The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL ADVOCATES, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants, CITY OF TACOMA, KING COUNTY, Defendant-Intervenors.	Case No. 2:21-cv-1637-BJR **Plaintiff's Motion for Summary Judgment**

INTRODUCTION

Puget Sound is being starved of oxygen. For over five decades, the U.S. Environmental Protection Agency ("EPA") and the State of Washington have documented a deepening crisis in the Sound caused primarily by nitrogen pollution from sewage treatment plants, which causes oxygen depletion, threatening the entire marine ecosystem. The Clean Water Act ("CWA") mandates one specific remedy for such impaired waters: a science-based cleanup plan known as a Total Maximum Daily Load, or "TMDL." Importantly, a TMDL is the CWA's primary mechanism for translating

water quality standards into enforceable pollution limits. Thus, a TMDL targeted at addressing the cause of the Sound's unnaturally low dissolved oxygen levels would establish the analytical and legal foundation to issue restrictions on nitrogen discharges, thereby reversing the Sound's decline.

Yet after decades of studies and failed alternatives, Washington has failed to produce the required cleanup plan to address this crisis. Under the CWA, this prolonged inaction constitutes a "constructive submission" of an inadequate TMDL to EPA, triggering EPA's non-discretionary duty to disapprove it and promptly issue its own TMDL for Puget Sound. Because EPA has failed to perform this mandatory duty, while nitrogen pollution continues unchecked and is projected to increase significantly in the coming years, this Court should order EPA to comply with the law and finally deliver the cleanup plan required to restore Puget Sound by a date certain.

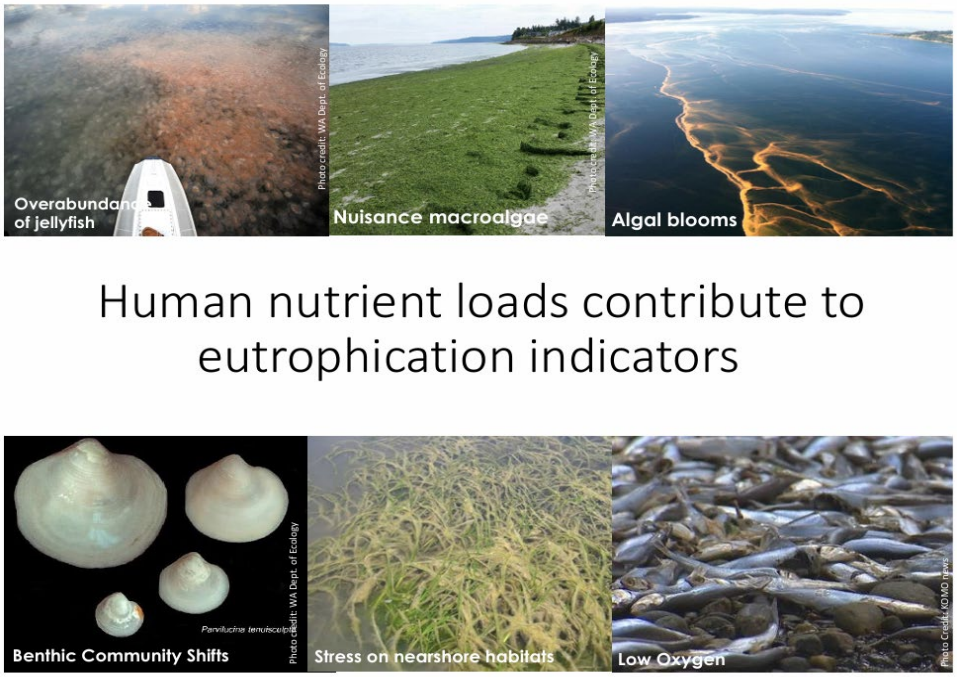
FACTUAL AND LEGAL BACKGROUND[1]

A. The Water Quality Crisis in Puget Sound.

Puget Sound suffers from dangerously low levels of dissolved oxygen ("DO"). As the Washington State Department of Ecology ("Ecology") stated so simply nearly 20 years ago, "[f]ish need oxygen" yet "[t]here are many areas in Puget Sound with very low levels of dissolved oxygen." Hawley Decl. ¶ 2, Exh. A at NWEA00002 (Ecology, Public Notice, South Puget Sound Dissolved Oxygen Study (Oct. 2006)). Excess loads of nitrogen are causing critically low dissolved oxygen levels throughout Puget Sound; this nutrient pollution feeds an overabundance of plant and algal growth, which, upon dying and decomposing, depletes the levels of dissolved oxygen that fish and other marine life need to survive. *See* AR0002525; *see also* AR0033675–77. Specifically, excess nutrients contribute to a process called

[1] In this brief, citations to the Administrative Record EPA lodged with the Court, Dkt. Nos. 27, 59, are abbreviated as "AR". Consistent with the Court's order granting NWEA's motion to clarify the scope of review, Dkt. No. 50, NWEA files a small number of non-record documents in support of its motion for summary judgment. *See generally* Declaration of A. Hawley. These additional documents are highly relevant to NWEA's constructive submission claim and are not duplicative of documents found in the existing record produced by EPA. Citations to the exhibits submitted in support of this motion are abbreviated as "NWEA".

"eutrophication," indicated by a decrease in the dissolved oxygen available for aquatic life and a range of other negative environmental impacts.



AR0010147.

Ecology and EPA have known about this problem for at least 55 years. AR0025662 (noting that research in the 1950s documented "[t]he tendency towards seasonally low DO at Puget Sound inlets and bays, and the potential for eutrophication at those locations"); AR0001518 ("A 1986 study commissioned by Ecology highlighted the problems caused by low DO within [Budd] Inlet, inculpating low-DO conditions in fish kills and water quality violations extending back to 1971."). By the 1990s, the scope and cause of the problem were clear. In 1997, for example, Ecology warned that low dissolved oxygen could cause "a shift in species composition, a decrease in population numbers and species diversity with a resulting decrease in amount and type of biomass, a disruption of usual predator-prey interaction, and a shift in the expected trophic pathways." A. Hawley Decl. ¶ 3, Exh. B at NWEA00072 (Ecology, *Washington State Marine Water Quality in 1994 and 1995* (April 1997)). In 2013, Ecology told EPA: "Wastewater discharges are at or approaching levels of regulatory concern in South and Central

Puget Sound now and will increase with population." AR0016941. By 2017, there was no question: "We have over a decade's worth of science and analysis that show increasing nutrients are adversely affecting the ecological integrity of Puget Sound."AR0030250. And by 2019, Ecology concluded that "Puget Sound's cumulative annual hypoxic volumes for 2006, 2008, and 2014 were between 28% and 35% higher than under reference (pre-industrial) conditions." AR0011044.[2]

EPA and Ecology have determined that Puget Sound's human nitrogen load "is almost entirely from" wastewater treatment plants ("WWTPs"). AR0017555; *see also* AR0013866 (showing sewage treatment plants contribute 60 percent annually and 80 percent in summer to nitrogen loading); *see also* AR0017555 ("In Puget Sound, human sources of [nitrogen] (both point and nonpoint) are 2.7 times higher than natural loads[.]"). In its analysis of the "Impacts of Current and Future Human Nitrogen Sources and Climate Change through 2070," Ecology projects that as the region's population grows, "[f]uture loads from marine point sources would nearly double if current treatment technology used at each wastewater plant continues as is." AR0016631; *see also* AR0016606 ("[m]arine point source [nitrogen] loads will increase 11% by 2020, 35% by 2040, and more than double to 67% by 2070 relative to 2006 baseline levels."). EPA predicted over 30 years ago that the nitrogen loads would increase. *See* Hawley Decl. ¶ 4, Exh. C at NWEA00380 (EPA, *Nutrients and Phytoplankton in Puget Sound* (July 1991)) ("[w]ith the rapidly increasing human population in the Puget Sound region, discharges of nutrients into Puget Sound will likely increase.").

These additional loads of nitrogen will further stress the ecosystem. *See* AR0016629 (finding that "[t]he biggest changes occur in South Puget Sound and the southern part of Central Puget Sound, where current human sources have the highest relative impact."). The agencies agree that this crisis will only get worse without decisive action to curtail nitrogen discharges to the Sound. AR0008472 ("[a]s our region's population grows, the noncompliant area is projected to grow larger and total noncompliant

[2] "Hypoxia" describes water quality when dissolved oxygen levels become too low to support most aquatic life. *Id.*

days would increase if we continue do nothing."); AR0013825 (other expected adverse effects include "[a]reas with adversely affected benthos will likely increase" and "[c]hanges in food web interactions").

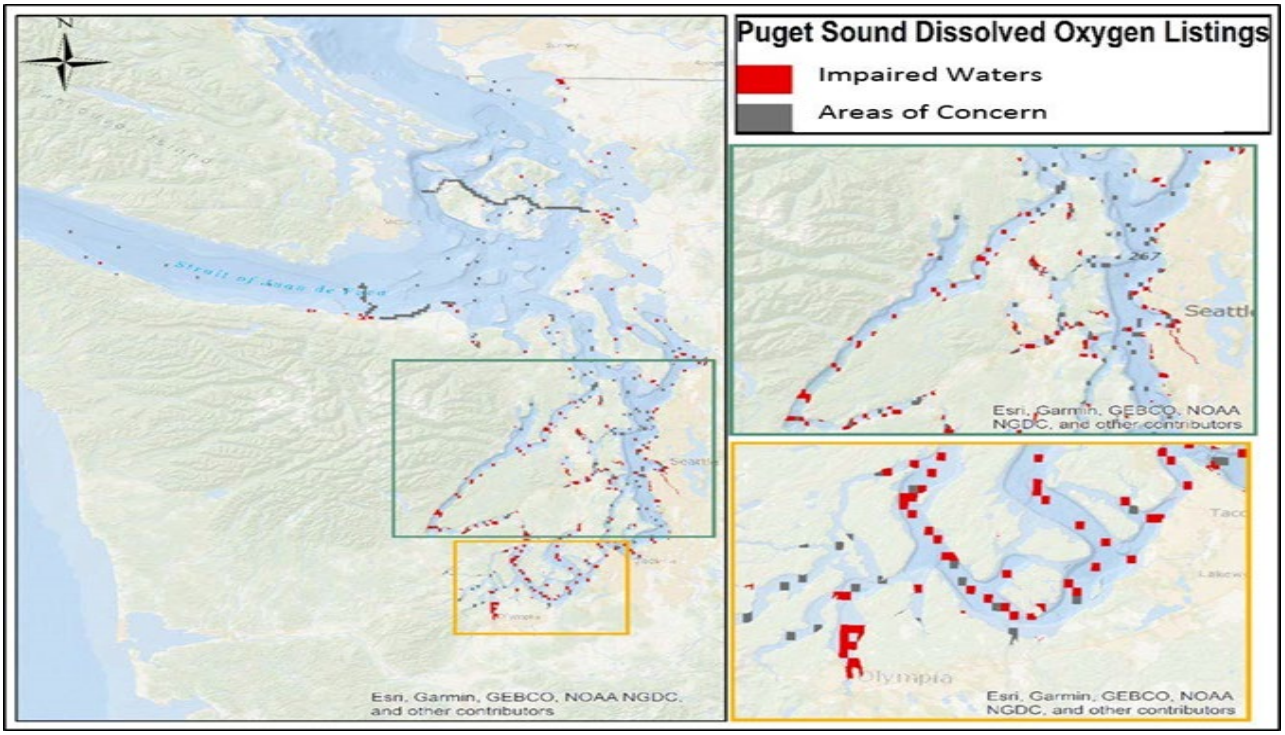
B. Clean Water Act and Water Quality Limited Waters

The CWA requires Washington, subject to EPA oversight, to develop water quality standards for surface waters to protect human health and aquatic life. 33 U.S.C. § 1313(c)(2)(A). To these ends, Washington has established designated uses for its marine waters that apply to salmonids and other fish species; clam, oyster, and mussel, rearing and spawning; and crustaceans and other shellfish. WAC 173-201A-210; WAC 173-201A-610, and WAC 173-201A-612. The state's water quality standards include specific numeric criteria designed to protect these uses, such as minimum levels of dissolved oxygen for marine waters. WAC 173-201A-210 (1)(d), Table 210(1)(d).

Once established, the state must periodically determine whether its waters meet those standards. *Id.* § 1313(d)(1). Waters not meeting applicable water quality standards are deemed "impaired" and placed on a state's "CWA section 303(d) list." *See* 33 U.S.C. § 1313(d).

In 1996, Ecology first listed 17 Puget Sound segments as impaired for dissolved oxygen.[3] AR0000003. That list has steadily increased, to 25 segments in 1998, 52 segments in 2004, 100 segments in 2008, and 141 segments in 2012. *Id.* Today, there are currently 197 Puget Sound dissolved oxygen listings—an area over 63 square miles. *Id.* (Ecology's 2014-2018 list that EPA approved in 2022). The dissolved oxygen crisis is likely much worse, however, as Ecology has identified another 289 "Category 2" water segments in Puget Sound, a category that indicates "waters of concern," along with 510 segments identified as in "Category 3" for having insufficient data for dissolved oxygen. *Id.* In fact, Ecology now estimates that approximately 20 percent of Puget Sound—equating to roughly 200 square miles—does not meet the dissolved oxygen standards. AR0011044.

[3] The waters of Puget Sound are assessed by grid cells and by individual pollutant or parameter, thus yielding segment-parameter impairments. Each cell is approximately 2,460 by 3,660 feet.



AR0011048.

C. Clean Water Act Cleanup Plans: Total Maximum Daily Loads

The CWA is designed to protect beneficial water uses, such as fish and shellfish consumption, recreation, and habitat for imperiled species. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10, *see generally Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1206 (9th Cir. 2019) (describing section 303(d)'s TMDL program). TMDLs are "crucial" to the CWA's success "because [they] bring[] rigor, accountability, and statutory authority to the process." Hawley Decl. ¶ 5, Exh. D at NWEA00533 (EPA, *New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)* (Aug. 8, 1997) ("1997 TMDL Guidance"). As this Court explained, "TMDLs provide a basis for developing other pollution control measures where technology-based point source controls prove inadequate," and as such, "[t]he role of TMDLs in the CWA strategy for improving water quality confirms that they were to be developed quickly." *Idaho Sportsman's Coal. v. Browner*, 951 F. Supp. 962, 967 (W.D. Wash. 1996).

TMDLs express the total load of pollution that can enter a waterbody daily and still meet applicable standards; this is known as a "loading capacity." *Id*; 40 C.F.R. § 130.2(f). Like cutting slices

of a pie, portions of the loading capacity are "allocated" to pollution sources. 40 C.F.R. § 130.2(i); *see Pronsolino v. Nastri*, 291 F.3d 1123, 1126, 1128 (9th Cir. 2002). Portions allocated to "point sources" are called wasteload allocations. *Id.* § 130.2(h). Portions allocated to "nonpoint" sources—such as runoff from logging and farming—are called load allocations. *Id.* § 130.2(g). Thus, the TMDL is the "sum of the individual waste load allocations for point sources and load allocations for nonpoint sources and natural background." *Id.* § 130.2(i). When allocations are met, water quality standards will be attained. *Pronsolino,* 291 F.3d at 1129.

To this end, state- and EPA-issued National Pollutant Discharge Elimination System ("NPDES") discharge permits must comply with both water quality standards and wasteload allocations. 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §§ 122.4(d), 122.44(d)(1), 122.44(d)(1)(vii)(B). As the Eleventh Circuit explained:

> The theory is that individual discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL. As should be apparent, TMDLs are central to the [CWA's] water-quality scheme because … they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.

Sierra Club v. Meiburg, 296 F.3d 1021, 1025-26 (11th Cir. 2002). Importantly, such permits cannot issue to a new discharger that would contribute to a violation of water quality standards unless a TMDL is in place with "sufficient remaining pollutant load allocations to allow for the [new] discharge," along with compliance schedules for existing dischargers. 40 C.F.R. § 122.4(i); *see Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011–14 (9th Cir. 2007). As such, TMDLs are a principal mechanism for reducing point source pollution by requiring more stringent effluent limits in discharge permits where necessary to meet water quality standards.

TMDLs prepared by states are submitted to EPA for approval. 33 U.S.C. § 1313(d)(2). In acting on a state-submitted TMDL, EPA evaluates whether the TMDL has demonstrated "reasonable assurance" that water quality standards will be attained through the setting *and implementation* of

wasteload and load allocations that are "established at a level necessary to implement the applicable water quality standards."[4] 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1) ("TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical [water quality standards]"). The CWA also requires that a TMDL include a "margin of safety" to account for "any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 303(d)(1)(C); 40 C.F.R. §§ 130.2(h) (wasteload allocations are a type of effluent limitation), 130.7(c)(1).[5] EPA-approved TMDLs become part of the state's continuing planning process and water quality management plans required under CWA section 303. 33 U.S.C. § 1313(e)(3)(C); 40 C.F.R. §§ 130.5(b)(3), 130.6(c)(1), and 130.7(a).

D. The Constructive Submission Doctrine

EPA has 30 days to approve or disapprove a state's TMDL submission, and must issue its own replacement within 30 days if it disapproves the TMDL. 33 U.S.C. § 1313(d)(2). These statutory provisions create an "expedited timeline" reflecting the "clear expediency" Congress sought for completion of TMDLs. *Columbia Riverkeeper*, 944 F.3d at 1210. The Act, however, does not impose a deadline for states' TMDL submissions, and is "silent as to what duties the EPA has when a state simply fails to submit a TMDL altogether." *Id.* at 1208; 33 U.S.C. § 1313(d)(2).

To fill this statutory gap, courts have adopted the "constructive submission doctrine." *Columbia Riverkeeper*, 944 F.3d at 1210. The Ninth Circuit first recognized this doctrine in *San Francisco*

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[4] *See Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289, 325 n.20 (M.D. Pa. 2013) (explaining that "EPA's reasonable assurance requirement was first published in a 1991 guidance document and was later reiterated in a 1997 guidance document"). EPA Region 10's TMDL checklist includes whether reasonable assurance has been demonstrated. AR0021450, fn. 8.

[5] Congress understood "tight deadlines might mean that initially established TMDLs would be based on less than ideal data," which is why it included the requirement that TMDLs use "a margin of safety which takes into account any lack of knowledge." *Nat. Res. Def. Council, Inc. v. Fox*, 909 F. Supp. 153, 157 (S.D.N.Y. 1995) (quoting 33 U.S.C. § 1313(d)(1)(C)). "In other words, Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving. No other program has such a strong statutory endorsement for action in the face of an incomplete database." *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1429, n.8 (W.D. Wash. 1991) (quoting Thomas Wilson, Chief of the Office of Water Planning, EPA Region X, EPA Nonpoint Source News–Notes, October 1990, at 20).

Baykeeper v. Whitman, 297 F.3d 877 (9th Cir. 2002) and reaffirmed EPA's "mandatory duty to establish a TMDL when a State fails over a long period of time to submit a TMDL" in *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005) (a state's "'prolonged' failure can amount to the 'constructive submission' of an inadequate TMDL, thus triggering the EPA's duty to issue its own."). Simply stated, a constructive submission occurs "when the state's actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody." *Columbia Riverkeeper*, 944 F.3d at 1210 (quoting *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001)). When a TMDL has been constructively submitted, EPA's mandatory duty to develop and issue its own TMDL within 30 days is triggered. *Id.* at 1211.

The constructive submission doctrine applies to situations where (a) a state failed to submit *any* TMDLs, *see, e.g.*, *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991), and also (b) where a state "has determined not to submit a required TMDL for a given impaired waterbody." *Hayes*, 264 F.3d at 1023 (citing *Scott v. City of Hammond*, 741 F.2d 992, 997 (7th Cir. 1984)). In *Columbia Riverkeeper*, holding that a state's inaction on a particular waterbody can trigger EPA's mandatory duty to develop a TMDL, the Ninth Circuit explained:

> Where a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act.

944 F.3d at 1211. The court concluded that allowing EPA to "indefinitely avoid compliance . . . would undermine the clear expediency that Congress mandated throughout" CWA section 303(d)(2) and "would be difficult to reconcile with the purpose of the statute." *Id.* at 1210.

STANDARD OF REVIEW

The CWA includes a citizen suit provision authorizing suit against the EPA Administrator for an "alleged . . . failure of the Administrator to perform any act or duty under this chapter which is not

discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). District courts have jurisdiction to "order the Administrator to perform such act or duty," which may be imposed by the Act or regulations promulgated under the Act. *Id.*

ARGUMENT

A. Northwest Environmental Advocates Has Standing.

An organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State App. Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Here, NWEA easily meets this test based on several NWEA members who would have standing in their individual capacity. *See* Declaration of Helen Bresler ¶¶ 7–16; Declaration of Ron Peltier Decl. ¶¶ 4–19. Specifically, the Ninth Circuit has held that an organization's members who have been "adversely affected by the inadequate water quality of a representative number of waters throughout the state" have standing to challenge the adequacy of a state TMDL program. *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994). Here, NWEA's members regularly use Puget Sound, and their aesthetic, recreational, and other interests have been adversely affected due to ongoing water quality impairment. *See, e.g.,* H. Bresler Decl. ¶¶ 9–10; R. Peltier Decl. ¶¶ 4–14. These members aver that their use and enjoyment of Puget Sound is diminished by its degraded condition resulting from excess nitrogen and the dissolved oxygen impairment. *Id.* These injuries are traceable to EPA's failure to develop a TMDL, satisfying the causation element of standing. *See Alaska Ctr. for the Env't*, 20 F.3d at 985 (members' injury "is the result of EPA's failure to comply with the CWA to establish TMDLs"). A favorable decision from this Court would redress the injuries of NWEA's members by ensuring a schedule for a Puget Sound TMDL that would lead directly to pollutant

reductions, thus reducing water quality problems in the Sound. *Id.* at 985–86 (Congress has "already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution" and thus redressability based upon TMDL issuance was not "completely speculative" although their implementation may fall to the state). Thus, NWEA has members who would have standing to sue in their own right.

As a result, because protecting Puget Sound is germane to NWEA's mission to protect and restore regional water quality, Declaration of N. Bell ¶¶ 2-6, 25-30, and the extant lawsuit may proceed without the involvement of NWEA's individual members, NWEA has standing to bring this suit.

B. The Development and Implementation of the Legally Mandated TMDL is Essential to Protect and Restore the Puget Sound.

A TMDL addressing the dissolved oxygen impairments in Puget Sound is needed to ensure that Ecology and EPA issue NPDES permits that meet federal and state law.[6] That is not currently happening. Today, there are 88 municipal WWTPs cumulatively discharging 25 million pounds of nitrogen directly to the Sound each year under Ecology or EPA-issued permits. AR0017576 (map showing facilities discharging directly to Puget Sound); AR0011060 (annual average DIN load from marine point sources is 30,540 kg/day). There are approximately 20 other municipal treatment plants that discharge into tributaries to the Sound. AR0017575; AR0017547 (map depicting average annual human nitrogen loads). Currently, "none of the WWTPs or industrial facilities discharging to Puget Sound have numeric effluent limits protective of dissolved oxygen across the Sound." AR0032450.[7]

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[6] As noted above, currently 170 waterbody segments across Puget Sound are listed on the state's 303(d) as category 5 impaired waters. Because the "[d]ischarges in one basin can affect the water quality in other basins . . . all wastewater discharges to the greater Puget Sound containing inorganic nitrogen contribute to D.O. impairments." AR0003472. As a result, a TMDL to limit excess nitrogen pollution that contributes to the dissolved oxygen impairment in these segments will necessarily be Puget Sound-wide, given the far-field effects of nutrient pollution. AR0022211. As a result, a TMDL is necessary in Washington State Water Resource Inventory Areas ("WRIA") nos. 1–3 and 5–19. *See* https://gis.ecology.wa.gov/portal/apps/webappviewer/index.html?id=6161245732144516921 09e1e2971b548.

[7] One facility has numeric nitrogen limits, based on its treatment technology. *See* AR004614 (Ecology's Fact Sheet for the LOTT sewage treatment plant discharge permit explaining "Ecology is completing a TMDL, referenced

Indeed, as a senior manager at Ecology notes:

> What has made Washington more unique across the nation is our slow application of technology that provides additional treatment to wastewater discharges. Broadly speaking, WWTP discharging into Puget Sound have had no significant discharge treatment improvements in 40 years – that is quite extraordinary when we look across the nation and see far and wide the regular use of advanced treatment technology on WWTP elsewhere.

Hawley Decl. ¶ 6, Exh. E at NWEA00543 (Email from J. Killelea to W. Weaver *et al.* (April 16, 2024)).[8]

The reason for this is simple: Ecology has not prepared a Puget Sound TMDL as the CWA requires.[9] That is, while Ecology has determined that WWTPs discharge into Puget Sound have a "reasonable potential" to contribute to the violations of the dissolved oxygen standard, it has continually failed to establish numeric effluent limits to address the problem. *See* AR0003295 (Ecology acknowledging in the Fact Sheet for the Nutrient General Permit that "[n]umeric effluent limits will replace these narrative effluent limits after establishing a facility specific compliance period once Ecology completes the alternative restoration plan (e.g., Nutrient Reduction Plan) or EPA approves a TMDL."); s*ee also, e.g.*, AR0022211 (*Kitsap County v. State of Washington, Department of Ecology*, PCHB No. 20-005, Order of Dismissal (Oct. 16, 2020 (Ecology had not done the work "necessary to quantify both the [WWTP's] far-field water quality effect and the corresponding effluent limit necessary to prevent an exceedance of the D.O. standard"). In fact, for far-field pollutants—pollutants that when "[d]ischarge[d] in one basin can affect the water quality in other

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above, to establish effluent limits for the following nutrient: Nitrogen. The proposed permit includes effluent limits for Total Inorganic Nitrogen (TIN) derived from the engineering report on the design of the nitrogen removal process."); *see also* AR0024902 (LOTT is the only facility with limits).

[8] But this should not be surprising because a least some permittees, "are of the opinion that it is the Department's duty as the regulatory agency implementing the Clean Water Act to force the City to invest in major improvements before that time; it is not incumbent on the City to take this initiative." Hawley Decl. ¶ 7, Exh. F at NWEA00545 (E-mail from K. Dinicola to V. McGowan (June 26, 2024) (noting that Ecology can "rest assured, the City of Tacoma will not take steps absent clear regulatory drivers.")).

[9] By contrast, a TMDL for Long Island Sound has been highly effective. *See* AR0022588 (EPA's noting that "[s]ince the 2000 TMDL NY & CT are discharging 47 million fewer pounds of nitrogen annually by sewage treatment plants compared to the early 1990s, a 60% reduction.").

basins," AR0003472—such as nitrogen, Ecology's practice is to "defer any water quality-based limits on the pollutant until the TMDL is completed and a WLA is assigned" where a TMDL is "in progress." Hawley Decl. ¶ 8, Exh. G at NWEA00775 (Ecology, *Permit Writers Manual* (rev. July 2018)); *see also* AR0023917 (explaining that Ecology had "yet to develop guidance for the Permit Writers Manual or fact sheet language that addresses how to move forward with limits after the nutrient [reasonable potential] determination."). And therefore, having claimed it might write a Puget Sound TMDL in the future, Ecology has routinely omitted nitrogen effluent limits in NPDES permits. *See, e.g.*, Hawley Decl. ¶ 9, Exh. H at NWEA01142 (Ecology, *Fact Sheet for NPDES Permit WA0029581 King County South Wastewater Treatment Plant* (July 1, 2015)) ("Ecology will use this [monitoring] data if a TMDL is developed for dissolved oxygen; such a TMDL will likely establish waste load allocations for nutrients."); *see also* AR0004157–58 (NWEA Petition collecting Ecology-issued NPDES permits that do not include water quality-based effluent limits).[10]

In addition, the lack of a Puget Sound TMDL has hampered Ecology's ability to develop TMDLs for the watersheds that contribute the remaining 31 percent of the Sound's nitrogen loads. AR0033753; AR0032427 ("Domestic WWTPs and industrial facilities discharging into Puget Sound represent around two thirds of the total human nitrogen load to the Sound.") These include sewage treatment plants discharging to rivers and nonpoint sources, which are significant nitrogen sources. *Id.*; *see also* Hawley Decl. ¶ 10, Exh. I at NWEA01215–17 (State-EPA Nutrient Innovations Task Group, An Urgent Call to Action (Aug. 27, 2009)) (noting the significant contributions of nitrogen from sources other than WWTPs and industries, including urban stormwater, on-site septic systems, and livestock production).

[10] EPA has followed suit in its own NPDES permits for Puget Sound dischargers. In issuing permits for two wastewater treatment plants on Lummi Nation land, EPA adopted Ecology's findings that the facilities had a reasonable potential (that would trigger an effluent limitation, *see* 40 C.F.R. 122.4(d)(1)((i)) to contribute to the Sound's dissolved oxygen impairment but declined to include numeric water quality-based effluent limits for nitrogen. AR0031467–68 (Petition for Review). EPA's rationale was the same as Ecology's: that it is "impracticable to develop facility specific numeric nutrient [water quality based effluent limits]" without a completed TMDL and more data. AR0031458–59.

All the while, Ecology continues to demonstrate that the lack of nitrogen effluent limits—the very limits it and EPA routinely avoid in permits because there is no TMDL—is causing and contributing to violations of water quality standards that will become both more extensive and more severe in the future. AR0008902 (predicting "compliance could be almost achieved in WA waters" with nitrogen reductions of 65 percent), AR0008903 (predicting increases in "number of days and noncompliant area" from population growth).

C. Ecology has Constructively Submitted an Inadequate and Unlawful TMDL.

"There comes a point at which continual delay of a prioritized TMDL and detours to illusory alternatives ripen into a constructive submission that no action will be taken." *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at *11 (W.D. Wash. Mar. 16, 2015). Where a state has (1) "failed to develop and issue a particular TMDL for a prolonged period of time," and (2) "has failed to develop a schedule and credible plan for producing that TMDL," it has constructively submitted that TMDL under 33 U.S.C. § 1313(d)(2), "which triggers the EPA's mandatory duty to act." *Columbia Riverkeeper*, 944 F.3d at 1211. Here, Ecology has failed to develop and submit a Puget Sound TMDL for nearly 30 years. This is a prolonged delay, by any measure. Moreover, Ecology has no schedule or credible plan for completing the missing TMDL. As a result, EPA is liable for its failure to disapprove this constructively submitted TMDL and issue its own, as required by 33 U.S.C. § 1313(d)(2).

1. Ecology has failed to submit a Puget Sound TMDL to EPA for a prolonged period of time.

Ecology first placed segments of Puget Sound on the 303(d) list for dissolved oxygen in 1996, triggering the state's duty to develop and implement TMDLs. Despite this well-documented and worsening crisis, Ecology has never developed a TMDL to address the Sound-wide impairment. Now, nearly 30 years later, a "prolonged period of time" had already passed under any reasonable definition.

Although the Ninth Circuit has not set a bright-line rule for what constitutes a "prolonged period of time" in the constructive submission context, it has held "the failure of the EPA to take any

steps to establish the TMDLs mandated by Congress for more than a decade" violates the CWA. *Alaska Center for the Environment*, 20 F.3d at 986.[11] In *Columbia Riverkeeper*, the Ninth Circuit recognized the CWA's water quality goals are "dramatically undermined" without TMDLs, finding the roughly 20 years of delay in two states' submitting a Columbia River TMDL a "prolonged failure" constituting a constructive submission, and thus triggering EPA's mandatory duty to act. 944 F.3d at 1210–11.

EPA has suggested that 10 to 15 years without a required TMDL is "prolonged" enough to constitute a constructive submission. In its 1997 TMDL Guidance, EPA explains that state schedules for "the establishment of TMDLs for all waters on the most recent section 303(d) list . . . should be expeditious and normally extend from eight to thirteen years in length[.]" NWEA00535. EPA later stated that states "should generally schedule all TMDLs no later than 10 years (with a possible 5 year extension) from the later of July 11, 2000 or the date of initial listing of the waterbody/pollutant combination on a section 303(d) list[.]" 65 Fed. Reg. 43,586, 43,613 (July 13, 2000).[12]

Importantly, courts have recognized that a failure to expeditiously produce TMDLs fatally undermines CWA goals. In *Sierra Club v. Hankinson*, the court found EPA's approving Georgia's TMDL submissions arbitrary despite the state's promise to "develop approximately 25 complex TMDLs for its major river basins within the next eight years[,]" remarking that at that pace, "Georgia will take over a hundred years to complete TMDLs for the approximately 340 [water quality limited waters]." 939 F. Supp. 865, 871 (N.D. Ga. 1996). In *Idaho Sportsmen's Coalition*, the court rejected EPA's proposed 25-year schedule for completing all Idaho TMDLs, citing the schedule's "extreme slowness," and lamented that if such a schedule were approved,

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[11] There, the Ninth Circuit upheld the district court's order requiring EPA to work with the state to establish a reasonable schedule for the development of TMDLs for all water quality limited waterbodies, *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1380 (W.D. Wash. 1992). Previously, this Court remarked there "could hardly be a more compelling case for finding a 'constructive submission'" than the State of Alaska's failure to produce any TMDLs "over the past eleven years." *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991).

[12] EPA explained in the preamble that, as of July 2000, "46 States are developing TMDLs based on schedules of 13 years or less," 65 Fed. Reg. at 43,613. The rule itself was later rescinded, but as EPA noted "a ten year schedule is consistent with current EPA policy" as set forth in its 1997 TMDL Guidance. *Id.*

> The net result would be to **put off for another generation** a step that Congress required be taken years ago. . . . [A]t Idaho's proposed submission rate the twenty-five years could easily turn into fifty or seventy-five. Although courts have allowed additional time when CWA deadlines are missed, **nothing in the law could justify so glacial a pace**.

951 F. Supp. at 967 (emphasis added); *see also Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 55 (D.D.C. 2010) (entering a schedule for completion of District of Columbia TMDLs from four to seven years); *Nat. Res. Def. Council, Inc. v. EPA*, 490 F. Supp. 3d 190, 196 (D.D.C. 2020) ("[T]he development of a TMDL sometimes takes several years, or even a decade in extreme cases."). For the extraordinarily complex multi-state Chesapeake Bay TMDL, 10 years was appropriate. *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 419 (D. Md. 2001) (holding that EPA's approval of Maryland's schedule calling for "TMDLs to be developed for all waters but the Chesapeake Bay by 2008 and for the Chesapeake Bay by 2011"—that is, within 10 years—was not an abuse of discretion).

As one district court has explained, "the passage of time functions in some cases as a proxy for a state's unexpressed, but nevertheless clear and unambiguous, decision to submit no TMDL for a given body of water." *Env't Law & Policy Ctr. v. EPA*, 415 F. Supp. 3d 775, 792 (N.D. Ohio 2019). This is the case here. Over the past 30 years, Ecology has gone to great lengths to avoid writing a TMDL. Under any definition, Ecology has failed to submit a Puget Sound TMDL to EPA for a "prolonged period of time."

2. Ecology Has No Schedule or Credible Plan for Completing the TMDL.

Not only has Ecology failed to produce a Puget Sound TMDL for a prolonged period, but it also lacks a schedule or any plan for completing a Puget Sound TMDL—thus satisfying the second criterion for finding a constructive submission. *See* AR0002101 (Ecology's ranking Puget Sound "**low priority** for TMDL development") (emphasis original). Indeed, after years of studies conducted for an eventual TMDL, in 2018, Ecology abandoned it in favor of a "TMDL Alternative"—i.e., something

other than an actual TMDL. Hawley Decl. ¶ 11, Exh. J at NWEA01367–69 (Ecology, *Puget Sound Nutrient Source Reduction DRAFT Project Charter, Version 1.5* (July 30, 2018)).[13]

This effort to avoid writing a TMDL has culminated in Ecology's issuance of its "Draft Puget Sound Nutrient Reduction Plan," framed as an "advance restoration plan" ("Draft ARP"). AR0032411-487.[14] Rather than being a plan "designed to provide a more immediate and practical way to begin addressing water quality impairments in advance of a TMDL," *see* AR0007100, however, the Draft ARP is unquestionably intended as a plan to avoid writing a TMDL for decades. Thus, contrary to EPA's assertion that such plans "do not replace TMDLs," *id.*, that is precisely Ecology's goal. But, as explained in detail below: 1) a TMDL is vitally important now, and could be started today based on the work EPA and Ecology have already done; 2) the Draft ARP, even it were to become final as an ARP, is fatally flawed and has little chance of achieving anything but further delays; and 3) Ecology's track record of failing to implement measures that will result in improvements in water quality portend yet another failure. As a result, this Court should not let yet another illusory alternative forestall the development of the much-needed TMDL.

a. There is no justification for Ecology's continuing to avoid finalizing a TMDL.

This Court confronted a similar issue in *Sierra Club v. McLerran,* where it was asked to consider whether a long-overdue Spokane River PCB TMDL had been constructively submitted to EPA. No.

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[13] In 2017, Ecology was still "kicking around ideas for the end goal of the Nutrient Reduction Strategy (whether it will be a TMDL or TMDL alternative)" AR0030449. By June 2019, "Ecology has moved from model development and project scoping to executing the Puget Sound Nutrient Source Reduction Project with the goal of using the Salish Sea model and focused stakeholder engagement to develop a TMDL alternative for dissolved oxygen in the Sound." AR0010757.

[14] Ecology's shifts from "TMDL Alternative," to "Alternative Restoration Plan," to "Advance Restoration Plan," track the semantics of EPA's various potential options for a state to address a water quality issue, without writing a formal TMDL. *See, e.g.,* AR0018344 (Ecology staff's noting in 2021 that "EPA is really trying to get away from 'TMDL alternative' verbiage; ARP now stands for 'advance restoration plan' to avoid any grumbling from stakeholders that 'other restoration approaches' are a blanket way to avoid a TMDL in perpetuity."); *see also* AR0022175 (EPA's instructing staff in a 2021 presentation to "avoid terms like 'TMDL alternative' . . . as these plans are not an alternative to a TMDL, but a restoration plan implemented in advance of a TMDL."). In the end, Ecology's efforts on this front have resulted in only one thing: delay.

11-CV-1759-BJR, 2015 WL 1188522, at *8–9 (W.D. Wash. Mar. 16, 2015). There, Ecology sought to rely on a "Toxics Reduction Strategy" and a Task Force to avoid developing the TMDL. *Id.* at *3–4. As here, the *McLerran* plaintiffs argued this amounted to a constructive submission of an inadequate TMDL. *Id.* While ultimately concluding that EPA had acquiesced to Ecology's unlawful delay, the Court first found that there had not yet been a "constructive submission" of a TMDL. *Id.* at *12. In reaching this decision, the Court relied on the significant and legitimate work that remained to be done before a PCB TMDL could be completed. *Id.* at *8–9. Specifically, the Court found that major scientific gaps regarding the sources of pollution and the lack of a formal public process justified Ecology's decision to temporarily pursue an alternative. *Id.*

The situation for Puget Sound could not be more different. First, the scientific gap that was central to the *McLerran* decision is absent here. Ecology has the technical foundation and has completed most of the public process necessary for a Puget Sound TMDL. The agency's extensive scientific work, culminating in the technical analyses that support the Draft ARP, provides a sufficient basis for the required elements of a TMDL. Indeed, by as early as 2011, Ecology and EPA had quantified the nitrogen sources. *See generally* AR0017540. By 2019, the agencies had confirmed the degree to which "discharges in one basin can affect the water quality in others," AR0011116, using a model that one EPA expert called "Amazing." AR0028533 (they had "never seen such a well-documented and peer-reviewed model"); *see also* AR0009212 ("SSM model performance is comparable to Chesapeake Bay model"). By 2021, EPA stated that perfecting the model had passed the point of "Diminishing Returns." AR0009167. Now, in 2025, Ecology has determined precisely the nitrogen load reduction targets required from each of eight regions to protect water quality throughout the Sound. Hawley Decl. ¶ 12, Exh. K at NWEA01531(Ecology's identifying the nitrogen reduction scenario that would lead to compliance, that it would use in the Draft ARP); *see also* AR0032441 ("The nitrogen targets are derived from the loading scenario specified" in the model). And it has derived

these targets from *nitrogen load reductions assigned to each individual marine point source discharge*. AR0033611–18 (description and tables of results). Thus, unlike the Spokane River PCBs, any remaining uncertainty is no barrier to action. *See* 33 U.S.C. § 1313(d)(1)(C); *cf. Alaska Ctr. for the Env't*, 762 F. Supp. at 1429, n.8 (the "margin of safety" is intended to compensate for any uncertainty when developing a TMDL).

Indeed, Ecology has repeatedly stated that it could begin developing a TMDL based on the work it has already done. *See* AR0019013 ("the project has been designed from the beginning to be equivalent to a TMDL and the [model] is robust enough to be used for setting targets/allocations at this large regional scale."). In 2018, Ecology stated that "[t]he elements of a TMDL alternative are very similar to a traditional TMDL and this project is designed to develop the nutrient load reductions for marine and watershed sources, account for seasonal variability, and will include a margin of safety and allocation for growth." NWEA01369. Seven years later, in 2023, Ecology suggested the "Alternative Restoration Plan" would include "almost every required part of a TMDL document to make it easy to transition this document to a TMDL report if that becomes necessary." Hawley Decl. ¶ 13, Exh. L at NWEA01553 (Ecology, *Brief for PSNSRP Steering Committee* (March 20, 2023)).

Second, the procedural gap that justified the delay in *McLerran* does not exist here. *See* 2015 WL 1188522, at *9 (noting that Ecology only had an informal draft TMDL marked "[d]o not cite or quote" and had not yet conducted a formal public process). Here, Ecology has engaged in eight years of public workshops, stakeholder meetings, and public comment periods for its technical and policy work, and the ensuing Draft ARP. *See, e.g.*, AR0013946 (agenda for EPA-funded meeting of the "Puget Sound Nutrient Dialogue"); AR0032428 (describing the public meetings that have "met regularly since 2018 to discuss, learn, and provide input").[15] This extensive, multi-year public process is the opposite of the preliminary, informal steps taken in *McLerran*.

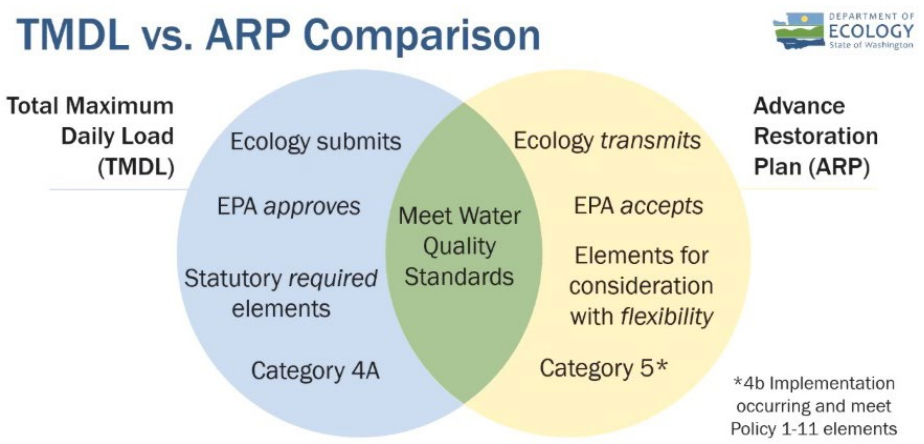
[15] *See also* AR0033547–86 (documenting over twenty public meetings from July 2017 to March 2025, detailing technical presentations on the modeling, stakeholder feedback on reduction scenarios, and discussions of implementation strategies).

With no legitimate scientific or procedural justification for further delay, Ecology's failure to produce a TMDL can no longer be characterized as merely a reasonable prioritization of its TMDL resources, but rather a final decision to forgo its obligation, triggering EPA's mandatory duty.

b. The Draft Advance Restoration Plan is an Unlawful "Illusory Alternative" for a TMDL.

On March 27, 2025, Ecology yet again confirmed that it has no plan to write a TMDL for Puget Sound by recommitting to its Draft ARP. *See* AR0033755–56. Having foreclosed any legitimate justification for further delay, Ecology's pursuit of this non-binding plan constitutes precisely the type of "detour[] to [an] illusory alternative[]" that ripens delay into a constructive submission. *See McLerran*, 2015 WL 1188522, at *11.

Ecology's Draft ARP is not a TMDL. Ecology's diagram illustrates the distinction:



AR0033755. The Draft ARP's deficiencies are not mere technicalities; they are wholesale omissions of the CWA's core requirements. The draft plan is an unenforceable collection of vague and unattainable goals, and lacks the components required of a TMDL, including, importantly, EPA's review and approval.[16]

[16] Notably, Ecology previously explained why the dissolved oxygen crisis in Puget Sound is better addressed by the development and implementation, and not a TMDL Alternative like the Draft ARP. *See* AR0022977–78 (enumerating factors when a TMDL Alternative may be successful, such as where the watershed is "primarily rural"; "small"; and "dominated by nonpoint sources," and when Ecology "know[s] the pollution control strategies necessary to solve the pollution problems in the watershed" and "[t]he point source impact is minimal, dominated by general permittees and wasteload allocations would contribute little to implementation," and "[t]here is local community and governmental support for water cleanup efforts").

First, the Draft ARP contains no binding and enforceable wasteload allocations for point sources or load allocations for nonpoint sources as required by 40 C.F.R. § 130.2(h). Instead, the Draft ARP establishes eight aggregated, basin-wide "total nitrogen loading targets." AR0032447. This approach fails to provide the "daily caps among each point source of pollution" that TMDLs require. *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 248–49 (D.D.C. 2011). And it fails to meet CWA goals to ensure that permits issued pursuant to the Act's section 402 comply with the requirements of section 301(b)(1)(C), namely that such permits include "any more stringent limitation . . . required to implement any applicable water quality standard[.]" 33 U.S.C. § 1311(b)(1)(C). Without individual, enforceable wasteload allocations, the Draft ARP lacks any binding connection to the pollution sources causing the impairment.

Ecology itself foresaw the legal flaws in its approach, specifically whether a TMDL Alternative would be a legal basis for future NPDES effluent limits. In 2018, when Ecology was deciding whether to completely abandon its planned TMDL in favor of a TMDL Alternative, Ecology noted:

> If a decision is made to not develop a TMDL, it is unclear how we use our NPDES permit authority to require dischargers to invest in advanced treatment to meet new effluent limits that do not have the force of a wasteload allocation.

NWEA01378. This observation is sadly accurate and prophetic. Under the proposed approach, Ecology will not be able to develop future effluent limits "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. 130.7 [TMDL program]," 40 C.F.R. § 122.44(d)(1)(vii)(B), because the Draft ARP is not a TMDL and EPA only reviews, but does not approve, such plans. AR0033929. This lack of rigor will not only undermine any certainty that future NPDES permits will ensure compliance with water quality standards, but also render any permits Ecology and EPA may issue vulnerable to challenge by the permittees; a vulnerability some permittees may very well exploit. *See, e.g.*, Hawley Decl. ¶ 14, Exh. M at NWEA01565–66 (*Puget Soundkeeper Alliance v. Dep't of Ecology*, No. P21-082c, King County Notice of Appeal (PCHB Dec. 28, 2021)) (Intervenor King County's

challenge of Ecology's use of modeling to determine that sewage treatment facilities are contributing to the Puget Sound's impairments, and challenging a permit's nutrient effluent limits).

Second, the Draft ARP fails to implement the precautionary elements of a TMDL that ensure the plan will achieve compliance with water quality standards. Specifically, the Draft ARP fails to explain how it provides "reasonable assurance" that it will reduce pollutant loads. Tellingly, avoiding this exact requirement was one of the purported benefits of using a TMDL Alternative. AR0033756; *see also* AR0022983 (Ecology's advising that for TMDL Alternatives, "[EPA's] TMDL template may be useful by removing . . . TMDL-specific Reasonable Assurance section[.]"). Reasonable assurance ensures that a TMDL's allocations will achieve water quality standards. AR0033932–33 (explaining the steps in EPA's review of TMDLs). While Ecology has claimed its plan's reasonable assurances will "go further than a standard TMDL," AR0019013, the Draft ARP contains no such analysis, thus foregoing the rigor and accountability that are the hallmarks of a TMDL, in favor of offering "flexibility" and the promise that the necessary plans and controls will be figured out later. *See, e.g.*, AR0032447.

Similarly, Ecology fails to explain how it will account for "any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). Undoubtedly, when dealing with a waterbody as large and complex as the Puget Sound, there will be variables that make establishing precise load and wasteload allocations difficult. Ecology identifies several in the Draft ARP. *See, e.g.*, AR0032449 (noting that "external sources [of nitrogen] include Canadian wastewater treatment plants and rivers, atmospheric deposition, the open ocean boundary, and changes in nutrient loading and dynamics resulting from climate change."). But rather than addressing these uncertainties with the statutorily mandated margin of safety, the Draft ARP ignores the problem. *Id.* This is the opposite of how the CWA expects the state to account for uncertainty. Under the CWA's requirement that a TMDL apply a "margin of safety" to any wasteload allocations,

any benefit of the doubt should go to the waterbody in the form of protective limits that ensure the TMDL will result in compliance with water quality standards. In contrast, the Draft ARP fails to ensure sufficient limits on permitted nitrogen sources.

The Draft ARP is not a step toward a TMDL, but rather a step away from one, and it condemns Puget Sound to continue to suffer from low dissolved oxygen and a myriad of related biological ills for another 30 years or more. While Ecology claims that "[i]n the event [it] cannot meet water quality standards with this approach, the requirement to develop a TMDL still remains," AR0032423, that day will not come until 2042 at the earliest, or more likely 2055, according to its own terms, AR0032470. By presenting this illusory alternative as a substitute, Ecology has reconfirmed its prior decision to abandon the legally required TMDL cleanup plan for Puget Sound.

c. The Draft ARP is the Culmination of a Decades-Long Pattern of Avoidance.

The Draft ARP is the predictable next step in Ecology's decades-long pattern of avoidance when it comes to addressing the human nitrogen sources causing the Puget Sound's dissolved oxygen and eutrophication crisis. Whether it is the many "detours to illusory alternatives," or the unreasonable delay in using the available, and often mandated, regulatory tools to limit the discharge of nutrients, Ecology has a long history of avoiding taking the steps necessary to confront the problem. This history is a cautionary tale.

Budd Inlet, for example, is a microcosm of the glacial pace with which Ecology and EPA have addressed Puget Sound's water quality problems. Almost four decades ago, in 1986, an Ecology-commissioned study identified the causes of, and potential solutions for, the low dissolved oxygen in Budd Inlet. AR0001518. This study demonstrated that excess nutrients in the Inlet were supporting a specific type of algal bloom that was, in turn, in large part causing the dissolved oxygen depletion in the water. Hawley Decl. ¶ 15, Exh. N at NWEA01592 & NWEA01596 (URS Corp., *Southern Puget Sound Water Quality Assessment Study Final Report, Comprehensive Circulation and Water Quality Study of Budd Inlet*

(July 31, 1986)). The study also found that Puget Sound was the primary source of nitrogenous nutrients to Budd Inlet, contributing 63 percent of the nitrogen found. NWEA01720. In 1991, in response to "widespread bacterial contamination, low levels of dissolved oxygen (resulting from eutrophication) in the water, and chemical contamination of sediment and marine organisms," EPA developed a Budd Inlet Action Plan, identifying the "[p]otential sources of contaminants that contribute to eutrophication include WWTPs, [stormwater discharges], marinas, and surface runoff." Hawley Decl. ¶ 16, Exh. O at NWEA01888 & NWEA01910. In the Action Plan, EPA developed a "site-specific action plan address[ing] areas with known eutrophication . . . intended to prioritize source identification, source control, and remedial activities . . . [and] identify specific contaminant sources and source-specific control actions that will be taken to improve environmental conditions in Budd Inlet." NWEA01941. These actions included Ecology's reissuance of CWA permits to the area's WWTPs. NWEA01941-43. As part of that specific effort, the next year, Ecology submitted to EPA what it categorized as "TMDLs." *See* Hawley Decl. ¶ 17, Exh. P at NWEA02112–15; 2120-23. EPA rejected that effort. *See* Hawley Decl. ¶ 18, Exh. Q at NWEA02125–28; 2133-36 (EPA documents showing receipt and rejection without replacement of Ecology's 1992 TMDL submission). After that initial cursory effort, it took Ecology over ten years to publish the data that would be necessary to support an actual Budd Inlet TMDL, AR0001329, and yet another ten years to submit the TMDL to EPA for approval, AR0001506. Thus, even where Ecology has endeavored to complete a TMDL for a portion of the Sound, comprising just 13 segments, AR0000725, the length of time it has taken should give the Court pause when considering what it means when Ecology is asking for another 30 years of delay before beginning to write a TMDL for the rest of Puget Sound.[17]

[17] Notably, the Budd Inlet TMDL itself relies on a 61 percent reduction in nitrogen from Puget Sound. AR0001555 (Budd Inlet TMDL's describing a "bubble allocation" to Puget Sound). Ecology expected that those reductions "will be met through a combination of point and nonpoint actions to be described in the 2024 nutrient management plan." *Id.* But because the Draft ARP fails to provide those details, even Ecology's completed TMDL for a portion of Budd Inlet is inadequate to ensure this small section of the Puget Sound will come into compliance with the state's water quality standards.

With respect to Puget Sound generally, Ecology has a demonstrated history of avoiding the changes necessary to achieve water quality compliance, even when legally mandated. As early as 2007, EPA and Ecology began pursuing a technology-based approach under state law—known as All Known, Available, and Reasonable Treatment ("AKART"), RCW 90.48.010—explicitly because it might "postpone or eliminate the need for the costly TMDL process." Hawley Decl. ¶ 19, Exh. R at NWEA02139 (*AKART evaluation for nutrient removal* (Mar. 17, 2008)). At the same time, the agencies' internal documents showed they were fully aware of the nature, scale, and needs of the problem:

> The necessity of reducing nutrients is also becoming more clearly identified as a priority for protecting Puget Sound water quality. However, at this time only one of the 65 direct discharges of wastewater into the Puget Sound provides treatment to remove nitrogen. This discharger successfully removes over 90% of the nitrogen from municipal influent at a cost that is affordable to utility users. Providing similar treatment for nutrient removal to other discharges into South/Central Puget Sound could eliminate over 30 million pounds of nitrogen loading a year from reaching estuary waters.

NWEA02138.

That approach resulted in a 2011 EPA-funded evaluation on the use of nutrient removal technology at Washington's sewage treatment plants. Hawley Decl. ¶ 20; Exh. S at NWEA02146. There, Ecology and EPA concluded that then-available treatment technology could dramatically reduce nitrogen loads from sewage treatment plants. NWEA02210 ("This report identifies a range of established technologies that are available and economically reasonable[.]"). That same year, Ecology also confirmed municipal sewage discharges as the largest human source of nitrogen to Puget Sound. *See, e.g.,* AR0017549 (municipal dischargers generate 81 percent of Puget Sound human nitrogen loads in the summer and 59 percent annually). Despite simultaneously concluding that sewage treatment plants were the primary cause of Puget Sound's growing dissolved oxygen crisis and that facilities could reduce nitrogen loads by up to 90 percent, NWEA02138, Ecology and EPA took no steps to require these measures.

Indeed, Ecology's resistance to employing the available (and legally-mandated) regulatory tools was laid bare seven years later, when NWEA petitioned Ecology for a rule requiring the use of nutrient removal technology as AKART. Specifically, NWEA requested Ecology engage in a rulemaking to rewrite a long-outdated regulation setting the treatment standards for sewage treatment plants, which Ecology had maintained precluded AKART-based effluent limitations on nitrogen based on modern treatment technology.[18] AR0004121. Ecology denied the petition. AR0004118. In doing so, Ecology reversed course, stating that "a water quality-based approach is necessary to address dissolved oxygen impairments caused by excess nutrient loading to Puget Sound and its tributaries." *Id.* Nonetheless, the agency has continued to issue NPDES permits without numeric effluent limits for nitrogen because "Ecology has not completed a TMDL or established a wasteload allocation for nutrients." *See, e.g.*, AR0009859 (2020 Fact Sheet for Birch Bay Water & Sewage Dist. WWTP).

The lack of a TMDL similarly doomed Ecology's 2022 attempt to address the Puget Sound dissolved oxygen crisis through the CWA's permitting program. Decades after first identifying that excess human nitrogen is causing eutrophication of Puget Sound, in 2021, Ecology formally determined that all of Puget Sound's nitrogen dischargers were causing or contributing to violations of water quality standards. AR0003289. With this determination in hand, Ecology developed the so-called Puget Sound Nutrient General Permit. AR0003348-408. Yet the proposed general permit—which was meant to cover 58 municipal sewage treatment plants directly discharging nitrogen to Puget Sound—did not establish numeric effluent limits for the discharge of nitrogen because Ecology suggested that it had not completed the work necessary to do so. AR0003292; *see also* AR0003295 (Ecology's admitting that numeric limits will be included in the permit only "once Ecology *completes* the . . . Nutrient Reduction Plan[] *or EPA approves a TMDL*.") (emphasis added). The absence of

[18] *See* AR0004157–58 (collecting permits that relied on the outdated regulations to avoid imposing effluent limits for nitrogen).

numeric effluent limits in Puget Sound NPDES permits is consistent with the agency's long-held policy "that it does not make sense to require existing point source dischargers to meet the water quality standards in their discharge before a water cleanup plan is completed." AR0015011. As Washington's Pollution Control Hearings Board ("PCHB") noted, although "the parties do not seriously dispute that there is a need for action on the nutrient pollution problem," AR0031651, the general permit "allow[ed] WWTPs to generally maintain their current nitrogen discharge levels but requires them to monitor specified parameters and optimize the ability of their existing facilities to remove nitrogen." AR0031647. Thus, Ecology's permit to address the ongoing dissolved oxygen crisis maintained the status quo.[19]

Finally, the process that has led to the Draft ARP itself has been repeatedly delayed, and the timeline for making meaningful progress towards cleaning up Puget Sound has extended to absurd lengths—thereby promising to "put off for another generation" the TMDL that Congress required to be completed decades ago. *Idaho Sportsmen's Coalition*, 951 F. Supp. at 967. Originally scheduled for completion in 2021, AR0013960, the ARP is still only a draft in mid-2025. Ecology's projected deadline for achieving water quality standards has also slipped, from an original goal of 2040 to the current goal of 2050—a staggering *54 years* after Puget Sound was first identified as impaired. *Compare* AR0012998 ("The plan will guide regional investments in point and nonpoint source nutrient controls so that Puget Sound will meet DO water quality criteria and aquatic life designated uses by 2040."), *with* AR0032421("our goal of restoring DO in Puget Sound by 2050"). Similarly, while Ecology asserted in 2020 that it expected to have "numeric point source nutrient load reductions that will support [numeric effluent limits] by the end of 2024," AR0009860, now it proposes a date seven years

[19] Of course, any benefit the general permit *may have had* was never realized because the permit was invalidated on an appeal by Intervenors, among others. *Id.* Now, in 2025 Ecology is poised to repeat the same mistake of issuing a permit authorizing current nitrogen discharge loads. AR0032048-49 (draft general permit with "action levels" that trigger "corrective action" but no numeric effluent limits).

later: "All marine point source permits reissued with [numeric effluent limits]" by 2031, AR0032467. Delay has infected this entire process. There is no reason to believe that it will not continue in this vein. While scheduled for completion by the end of 2025, the Draft ARP is but a shell of what it was originally purported to include—most importantly, it does not include the "individual pollution limits" it asserted in 2022 would be included, AR0000883—and it is not yet final.[20]

In sum, Ecology can no longer hide behind endless "illusory alternatives" to delay completion of a Puget Sound TMDL. Indeed, Ecology's track record of starting and abandoning various efforts toward restoring Puget Sound's water quality, and its repeated failed efforts to use any method that does not include writing the legally mandated TMDL, demonstrates why the Court should not rely on the Draft ARP as a viable approach or alternative path toward achieving water quality standards.

REMEDY

The CWA's citizen suit provision empowers the Court to order the Administrator to perform any act or duty "which is not discretionary." 33 U.S.C. § 1365(a)(2).[21] The issuance of a TMDL is such a discrete and required action, compelled by the CWA's statutory scheme once a state's prolonged failure triggers EPA's mandatory duty. Thus, under the CWA, this Court may order EPA to issue the missing TMDL by a date certain.

Here, an order compelling EPA to issue a TMDL is necessary. For three decades, since first listing parts of Puget Sound as impaired for dissolved oxygen, Washington has failed to produce the

[20] This pattern of broken promises extends to the substance of Ecology's approaches to addressing nutrients in Puget Sound. For example, in 2016, EPA told the state that any alternative framework must have "***assurances equivalent to a TMDL***." AR0030490 (emphasis original). The Draft ARP does not. *See supra* § C.2.b at 22. Similarly, in its 2022 EPA-approved Budd Inlet TMDL, Ecology asserted that the ARP "*will set individual pollution limits for sources external to Budd Inlet* that will ensure the pollutants loads entering Budd Inlet from Puget Sound meet the bubble allocation and will address impairments elsewhere in Puget Sound." AR0000883 (emphasis added). Yet, the 2025 Draft ARP does not establish individual limits. Draft ARP at 31 ("Targets are aggregated to each of the eight basins in Puget Sound.").

[21] Separately, the APA directs the Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This authority applies where an agency has failed to take a "discrete agency action that it *is required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in original).

required TMDL for Puget Sound. The state's recent turn to a non-binding TMDL Alternative confirms its decision to avoid its legal duty. Thus, for the reasons discussed above, the Court should declare that Ecology has constructively submitted an inadequate TMDL to EPA to address the 303(d) listings for dissolved oxygen impairment in Puget Sound, pursuant to 33 U.S.C. § 1313(d)(2).

EPA's continued acquiescence, in turn, demonstrates that, without judicial intervention, the delay will be indefinite. Indeed, EPA has failed to step in, as the CWA requires, despite the state's own recognition that "[w]e are running out of time to take action" and must "be on the 'Puget Sound' timeline" rather than Ecology's. AR0026716–17. This prolonged history of inaction makes clear that only a court order with a firm deadline will remedy EPA's failure to act and secure compliance with the CWA's mandate. As a result, the Court should further declare that because EPA cannot approve the constructively submitted TMDL consistent with its obligations under the CWA, such submission has triggered EPA's duty to establish the required TMDL for dissolved oxygen in Puget Sound. *See Columbia Riverkeeper v. Pruitt*, 337 F. Supp. 3d 989, 999 (W.D. Wash. 2018).

From there, the law is clear: EPA must complete a final TMDL for dissolved oxygen in Puget Sound within 30 days of the Court's order. 33 U.S.C. § 1313(d)(2). This timeframe, although admittedly short, is reasonable. EPA has been on notice since at least December 2021, when this case was initiated, that this Court may order such relief. Further, EPA has been aware of this problem for decades, and funded and participated in study after study of the problem, perfected modeling, and the steps necessary to craft a solution. Finally, most recently, EPA has participated in the development of the Draft ARP, a process that has developed and collected most of the information necessary for EPA to develop a TMDL. *See* NWEA01531; *see also* AR0033658–66 (explaining the step necessary to develop water quality-based effluent limits), AR0033611–18 (table of individual WWTP reductions). Such expediency is not unprecedented; after litigation was filed for the similarly complex, multi-state Chesapeake Bay in 2009, EPA issued a final TMDL the following year. AR0010923.

The Clean Water Act demands prompt action. *See, e.g., Idaho Sportsmen's Coal.*, 951 F. Supp. at 967 ("The role of TMDLs in the CWA strategy for improving water quality confirms that they were to be developed quickly."). So too does the ongoing degradation of Puget Sound, as Ecology acknowledged in 2019: "We need to do something ***now*** before increasing human and other physical stresses further degrade the integrity of Puget Sound water quality." AR0010154 (emphasis original).

CONCLUSION

For the foregoing reasons, the Court should grant NWEA's motion for summary judgment, declare that Ecology has constructively submitted an inadequate TMDL to address the dissolved oxygen impairment throughout Puget Sound thus triggering EPA's mandatory duty to establish a TMDL, and order EPA to develop a TMDL for dissolved oxygen in Puget Sound within 30 days of this Court's order.

Dated this 25th day of July 2025

Respectfully submitted,

/s/ Andrew Hawley
Andrew Hawley (WSBA # 53052)
WESTERN ENVIRONMENTAL LAW CENTER
2400 NW 80th St, #338
Seattle, WA 98117
(206) 487-7250
hawley@westernlaw.org

/s/ Bryan Telegin
Bryan Telegin (WSBA # 46686)
Telegin Law PLLC
216 6th Street
Bremerton, WA 98337
(206) 453.2884, ext. 101
bryan@teleginlaw.com

James N. Saul (OSB #1067236)
(Admitted *Pro Hac Vice*)
WILD & SCENIC LAW CENTER
3519 NE 15th Ave., No. 207
Portland, OR 97219
(503) 342-2839
jamie@wildandsceniclaw.org

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of the Court on July 25, 2025, using the Court's electronic filing system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's system.

Andrew M. Hawley
Andrew M. Hawley