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

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation, Plaintiff, v. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Defendant.	NO.: 2:17-cv-00263 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** (Pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 555(b) & 706(1))

NATURE OF THE CASE

1. This is an action against the U.S. Environmental Protection Agency ("EPA") for failing to respond within a reasonable time to Plaintiff Northwest Environmental Advocates' ("NWEA") Petition for Rulemaking Under the Clean Water Act to Update the Water Quality Criteria for Toxics in the State of Washington ("Petition"). This action arises under and alleges violations of the Administrative Procedure Act ("APA") (5 U.S.C. §§ 551–706), specifically sections 553(e), 555(b) and (e), and 706(l).

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2. As described in further detail below and in NWEA's Petition, which is attached hereto as Exhibit A and fully incorporated by reference, the Clean Water Act ("CWA") requires each state to develop, and every three years review and update if appropriate, water quality standards in order to "protect the public health or welfare[.]" 33 U.S.C. § 1313(c)(2)(A). During this process, the CWA specifically requires states to adopt water quality criteria—part of a water quality standard—for toxic pollutants for which EPA has published recommended criteria. *Id*. § 1313(c)(2)(B). When a state fails to meet these requirements, or when a state's standards are inadequate, the CWA requires EPA to promulgate standards for the state's waters. *Id*. §§ 1313(c)(3), (4).

3. Washington's water quality criteria intended to protect aquatic life and human health, and the data that the state relies upon to establish those criteria, are outdated and inadequate. Washington has not adopted new or revised aquatic life criteria for many toxic pollutants for at least 19 years and many of these state criteria are significantly less protective than EPA's recommended criteria for these pollutants. Washington and EPA have known for years that continued use of the state's outdated toxics criteria violates the CWA and poses a risk of harm to species that are listed as threatened or endangered under the Endangered Species Act ("ESA"), including Chinook salmon and Southern Resident orca whales, yet neither Washington nor EPA has taken any action to update these aquatic life criteria.

4. Based on these and other concerns, on October 28, 2013—over three years ago—NWEA submitted its Petition to EPA pursuant to the APA, 5 U.S.C. §§ 553(e) and 555(e), requesting that EPA take the following actions: (1) make a determination pursuant to CWA section 303(c)(4)(B) that Washington's federally-promulgated water quality toxics criteria for the protection of human health, set out in 40 C.F.R. § 131.36(d)(14), fail to provide full

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protection for the state's designated uses; (2) determine that Washington has failed to adopt the human health and aquatic life criteria as are required by section 303(c)(2)(B) in each triennial review of its water quality standards conducted since 1992; and (3) promulgate federal regulations applicable to Washington, pursuant to section 303(c)(4), setting forth new and revised water quality standards as necessary to meet the CWA's requirements.

5. NWEA sent EPA follow-up letters to its Petition on August 31, 2015 and February 9, 2016, reminding the agency of the importance of the pending Petition and providing additional information with respect to the need for revised aquatic life criteria in particular to protect species in Washington's waters. These follow-up letters are attached as Exhibits B and C (respectively), and fully incorporated herein by reference.

6. While Washington and EPA have recently taken action to update Washington's water quality criteria for human health, *see* 81 Fed. Reg. 85,417 (Nov. 28, 2016), that action does not obviate the need for a prompt response to NWEA's Petition for several reasons. First, EPA took no action with respect to the human health criteria proposed by Washington for three toxic pollutants—arsenic, dioxin and thallium, *see id*. at 85,421—and as a result Washington's human health criteria for those pollutants remain woefully out of date. Second, neither Washington nor EPA has made any effort to revise Washington's decades-old water quality criteria for the protection of aquatic life from toxic contaminants. Third, the updating of Washington's toxic criteria for human health does not relieve the ongoing risk to aquatic species because for many toxic pollutants EPA's nationally recommended aquatic life criteria are far more stringent than the human health criterion.

7. As of the filing of this Complaint, EPA has not responded to (*i.e*., granted or denied) Plaintiff's Petition. Plaintiff therefore brings this action pursuant to the APA to compel

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EPA to respond to its Petition. Plaintiff seeks declaratory and injunctive relief for EPA's failure to timely respond to its Petition.

PARTIES

8. Plaintiff NORTHWEST ENVIRONMENTAL ADVOCATES ("NWEA") is a non-profit environmental organization established in 1969, incorporated in 1983, and organized under section 501(c)(3) of the Internal Revenue Code, with its principal place of business in Portland, Oregon. NWEA's mission is to work through advocacy and education to protect and restore water and air quality, wetlands, and wildlife habitat in the Northwest, including Washington, and nationally. To this end, NWEA promotes informed citizen involvement in the protection of the Northwest's waterways. NWEA engages in advocacy with administrative agencies, community organizing, education, lobbying, litigation, and other strategies to ensure better implementation of the laws that protect and restore the natural environment. NWEA has participated in the development of CWA programs in Washington for years.

9. Several of NWEA's members reside near, visit, use, and/or enjoy rivers, streams, estuaries, wetlands, marine, and other surface waters throughout Washington, the Puget Sound, the Pacific Ocean, and their many tributaries. These members regularly use and enjoy these waters and adjacent lands and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, conservation, educational, employment, volunteer, restoration, and other purposes. These NWEA members derive recreational, scientific, personal, professional, and aesthetic benefits from their use and enjoyment of Washington's waters and the fish and aquatic-dependent wildlife that rely upon Washington's waters for habitat-related functions. Many of them also enjoy recreational fishing for salmon and trout species in those waters. Some of them depend on fishing not for recreation,

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but for a substantial portion of their diet. Others would like to fish and consume fish, but are dissuaded by fear of the toxic pollutants in the water.

10. Beyond fishing, some of NWEA's members enjoy clamming, crabbing, swimming, wading, boating, photography, bird-and wildlife- watching, taking their children to and generally interacting recreationally, spiritually, and in terms of their employment, with fresh and salt water systems within Washington, many of which are designated critical habitat for threatened and endangered species that depend upon clean, toxic-free waters. Further, NWEA and many of its members are active in working for restoration of salmon populations and salmon habitat, and in promoting appreciation and protection of salmonid species, and the species that rely upon salmonids as prey, such as orca whales.

11. EPA's failure to respond within a reasonable time to NWEA's Petition harms NWEA and its members because it allows for the continued use of outdated water quality criteria for toxics in Washington's regulatory programs that do not protect human health and aquatic life, including threatened and endangered aquatic and aquatic-dependent species. For example, the state issues industrial and municipal wastewater discharge permits pursuant to the National Pollutant Discharge Elimination System ("NPDES") established by section 402 of the CWA, and derives the facility-specific discharge limitations in those permits in part from the applicable water quality criteria. Washington's outdated and unprotective toxic criteria lead to less stringent discharge limitations for individual facilities, which in turn results in more toxic water pollution in the state's surface waters than the CWA allows.

12. Numerous other state or federal regulatory programs depend on or derive their substantive standards from the applicable water quality criteria, including the issuance of NPDES permits to federal facilities and tribes in Washington by EPA; the identification of so-

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called "impaired waters" under CWA section 303(d); the development of clean-up plans called total maximum daily loads ("TMDLs") intended to bring impaired waters back into compliance with water quality standards; the State's establishment of management practices to control nonpoint source runoff to meet water quality standards; and the State's issuance of water quality certifications for projects with federal permits to ensure compliance with water quality standards. Washington's outdated and unprotective toxic criteria thus render Washington's programs and policies intended to protect and improve water quality less effective, resulting in the discharge of more toxic pollutants to the State's surface waters and thereby harming NWEA and its members.

13. NWEA and its members reasonably fear that many of Washington's water quality criteria do not protect human health, aquatic life, and aquatic-dependent wildlife. The continued use of such unprotective criteria impairs the recreational, aesthetic, and other interests of NWEA and its members in a number of ways. Washington's native fish and shellfish populations, including threatened and endangered species, are adversely affected when water quality criteria are not sufficient to maintain water quality at levels that protect these species and their habitat. Adverse effects to Washington's native fish populations are directly related to degradation of water quality throughout the State, including the presence of toxic pollutants, both individually and in combination with other forms of water pollution, such as high temperatures and low levels of dissolved oxygen. For example, native fish and wildlife populations are directly harmed by toxic pollution from past, present, and future industrial and urban sources. Harmful sources of pollution would be addressed through the use of adequately protective water quality criteria in the State's CWA regulatory programs.

14. The aesthetic, recreational, spiritual, scientific, subsistence, and other benefits derived by NWEA's members from their use of Washington's waters are and will continue to be

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diminished by the presence of toxic pollutants at the unprotective levels currently allowed by Washington's criteria and by EPA's delay in promulgating new, more stringent, and scientifically-sound water quality standards that, if properly implemented, will lead to reductions of those pollutants. The harm to native fish and wildlife populations has diminished NWEA's members' recreational, aesthetic, and employment opportunities related to these species. For example, some of NWEA's members derive these benefits by fishing in Washington. These members fish in rivers, streams, and lakes in Washington and areas of the Puget Sound, and would fish for certain species but for their protected status under the ESA and their relative scarcity, which these members reasonably believe is due in part to the presence of toxic pollutants in Washington's waters which negatively affect these species. Additionally, NWEA's members no longer eat certain species of fish that they used to catch or purchase locally due, in part, to concerns about contamination and toxic pollution.

15. NWEA's members would derive more benefits from their use of Washington waters and adjacent lands if Washington had more protective human health and aquatic life water quality criteria for toxic pollutants because there would be less toxic pollution in Washington's waters and thus a reduction of the adverse effects that such pollution has on water quality, human health, aquatic life, and aquatic-dependent wildlife, including fish and wildlife listed as threatened or endangered under the ESA. By failing to respond to NWEA's Petition, EPA is failing to ensure that Washington's water quality criteria protect the beneficial uses of Washington's waters, human health, and threatened and endangered species and their habitat consistent with the requirements of the CWA.

16. The relief requested in this lawsuit—requiring EPA to respond to NWEA's Petition—can redress these injuries because it will help ensure that water quality criteria used

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and implemented in Washington's regulatory pollution control programs are sufficiently protective of human health, fish, wildlife, and threatened and endangered species and their habitat. These would, in turn, improve NWEA's members' use and enjoyment of Washington's waters and the species that depend upon the quality of those waters. The longer EPA delays in responding to NWEA's Petition, the longer Washington's unprotective criteria remain in place and the longer NWEA and its members' interests continue to be harmed by both the levels of toxic pollutants that Washington and EPA, through the criteria, allow to be discharged, and the CWA implementation programs, policies, and practices that are based on these unprotective criteria.

17. The above-described interests of NWEA and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be affected by EPA's disregard of its statutory duties under the APA and CWA, and by the unlawful harm imposed on water quality, human health, and fish and wildlife and their habitat that results from EPA's inaction.

18. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, a federal agency, is responsible for implementing the CWA. *See* 33 U.S.C. §§ 1251–1387. Further, as a federal agency, Defendant must respond within a reasonable time to a petition for rulemaking, pursuant to the APA sections 553(e) and 555(b) and (e).

JURISDICTION AND VENUE

19. This court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal question). The relief requested herein is proper under 28 U.S.C. §§ 2201 (declaratory judgment) and 2202 (injunctive relief), and 5 U.S.C. § 706(l) (APA). There is an actual, justiciable controversy between the NWEA and Defendant, and NWEA has challenged a final agency

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action, as defined by APA section 551(13).

20. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) (venue in action against officer of the United States) and LCR 3(d)(1) because a substantial part of the events or omissions giving rise to the claims occurred in the Seattle Division, where Defendant EPA's regional office is located, and where members of NWEA reside.

LEGAL BACKGROUND

The Clean Water Act and Water Quality Criteria

21. Congress adopted amendments to the CWA in 1972 in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The primary goal of the CWA is to eliminate the discharge of pollutants into navigable waters entirely; it also establishes "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife," *id*. § 1251(a)(1)–(2), and sets a "national policy that the discharge of toxic pollutants in toxic amounts be prohibited[.]" *Id*. § 1251(a)(3).

22. To meet these water quality goals, the CWA requires that states develop water quality standards that establish, and then protect, the desired conditions of each waterway within the state's regulatory jurisdiction. *See id*. § 1313(a); *see also* 40 C.F.R. § 131.11(a)(1). Water quality standards must include three elements: (1) one or more designated uses of a waterway; (2) numeric and narrative criteria specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like that are necessary to protect designated uses; and (3) an antidegradation policy that protects existing uses and ensures that high quality waters will be maintained. 33 U.S.C. §§ 1313(c)(2), (d)(4)(B); 40 C.F.R. Part 131, Subpart B. For waters with multiple uses designations, the criteria must support the most

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sensitive use. 40 C.F.R. § 131.11(a)(1).

23. The standards must be sufficient to protect the public health or welfare, enhance the quality of water and wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water, taking into consideration their use and value for public water supplies, and agricultural, industrial, and other purposes including navigation. *See* 33 U.S.C. § 1313(c)(2)(A). These standards serve as the regulatory basis for water quality-based treatment controls and strategies. *See* 40 C.F.R. § 131.2.

24. Water quality criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." *Id*. § 131.11(a)(1). The adoption of criteria for the protection of human health is required for waterbodies designated for public water supply and where fish ingestion is considered an important activity included in a designated use.[1]

25. States have the primary responsibility for reviewing, establishing, and revising water quality standards for those waters within their borders. *See* 33 U.S.C. § 1313(c)(1). Frequently, states rely upon EPA's recommended criteria issued as guidance under CWA section 304(a), wherein EPA is required to develop, publish, and revise from time to time, "criteria for water quality accurately reflecting the latest scientific knowledge [] on the kind and extent of all identifiable effects on health and welfare[.]" *Id*. § 1314(a)(1). Section 304(a) recommended criteria are based upon scientific data concerning the relationship between pollutants and their effect on human health and the environment and do not consider the technological feasibility or

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[1] EPA, Water Quality Standards Handbook: Second Edition, EPA-823-B-94-005a (August 1994), Chapter 3.1.1, *available at*: http://water.epa.gov/scitech/swguidance/standards/handbook/chapter03.cfm#section1, web version last updated in 2014 (last visited Feb. 8, 2017) (hereinafter "Standards Handbook").

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economic impact of meeting the criteria.[2] Until a state adopts the recommended criteria, and EPA approves the criteria pursuant to section 303(c)(3), the recommended criteria have no regulatory effect.

26. States must also "adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses" whenever they review or revise existing water quality standards or adopt new standards. 33 U.S.C. § 1313(c)(2)(B). EPA has informed states in guidance memoranda that "EPA expects each State to comply with [these] statutory requirements in any section 303(c) water quality standards review initiated after enactment of the Water Quality Act of 1987."[3]

27. EPA policy allows, and in fact encourages, states to adopt statewide numeric criteria in their water quality standards for all toxic pollutants for which EPA has developed 304(a) recommended criteria, regardless of whether the pollutants are known to be present in navigable waters within the state. Alternatively, states may adopt specific numeric criteria for toxic pollutants as necessary to support designated uses where such pollutants are discharged or are present in the affected waters and could reasonably be expected to interfere with designated uses. 33 U.S.C. § 1313(c)(2)(B).

28. State standards may be less stringent than directed by EPA guidance only if they

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[2] EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000),* EPA-822-B-00-004 (Oct. 2000), 65 Fed. Reg. 66443 (Nov. 3, 2000) (hereinafter "2000 Methodology"), at 1–1.

[3] *See, e.g.*, EPA, Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B) at 15 (Dec. 1988), *available at* https://www.epa.gov/sites/production/files/2014-10/documents/cwa303c-hanmer-memo.pdf (last visited Feb. 8, 2017).

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protect the designated uses and are based on "sound scientific rationale." 40 C.F.R. § 131.11(a). However, a state's adoption of the EPA-recommended 304(a) criteria may not be adequate to meet the requirements of the CWA and EPA regulations if the recommended criteria are not adequate to protect the state's designated uses.

29. States must review and, where necessary, revise their water quality standards at least every three years, a process called the "triennial review." *See* 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20(a). Any revised or newly adopted water quality standards must be submitted to EPA for review and either approval or disapproval. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.20(c). States must also submit for review any state-issued policies that affect water quality standards. *See* 40 C.F.R. §§ 131.13, 131.20(c).

30. When a state adopts or revises water quality standards, EPA must review the standards to ensure compatibility with the CWA. *See* 33 U.S.C. § 1313(c)(2). EPA must notify the state within 60 days if it approves the new or revised standards. *See id*. § 1313(c)(3). If EPA disapproves a state's water quality standards, EPA is directed by the law to specify changes that are needed to ensure compliance with the requirements of CWA section 303(c) and federal water quality standards regulations. *See id*. §§ 1313(c)(3), (c)(4); *see also* 40 C.F.R. § 131.21. In any instance in which EPA determines that a new or revised standard is necessary to meet the requirements of the CWA, the CWA requires that the Administrator promptly prepare and publish proposed regulations setting forth a revised or new water quality standard. *See* 33 U.S.C. § 1313(c)(4)(B).

The Administrative Procedure Act

31. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant

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statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

32. Agency action includes the failure to act. *See id*. § 551(13).

33. EPA is a federal agency whose actions are subject to review under the APA. *See id*. § 551(1).

34. The APA authorizes courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Id*. § 706(2)(A). The APA requires agencies to conclude issues presented to them "within a reasonable time" and empowers reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" *Id*. §§ 555(b), 706(1).

35. In determining whether an agency's delay in responding to a petition for rulemaking is "unreasonable," courts generally look to several factors first described in *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) (hereafter, the "*TRAC* factors"); *see also Independence Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (applying *TRAC* factors when evaluating whether an agency has "unlawfully withheld or unreasonably delayed" an action within the meaning of APA section 706(1)).

36. The *TRAC* factors are: "(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind

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agency lassitude in order to hold that agency action is unreasonably delayed." 750 F.2d at 80 (internal quotations and citations omitted).

FACTUAL BACKGROUND

Washington's Aquatic Life Water Quality Criteria

37. Washington adopted some aquatic life criteria for 25 toxic pollutants[4] and submitted them to EPA for approval on November 25, 1992. EPA approved these criteria on March 18, 1993. Because Washington did not adopt aquatic life criteria for marine chronic copper and marine chronic cyanide, Washington's aquatic life criteria for these pollutants were established by EPA through the National Toxics Rule ("NTR"), in which EPA promulgated chemical-specific, numeric water quality criteria for priority toxic pollutants for 14 states and territories—including Washington—which had failed to adopt new or revised numeric water quality criteria for toxic pollutants as required by CWA section 303(c)(2)(B). *See generally,* EPA, *Water Quality Standards: Establishment of National Criteria for Priority Toxic Pollutants; States' Compliance,* Final Rule, 57 Fed. Reg. 60848, 60923 (Dec. 22, 1992).

38. Washington has adopted some new or revised aquatic life criteria for toxic pollutants since 1992. On November 18, 1997, Washington adopted some new or revised aquatic life criteria for arsenic, cadmium, chromium IV, copper, cyanide, lead, mercury, nickel,

[4] For any given toxic contaminant, a standard may contain up to six numeric criteria including, for aquatic life protection: marine acute, marine chronic, freshwater acute, and freshwater chronic criteria. In addition, the standard may include numeric criteria for protection of human health including: consumption of water + organisms, and consumption of organisms only. Finally, a standard may contain site-specific numeric criteria that apply to limited waterbodies in the state or criteria that are based on other endpoints than human health protection. Thus, in this Complaint, when Plaintiff states, for example, that Washington or EPA adopted "some" aquatic life criteria for 25 pollutants, Plaintiff means that Washington or EPA adopted at least one of these types of aquatic life criteria for 25 pollutants.

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selenium, silver, and zinc, including new or revised marine copper (acute and chronic) and site-specific (inside Puget Sound) marine cyanide (acute and chronic). The majority of these revisions made the criteria less stringent, and Washington also failed to adopt some new or revised aquatic life criteria for which EPA-recommended 304(a) criteria were then available and more stringent than Washington's existing criteria. In 2003, Washington adopted marine chronic cyanide criteria for waters outside of Puget Sound.[5] And in 2006, Washington adopted new or revised ammonia criteria, which EPA approved in 2008, prior to EPA's issuing its new recommended 304(a) criteria in 2013.

39. Notwithstanding these occasional revisions, since at least December 5, 1997—over 19 years ago—Washington has failed to adopt new or revised aquatic life criteria for many toxic pollutants, including many of the pollutants for which EPA has published 304(a) recommended criteria since 1992.[6] There are currently no proposals for any revisions to Washington's aquatic life criteria.

40. These toxic chemicals pose significant hazards to aquatic species in Washington's waters, particularly those species listed as threatened or endangered under the ESA. Recent formal consultations that EPA has conducted with federal wildlife agencies pursuant to section 7 of the ESA, *see* 16 U.S.C. § 1536, in connection with the revision of water quality standards for many of these same toxic pollutants by other West Coast states, for the same or similar species as

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[5] As a result of Washington's 1997 and 2003 adoptions of copper and cyanide criteria, in 2007 EPA removed Washington for all copper and cyanide aquatic life criteria from the NTR.

[6] Toxic pollutants for which Washington has not adopted new or revised aquatic life criteria since at least 1997 and for which EPA has issued new or revised 304(a) recommended criteria include: acrolein, aluminum, ammonia, arsenic, carbaryl, cadmium, chromium III, copper, cyanide, demeton, diazinon, dieldrin, endrin, guthion, heptachlor epoxide, iron, Lindane, malathion, mercury, methoxychlor, mirex, nickel, nonylphenol, pentachlorophenol, PCBs, selenium, and tributylin.

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are present in Washington waters, have identified these hazards. For example, in 1998, the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") released a draft biological opinion on EPA's promulgation of toxic criteria for California, finding "jeopardy" for the toxic pollutants cadmium, selenium, pentachlorophenol, and mercury.[7] This was followed, in 2012, by NMFS's issuing a biological opinion finding jeopardy for Oregon's cadmium, copper, aluminum, and ammonia criteria.[8] Subsequently, in June 2015, FWS completed a biological opinion on EPA's 1996, 1997, and 2005 toxic criteria approval actions for Idaho, finding jeopardy for eight pollutants (arsenic, copper, lead, nickel, selenium, zinc, cyanide, and mercury) and a low-end hardness floor for metals.[9] Likewise, NMFS recently completed its biological opinion on the same Idaho criteria, making a jeopardy conclusion for five of those pollutants (arsenic, copper, selenium, cyanide, and mercury) and the hardness floor.[10] Many of the species addressed by the draft jeopardy opinion in California and the final

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[7] NMFS and FWS, Final Biological Opinion on the effects of the U.S. Environmental Protection Agency's "Final Rule for the Promulgation of Water Quality Standards: Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California" (March 24, 2000) at 4–5, *available at* http://wwwrcamnl.wr.usgs.gov/Selenium/Library_articles/CTR_Final_BO_032400.pdf (last visited Feb. 8, 2017). Under the ESA, a proposed action "jeopardizes" a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id*. at 5. EPA ultimately modified its proposed rule to avoid a final jeopardy biological opinion.

[8] *See* NMFS, Jeopardy and Adverse Modification of Critical Habitat Biological Opinion for the Environmental Protection Agency's Proposed Approval of Certain Oregon Administrative Rules Related to Revised Water Quality Criteria for Toxic Pollutants, NWR-2008-148(Aug. 14, 2012), *available at* https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts (last accessed Feb. 9, 2017).

[9] *See* FWS, Biological Opinion for the Idaho Water Quality Standards for Numeric Water Quality Criteria for Toxic Pollutants, 01EIFW00-2014-F-0233 (June 25, 2015), *available at* https://www.deq.idaho.gov/media/60177187/usfws-biological-opinion-numeric-criteria-toxic-pollutants.pdf (last visited Feb. 8, 2017).

[10] *See* NMFS, Final Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Water Quality Toxics Standards for Idaho, No. 2000-1484 (May 7, 2014), *available at*

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jeopardy opinions in Oregon and Idaho are also present in Washington waters.

41. Levels of these and other toxic pollutants are among the reasons that EPA has long been concerned about the health of one of Washington's important waterbodies, Puget Sound. EPA features the toxic contamination of Southern Resident killer whales, Pacific herring, and harbor seals in Puget Sound on its website as evidence of its ongoing concerns about pollution of Washington's waters.[11] A 2006 EPA report on the ecosystem health of the Puget Sound and Georgia Basin focused on the effect of industrial activities and polluted surface runoff of metals and organic compounds, noting that killer whales "are some of the most contaminated marine mammals in the world because they have bioaccumulated these chemical contaminants through the entire food web," and that "[t]oxic chemical concentrations in Killer Whales and contamination of food sources" are among the reasons the species is listed under the ESA.[12]

42. A significant amount of toxic pollutants also enter Washington waters via stormwater runoff, much of which is regulated under NPDES permits for which EPA retains oversight.[13] The provisions in these permits related to discharges of toxics, as well as

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https://www.deq.idaho.gov/media/1117928/triennial-review-noaa-toxics-biological-opinion-0514.pdf (last visited Feb. 8, 2017).

[11] *See* Exhibit B at 2 n. 5.

[12] EPA, Puget Sound Georgia Basin Transboundary Ecosystem Indicator Report (2006) at 119–120, *available at* http://s3.amazonaws.com/zanran_storage/www.epa.gov/ContentPages/109464162.pdf (last visited Feb. 8, 2017)*; see also* Exhibit B at 2–3 and 3 n. 6–7.

[13] For example, a Washington Department of Ecology report summarizing data collected between 2007 and 2013 from municipal stormwater permittees revealed that across four different land uses (low-density residential, high-density residential, commercial, and industrial), "copper, zinc, and lead were—more often than not—found to exceed (not meet) water quality criteria.… Dissolved zinc and copper in stormwater samples exceeded acute aquatic life criteria in 36% and 50% of the samples, respectively, over the three years of data. Mercury and total PCBs exceeded chronic aquatic life criteria in 17% and 41% of the samples, respectively." *See* Washington Department of Ecology, Western Washington NPDES Phase I Stormwater Permit: Final S8.D

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Washington studies intended to help inform and improve stormwater quality in the state, are based on outdated toxics aquatic life criteria and thus do not provide sufficient protection for aquatic life.[14]

Washington's Human Health Water Quality Criteria

43. On August 1, 2016, Washington adopted some new and revised human health water quality criteria. By letter dated November 15, 2016, EPA approved some of these criteria while disapproving others, and shortly thereafter promulgated federal human health water quality criteria for 74 different toxic pollutants which are now applicable to Washington. 81 Fed. Reg. 85,417 (Nov. 28, 2016). However, EPA took no action with respect to the human health criteria proposed by Washington for three toxic pollutants—arsenic, dioxin and thallium, *see id*. at 85,421—and as a result Washington's human health criteria for those three pollutants remain woefully out of date.

44. Furthermore, the fact that neither Washington nor EPA has made any effort to revise Washington's decades-old water quality criteria for the protection of aquatic life poses an ongoing risk to aquatic species because for many toxic pollutants EPA's recommended aquatic life criteria are actually far more stringent than the human health criterion. *See* EPA, National Recommended Water Quality Criteria, at https://www.epa.gov/wqc/national-recommended-water-quality-criteria (EPA's website with tables identifying EPA's current national recommended water quality criteria for both aquatic life and human health).

45. For example, while EPA recommends that criteria for copper not exceed 1,300 micrograms per liter (μg/L) in order to protect human health, copper has such a deleterious effect

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Data Characterization 2009-2013, at 12–13, *available at* https://fortress.wa.gov/ecy/publications/SummaryPages/1503001.html (last visited Feb. 8, 2017).

[14] *See* Exhibit B at 5–6.

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on aquatic life that EPA recommends that criteria not exceed 4.8 μg/L to protect against acute effects to aquatic species in saltwater. Similarly, EPA's recommended human health criteria for zinc are 7,400 and 26,000 μg/L for water + organisms and organisms only respectively, yet the agency recommends no more than 120 μg/L for protection of aquatic species in freshwater. Thus, it is imperative that states comply with CWA section 303(c)(2)(B) for both aquatic life and human health criteria.

EPA's Unreasonable Delay in Responding to NWEA's Petition

46. EPA's failure to revise the aquatic life and human health criteria for toxic pollutants in Washington in light of that state's own continued inaction places public health and welfare in jeopardy and is inconsistent with Congressional intent and statutory requirements. EPA's failure to update Washington's toxic criteria is further inexcusable in light of the deadly impacts of toxic chemicals, not only on humans, but on threatened and endangered species, such as salmon, steelhead, and orca whales, and on other aquatic and aquatic-dependent wildlife, including mammals and birds.

47. Based on these concerns, in October 2013, NWEA petitioned EPA under the CWA and APA to update Washington's water quality criteria for the protection of human health and aquatic life from toxic pollutants. *See generally,* Exhibit A.

48. As of the filing of this Complaint, EPA has not formally responded to (*i.e.*, granted or denied) NWEA's Petition.

49. NWEA is not aware of, and does not allege, any impropriety on EPA's part in not responding within a reasonable time to NWEA's Petition. However, EPA has no justified explanation for its failure to respond to the Petition. Congress made clear in its 1987 amendments to the CWA that either states or EPA should regularly revise water quality criteria

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for toxic pollutants during any triennial review required by the CWA. Despite this clear Congressional mandate, Washington has reviewed and revised its standards multiple times without adopting new or revised criteria for many toxics, and neither Washington nor EPA has adopted criteria sufficient to satisfy the CWA's requirements.

50. The action that NWEA is asking this Court to compel EPA to perform—responding to NWEA's Petition that it submitted more than three years ago—will have little, if any, economic impact. But even if this action were to have an economic impact or touch on economic regulation in some way, as described above and as further detailed in Plaintiff's Petition and follow-up letters, *see generally* Exhibits A–C, EPA's failure to promulgate revised criteria for toxic pollutants to protect human health and aquatic life in Washington clearly places human health and welfare at an intolerable risk. This risk, which continues to grow each day, outweighs any economic impact that might occur from EPA's responding to NWEA's Petition.

51. Moreover, an order from this Court requiring EPA to respond to NWEA's Petition will not negatively affect other agency priorities. Plaintiff's Petition is intended to force EPA to take an action with regard to vastly outdated water quality criteria for toxic pollutants, and it is difficult to imagine that EPA has priorities greater than protecting human health and aquatic life, particularly threatened and endangered species, and ensuring the integrity of the CWA regulatory system. Because these criteria are the foundation of the CWA's entire water quality-based regulatory program—such that other actions taken by Washington and EPA incorporate and are significantly based on these criteria—the repercussions of these outdated criteria are magnified and negatively impact the implementation and effectiveness of the CWA in Washington as a whole. The interests at stake here, as detailed above, include protecting human health, the recreational, aesthetic, and other important uses of Washington's waters, the

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state's aquatic ecosystems, and the threatened, endangered, and other species that depend on these ecosystems. Every day that EPA fails to take action to respond to NWEA's Petition harms and further prejudices these interests.

CLAIM FOR RELIEF

52. NWEA realleges and incorporates herein by reference the allegations contained in the foregoing paragraphs as if fully set forth below.

53. The APA requires agencies to conclude issues presented to them "within a reasonable time" and empowers reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. §§ 555(b), 706(1).

54. NWEA's submission of its Petition to EPA in October 2013 triggered EPA's duty under the APA to conclude the issues presented in NWEA's Petition within a reasonable time.

55. As of the filing of this Complaint, EPA has not responded to the Petition.

56. EPA's failure to respond to the Petition represents a failure to conclude the issues presented in that Petition within a reasonable time.

57. EPA's failure to respond to the Petition constitutes an unreasonable delay of agency action under 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff NWEA respectfully requests that the Court grant the following relief:

1. Declare that EPA's failure to act on NWEA's Petition constitutes a failure to conclude the issues presented to EPA in the Petition within a reasonable time, and constitutes agency action unlawfully withheld or unreasonably denied in violation of the APA, 5 U.S.C. § 706(l);

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2. Order EPA to respond to Plaintiff's Petition within 30 days of the date of this Court's order, in accordance with the APA, 5 U.S.C. § 706(l);

3. Award NWEA its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

4. Grant NWEA such other relief as the Court deems just and proper.

DATED this 21st day of February, 2017.

Respectfully submitted,

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