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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).

1 2. As described in further detail below and in NWEA’s Petition, which is attached
2 hereto as Exhibit A and fully incorporated by reference, the Clean Water Act (“CWA”) requires
3 each state to develop, and every three years review and update if appropriate, water quality
4 standards in order to “protect the public health or welfare[.]” 33 U.S.C. § 1313(c)(2)(A). During
5 this process, the CWA specifically requires states to adopt water quality criteria—part of a water
6 quality standard—for toxic pollutants for which EPA has published recommended criteria. *Id.* §
7 1313(c)(2)(B). When a state fails to meet these requirements, or when a state’s standards are
8 inadequate, the CWA requires EPA to promulgate standards for the state’s waters. *Id.* §§
9 1313(c)(3), (4).

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11 health, and the data that the state relies upon to establish those criteria, are outdated and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15 years that continued use of the state’s outdated toxics criteria violates the CWA and poses a risk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

19 4. Based on these and other concerns, on October 28, 2013—over three years ago—
20 NWEA submitted its Petition to EPA pursuant to the APA, 5 U.S.C. §§ 553(e) and 555(e),
21 requesting that EPA take the following actions: (1) make a determination pursuant to CWA
22 section 303(c)(4)(B) that Washington’s federally-promulgated water quality toxics criteria for
23 the protection of human health, set out in 40 C.F.R. § 131.36(d)(14), fail to provide full
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1 protection for the state's designated uses; (2) determine that Washington has failed to adopt the
2 human health and aquatic life criteria as are required by section 303(c)(2)(B) in each triennial
3 review of its water quality standards conducted since 1992; and (3) promulgate federal
4 regulations applicable to Washington, pursuant to section 303(c)(4), setting forth new and
5 revised water quality standards as necessary to meet the CWA's requirements.

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

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

22 7. As of the filing of this Complaint, EPA has not responded to (*i.e.*, granted or
23 denied) Plaintiff's Petition. Plaintiff therefore brings this action pursuant to the APA to compel
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1 EPA to respond to its Petition. Plaintiff seeks declaratory and injunctive relief for EPA's failure
2 to timely respond to its Petition.

3 **PARTIES**

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

14 9. Several of NWEA's members reside near, visit, use, and/or enjoy rivers, streams,
15 estuaries, wetlands, marine, and other surface waters throughout Washington, the Puget Sound,
16 the Pacific Ocean, and their many tributaries. These members regularly use and enjoy these
17 waters and adjacent lands and have definite future plans to continue to use and enjoy these
18 waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, conservation,
19 educational, employment, volunteer, restoration, and other purposes. These NWEA members
20 derive recreational, scientific, personal, professional, and aesthetic benefits from their use and
21 enjoyment of Washington's waters and the fish and aquatic-dependent wildlife that rely upon
22 Washington's waters for habitat-related functions. Many of them also enjoy recreational fishing
23 for salmon and trout species in those waters. Some of them depend on fishing not for recreation,
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1 but for a substantial portion of their diet. Others would like to fish and consume fish, but are
2 dissuaded by fear of the toxic pollutants in the water.

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

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

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

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

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

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

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

22 16. The relief requested in this lawsuit—requiring EPA to respond to NWEA's
23 Petition—can redress these injuries because it will help ensure that water quality criteria used
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1 and implemented in Washington's regulatory pollution control programs are sufficiently
2 protective of human health, fish, wildlife, and threatened and endangered species and their
3 habitat. These would, in turn, improve NWEA's members' use and enjoyment of Washington's
4 waters and the species that depend upon the quality of those waters. The longer EPA delays in
5 responding to NWEA's Petition, the longer Washington's unprotective criteria remain in place
6 and the longer NWEA and its members' interests continue to be harmed by both the levels of
7 toxic pollutants that Washington and EPA, through the criteria, allow to be discharged, and the
8 CWA implementation programs, policies, and practices that are based on these unprotective
9 criteria.

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

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

19 **JURISDICTION AND VENUE**

20 19. This court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal
21 question). The relief requested herein is proper under 28 U.S.C. §§ 2201 (declaratory judgment)
22 and 2202 (injunctive relief), and 5 U.S.C. § 706(l) (APA). There is an actual, justiciable
23 controversy between the NWEA and Defendant, and NWEA has challenged a final agency
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1 action, as defined by APA section 551(13).

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

6 LEGAL BACKGROUND

7 **The Clean Water Act and Water Quality Criteria**

8 21. Congress adopted amendments to the CWA in 1972 in an effort “to restore and
9 maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §
10 1251(a). The primary goal of the CWA is to eliminate the discharge of pollutants into navigable
11 waters entirely; it also establishes “an interim goal of water quality which provides for the
12 protection and propagation of fish, shellfish, and wildlife,” *id.* § 1251(a)(1)–(2), and sets a
13 “national policy that the discharge of toxic pollutants in toxic amounts be prohibited[.]” *Id.* §
14 1251(a)(3).

15 22. To meet these water quality goals, the CWA requires that states develop water
16 quality standards that establish, and then protect, the desired conditions of each waterway within
17 the state’s regulatory jurisdiction. *See id.* § 1313(a); *see also* 40 C.F.R. § 131.11(a)(1). Water
18 quality standards must include three elements: (1) one or more designated uses of a waterway;
19 (2) numeric and narrative criteria specifying the water quality conditions, such as maximum
20 amounts of toxic pollutants, maximum temperature levels, and the like that are necessary to
21 protect designated uses; and (3) an antidegradation policy that protects existing uses and ensures
22 that high quality waters will be maintained. 33 U.S.C. §§ 1313(c)(2), (d)(4)(B); 40 C.F.R. Part
23 131, Subpart B. For waters with multiple uses designations, the criteria must support the most
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1 sensitive use. 40 C.F.R. § 131.11(a)(1).

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

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

13 25. States have the primary responsibility for reviewing, establishing, and revising
14 water quality standards for those waters within their borders. *See* 33 U.S.C. § 1313(c)(1).
15 Frequently, states rely upon EPA’s recommended criteria issued as guidance under CWA section
16 304(a), wherein EPA is required to develop, publish, and revise from time to time, “criteria for
17 water quality accurately reflecting the latest scientific knowledge [] on the kind and extent of all
18 identifiable effects on health and welfare[.]” *Id.* § 1314(a)(1). Section 304(a) recommended
19 criteria are based upon scientific data concerning the relationship between pollutants and their
20 effect on human health and the environment and do not consider the technological feasibility or

21 _____
22 ¹ EPA, Water Quality Standards Handbook: Second Edition, EPA-823-B-94-005a (August
23 1994), Chapter 3.1.1, *available at*:
24 <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”).

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

4 26. States must also “adopt criteria for all toxic pollutants listed pursuant to section
5 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title,
6 the discharge or presence of which in the affected waters could reasonably be expected to
7 interfere with those designated uses” whenever they review or revise existing water quality
8 standards or adopt new standards. 33 U.S.C. § 1313(c)(2)(B). EPA has informed states in
9 guidance memoranda that “EPA expects each State to comply with [these] statutory requirements
10 in any section 303(c) water quality standards review initiated after enactment of the Water
11 Quality Act of 1987.”³

12 27. EPA policy allows, and in fact encourages, states to adopt statewide numeric
13 criteria in their water quality standards for all toxic pollutants for which EPA has developed
14 304(a) recommended criteria, regardless of whether the pollutants are known to be present in
15 navigable waters within the state. Alternatively, states may adopt specific numeric criteria for
16 toxic pollutants as necessary to support designated uses where such pollutants are discharged or
17 are present in the affected waters and could reasonably be expected to interfere with designated
18 uses. 33 U.S.C. § 1313(c)(2)(B).

19 28. State standards may be less stringent than directed by EPA guidance only if they
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21 ² EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human*
22 *Health (2000)*, EPA-822-B-00-004 (Oct. 2000), 65 Fed. Reg. 66443 (Nov. 3, 2000) (hereinafter
23 “2000 Methodology”), at 1–1.

24 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).

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

5 29. States must review and, where necessary, revise their water quality standards at
6 least every three years, a process called the “triennial review.” *See* 33 U.S.C. § 1313(c)(1); 40
7 C.F.R. § 131.20(a). Any revised or newly adopted water quality standards must be submitted to
8 EPA for review and either approval or disapproval. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §
9 131.20(c). States must also submit for review any state-issued policies that affect water quality
10 standards. *See* 40 C.F.R. §§ 131.13, 131.20(c).

11 30. When a state adopts or revises water quality standards, EPA must review the
12 standards to ensure compatibility with the CWA. *See* 33 U.S.C. § 1313(c)(2). EPA must notify
13 the state within 60 days if it approves the new or revised standards. *See id.* § 1313(c)(3). If EPA
14 disapproves a state’s water quality standards, EPA is directed by the law to specify changes that
15 are needed to ensure compliance with the requirements of CWA section 303(c) and federal water
16 quality standards regulations. *See id.* §§ 1313(c)(3), (c)(4); *see also* 40 C.F.R. § 131.21. In any
17 instance in which EPA determines that a new or revised standard is necessary to meet the
18 requirements of the CWA, the CWA requires that the Administrator promptly prepare and
19 publish proposed regulations setting forth a revised or new water quality standard. *See* 33 U.S.C.
20 § 1313(c)(4)(B).

21 **The Administrative Procedure Act**

22 31. The APA provides that “[a] person suffering legal wrong because of agency
23 action, or adversely affected or aggrieved by agency action within the meaning of a relevant
24

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

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

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

5 34. The APA authorizes courts to hold unlawful and set aside any agency action that
6 is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” *Id.* §
7 706(2)(A). The APA requires agencies to conclude issues presented to them “within a reasonable
8 time” and empowers reviewing courts to “compel agency action unlawfully withheld or
9 unreasonably delayed[.]” *Id.* §§ 555(b), 706(1).

10 35. In determining whether an agency’s delay in responding to a petition for
11 rulemaking is “unreasonable,” courts generally look to several factors first described in
12 *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) (hereafter,
13 the “TRAC factors”); *see also Independence Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir.
14 1997) (applying TRAC factors when evaluating whether an agency has “unlawfully withheld or
15 unreasonably delayed” an action within the meaning of APA section 706(1)).

16 36. The TRAC factors are: “(1) the time agencies take to make decisions must be
17 governed by a rule of reason; (2) where Congress has provided a timetable or other indication of
18 the speed with which it expects the agency to proceed in the enabling statute, that statutory
19 scheme may supply content for this rule of reason; (3) delays that might be reasonable in the
20 sphere of economic regulation are less tolerable when human health and welfare are at stake; (4)
21 the court should consider the effect of expediting delayed action on agency activities of a higher
22 or competing priority; (5) the court should also take into account the nature and extent of the
23 interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind
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1 agency lassitude in order to hold that agency action is unreasonably delayed.” 750 F.2d at 80
 2 (internal quotations and citations omitted).

3 FACTUAL BACKGROUND

4 **Washington’s Aquatic Life Water Quality Criteria**

5 37. Washington adopted some aquatic life criteria for 25 toxic pollutants⁴ and
 6 submitted them to EPA for approval on November 25, 1992. EPA approved these criteria on
 7 March 18, 1993. Because Washington did not adopt aquatic life criteria for marine chronic
 8 copper and marine chronic cyanide, Washington’s aquatic life criteria for these pollutants were
 9 established by EPA through the National Toxics Rule (“NTR”), in which EPA promulgated
 10 chemical-specific, numeric water quality criteria for priority toxic pollutants for 14 states and
 11 territories—including Washington—which had failed to adopt new or revised numeric water
 12 quality criteria for toxic pollutants as required by CWA section 303(c)(2)(B). *See generally,*
 13 *EPA, Water Quality Standards: Establishment of National Criteria for Priority Toxic Pollutants;*
 14 *States’ Compliance*, Final Rule, 57 Fed. Reg. 60848, 60923 (Dec. 22, 1992).

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

19 ⁴ For any given toxic contaminant, a standard may contain up to six numeric criteria including,
 20 for aquatic life protection: marine acute, marine chronic, freshwater acute, and freshwater
 21 chronic criteria. In addition, the standard may include numeric criteria for protection of human
 22 health including: consumption of water + organisms, and consumption of organisms only.
 23 Finally, a standard may contain site-specific numeric criteria that apply to limited waterbodies in
 24 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.

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

9 39. Notwithstanding these occasional revisions, since at least December 5, 1997—
10 over 19 years ago—Washington has failed to adopt new or revised aquatic life criteria for many
11 toxic pollutants, including many of the pollutants for which EPA has published 304(a)
12 recommended criteria since 1992.⁶ There are currently no proposals for any revisions to
13 Washington's aquatic life criteria.

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

19
20 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.

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

1 are present in Washington waters, have identified these hazards. For example, in 1998, the U.S.
2 Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) released a
3 draft biological opinion on EPA’s promulgation of toxic criteria for California, finding
4 “jeopardy” for the toxic pollutants cadmium, selenium, pentachlorophenol, and mercury.⁷ This
5 was followed, in 2012, by NMFS’s issuing a biological opinion finding jeopardy for Oregon’s
6 cadmium, copper, aluminum, and ammonia criteria.⁸ Subsequently, in June 2015, FWS
7 completed a biological opinion on EPA’s 1996, 1997, and 2005 toxic criteria approval actions
8 for Idaho, finding jeopardy for eight pollutants (arsenic, copper, lead, nickel, selenium, zinc,
9 cyanide, and mercury) and a low-end hardness floor for metals.⁹ Likewise, NMFS recently
10 completed its biological opinion on the same Idaho criteria, making a jeopardy conclusion for
11 five of those pollutants (arsenic, copper, selenium, cyanide, and mercury) and the hardness
12 floor.¹⁰ Many of the species addressed by the draft jeopardy opinion in California and the final
13

14 ⁷ NMFS and FWS, Final Biological Opinion on the effects of the U.S. Environmental Protection
15 Agency’s “Final Rule for the Promulgation of Water Quality Standards: Establishment of
16 Numeric Criteria for Priority Toxic Pollutants for the State of California” (March 24, 2000) at 4–
17 5, *available at* [http://wwwrcamnl.wr.usgs.gov/Selenium/Library_articles/
18 CTR_Final_BO_032400.pdf](http://wwwrcamnl.wr.usgs.gov/Selenium/Library_articles/CTR_Final_BO_032400.pdf) (last visited Feb. 8, 2017). Under the ESA, a proposed action
19 “jeopardizes” a species if it “reasonably would be expected, directly or indirectly, to reduce
20 appreciably the likelihood of both the survival and recovery of a listed species in the wild by
21 reducing the reproduction, numbers, or distribution of that species.” *Id.* at 5. EPA ultimately
22 modified its proposed rule to avoid a final jeopardy biological opinion.

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

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

23 ¹⁰ See NMFS, Final Endangered Species Act Section 7 Formal Consultation and Magnuson-
24 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*

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

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

12 42. A significant amount of toxic pollutants also enter Washington waters via
 13 stormwater runoff, much of which is regulated under NPDES permits for which EPA retains
 14 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).

17 ¹¹ See Exhibit B at 2 n. 5.

18 ¹² EPA, Puget Sound Georgia Basin Transboundary Ecosystem Indicator Report (2006) at 119–
 120, *available at*

19 http://s3.amazonaws.com/zanran_storage/www.epa.gov/ContentPages/109464162.pdf (last
 20 visited Feb. 8, 2017); *see also* Exhibit B at 2–3 and 3 n. 6–7.

21 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
 22 uses (low-density residential, high-density residential, commercial, and industrial), “copper, zinc,
 23 and lead were—more often than not—found to exceed (not meet) water quality criteria....
 24 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

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

4 **Washington's Human Health Water Quality Criteria**

5 43. On August 1, 2016, Washington adopted some new and revised human health
6 water quality criteria. By letter dated November 15, 2016, EPA approved some of these criteria
7 while disapproving others, and shortly thereafter promulgated federal human health water quality
8 criteria for 74 different toxic pollutants which are now applicable to Washington. 81 Fed. Reg.
9 85,417 (Nov. 28, 2016). However, EPA took no action with respect to the human health criteria
10 proposed by Washington for three toxic pollutants—arsenic, dioxin and thallium, *see id.* at
11 85,421—and as a result Washington's human health criteria for those three pollutants remain
12 woefully out of date.

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

20 45. For example, while EPA recommends that criteria for copper not exceed 1,300
21 micrograms per liter ($\mu\text{g/L}$) in order to protect human health, copper has such a deleterious effect

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

24 ¹⁴ *See* Exhibit B at 5–6.

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

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

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

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

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

20 49. NWEA is not aware of, and does not allege, any impropriety on EPA's part in not
21 responding within a reasonable time to NWEA's Petition. However, EPA has no justified
22 explanation for its failure to respond to the Petition. Congress made clear in its 1987
23 amendments to the CWA that either states or EPA should regularly revise water quality criteria
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1 for toxic pollutants during any triennial review required by the CWA. Despite this clear
2 Congressional mandate, Washington has reviewed and revised its standards multiple times
3 without adopting new or revised criteria for many toxics, and neither Washington nor EPA has
4 adopted criteria sufficient to satisfy the CWA's requirements.

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

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

4 **CLAIM FOR RELIEF**

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

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

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

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

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

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

17 **PRAYER FOR RELIEF**

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

20 1. Declare that EPA's failure to act on NWEA's Petition constitutes a failure to
21 conclude the issues presented to EPA in the Petition within a reasonable time, and constitutes
22 agency action unlawfully withheld or unreasonably denied in violation of the APA, 5 U.S.C. §
23 706(1);
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