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

PUGET SOUNDKEEPER ALLIANCE, CENTER)	No. 2:16-cv-00293-JLR
FOR JUSTICE, RE SOURCES FOR)	
SUSTAINABLE COMMUNITIES, PACIFIC)	
COAST FEDERATION OF FISHERMEN’S)	PLAINTIFFS’ MOTION FOR
ASSOCIATIONS, and INSTITUTE FOR)	SUMMARY JUDGMENT AND
FISHERIES RESOURCES,)	MEMORANDUM IN SUPPORT
)	THERE TO
Plaintiffs,)	
)	
v.)	NOTE ON MOTION CALENDAR:
)	March 25, 2016
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY and GINA McCARTHY,)	
Administrator, United States Environmental)	
Protection Agency,)	
)	
Defendants.)	
)	

PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT THERE TO
(No. 2:16-cv-00293-JLR)

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1 Plaintiffs Puget Soundkeeper Alliance, Center for Justice (Spokane Riverkeeper), RE
2 Sources for Sustainable Communities, Pacific Coast Federation of Fishermen’s Associations, and
3 Institute for Fisheries Resources (collectively, “Waterkeepers Washington”) move the Court for an
4 order for summary judgment under Rule 56, Federal Rules of Civil Procedure. In accordance with
5 Local Civil Rule 7, this Motion is noted for consideration on Friday, May 25, 2016. Oral argument
6 is not requested. This Motion is based upon the Complaint, the Memorandum below, and the
7 accompanying declarations and exhibits.

8 INTRODUCTION

9 This case concerns one of the most fundamental requirements of the Clean Water Act: the
10 protection of the health and cultures of people who consume fish and shellfish and the livelihoods of
11 fishermen and women. Forty-two years ago, the Clean Water Act made the promise to rid our
12 nation’s waters of toxic pollutants and to restore and protect the “fishable and swimmable”
13 character of those waters. The Clean Water Act also imposed the necessary requirements to fulfill
14 those promises on states and the U.S. Environmental Protection Agency (“EPA”). Unfortunately,
15 long past the timelines set forth in the Clean Water Act, Washington and the nation continue to
16 struggle to meet those most basic goals, with outdated standards that are inadequate to protect
17 consumers from toxins like mercury, polychlorinated biphenyls (“PCBs”), and arsenic.

18 Washington’s human health water quality standards for toxic pollutants are based in part
19 upon a fish consumption rate—the amount of fish people consume, and that rate is a crucial
20 component of meeting the Clean Water Act’s purpose and requirements to protect the health and
21 cultures of all people to safely eat fish. The Environmental Protection Agency’s (“EPA”) failure to
22 act on its mandatory duty to finalize its proposed human health criteria for the state of Washington
23 puts both health and culture at risk as people are exposed to elevated levels of cancer-causing toxins
24 like mercury and PCBs, even as EPA consistently recognizes and articulates the danger.

1 As EPA has determined, Washington State's regulatory fish consumption rate and the
2 human health water quality standards based on that rate fail to protect consumers of fish and
3 shellfish in Washington. Numerous studies demonstrate that people in Washington, especially
4 people who fish and Native and Asian/Pacific-Islander communities, consume orders of magnitude
5 more fish and shellfish than Washington estimates. Because Washington grossly underestimates
6 fish consumption rates, Washington's human health water quality standards allow far more toxins in
7 fish and shellfish than is safe for people to consume in their actual, normal or customary amounts.
8 EPA has repeatedly communicated its general disapproval of the inadequate standard to
9 Washington, and finally, in the face of the state's repeated failure to act, in September of 2015, EPA
10 determined Washington's standards are inadequate to protect designated uses; accordingly EPA
11 proposed revised standards for Washington. EPA has failed to finalize the proposed standard within
12 the explicit deadline set by Congress in the Clean Water Act. EPA has, therefore, failed to meet its
13 mandatory obligations, continuing to leave Washington consumers exposed to unsafe levels of
14 toxins.

15 Waterkeepers Washington moves for summary judgment against Defendants U.S.
16 Environmental Protection Agency and Administrator Gina McCarthy. EPA and the Administrator
17 have failed to comply with the nondiscretionary obligation under 33 U.S.C. § 1313(c)(4) to
18 promptly promulgate revised human health criteria based on an accurate fish consumption rate for
19 Washington that adequately protects the fishable and swimmable uses required by the Clean Water
20 Act. Waterkeepers Washington requests an order from the Court requiring EPA to finalize the
21 proposed revised fish consumption rate and human health water quality standards for Washington
22 within 30 days of the Court's order.

BACKGROUND

Clean Water Act Water Quality Standards Framework.

The overarching commitment of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To that end, the Clean Water Act sets national goals to eliminate all discharges of pollutants by 1985, to attain water quality which provides for the protection and propagation of fish and shellfish by 1983 (the “fishable” goal), and sets national policy to *prohibit* toxic pollutants in toxic amounts. 33 U.S.C. § 1251(a)(1), (2), and (3). In order to ensure the attainment of these goals and implementation of this policy, the Clean Water Act imposes an obligation on states, with EPA in an oversight role, to develop water quality standards comprised of narrative or numeric water quality criteria sufficient to protect designated uses such as fishing or recreation. 33 U.S.C. § 1313(a) and (b). *See also*, 40 C.F.R. §§ 130.3, 130.10(a)(3), 131.4, 131.5, 131.10 and 131.11.

States have the first obligation and opportunity to promulgate water quality standards that are then submitted to EPA for review and to approve or disapprove. 33 U.S.C. § 1313(a) and (b); 40 C.F.R. § 131.21. States are thereafter required to review their water quality standards not less than once every three years, to subject that review to a public process, and to submit the results of that review and any proposed changes to EPA, again for review and approval (generally referred to as the “triennial review”). 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20. If a state fails to promulgate standards adequate to meet the requirements of the Clean Water Act, or fails to revise a standard after EPA disapproves, EPA is required to step in and promulgate the necessary standard. 33 U.S.C. § 1313(b) and (c). Plainly, through the triennial review requirement and EPA’s independent review authority, Congress meant to ensure that up-to-date and protective standards would be in place regardless of a state’s inability or refusal to meet its clean water obligations.

Moreover, EPA has independent authority to ensure that a state’s standards are up-to-date and adequate to meet the requirements of the Clean Water Act. 33 U.S.C. § 1313(c)(4). At any time, when “the Administrator determines that a revised or new standard is necessary to meet the

1 requirements” of the Clean Water Act, EPA “*shall* promptly prepare and publish proposed [revised]
2 regulations.” 33 U.S.C. § 1313(c)(4) (emphasis added). Again, the Clean Water Act structures the
3 relationship such that EPA assumes the role of issuing standards that comply with the Clean Water
4 Act, when a state has failed to do so.

5 **Washington’s Inadequate Human Health water quality standards.**

6 Protective human health water quality standards based on an accurate fish consumption rate
7 are crucial protections for the people in Washington who eat fish and shellfish. One of the ways
8 water pollution adversely affects human health is through the consumption of fish and shellfish that
9 have accumulated toxic water pollutants such as mercury, lead, or PCBs. Toxins, once entering the
10 water, can accumulate in fish and shellfish tissue, ultimately exposing humans. *See* Washington
11 Dep’t of Ecology Technical Support Document, Version 2.0, at xiii, relevant portions attached to
12 Declaration of Janette K. Brimmer as Ex. A, entire document *available at*
13 <https://fortress.wa.gov/ecy/publications/publications/1209058.pdf>. *See also* Brimmer Decl. Ex. B,
14 EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human*
15 *Health* (2000) at 5-1, *also available at* <http://perma.cc/0Ug1xn41Q88>, (“Human Health Guidance”).
16 Therefore, a water quality standard for toxins must be set to ensure that humans can safely consume
17 fish and shellfish and not overexpose themselves to accumulative toxins. *See*, Brimmer Decl.
18 Ex. C, National Environmental Justice Advisory Committee, *Fish Consumption and Environmental*
19 *Justice* (2002), at 11 and 13, *also available at* <http://perma.cc/0D64qSMD6s8> (“Environmental
20 Justice Report”). *See also*, 80 Fed. Reg. 55,063, 55,064-65 (Sept. 14, 2015) and referenced
21 guidance. In order to set a proper standard, an agency must determine the amount of fish people in
22 the state consume daily—the fish consumption rate. If the rate is set too low, people will be
23 exposed to unhealthy, perhaps even dangerous, levels of toxins when consuming their normal or
24 culturally-customary amount of fish or shellfish. Environmental Justice Report at 14-15; 24.

1 Washington's fish consumption rate is set at 6.5 grams per day ("g/day"), approximately one
2 bite-size piece of fish, which is cumulatively approximately one fish meal per month (slightly under
3 8 oz. of fish per month). 40 C.F.R. § 131.36 ("National Toxics Rule"); Wash. Admin. Code. § 173-
4 201A-240(5) (2011) (adopting National Toxics Rule); 80 Fed. Reg. at 55,064 and 55,066.

5 As early as 2000, EPA directed states to end reliance on the National Toxics Rule and to
6 update fish consumption rates and accompanying human health criteria based on the best available
7 local consumer data. Human Health Guidance at 1-1. In the Human Health Guidance, EPA made
8 its intentions known early in the document:

9 The Agency intends to use the 2000 Human Health Methodology both to develop
10 new [Ambient Water Quality Criteria ("AWQC")] for additional pollutants and to
11 revise existing AWQC. Within the next several years, EPA intends to focus on
12 deriving AWQC for chemicals of high priority (including, but not limited to,
13 mercury, arsenic, PCBs, and dioxin). Furthermore, EPA anticipates that 304(a)
14 criteria development in the future will be for bioaccumulative chemicals and
15 pollutants considered highest priority by the Agency. The 2000 Human Health
16 Methodology is also intended to provide States and authorized Tribes flexibility
17 in establishing water quality standards by providing scientifically valid options for
18 developing their own water quality criteria that consider local conditions. States
19 and authorized Tribes are strongly encouraged to use this Methodology to derive
20 their own AWQC.

21 Human Health Guidance at 1-1. EPA further directed:

22 that priority be given to identifying and adequately protecting the most highly
23 exposed population. Thus, if the State or Tribe determines that a highly exposed
24 population is at greater risk and would not be adequately protected by criteria
25 based on the general population, and by the national 304(a) criteria in particular,
26 EPA recommends that the State or Tribe adopt more stringent criteria using
27 alternative exposure assumptions.

28 Human Health Guidance at 2-2. EPA directed states to use a preferred hierarchy in determining
exposure rates from fish consumption when states develop human health criteria for water quality
with the use of local data on specific, actual consumption rates, being the highest and best source of
information to underlie the criteria development. *Id.* at 4-24 to 4-27.

Soon after EPA issued its Human Health Guidance, a federal advisory committee on
Environmental Justice issued a report on the need for states to ensure that all populations are

1 protected, especially those with particularly high fish consumption rates for cultural, religious,
2 social, and/or economic reasons. Brimmer Decl. Ex. C. *See also*, 80 Fed. Reg. at 55,067-68. The
3 Environmental Justice Report emphasized that, for many native communities and/or communities of
4 color, fishing and eating fish is more than simply an inexpensive way to feed one's family or an
5 option for recreation. In fact, the report described how sharing and eating fish is an integral part of
6 many communities' cultures, religion, or social network and as such, larger amounts of fish may be
7 consumed by members of the community than had previously been assumed by state or federal
8 regulators. Human Health Guidance at 2-13. The report therefore also emphasized the need to use
9 actual data for fish and shellfish consumers in the state and to set standards that are protective of a
10 state's varied communities. *Id.* at 30-32. Surveys of and data from Washington communities—
11 Indian Tribes and the Asian/Pacific-Islander Communities in King County—figure prominently in
12 the Environmental Justice Report. *See id.* at pp. 8-9, 12, 14-15, 27 (Table 1), 29. *See also*, 80 Fed.
13 Reg. 55,067-68.

14 Similarly, as the enclosed declarations show, Washington has a thriving commercial and
15 recreational fishery and those individuals are also eating fish well above the paltry one meal a
16 month standard for which they are protected from toxins under Washington's outdated standard.
17 All told, fishermen and women in Washington caught about 86,701 metric tons of fish and shellfish
18 in 2014, with an initial ex vessel value of nearly \$326 million. Glen Spain Decl. ¶ 6. *See also*, Joel
19 Kawahara Decl. Recreational fishermen often eat fish and shellfish in amounts far exceeding
20 Washington's 6.5 g/day fish consumption estimate even though many have reduced the amount of
21 fish they eat to avoid toxics. *See* Matthew Warning Decl. ¶¶ 5-11 (describing spearfishing and
22 eating lingcod and other fish); Michael Harves Decl. ¶¶ 6-9 (describing fishing for bass and other
23 fish).

24 In sum, as determined by EPA the best available data in Washington show that the actual
25 fish consumption rate for many (possibly most) people in the state is far in excess of the 6.5 g/day
26

1 estimate used by Washington, with some communities consuming up to 200, 300, and even up to
 2 500 g/day. *See* Environmental Justice Report at 15 & n.35, 38, 50 & n.136, 51 & n.138, 54 and 80
 3 Fed. Reg. 55,066-68.

4 **EPA Determined That Washington’s Human Health Water Quality Standards and Fish**
 5 **Consumption Rate are Inaccurate and Not Protective of Fish Consumers.**

6 Since EPA’s notification to states in 2000 that they should move away from the National
 7 Toxics Rule and the inaccurate, under-protective 6.5 g/day fish consumption rate, EPA sent
 8 repeated communications to Ecology informing Ecology that Washington’s fish consumption rate
 9 and human health water quality standards are inadequate to protect designated uses (catching and
 10 eating fish) under the Clean Water Act, culminating in a formal and explicit determination by EPA
 11 that Washington’s standards are inadequate. The determination included a proposed replacement
 12 standard. For over five years, EPA has been telling Ecology that Ecology must update its standards
 13 because the fish consumption rate used for Washington is incorrect, trying, with increasing urgency
 14 in each communication, to convince the state to do its job under the Clean Water Act:

- 15 • November 10, 2010, email from Jannine Jennings, Manager of EPA Region 10’s Water
 16 Quality Standards Unit to Ecology instructing Ecology to “move forward with revisions to
 17 the human health criteria in order to incorporate a higher fish consumption rate”;¹
- 18 • December 16, 2010, letter from Ms. Jennings at EPA to Becca Conklin at Ecology stating
 19 “EPA believes that a fish consumption rate of 6.5 grams per day is not reflective of fish and
 20 shellfish consumers in the State of Washington”;
- 21 • January 17, 2012, letter from Ms. Jennings at EPA to Kelly Susewind of the Ecology Water
 22 Quality Program and Jim Pendowski of the Ecology Toxics Cleanup Program, repeating that
 23 human health criteria must protect designated uses, must be scientifically based, and that
 24 local data is the preferred foundation for fish consumption rates and that “several studies of

25 ¹ Copies of each referenced communication are attached to the Declaration of Janette K.
 26 Brimmer.

1 Northwest populations indicate [Washington’s 6.5 g/day] is not reflective of the amount of
2 fish and shellfish consumed by some in the state of Washington” and is not consistent with
3 EPA’s 2000 guidance and that EPA “believes the information is currently available to make
4 decisions on these matters and requests Ecology to quickly move through the process
5 necessary to do so”;

- 6 • September 6, 2012, letter from EPA Region 10 Administrator Dennis McLerran to Ecology
7 Director Ted Sturdevant again outlining that Washington’s fish consumption rate is
8 inaccurate and inadequate to protect fish and shellfish consumers, noting specifically that
9 “surveys demonstrate that tribal and other high fish consuming residents are eating fish at
10 rates significantly higher than the current default rates,” and that EPA strongly supported
11 adoption of new standards in Oregon based on a fish consumption rate of 175 g/day; and
- 12 • June 21, 2013, letter from EPA Region 10 Administrator McLerran to Ecology’s Director,
13 Maia Bellon stating that “[t]he best available science includes evidence of consumption rates
14 well above 6.5 grams per day among high fish consumers and shows that the human health
15 criteria currently in effect for clean water purposes in Washington are not sufficiently
16 protective,” and that “there are scientifically sound regional and local data available in
17 Washington that are sufficient for Ecology to move forward in choosing a protective and
18 accurate fish consumption rate at this time.”

19 Only after years of direction and urging from EPA, Ecology published a wholly-inadequate
20 proposed rule in January of 2015. EPA, tribes, and Waterkeepers Washington sharply criticized
21 Ecology’s attempt as inconsistent with the law, EPA guidance, and science. *See, e.g.*, EPA’s
22 comment letter dated March 23, 2015, attached to Brimmer Decl. Ex. J. EPA was especially critical
23 of Ecology’s failure to set a protective and accurate consumption standard, Ecology’s weakening of
24 cancer risk protections, and Ecology’s failure to follow EPA’s guidance that directed how to ensure
25 that fish-eating populations are protected from dangerous toxins in the water. *Id.* Ecology

1 ultimately let the clock run out on finishing a human health water quality standard, withdrawing the
2 inadequate proposed rule and failing to propose a replacement.²

3 Finally, on September 14, 2015, EPA published its formal determination under 33 U.S.C.
4 § 1313(c)(4) that Washington's human health water quality standards, as set forth in the NTR, are
5 not protective of designated uses. 80 Fed. Reg. at 55,066. EPA proposed a replacement standard
6 based upon a closer approximation of what people in Washington, particularly tribal-members,
7 actually consume and applying EPA guidance for how human health criteria should be calculated.
8 *Id.* at 55,067-71.

9 PARTIES AND STANDING

10 This case arises under the citizen-suit provision of the Clean Water Act, which provides a
11 cause of action in federal district court for citizens to enforce EPA's mandatory obligations under
12 the Act. 33 U.S.C. § 1365(a)(2). Waterkeepers Washington is comprised of organizations whose
13 members have business, recreational and fish consumption interests resulting in concerns regarding
14 Washington's inadequate and unsafe fish consumption rate and inadequate human health water
15 quality standards. *Id.* The organizations' missions are to advocate for clean and healthy, "fishable,"
16 waters in the state of Washington and the Columbia Basin. *See* Declarations Chris Wilke, Jerry
17 White, Glen Spain, and Lee First. In addition to their organizational concerns regarding
18 Washington's weak protections for fish consumers, staff in these organizations also consume fish
19 and shellfish and they are personally injured by the attendant health risks to themselves and their
20 families. *See* Chris Wilke Decl. ¶¶ 17, 21-23, Katelyn Kinn Decl. ¶¶ 17-23, Jerry White Decl.

21
22 ² On February 1, 2016, four months after EPA proposed a revised human health water quality
23 standard for Washington and approximately six weeks after Waterkeepers Washington gave
24 notice of intent to sue, Ecology proposed a new fish consumption rate and water quality
25 standards. <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/1203docs.html>. The
26 latest version still includes many of the components EPA, the tribes and Waterkeepers
Washington criticized previously and it still fails to set revised standards for Washington's most
pressing and prevalent water toxins in fish, PCBs and mercury. Ecology is accepting comments
through April 22, 2016. *Id.*

1 ¶¶ 19-21, Glen Spain Decl. ¶ 19, and Lee First Decl. at ¶¶ 12-14, 19-20.

2 Moreover, the various Waterkeepers Washington member declarants describe in detail their
3 consumption of Washington-origin fish along with economic, recreational, and other benefits to
4 healthy fish in Washington. For example, Puget Soundkeeper Alliance member Matthew Warning
5 regularly spearfishes for lingcod and other fish. Matthew Warning Decl. ¶¶ 5-11. He was
6 devastated to learn through testing of fish he caught that the toxicity levels were dangerously high
7 and has subsequently had to choose between not eating the fish he catches and exposing himself to
8 harmful toxins. *Id.* ¶¶ 9-18. Joel Kawahara is a commercial fisherman and member of an
9 organizational member of PCFFA who depends on healthy fish for his livelihood. Joel Kawahara
10 Decl. ¶¶ 4-8, 14. In addition to depending on the availability of healthy fish for his livelihood, Mr.
11 Kawahara eats fish from his catch and other Washington fish at a level far above that estimated by
12 Washington. *Id.* ¶¶ 16-17. Other members of Waterkeepers Washington have given up fishing and
13 eating their catch or have greatly reduced doing so because of their concerns about toxics in fish in
14 Washington. Michael Harves Decl. ¶ 8. This is consistent with some of the information reported to
15 the Environmental Justice advisory committee where members of some native tribes report
16 suppressed intake of fish either because of threatened or endangered stocks or over concern for their
17 health. Brimmer Decl. Ex. C, Ch. 1.G. p. 43-4).

18 STANDARD OF REVIEW

19 Summary judgment is appropriate if there is no genuine issue of material fact and the
20 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party
21 bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*
22 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden,
23 however, the opposing party must then set forth specific facts showing that there is some genuine
24 issue for trial in order to defeat the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986).

ARGUMENT

1
2 There are no facts in dispute necessitating a trial in this case, making summary judgment
3 appropriate. The sole question here is whether EPA has violated its mandatory duty to promulgate a
4 human health water quality standard for Washington no later than December 14, 2015, under 33
5 U.S.C. § 1313(c)(4)(B). The law is plain that upon making such determination under § 1313(c)(4)
6 that a state's standards are not protective of designated uses, "[t]he Administrator shall promulgate
7 any revised or new standard under this paragraph not later than ninety days after he publishes such
8 proposed standards. . . ." *Id.* § 1313(c)(4). There is no dispute that EPA has made a determination
9 that the human health water quality standards applicable in Washington are not adequate and
10 revised standards are necessary, and that EPA published proposed revised standards on September
11 14, 2015. There is further, no dispute that EPA has not, as of the date of this pleading, promulgated
12 a final standard. EPA is, therefore, in violation of a mandatory duty under 33 U.S.C. § 1313(c)(4).

13 I. EPA HAS DETERMINED THAT REVISED HUMAN HEALTH WATER QUALITY
14 STANDARDS BASED UPON A CORRECTED FISH CONSUMPTION RATE ARE
15 NECESSARY TO MEET THE REQUIREMENTS OF THE CLEAN WATER ACT.

16 On September 14, 2015, EPA explicitly determined under 33 U.S.C. § 1313(c)(4)(B) that
17 Washington's fish consumption rate and accompanying water quality standards are not adequate.
18 80 Fed. Reg. 55,063, 55,066-67 (Sept. 14, 2015). At the same time, EPA issued its own proposed
19 rule to replace the inadequate standards. *See generally id.* EPA stated in its proposed rule:

20 Surveys of local residents in the Pacific Northwest, including tribes and
21 recreational anglers, reflect high consumption levels of fish and shellfish—much
22 higher than the 6.5 g/day rate that EPA used in 1992 to derive Washington's
23 human health criteria in the NTR. Since that time, data have become available
24 that better represent regional and local fish consumption in Washington

25 *Id.* at 55,066. EPA also determined that

26 the 6.5 g/day [fish consumption rate] that EPA used to derive the current human
27 health criteria applicable to Washington does not account for these more recent
28 local data, nor suppression in fish consumption (as discussed earlier). In addition,
the 6.5 g/day FCR does not account for EPA's 2000 recommendation to use an
upper percentile of fish consumption data for the target general population (as
with EPA's current national FCR of 22 g/day) rather than an average.

1 *Id.* As a result, the human health water quality standards applicable in Washington are inaccurate
2 and do not protect designated uses. EPA went on to state that

3 [b]ecause Washington’s existing human health criteria, as promulgated by EPA in
4 the NTR, are no longer protective of the applicable designated uses per the CWA
5 and EPA’s regulations at 40 CFR 131.11, EPA determines under CWA section
303(c)(4)(B) that new or revised WQS for the protection of human health are
6 necessary to meet the requirements of the CWA for Washington.

7 *Id.* (emphasis added).

8 Further, EPA’s determination clearly constitutes a “determination” under its regulations.
9 *See* 40 C.F.R. § 131.22(b). Under those regulations, to constitute a determination, it must be signed
10 by the Administrator, *id.* (b)(1), and “[c]ontain a statement that the document constitutes an
11 Administrator’s determination under section 303(c)(4)(B) of the Act,” *id.* (b)(2). EPA’s
12 determination checks both of these boxes without ambiguity. 80 Fed. Reg. at 55,075 (electronic
13 signature of Administrator Gina McCarthy), 55,066-67 (characterizing action as determination
14 “under CWA section 303(c)(4)(B)”).

15 At the time of its determination, on September 14, 2015, EPA published proposed water
16 quality standards revisions applicable to Washington in accordance with its obligations under 33
17 U.S.C. § 1313(c)(4). *Id.* at 55,069-71. EPA’s actions were entirely consistent with its multiple,
18 repeated warnings and notices to Ecology and its repeated (and repeatedly unheeded) requests that
19 Ecology address the situation.

20 II. EPA’S DETERMINATION TRIGGERED A MANDATORY DUTY FOR EPA TO
21 PROMULGATE THE REVISED STANDARD BY DECEMBER 14, 2015, AND EPA
22 IS IN VIOLATION OF THAT DUTY.

23 The plain language of the Clean Water Act and case law shows that upon making a
24 determination, EPA is required to propose and promulgate a revised fish consumption rate and
25 human health standard from that rate, for Washington. In particular, EPA “shall promulgate any
26 revised or new standard. . . not later than ninety days after [the Administrator] publishes such
27 proposed standards . . .” 33 U.S.C. § 1313(c)(4). The duty is mandatory. *See Nw. Envtl. Advocates*

1 v. *EPA*, 268 F. Supp. 2d 1255, 1260 (D. Or. 2003) (citing *Idaho Conservation League, Inc., v.*
2 *Russell*, 946 F.2d 717, 720 (9th Cir. 1991)). As this Court observed in earlier litigation related to
3 Washington’s fish consumption rate, “[t]he provision uses the mandatory language of ‘shall’ and
4 there is no dispute that the duty is mandatory once such a determination is made.” *Puget*
5 *Soundkeeper All. v. U.S. E.P.A.*, No. C13-1839-JCC, 2014 WL 4674393, at *2 (W.D. Wash. Sept.
6 18, 2014). There is no Ninth Circuit case law suggesting otherwise. *See Idaho Conservation*
7 *League, Inc.*, 946 F.2d at 720 (“There is no case law suggesting Section 303(c) leaves the
8 Administrator any discretion to deviate from this apparently mandatory course.”).

9 That this duty is mandatory is consistent with the Clean Water Act’s overarching
10 framework. States have the first opportunity to promulgate adequate water quality standards, and
11 EPA provides a backstop for states’ efforts such that inadequate state standards are replaced by
12 standards EPA issues quickly after they are found to be inadequate. *See* 33 U.S.C. § 1313; *Nw.*
13 *Envtl. Advocates*, 268 F. Supp. 2d at 1261; *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088,
14 1101-02 (E.D. Pa. 1996). If EPA’s duty were not mandatory, EPA inaction would allow unlawful
15 standards to remain in place indefinitely, with no check on state standards EPA has explicitly
16 concluded are deficient. *See Nw. Envntl. Advocates*, 268 F. Supp. 2d at 1261. That situation is
17 entirely contrary to the overall structure of the Clean Water Act (and other environmental laws such
18 as the Clean Air Act) where concepts of shared federalism and EPA oversight are integral to
19 ensuring the law is fully-implemented as intended. EPA’s inaction frustrates the purpose of the
20 Clean Water Act to restore and maintain “the chemical, physical, and biological integrity of the
21 Nation’s waters.” *See Nw. Envntl. Advocates*, 268 F. Supp. 2d at 1260 (citing 33 U.S.C. § 1251(a)).
22 Rather than leave the states completely to their own devices, Congress mandated that EPA must
23 maintain a supervisory and approval role and that if EPA makes a determination that a new or
24 revised standard is necessary to meet the requirements of the Clean Water Act, EPA is legally
25 obligated to finalize revised standards within 90 days of publishing its own proposal.

1 Five years after its first communication expressing concern and dissatisfaction with
 2 Washington's fish consumption rate, and well after it finally exhausted what had been near-infinite
 3 patience with the State of Washington, EPA has failed to finalize and promulgate revised human
 4 health water quality standards for Washington.³ Once EPA made its § 1313(c)(4) determination and
 5 proposed a standard, EPA had a mandatory duty to finalize and promulgate its proposed revised
 6 standards within ninety days. 33 U.S.C. § 1313(c)(4). EPA is not authorized by the Clean Water
 7 Act to continue to wait for Washington to comply with the law. EPA is obligated by statute to step
 8 in to protect fish and shellfish consumers by promulgating revised human health water quality
 9 standards and a more accurate, more protective fish consumption rate.

10 III. WATERKEEPERS WASHINGTON REQUESTS AN ORDER DIRECTING EPA TO
 11 ACT WITHIN A SET TIME.

12 Waterkeepers Washington requests an order from the court directing EPA to finalize and
 13 promulgate revised human health water quality standards within 30 days of the court's order. This
 14 period of time is commensurate with periods set forth in § 1313 for EPA action and is reasonable
 15 given the critically important human health and environmental justice issues involved, the delay that
 16 has already occurred, and the fact that EPA has already developed and published the proposed
 17 standards. Waterkeepers Washington also seeks an award of their costs and fees incurred in this
 18 litigation.

19 The Clean Water Act provides courts with broad remedial authority to address violations in
 20 citizen suits. *See, e.g., U.S. v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986); *Weinberger v. Romero-*
 21 *Barcelo*, 456 U.S. 305, 320 (1982) (court has broad authority "to order that relief it considers
 22 necessary to secure prompt compliance with the Act"). In fashioning remedies under the Clean
 23 Water Act, courts have recognized "there is a strong public interest in meticulous compliance with

24 _____
 25 ³ In fact, data from Washington was repeatedly cited in the Environmental Justice Advisory
 26 Committee Report to EPA back in 2002. *See* Environmental Justice Report at 15 & n.35, 38, 50
 & n.136, 51 & n.138, 54.

1 the law by public officials.” *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993)
2 (citing *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88, 68 S. Ct. 1, 45 (1947)). As the
3 Ninth Circuit has emphasized, “the public interest *requires* strict enforcement of the [CWA] to
4 effectuate its purpose of protecting sensitive aquatic environments.” *Akers*, 785 F.2d at 823
5 (emphasis added). Finally, the Clean Water Act authorizes an award of litigation costs and
6 attorneys’ fees to plaintiffs who bring CWA enforcement actions. 33 U.S.C. § 1365.

7 Making the environment “whole” in this case entails ensuring that the ongoing failure of the
8 state and EPA to protect consumers of fish is corrected as quickly as possible and in accordance
9 with the clear direction found in the statute. Both the language of § 1313 and courts’ recognition of
10 broad equitable authorities in this regard support an order as requested by Waterkeepers
11 Washington. Moreover, the history of this case dictates the need for specific date-certain deadlines
12 for the finalization of the revised standards as the state and EPA have shown a significant reluctance
13 to act within any specific time. It will not serve the purposes of the Clean Water Act to simply
14 order the EPA to generally comply with the mandatory duty that it has already ignored.

15 CONCLUSION

16 For the foregoing reasons, Waterkeepers Washington respectfully requests that the Court
17 grant its motion for summary judgment and that the Court order EPA to finalize and promulgate its
18 revised human health criteria for Washington within 30 days of the court’s order.

1 Respectfully submitted this 1st day of March, 2016.

2
3 s/ Janette K. Brimmer

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13 *Fisheries Resources*

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the state of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203; Seattle, Washington 98104-1711.

I HEREBY CERTIFY that on March 1, 2016, I electronically filed the following with the Clerk of the Court using the CM/ECF system:

1. Plaintiffs' Motion for Summary Judgment and Memorandum in Support Thereto (Note on Motion Calendar, March 25, 2015);
2. Declaration of Janette K. Brimmer in Support of Plaintiffs' Motion for Summary Judgment;
3. Declaration of Lee First in Support of Plaintiffs' Motion for Summary Judgment;
4. Declaration of Michael T. Harves in Support of Plaintiffs' Motion for Summary Judgment;
5. Declaration of Joel Kawahara in Support of Plaintiffs' Motion for Summary Judgment;
6. Declaration of Katelyn Kinn in Support of Plaintiffs' Motion for Summary Judgment;
7. Declaration of Glen H. Spain in Support of Plaintiffs' Motion for Summary Judgment;
8. Declaration of Matthew James Warning in Support of Plaintiffs' Motion for Summary Judgment;
9. Declaration of Jerry White, Jr., in Support of Plaintiffs' Motion for Summary Judgment; and
10. Declaration of Chris Wilke in Support of Plaintiffs' Motion for Summary Judgment.

AND I HEREBY CERTIFY that on March 2, 2016, service of the foregoing documents will be affected on the following non-CM/ECF participants via overnight courier or hand delivery:

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, 1200 Pennsylvania Avenue, NW
Mail Code 6101A
Washington, DC 20460

- via facsimile
- via overnight courier
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- via hand delivery
- via e-mail
- via CM/ECF filing system

Dennis McLerran, Regional Administrator
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- via facsimile
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- via hand delivery
- via e-mail
- via CM/ECF filing system

Loretta E. Lynch
United States Attorney General
U.S. Department of Justice
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- via facsimile
- via overnight courier
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- via hand delivery
- via e-mail
- via CM/ECF filing system

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March, 2016, at Seattle, Washington.

s/ Eudora Powell

EUDORA POWELL