adopt a novel and expansive view of the TMDL constructive submission  
11 doctrine that would eviscerate states’ discretion to prioritize certain TMDLs over others or to  
12 pursue water quality improvement projects through an ARP before completing a TMDL.  
13 Plaintiff also requests that the Court order the Environmental Protection Agency (EPA) to  
14 complete a Puget Sound-wide DO TMDL in thirty days, ignoring or dismissing the legal and  
15 factual obstacles to doing so. In their Consolidated Brief, Defendants have explained why  
16 Plaintiff’s constructive submission claim and requested relief are inconsistent with the Clean  
17 Water Act, applicable case law, and the record. Ecology supports Defendants’ arguments and  
18 does not intend to repeat those arguments here. Rather, Ecology seeks to aid the Court by  
19 providing additional context and addressing certain misstatements of law and fact contained in  
20 Plaintiff’s Motion for Summary Judgment and supporting declarations.  
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23 As explained below, this Court should deny Plaintiff’s Motion for Summary Judgment,  
24 grant the Cross-Motion for Summary Judgment filed by Defendants, and either dismiss  
25 Plaintiff’s Complaint or enter judgment in favor of Defendants.  
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## II. ARGUMENT

### A. Ecology Has Not Constructively Submitted to EPA an Inadequate or Unlawful TMDL

Constructive submission occurs when a state clearly and unambiguously abandons the TMDLs at issue. *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1209-11 (9th Cir. 2019). As Plaintiff concedes and Defendants astutely point out, Ecology has (1) never explicitly abandoned the development of Puget Sound DO TMDLs; (2) already prepared DO TMDLs for Budd Inlet, the southernmost inlet of Puget Sound; and (3) expressly committed to completing additional Puget Sound DO TMDLs in the future should it prove necessary to do so. *See* Dkt. #60, at 19, 23–24; Dkt. #65, at 12, 25–26; AR\_0000725; AR\_0001507; AR\_0032423; AR\_0032433; AR\_0032467; AR\_0032483; NWEA01553. Undeterred by these facts or the Ninth Circuit’s demanding constructive submission standard, Plaintiff contends that Ecology need only implicitly abandon the development of Puget Sound DO TMDLs and such implicit abandonment is sufficiently evidenced by the “prolonged period of time” without a Puget Sound-wide DO TMDL and Ecology’s failure to develop a schedule and credible plan to complete that TMDL. Dkt. #60, at 14. Defendants deftly refute these contentions by explaining that Plaintiff insupportably lowers the Ninth Circuit’s constructive submission standard and that, even applying Plaintiff’s lower standard, Plaintiff cannot demonstrate Ecology has constructively submitted any Puget Sound DO TMDLs. *See* Dkt. #65, at 17–30. Ecology buttresses Defendants’ arguments with the following points.

Plaintiff’s lowering of the Ninth Circuit’s constructive submission standard would allow well-funded litigants to use the guise of a constructive submission claim to disproportionately influence discretionary decisions—including when and where completing a TMDL is the best

1 use of limited resources—that states make after considering comments from members of the  
2 public. *See Nw. Env't Advocates v. U.S. EPA*, 745 F. Supp. 3d 1150, 1173 (D. Or. 2024).  
3 Adopting Plaintiff's unsupported and unsupportable standard would threaten this process and  
4 negatively impact water quality in Washington and beyond. The increased litigation risk arising  
5 from such a standard would encourage states like Washington to prioritize completing TMDLs  
6 identified by litigious parties, even when other meritorious approaches would have led to  
7 effective permits and cleaner water sooner at a lower cost. The inefficient use of limited  
8 resources—to curb legal exposure that should not exist—would have a cascading, detrimental  
9 effect on states' efforts to address specific impairments and to improve water quality more  
10 generally.  
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13 By contending the mere passage of time is sufficient to demonstrate Ecology has  
14 constructively submitted to EPA an inadequate and unlawful TMDL, Plaintiff invites the Court  
15 to ignore or discount facts that militate against such a finding.<sup>1</sup> The Court should reject Plaintiff's  
16 invitation. The record demonstrates that DO impairments in Puget Sound are complex and  
17 interrelated. Ecology's work to address the DO impairment in Budd Inlet revealed the need to  
18 understand and quantify the scope of the DO problem across Puget Sound. Ecology then spent  
19 years building and refining a model to understand and quantify the scope of the DO problem  
20 across Puget Sound. It was not until 2019 that Ecology understood how wastewater treatment  
21 facilities discharging to Puget Sound—the largest contributors of anthropogenic nitrogen loading  
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25 <sup>1</sup> However, Plaintiff accurately notes that the passage of time is due, at least in part, to the “technical  
26 complications of doing such a large TMDL . . . .” Dkt. #60-4 at 4 (Decl. of Helen Bresler). Plaintiff's allegation that Ecology continues to delay the DO TMDL “because of political pressure against doing a TMDL,” *id.*, lacks foundation or personal knowledge and fails to satisfy the specialized knowledge requirements for expert opinions in Federal Rule of Evidence 702.

1 to the Sound—could affect DO concentrations far from where the discharges occur. And it was  
2 not until 2025 that Ecology determined how nitrogen reductions required to meet new state-  
3 adopted water quality standards could be distributed among wastewater treatment plants  
4 discharging directly to the Sound and upstream sources of nitrogen in the watersheds that drain  
5 into the Sound. By conducting a more demanding inquiry and rejecting Plaintiff’s constructive  
6 submission claim, this Court can help Washington and other states avoid prioritizing a TMDL  
7 based solely on how long a waterbody segment has been on a state’s 303(d) list.  
8

9 Plaintiff’s contention that Ecology does not have a credible schedule or plan to submit  
10 DO TMDLs for Puget Sound to EPA is meritless. This contention is based primarily on  
11 Plaintiff’s mistaken belief that there are no obstacles to preparing Puget Sound DO TMDLs,  
12 such that to be credible any schedule or plan for completing DO TMDLs may span no more than  
13 thirty days. Plaintiff is wrong for at least two reasons. First, EPA has not yet approved the state-  
14 adopted natural conditions criteria that may constitute the applicable water quality standards  
15 underlying waste load allocations in Puget Sound DO TMDLs.<sup>2, 3</sup> Second, there are questions  
16 around the need for and sequencing of additional data collection and modeling to establish  
17 individual wasteload allocations for every upstream point source that discharges to freshwaters  
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22 <sup>2</sup> On September 30, 2025, Ecology submitted these natural conditions criteria for EPA’s review and  
23 approval. Available at [https://ecology.wa.gov/water-shorelines/water-quality/water-quality-standards/updates-to-](https://ecology.wa.gov/water-shorelines/water-quality/water-quality-standards/updates-to-the-standards)  
24 [the-standards](https://ecology.wa.gov/water-shorelines/water-quality/water-quality-standards/updates-to-the-standards). Before completing its review and making a final decision, EPA must consult with USFWS and NMFS  
25 regarding potential impacts on endangered species. It is unclear when EPA will complete these consultations and  
26 approve or deny those criteria, given that Washington is still awaiting approval for three other water quality  
standards rule revisions submitted in 2021, 2022, and 2024.

<sup>3</sup> The complications caused by changing standards has led EPA to advise states that they need not prioritize  
TMDLs involving water quality standards that are subject to change. EPA, Guidance for 2006 Assessment, Listing  
and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act at 62 (July 29,  
2005), available at <https://www.epa.gov/sites/default/files/2015-10/documents/2006irg-report.pdf>.

1 that flow to Puget Sound. There are also questions regarding how those individual wasteload  
2 allocations could and should be equitably and reasonably distributed.

3 Plaintiff's meritless contention that Ecology does not have a credible schedule or plan to  
4 submit Puget Sound DO TMDLs to EPA is also based on Plaintiff's mistaken belief that Ecology  
5 is unwilling to convert the PSNRP into a DO TMDL any earlier than 2042 or 2055. Dkt. #60,  
6 at 23. Contrary to Plaintiff's belief, Ecology regularly evaluates its TMDL priorities and could  
7 and would prioritize developing Puget Sound DO TMDLs if any of those evaluations support  
8 doing so. Requiring a more robust schedule or plan for Puget Sound DO TMDLs while Ecology  
9 implements the PSNRP would unnecessarily prevent Washington and other states from trying  
10 more flexible, stakeholder-informed strategies before turning to TMDLs.

11 Finally, Plaintiff misses the mark with its contention that the PSNRP is an illusory  
12 alternative to a TMDL that "ripens delay into a constructive submission."<sup>4</sup> Dkt. #60, at 20.  
13 Plaintiff touts the "reasonable assurances" and "margins of safety" inherent in the TMDL  
14 process. *Id.* at 22–23. However, these TMDL principles do not entirely insulate load allocations  
15 and wasteload allocations from legal challenges, as evidenced by Plaintiff's challenge of the  
16 Budd Inlet and Deschutes River TMDLs pending in this Court. *See NWEA v. EPA*, No. 19-2079  
17 (W.D. Wash.). In addition, the PSNRP provides reasonable assurance that DO water quality  
18 standards will be met by establishing total nitrogen targets for marine point sources discharging  
19 to Puget Sound and watersheds draining into Puget Sound and by establishing how those targets  
20 will be used to inform effluent limits in point sources' discharge permits<sup>5</sup> and non-point source  
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25 <sup>4</sup> Plaintiff could have given Ecology the opportunity to respond to its concerns regarding the PSNRP by  
submitting comments on the draft PSNRP but chose not to do so.

26 <sup>5</sup> Plaintiff does not and cannot support its assertions that "nothing short of a TMDL can ensure there are  
permit limits that meet the requirements of the CWA and its implementing regulations" or that the absence of

1 loading reduction strategies.<sup>6</sup> Moreover, the assumptions built into the Salish Sea Model, and  
 2 Ecology’s use of that model when developing the draft ARP, are consistent with standard  
 3 practices Ecology has used for including implicit margins of safety in past DO TMDLs.

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 5 In sum, Ecology has not decided to “forgo” or “abandon” promulgating Puget Sound  
 6 DO TMDLs, as Plaintiff alleges. Dkt. #60, at 20, 23. Ecology has simply assigned Puget Sound  
 7 DO TMDLs lower priority while it pursues a focused and efficient approach to identify and  
 8 reduce sources of nitrogen to Puget Sound. The work Ecology is performing under the PSNRP  
 9 will bolster, not stymie, Ecology’s commitment to complete Puget Sound DO TMDLs if areas  
 10 of the Puget Sound continue to be impaired for DO and TMDLs addressing those impairments  
 11 become a higher priority than Washington’s many other currently higher priority TMDL and  
 12 Clean Water Act obligations. While Plaintiff may have preferred that Ecology commit to  
 13 completing Puget Sound DO TMDLs sooner, Plaintiff has not demonstrated that it was  
 14 unreasonable or unlawful for Ecology to first invest its limited resources in the clean-up efforts  
 15 identified in the PSNRP.  
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17 **B. This Court Should Deny Plaintiff’s Requested Relief**

18 As explained above and in Defendants’ Consolidated Brief, Plaintiff is not entitled to  
 19 any relief. Should this Court disagree, Defendants have explained why any relief the Court  
 20 awards to Plaintiff must be narrowly tailored, be respectful of Ecology’s discretion, and not  
 21 force EPA to prepare a Puget Sound-wide DO TMDL in thirty days. Dkt. #65, at 30–33.  
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 25 numeric water quality based effluent limits in discharge permits resulted from Ecology’s decision to pursue the  
 26 PSNRP before completing a TMDL. Dkt. #60 at 12; Dkt. #60-2 at 12.

<sup>6</sup> Plaintiff’s assertion that developing individual load allocations for non-point sources is critical to  
 ensuring nutrient reductions from non-point sources is undermined by its competing assertion that past TMDLs  
 with such load allocations have not resulted in meaningful reductions from non-point sources (Dkt. #60-2 at 5, 11)  
 and Ecology’s robust non-point source program, the success of which is not confined to the TMDL context.

1 Awarding Plaintiff any broader relief would unnecessarily harm EPA, Ecology, and the public  
2 interest by diverting resources from other Clean Water Act efforts and obligations to a TMDL  
3 for an impairment that Ecology is already addressing through the PSNRP.  
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5 **III. CONCLUSION**

6 For the reasons discussed above and in Defendants’ Consolidated Brief, Amicus Curiae  
7 State of Washington, Department of Ecology respectfully requests that the Court grant  
8 Defendants’ Cross-Motion for Summary Judgment, deny Plaintiff’s Motion for Summary  
9 Judgment, and either dismiss Plaintiff’s Complaint or enter final judgment in Defendants’  
10 favor.  
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12 RESPECTFULLY SUBMITTED this 10th day of October 2025.

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14 Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Western District of Washington by using the CM/ECF system. Participants in this case who are registered users will be served by the CM/ECF system.

DATED this 10th day of October 2025.

s/ Adam L. Levitan  
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Assistant Attorney General