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

PUGET SOUNDKEEPER ALLIANCE, COLUMBIA RIVERKEEPER, SPOKANE RIVERKEEPER, RE SOURCES FOR SUSTAINABLE COMMUNITIES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, United States Environmental Protection Agency, Defendants.	Civ. No. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

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

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

3. One of the ways water pollution adversely affects human health is through the consumption of fish and shellfish that have accumulated toxic water pollutants in fish tissue. Therefore, determining the amount of fish people in a state actually consume is a critical component of setting human health water quality criteria. In setting human health water quality criteria, a state must set the level of toxic pollutants low enough that fish remain safe to eat. If a state sets the foundational water quality standard fish consumption rate lower than the amounts actually consumed, the commensurate human health criteria will be too lenient and people consuming fish will ingest levels of toxins that will put them at risk for adverse health

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consequences. Failure to adopt human health criteria based on an accurate fish consumption rate is a failure to promulgate water quality standards that meet the requirements of the Clean Water Act.

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

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

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

PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

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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.

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

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

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

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

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

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

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

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

a. On November 10, 2010, Jannine Jennings, Manager of the Water Quality Standards Unit for Region 10, sent an email to Ecology noting that EPA would shortly send comments on Washington State's triennial water quality standards

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review "stating EPA's desire for Washington to move forward with revisions to the human health criteria in order to incorporate a higher fish consumption rate."

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

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

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

d. EPA's Regional Administrator Dennis McLerran wrote to Ecology's Director Maia Bellon on June 13, 2013 stating: "The best available science includes evidence of consumption rates well above 6.5 grams per day among high fish consumers and shows that the human health criteria currently in effect for clean water purposes in Washington are not sufficiently protective." Regional Administrator McLerran also points out that "[t]he EPA believes there are scientifically sound regional and local data available in Washington that are

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sufficient for Ecology to move forward in choosing a protective and accurate fish consumption rate at this time."

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

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

FIRST CAUSE OF ACTION

32. Plaintiffs restate and reallege all preceding paragraphs.

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

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

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

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

37. Based upon the foregoing and 33 U.S.C. § 1313(c)(4), Plaintiffs are entitled to an order requiring EPA to promptly prepare and publish proposed regulations setting forth a revised fish consumption rate and attendant human health criteria for Washington State and to

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promulgate the revised standards no later than ninety days after publishing the proposed standards.

REQUEST FOR RELIEF

BASED UPON THE FOREGOING, Plaintiffs request the following relief:

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

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

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

D. An award of Plaintiffs' costs and reasonable attorneys' fees pursuant to 33 U.S.C. § 1365; and

E. Such further relief as the Court deems just and equitable.

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Respectfully submitted this 11th day of October, 2013.

s/ Janette K. Brimmer
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EXHIBIT A

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

July 23, 2013

Via Certified Mail
Return Receipt Requested

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dennis McLerran
Regional Administrator
U.S. Environmental Protection Agency, Region X
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: Notice of Violation of Non-Discretionary Duty to Propound Washington State Fish Consumption Rate Under Section 303 of the Clean Water Act, 33 U.S.C. § 1313

Dear Ms. McCarthy and Mr. McLerran:

On behalf of Columbia Riverkeeper, Puget Soundkeeper Alliance, Spokane Riverkeeper, and North Sound Baykeeper ("Waterkeepers Washington"),[1] we ask that you take immediate action to remedy ongoing violations of a non-discretionary duty under the Clean Water Act ("CWA") by the United States Environmental Protection Agency ("EPA"). As described fully below, EPA is in violation of Clean Water Act section 303 (33 U.S.C. § 1313(c)(4)), due to its failure to promptly promulgate human health criteria water quality standards based upon a protective fish consumption rate for Washington State after having "determine[d] that a revised or new standard is necessary to meet the requirements of [CWA section 303]." This letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the CWA, 33 U.S.C. § 1365.

Washington State lags far behind other states when it comes to stopping toxic pollution and protecting people who regularly eat locally caught fish. Studies across Washington State show serious problems with toxic pollution accumulating in fish and shellfish that people

[1] Waterkeepers Washington are members of the international Waterkeeper Alliance.

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regularly eat. The large number of fish advisories (PCBs, DDT, mercury and lead)—advising people to limit or stop eating certain kinds of fish—reflects the severity of the problem.

Washington's water quality standards—the amount of pollution a state deems tolerable—simply allow too much toxic pollution because the formula used to develop these standards assumes that people eat very little fish. Yet surveys of tribes in Washington show consumption rates of 200, 300 and even over 500 grams per day, even with the suppressed consumption due to severely reduced stocks of salmon, shellfish, and other fish relied upon by these tribes. Despite these facts, Washington has relied on one of the nation's lowest fish consumption rates—6.5 grams per day—for nearly two decades. By using a low fish consumption rate, Washington's human health criteria water quality standards, which are intended to protect public health and aquatic resources, fail to achieve these objectives. For the reasons explained below, EPA has violated its mandatory duty under the CWA, 33 U.S.C. § 1313(c)(4), by failing to promptly promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for subsistence populations in the state.

I. BACKGROUND

The CWA requires states to set water quality standards that are protective of the "fishable and swimmable" goals of the Act. *See* 33 U.S.C. § 1313. In particular, water quality standards are required to ensure that designated uses of waters are achieved and maintained. EPA is directed to review and approve or disapprove states' water quality standards, and if EPA disapproves a standard or determines a revised or new standard is necessary to meet the requirements of the CWA, EPA is required to step in and promptly promulgate the standards for the state. *See id* § 1313(c)(4). EPA has repeatedly emphasized the necessity of setting fish consumption rates that protect the ability of people to eat normal, healthy amounts of fish (a designated use) without taking on a burden of toxic chemicals.

Long-time EPA guidance directs states to move away from the outdated National Toxics Rule ("NTR") for setting fish consumption rates for water quality, and instead to set updated fish consumption rates that are based upon the best available data, particularly local surveys, that reflect the levels of fish that local populations actually consume in order to fully-protect that designated use.

Despite EPA guidance and specific direction, Washington has never properly adopted a fish consumption rate as part of its state water quality standards and instead relies on the outdated NTR that provides for consumption of only 6.5 grams of fish or shellfish a day, about the amount that fits on a cracker, slightly less than ½ pound a month. In the Pacific Northwest, community surveys dating back a decade, repeatedly acknowledged and utilized by EPA in various guidance documents and directions to states, show that fish is consumed at a higher rate than many other parts of the nation, and certain populations consume fish at significantly higher rates than the general population. Surveys of Native American tribes in Washington show

consumption rates of 796 and 205-280 grams per day ("g/day"),[2] even with consumption suppressed due to severely reduced stocks and contamination of salmon, shellfish, and other fish relied upon by these tribes.[3] A survey of Pacific-Asian communities in the Puget Sound region reflect consumption rates of 170 g/day. *See, e.g.*, Nat'l Environmental Justice Advisory Council Meeting (a Federal Advisory Committee to the U.S. Environmental Protection Agency), *Fish Consumption and Environmental Justice* (Dec. 2001 (rev'd Nov. 2002)) ("Environmental Justice Report"); EPA, *Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Vol. 2 Risk Assessment and Fish Consumption Limits, 3d ed.*, at 1-6 through 1-9 (Nov. 2000) ("Fish Advisories Guidance").

II. THE EPA ADMINISTRATOR IS IN VIOLATION OF A NON-DISCRETIONARY DUTY BY FAILING TO PROMPLTY PROMULGATE A FISH CONSUMPTION RATE FOR THE STATE OF WASHINGTON.

A. Legal Framework.

The CWA requires the development of water quality standards, which are narrative and/or numeric standards designed to protect designated uses of our nation's waters. In short, water quality standards are required to protect the integrity of our nation's waters for "fishing and swimming;" that is they are to protect the biological and human health needs associated with our waters. 33 U.S.C. §§ 1251 & 1313. The CWA provides for a dual state and federal effort in ensuring that those requirements of the law are timely and well met.

While a state is given the first opportunity to set water quality standards that meet those requirements, the law assigns EPA the critical role of oversight to ensure that the state acts promptly to develop and keep current protective water quality standards and to quickly step in if the state does not. *Id.* § 1313(a) through (c). Specific to the issues here, the CWA requires that where EPA has determined a state's water quality standard does not meet the requirements of the CWA and that a new or revised standard is necessary to comply with the requirements of the CWA, EPA must promptly promulgate a new or revised standard and finalize that standard within 90 days of publishing the proposed standard unless the state steps in and corrects the problem. *See* 33 U.S.C. § 1313(c)(4). This provision makes clear that EPA has a duty to act.

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[2] In 2008, a fish consumption rate of 586 g/day was established for native subsistence consumers on the Lower Elwha, related to the Rayonier cleanup near Port Angeles, Washington.

[3] Failing to take into account suppression of consumption due to depletion and contamination factors also leads to a downward water- and fish-contamination spiral where consumers are not adequately protected so they eat less fish out of fear of the higher levels of contamination that have been allowed (based on suppressed instead of accurate consumption rates), which in turn affects future surveys. This is the polar opposite of the Clean Water Act's direction to restore and maintain the chemical, physical, and biological integrity of our nation's waters.

B. EPA's Violation.

EPA has repeatedly informed the State of Washington, Department of Ecology that EPA has determined Washington's human health criteria water quality standards lack an accurate fish consumption rate related to water toxins that affect human health,[4] and that Washington's reliance on the NTR assumed consumption rate of 6.5 g/day is wholly inadequate to protect *any* fish consumers, much less tribes and other subsistence populations, and that a new standard is therefore necessary. EPA's communications to Washington are consistent with its repeated statements in guidance to *all* states over a decade ago that the NTR rate of 6.5 g/day is inaccurate and inadequate as a whole, and that it is especially not protective of fishing uses and consumption in various communities that rely heavily on fishing. *See* Fish Advisories Guidance, at 1-4 through1-9 and Appendix B. *See also* Environmental Justice Report at 27-33. Interestingly, EPA's guidance and instruction to states to gather and rely on local data is based in large measure upon consumption surveys of tribes and Pacific-Asian populations *in Washington State*. *Id.; see also,* Environmental Justice Report at 30. Despite the fact that EPA has, for a decade, made plain that 6.5 g/day is not protective of any fish consumer, much less communities in Washington such as tribes, Washington has failed to adopt a protective standard and in so doing has failed to protect and maintain designated uses.

In addition to the plain statements in numerous guidance documents about the need and process for locally-accurate and protective fish consumption rates as an integral and necessary part of water quality standards, EPA has issued specific written communications on Washington's lack of a standard. On November 10, 2010, Jannine Jennings, Manager of the Water Quality Standards Unit for Region 10, sent an email to the Washington State Department of Ecology ("Ecology") noting that EPA would shortly send comments on Washington State's triennial review "stating EPA's desire for Washington to move forward with revisions to the human health criteria in order to incorporate a higher fish consumption rate."

On December 16, 2010, Ms. Jennings submitted comments on the Washington State triennial review, commenting on behalf of EPA. Ms. Jennings pointed out that federal regulation requires states to adopt criteria to protect all designated uses and that such criteria must be based on a sound scientific rationale and contain sufficient parameters to protect the use. She stated: "EPA urges Ecology to make the revision of Washington's human health criteria the most important priority in this Triennial Review." Ms. Jennings also pointed out that "this is a priority for Region 10," and "Washington's human health criteria were issued by EPA in 1992 through the National Toxics Rule (NTR). The human health criteria are not in the State's WQS and

[4] It is important to note that while human health is a focus, it is also critical that EPA and the state recognize and protect uses that encompass social, cultural, and religious components of fish use and consumption among various subsistence populations, particularly Pacific Northwest tribes. *See* Environmental Justice Report, at 56-59.

Washington is one of a handful of states remaining in the NTR for human health criteria." Ms. Jennings pointed out that in 2000, EPA updated its methodology for deriving human health criteria, recommending that states use a fish consumption rate that accurately represents local populations to be protected wherever local information about fish consumption is available. She then stated, "*EPA believes that a fish consumption rate of 6.5 grams per day is not reflective of fish and shellfish consumers in the State of Washington*," and that Ecology should examine EPA's most recent criteria documents and other studies to determine an appropriate rate for criteria that will be protective of the state's designated uses (emphasis added).

On November 17, 2012, Ms. Jennings sent a letter to Kelly Susewind (Washington State Department of Ecology Water Quality Program) and Jim Pendowski (Washington State Department of Ecology Toxics Cleanup Program) providing comments on Ecology's draft Technical Support Document for the Sediment Standards. Ms. Jennings repeats statements from the 2010 letter that criteria must protect designated uses, must be scientifically based, and for human health criteria and fish consumption rates, Ecology should use local data as the preferred foundation. Ms. Jennings also repeats that Washington currently has a rate of 6.5 g/day and noted "as identified in your draft document, several studies of Northwest populations indicate that this rate is not reflective of the amount of fish and shellfish consumed by some in the state of Washington. Therefore, it is appropriate and consistent with EPA guidance for Ecology to examine the current science to determine an appropriate fish consumption rate . . . ." Shortly thereafter in the letter, Ms. Jennings stated "we encourage you to quickly incorporate this information [from tribal and other surveys] into your rulemaking process and move forward with adopting revised criteria." Ms. Jennings summarized that "EPA believes the information is currently available to make decisions on these matters and requests Ecology to quickly move through the process necessary to do so." She closed by repeating that this is a priority for EPA Region 10.[5]

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

[5] In related activity on Washington's sediment standards, on October 17, 2011, Lon Kissinger, scientific and technical staff at EPA, noted that even the 54 g/day used by Washington in site cleanup work was inadequate given that "fish and shellfish consumption surveys from the Pacific Northwest indicate that there are groups of individuals, most notably tribes, which consume much more seafood than Ecology's default rate."

EPA has determined and communicated to Washington that Washington's current human health criteria and fish consumption rate are inadequate to protect designated uses under the Clean Water Act and that a revised or new fish consumption rate is necessary in order to protect Washington fish consumers and fishing designated uses under the Clean Water Act. EPA has violated its mandatory duty under the CWA, 33 U.S.C. § 1313(c)(4), by failing to promptly promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for subsistence populations in the state.

IDENTITY AND ADDRESSES OF WATERKEEPERS WASHINGTON

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Hood River, OR 97031

Puget Soundkeeper Alliance
Chris Wilke, Executive Director
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Seattle, WA 98107

Spokane Riverkeeper
Bart Mahailovich, Director
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Spokane, WA 99201

North Sound Baykeeper (RE-Sources, Inc.)
Matt Krogh, Project Manager
2309 Meridian Street
Bellingham, WA 98225

Counsel for Waterkeepers Washington
Janette Brimmer and Matthew Baca
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104

CONCLUSION

EPA is in continuing violation of the CWA. Waterkeepers Washington provide this Notice for the continuing violation outlined above, including if the violation continues subsequent to the date of this Notice. This Notice is given pursuant to 33 U.S.C. § 1365.

Waterkeepers Washington send this notice only after years of unsuccessful attempts to persuade Washington State and EPA to protect people who eat fish by adopting accurate, protective human health criteria water quality standards. Waterkeepers Washington continue to believe that this issue should be resolved without the initiation of litigation and without devoting resources to court proceedings. We stand ready to work with you in good faith to resolve EPA's violations. However, unless this violation is cured within sixty days by the promulgation of a proposed rule incorporating an accurate fish consumption rate into new human health criteria, we reserve the right to take appropriate legal action to compel EPA to comply with the CWA and to protect consumers of fish and shellfish in Washington State.

Please contact the undersigned should you have any questions.

Sincerely,

Janette K. Brimmer
Matthew R. Baca

cc: Maia Bellon, Director
Washington State Department of Ecology
300 Desmond Drive
Lacey, WA 98503

Eric Holder
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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cc: North Sound Baykeeper
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Northwest Indian Fisheries Commission
6730 Martin Way E.
Olympia, WA 98516

Columbia River Inter-Tribal Fish Commission
700 N.E. Multnomah Street, Suite 1200
Portland, Oregon 97232

EXHIBIT B

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

August 8, 2013

Via Certified Mail
Return Receipt Requested

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dennis McLerran
Regional Administrator
U.S. Environmental Protection Agency, Region X
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: Notice of Violation of Non-Discretionary Duty to Propound Washington State Fish Consumption Rate Under Section 303 of the Clean Water Act, 33 U.S.C. § 1313

Dear Ms. McCarthy and Mr. McLerran:

On behalf of Pacific Coast Federation of Fishermen's Associations ("PCFFA") and the Institute for Fisheries Resources ("IFR"),[1] we ask that you take immediate action to remedy ongoing violations of a non-discretionary duty under the Clean Water Act ("CWA") by the United States Environmental Protection Agency ("EPA"). As described fully below, EPA is in violation of Clean Water Act section 303 (33 U.S.C. § 1313(c)(4)), due to its failure to promptly promulgate human health criteria water quality standards based upon a protective fish consumption rate for Washington State after having "determine[d] that a revised or new standard is necessary to meet the requirements of [CWA section 303]." This letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the CWA, 33 U.S.C. § 1365.

Washington State lags far behind other states when it comes to stopping toxic pollution and protecting people who regularly eat locally caught fish. Studies across Washington State

[1] This letter is a duplicate of and intended to supplement and not replace the letter dated July 23, 2013 on behalf of Waterkeepers Washington.

705 SECOND AVENUE, SUITE 203 SEATTLE, WA 98104-1711
T: 206.343.7340 F: 206.343.1526 E: eajuswa@earthjustice.org W: www.earthjustice.org

show serious problems with toxic pollution accumulating in fish and shellfish that people regularly eat. The large number of fish advisories (PCBs, DDT, mercury and lead)—advising people to limit or stop eating certain kinds of fish—reflects the severity of the problem.

Washington's water quality standards—the amount of pollution a state deems tolerable—simply allow too much toxic pollution because the formula used to develop these standards assumes that people eat very little fish. Yet surveys of tribes in Washington show consumption rates of 200, 300 and even over 500 grams per day, even with the suppressed consumption due to severely reduced stocks of salmon, shellfish, and other fish relied upon by these tribes. Despite these facts, Washington has relied on one of the nation's lowest fish consumption rates—6.5 grams per day—for nearly two decades. By using a low fish consumption rate, Washington's human health criteria water quality standards, which are intended to protect public health and aquatic resources, fail to achieve these objectives. For the reasons explained below, EPA has violated its mandatory duty under the CWA, 33 U.S.C. § 1313(c)(4), by failing to promptly promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for subsistence populations in the state.

I. BACKGROUND

The CWA requires states to set water quality standards that are protective of the "fishable and swimmable" goals of the Act. *See* 33 U.S.C. § 1313. In particular, water quality standards are required to ensure that designated uses of waters are achieved and maintained. EPA is directed to review and approve or disapprove states' water quality standards, and if EPA disapproves a standard or determines a revised or new standard is necessary to meet the requirements of the CWA, EPA is required to step in and promptly promulgate the standards for the state. *See id* § 1313(c)(4). EPA has repeatedly emphasized the necessity of setting fish consumption rates that protect the ability of people to eat normal, healthy amounts of fish (a designated use) without taking on a burden of toxic chemicals.

Long-time EPA guidance directs states to move away from the outdated National Toxics Rule ("NTR") for setting fish consumption rates for water quality, and instead to set updated fish consumption rates that are based upon the best available data, particularly local surveys, that reflect the levels of fish that local populations actually consume in order to fully-protect that designated use.

Despite EPA guidance and specific direction, Washington has never properly adopted a fish consumption rate as part of its state water quality standards and instead relies on the outdated NTR that provides for consumption of only 6.5 grams of fish or shellfish a day, about the amount that fits on a cracker, slightly less than ½ pound a month. In the Pacific Northwest, community surveys dating back a decade, repeatedly acknowledged and utilized by EPA in various guidance documents and directions to states, show that fish is consumed at a higher rate than many other parts of the nation, and certain populations consume fish at significantly higher

rates than the general population. Surveys of Native American tribes in Washington show consumption rates of 796 and 205-280 grams per day ("g/day"),[2] even with consumption suppressed due to severely reduced stocks and contamination of salmon, shellfish, and other fish relied upon by these tribes.[3] A survey of Pacific-Asian communities in the Puget Sound region reflect consumption rates of 170 g/day. *See, e.g.*, Nat'l Environmental Justice Advisory Council Meeting (a Federal Advisory Committee to the U.S. Environmental Protection Agency), *Fish Consumption and Environmental Justice* (Dec. 2001 (rev'd Nov. 2002)) ("Environmental Justice Report"); EPA, *Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Vol. 2 Risk Assessment and Fish Consumption Limits, 3d ed.*, at 1-6 through 1-9 (Nov. 2000) ("Fish Advisories Guidance").

II. THE EPA ADMINISTRATOR IS IN VIOLATION OF A NON-DISCRETIONARY DUTY BY FAILING TO PROMPLTY PROMULGATE A FISH CONSUMPTION RATE FOR THE STATE OF WASHINGTON.

A. Legal Framework.

The CWA requires the development of water quality standards, which are narrative and/or numeric standards designed to protect designated uses of our nation's waters. In short, water quality standards are required to protect the integrity of our nation's waters for "fishing and swimming;" that is they are to protect the biological and human health needs associated with our waters. 33 U.S.C. §§ 1251 & 1313. The CWA provides for a dual state and federal effort in ensuring that those requirements of the law are timely and well met.

While a state is given the first opportunity to set water quality standards that meet those requirements, the law assigns EPA the critical role of oversight to ensure that the state acts promptly to develop and keep current protective water quality standards and to quickly step in if the state does not. *Id.* § 1313(a) through (c). Specific to the issues here, the CWA requires that where EPA has determined a state's water quality standard does not meet the requirements of the CWA and that a new or revised standard is necessary to comply with the requirements of the CWA, EPA must promptly promulgate a new or revised standard and finalize that standard

[2] In 2008, a fish consumption rate of 586 g/day was established for native subsistence consumers on the Lower Elwha, related to the Rayonier cleanup near Port Angeles, Washington.

[3] Failing to take into account suppression of consumption due to depletion and contamination factors also leads to a downward water- and fish-contamination spiral where consumers are not adequately protected so they eat less fish out of fear of the higher levels of contamination that have been allowed (based on suppressed instead of accurate consumption rates), which in turn affects future surveys. This is the polar opposite of the Clean Water Act's direction to restore and maintain the chemical, physical, and biological integrity of our nation's waters.

within 90 days of publishing the proposed standard unless the state steps in and corrects the problem. *See* 33 U.S.C. § 1313(c)(4). This provision makes clear that EPA has a duty to act.

B. EPA's Violation.

EPA has repeatedly informed the State of Washington, Department of Ecology that EPA has determined Washington's human health criteria water quality standards lack an accurate fish consumption rate related to water toxins that affect human health,[4] and that Washington's reliance on the NTR assumed consumption rate of 6.5 g/day is wholly inadequate to protect *any* fish consumers, much less tribes and other subsistence populations, and that a new standard is therefore necessary. EPA's communications to Washington are consistent with its repeated statements in guidance to *all* states over a decade ago that the NTR rate of 6.5 g/day is inaccurate and inadequate as a whole, and that it is especially not protective of fishing uses and consumption in various communities that rely heavily on fishing. *See* Fish Advisories Guidance, at 1-4 through1-9 and Appendix B. *See also* Environmental Justice Report at 27-33. Interestingly, EPA's guidance and instruction to states to gather and rely on local data is based in large measure upon consumption surveys of tribes and Pacific-Asian populations *in Washington State*. *Id.; see also,* Environmental Justice Report at 30. Despite the fact that EPA has, for a decade, made plain that 6.5 g/day is not protective of any fish consumer, much less communities in Washington such as tribes, Washington has failed to adopt a protective standard and in so doing has failed to protect and maintain designated uses.

In addition to the plain statements in numerous guidance documents about the need and process for locally-accurate and protective fish consumption rates as an integral and necessary part of water quality standards, EPA has issued specific written communications on Washington's lack of a standard. On November 10, 2010, Jannine Jennings, Manager of the Water Quality Standards Unit for Region 10, sent an email to the Washington State Department of Ecology ("Ecology") noting that EPA would shortly send comments on Washington State's triennial review "stating EPA's desire for Washington to move forward with revisions to the human health criteria in order to incorporate a higher fish consumption rate."

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IDENTITY AND ADDRESSES OF PCFFA AND IFR

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CONCLUSION

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PCFFA and IFR send this notice only after years of unsuccessful attempts to persuade Washington State and EPA to protect people who eat fish by adopting accurate, protective human health criteria water quality standards. PCFFA and IFR continue to believe that this issue should be resolved without the initiation of litigation and without devoting resources to court proceedings. We stand ready to work with you in good faith to resolve EPA's violations. However, unless this violation is cured within sixty days by the promulgation of a proposed rule incorporating an accurate fish consumption rate into new human health criteria, we reserve the

right to take appropriate legal action to compel EPA to comply with the CWA and to protect consumers of fish and shellfish in Washington State.

Please contact the undersigned should you have any questions.

Sincerely,

Janette K. Brimmer
Matthew R. Baca

cc: Maia Bellon, Director
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