MELISSA POWERS (OSB # 02118)
ALLISON LAPLANTE (OSB # 02361)
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
Phone (503) 768-6727, (503) 768-6894
Fax (503) 768-6642
powers@lclark.edu, laplante@lclark.edu

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit corporation, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, a United States Government Agency, Defendant.	Civil No: **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** (Violations of the Clean Water Act)

INTRODUCTION

1. Through this action, Plaintiff Northwest Environmental Advocates ("NWEA") challenges the United States Environmental Protection Agency's ("EPA") failure to perform its non-discretionary duties under the Federal Water Pollution Control Act, more commonly referred to as the Clean Water Act ("CWA"). On July 8, 2004, the Oregon Department of Environmental Quality ("DEQ") submitted Oregon's new or revised water quality standards for toxic pollutants to EPA for review. EPA was required to approve or disapprove the submitted water quality standards within the timelines set forth in CWA section 303(c)(3), 33 U.S.C. §1313(c)(3). EPA missed both the 60-day deadline for approving the submitted water quality standards, and the 90-day deadline for disapproving the standards. In failing to act upon Oregon's water quality standards for toxic pollutants, EPA violated its nondiscretionary duties under the CWA.

2. This action seeks a declaration that EPA's failure to perform its mandatory duties to act upon Oregon's submission of its water quality standards violates the CWA, 33 U.S.C. § 1313(c)(3). This action also seeks an injunction ordering EPA to immediately make a determination regarding the adequacy of Oregon's water quality standards for toxic pollutants.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (CWA citizen suit provision); and 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). As required by 33 U.S.C. § 1365(b), Plaintiff furnished Defendant EPA with written notice of its violations of the CWA more than 60 days prior to filing this complaint. The notice is attached hereto as Exhibit A and incorporated by reference.

4. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C.

§ 1540(g)(3)(A) because a substantial part of the events or omissions giving rise to the claims occurred in Oregon.

PARTIES

5. The Plaintiff in this action is Northwest Environmental Advocates ("NWEA"). Established in 1969, NWEA is a regional non-profit environmental organization incorporated under the laws of Oregon, 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 Pacific Northwest.

6. Plaintiff and its members use and enjoy the waters of the State of Oregon for recreational, scientific, and aesthetic purposes. Plaintiff and its members derive or, but for the threatened status of chinook, coho, sockeye and chum salmon, steelhead, and bull trout, would derive recreational, scientific, and aesthetic benefits from the existence in the wild of these species of salmon and trout, through wildlife observation, study, photography, and recreational fishing within the Columbia and Snake River basins and the Pacific Ocean. Plaintiff's members also enjoy or, but for the presence of toxic pollutants in these fish, would enjoy eating salmon and other fish caught in Oregon waters. Some of these members have reduced their fish consumption to limit their exposure to toxic pollutants; other members have stopped consuming fish entirely due to their reasonable concerns about toxic pollutants. Plaintiff and its members also derive or, but for the effects of toxic pollutants on populations of birds and mammals, would derive recreational, scientific, and aesthetic benefits from the existence of these species in the wild.

7. The past, present, and future enjoyment of these benefits by Plaintiff and its members

has been, is being, and will continue to be irreparably harmed by Defendant EPA's failure to act on Oregon's water quality standards for toxic pollutants. Plaintiff and its members reasonably fear that Oregon's water quality standards for toxic pollutants do not protect fish, wildlife and other beneficial uses of Oregon's waters, as required by the CWA. By failing to act on, and specifically disapprove, Oregon's water quality standards submission, EPA is failing to ensure that Oregon's water quality standards protect beneficial uses, including threatened and endangered species.

8. The above-described aesthetic, conservation, and scientific interests of Plaintiff and its members have been, are being, and, unless the relief requested is granted, will continue to be adversely affected and irreparably injured by Defendant EPA's failure to comply with the CWA. Plaintiff's injury in fact is fairly traceable to Defendant's conduct and would be redressed by the relief that Plaintiff seeks in this case. Plaintiff has no adequate remedy at law.

9. Defendant EPA is a federal agency charged with the administration of the CWA (as more specifically described herein), as well as other environmental statutes.

LEGAL BACKGROUND

The Clean Water Act ("CWA") and Water Quality Standards

10. In 1972, Congress adopted amendments to the CWA 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 CWA establishes an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]" 33 U.S.C. § 1251(a)(2).

11. To those ends, the CWA requires states to develop water quality standards that establish, and then protect, the desired conditions of each waterway within the state's regulatory

jurisdiction. 33 U.S.C. § 1313(a). Water quality standards must be sufficient to "protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA]." 33 U.S.C. § 1313(c)(2)(A). State water quality standards must be reviewed and ultimately approved by EPA before they become a component of the state's regulatory scheme deemed consistent with the federal CWA.

12. Water quality standards establish the water quality goals for a waterbody. 40 C.F.R. § 131.2. They are the benchmarks by which the quality of waterbodies is measured: waterbodies that do not meet these benchmarks are deemed "water quality-limited" and placed on the CWA § 303(d) list. States must develop total maximum daily loads ("TMDLs") for all 303(d)-listed waters in order to establish the scientific basis for cleaning up water pollution that exceeds water quality standards. A TMDL is the total daily loading of pollutants for a particular waterbody or segment that will implement the applicable water quality standards. A TMDL includes a margin of safety reflecting any lack of knowledge concerning the relationship between effluent limitations and water quality.

13. Water quality standards also serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under CWA §§ 301 and 306, 33 U.S.C. §§ 1311 & 1316. A point source is a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Point source discharges are regulated under National Pollutant Discharge Elimination System ("NPDES") permits, which require point sources to meet both technology-based effluent limitations and "any more stringent limitation . . . necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). Water

quality standards are thus integral to regulation of point source discharges. Water quality standards are also the basis for regulatory certifications by state agencies of federal actions, such as dredging, pursuant to CWA § 401, 33 U.S.C. §1341.

Elements of Water Quality Standards

14. 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 the designated uses; and (3) an antidegradation policy that ensures that uses dating to 1975 are protected and high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

15. ***Designated Uses***–Uses must be designated based on consideration of the use and value of a waterbody for public water supplies, protection and propagation of fish, shellfish, and wildlife, recreation, and agricultural, industrial, and other purposes. 40 C.F.R. § 131.10(a). Although states retain discretion to establish designated uses, that discretion is limited by several parameters. First, water quality standards as a whole must provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water. 40 C.F.R. § 131.2. Designated uses, therefore, must be established so as to provide for these protections. 40 C.F.R. § 131.10(a). Second, waste assimilation and waste transport shall never be adopted as designated uses for any waters of the United States. *Id.* Third, although states may remove a designated use if that use cannot be attained, states may not remove a designated use if that use is also an "existing use." 40 C.F.R. § 131.10(h). Fourth, states may remove designated uses that are not "existing uses" so long as they perform a Use Attainability Analysis ("UAA") consistent

with CWA regulations, and the results are submitted to EPA for review and approval. 40 C.F.R. § 131.10(g) and (j). Fifth, states must ensure their use designations provide for the attainment and maintenance of standards of downstream waters. 40 C.F.R. § 131.10(a).

16. ***Numeric and Narrative Criteria***–Water quality criteria must be set at a level necessary to protect the designated uses of a waterbody. 33 U.S.C.§ 1313(c)(2); 33 U.S.C.§ 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). The criteria must also be set at the level necessary to protect the most sensitive use of a waterbody. *Id.* States may establish narrative water quality criteria "to supplement numerical criteria." 40 C.F.R. § 131.11(b)(2).

17. ***Antidegradation Policy and Implementation Methods***–The third component of water quality standards, the antidegradation policy, stems from the CWA's dictate to "restore and *maintain* the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). The antidegradation policy must assure that water quality that meets or exceeds water quality standards is maintained and that no further degradation is allowed for waters that do not meet water quality standards. States must also develop antidegradation policy implementation methods. 40 C.F.R. § 131.12.

Review and Revision of State Water Quality Standards

18. States must review and revise their water quality standards at least every three years, in a process called the "Triennial Review," thereafter submitting the results of the review and all new and revised water quality standards to EPA for its approval or disapproval. 33 U.S.C. § 1313(c)(1)&(3). States must include in their submissions to EPA information that will assist

EPA in its review, such as methods, analyses, scientific bases, and policies that affect implementation. 40 C.F.R. § 131.6. Water quality standards may be revised only if the revision is subject to and consistent with the state's antidegradation policy. 33 U.S.C. § 1313(d)(4)(B).

19. A state-developed water quality standard, as well as any state policy affecting water quality standards, does not become effective until EPA approves the standard or policy. 40 C.F.R. § 131.21(c). States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c). States must also submit any state-issued policies that affect water quality standards to EPA for review. 40 C.F.R. §§ 131.13, 131.20(c).

20. EPA must review the submitted standards and general policies to determine that the standards as a whole meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.5, 131.13, 131.21(b). If EPA approves a new or revised standard, it must notify the state within 60 days of the state's submission of the standard. 33 U.S.C. § 1313(c)(3). If EPA determines that a standard is not consistent with the requirements of the CWA, within 90 days of the state's submission, EPA must notify the state of EPA's intent to disapprove the standard and specify changes to the standard that are necessary to comply with the CWA. *Id.* If the state does not cure the problems with the standard within a second 90-day period, EPA must "promptly" promulgate a substitute standard. *Id.*; 33 U.S.C. § 1313(c)(4)(A). EPA must also establish new or revised water quality standards whenever the agency determines that new or revised standards are necessary to meet the requirements of the CWA. 33 U.S.C. § 1313(c)(4)(B).

Water Quality Standards for Toxic Pollutants

21. The CWA requires that as part of each Triennial Review the state "shall adopt criteria for all toxic pollutants" identified as such by EPA, the "discharge or presence of which in

the affected waters could reasonably be expected to interfere with [the] designated uses[.]" 33 U.S.C. § 1313(c)(2)(B). *See also* 40 C.F.R. § 131.11(a)(2). The criteria are to be specific numeric criteria or, where EPA has not issued recommended values, they must be "based on biological monitoring or assessment methods." *Id.*; 40 C.F.R. § 131.11(b)(2).

22. The state numeric criteria are influenced by suggested national criteria that EPA is required to develop, publish, and revise to "accurately reflect[] the latest scientific knowledge." 33 U.S.C. § 1314(a)(1). Nonetheless, these national recommendations do not negate the requirement that criteria be set at a level necessary to protect the most sensitive use of a waterbody. 40 C.F.R. § 131.11(a)(1). As part of the 1987 amendments to the CWA, EPA is also required to prepare and periodically revise a list of toxic priority pollutants. 33 U.S.C. § 1317(a)(1); *see* EPA, National Recommended Water Quality Criteria: 2002 (November 2002).

FACTUAL BACKGROUND

Status of Water Quality, Fish, and Wildlife in Oregon

23. With over 100,000 miles of rivers, 6,200 lakes, and nine estuaries, Oregon's extensive water resources provide habitat and food sources for many species of fish, birds and wildlife, and support recreational and commercial fisheries.

24. Oregon waters provide some of the last remaining habitat for at least fourteen Endangered Species Act ("ESA")-listed salmon and steelhead, as well as several trout species, including bull trout. The most recent data show that salmon and steelhead throughout Oregon and the Pacific Northwest have experienced considerable and consistent declines in populations. Although 10 to 16 million salmon inhabited the Columbia River over a century ago, at least 67 stocks have gone extinct in the last decade and those stocks that remain are in serious jeopardy.

25. Impaired water quality plays a significant role in the decline of salmon populations. Salmon, like all animal species, are subject to the properties of toxic pollutants that cause cancers, immune deficiency and reproductive disorders, and other chronic effects. Therefore, toxic pollution in salmon habitat combines with habitat degradation and other factors to put salmon survival and recovery at risk. For this reason, the National Marine Fisheries Service ("NMFS") considers fourteen salmon and steelhead evolutionary significant units ("ESUs") in Oregon either "in danger of extinction throughout all or a significant portion of [their] range[s]" or "likely to become" in danger of extinction "within the foreseeable future," and in need of protection under the ESA.[1]

26. Oregon waters are also the major source of food for aquatic-dependent birds and mammals. Centuries of human use, resource extraction, and pollution have degraded Oregon's streams and rivers, and contributed to the precipitous decline of these species. For example, poor reproductive success in bald eagles along the Lower Columbia River has been associated with high levels of dioxin, furans, PCBs and DDE. Recently, the U.S. Fish and Wildlife Service

---

[1] Snake River fall Chinook salmon, listed as threatened, 57 Fed. Reg. 14,653 (April 22, 1992); Snake River spring/summer Chinook salmon, listed as threatened, 57 Fed. Reg. 14,653 (April 22, 1992); Snake River Sockeye salmon, listed as endangered, 56 Fed. Reg. 58,619 (Nov. 20, 1991); Snake River steelhead, listed as threatened, 62 Fed. Reg. 43,937 (Aug. 18, 1997); Lower Columbia River Chinook salmon, listed as threatened, 64 Fed. Reg. 14,308 (March 24, 1999); Upper Columbia River spring Chinook salmon, listed as endangered, 64 Fed. Reg. 14,308 (March 24, 1999); Upper Willamette River Chinook salmon, listed as threatened, 64 Fed. Reg. 14,308 (March 24, 1999); Columbia River chum salmon, listed as threatened, 64 Fed. Reg. 14,508 (March 25, 1999); Southern Oregon/Northern California coast coho salmon, listed as threatened, 62 Fed. Reg. 24,588 (May 6, 1997); Oregon Coast coho salmon, listed as threatened, 63 Fed. Reg. 42,587 (Aug. 10, 1998); Middle Columbia River steelhead, listed as threatened, 64 Fed. Reg. 14,517 (March 25, 1999); Lower Columbia River steelhead, listed as threatened, 63 Fed. Reg. 13,347 (March 19, 1998); Upper Willamette River steelhead, listed as threatened, 64 Fed. Reg. 14,517 (March 25, 1999); Upper Columbia River steelhead, listed as endangered, 62 Fed. Reg. 43,937 (Aug. 18, 1997).

concluded that organochlorine concentrations in the bald eagle, Caspian terns, and double-crested cormorants of the Lower Columbia River exceed levels at which the animals will suffer impairment. Likewise, toxic pollutants have been implicated as the cause of impairment of piscivorous mammals such as river otters and mink in the Lower Columbia River.

Litigation Concerning Oregon's Water Quality Standards

27. As a result of its 1992-1994 Triennial Review, Oregon revised its water quality standards for temperature, intergravel dissolved oxygen ("IGDO"), and pH. On January 11, 1996, Oregon submitted its revised standards to EPA for review and approval. While EPA's review was pending, the Secretaries of Commerce and Interior listed several populations of salmon, steelhead, and bull trout in Oregon as either threatened or endangered under the ESA. On July 22, 1999, despite deep concerns expressed by NMFS biologists and EPA's own scientists regarding the adequacy of Oregon's water quality standards, EPA approved Oregon's revised standards with little exception.

28. In April of 2001, NWEA filed suit in this Court seeking review of EPA's approval decision, as well as NMFS' 1999 biological opinion regarding the effect of EPA's decision. *See Northwest Environmental Advocates v. U.S. Environmental Protection Agency, et. al.*, CV-01-510-HA (filed April 12, 2001). On cross motions for summary judgment, this Court found that EPA and NMFS violated the CWA and the ESA. *See Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 268 F. Supp. 2d 1255 (D. Or. 2003). This Court then ordered EPA to rescind portions of its 1999 approval and either promulgate federal water quality standards for Oregon or approve a new Oregon submission by March 2, 2004.

29. Following this Court's order, EPA and DEQ separately proposed for public review

revised water quality standards for Oregon. EPA ultimately chose to abandon its own proposed rulemaking and to review the Oregon standards pursuant to CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3).

30. On December 10, 2003, DEQ submitted its revised water quality standards to EPA. On March 2, 2004, EPA approved portions of the water quality standards submitted. Plaintiff has challenged EPA's approval decision, along with other actions and inactions related to the December 10, 2003 water quality standards submission, as arbitrary and capricious and in violation of the CWA. *See Northwest Environmental Advocates v. U.S. Environmental Protection Agency, et. al.*, CV-05-1876-HA (filed December 13, 2005).

Oregon's July 8, 2004 Submission

31. On July 8, 2004, Oregon submitted revised water quality standards for toxic pollutants to EPA. These proposed water quality criteria follow the EPA-recommended numeric criteria for many toxic pollutants, but are less protective than the EPA-recommended criteria for several toxic pollutants. *See* OAR 340-041-0033, EPA Numeric Criteria table: http://oaspub.epa.gov/pls/wqs/wqsi_epa_criteria.report.

32. Even where Oregon has followed EPA's recommenced numeric criteria, Oregon has also proposed policies related to water quality standards that will weaken the application of water quality criteria for most pollutants found in Oregon waters. For example, Oregon has proposed changing its method of assessing concentrations of toxic pollutants in water from a "total recoverable" standard to a "total dissolved" method.

33. Moreover, Oregon's water quality standards submitted to EPA on July 8, 2004 do not protect the uses of Oregon's waters. The standards fail to protect threatened and endangered

species found in Oregon waters. The standards fail to protect the designated use of wildlife, such as fish-eating birds and mammals in Oregon. Oregon's toxic criteria are also based on fish consumption levels that have been demonstrated to not reflect actual fish consumption by some populations in Oregon, leaving those people without sufficient protection from cancers and chronic diseases. Further, Oregon has failed to develop implementation methods for applying its narrative toxics criteria and thus has no effective means left to fill the gaps left by Oregon's adoption of inadequate numeric criteria.

34. Though Oregon's water quality standards submitted on July 8, 2004 do not protect beneficial uses, Oregon is currently applying certain revised criteria which Oregon has deemed more protective, even without EPA review and approval. *See* OAR 340-041-0033(2)(a)(A). Thus, Oregon is issuing NPDES permits, developing TMDLs, issuing water quality certifications for federally-permitted actions, and making other decisions affecting water quality based on inadequate water quality standards.

CLAIM FOR RELIEF

(Violation of Mandatory Duty, CWA Section 303(c) and Regulations)

EPA's Failure to Act on Oregon's Water Quality Standards

35. Plaintiff realleges all preceding paragraphs.

36. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c).

37. EPA has a mandatory duty to review submitted standards and general policies to determine that the standards meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5; 40 C.F.R. § 131.21(b).

38. If EPA approves a new or revised standard, it must notify the state within 60 days of the state's submission of the standard. 33 U.S.C. § 1313(c)(3).

39. If EPA determines that a standard is not consistent with the requirements of the CWA, within 90 days of the state's submission, EPA must notify the state of EPA's intent to disapprove the standard and specify changes to the standard that are necessary to comply with the CWA. *Id.*

40. EPA must therefore take action on a state's submission of each water quality standard within 90 days of submission. *Id.*

41. On July 8, 2004, Oregon reviewed its water quality standards for toxic pollutants and submitted revised standards to EPA for review and approval.

42. More than 90 days have passed since Oregon submitted its water quality standards for toxic pollutants to EPA.

43. EPA has failed to take action on Oregon's water quality standards submitted on July 8, 2004.

44. By failing to act upon Oregon's water quality standards, EPA has violated its mandatory duties under 33 U.S.C. § 1313(c)(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that EPA has failed to perform its mandatory duties to act upon the State of Oregon's submission of its water quality standards for toxics pollutants, in violation of 33 U.S.C. § 1313(c)(3);

2. Order EPA to immediately approve or disapprove Oregon's water quality standards

submitted on July 8, 2004;

3. Award Plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation; and,

4. Grant such other and further relief as the Court may deem just and proper.

Dated this 7th day of April, 2006.

Respectfully submitted,

_____

MELISSA POWERS (OSB # 02118)
ALLISON LAPLANTE (OSB # 02361)
Pacific Environmental Advocacy Center
tel: (503) 768-6727 (powers)
tel: (503) 768-6894 (laplante)
fax: (503) 768-6642
powers@lclark.edu, laplante@lclark.edu

Attorneys for Plaintiff