

EXHIBIT 1

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, and
CHRISTOPHER HLADICK, in his official
capacity as Regional Administrator of EPA
Region 10,

Defendants.

Case No. C91-427R

**[PROPOSED] SECOND AMENDED
COMPLAINT**

1 Plaintiffs allege:
2

3 **INTRODUCTION**

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5 1.

6 This is a citizen suit to enforce the Clean Water Act. The Act requires that states regulate
7 water pollutant discharges based on the pollutant loading capacity of navigable waters rather
8 than on the technological ability of polluters to control their discharges. The core of this process
9 is "total maximum daily load" (TMDL), the total amount of each pollutant which a waterway can
10 absorb without violating set water quality standards. The State of Washington's TMDL program
11 falls far short of the requirements of the Act, and it is fifteen years late.
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14 **JURISDICTION**

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16 2.

17 This is a suit to compel the defendant Administrator to perform nondiscretionary duties
18 under the Clean Water Act, 33 U.S.C. § 1251 et seq., and this court has jurisdiction under 33
19 U.S.C. § 1365(a).
20

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22 3.

23 This is an action for judicial review and to compel Agency action unlawfully withheld
24 and unreasonably delayed by defendant in enforcing the Clean Water Act, and this court has
25 jurisdiction under 28 U.S.C. § 1331 and 5.U.S.C § 706(1).
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VENUE

4.

This action is properly brought in this judicial district under 28 U.S.C. § 1391(b).

PARTIES

5.

Plaintiff Northwest Environmental Advocates (NWEA) is a nonprofit, tax-exempt, environmental membership organization formed in 1969 and incorporated under the laws of Oregon. Plaintiff NWEA is an advocate for the environments of Oregon and Washington, focusing in particular on protection of water quality and riparian habitat. Plaintiff NWEA also addresses the issues of water quality, hazardous waste, and nuclear facilities throughout Oregon and Washington. Many of plaintiff NWEA's members live, work and recreate in areas that are directly affected by the defendant's failure to comply with the Clean Water Act as alleged herein.

6.

Plaintiff Northwest Environmental Defense Center (NEDC) is a nonprofit, tax-exempt, public interest environmental membership organization formed in 1969 and incorporated under the laws of the State of Oregon. Plaintiff NEDC is dedicated to the protection of natural resources, including the waters of the Pacific Northwest. Many of plaintiff NEDC's members live, work and enjoy recreational activities, including canoeing, sailing, sightseeing, birdwatching, fishing and swimming, in areas directly affected by defendant's failure to comply with the Clean Water Act as alleged herein.

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7.

Plaintiffs NWEA and NEDC also seek to educate and communicate with their members and others concerning the protection and enhancement of water quality and compliance with water quality laws in the Pacific Northwest. Their work is made more difficult with respect to those water bodies on which defendants have failed to comply with the Clean Water Act as alleged herein.

8.

Plaintiffs NWEA and NEDC have brought, and intend to bring, legal and administrative actions to enforce the terms of National Pollution Discharge Elimination System (NPDES) permits and to oppose the issuance of, or affect the terms of, NPDES permits for discharge into the waters of the Pacific Northwest where permitted discharges exceed the loading capacity of those waters. Defendant's failure to comply with the Clean Water Act as alleged herein makes this work more difficult.

9.

For the reasons described in paragraphs 5 through 8 above, plaintiffs have suffered, and continue to suffer, injury in fact on account of defendant's failure to comply with the Clean Water Act alleged below. For the same reasons, plaintiffs are also adversely affected and aggrieved by the actions and failures to act of the Administrator within the meaning of the Administrative Proceeding Act. Plaintiffs' injury in fact is fairly traceable to defendant's conduct and would be redressed by the relief plaintiffs seek in this case.

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3 Defendant ~~Browner~~ Wheeler is the Administrator of the United States Environmental
4 Protection Agency (EPA), the agency charged with enforcing the Clean Water Act as more
5 specifically described herein. ~~She~~ He is sued in ~~her~~ his official capacity, ~~and was acting in her~~
6 ~~capacity at all times relevant hereto.~~ Administrator Wheeler is substituted for the prior named
7 defendant, former EPA Administrator Carol M. Browner, pursuant to Federal Rule of Civil
8 Procedure 25(d).
9

10
11 ~~11.~~

12 ~~Defendant Browner's predecessor as Administrator of the EPA was former defendant~~
13 ~~William Reilly. Mr. Reilly served as Administrator of the Agency until he was replaced by~~
14 ~~defendant Browner in 1993.~~
15

16
17 11.

18 Defendant Christopher Hladick is sued in his official capacity as the Regional
19 Administrator of EPA Region 10, which includes the State of Washington. In that capacity Mr.
20 Hladick has the duty to, *inter alia*, determine the schedule of Washington's TMDL submissions
21 and to review and either approve or disapprove Washington's TMDL submissions. See 40 C.F.R.
22 § 130.7(d).
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NOTICE

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4 On January 4, 1991, plaintiffs gave notice to former defendant William Reilly of the
5 EPA, the Attorney General for the United States, and to former defendant Christine Gregoire,
6 Director of the Washington Department of Ecology, and the State of Washington , of the
7 violations of the Clean Water Act alleged in the original Complaint herein, as required by 33 U S
8 C S 1365(b).
9

13.

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12
13 On July 28, 1994, plaintiffs gave notice to defendant Administrator, the Attorney General
14 for the United States, and to counsel for the defendant of the additional violations of the Clean
15 Water Act alleged in ~~this~~ plaintiff's First Amended Complaint, as required by 33 U.S.C. §
16 1365(b).
17

14.

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20 On May 15, 2019, NWEA gave notice to defendant Wheeler, the Regional Administrator
21 for EPA Region 10, and EPA's counsel of NWEA's intent to file the Clean Water Act citizen
22 suit claims alleged herein, as required by 33 U.S.C. § 1365(b). William Barr, United States
23 Attorney General, was provided a copy of that notice.
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FACTS LEGAL BACKGROUND

A. The Clean Water Act

15.

Under § 303 of the Clean Water Act (33 U.S.C. § 1313), each state must establish water quality standards describing the designated uses of the navigable waters of the state and the water quality criteria for such waters sufficient to protect the public health or welfare, enhance the quality of water, and serve the purposes of the Act, taking into consideration the use and value of the navigable waters of the state for public water supply, fish, shellfish and wildlife propagation, recreation, agriculture, industry and navigation.

16.

Section 301 of the Clean Water Act (33 U.S.C. § 1311) requires that limitations on discharge of pollutants into navigable waters by point sources, including publicly owned treatment works (effluent limitations) shall be established not later than July 7, 1977.

17.

Under 33 U.S.C. § 1313(d), each state must identify those waters within its boundaries for which the effluent limitations required by Section 1311 are not stringent enough to implement the water quality standards applicable established by Section 1313(c). These waters for which effluent limitations are insufficient to achieve water quality standards are known as “water quality limited segments” (WQLSs). The state list of WQLSs is submitted to EPA biennially under 33 U.S.C. § 1313(d) and is commonly known as the state’s “303(d) list.”

Washington's 1990 § 303(d) List

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3 17.

4 In order to designate a segment as water quality limited in its 1990 § 303 (d) list, the
5 State of Washington required that effluent limitations be insufficient to implement at least two
6 water quality standards (three before 1990) for that segment.
7

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9 18.

10 In 1990 the State of Washington omitted from its § 303(d) list those water bodies for
11 which 95% of the total water body supported "designated uses."
12

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14 19.

15 In 1990 the State of Washington omitted from its § 303(d) list those water bodies for
16 which it was "expected" that designated uses would be fully supported after implementation of
17 technology based treatment requirements to control sources of water pollution.
18

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20 20.

21 In 1990 the State of Washington omitted from its § 303(d) list those water bodies for
22 which available information suggested that they might be water quality limited, although
23 information was not sufficient for the state to decide whether these water bodies were, in fact,
24 water quality limited.
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27 21.
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1 In its ~~1990 § 303(d) list~~, Washington failed to assign priority to the listed WQLSs as
2 required by ~~§ 1313(d)(1)~~.

3
4 ~~22.~~

5
6 In ~~1990~~ the State of Washington identified at least 151 waters as water quality limited
7 segments under ~~33 U.S.C. § 1313(d)(1)(A)~~ and each of those waterways is part of the navigable
8 waters of the United States within the meaning of ~~33 U.S.C. § 1362(7)~~.

9
10 ~~23.~~

11
12 Within ~~thirty (30) days~~ of the state's submission of its list of WQLSs, defendant
13 Administrator is required to approve or disapprove the identification of those WQLSs. Defendant
14 failed to approve or disapprove ~~Washington 1990 § 303(d) list~~ within 30 days.

15
16 ~~24.~~

17
18 Under ~~33 U.S.C.S 1313 (d)(1)(B)~~, each state is required to identify its waters for which
19 controls on thermal discharges are not stringent enough to ensure protection and propagation of a
20 balanced indigenous population of shellfish, fish and wildlife. The State of Washington's ~~1990 §~~
21 ~~303(d) list~~ failed to make this identification.

22
23 ~~1992 S 303(d) List~~

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25 ~~25.~~

26
27 The State of Washington's ~~1992 § 303(d) list~~ was submitted in April, 1992. The EPA
28 "~~conditionally approved~~" that list on February 5, 1993, about nine months after the ~~thirty (30)~~

1 ~~day time period for approval or disapproval required by 33 U.S.C. § 1313(d)(2).~~

2
3 26.

4 ~~In its 1992 § 303(d) list, the State of Washington failed to list WQLSs if the source of~~
5 ~~pollution was a nonpoint source. The State contended it had broad authority under state law to~~
6 ~~enforce best management practices (BMPs) and such BMPs were expected to attain water~~
7 ~~quality. EPA's "conditional approval" of the 1992 § 303 (d) list required that the State of~~
8 ~~Washington take the following steps in order to gain full approval in 1994: (a) Consolidate~~
9 ~~previous lists into the 1994 § 303(d) list; Clarify the state's prioritization process; Include waters~~
10 ~~affected by nonpoint sources; and Increase public participation in the listing process.~~

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13 27.

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15 ~~The Clean Water Act does not provide for "conditional approval" of state-submitted §~~
16 ~~303(d) lists.~~

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18 28.

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20 ~~EPA's "conditional approval" of the 1992 list in fact told the State its 1992 list did not~~
21 ~~comply with the law. EPA's action was in fact a disapproval of the 1992 list.~~

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23 29.

24
25 ~~Under 33 U.S.C. § 1313 (d) (1) (B), each state is required to identify its waters for which~~
26 ~~controls on thermal discharges are not stringent enough to ensure protection and propagation of a~~
27 ~~balanced indigenous population of shellfish, fish and wildlife. The State of Washington's 1992 §~~
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1 ~~303(d) list failed to make this identification.~~

2
3 1994 S 303(d) List

4 30.

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6 ~~The State of Washington submitted its 1994 303(d) list on May 13, 1994. The EPA~~
7 ~~approved that list on July 7, 1994, about three weeks after the expiration of the thirty (30)-day~~
8 ~~time period required for approval or disapproval under 33 U.S.C. § 1313(d) (2).~~

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10 31.

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12 ~~Under 33 U.S.C. § 1313 (d) (1) (B), each state is required to identify its waters for which~~
13 ~~controls on thermal discharges are not stringent enough to ensure protection and propagation of a~~
14 ~~balanced indigenous population of shellfish, fish and wildlife. The State of Washington's 1994 §~~
15 ~~303(d) list failed to make this identification.~~

16
17 Priority Ranking Process

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19 32.

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21 ~~33 U.S.C. § 1313 (d)(1)(A) requires the state to establish a priority ranking for all water~~
22 ~~quality limited segments, taking into account the severity of the pollution and the usage to be~~
23 ~~made of those waters.~~

24
25 33.

26
27 ~~In its 1990 § 303(d) list, the State of Washington failed to prioritize water quality limited~~
28

1 segments.

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3 34.

4 In its 1992 § 303(d) list, the State of Washington failed to provide any rational or
5 consistent prioritization. EPA therefore found the State's prioritization inadequate and required
6 "clarification" in the 1994 list.
7

8
9 35.

10 In its 1994 § 303(d) list, the state says it will designate all waters on which it intends to do
11 TMDLs as "high" priority and all other waters as "medium" priority. This violates § 1313
12 because it fails to prioritize among those waters which need TMDLs.
13

14
15 36.

16 The state's priority system also says the state will identify all waters for which TMDLs
17 will be done, then make all those TMDL waters on the § 303(d) list "high" priority while other
18 waters on the § 303(d) list will be "medium" priority. This violates § 1313 because TMDLs are
19 required for all waters on the § 303(d) list.
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22 37.

23 Some State of Washington documents indicate that priority is "high" for all Water
24 Quality Limited Segments. That violates the Clean Water Act because prioritization is required
25 among all waters on the § 303(d) list.
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28 38.

1 42.

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3 The State of Washington has removed from its 1994 § 303(d) list all waters for which the
4 EPA has approved a TMDL despite the absence of any determination that the establishment of
5 the TMDL has, in fact, caused water quality standards to be met.

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7 43.

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9 The State of Washington decided to include waters on its 1994 § 303(d) list only upon a
10 demonstration that "compelling evidence" existed to justify a listing. There is no authority in the
11 Clean Water Act for imposing such a high burden of proof for a listing.

12
13 44.

14
15 The State of Washington has eliminated waters from its 1994 § 303(d) list which
16 appeared in its 1992 § 303(d) list:

17
18 (1) If the state "could not find" support for the previous listing in the Administrative
19 Record;

20
21 (2) If the state could not verify the basis for the original listing;

22
23 (3) If the data which supplied the basis for the original listing were lost or misplaced;

24
25 (4) If the detection limit flag was lost during data retrieval;

26
27 (5) If sample metals testing was later found to be contaminated;

28 (6) If the data which provided the basis for the original listing were not verified by a

1 ~~state accredited laboratory or otherwise failed to meet new technical verification~~
2 ~~standards which did not apply at the time of the original listings;~~

3
4 ~~(7) If the original listing was based upon testing methods which later were changed;~~

5
6 ~~(8) If the information upon which the original listing was based did not contain~~
7 ~~information sufficient to "verify the quality of the data" according to new criteria adopted~~
8 ~~by the state in 1993; or~~

9
10 ~~(9) If the monitoring station from which the data to support the listing was originally~~
11 ~~derived is not located so as to "represent the river segment for the parameter previously~~
12 ~~listed", even when no other water body is~~

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14 ~~48. 18.~~

15
16 Under 33 U.S.C. § 1313(d)(1)(C) each state must establish, for each WQLS, a total
17 maximum daily load (TMDL) for each pollutant ~~that~~ ~~which~~ the EPA has identified under 33
18 U.S.C. § 1314(a)(2) as suitable for such calculation. The TMDL is the maximum daily amount of
19 each identified pollutant at which the applicable water quality standard will be achieved,
20 allowing for seasonal variations and a margin of safety which takes into account any lack of
21 knowledge concerning the relationship between effluent limitations and water quality.

22
23 Defendant's regulations under 33 U.S.C. § 1313(d) require each state to establish TMDLs by
24 designating "waste load allocations" (WLAs) for point sources of water pollution and "load
25 allocations" (LAs) for natural background pollution sources and nonpoint sources such as
26 agricultural and urban runoff. The sum of WLAs and LAs for any WQLS is the TMDL for that
27 segment. 40 C.F.R. § 130.2(i).
28

1 a TMDL is designated "incomplete," EPA returns it to the state for further work without any
2 specific requirements for time of resubmission.

3
4 23.

5
6 Congress intended for TMDLs to be developed promptly, without undue delay. For
7 example, the Clean Water Act requires TMDLs to incorporate a "a margin of safety which takes
8 into account any lack of knowledge," 33 U.S.C. § 1313(d)(1)(C), strongly suggesting that any
9 imprecise information must not be the basis for any delay. *Ala. Ctr. for the Env't. v. Reilly*, 762
10 F. Supp. 1422, 1429 (W.D. Wash 1991); *Natural Resources Defense Council, Inc. v. Fox*, 909 F.
11 Supp. 153, 157-58 (S.D.N.Y.1995); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 966
12 (W.D. Wash. 1996).

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15 24.

16 Similarly, EPA regulations provide that each state "shall establish TMDLs" for the
17 WQLS identified on its § 303(d) list, and that "[s]chedules for submission of TMDLs shall be
18 determined by the [EPA] Regional Administrator and the State." 40 C.F.R. § 130.7(c)(1), (d)(1).

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21 25.

22 In guidance published more than 20 years ago, EPA recognized that it "needs an overall
23 plan for completing and approving TMDLs for all listed waters" and that each EPA Region
24 should "secure a specific written agreement with each State in the Region establishing an
25 appropriate schedule for the establishment of TMDLs for all waters on the most recent section
26 303(d) list," with those schedules being "expeditious" and extending "from eight to thirteen
27

1 years in length.” Memorandum from Robert Perciasepe, Assistant Administrator, EPA Office of
2 Water, to Regional Administrators and Regional Water Division Directors: New Policies for
3 Establishing and Implementing Total Maximum Daily Loads (TMDLs) (1997) at 3.
4

5 26.
6

7 Thus, as this Court itself has noted, CWA § 303(d) “expressly requires the EPA to step
8 into the states’ shoes if their TMDL submissions . . . are inadequate.” Alaska Center, 762 F.
9 Supp. at 1429). Further, because “Congress prescribed early deadlines for the TMDL process,”
10 appropriate TMDL schedules must be counted in “months and a few years, not decades.” Idaho
11 Sportsmen’s, 951 F. Supp. at 967.
12

13 27.
14

15 A number of courts, including the Ninth Circuit, have recognized the “constructive
16 submission” doctrine, pursuant to which “a complete failure by a state to submit TMDLs will be
17 construed as a constructive submission of no TMDLs, which in turn triggers the EPA’s
18 nondiscretionary duty to act” under 33 U.S.C. § 1313(d)(2). San Francisco BayKeeper v.
19 Whitman, 297 F.3d 877, 881 (9th Cir. 2002); Alaska Center, 762 F. Supp. at 1429.
20

21 28.
22

23 More recently, several courts (including this Court) have found that a constructive
24 submission also occurs where a state “clearly and unambiguously” indicates that it will not
25 prepare a TMDL for a particular water body. Sierra Club v. McLerran, No. 11-CV-1759-BJR,
26 2015 WL 1188522, at *7 (W.D. Wash. Mar. 16, 2015); see also Columbia Riverkeeper v. Pruitt,
27 2015 WL 1188522, at *7 (W.D. Wash. Mar. 16, 2015); see also Columbia Riverkeeper v. Pruitt,
28

1 337 F. Supp. 3d 989, 998 (W.D. Wash. 2018).

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3 29.

4 Several of these courts, including the Ninth Circuit in *San Francisco Baykeeper*, have
5 implicitly or expressly noted that a state’s lack of “progress on a schedule to complete its
6 remaining TMDLs” can amount to a constructive submission. 297 F.3d at 882.

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9 **B. Judicial Review of EPA Actions**

10 30

11 The Clean Water Act authorizes citizen suits against the EPA Administrator “where there
12 is alleged a failure to of the Administrator to perform any act or duty under this chapter which is
13 not discretionary with the Administrator.” 33 U.S.C. § 1365(a)(2).

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16 31.

17 The district courts have jurisdiction over suits against the Administrator arising under the
18 citizen suit provision, and may “order the Administrator to perform such act or duty” the non-
19 performance of which is the basis for the claim. 33 U.S.C. § 1365(a).

20
21 32.

22 Regulations promulgated by EPA to implement the Clean Water Act may establish for
23 the agency a nondiscretionary duty the failure to undertake of which is subject to review under
24 the citizen suit provision of the Clean Water Act where the duty is clear-cut and readily
25 ascertainable from the regulatory language.

1 33.

2
3 The Administrative Procedure Act (“APA”) authorizes judicial review of final agency
4 actions for which there is no other adequate remedy in a court. 5 U.S.C. § 704. For purposes of
5 judicial review, “final agency actions” include the failure to act.
6

7 34.

8
9 When reviewing a final agency action under the APA, the court shall “compel agency
10 action unlawfully withheld or unreasonably delayed” and shall “hold unlawful and set aside
11 agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of
12 discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(1), (2)(A).
13

14 **GENERAL FACTUAL ALLEGATIONS**

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16 ~~53.~~ 35.

17
18 The State of Washington failed to submit any TMDLs by the first TMDL deadline of
19 June 26, 1979.
20

21 54.

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23 ~~With the alleged exceptions of proposed TMDLs for phosphorous on the Spokane River~~
24 ~~and south fork of the Palouse River and for dioxin in Gray's Harbor, Commencement Bay and~~
25 ~~Everett Harbor, the State of Washington failed to submit any TMDLs, WLAs or LAs for any~~
26
27 ~~other water quality limited segment by the time of the commencement of this lawsuit in March,~~
28 ~~1991. At that time, none of the state's TMDLs had yet been approved by EPA.~~

1 36.

2
3 At the time of commencement of this lawsuit in March 1991, Washington had submitted
4 to EPA, at most, a total of five TMDLs.

5
6 55.

7
8 ~~In 1988, the State of Washington submitted to EPA 14 "studies" as TMDLs. At the time~~
9 ~~of the commencement of this lawsuit in March 7 1991, the Administrator had neither approved~~
10 ~~nor disapproved those studies as TMDLs.~~

11
12 56.

13
14 ~~The State of Washington's 1994 § 303(d) list contains 445 water quality limited~~
15 ~~segments. The State of Washington has committed to perform TMDLs for only two of these 44 5~~
16 ~~impaired segments in 1994-95. The State of Washington has refused to commit to any specific~~
17 ~~number of TMDLs to be completed beyond the 1994-95 biennium or to commit to any time by~~
18 ~~which all necessary TMDLs will be done.~~

19
20 57.

21
22 ~~The state's proposal for two TMDLs from the 1994 § 303(d) list without any further~~
23 ~~TMDL commitment is not a reasonable schedule for the development of TMDLs for all water~~
24 ~~bodies designated as Water Quality Limited Segments.~~

25
26 58.

27
28 ~~Defendant Administrator may not approve any state National Pollution Discharge~~

1 ~~Elimination System (NPDES) permit program for a state which does not have an approved~~
2 ~~continuing planning process under 33 USC § 1313(e). A state continuing planning process may~~
3 ~~be approved only if it includes total maximum daily loads in accordance with § 1313(d). 33 USC~~
4 ~~§ 1313(e) (3) (C). The State of Washington has not complied with the total maximum daily load~~
5 ~~provisions of § 1313(d). The State of Washington nevertheless has issued and continues to issue~~
6 ~~NPDES permits under 33 USC § 1342.~~

7
8
9 37.

10 During the prior litigation in this case, plaintiffs, EPA, and Washington (acting through
11 its Department of Ecology) negotiated and agreed upon a “Schedule for TMDL Submittal”
12 (“TMDL Schedule”) by which the State would “prioritize, schedule, scope, develop, and submit”
13 for EPA review TMDLs for those WQLS on the State’s 1996 § 303(d) list over a 15-year period.
14 That TMDL Schedule was incorporated into an October 29, 1997 Memorandum of Agreement
15 (“1997 MOA”) between EPA and Washington, and also incorporated into a settlement
16 agreement executed in January 1998 between plaintiffs and EPA (“1998 Settlement
17 Agreement”).

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19
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21 38.

22 The TMDL Schedule required the State to submit to EPA 249 TMDLs by June 30, 2003;
23 an additional 552 TMDLs by June 30, 2008; and an additional 765 TMDLs by June 30, 2013, for
24 a total of 1,566 TMDLs in a 15-year period. The TMDL Schedule contemplated that a TMDL
25 would be prepared for each water on Washington’s 1996 § 303(d) list by no later than June 30,
26 2013. Although The TMDL Schedule and Settlement Agreement allowed the State and/or EPA
27
28

1 to “substitute one or more . . . future-listed waters for one or more waters on the 1996 303(d)
2 list” and to count such TMDLs for purposes of determining whether EPA is meeting its
3 commitments under the Agreement, see Settlement Agreement at 8-9, ¶ 7, any substitution under
4 that provision does not affect EPA’s obligation to “take all steps necessary to ensure that TMDLs
5 for all WQLSs on the 1996 Section 303(d) list are completed by June 30, 2013 . . . through
6 establishment of TMDLs or approval of the TMDLs submitted by the State.” Settlement
7 Agreement at ¶ 6.

8
9
10 39.

11 The 1998 Settlement Agreement authorized EPA and the State to substitute “future-listed
12 waters”—that is, WQLS included on a future § 303(d) list—for waters on the State’s 1996 §
13 303(d) list so long as the substitution was “of comparable TMDL complexity,” and provided that
14 a substituted water would count towards the total number of TMDLs required by the respective
15 interim and final deadlines in the TMDL Schedule.

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17
18 40.

19
20 Plaintiffs and EPA recognized that the State of Washington would have primary
21 responsibility for the completion of TMDLs pursuant to Clean Water Act § 303(d) and in
22 accordance with the TMDL Schedule incorporated into the 1998 Settlement Agreement.
23 Nonetheless, EPA agreed to serve as a “backstop” in the event of the state’s failure by agreeing
24 to “take all steps necessary to ensure completion of the requisite number of TMDLs targeted for”
25 completion by the interim deadlines in the TMDL Schedule, and further agreed to “take all steps
26 necessary” to ensure that TMDLs for all WQLSs on the 1996 § 303(d) list “are completed by
27
28

1 June 30, 2013 . . . through establishment of TMDLs or approval of the TMDLs submitted by the
2 State.”

3
4 41.

5
6 By the TMDL Schedule’s first interim deadline—June 30, 2003—Washington had
7 completed and submitted to EPA a total of 302 TMDLs, 53 more than the 349 TMDLs to which
8 the parties had agreed in the 1997 MOU, 1998 Settlement Agreement, and TMDL Schedule.¹

9
10 42.

11
12 By the second interim deadline—June 30, 2008—Washington had completed and
13 submitted to EPA a total of 641 TMDLs, 160 fewer than the 801 TMDLs to which the parties
14 had agreed in the 1997 MOU, 1998 Settlement Agreement, and TMDL Schedule.

15
16 43.

17
18 By the final deadline—June 30, 2013—Washington had completed and submitted to
19 EPA a total of 867 TMDLs, 699 fewer than the 1,566 TMDLs to which the parties had agreed in
20 the 1997 MOU, 1998 Settlement Agreement, and TMDL Schedule.

21
22 44.

23
24 During the 15-year period of the prior TMDL Schedule (1998-2013), Washington
25 completed TMDLs at an average rate of about 58 TMDLs per year.

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27
28

¹ TMDLs are counted using waterbody segments in place in 1996.

1 45.

2
3 The 1997 MOU between EPA and Washington incorporating the TMDL Schedule had an
4 express termination date of December 31, 2013. There is presently no MOU or other written
5 agreement between EPA and Washington that applies to or provides a firm and binding schedule
6 for the completion of the remaining TMDLs needed in the State of Washington, although there is
7 a “Performance Partnership Agreement” between EPA and the State that sets an unenforceable
8 “goal” of maintaining “an average pace of 53 TMDLs per year.” Washington State Department
9 of Ecology and U.S. Environmental Protection Agency, Environmental Performance Partnership
10 Agreement: State Fiscal Years 2020-2021 (June 20, 2019) at 77.

11
12
13 46.

14
15 During the six State fiscal years following the end of the original TMDL Schedule—that
16 is, July 1, 2013 through June 30, 2019—Washington completed and submitted to EPA seven
17 submissions including a total of 57 approvable TMDLs, an average rate of about 10 TMDLs per
18 year. However, Washington has not submitted a single TMDL to EPA since December 18, 2015,
19 a period of nearly four years.

20
21 47.

22
23 There remain approximately 545 WQLS that were listed on Washington’s 1996 § 303(d)
24 list (some of which may have been listed even earlier) and still need, but presently lack, a
25 TMDL. Neither Washington nor EPA have commenced the work necessary to prepare those 545
26 TMDLs, and neither Washington nor EPA have a schedule in place for the eventual completion
27 of those 545 TMDLs.

FIRST CLAIM FOR RELIEF

~~Administrator's Duty to Act on S 303(d) Lists~~

~~59.~~

~~Plaintiffs reallege paragraphs 1 through 58 above.~~

~~60.~~

~~Defendant Administrator has a non-discretionary duty to review and approve or disapprove any § 303(d) list submitted by the State of Washington within 30 days of submission.~~

~~61.~~

~~Defendant Administrator failed to act within 30 days on the State of Washington's 1990 § 303(d) list, 1992 S 303(d) list or 1994 § 303(d) list.~~

~~62.~~

~~Plaintiffs are entitled to a declaration that the Administrator failed to perform a non-discretionary duty under the Clean Water Act in these respects and therefore violated 33 U.S.C. § 1313 (d) (2).~~

~~63.~~

~~Defendants' failure to act within the statutory time on state-submitted § 303 (d) lists is~~

1 ~~capable of repetition yet evading review.~~

2
3 64.

4 ~~Plaintiffs are entitled to their costs of litigation, including reasonable attorney fees and~~
5 ~~expert witness fees under 33 U.S.C. § 1365(d).~~
6

7 ~~SECOND CLAIM FOR RELIEF~~
8

9 ~~Judicial Review of Late Action on S 303(d) Lists~~
10

11 65.

12
13 ~~Plaintiffs reallege paragraphs 1 through 58 and 60 through 63 above. Defendant~~
14 ~~Administrator's failure to act timely on the State submitted § 303(d) lists is arbitrary and~~
15 ~~capricious, an abuse of discretion and amounts to the unlawful withholding and unreasonable~~
16 ~~delay of agency action required by law within the meaning of 5 U.S.C. § 706.~~
17

18 67.

19
20 ~~Plaintiffs are entitled to prevail in this matter, and the position of defendant Administrator~~
21 ~~herein is not substantially justified, and plaintiffs are entitled to their attorney fees and costs~~
22 ~~under 28 U.S.C. § 2412(d).~~
23

24
25
26 ~~THIRD CLAIM FOR RELIEF~~
27

28 ~~"Conditional Approval" Violates Non-Discretionary Duty~~

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FOURTH CLAIM FOR RELIEF

Judicial Review of "Conditional Approval" of § 303(d) Lists

74.

Plaintiffs reallege paragraphs 1 through 58 and paragraphs 69 through 72 above.

75.

Defendant Administrator's "conditional approval" of the State's 1992 § 303(d) list was arbitrary, capricious, an abuse of discretion and contrary to the Clean Water Act, which provides only 5 for approval or disapproval of a State's § 303(d) list.

76.

Plaintiffs are entitled to prevail in this matter, and the position of defendant Administrator herein is not substantially justified, and plaintiffs are entitled to their attorney fees and costs under 28 US C § 2412(d).

FIFTH CLAIM FOR RELIEF

Administrator's Non-Discretionary Duty to Disapprove the 1994 § 303(d) List

77.

Plaintiffs reallege paragraphs 1 through 58 above.

78.

1 ~~(4) Excluding waters which are partly or fully on tribal reservations;~~

2
3 ~~(5) Excluding waters which are on land owned by the United States Forest Service or~~
4 ~~other federal agencies;~~

5
6 ~~(6) Removing segments for which TMDLs have been done, without providing data to~~
7 ~~show that water quality standards have been met;~~

8
9 ~~(7) Requiring “compelling evidence” in order to put waters on the § 303(d) list;~~

10
11 ~~(8) Removing waters previously listed on the ground that data supporting listing were~~
12 ~~inadequate as alleged in paragraph 45 above; and~~

13
14 ~~(9) Using “best professional judgment” to remove waters from the § 303(d) list but~~
15 ~~refusing to use “best professional judgment” to list any water.~~

16
17 82.

18 Because of these violations, defendant Administrator had a non-discretionary duty to
19 disapprove the State of Washington's 1994 § 303(d) list.
20

21
22 83.

23 Plaintiffs are entitled to their costs of litigation, including reasonable attorney fees and
24 expert witness fees under 33 U.S.C. § 1365(d).
25

26 **SIXTH CLAIM FOR RELIEF**

27
28 **Judicial Review of Approval of 1994 § 303(d) List**

1 84.

2
3 Plaintiffs reallege paragraphs 1 through 58 and paragraphs 78 through 83 above.

4 85.

5
6 Defendant Administrator's approval of the State of Washington's 1994 § 303(d) list was
7 arbitrary, capricious, an abuse of discretion and amounts to the unlawful withholding and
8 unreasonable delay of agency action required by law within the meaning of 5 U.S.C. § 706.
9

10 86.

11
12 Plaintiffs are entitled to prevail in this matter, and the position of defendant Administrator
13 herein is not substantially justified, and plaintiffs are entitled to their attorney fees and costs
14 under 28 U.S.C. § 2412(d).
15

16 SEVENTH CLAIM FOR RELIEF

17
18 Non-Discretionary Duty to Approve or Disapprove TMDLs

19
20 87.

21
22 Plaintiffs reallege paragraphs 1 through 58 above.

23 88.

24
25 Defendant Administrator's failure to act within 30 days on TMDLs submitted by the State
26 of Washington as alleged violates 33 U.S.C. § 1313(d).
27
28

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89.

~~Defendant Administrator's designation of proposed TMDLs submitted by the State of Washington as "incomplete" violates 33 U.S.C. § 1313 (d) (2), which requires that the Administrator either approve or disapprove each State submitted TMDL. The Administrator has a non-discretionary duty to approve or disapprove each State submitted TMDL.~~

90.

~~Plaintiffs are entitled to their costs of litigation, including reasonable attorney fees and expert witness fees under 33 U.S.C. § 1365(d).~~

EIGHTH CLAIM FOR RELIEF

Judicial Review of "Incomplete TMDL" Designation

91.

~~Plaintiffs reallege paragraphs 1 through 58 and paragraphs 88 and 89 above.~~

92.

~~Defendant Administrator's failure to approve or disapprove TMDLs submitted by the State of Washington within 30 days is arbitrary, capricious an abuse of discretion and amounts to the unlawful withholding and unreasonable delay of agency action required by law within the meaning of 5 U.S.C. § 706.~~

93.

1 Plaintiffs are entitled to prevail in this matter, and the position of defendant Administrator
2 herein is not substantially justified, and plaintiffs are entitled to their attorney fees and costs
3 under 28 U.S.C. § 2412(d).
4

5 ~~NINTH CLAIM FOR RELIEF~~

6
7 **FIRST CLAIM FOR RELIEF**

8 **Clean Water Act:**

9 **Non-Discretionary Duty to Establish Reasonable TMDL Schedule**

10 ~~94. 48.~~

11 Plaintiffs reallege paragraphs 1 through 58 above all preceding paragraphs as if fully set
12 forth herein.
13

14 ~~95. 49.~~

15
16 Under 33 U.S.C. § 1313(d), defendant Administrator has a non-discretionary duty to see
17 ensure that a reasonable schedule is established for the development of TMDLs for all water
18 quality limited segments in the State of Washington.
19

20 ~~50.~~

21
22 Under 40 C.F.R. § 130.7(d)(1), EPA, acting through the appropriate Regional
23 Administrator and in consultation with the state, has a non-discretionary duty to determine each
24 state's schedule for the submission of TMDLs.
25

26 ~~96. 51.~~

27
28 Neither EPA, nor the EPA Administrator, nor the Regional Administrator for Region 10

1 has taken steps to ensure that a reasonable schedule is established for the development of
2 TMDLs for all water quality limited segments in the State of Washington, contrary to 33 U.S.C.
3 § 1313(d).

4
5 52.

6
7 Neither EPA, nor the EPA Administrator, nor the Regional Administrator for Region 10
8 has determined a schedule for Washington's submission of TMDLs to EPA, contrary to 40
9 C.F.R. § 130.7(d)(1).

10
11 53.

12
13 EPA, the EPA Administrator, and the Regional Administrator for Region 10 have has
14 failed to perform ~~this~~ these non-discretionary ~~duty~~ duties within the meaning of 33 U.S.C. §
15 1365(2).

16
17 97. 54.

18
19 Plaintiffs are entitled to an order compelling EPA, the EPA Administrator, or the
20 Regional Administrator for Region 10, as appropriate, to perform their nondiscretionary duties
21 set forth above, and awarding Plaintiffs their costs of litigation, including reasonable attorney
22 fees and expert witness fees under 33 U.S.C. 1365(d).

23
24 ~~TENTH CLAIM FOR RELIEF~~

SECOND CLAIM FOR RELIEF
(In the Alternative)

Administrative Procedure Act:
Judicial Review of EPA's Failure to Establish Reasonable TMDL Schedule

~~98.~~ 55.

Plaintiffs reallege paragraphs 1 through 58 and 95 and 96 above all preceding paragraphs as if fully set forth herein.

~~99.~~ 56.

Defendant Administrator's failure to establish a reasonable schedule for development of TMDLs for all water quality limited segments in the State of Washington, as required by 33 U.S.C. § 1313(d), is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law amounts to the unlawful withholding and unreasonable delay of agency action required by law within the meaning of 5 U.S.C. § 706(2)(A).

57.

Defendant Regional Administrator's failure to determine a schedule for the submission of TMDLs by the State of Washington, as required by 40 C.F.R. § 130.7(d)(1), constitutes the unreasonable delay of agency action within the meaning of 5 U.S.C. § 706(1).

~~100.~~ 58.

Plaintiffs are entitled to ~~prevail in this matter~~ an order compelling defendants' action unreasonably delayed, and holding unlawful and setting aside defendants' actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

1 59.

2
3 The position of defendant Administrator herein is not substantially justified, and plaintiffs
4 are entitled to their attorney fees and costs under 28 U.S.C. § 2412(d).

5
6 **THIRD CLAIM FOR RELIEF**
7 **Clean Water Act:**
8 **EPA's Failure to Review and Disapprove of Washington's "Constructive Submission" of**
9 **Remaining TMDLs for Waters on Washington's 1996 § 303(d) List**

10 60.

11 Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

12 61.

13
14 There are approximately 545 WQLS included on Washington's 1996 § 303(d) list that
15 remain impaired to this day, but for which neither the State of Washington nor EPA has prepared
16 a TMDL.

17 62.

18
19
20 Neither Washington nor EPA has a work plan, schedule, or anticipated timeline for the
21 completion of those approximately 545 TMDLs remaining from the State's 1996 § 303(d) list.

22 63.

23
24
25 The State's ongoing failure to prepare a TMDL for those approximately 545 WQLS that
26 have been § 303(d)-listed for at least 23 years, coupled with the absence of a clear plan,
27 schedule, or timeline for completion of the requisite TMDLs, constitutes a clear and
28

1 unambiguous statement by the State that it does not intend to prepare those TMDLs.

2
3 64.

4 Washington has therefore “constructively submitted” those approximately 545 TMDLs to
5 EPA, thereby triggering the Administrator’s nondiscretionary duty to review and disapprove of
6 them within thirty days, and to establish the needed TMDLs within thirty days of his
7 disapproval, pursuant to 33 U.S.C. § 1313(d)(2).

8
9
10 65.

11 The Administrator’s failure to perform the nondiscretionary duties described above is
12 reviewable under the Clean Water Act’s citizen suit provision, and warrants an order from the
13 Court compelling the Administrator to perform such duties under 33 U.S.C. § 1365(a)(2).

14
15
16 ~~ELEVENTH CLAIM FOR RELIEF~~

17
18 ~~Non-Discretionary Duty to Disapprove Continuing Planning Process~~

19
20 ~~101.~~

21 ~~Plaintiffs reallege paragraphs 1 through 99 above.~~

22
23 ~~102.~~

24
25 ~~Under 33 USC§ 1.31.3(e), each state must have a continuing planning process approved~~
26 ~~by defendant Administrator which is consistent with the Clean Water Act. Each state is required~~
27 ~~to submit to defendant Administrator for approval a proposed continuing planning process which~~
28

1 ~~is consistent with the Act. Defendant Administrator must review each state's approved planning~~
2 ~~process for the purpose of ensuring that it is at all times consistent with the Clean Water Act.~~

3
4 103.

5
6 Defendant Administrator may not approve any state NPDES permit program for a state
7 which does not have an approved continuing planning process under Section 1313(e). 33 U.S.C.
8 § 1313(e)(2).

9
10 104.

11
12 In order for a state continuing planning process to be approved, it must at all times be
13 consistent with the Clean Water Act.

14
15 105.

16
17 In order for a state planning process to be approved, it must result in plans for all
18 navigable waters within a state, which include TMDLs if required under Section 303(d). 33
19 U.S.C. § 1313(e)(3)(C).

20
21 106.

22
23 In order for a state planning process to be approved, it must contain adequate authority
24 for intergovernmental cooperation. 33 U.S.C. § 1313 (e)(3)(E).

25
26 107.

27
28 The State of Washington's continuing planning process has not resulted in compliance

1 with Section 303(d) because of the State's failure to submit appropriate § 303(d) lists and to
2 implement a TMDL program as alleged herein. The State of Washington's continuing planning
3 process does not contain adequate authority for intergovernmental cooperation with the federal
4 government or Indian tribes because the State summarily excludes waters on tribal and federal
5 lands from § 303(d) listing.
6

7
8 108.

9 Defendant Administrator is now, and has been since June 27, 1979, under a non-
10 discretionary duty to disapprove the State of Washington's continuing planning process and,
11 therefore, to disapprove the State of Washington's NPDES permit program under Section
12 1313(e)(2).
13

14
15 109.

16 Plaintiffs are entitled to their costs of litigation, including reasonable attorney fees and
17 expert witness fees under 33 U.S.C. § 1365(d).
18

19 TWELFTH CLAIM FOR RELIEF
20

21 Judicial Review of Administrator's Failure to Disapprove Continuing Planning Process
22

23 110.

24 Plaintiffs reallege paragraphs 1 through 109 above.
25

26
27 111.
28

1 Defendant Administrator's failure to review and disapprove the State of Washington's
2 continuing planning process and NPDES program under Section 1313(e) is arbitrary, capricious,
3 an abuse of discretion, not in accordance with law, and constitutes agency action unlawfully
4 withheld and unreasonably delayed.

5
6 112.

7
8 Plaintiffs are entitled to prevail in this matter, and the position of defendant Administrator
9 herein is not substantially justified, and plaintiffs are entitled to their attorney fees and costs
10 under 28 U.S.C. § 2412(d).

11
12 WHEREFORE, plaintiffs pray for relief as follows request that the Court grant the
13 following relief:

- 14
15 1. An order declaring that the Administrator or the Regional Administrator, as
16 appropriate, violated his non-discretionary duties under 33 U.S.C. § 1313(d) and 40
17 C.F.R. § 130.7(d)(1), or alternatively acted arbitrarily and capriciously, abused his
18 discretion, or acted otherwise not in accordance with law under 5 U.S.C. § 706(2)(A),
19 or has unreasonably delayed within the meaning of 5 U.S.C. § 706(1), by failing to
20 establish a reasonable schedule for the completion of all remaining TMDLs for the
21 State of Washington and for the submission of those TMDLs to EPA;
22
23 2. An order declaring that the Administrator violated his nondiscretionary duty under 33
24 U.S.C. § 1313(d)(2) when he failed to review and either approve or disapprove the
25 State of Washington's constructive submission of approximately 545 TMDLs for
26
27
28

1 each WQLS that has been on the State's § 303(d) list since at least 1996 but which
2 still lack a TMDL;

- 3 3. An order requiring the Administrator to establish a reasonable but aggressive
4 schedule for the completion of all remaining TMDLs for the State of Washington, and
5 further compelling the Administrator pursuant to 33 U.S.C. § 1365(a) to perform all
6 such nondiscretionary duties under 33 U.S.C. § 1313(d) or, alternatively, holding
7 unlawful and setting aside all actions found to be arbitrary, capricious, an abuse of
8 discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2), and
9 compelling EPA, the Administrator, or the Regional Administrator to take such
10 actions they have unreasonably delayed;
11
12 4. Ordering defendants to pay plaintiffs' costs of litigation, including reasonable
13 attorney and expert witness fees, pursuant to 33 U.S.C. § 1365(d) and 28 U.S.C. §
14 2412; and
15
16 5. Such additional relief that the Court deems just and proper.
17
18
19

20 ~~1. On plaintiffs' FIRST and SECOND CLAIMS FOR RELIEF, plaintiffs request: a~~
21 ~~declaration by the court that defendant Administrator violated a non-discretionary duty and the~~
22 ~~Administrative Procedure Act in failing to act timely on the State of Washington's § 303(d) list~~
23 ~~for 1990, 1992 and 1994; an order that the defendant act timely on all future submitted § 303(d)~~
24 ~~lists; and reasonable attorney and expert witness fees as alleged;~~
25
26
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28

1 ~~2. On plaintiffs' THIRD and FOURTH CLAIMS FOR RELIEF, plaintiffs request: a~~
2 ~~declaration that defendant Administrator violated a non-discretionary duty and the~~
3 ~~Administrative Procedure Act in issuing a "conditional approval" of the State of Washington's~~
4 ~~1992 § 303(d) list; an order that defendant approve or disapprove all future § 303(d) lists without~~
5 ~~conditions; and reasonable attorney and expert witness fees as alleged;~~
6

7
8
9 ~~3. On plaintiffs' FIFTH and SIXTH CLAIMS FOR RELIEF, plaintiffs request: a~~
10 ~~declaration that defendant Administrator has failed to perform a non-discretionary duty and~~
11 ~~violates the Administrative Procedure Act as specifically alleged in approving the State of~~
12 ~~Washington's 1994 § 303 (d) list; an order that defendant Administrator disapprove the State's~~
13 ~~1994 § 303(d) list and any future § 303(d) submission which does not comply with the Clean~~
14 ~~Water Act; and reasonable attorney and expert witness fees as alleged;~~
15
16

17
18
19 ~~4. On plaintiffs' SEVENTH and EIGHTH CLAIMS FOR RELIEF, plaintiffs request: a~~
20 ~~declaration that defendant Administrator violated a non-discretionary duty and the~~
21 ~~Administrative Procedure Act by designating State-submitted TMDLs "incomplete" rather than~~
22 ~~approving or disapproving them; an order that defendant Administrator disapprove all TMDLs~~
23 ~~which have thus far been found "incomplete;" and reasonable attorney and expert witness fees as~~
24
25 ~~26 alleged;~~
26
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28

1 ~~5. On plaintiffs' NINTH and TENTH CLAIMS FOR RELIEF, plaintiffs request: a~~
2 ~~declaration that defendant Administrator has failed to perform a non-discretionary duty and~~
3 ~~violated the Administrative Procedure Act in failing to establish a reasonable schedule for the~~
4 ~~development of TMDLs for all water quality limited segments in the state of Washington; an~~
5 ~~order that defendant Administrator establish such a reasonable schedule; and reasonable attorney~~
6 ~~and expert witness fees as alleged;~~
7

8
9
10 ~~6. On plaintiffs' ELEVENTH and TWELFTH CLAIMS FOR RELIEF, plaintiffs request:~~
11 ~~a declaration that the State of Washington's continuing planning process does not comply with~~
12 ~~33 U.S.C. § 1313(e); a declaration that defendant Administrator has a non-discretionary duty to~~
13 ~~disapprove that continuing planning process; a declaration that defendant Administrator has a~~
14 ~~non-discretionary duty to disapprove the State of Washington's NPDES permit program under 33~~
15 ~~U.S.C. § 1313(e) (2); an order that defendant Administrator prohibit the issuance or renewal by~~
16 ~~the State of Washington of any NPDES permits or any modification of any existing NPDES~~
17 ~~permit which would allow for additional discharge of pollutants into the navigable waters of the~~
18 ~~State of Washington; and attorney and expert witness fees and costs as alleged.~~
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25 ~~DATED this 15th date of November, 1994.~~

26
27 ~~ROYCE, SWANSON, THOMAS & COON~~
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Dated this _____ th day of _____, 2019.

s/ Andrew Hawley
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