

# Limping Towards Clean Water Act Compliance

## *San Francisco BayKeeper v. Whitman*

In *San Francisco BayKeeper v. Whitman*,<sup>1</sup> the Ninth Circuit Court of Appeals upheld the dismissal of a lawsuit by BayKeeper that sought a court declaration that the State of California failed to implement an adequate water pollution control program under Clean Water Act (CWA)<sup>2</sup> requirements, and failed to establish total maximum daily loads (TMDLs) for pollutants on certain waters.<sup>3</sup> BayKeeper argued that California's failure to timely submit TMDLs to the agency triggered the Environmental Protection Agency's duty to establish TMDLs for the state under the "constructive submission" doctrine.<sup>4</sup> The court held that BayKeeper could not maintain an action under either the CWA<sup>5</sup> or the Administrative Procedures Act (APA)<sup>6</sup> because it had failed to show that the Environmental Protection Agency (EPA) had a non-discretionary duty to establish water pollution standards for California.

The CWA sets up a two-tiered system for dealing with water pollution. The primary mechanism for regulation is through technology-based permits for individual polluters that are based upon the best available technology.<sup>7</sup> When this system fails to effectively eliminate pollutants in certain waters, the Act requires states to employ to a water-quality based approach.<sup>8</sup> This approach requires states to designate impaired water bodies (called water quality limited segments) and rank

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1. 297 F.3d 877 (9th Cir. 2002).

2. Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251–1387 (2003).

3. 33 U.S.C. § 1313(d) (relating to state water quality programs).

4. *San Francisco Baykeeper*, 297 F.3d at 881.

5. 33 U.S.C. § 1365(a)(2) (limiting citizen-suits against the EPA to suits alleging the EPA has failed to perform a duty "which is not discretionary").

6. 5 U.S.C. § 706(1) (2003) (authorizing courts to "compel agency action. . .unreasonably delayed").

7. 33 U.S.C. §§ 1311.

8. *Id.* § 1313(d)(1)(A).

the waters in order of priority<sup>9</sup>. Based on that ranking, states must calculate levels of permissible pollution in the water source, or TMDLs.<sup>10</sup> The list of water quality limited segments (WQLS) and TMDLs are submitted to the EPA, which has the task of reviewing the state approach to make sure it meets CWA requirements.<sup>11</sup> The statute stipulates that the EPA must review the state's submissions within thirty days.<sup>12</sup> If approved by the EPA, the state incorporates the submissions into its continuing planning process.<sup>13</sup> However, the statute does not mention what the EPA must do if the state never submits TMDLs for review. Previous courts have held that prolonged failure of a state to submit TMDLs can constitute "constructive submission" by that state of no TMDLs.<sup>14</sup> Under this theory, if a state fails to submit any TMDLs, the EPA has a mandatory duty to disapprove the "submission."<sup>15</sup> This mandatory duty is important because CWA citizen suits are only available to compel the agency to perform a non-discretionary duty.<sup>16</sup>

In this case, BayKeeper challenged California's attempt at water-quality-based management, arguing that the state had failed to create the TMDLs required by law and that the EPA had been remiss in approving California's submissions.<sup>17</sup> Under the Act, the first state submission was due by June 26, 1979.<sup>18</sup> In this case, California did not make a TMDL submission until 1994, but has since submitted forty-six TMDLs and created a schedule for finishing the remaining submissions.<sup>19</sup> The question before the court was whether California's delay in submitting materials and creating necessary TMDLs constituted constructive submission, thus triggering EPA's non-discretionary duty.<sup>20</sup>

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9. The CWA requires each state to establish a priority ranking for identified waters, "taking into account the severity of the pollution and the uses to be made of such waters." *Id.* This ranking is tied to the use identifications and water quality evaluations required by other sections of the CWA. Together, these evaluations provide an overall assessment of the magnitude, types, and sources of water pollution, and a framework for prioritizing pollution problems based upon the expected uses of waterways.

10. A TMDL defines the daily maximum amount of a pollutant that a body of water can receive from all point and nonpoint sources before a violation of a state water quality standard will occur. The allocations generally require additional land use controls for nonpoint sources of pollution beyond those required by the technology-forcing provisions of the CWA. *Id.* § 1313(d)(1)(C).

11. *Id.* § 1313(d)(2).

12. *Id.*

13. *Id.* State plans are incorporated under 33 U.S.C. § 1313(e).

14. *San Francisco Baykeeper*, 297 F.3d at 881-882 (citing, e.g., *Scott v. City of Hammond*, 741 F.2d 992, 996-97 (7th Cir. 1984)).

15. *Id.* at 882.

16. See 33 U.S.C. § 1365(a)(2) (limiting citizen-suits against EPA to suits alleging EPA has failed to perform a duty "which is not discretionary").

17. *San Francisco Baykeeper*, 297 F.3d at 881.

18. 33 U.S.C. § 1313(d)(2).

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

20. *Id.* at 881-882.

The Ninth Circuit ruled that this delay was not the same as a failure to submit materials entirely. It held that “the constructive submission doctrine is viable only when ‘the state fails to submit any TMDLs and has no plans to remedy this situation.’”<sup>21</sup> The court found that this interpretation of the law was consistent with previous rulings from other circuits that limited the doctrine of constructive submission.<sup>22</sup> California’s submission of some materials and establishment of a plan to complete the remaining documents was sufficient to allow the EPA to avoid the non-discretionary duty of review that would have attached had there been constructive submission.<sup>23</sup> The court further noted that any past failings of the EPA in this matter were also not reviewable because the court could not order any remedy that went beyond ensuring EPA’s present compliance with statutory mandates.<sup>24</sup>

BayKeeper also argued that the plain language of Section 303(d) required states to submit both WQLS lists and TMDLs simultaneously, and that California’s incomplete submissions<sup>25</sup> constituted constructive submission triggering the EPA’s duty to act.<sup>26</sup> The court disagreed and deferred to the agency’s “reasonable” interpretation of the statute.<sup>27</sup> The EPA had interpreted the statute as not requiring simultaneous submission since the creation of TMDLs was more time-consuming and expensive than the rest of the process.<sup>28</sup> Thus, the timetable that California submissions followed was consistent with statutory requirements.

As an alternative to its claim under the CWA’s citizen suit provision, BayKeeper argued that the court could order the EPA to establish TMDLs for California under the APA, which authorizes courts to

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21. *Id.* at 882 (quoting unpublished district court opinion).

22. *Id.* at 882-883 (citing *Scott*, 741 F.2d at 996-97; *Hayes v. Whitman*, 264 F.3d 1017, 1022-24 (10th Cir. 2001); *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 540 (S.D.N.Y. 2000); *Sierra Club, North Star Chapter v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993); *Idaho Sportsmen’s Coalition v. Browner*, 951 F. Supp. 962, 967-68 (W.D. Wash. 1996); *Sierra Club v. Hankinson*, 939 F. Supp. 865, 872 n.6 (N.D. Ga. 1996)).

23. *Id.* at 883-85.

24. *Id.* (quoting *Natural Res. Def. Council*, 93 F. Supp. 2d at 536).

25. California submitted WQLS lists to the EPA between 1980 and 1991 that did not include TMDLs. *San Francisco Baykeeper*, 297 F.3d at 883.

26. *Id.* at 884. “33 U.S.C. § 1313(d)(2), provides:

Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission.”

27. *San Francisco Baykeeper*, 297 F.3d at 885.

28. *Id.*

“compel agency action. . .unreasonably delayed.”<sup>29</sup> However, the court held that “for a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place.”<sup>30</sup> Because the court found that the EPA had no such duty under the CWA, it also rejected BayKeeper’s APA claim.<sup>31</sup>

The Ninth Circuit’s ruling in this case is doctrinally legitimate but results in poor policy. While the ruling is consistent with other decisions that have declined to extend the doctrine of constructive submission beyond those situations where no TMDLs have been submitted, the effect of such a ruling is to further weaken the promise of that doctrine as a means to check state unwillingness to design effective water quality standards. By requiring EPA review only when there is no state TMDL implementation plan at all, this decision allows states to continue to drag their feet on CWA implementation by only complying in a minimal or technical sense with requirements. The ability of citizens to challenge EPA actions in the review of TMDL plans is especially important; as one judge has noted, “the only ‘consistently held interpretation’ that the EPA has demonstrated with respect to the Clean Water Act’s TMDL requirements has been to ignore them.”<sup>32</sup>

*Aaron Monick*

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29. *Id.* (quoting 5 U.S.C. § 706(1) (2003)).

30. *Id.*

31. *Id.* at 886.

32. *Alaska Ctr. for the Env’t v. Reilly*, 796 F. Supp. 1374, 1379 (W.D. Wash. 1992).