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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation, **IDAHO CONSERVATION
LEAGUE**, an Idaho non-profit corporation,

Plaintiffs,

v.

**THE NATIONAL MARINE FISHERIES
SERVICE**, a division of the United States
Department of Commerce, **THE UNITED
STATES FISH AND WILDLIFE SERVICE**,
a bureau of the United States Department of
the Interior, and **THE ENVIRONMENTAL
PROTECTION AGENCY**,

Defendants.

Case No. 1:13-cv-00263-DCN

**PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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INTRODUCTION

Mercury is a pervasive toxic pollutant that has significant deleterious effects on aquatic life—including imperiled species of salmon—as well as on aquatic-dependent life, such as the birds and mammals that consume those fish. SOF ¶¶ 1–6.¹ The State of Idaho previously adopted water quality standards for the protection of aquatic life from mercury. *Id.* ¶ 7. In response to a petition from the mining industry, however, Idaho revised its water quality standards by wholly removing those mercury standards from the books. *Id.* ¶¶ 7–8, 15. Under Clean Water Act Section 303(c), 33 U.S.C. § 1313(c), Defendant United States Environmental Protection Agency (EPA) is required to review and approve revisions to state water quality standards, like those that Idaho made. EPA conducted its review, and in 2008, disapproved Idaho’s deletion of the mercury standards, giving Idaho several options for a path forward. *Id.* ¶¶ 12–13. Idaho took none of those steps. In the face of state inaction after *90 days*, EPA was required by the Clean Water Act to step in and promulgate new mercury standards for Idaho. *See* 33 U.S.C. § 1313(c). But in the *twelve years* that have followed, EPA has taken no action. *Id.* ¶ 16. EPA is thus in violation of its mandatory duty under the Clean Water Act, and Plaintiffs are entitled to summary judgment on Claim Six.

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¹ Pursuant to Local Rule 7.1(c)(2), Plaintiffs submit herewith a Separate Statement of Undisputed Facts (“SOF”) with supporting citations to the Administrative Record (“AR”) filed by EPA, along with citations to other documents publicly available on government websites.

BACKGROUND

I. Legal Background

A. The Clean Water Act and Water Quality Standards

Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To those ends, Section 303 of the Act requires states—or in the case of state inaction, EPA—to develop “water quality standards” that establish, and then protect, the desired conditions of each waterway within each state’s regulatory jurisdiction. 33 U.S.C. § 1313(a), (c).

Water quality standards establish the water quality goals for a waterbody. 40 C.F.R. § 131.2. Those standards must “protect the public health and welfare, enhance the quality of water, and serve the purposes” of the Act. *Id.* Wherever attainable, those standards must provide water quality for the protection and propagation of fish and wildlife. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 130.3.

Water quality standards are the regulatory basis for water quality-based controls on point source pollution, as required under Clean Water Act Sections 301 and 306. 33 U.S.C. §§ 1311, 1316. Point source discharges are regulated under Clean Water Act Section 402’s National Pollutant Discharge Elimination System (NPDES) permits, which require point sources to meet both technology-based effluent limitations and “any more stringent limitation . . . necessary to meet water quality standards.” 33 U.S.C. §§ 1311(b)(1)(C), 1342. Water quality standards are thus integral to regulation of point source discharges.

Water quality standards are also the regulatory basis for “nonpoint source” pollution, defined by exclusion as all water pollution not caused by point source discharges. *See* 33 U.S.C. § 1362(14) (defining “point source”); *Basic Information About Nonpoint Source (NPS)*

Pollution, Env't Prot. Agency (Aug. 10, 2018).² Congress did not establish an analogous federal permitting scheme for nonpoint source pollution; instead, Congress assigned states the task of implementing water quality standards for nonpoint sources, with oversight, guidance, and funding from EPA. *See, e.g.*, 33 U.S.C. §§ 1288, 1313, 1329. Thus, irrespective of implementation methods, water quality standards apply to all sources of pollution, point and nonpoint alike. And because water quality standards form the basis for many regulatory decisions under the Clean Water Act, it is critical that states and EPA get the standards “right.”

Water quality standards must include three elements: (1) one or more “designated uses” for individual waterbodies—including, *e.g.*, the propagation of fish, recreation, navigation, and public water supply; (2) numeric and narrative “criteria” specifying the water quality conditions, such as maximum amounts of toxic pollutants, that are necessary to protect the designated uses; and (3) “antidegradation” requirements ensuring that “existing uses” (uses dating to 1975) are protected and that high-quality waters will be maintained and protected. 33 U.S.C. § 1313(c)(2), (d)(4)(B); 40 C.F.R. Part 131, Subpart B.

B. Water Quality Criteria and Toxic Pollutants

Water quality criteria, one of the three components of water quality standards, “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a)(1). For waters with multiple use designations, the criteria must support the most sensitive use. *Id.*

There are generally two types of numeric water quality criteria: criteria to protect human health, and criteria to protect aquatic life. The adoption of criteria for the protection of human

² Available at: <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last visited Oct. 7, 2020).

health is required for waterbodies where designated uses include public water supply or habitat for fish caught for human consumption. Unlike criteria for human health, the purpose of criteria for the protection of aquatic life is to protect fish, invertebrates, and other aquatic and aquatic-dependent species that are the hallmarks of a healthy waterbody. The adoption of toxic criteria protective of aquatic life must take into account “the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms.” 33 U.S.C. § 1317(a)(1).

Frequently, states rely upon EPA’s recommended criteria issued as guidance under Clean Water Act Section 304(a), which requires EPA to develop, publish, and revise from time to time, “criteria for water quality accurately reflecting the latest scientific knowledge [] on the kind and extent of all identifiable effects on health and welfare.” *Id.* § 1314(a)(1). These recommended criteria are based upon scientific data concerning the relationship between pollutants and their effects on human health and the environment; EPA may not consider technological feasibility or economic impacts when it develops the 304(a) criteria. *See* EPA, Water Quality Criteria Documents; Availability, 45 Fed. Reg. 79318, 79319 (Nov. 28, 1980). Until a state adopts the recommended criteria, and EPA approves the state criteria pursuant to Section 303(c)(3), the EPA recommended criteria have no regulatory effect. 33 U.S.C. § 1313(c)(3).

The Clean Water Act identifies certain toxic pollutants as a high priority for regulation by establishing a list of “priority pollutants” in 33 U.S.C. § 1317(a)(1). EPA’s priority pollutant list consists of 126 pollutants, including mercury. *See* 40 C.F.R. Part 423, Appendix A. After EPA has issued Section 304(a) recommended criteria for any of these priority pollutants, “whenever a State reviews water quality standards” the state must adopt its own numeric criteria for those

pollutants “the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses.” 33 U.S.C. § 1313(c)(2)(B).

State criteria may be less stringent than the EPA recommended criteria only if the state demonstrates to EPA that the criteria protect the most sensitive designated uses and are based on “sound scientific rationale.” 40 C.F.R. § 131.11(a). A state also may adopt more stringent criteria. However, a state may not rely solely on Section 304(a) EPA-recommended criteria if those recommended criteria are not adequate to protect that state’s designated uses. *Id.*

C. Review, Revision, and Submission of State Water Quality Standards

The Clean Water Act requires states to review and revise their water quality standards at least every three years and submit the results of the review and all new and revised water quality standards to EPA for approval. 33 U.S.C. § 1313(c)(1), (3). States must include in their submissions to EPA a certification that the standards were adopted pursuant to state law. 40 C.F.R. § 131.6.

After a state submits to EPA a new or revised water quality standard, EPA must determine whether the standard meets the Act’s requirements. 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.5, 131.21(a)–(b). EPA must either (1) notify the state within 60 days that the standard is approved; or (2) notify the state within 90 days that the standard is disapproved, explaining why the state standard is inconsistent with the Act’s requirements, and specifying changes needed to comply with the Act. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)–(b). If the state does not adopt the specified changes within 90 days after the date of notification, EPA must “promptly” promulgate a replacement standard. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.22. Thus, even though the Clean Water Act allows the state to make the first attempt to set standards, the statute also requires significant EPA oversight and action.

D. The Clean Water Act's Citizen Suit Provision

Clean Water Act Section 505(a) provides that (absent exceptions not relevant here) “any citizen may commence a civil action . . . against the Administrator [of the EPA] where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a)(2). Here, Plaintiffs have sued EPA under the Clean Water Act's citizen suit provision for the agency's failure to promulgate Section 303(c)(3) replacement criteria for mercury in Idaho. 33 U.S.C. § 1365(a)(2); 33 U.S.C. § 1313(c)(3).

E. Standard and Scope of Review

The claim at issue here arises under the Clean Water Act citizen suit provision, 33 U.S.C. § 1365(a)(2). Review is limited to determining whether EPA “failed to exercise a nondiscretionary duty.” *See Nw. Env't Advocs. v. U.S. Env't Prot. Agency*, 268 F. Supp. 2d 1255, 1259 (D. Or. 2003). Though EPA developed an administrative record for this claim, this Court's review is not limited to that record, as Plaintiffs' claim does not arise under the Administrative Procedure Act (APA). *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011) (“[B]ecause the [Endangered Species Act] provides a citizen suit remedy—the APA does not apply in such actions Therefore, . . . we may consider evidence outside the administrative record for the limited purposes of reviewing Plaintiffs' [citizen suit] claim.”). Though the Court's review of this claim is not limited to the administrative record EPA produced, Plaintiffs have nonetheless relied exclusively on record evidence, or other publicly available information of which this Court may take judicial notice. *See, e.g., Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (allowing judicial notice of information made publicly available through a government website).

II. Factual and Procedural Background

A. Harmful Effects of Mercury

Mercury is a Clean Water Act-designated “priority pollutant” that is toxic, widespread, and persistent in the environment. 40 C.F.R. Part 423, Appendix A. Aquatic systems experience the greatest exposure to mercury due to bioaccumulation. SOF ¶ 1. Transformed by microbes into methylmercury, it is retained in fish tissue and is the only form that biomagnifies in aquatic food webs. *Id.* ¶ 2. Biomagnification of mercury occurs when the lowest level trophic species, such as phytoplankton, take up mercury from water and sediments. *Id.* ¶ 3. Zooplankton consume phytoplankton, small fish and invertebrates consume the zooplankton, and larger fish, birds, and mammals consume the small and larger fish. *Id.* ¶ 4. Organisms that are the highest on the food web have the highest methylmercury concentrations. *Id.* Therefore, protection of those predators must drive the adoption of protective criteria. *Id.*

Birds and mammals that eat fish have more exposure to methylmercury than other animals in water ecosystems. *Id.* ¶ 5. Predators that eat these birds and mammals are also at risk. *Id.* Methylmercury has been found in a wide range of fish-eating birds and mammals including kingfishers, bald eagles, mink, river otter, and osprey. *Id.* At unsafe levels of exposure, methylmercury’s harmful effects on these animals include: death, neurological disorders, organ damage, impaired immune response, impaired growth and development, reduced reproductive success, changes in respiration, increased susceptibility to pathogens, and change in behavior (*e.g.*, migration, predator-prey interactions). *Id.* In mammals, fetuses are particularly sensitive to mercury, experiencing deleterious developmental effects when the mothers appear to be unaffected. *Id.*

At the population level, species may experience the following adverse impacts from mercury contamination: decreased genotypic and phenotypic diversity, decreased biomass, increase mortality rate, decreased fecundity rate, decreased recruitment of juveniles, increased frequency of disease, decreased yield, change in age/size class structure, and extinction. *Id.* ¶ 6.

B. Idaho's Mercury Criteria

In 2003, the Idaho Mining Association petitioned the Idaho Department of Environmental Quality (IDEQ) to change Idaho's water quality standards for mercury. *Id.* ¶ 7. In its petition, the Idaho Mining Association proposed that IDEQ adopt new criteria for mercury consistent with EPA's 2002 Section 304(a) water quality criteria: a 1.4 µg/l acute aquatic life criterion; a 0.77 µg/l chronic aquatic life criterion; and the addition of a 0.3 mg/kg fish tissue methylmercury human health criterion.³ *Id.* Idaho's previously adopted criteria then in effect—approved by EPA in 1997—included a 2.1 µg/l acute aquatic mercury criterion and a 0.012 µg/l chronic aquatic mercury criterion. *Id.* Idaho Mining Association explained that its policies included “a commitment to ensure . . . that state water quality standards do not impose requirements more stringent than minimum federal requirements,” and that it believed the purportedly low levels for mercury criteria under Idaho's water quality standards imposed “onerous and expensive sampling procedures and analytical tests” to demonstrate compliance with permit limits. *Id.* On May 24, 2004, Idaho Mining Association amended its proposed changes by letter, requesting that IDEQ remove both aquatic life criteria from the standards. *Id.*

IDEQ initiated negotiated rulemaking to consider Idaho Mining Association's proposed revision along with other updates to Idaho's water quality criteria, and published its proposed

³ Aquatic life criteria are expressed in two forms: (1) acute criteria to protect against mortality and adverse effects of short-term exposure to a toxic chemical, and (2) chronic criteria to protect against mortality and adverse effects as a result of long-term exposure to that chemical.

rule in the Idaho Administrative Bulletin on August 4, 2004. *Id.* ¶ 8. That rule added a 0.3 mg/kg fish tissue mercury human health criterion but eliminated both the chronic and acute aquatic life criteria, replacing both with footnote “g.” *Id.* Footnote “g” states: “No aquatic life criterion is adopted for inorganic mercury. However, the narrative criteria for toxics in Section 200 of these rules applies. The Department believes application of the human health criterion for methylmercury will be protective of aquatic life in most situations.” *Id.*

On September 20, 2004, EPA submitted comments to IDEQ on the proposed rule. *Id.* ¶ 9. EPA stated that IDEQ did not present evidence to support its assertion in footnote “g” to the proposed revisions that “the application of human health criterion for methyl mercury (a fish tissue based criter[ion]) will be protective of aquatic life in most situations.” *Id.* EPA also stated “the EPA’s current recommended 304(a) chronic freshwater aquatic life criterion (0.77 µg/l) for mercury may not be appropriately protective in Idaho.” *Id.* EPA explained that several species of fish, including rainbow trout, coho salmon, and bluegill, “may not be adequately protected” by EPA’s recommended chronic criterion of 0.77 µg/l. *Id.*

EPA made two recommendations. First, EPA stated that it “believes that a chronic aquatic life criterion value of 0.012 µg/l may be protective of aquatic species in Idaho,” and therefore recommended that Idaho “retain the current chronic value of 0.012 µg/l until a chronic aquatic life mercury criterion that adequately protects aquatic species in Idaho is developed by the State of Idaho or by EPA.” *Id.* ¶ 10. Second, EPA encouraged Idaho to replace its current acute aquatic life criterion (2.1 µg/l) with EPA’s recommended 304(a) acute aquatic life criterion for mercury (1.4 µg/l). *Id.* EPA believed that retaining the 0.012 µg/l chronic value, and adopting the 1.4 µg/l acute value, would be a suitable approach “until a chronic life mercury criterion that is protective [of] species in Idaho is developed by the State of Idaho or by EPA.” *Id.*

IDEQ did not incorporate EPA's recommendations into the proposed rule. *Id.* ¶ 11. The 2005 Idaho Legislature adopted the rule as final, and it became effective on April 6, 2005. *Id.* On August 8, 2005, IDEQ submitted the rule, along with several additional revisions of Idaho's water quality standards, to EPA for review and approval. *Id.*

On December 12, 2008, EPA sent to IDEQ a letter, "Re: EPA Disapproval of Idaho's Removal of Mercury Acute and Chronic Freshwater Aquatic Life Criteria, Docket No. 58-0102-0302" ("Disapproval Letter"). SOF ¶ 12. EPA stated that it was, "[i]n accordance with its authorities . . . disapproving the removal of acute and chronic numeric freshwater aquatic life criteria for mercury . . . and the addition of footnote 'g,'" having determined that those changes were "inconsistent with Clean Water Act Section 303(c) and 40 CFR 131.11." *Id.* ¶ 12. Specifically, EPA explained that IDEQ's implementation guidance for the mercury criteria did "not contain definitive information on how the State would translate the fish tissue criterion developed to protect human health to a value which can be used to protect aquatic life." *Id.*

EPA recommended four remedies to address EPA's disapproval:

"There are several options Idaho could consider in establishing mercury criteria that are based on scientifically defensible methods and protect Idaho's designated aquatic life uses including:

- 1) evaluate the protectiveness of EPA's current recommended 304(a) numeric acute freshwater aquatic life criterion for mercury (1.4 µg/l);
- 2) evaluate the protectiveness of Idaho's previous numeric chronic freshwater aquatic life criterion for mercury (0.012 µg/l);
- 3) evaluate development of Idaho-specific numeric acute and chronic freshwater aquatic life criteria for mercury; and
- 4) evaluate the use of a combination of protective numeric water column values and numeric wildlife criteria appropriate for Idaho species"

Id. ¶ 13. EPA emphasized that it did not recommend using the 304(a) numeric chronic freshwater criterion for mercury (0.77 µg/l) in the above options, because that value "may not

adequately protect such important fishes as the rainbow trout, coho salmon and bluegill, and there are several species of trout and salmon present in Idaho.” *Id.*

EPA also noted that “[u]ntil Idaho develops and adopts and EPA approves revisions to numeric acute and chronic aquatic life criteria for mercury,” the criteria in effect would be the previously adopted acute (2.1 µg/l) and chronic (0.012 µg/l) criteria that EPA approved in 1997. *Id.* ¶ 14.

C. Plaintiffs’ Lawsuit

In 2013, Plaintiffs brought suit against EPA, as well as the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). *See* Dkt. #1. Plaintiffs’ complaint alleged that the three federal agencies failed to take actions required under the Clean Water Act and the Endangered Species Act pertaining to several water quality standards provisions in Idaho. *Id.* In 2015, Plaintiffs reached a settlement agreement with FWS and NMFS regarding the claims against those agencies. *See* Dkt. #37. Also in 2015, EPA moved to dismiss many of Plaintiffs’ claims against it, which the parties fully brief that year. In 2019, Judge Lodge issued an order granting in part and denying in part EPA’s motion to dismiss. *See* Dkt. #56. Since that time, the parties have been focused on attempting to settle the remaining claims in the case. The parties have made significant progress toward reaching a final settlement of all remaining claims in this case, with the exception of the claim pertaining to mercury (Claim Six). *See* Dkt. #83. Accordingly, Plaintiffs now seek partial summary judgment on that claim.⁴

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⁴ EPA has not filed an Answer to the First Amended Complaint. The parties are conferring on whether EPA is required to file an Answer related to allegations at issue for summary judgment, and if so, when that will occur.

ARGUMENT

I. EPA’s 2008 Disapproval of Idaho’s Aquatic Life Criteria for Mercury Triggered EPA’s Mandatory Duty to Promulgate Replacement Standards.

A. Clean Water Act Section 303 Imposes on EPA a Mandatory Duty to Promulgate a Replacement Standard Where EPA Has Disapproved a State’s Revised Water Quality Standard and the State Fails to Adopt Required Changes.

The plain terms of Clean Water Act Section 303(c) dictate that after EPA disapproves a state’s revised water quality standard and the state fails to adopt, within 90 days, the EPA-specified changes to that standard, EPA must “promptly” promulgate a replacement standard.

Section 303(c) is unambiguous about EPA’s mandatory duty to promulgate. Section 303(c)(3) provides that after EPA determines that a state-submitted “revised or new standard is not consistent with the applicable requirements” of the Act, EPA shall within 90 days of the state’s submission “notify the State and specify the changes [necessary] to meet such requirements.” 33 U.S.C. § 1313(c)(3). “If such changes are not adopted by the state within ninety days after the date of notification, the Administrator [of EPA] *shall promulgate such standard* pursuant to paragraph (4) of this subsection.” *Id.* (emphasis added). Section 303(c)(4) requires EPA to “promptly prepare and publish regulations setting forth [the] revised . . . water quality standard” and to promulgate that standard within 90 days of publishing. *Id.* § 1313(c)(4).

As the Ninth Circuit and district courts within the Ninth Circuit have consistently recognized, Section 304(c)(4) imposes on EPA a mandatory duty to promulgate a replacement water quality standard even though that paragraph does not include a date-certain deadline. *See, e.g., Idaho Conservation League Inc. v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991) (holding that a plaintiff’s suit seeking to force EPA to promulgate water quality regulations was not frivolous because Paragraph (4) contains “mandatory language”); *Nw. Env’t Advocs.*, 268 F. Supp. 2d at

1261 (holding that under Section 303(c)(4) “a state’s failure to submit revisions in a timely fashion triggers EPA’s nondiscretionary duty to act”); *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 549 (W.D. Wash. 1997) (“By the plain language of the statute, and under the cited authorities, the EPA’s duty under § [303](c)(4)(A) is mandatory.”).

Section 303(c)(4) requires EPA to (1) “promptly” prepare and publish a replacement standard where a state fails to do so within the 90-day period specified by Section 303(c)(3); and (2) promulgate that standard within 90 days of publishing. 33 U.S.C. § 1313(c)(3)–(4). The term “promptly” is not defined in the Clean Water Act. “[W]here words in a statute are not defined, they must be given their ordinary meaning.” *United States v. Granderson*, 511 U.S. 39, 71 (1994). “Promptly” indicates action performed—or at least initiated—without delay. *See, e.g.*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003) (defining “prompt” as “performed readily or immediately”); Random House Webster’s Unabridged Dictionary (2d ed. 2001) (defining “prompt” as “done, performed, delivered, etc., at once or without delay”); Black’s Law Dictionary (9th ed. 2009) (defining the verb form of “prompt” as “[t]o incite, esp. to immediate action,” and “immediate” as “[o]ccurring without delay; instant”). One district court that has examined the issue concluded that the EPA’s 588-day delay in promulgating a replacement standard under Section 303(c) was unlawful, based on the plain meaning of prompt (“without undue delay”), the purposes of the Act, and the procedures and timelines detailed in Section 303. *Raymond Proffitt Found. v. U.S. Env’t Prot. Agency*, 930 F. Supp. 1088, 1096–100 (E.D. Pa. 1996). Here, 1,645 days elapsed between EPA’s disapproval and the filing of Plaintiffs’ complaint, and 2,671 additional days have passed since then—a total of 4,316 days (twelve years). Yet nothing in the record suggests that EPA has taken any action toward developing a replacement standard—let alone promulgating one.

B. Idaho’s Removal of Its Prior Mercury Criteria Was a “Revision” of a Water Quality Standard Within the Meaning of Section 303(c).

Idaho’s removal of its chronic and acute numeric freshwater aquatic life criteria for mercury was a revision of those standards triggering EPA’s Section 303(c) duty to promulgate. EPA itself regarded Idaho’s mercury criteria removals as a “revision” of water quality standards within the meaning of Section 303(c). EPA’s Disapproval Letter refers to the removals as a “revision” and explains the removals as “inconsistent with [Clean Water Act Section] 303(c) and 40 CFR 131.11,” which govern state submissions of new and revised water quality standards. SOF ¶ 12. Earlier communications from EPA to IDEQ similarly characterize the removals as a “revision,” including in EPA’s 2004 comments on Idaho’s proposed rule. SOF ¶¶ 9–10. Thus, any argument by EPA that it does not consider Idaho’s action a revision of a water quality standard would be a *post hoc* interpretation, developed solely for litigation purposes and unsupported by any evidence. The Ninth Circuit has rejected the notion of deferring to agencies’ litigation positions interpreting statutes they are charged with administering. *See Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012); *see also Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 156 (1991) (holding that “agency ‘litigating positions’ are not entitled to deference when they are merely appellate counsel’s ‘*post hoc* rationalizations’ for agency action, advanced for the first time in the reviewing court”).

Moreover, IDEQ also understood the removal as a revision: the revision followed a negotiated rulemaking in response to a petition from the Idaho Mining Association urging IDEQ to adopt “revised mercury criteria,” SOF ¶ 7; IDEQ sought and responded to comments concerning the revision—including comments from EPA, SOF ¶ 11; IDEQ sought and received the state certification as required under 40 C.F.R. § 131.6 for EPA approval of revised water quality standards, *Id.*; and IDEQ submitted the revision to EPA, along with several other

revisions of the state's water quality standards, for review and approval pursuant to the Clean Water Act's scheme that governs the process for approving revised standards. *Id.*; *see also* 33 U.S.C. § 1313(c).

C. EPA's 2008 Letter Was a Section 303(c) Disapproval of Idaho's Revised Mercury Standard.

Under the plain terms of EPA's 2008 Disapproval Letter, EPA disapproved Idaho's revised criteria under the agency's Section 303(c) authority. EPA stated that it reviewed and disapproved Idaho's removal of acute and chronic numeric freshwater aquatic life criteria for mercury "[p]ursuant to [EPA's] authority under Section 303(c) of the Clean Water Act . . . and the implementing regulations at 40 CFR Part 131." SOF ¶ 12. Under Section 303(c)(3), if EPA disapproves a revised standard, the agency is required to specify necessary changes to ensure compliance with the Act, as it did here. 33 U.S.C. § 1313(c)(3); *see also* SOF ¶ 13. Accordingly, in its Disapproval Letter, the agency also specified potential changes necessary to "assure compliance with the requirements of Section 303(c)": (1) evaluating the protectiveness of EPA's recommended 304(a) numeric acute freshwater aquatic life criterion for mercury (1.4 µg/l); (2) evaluating the protectiveness of Idaho's previous numeric chronic freshwater aquatic life criterion for mercury (0.012 µg/l); (3) evaluating development of Idaho-specific numeric acute and chronic freshwater aquatic life criteria for mercury; and (4) evaluating the use of a combination of protective numeric water column values and numeric wildlife criteria appropriate for Idaho species. SOF ¶ 13. Plaintiffs are aware of no evidence in the record or otherwise showing that Idaho has actually taken any of EPA's recommended actions. SOF ¶ 16.

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D. Post-Disapproval Reversion to Standards Previously Approved by EPA Does Not Relieve EPA of Its Section 303(c)(4) Duty to Promulgate.

EPA may argue that it is relieved of its Section 303 duty to promulgate replacement standards because the agency's 2008 disapproval resulted in an automatic reversion to Idaho's previously adopted acute and chronic mercury criteria, approved by EPA in 1997. EPA explained in its 2008 Disapproval Letter that, until Idaho develops and adopts, and EPA approves, revisions to acute and aquatic life mercury criteria, the 1997-approved standards would remain in effect. SOF ¶ 15. EPA's Disapproval Letter provides no authority for its position that the mercury standards in Idaho revert to the previously approved standards. But, in any event, for EPA to use its "reversion" rationale to create an exception to its statutory duty to promulgate would contravene the plain terms and purpose of the Act. Moreover, it would contravene the intention of both the statute and the regulations that water quality standards provide adequate protection to aquatic life uses. In fact, EPA's more recent statements reflect the agency's own uncertainty about whether the 1997-approved standards are adequately protective.

Nothing in Clean Water Act Section 303 or EPA's regulations suggests that a state's removal of an EPA-approved standard is not a "revision" triggering EPA's Section 303(c)(4) duty to promulgate. *See* 33 U.S.C. § 1313; 40 C.F.R. §§ 131.20–131.21. And such a carve-out would contravene the purpose of the statute, as EPA's disapproval could leave the inadequate standards in place indefinitely. To "allow the agency's inaction to leave old standards or no standards in place" would "defeat[] the CWA's purpose." *Nw. Env't Advocs.*, 268 F. Supp. 2d at 1261. That is exactly what has occurred here, with respect to both the chronic criterion and the acute criterion for mercury.

Further, EPA's statements reflect the agency's own uncertainty about whether the 1997-approved standards were adequately protective in the first place. In 2004, EPA warned IDEQ

that the 1997-approved chronic criteria for mercury (0.012 µg/l) only “may” have been “protective of aquatic species in Idaho,” and recommended that Idaho retain the 1997 chronic criterion only “until a chronic aquatic life mercury criterion that is protective [of] species in Idaho is developed by the State of Idaho or by EPA.” SOF ¶ 10. In addition, EPA recommended that Idaho adopt EPA’s recommended acute aquatic life criteria of 1.4 µg/l until Idaho or EPA developed an adequately protective chronic criterion. *Id.* The 1997 acute criteria—still in effect according to EPA—is 2.1 µg/l *id.* ¶ 14, which is even less protective than EPA’s recommended criteria. EPA’s warnings and recommendations to IDEQ demonstrate EPA’s uncertainty about the 1997-approved standards that EPA contends remain in effect today.

Moreover, Idaho does not even appear to believe the 1997-approved standards are currently the operative water quality standards within the State of Idaho. Recently, Idaho published a document entitled “WQS Triennial Review – Issue Paper: Data and Information Needs Necessary for the State of Idaho to Consider Adoption of EPA 304(a) Aquatic Life Criteria for Mercury.” SOF ¶ 15. In this document, IDEQ plainly states its view of the status of mercury criteria: “DEQ does not have aquatic life criteria for mercury.” *Id.*; *see also id.* (“Currently, Idaho has no aquatic life criterion in rule.”). Irrespective of EPA’s position that Idaho’s aquatic life mercury criteria revert to the 1997 standards, Idaho appears to believe it has *no criteria whatsoever*, further illustrating the importance of EPA’s obligation to promulgate standards for the state.

II. Plaintiffs Have Standing to Pursue This Claim.

Plaintiffs have standing to pursue their claim against EPA. To demonstrate standing, a plaintiff must show: (1) it has suffered an “injury in fact”; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to speculative, that the injury will be redressed

by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Plaintiffs have standing to bring this action on behalf of their injured members because the injuries at stake are germane to Plaintiffs' purposes. *See id.* at 181; *see also* Decl. of Nina Bell ("Bell Decl."), ¶¶ 2–15; Decl. of Justin Hayes ("Hayes Decl."), ¶¶ 3, 6–9.

The "injury in fact" requirement in environmental cases is satisfied if an individual adequately shows an aesthetic or recreational interest in a particular place or animal and shows reasonable concerns that those interests are impaired by a defendant's conduct. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147, 1151 (9th Cir. 2000); *Laidlaw*, 528 U.S. at 183–84. Plaintiffs' members derive recreational and aesthetic enjoyment from Idaho rivers and streams and their wildlife; their use and enjoyment of these waters is diminished by EPA's failure to promulgate sufficiently protective water quality criteria for mercury in Idaho and by the members' reasonable concerns about EPA's failure. *See* Hayes Decl. ¶¶ 2, 4–5, 10–18, 20; Decl. of John Robison ("Robison Decl."), ¶¶ 2–11, 13; Decl. of Karen Balch ("K. Balch Decl.") ¶¶ 2, 5, 8–20; Decl. of Olin Balch ("O. Balch Decl.") ¶¶ 2, 5–19.

These injuries stem from EPA's conduct addressed herein and are therefore "fairly traceable" to the violations. *See Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994–95 (9th Cir. 2000); *Ecological Rights Found.*, 230 F.3d at 1152. The injuries complained of are redressable by an order from the Court enjoining EPA from violating the Clean Water Act, and requiring EPA to fulfill its mandatory duty to promulgate sufficiently protective mercury criteria in the face of Idaho's failure to do so. *See Covington v. Jefferson Cnty.*, 358 F.3d 626, 639 (9th Cir. 2004); *Laidlaw*, 528 U.S. at 185–88; *see also* Hayes Decl. ¶ 19; Robison Decl. ¶ 12; K. Balch Decl. ¶ 21; O. Balch Decl. ¶ 20.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant summary judgment to Plaintiffs on Claim Six, find that EPA violated its mandatory duty under the Clean Water Act, and order EPA to promulgate mercury criteria for Idaho by a date certain.⁵

Dated this 9th day of October, 2020.

Respectfully submitted,

s/ Allison LaPlante

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⁵ Plaintiffs respectfully request the opportunity to submit further briefing on the question of remedy once liability has been decided.

CERTIFICATE OF SERVICE

I, Allison LaPlante, hereby certify that, on October 9, 2020, I electronically filed the foregoing document in the above-captioned action with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel of record in this matter.

s/Allison LaPlante
Allison LaPlante
Counsel for Plaintiffs