

Litigation over Spokane River PCB TMDL

Sierra Club et al v. McLerran No. 11-CV-1759-BJR

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Abstract

The Washington State Department of Ecology (“Ecology”) has attempted to fulfill its TMDL obligations under the Clean Water Act by creating the Spokane River Regional Toxics Task Force (“SRRTTF”), known as a “TMDL Alternative.” However, after a Federal District Court ruling that a Task Force cannot replace a TMDL, Ecology continues to insist on a Task Force. Through Ecology’s actions and unwillingness to promulgate a TMDL, Sierra Club’s litigation argues that EPA’s nondiscretionary duty under the Clean Water Act has been triggered by comparing the facts with relevant case law.

On October 1st, 2011, Sierra Club filed their lawsuit against McLerran and the Environmental Protection Agency (“EPA”) in Federal District Court.¹

On March 16th, 2015, Sierra Club and EPA both filed cross-motions for summary judgment.² In their lawsuit, Sierra Club alleged that EPA had violated both the Clean Water Act (“CWA”) and the Administrative Procedures Act (“APA”).³ In addition, the Spokane Tribe, who intervened on behalf of the Sierra Club, argued that EPA “owed a trust responsibility to the Spokane Tribe.”⁴

Specifically, Sierra Club argued that it was entitled to sue under the CWA’s citizen-suit provision which “authorizes citizens to institute actions in federal court against the EPA for failure to perform any act or duty under the CWA that is not discretionary.”⁵ Further, Sierra Club sued under the APA’s provisions.⁶ Sierra Club argued that EPA violated the provision for “agency action unlawfully withheld or unreasonably delayed.”⁷ In addition, Sierra Club argued that “final agency actions must be upheld unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁸

a. The CWA Claim

¹ Complaint 1, *Sierra Club et al v. McLerran*, (W.D. Wash. 2011).

² *Id.*

³ *Sierra Club et al v. McLerran et al*, No. 11-CV-1759-BJR, 2015 WL 1188522, *1 (W.D. Wash. Mar. 16, 1991).

⁴ *Id.*

⁵ *Id.* *5 (citing the Clean Water Act, 33 U.S.C. § 1365(a)(2) (2018)).

⁶ *Sierra Club*, No. 11-CV-1759-BJR *1.

⁷ *Id.* *9 (citing the Administrative Procedures Act, 5 U.S.C. § 706 (2013)).

⁸ *Sierra Club*, No. 11-CV-1759-BJR *9 (citing the Administrative Procedures Act, § 706(2)(A)).

Specifically, Sierra Club argued that the CWA created a nondiscretionary duty for the EPA “to make measurable progress toward meeting applicable water quality criteria for PCBs,” including submitting Total Maximum Daily Loads (“TMDL”) assessments.⁹ In 2006, Ecology created a draft plan that addressed the legal requirement that Ecology create a TMDL.¹⁰ In fact, Ecology used “the most stringent water quality standard . . . as the basis for calculating [the TMDL].”¹¹ However, the final draft omitted crucial details about TMDL including but not limited to background information explaining the TMDL and the actual TMDL pollution loading amount.¹² Sierra Club believed that by omitting the TMDL, Ecology had “abandoned the TMDL” and likely did not have plans to include it in the future.¹³

As a result, Sierra Club argued that EPA’s non-discretionary duty to act is triggered “when a state clearly and unambiguously abandons a particular TMDL.”¹⁴ While the statute directly discusses the consequences for the EPA approving or disapproving a TMDL plan, it does not contemplate the consequences for a state that does not submit a plan at all.¹⁵ Here, Ecology did not submit a plan related to a TMDL.¹⁶

The Court applied the case *Scott v. Hammond*, where the Court “held that even in the absence of express language in the statute, the EPA has a duty to develop TMDLs for a particular waterbody when a state fails to comply with the CWA’s submission requirements.”¹⁷ This duty occurs when there is a “prolonged failure” to submit plans which “amount[s] to the constructive submission by that state of no TMDLs.”¹⁸

The Court then determined when “a state’s failure to prepare a particular TMDL ripens into a constructive submission” and therefore, triggers this nondiscretionary duty.¹⁹ In the instant case, “the agency essentially completed a TMDL and then abandoned the TMDL for an alternate course.”²⁰ The Court found that this deviation was justified because EPA “lacked sufficient data and had not satisfied certain pre-submission requirements, i.e. public notice and consultation” which were necessary to create a TMDL.²¹ The Court reasoned that this indicated that EPA would likely submit a plan in the future once it had this information, not that it would never submit a plan at all.²² Therefore, the Court found that there was no constructive submission and the Court dismissed this claim.²³

⁹ *Sierra Club*, No. 11-CV-1759-BJR *4.

¹⁰ *Id.* *2.

¹¹ *Id.* *3.

¹² *Id.* *2, *3.

¹³ *Id.*

¹⁴ *Id.* *5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* *7.

²⁰ *Id.* *8.

²¹ *Id.*

²² *Id.*

²³ *Id.*

b. The APA Claim

Sierra Club first argued that “EPA’s failure to disapprove Ecology’s constructive submission” was a violation of Section 706(1).²⁴ However, since the Court determined that there was no constructive submission in the first place, the claim failed.²⁵ Therefore, the Court dismissed this claim.²⁶

Second, Sierra Club argued that the Task Force created by EPA cannot be a replacement of the TMDL therefore violating Section 706(2)(a).²⁷ The Court agreed with Sierra Club, noting that the SRRTTF cannot replace the TMDL because there is no evidence that it was “effective in furthering the preparation of a TMDL.”²⁸ In fact, the Court noted that there was “no metric to measure success, no clear trigger after which Ecology would produce a TMDL, and no specific date on which such a TMDL would be submitted to the EPA.”²⁹

c. The Spokane Tribe’s Claim

The Spokane Tribe argued that “EPA owed a trust duty” to the Tribe.³⁰ The Court found that “unless a specific duty exists, an agency’s compliance with general regulations and statutes discharges the agency’s general trust responsibility to Indian Tribes.”³¹ A specific duty is when “the statutory language . . . goes beyond a bare trust and permit[s] a fair inference that the Government is subject to duties as a trustee and liable in damages for breach.”³² Here, “there was no citation of a grant of specific rights to the Indian Tribes” in the statute.³³ Therefore, the Court dismissed this claim.³⁴

d. The Court’s Holdings

Overall, the Court held that partial summary judgment was owed to both parties.³⁵ The Court then remanded to EPA “with directions to consult with Ecology and file herein, within 120 days of the date of this order, a complete and duly adopted reasonable schedule for the measuring and completion of the work of the Task Force, including quantifiable benchmarks, plans for acquiring missing scientific information, deadlines for completed scientific studies, concrete permitting recommendations for the interim, specific standards upon which to judge the Task Force’s effectiveness, and a definite endpoint at which time Ecology must pursue and finalize its TMDL.”³⁶

²⁴ *Id.* *9.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* *10.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* *11.

³² *Id.* (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003)).

³³ *Id.* *12.

³⁴ *Id.*

³⁵ *Id.* *12, *13.

³⁶ *Id.* *12.

Four months after the District Court ruled on the case, the EPA attempted to comply with the Court's order in July of 2015 by explaining its Task Force and creating a pollution reduction schedule.³⁷ The EPA indicated that their goal was "the attainment of applicable water quality standards for PCBs in the Spokane River."³⁸ The Task Force's goal was "to develop a comprehensive plan³⁹ to bring the Spokane River into compliance with applicable water quality standards for PCBs."⁴⁰ Ecology stated that "although the Task Force's work will be used if development of a TMDL is necessary, the Task Force was not convened for that purpose."⁴¹

The crux of their plan was the reduction of PCB concentrations in the River by December 2027, a period of over 11 years.⁴² The plan also included a consultation requirement with Ecology and the Spokane Tribe.⁴³ If the PCB concentrations were not reduced according to the schedule, this would trigger the implementation of a TMDL, but only after a set time period had passed.⁴⁴ This time frame of implementation varied from several months to many years.⁴⁵ For example, if Ecology fails to meet the December 2024 water quality goal, the TMDL would not be submitted for approval until July 2027.⁴⁶ Notably, TMDL requirements *only* exist if a PCB reduction goal fails; otherwise, a TMDL may never be implemented.⁴⁷

In June of 2016, the Court granted the motion for Sierra Club to file their supplemental complaint.⁴⁸ Specifically, Sierra Club argued that "the State of Washington clearly and unambiguously indicated that it will not produce a TMDL for . . . Spokane River, thereby triggering EPA's non-discretionary obligations under the Clean Water Act to implement a TMDL itself."⁴⁹ Further, Sierra Club argues "that the schedule unnecessarily delays the implementation of a TMDL."⁵⁰ In other words, the schedule only triggers a TMDL if PCB reduction goals are not met.⁵¹ This would be a significant delay in the implementation of a TMDL.⁵² In granting Sierra Club's motion, the Court held that "the supplemental complaint will spare both parties the unnecessary cost and delay associated with initiating a second action."⁵³

³⁷ EPA's Plan for Addressing PCBs in the Spokane River 1, July 14, 2015.

³⁸ *Id.*

³⁹ For more information on EPA's schedule, visit <http://srtrtf.org/wp-content/uploads/2015/07/EPA-plan-for-PCBs-in-response-to-court-order.pdf>

⁴⁰ *Id.* 9.

⁴¹ *Id.*

⁴² *Id.* 11.

⁴³ *Id.* 12.

⁴⁴ *Id.* 11, 12.

⁴⁵ *Id.* 11, 12.

⁴⁶ *Id.* 12.

⁴⁷ *Id.*

⁴⁸ Order Grant Mot. to File Suppl. Compl. 1, June 1, 2016.

⁴⁹ *Id.*

⁵⁰ Order Grant Mot. to File Suppl. Compl. 1, June 1, 2016

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* *2.

Also, a supplemental complaint is further justified because “the supplemental complaint is closely related to the original complaint.”⁵⁴

In January of 2017, the Court granted the motion to stay the proceedings with directions for the Parties to provide status updates every 120 days until the parties set their briefing schedule and resume the proceedings.⁵⁵

In June of 2020, the Court granted the Defendants’ motion setting the briefing schedule for Defendants’ motion to dismiss.⁵⁶ This order effectively ended the stay and resumed the proceedings.⁵⁷

In July of 2020, EPA moved for Summary Judgment to dismiss the supplemental complaints filed in June 2016.⁵⁸

In September of 2020, the Court denied EPA’s motion for summary judgment on the supplemental complaints.⁵⁹ The Court found that Sierra Club had the ability to challenge EPA’s plan because it constituted a final action by EPA.⁶⁰

Next Steps? Although there is no definitive prediction of what timeline the legal proceedings will follow, a letter of notice from Sierra Club’s legal team indicates possible themes of discussion. In the letter, Sierra Club emphasized that “EPA’s duties to approve or disapprove TMDL submissions, and to promulgate its own TMDLs upon disapproval, are non-discretionary, and these duties extend to a state’s constructive submission of TMDLs.”⁶¹ In doing so, Sierra Club referenced a strikingly similar case — *Columbia Riverkeeper v. Wheeler*.⁶²

In *Wheeler*, the issue was whether inaction by the states of Washington and Oregon to create a temperature TMDL constituted a constructive submission.⁶³ Under the CWA, all water bodies designated by the state as impaired must set TMDLs for specific pollutants.⁶⁴ If the TMDL is approved by EPA, it goes into effect.⁶⁵ If the TMDL is disapproved by EPA, EPA has a nondiscretionary duty to institute the TMDL on behalf of the state.⁶⁶ In the case of inaction, if a “state [that] has clearly and unambiguously declared that it will not submit TMDLs for the entire state, then that decision will be construed as a constructive submission of no TMDLs, which in turn triggers the EPA’s nondiscretionary duty to act.”⁶⁷ This is not limited to “a wholesale failure to submit a TMDL”, but also includes a failure to submit a TMDL over a long period of

⁵⁴ *Id.*

⁵⁵ Order Grant. Mot. to Stay 1, Jan. 26, 2017.

⁵⁶ Order Grant. Mot. Setting Br. Schedule for EPA’s and Intervenor-Def’s Mot. to Dismiss 1, June 19, 2020.

⁵⁷ *Id.*

⁵⁸ Mot. for Summ. J., for the Dismiss of the Suppl. Compl. 1, July 17, 2020.

⁵⁹ Order Den. EPA’s Mot. for Dismiss of the Suppl. Compl. 1, Sept. 23, 2020.

⁶⁰ Michael Phillis, *EPA Denied Exit From Wash. River PCB Litigation*, Law 360 (Sept. 23, 2020) <https://www.law360.com/articles/1312681/epa-denied-exit-from-wash-river-pcb-litigation>.

⁶¹ Supp. Notice of Intent to Sue. 3, Feb. 21, 2020.

⁶² *Id.*

⁶³ *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1205 (9th Cir. 2019).

⁶⁴ *Id.* at 1206.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

time.⁶⁸ The Court held that there was a constructive submission, thus triggering EPA's non-discretionary duty to act.⁶⁹ The Court reasoned that the failure to create a temperature TMDL over about a decade was "prolonged" and "amounts to refusal to act."⁷⁰

Discussion: The Court will need to determine if, like *Wheeler*, the failure to submit a TMDL over time equates to a constructive submission. Similar to *Wheeler*, Ecology failed to submit a TMDL over a lengthy period of time.⁷¹ The schedule triggered the creation of a TMDL only if water quality standards from the schedule are not met.⁷² If water quality standards are met, it is possible that a TMDL would never come into effect. In addition, if the TMDL is triggered, the schedule provides that it will be created after a time delay from several months to several years.⁷³ As a result, a TMDL appears incidental to the failure to meet water quality standards. On its face, the schedule's TMDL provisions appear not to satisfy the statutory requirements under the CWA. If Sierra Club relies on the precedent set by *Wheeler*, it appears likely that the Court will find the facts analogous and that a constructive submission has occurred, thus triggering the EPA's nondiscretionary duty to set the TMDL on behalf of Ecology.

⁶⁸ *Id.* at 1209.

⁶⁹ *Id.* at 1211.

⁷⁰ *Id.*

⁷¹ EPA's Plan for Addressing PCBs in the Spokane River 11, July 14, 2015.

⁷² *Id.*

⁷³ *Id.*