The Honorable Barbara J. Rothstein

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

NORTHWEST ENVIRONMENTAL ADVOCATES and NORTHWEST ENVIRONMENTAL DEFENSE CENTER, Plaintiffs, v. ANDREW R. WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency, Defendant.	Case No. C91-427R PLAINTIFFS' MOTION TO REACTIVATE CASE AND FOR LEAVE TO FILE SECOND AMENDED COMPLAINT NOTED: **ORAL ARGUMENT REQUESTED**

MOTION

Plaintiffs Northwest Environmental Advocates (NWEA)[1] and Northwest Environmental Defense Center (NEDC) hereby move the Court for an order re-opening and reactivating this civil action, which has been dormant since shortly after the entry of a consent decree on January 20, 1998. Further, Plaintiffs seek leave to file the accompanying proposed Second Amended Complaint, which adds one new claim and removes several others included in the First Amended Complaint.[2] *See* Dkt. #67, filed Nov. 23, 1994. The grounds for the motion are set forth below.

MEMORANDUM

A. Introduction and Background of the Litigation

This suit reflects NWEA's long-standing and still ongoing effort to compel the Environmental Protection Agency ("EPA"), acting though its Administrator and the Regional Administrator for Region 10, to comply with its obligations under the Clean Water Act ("CWA" or "Act") to ensure that, for every surface water in the State of Washington with excess pollution, there is a timely and effective clean-up plan sufficient to implement the state's water quality standards. *See generally* 33 U.S.C. § 1313(d)(2). These clean-up plans, known as total maximum daily loads or "TMDLs" in Clean Water Act parlance, are essential to achieving the Act's goals because they establish

> the maximum amount of pollutants a water quality limited segment can receive

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[1] Plaintiff Northwest Environmental Defense Center (NEDC) joins this motion and supports NWEA's litigation efforts as described herein, but intends to seek a stipulation of its dismissal from this action pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) once the case becomes active again.

[2] As required by Local Civil Rule 15, NWEA's proposed Second Amended Complaint is filed herewith as Exhibit 1.

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> daily without violating the state's water quality standards. TMDLs are supposed to be developed in accordance with their priority ranking on the 303(d) list.

Sierra Club v. McLerran, No. 11-CV-1759-BJR, 2015 WL 1188522, at *1 (W.D. Wash. Mar. 16, 2015). As this Court has noted, when it comes to TMDLs "the CWA does not give the EPA authority to approve an indefinite delay;" to the contrary, the Act "commands the EPA to ensure prompt compliance" with the Act. *Id.* at *10 (citing *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) and *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 967 (W.D. Wash. 1996)). In the intervening years since this case was filed, EPA has ignored that statutory command, compelling NWEA to revive this action.

The objectives NWEA seeks to achieve through its proposed Second Amended Complaint and reactivation of this litigation are similar to those ordered by this Court in *McLerran* with respect to the Spokane River—including "a definite schedule with concrete goals" and "a reasonable end date" for the completion of TMDLs, *see* 2015 WL 1188522 at *11—only here, NWEA focuses on all of those waters still impaired since at least the time EPA approved Washington's 1996 303(d) list. The State has unambiguously abandoned its effort to develop TMDLs for those long-polluted waters, and intervention by EPA is mandatory in the face of this programmatic failure.

1. Early Litigation and Partial Settlement: 1991-1998

Plaintiffs filed their initial complaint in this case more than 25 years ago, in March 1991. Dkt. #1, Compl. A consent decree was entered by the Court on October 13, 1992, *see* Dkt. #58, but was vacated almost two years later. Dkt. #61. Litigation recommenced when Plaintiffs' First Amended Complaint was filed November 23, 1994. Dkt. #67.

In January 1998, following several years of negotiations, the parties partially settled Plaintiffs' claims via a consent decree and a related settlement agreement that called for, *inter*

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alia, a 15-year schedule to complete all TMDLs needed at that time. The consent decree, entered by the Court on January 20, 1998, *see* Dkt. #106 ("1998 Consent Decree"), required EPA to "take all steps necessary to ensure that thirty-eight (38) TMDLs are completed for waters listed pursuant to CWA Section 303(d) within five (5) years" of its date of entry. 1998 Consent Decree at ¶ 5.[3] That Consent Decree further provided that upon completion of EPA's obligations under it, Counts 7 and 8 of the complaint "shall be dismissed with prejudice" and that the parties would "file the appropriate notice with the Court so that the Court may issue the appropriate order of dismissal." *Id.* at ¶ 11. Such notice was never filed, however, and dismissal of those counts never occurred.

Concurrently with the 1998 Consent Decree, Plaintiffs and EPA entered a separate settlement agreement intended to "set forth terms for . . . establishment of TMDLs for the waters on [Washington's] 1996 Section 303(d) list that are not addressed in the Consent Decree." Settlement Agreement (January 6, 1998) at 2, ¶ G.[4] The central element of that Settlement Agreement was a 15-year schedule for the completion of TMDLs for all waters included on the State's 1996 Section 303(d) list—1,566 TMDLs in total—by June 30, 2013. Settlement Agreement, Attachment A (hereinafter, "1998 TMDL Schedule"). While Plaintiffs and EPA understood that Washington would have primary responsibility for developing those TMDLs, they expressly recognized EPA's critical oversight role in the TMDL process, including its essential function as a "backstop" against the State's potential delay. To that end, the Settlement Agreement also provided as follows:

EPA also commits that it will take all steps necessary to ensure that TMDLs for all

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[3] NWEA does not allege that EPA has violated the 1998 Consent Decree.

[4] The fully executed 1998 Settlement Agreement is attached hereto as Exhibit 2.

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> WQLSs on the 1996 Section 303(d) list are completed by June 30, 2013, consistent with Paragraph 5 above, through establishment of TMDLs or approval of the TMDLs submitted by the State.

Settlement Agreement at 8, ¶ 6.[5] EPA also made several commitments to allow NWEA and others to "assess EPA's satisfaction of its commitments" regarding TMDL development in Washington; the Settlement Agreement requires EPA to submit a progress report to NWEA every two years identifying

> (a) the TMDLs submitted by the State during the two-year period, the date of each submission, EPA action taken on each submission and the date of the action taken;
> (b) the TMDLs that EPA has established during the two-year reporting period;
> (c) all WQLSs that are on the 1996 Section 303(d) list that are not included on subsequent Section 303 (d) lists because other pollution controls are stringent enough to implement applicable water quality standards[.]

Settlement Agreement at 9-10, ¶ 9. The Settlement Agreement remains in effect today; it terminates only "[u]pon fulfillment of EPA's obligations under" it, and the parties agreed to file a joint motion to dismiss NWEA's remaining claims upon its termination. *Id*. at 10, ¶ 11. No such joint motion was filed, and as discussed further below, EPA has failed to fulfil its obligations under the Settlement Agreement.

The dispute resolution provision of the Settlement Agreement requires the dissatisfied party to "provide the other party with written notice of the dispute and a request for negotiations." Settlement Agreement at 11, ¶ 15. It then requires the parties to meet and confer regarding the dispute within 30 days of the written notice, and provides that if a resolution is not

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[5] WQLS stands for "water quality limited segment", which is defined to mean a "segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act." 40 C.F.R. § 130.2(j). These are the segments of surface waters that make up the 303(d) list for which TMDLs are needed.

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reached within 60 days of that meeting, "NWEA's sole remedy is to reactivate the litigation" in this case. *Id*.

2. Post-Settlement TMDL Development in Washington: 1998-2019

During the first several years following the Settlement Agreement, Washington generally kept pace with the 1998 TMDL Schedule it had agreed to with NWEA and EPA. But by 2008 the State had fallen significantly behind, missing the Settlement Agreement's interim deadline to complete 801 TMDLs by June 30, 2008. EPA, in turn, missed its own interim deadline to "take all steps necessary to ensure completion of the requisite number of TMDLs" within two years of that interim deadline—i.e., by June 30, 2010. Settlement Agreement at 8, ¶ 6.

By the end of the 1998 TMDL Schedule (June 30, 2013), Washington had completed only 867 TMDLs—about 700 short of the 1,566 TMDLs it had agreed to complete by that date. According to EPA records, Washington completed TMDLs at a rate of about 48 per year during the term of the Settlement Agreement's TMDL schedule (FY 1998-2013). Since the end of that schedule in July 2013, however, the State essentially abandoned its TMDL program, and has completed ***only one TMDL*** during the past three fiscal years (2017-2019).

The graph below is taken from EPA records; it shows Washington's TMDL progress during the term of the Settlement Agreement TMDL schedule and through the present day:

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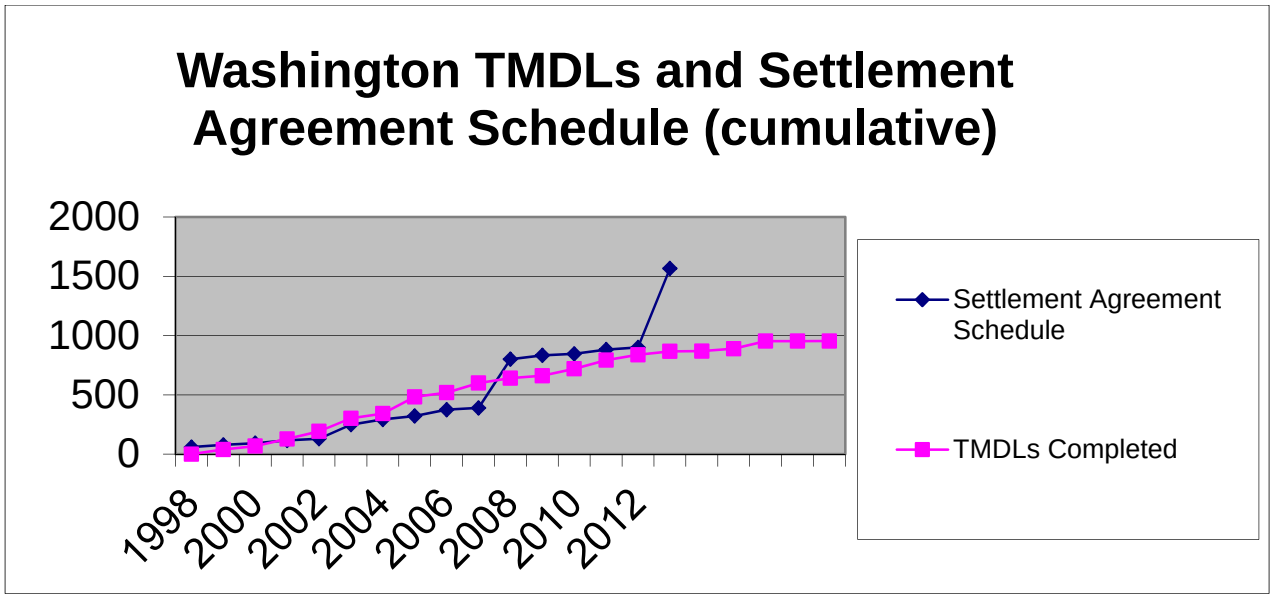

Moreover, Washington has—presumably with EPA's approval—prepared TMDLs for a number of WQLS first added to its Section 303(d) list *after* 1996, while ignoring or abandoning many WQLS listed in 1996 or earlier. While the Settlement Agreement allows the State and/or EPA to "substitute one or more such future-listed waters for one or more waters on the 1996 303(d) list" and to count such TMDLs for purposes of determining whether EPA is meeting its commitments under the Agreement, *see* Settlement Agreement at 8-9, ¶ 7, any substitution under that provision does not affect EPA's obligation to "take all steps necessary to ensure that TMDLs for all WQLSs on the 1996 Section 303(d) list are completed by June 30, 2013 . . . through establishment of TMDLs or approval of the TMDLs submitted by the State." Settlement Agreement at ¶ 6.[6] As a result, there are approximately 545 WQLS that have been on Washington's § 303(d) list since at least 1996, but which still lack a TMDL.

3. Settlement Agreement Dispute Resolution Process: 2011-19

[6] Further, any substitution of one WQLS for another was allowed only if "the substitution is between waters of comparable TMDL complexity." Settlement Agreement at ¶ 7.

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After both Washington and EPA had missed their respective interim deadlines for TMDL completion, NWEA invoked the Agreement's dispute resolution provision in 2011. NWEA negotiated with both parties in an effort to accelerate Washington's slowing rate of TMDL development and to secure EPA's continuing obligation to "ensure that TMDLs for all WQLSs on the 1996 Section 303(d) list are completed" as required by the Settlement Agreement. Negotiations continued off and on for several years, but the parties were unable to reach an agreement at that time.

On May 15, 2019, NWEA sent to EPA a letter providing its written notice of dispute of non-compliance with the Settlement Agreement and requesting negotiations with the agency.[7] Specifically, NWEA asserted in that letter that EPA had failed to comply with its obligation under the paragraph 6 of the Settlement Agreement to ensure that TMDLs for "all WQLSs on the [State's] 1996 section 303(d) list are completed by June 30, 2013" and had failed to provide NWEA with a biannual progress report required by paragraph 9 of the Settlement Agreement since early 2013.

In that same letter, NWEA notified Defendants of its intent to file suit against EPA, the EPA Administrator, and the Regional Administrator for EPA Region 10 pursuant to the CWA's citizen suit provision, 33 U.S.C. § 1365(a)(2), regarding their failure to fulfill their mandatory duties under section 303(d)(2) to review and either approve or disapprove, within 30 days of submission, a number of TMDLs that Washington has "constructively submitted" to EPA. Citing case law from both the Ninth Circuit and this Court on the "constructive submission" doctrine, NWEA alleged in that notice letter, and alleges in the accompanying proposed Second Amended Complaint, that

[7] A copy of NWEA's May 15, 2019 letter to EPA is attached hereto as Exhibit 3.

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> Washington has constructively submitted to EPA a TMDL for each and every WQLS that has been on the State's 303(d) list since 1996 for which no TMDL has been completed or approved by EPA. Those waters have been impaired for *at least* 23 years (many of those waters first appear on Washington's 303(d) lists prior to 1996), and yet Washington has no plan, and no schedule in place, for the development of TMDLs for such waters. With respect to each and every such constructively submitted TMDL, EPA has failed to complete its mandatory duty under Section 303(d)(2) to "either approve or disapprove" the TMDL. 33 U.S.C. § 1313(d)(2).

Notice Letter at 4-5 (citing *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002). NWEA and Defendants, through their respective counsel, conferred on June 18, 2019; July 9, 2019; and August 20, 2019, but were unable to reach a resolution of NWEA's dispute. Under the Settlement Agreement, therefore, NWEA's sole course of action is to "reactivate the litigation" in this case. EPA expressly agreed to that remedy in the Settlement Agreement, though preserved all defenses to NWEA's claims. Settlement Agreement at 11, ¶ 15.

Both the State of Washington and EPA have missed multiple deadlines contained in the 1998 Settlement Agreement and TMDL Schedule for the completion of TMDLs for all WQLS in the State; have completely ignored the approximately 545 WQLS that remain impaired although they were included on Washington's 1996 § 303(d) list more than two decades ago; have in recent years produced a smattering of TMDLs at what can only be described as a glacial pace; and currently have no plan, no schedule, and no firm commitment to complete the remaining TMDLs at any time in the future.

"Section 303(d) expressly requires the EPA to step into the states' shoes if their TMDL submissions . . . are inadequate[,]" *Alaska Ctr. for the Envt. v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991), and nothing in the Act "could justify so glacial a pace" as demonstrated here by Washington and EPA. *Idaho Sportmen's Coalition*, 951 F. Supp. at 967. This Court's intervention is thus necessary to get Washington's derelict TMDL program back into compliance

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with the Clean Water Act.

B. The Clean Water Act: Impaired Waters and Total Maximum Daily Loads

Under section 303(d) of the Clean Water Act, the states are required to identify all waters within their borders that fail to meet applicable water quality standards. 33 U.S.C. § 1313(d)(1)(A). Those waters are typically described as "impaired," and the list of impaired waters is colloquially called a "303(d) list."

For each impaired water on a state's 303(d) list, the Act requires the states to develop and submit to EPA a TMDL that is

> established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C). TMDLs must be established for each pollutant "preventing or expected to prevent attainment of water quality standards" established by the State. 40 C.F.R. § 130.7(c)(1)(ii).

Every two years, each state is required to submit a revised 303(d) list, along with "the loads established" under Section 303(d)(1)(C), to EPA for review and approval. 33 U.S.C. § 1313(d)(2). States must include in their submission "a priority ranking for all listed water quality-limited segments still requiring TMDLs, taking into account the severity of the pollution and the uses to be made of such waters and shall identify the pollutants causing or expected to cause violations of the applicable water quality standards." 40 C.F.R. § 130.7(b)(4).

While TMDL creation is thus left primarily to the states, EPA's supervision and, where warranted, active participation is critical to the success of the TMDL program. The EPA Regional Administrator may only approve a state's 303(d) list, individual TMDLs, TMDL priority ranking, and TMDL schedule if they meet all of the requirements of section 303 of the

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CWA and EPA's implementing regulations. 40 C.F.R. § 130.7(d)(2). Lists and loadings approved by EPA become part of the state's water quality management plan, but

> [i]f the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable WQS.

40 C.F.R. § 130.7(d)(2). Thus, where a state fails to submit an approvable TMDL on the timeline required by the CWA, EPA has a mandatory duty to step in—including, for example, to establish the necessary TMDLs itself. 33 U.S.C. § 303(d)(2).

C. The Court Should Grant NWEA's Motion to Reactivate this Litigation and Permit NWEA to File its Second Amended Complaint

In this case, NWEA seeks to reactivate the underlying litigation because the parties agreed long ago that reactivation is the sole remedy in the event of a breach of the 1998 Settlement Agreement. *See* Settlement Agreement at 11, ¶ 15. In executing that Settlement Agreement, EPA expressly agreed to reactivation and has waived any argument that reactivation is improper.

NWEA also moves the Court, pursuant to Federal Rule of Civil Procedure 15(a)(2), for leave to file its proposed Second Amended Complaint. Leave to amend should be freely given "when justice so requires," *id.*, and the Ninth Circuit has recognized a "strong policy permitting amendment." *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). As the Ninth Circuit explained in *Bowles*, amendment should be generally allowed absent a "specific finding of prejudice to the opposing party, bad faith by the moving party, or futility of the amendment." *Id*. at 758. Among those considerations, undue prejudice is the main factor; thus, "absent prejudice, or a strong showing" on any of the other factors, "there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Agne v. Papa John's Int'l, Inc.*, No. C10-1139-JCC, 2011 WL

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13127653, at *1 (W.D. Wash. Nov. 3, 2011) (emphasis in original). Because of the Ninth Circuit's "established practice of permitting amendments with 'extreme liberality' in order to further the policy of reaching merit-based decisions . . . the nonmoving party generally bears the burden of showing why leave to amend should be denied." *Puget Soundkeeper All. v. APM Terminals Tacoma LLC*, No. C17-5016 BHS, 2017 WL 5668054, at *1 (W.D. Wash. Nov. 27, 2017) (internal quotations omitted).

Here, none of the elements counseling against amendment are present. First, despite the fact that that the underlying litigation has been dormant for over 20 years, there will be no prejudice to EPA from its reactivation. NWEA seeks to revive two of its original claims—Claims 9 and 10, each based upon EPA's failure to establish a reasonable TMDL schedule for all impaired waters in the State of Washington—and while the factual predicate for those renewed claims extends forward in time to the present day, the nature of EPA's failure to properly implement the TMDL program in Washington is the same now as it was in 1991. NWEA's proposed amendment abandons NWEA's remaining claims, each of which pertain to specific section 303(d) lists, TMDLs, or other EPA actions or inactions occurring between 1990-1994. NWEA agrees those particular claims are no longer viable, given the passage of time. Furthermore, NWEA seeks to add an additional claim, also related to Washington's deficient TMDL program but based upon a "constructive submission" theory, the factual basis for which, NWEA alleges, arose after the expiration of the 1998 TMDL Schedule. There are obviously no pending deadlines in this case, and NWEA expects a new case management schedule will need to be established by the parties and the Court, which will eliminate any potential prejudice to EPA from reactivation of the case.

Second, NWEA seeks to amend its complaint in good faith, with no dilatory purpose.

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NWEA is merely invoking the remedy to which EPA itself agreed in the 1998 Settlement Agreement, which was triggered by EPA's failure to ensure that TMDLs for all of the WQLS on Washington's 1996 303(d) list were completed by June 30, 2012. NWEA properly engaged the Settlement Agreement's dispute resolution provision, negotiated in good faith with EPA on multiple occasions during 2012-14 and again in 2019, seeking to avoid litigation, but an agreement could not be reached.

Finally, NWEA's proposed amended complaint is not futile. That amended complaint contains three viable claims: two CWA citizen suit claims, and one APA claim, each of which challenges EPA's implicit approval of Washington's "indefinite delay" in completing its TMDLs and each of which is intended to compel "EPA to ensure prompt compliance with the CWA" within the State. *McLerran*, 2015 WL 1188522 at *10.

Because the interests of justice are furthered by the filing of NWEA's proposed Second Amended Complaint, and because there is no prejudice, undue delay, or futility in NWEA's amendment, NWEA's motion should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant NWEA's motion to re-open and reactivate this litigation and grant it leave to file the accompanying Second Amended Complaint.

Dated: September 24, 2019.

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s/ Andrew Hawley

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2019, I caused a true and correct copy of the Motion to Reactivate Case and for Leave to File Second Amended Complaint and associated exhibits to be filed with the Court's CM/ECF system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's system.

I hereby certify that I have mailed by United States Postal Service the documents to the following non CM/ECF participants:

David J. Kaplan
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Environmental Defense Section
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s/ Andrew Hawley
Andrew Hawley

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