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11 *Columbia Riverkeeper, Spokane Riverkeeper,*  
12 *RE Sources for Sustainable Communities, Pacific Coast*  
13 *Federation of Fishermen’s Associations, and Institute*  
14 *for Fisheries Resources*

15 UNITED STATES DISTRICT COURT  
16 FOR THE WESTERN DISTRICT OF WASHINGTON  
17 AT SEATTLE

18 PUGET SOUNDKEEPER ALLIANCE, )  
19 COLUMBIA RIVERKEEPER, SPOKANE )  
20 RIVERKEEPER, RE SOURCES FOR ) Civ. No.  
21 SUSTAINABLE COMMUNITIES, PACIFIC )  
22 COAST FEDERATION OF FISHERMEN’S )  
23 ASSOCIATIONS, and INSTITUTE FOR ) COMPLAINT FOR DECLARATORY  
24 FISHERIES RESOURCES, ) AND INJUNCTIVE RELIEF

25 Plaintiffs, )

26 v. )

27 UNITED STATES ENVIRONMENTAL )  
28 PROTECTION AGENCY and GINA McCARTHY, )  
Administrator, United States Environmental )  
Protection Agency, )

Defendants. )

INTRODUCTION

1  
2 1. Plaintiffs Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane  
3 Riverkeeper, RE Sources for Sustainable Communities, Pacific Coast Federation of Fishermen’s  
4 Associations, and the Institute for Fisheries Resources bring suit under the Clean Water Act to  
5 secure relief against ongoing violations by the U.S. Environmental Protection Agency (“EPA”)  
6 of a non-discretionary duty under the Clean Water Act to promulgate standards necessary to  
7 meet the requirements of the Clean Water Act and to protect designated uses including the  
8 consumption of fish.

9 2. The Clean Water Act requires states (or the Environmental Protection Agency if  
10 states fail to do so) to develop water quality standards necessary to meet the requirements of the  
11 Clean Water Act, including to protect designated uses of water. 33 U.S.C. § 1313. Those  
12 designated uses encompass the “fishable and swimmable” protections of the Clean Water Act:  
13 protecting and cleaning up our nation’s waters such that they are clean enough for drinking, for  
14 direct human contact for fishing or recreation, for healthy aquatic resources, and for catching and  
15 consuming fish and shellfish. Water Quality Standards include criteria, often numeric,  
16 sometimes narrative, necessary to ensure that the designated uses are attained and protected.

17 3. One of the ways water pollution adversely affects human health is through the  
18 consumption of fish and shellfish that have accumulated toxic water pollutants in fish tissue.  
19 Therefore, determining the amount of fish people in a state actually consume is a critical  
20 component of setting human health water quality criteria. In setting human health water quality  
21 criteria, a state must set the level of toxic pollutants low enough that fish remain safe to eat. If a  
22 state sets the foundational water quality standard fish consumption rate lower than the amounts  
23 actually consumed, the commensurate human health criteria will be too lenient and people  
24 consuming fish will ingest levels of toxins that will put them at risk for adverse health  
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1 consequences. Failure to adopt human health criteria based on an accurate fish consumption rate  
2 is a failure to promulgate water quality standards that meet the requirements of the Clean Water  
3 Act.

4 4. Washington's fish consumption rate is set at 6.5 grams per day ("g/day"). As  
5 such, it is not reflective of what people in Washington actually eat. Surveys of various  
6 communities in Washington show consumption rates of 200, 300, and even over 500 g/day.  
7 Therefore, Washington's fish consumption rate, along with the criteria based on it, are not  
8 protective and are not adequate to meet the requirements of the Clean Water Act.

9 5. EPA has repeatedly informed Washington that its fish consumption rate is not  
10 accurate; that it does not reflect what people in Washington actually consume and that the rate  
11 and human health criteria based on Washington's fish consumption rate must change. Neither  
12 Washington nor EPA has promulgated a new, accurate fish consumption rate or new, protective  
13 human health criteria.

14 6. The Clean Water Act mandates that EPA step in to correct what EPA has  
15 repeatedly determined to be an inadequate standard. For the reasons explained below, EPA has  
16 violated its mandatory duty under the Clean Water Act, 33 U.S.C. § 1313(c)(4), by failing to  
17 promptly promulgate human health criteria based on an accurate fish consumption rate for  
18 Washington that adequately protects the fishable and swimmable uses required by the Clean  
19 Water Act.  
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## 22 PARTIES

23 7. Plaintiff Puget Soundkeeper Alliance ("PSA") is a non-profit organization,  
24 incorporated under the laws of Washington and recognized by the Internal Revenue Service as a  
25 tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. PSA's donors  
26 and supporters reside on or near or recreate on or near the Puget Sound. PSA is located at 5305  
27

1 Shilshole Avenue N.W., Suite 150, Seattle, WA 98107. PSA's mission is to protect and preserve  
2 the waters of Puget Sound by monitoring, cleaning up, and preventing pollutants from entering  
3 its waters. To accomplish its mission, PSA actively monitors the Puget Sound, enlisting a  
4 network of trained volunteers to detect and report pollution. PSA actively engages government  
5 agencies and businesses working to regulate pollution discharges from sewage treatment plants,  
6 industrial facilities, construction sites, municipalities, and others. PSA frequently seeks  
7 enforcement of the Clean Water Act as part of its work to protect the Puget Sound.

8           8. Plaintiff Columbia Riverkeeper is a non-profit organization, incorporated under  
9 the laws of Washington and recognized by the Internal Revenue Service as a tax-exempt  
10 organization under Section 501(c)(3) of the Internal Revenue Code. Columbia Riverkeeper's  
11 donors and supporters reside on or near or recreate on the Columbia River, including residents in  
12 both the states of Washington and Oregon. Columbia Riverkeeper is located at 111 Third Street,  
13 Hood River, OR 97031. Columbia Riverkeeper's mission is to restore and protect the water  
14 quality of the Columbia River and all life connected to it, from the headwaters to the Pacific  
15 Ocean. To achieve its goals for the Columbia River watershed and estuary, Columbia  
16 Riverkeeper uses an integrated strategy of community-based grassroots organizing, public  
17 education, legal enforcement, and hands-on citizen involvement in tangible river protection  
18 projects. Enforcement of Clean Water Act laws and permits is an integral part of Columbia  
19 Riverkeeper's work on the Columbia River.

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22           9. Plaintiff Spokane Riverkeeper is a program of the Center for Justice, a non-profit  
23 organization, incorporated under the laws of Washington and recognized by the Internal Revenue  
24 Service as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.  
25 Spokane Riverkeeper's donors and supporters reside on or near or recreate in the Spokane River  
26

1 Watershed. Spokane Riverkeeper is located at 35 W. Main Avenue, Suite 300, Spokane, WA  
2 99201. Spokane Riverkeeper is dedicated to protecting and restoring the health of the Spokane  
3 River Watershed. Spokane Riverkeeper accomplishes its goals by collaborating, educating, and,  
4 when necessary, litigating to preserve the Spokane River’s health through the Clean Water Act  
5 and other laws.

6 10. Plaintiff RE Sources for Sustainable Communities, Inc. (“RE Sources”) is a non-  
7 profit organization, incorporated under the laws of Washington and recognized by the Internal  
8 Revenue Service as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue  
9 Code. RE Sources’s donors and supporters reside on or near or recreate on or near the northern  
10 Puget Sound. RE Sources is located at 2309 Meridian Street, Bellingham, WA 98225. North  
11 Sound Baykeeper (“Baykeeper”) is a program of RE Sources. Baykeeper works to protect and  
12 restore the marine and nearshore habitats of the northern Puget Sound region. Enforcement of  
13 Clean Water Act laws and permits is integral to achieving Baykeeper’s goals.

15 11. Plaintiff Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is a  
16 trade association of commercial fishing families that works to protect fish and fish habitat from  
17 pollution and to promote restoration where fish habitat and health are degraded. PCFFA’s  
18 principal place of business is in San Francisco, California, and a Northwest Regional Office is  
19 located in Eugene, Oregon. PCFFA is the largest organization of commercial fishermen on the  
20 west coast. It consists of a federation of 15 smaller commercial fishermen’s vessel owners’  
21 associations, trade associations, port associations, and marketing associations with membership  
22 throughout Washington, Oregon, and California. PCFFA also has “at-large” members who are  
23 unaffiliated with any particular fishermen’s association but have become individual members of  
24 PCFFA. Collectively, PCFFA represents nearly 1,200 west coast commercial fishing families.

1 Many of PCFFA's members derive all or part of their income from the harvesting of fish in or  
2 near Washington waters or fish that originate in Washington waters. Failure to adequately  
3 protect fish and fish consumers impairs the commercial interests of PCFFA and its members.

4 12. Plaintiff Institute for Fisheries Resources ("IFR") is a California non-profit  
5 organization that works to protect and restore fish populations and the human economies that  
6 depend on them by establishing alliances among fishing men and women, with government  
7 agencies, and with concerned citizens. IFR advocates for reforms to protect fish health and  
8 habitat throughout the U.S. West Coast and has successfully advocated for dam removals,  
9 improved pesticide controls, and enhanced marine and watershed conservation regulations  
10 throughout the West Coast. IFR's principle place of business is in San Francisco, California, and  
11 IFR also maintains a Northwest Regional Office in Eugene, Oregon. Most of IFR's at least 850  
12 contributors are commercial fishermen. IFR and PCFFA have common Board members, general  
13 membership, and staff; however, IFR is a separate organization that focuses on marine resources  
14 protection and conservation. IFR and its members are directly and indirectly injured by failure to  
15 adequately protect fish and fish consumers in Washington.

17 13. Defendant United States Environmental Protection Agency is an agency of the  
18 United States charged with overseeing and approving or disapproving state water quality  
19 standards under 33 U.S.C. § 1313.

21 14. Defendant Gina McCarthy, the Administrator of EPA, is the chief officer of EPA,  
22 the federal official ultimately responsible for EPA's administration and implementation of its  
23 legal duties. Administrator McCarthy is sued in her official capacity.

24 15. Plaintiffs have representational standing to bring this action. EPA's violations of  
25 the Clean Water Act have had an adverse impact on Plaintiffs and Plaintiffs' members' ability to  
26

1 use and enjoy water bodies in Washington State and have injured the health, recreational,  
2 environmental, aesthetic, commercial, and/or other interests of Plaintiffs and their members.  
3 These injuries are fairly traceable to EPA's violations and capable of redress by action of this  
4 Court.

5 16. Plaintiffs have organizational standing to bring this action. Plaintiffs have been  
6 actively engaged in a variety of educational and advocacy efforts to improve water quality and to  
7 improve protective health standards such as the fish consumption rate in the waters of  
8 Washington State. EPA's failure to comply with the requirements of the Clean Water Act by  
9 failing to promptly promulgate human health criteria water quality standards based upon a  
10 protective fish consumption rate for Washington State after having determined that a new  
11 standard is necessary has adversely affected Plaintiffs. These injuries are fairly traceable to  
12 Defendants' violations and redressable by the Court.

#### 14 JURISDICTION AND VENUE

15 17. This Court has jurisdiction of this matter pursuant to Section 505(a) of the Federal  
16 Water Pollution Control Act (hereinafter "The Clean Water Act"). 33 U.S.C. § 1365(a). The  
17 relief requested is authorized by 33 U.S.C. § 1365(a) and (d).

18 18. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because  
19 Plaintiffs PSA and Baykeeper reside and maintain headquarters in the Western District of  
20 Washington and because the subject of the Complaint is EPA's inaction with respect to  
21 Washington's fish consumption standards and attendant criteria for toxic contaminants.

22 19. More than 60 days prior to the filing of this action, the Plaintiffs, pursuant to  
23 33 U.S.C. § 1365, gave notice of the violation to the Administrator of the United States  
24 Environmental Protection Agency. A true and correct copy of the Notices are attached hereto as  
25 Exhibits A and B and incorporated by this reference.  
26

LEGAL AND FACTUAL BACKGROUND

20. The CWA requires states to set water quality standards necessary to achieve the requirements of the Clean Water Act: to restore and maintain the chemical, physical, and biological integrity of the nation’s waters, including the protection and propagation of fish and shellfish, and to prohibit pollution to water in toxic amounts. 33 U.S.C. §§ 1251 and 1313. Water quality standards must ensure that designated uses of waters such as protection of consumption of fish and swimming are achieved and maintained. *Id.* and 40 C.F.R. §§ 131.2 and 131.3(i).

21. A required part of a state’s water quality standards is use designations and water quality criteria necessary to protect those designated uses. 40 C.F.R. §§ 131.6 and 131.10.

22. For toxic pollutants, Washington continues to rely on 40 C.F.R. § 131.36, the National Toxics Rule, promulgated by EPA in 1992. 57 Fed. Reg. 60,848 (Dec. 22, 1992). Through its continued reliance on this rule, Washington assumes a designated fish consumption use of only 6.5 g/day, one of the nation’s lowest fish consumption rates.

23. Starting in 2000, EPA guidance has directed states to move away from relying on the National Toxics Rule for human health water quality criteria as it is outdated and based upon inaccurate assumptions regarding fish consumption rates underlying the development of human health water quality criteria, and generally not adequately protective of human health. Rather, through the guidance, EPA directed states to set updated fish consumption rates (and attendant human health criteria) that are based on the best available data, particularly local consumer surveys that reflect the amount of fish local populations actually consume in order to fully-protect that designated use. EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* at 1-12 (2000), available at <http://perma.cc/0Ug1xn41Q88>.

1 Shortly after EPA issued its 2000 guidance on fish consumption and human health criteria, a  
2 Federal Advisory Committee to EPA issued a Report regarding the need for states to ensure that  
3 all populations are protected, including those that have particularly high fish consumption rates  
4 for cultural, religious, social and/or economic reasons. National Environmental Justice Advisory  
5 Committee, *Fish Consumption and Environmental Justice* (2002), available at  
6 <http://perma.cc/0D64qSMD6s8> (“Environmental Justice Report”). The Environmental Justice  
7 Report confirmed and emphasized the need for states to use data reflective of actual consumption  
8 rates of various communities and to set standards that are protective of consumers at those rates.  
9 *Id.* at 30-32. The Environmental Justice Report also emphasized the need to consider that some  
10 consumption rates may currently be suppressed due to reduced fish availability and other factors.  
11 *Id.* at 43-49.

12  
13 24. Actual consumption of fish by residents of Washington is far greater than 6.5  
14 g/day.

15 25. Surveys of various communities in Washington—a number of which were cited  
16 by EPA in its 2000 Guidance and in the 2002 Environmental Justice Report—from Native  
17 American tribal members to members of the Pacific Islander and Asian communities to  
18 recreational fishermen, show consumption rates well in excess of 6.5 g/day. Some surveys show  
19 consumption rates of 200, 300, and over 500 g/day, even without considering suppressed  
20 consumption due to severely reduced stocks of salmon, shellfish, and other fish relied upon by  
21 various Washington residents.

22  
23 26. The Clean Water Act requires that where EPA has determined a state’s water  
24 quality standard does not meet the requirements of the Clean Water Act and that a new or revised  
25 standard is necessary to comply with the requirements of the Clean Water Act, EPA must

1 promptly promulgate a new or revised standard and finalize that standard within 90 days of  
2 publishing the proposed standard unless the state steps in and corrects the problem. *See*  
3 33 U.S.C. § 1313(c)(4).

4 27. EPA has repeatedly informed the State of Washington, Department of Ecology  
5 (“Ecology”) that Washington’s human health criteria water quality standards are not adequate to  
6 meet the requirements of the Clean Water Act because they are based upon an inaccurate fish  
7 consumption rate and that Washington’s reliance on the National Toxics Rule (“NTR”) assumed  
8 consumption rate of 6.5 g/day is wholly inadequate to protect fish consumers. Finally, EPA has  
9 repeatedly informed the State of Washington that a new fish consumption standard and human  
10 health criteria is therefore necessary.

11  
12 28. EPA’s communications to Washington are consistent with its repeated statements  
13 in guidance to all states over a decade ago that the NTR rate of 6.5 g/day is inaccurate and  
14 inadequate as a whole, and that it is especially not protective of fishing uses and consumption in  
15 various communities that rely heavily on fishing, using communities in Washington State as  
16 examples.

17 29. In addition to the plain statements in numerous guidance documents about the  
18 need for locally-accurate and protective fish consumption rates as an integral and necessary part  
19 of water quality standards, EPA has issued at least the following specific written  
20 communications to Washington regarding Washington’s insufficient fish consumption rate.

- 21  
22 a. On November 10, 2010, Jannine Jennings, Manager of the Water Quality  
23 Standards Unit for Region 10, sent an email to Ecology noting that EPA would  
24 shortly send comments on Washington State’s triennial water quality standards  
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1 review “stating EPA’s desire for Washington to move forward with revisions to  
2 the human health criteria in order to incorporate a higher fish consumption rate.”

3 b. On December 16, 2010, Ms. Jennings submitted comments on the Washington  
4 State triennial review, commenting on behalf of EPA. She stated: “EPA urges  
5 Ecology to make the revision of Washington’s human health criteria the most  
6 important priority in this Triennial Review.” Ms. Jennings also pointed out that  
7 “this is a priority for Region 10,” and “Washington’s human health criteria were  
8 issued by EPA in 1992 through the National Toxics Rule (NTR). The human  
9 health criteria are not in the State’s WQS and Washington is one of a handful of  
10 states remaining in the NTR for human health criteria.” Ms. Jennings pointed out  
11 that in 2000, EPA updated its methodology for deriving human health criteria,  
12 recommending that states use a fish consumption rate that accurately represents  
13 local populations to be protected wherever local information about fish  
14 consumption is available. She then stated, “EPA believes that a fish consumption  
15 rate of 6.5 grams per day is not reflective of fish and shellfish consumers in the  
16 State of Washington,” and that Ecology should examine EPA’s most recent  
17 criteria documents and other studies to determine an appropriate rate for criteria  
18 that will be protective of the state’s designated uses.

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21 c. On January 17, 2012, Ms. Jennings sent a letter to Kelly Susewind (Washington  
22 State Department of Ecology Water Quality Program) and Jim Pendowski  
23 (Washington State Department of Ecology Toxics Cleanup Program) providing  
24 comments on Ecology’s draft Technical Support Document for Sediment  
25 Standards. Ms. Jennings repeats statements from the 2010 letter that criteria must  
26

1 protect designated uses, must be scientifically based, and for human health criteria  
2 and fish consumption rates, Ecology should use local data as the preferred  
3 foundation. Ms. Jennings also repeats that Washington currently relies on a fish  
4 consumption rate of 6.5 g/day and noted “as identified in your draft document,  
5 several studies of Northwest populations indicate that this rate is not reflective of  
6 the amount of fish and shellfish consumed by some in the state of Washington.  
7 Therefore, it is appropriate and consistent with EPA guidance for Ecology to  
8 examine the current science to determine an appropriate fish consumption  
9 rate . . . .” Shortly thereafter in the letter, Ms. Jennings stated “we encourage you  
10 to quickly incorporate this information [from tribal and other surveys] into your  
11 rulemaking process and move forward with adopting revised criteria.”  
12 Ms. Jennings summarized that “EPA believes the information is currently  
13 available to make decisions on these matters and requests Ecology to quickly  
14 move through the process necessary to do so.” She closed by repeating that this is  
15 a priority for EPA Region 10.  
16

- 17 d. EPA’s Regional Administrator Dennis McLerran wrote to Ecology’s Director  
18 Maia Bellon on June 13, 2013 stating: “The best available science includes  
19 evidence of consumption rates well above 6.5 grams per day among high fish  
20 consumers and shows that the human health criteria currently in effect for clean  
21 water purposes in Washington are not sufficiently protective.” Regional  
22 Administrator McLerran also points out that “[t]he EPA believes there are  
23 scientifically sound regional and local data available in Washington that are  
24  
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1 sufficient for Ecology to move forward in choosing a protective and accurate fish  
2 consumption rate at this time.”

3 30. EPA has determined, under 33 U.S.C. § 1313(c)(4), that Washington’s current  
4 human health criteria and fish consumption rate are inadequate.

5 31. EPA has a mandatory obligation to promptly promulgate protective fish  
6 consumption rate and attendant human health criteria for the State of Washington and to finalize  
7 the standards and criteria within ninety days from publication of its proposal.

8  
9 **FIRST CAUSE OF ACTION**

10 32. Plaintiffs restate and reallege all preceding paragraphs.

11 33. EPA has determined that Washington’s current human health criteria and fish  
12 consumption rate are inadequate to protect designated uses under the Clean Water Act and that a  
13 revised or new fish consumption rate and attendant human health criteria is necessary in order to  
14 protect Washington fish consumers and fishing designated uses under the Clean Water Act.

15 34. EPA has violated its mandatory duty under the Clean Water Act, 33 U.S.C.  
16 § 1313(c)(4), by failing to promptly promulgate human health criteria based on an accurate fish  
17 consumption rate for Washington that adequately protects designated uses after determining that  
18 Washington’s current fish consumption rate and human health criteria are inadequate.

19 35. EPA’s continuing violations have caused and will continue to cause direct and  
20 immediate harm to fish consumers in Washington.

21 36. EPA’s continuing violations injure the health, recreational, environmental,  
22 aesthetic, commercial, and/or other interests of Plaintiffs and their members.

23 37. Based upon the foregoing and 33 U.S.C. § 1313(c)(4), Plaintiffs are entitled to an  
24 order requiring EPA to promptly prepare and publish proposed regulations setting forth a revised  
25 fish consumption rate and attendant human health criteria for Washington State and to  
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1 promulgate the revised standards no later than ninety days after publishing the proposed  
2 standards.

3 REQUEST FOR RELIEF

4 BASED UPON THE FOREGOING, Plaintiffs request the following relief:

5 A. A declaration that EPA is in violation of the Clean Water Act by failing to  
6 propose and adopt a revised fish consumption rate for Washington after determining that a  
7 revision of Washington's current fish consumption rate is necessary to comply with the Clean  
8 Water Act;

9 B. A declaration that EPA is in violation of the Clean Water Act by failing to  
10 propose and adopt human health criteria for toxic pollutants based on a revised fish consumption  
11 rate for Washington after determining that a revision of Washington's current fish consumption  
12 rate is necessary to comply with the Clean Water Act;

13 C. An injunction requiring EPA to comply with the Clean Water Act by preparing  
14 and publishing proposed regulations in the Federal Register setting forth a revised fish  
15 consumption rate for Washington within sixty days of the Court's order and promulgating the  
16 revised standard no later than ninety days after the date of publication of the revised standard in  
17 the Federal Register pursuant to 33 U.S.C. § 1313(c)(4);

18 D. An award of Plaintiffs' costs and reasonable attorneys' fees pursuant to 33 U.S.C.  
19 § 1365; and  
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21 E. Such further relief as the Court deems just and equitable.  
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1 Respectfully submitted this 11th day of October, 2013.

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