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The Honorable Marsha J. Pechman

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

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

No. 2:20-CV-01362 MJP

PLAINTIFF'S RESPONSE TO MOTION FOR A STAY PENDING APPEAL

NOTING DATE: June 24, 2022

I. INTRODUCTION

It is strange to settle a case and then continue to litigate it. But such is the strange path of the U.S. Environmental Protection Agency ("EPA") in this case. As stated in EPA's motion for an indefinite stay (ECF 71), the parties have reached a settlement in principle and are only awaiting final approval by senior counsel at the Department of Justice ("DOJ"). Once approved, we hope the settlement will be promptly finalized; but EPA's insistence on filing and litigating the instant motion certainly casts a shadow over that process.

Regardless, the crux of EPA's motion is baseless. Throughout its motion, EPA paints the remedy ordered by this Court as an unexpected shot out of left field, arguing that Northwest

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Environmental Advocates ("NWEA") never asked the Court for an order directing EPA to make a necessity determination, and complaining that it never had a fair chance to present evidence opposing that remedy. All this is false. The motion should be denied.

II. ARGUMENT

A. EPA's Request to Shorten Time Violates the Local Rules.

As an initial matter, EPA filed its motion for an indefinite stay on June 15, 2022, noting it for consideration on Friday, June 24, 2022. Under the local rules, NWEA's response is due Wednesday, June 22, 2022. *See* LCR 7(d)(2). Yet, EPA requests that this Court "act quickly on the present Motion for a Stay—ideally by June 21, 2022." ECF 71 at 1. This request to shorten time violates the plain language of LCR 6(b)—"Motions to shorten time have been abolished."

We understand EPA is worried about going beyond June 27, 2022 without complying with this Court's order on summary judgment, requiring it to make a necessity determination by that date. *See* ECF 57 at 21. But if EPA were truly concerned about violating the Court's 180-day deadline, then it should have either filed a motion earlier, or taken steps to comply. The remedy for EPA's tardiness is not to ask for shortened time on its belated motion (in violation of LCR 6(b)), or for a ruling before NWEA has an opportunity to respond.[1]

B. EPA Is Not "Entitled" to an Indefinite Stay.

In Section I.A of its motion, EPA argues that it is "entitled" to an indefinite stay pending appeal. ECF 71 at 2–6. The basis for this bold assertion, EPA argues, is that it is "likely to prevail" before the Ninth Circuit that this Court exceeded its authority when it ordered EPA to make a necessity determination. In support, EPA argues that NWEA never requested an order

[1] We also note that EPA's proposed order (ECF 71-1) describes its motion as a "joint motion." We agreed to join EPA's motion for a 60-day extension filed on June 13, 2022 (ECF 70), to allow time to finalize the settlement. We did *not* agree to join EPA's unilateral motion for an indefinite stay.

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1 requiring it to make a necessity determination, but only that EPA make a "new decision" on
2 NWEA's rulemaking petition.[2] EPA argues that the Court acted improperly by ordering it to
3 "take the action" that NWEA requested in its original petition—namely, a *positive* necessity
4 determination that new water quality criteria are necessary.[3] EPA also seeks to justify its failure
5 to present *any* evidence on summary judgment concerning the administrative burden of making a
6 necessity determination, complaining that it had no idea that this remedy was on the table.[4] These
7 arguments are wrong, and simply ignore what NWEA requested in its summary judgment
8 briefing and in its complaint.
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10 It is true that, throughout this case, NWEA has asked for an order directing EPA to make
11 a "new decision" on NWEA's rulemaking petition, specifically that portion of the petition asking
12 EPA to update Washington's woefully outdated aquatic life criteria for toxic pollutants.[5] NWEA
13 repeated this request in its summary judgment briefing.[6] But EPA errs in reading this request as
14 NWEA's having asked *only* for a new decision, without any regard for the content of this new
15 decision, or what must be included to make it valid under the Clean Water Act. As discussed
16 below, NWEA has been clear not only that EPA should have to make a new decision, but also
17 that such a decision must specifically evaluate whether new criteria are necessary to protect the
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[2] *See, e.g.,* ECF 71 at 5 (EPA's arguing "the Court ordered relief that was neither requested nor briefed by the parties" and that "Plaintiff did *not* request that the Court order EPA to make a necessity determination") (emphasis in original).

[3] *See* ECF 71 at 4 (EPA's arguing "[t]he effect of the Court's Order here was, in essence, to require EPA to grant Plaintiff's Petition by requiring EPA to take the action that the Petition requested—i.e., making a necessity determination").

[4] *See* ECF 71 at 6 (EPA's arguing that "[o]rdering a particular remedy without giving the party subject to that remedy notice and an opportunity to respond is reversible error").

[5] *See, e.g.,* ECF 1 (complaint) at 36, ¶3 (NWEA's requesting an order directing EPA "to render a new decision on the portion of NWEA's Petition requesting that EPA update the State of Washington's aquatic life criteria for toxic pollutants by a date certain").

[6] *See* ECF 52 (motion for summary judgment) at 30 (asking the Court to "vacate EPA's denial of NWEA's Petition, and remand the Petition back to EPA to make a new decision on the Petition within 180 days of the Court's order").

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state's aquatic species, based on sound scientific rationale. In other words, it has been NWEA's consistent position that EPA should be required to make a necessity determination.

This can be seen, first, in NWEA's complaint. After detailing Washington's decades-long failure to update its aquatic life criteria (despite EPA's repeatedly urging the state to do so), and after detailing how Washington's current criteria either fail to limit harmful toxic pollutants or fall far short of federal guidelines, Claim 1 of NWEA's complaint makes specific allegations as to why, exactly, EPA's response to NWEA's petition was arbitrary and capricious. First among them, NWEA alleged that EPA's response was arbitrary and capricious precisely because EPA "did not make a determination as to whether new or revised aquatic life criteria are necessary to meet the requirements of the Clean Water Act." ECF 1 at 34, ¶74.A. It was this failure, above all others, that made EPA's response arbitrary and capricious.

NWEA's complaint went on to allege that "EPA failed to adequately consider and/or ignored relevant scientific evidence and studies to ascertain whether updates to Washington's aquatic life criteria for toxic pollutants are necessary, and its denial of NWEA's Petition was not based on sound scientific rationale." *Id.*, ¶74.E. Here too, NWEA reiterated the fundamental error in EPA's petition response—that it ignored the science and failed to evaluate whether new criteria are necessary to protect the state's aquatic species.

Later, NWEA's summary judgment motion advanced this claim, arguing specifically that "[b]ecause EPA failed to evaluate whether new or revised aquatic life criteria are necessary to protect aquatic life from a *scientific* perspective, EPA's denial of NWEA's Petition was unreasonable, arbitrary, capricious, and not grounded in the statute." ECF 52 at 18 (emphasis in original). And in our response/reply brief, NWEA argued that in order to render a valid decision on the rulemaking petition—one that is grounded in the Clean Water Act, as Supreme Court

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precedent requires—EPA *must* evaluate whether new criteria are needed based on sound scientific rationale. Specifically, we argued:

> EPA's decision must be based on sound science regardless of the nature of the determination—positive, negative, or "not now." . . . Indeed, even with a "not now" decision, the agency must consider, based on science and applying a sound scientific rationale, whether existing criteria are sufficient to protect designated uses as a necessary prerequisite to making an informed decision about how to allocate resources.

ECF 55 at 11.[7]

NWEA made the argument in the block quote above in response to EPA's statement that it need only consider science when making a "positive" necessity determination. *See id*. at 10. Our point was that regardless of the outcome of EPA's response to NWEA's petition, EPA must evaluate whether new criteria are necessary from a scientific perspective to protect aquatic species. The bottom line is that NWEA consistently asked not only for a new decision on its rulemaking petition, but also that EPA be required to address the fundamental question of whether new criteria are necessary based on existing data and sound scientific rationale. That is what we asked for in our complaint, our motion for summary judgment, and our response to EPA's motion for summary judgment. It was our consistent position throughout the case.

In its order granting our motion for summary judgment, we believe the Court agreed with this argument. The Court did not order EPA to make a *positive* necessity determination—*i.e.,* to determine that new criteria are, in fact, necessary to protect aquatic species.[8] But by requiring EPA to make a necessity determination within 180 days—leaving open that EPA could ultimately

[7] *See also* ECF 55 at 12 ("[T]o reasonably assess the degree to which Washington's existing aquatic life criteria are failing to protect that life, EPA would have needed to evaluate the science and data regarding the presence of toxic pollutants in Washington's waters and the impacts of those pollutants on aquatic species at the current criteria levels. Only with this information could EPA have made a reasonable, informed decision about how to proceed.").

[8] *See* ECF 57 at 10 (explaining that "NWEA wants EPA to make a necessity determination, not necessarily a positive or negative one").

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make a positive *or* negative determination—the Court granted the relief we requested. By ordering EPA to make a necessity determination, the Court directed EPA to make a decision as to whether new criteria are needed from a scientific perspective. That is what we requested. That is what the Court ordered. And that is what we believe the Court meant when it directed EPA to make a necessity determination.

Now, EPA argues that the Court erred by granting relief that we never asked for. Specifically, EPA says that while the Court ordered it to make a necessity determination, all NWEA asked for was a new "decision" on the petition. *See* ECF 71 at 5 (arguing "the Court ordered relief that was neither requested nor briefed by the parties" and that "Plaintiff did *not* request that the Court order EPA to make a necessity determination") (emphasis in original). But, as discussed above, this is not the case. We argued consistently that EPA should be required to make a new decision on the petition, *and* that the new decision must evaluate whether new criteria are necessary based on sound scientific rationale. That is what we asked for. That is what the Court ordered.

Next, EPA argues that the Court erred by effectively ordering EPA to grant the relief that NWEA requested in its original rulemaking petition. *See* ECF 71 at 4 (arguing "[t]he effect of the Court's Order here was, in essence, to require EPA to grant Plaintiff's Petition by requiring EPA to take the action that the Petition requested—*i.e.,* making a necessity determination"). But our rulemaking petition asked for a positive necessity determination—an affirmative ruling that new criteria are necessary. This Court, in contrast, did not specify that EPA must make a positive or negative determination. By requiring EPA to make a necessity determination—positive *or* negative—the Court simply directed EPA to evaluate, based on sound science, whether new criteria are needed to protect the state's aquatic species.

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EPA also complains that it never had an opportunity to present argument or evidence on whether a necessity determination should be required, because that remedy was never asked for. *See* ECF 71 at 6 (arguing that "[o]rdering a particular remedy without giving the party subject to that remedy notice and an opportunity to respond is reversible error"). But again, EPA is wrong. We argued consistently that EPA should be required to make such a determination in response to our petition. Yet, EPA never proffered evidence that such an order would present substantial administrative burdens.[9] On summary judgment, EPA argued that its petition response was legally sufficient—arguments this Court rejected, and which it does not raise again in its motion for a stay. But it *never* argued or presented evidence that a necessity determination would be onerous or present significant administrative burdens. This is EPA's failing, not ours.

Finally, EPA states that the Court erred in directing the agency to evaluate the adequacy of existing criteria on remand, arguing that the "proper remedy" is simply to "remand . . . to the agency for reconsideration" with no further instruction. *See* ECF 71 at 3. But this ignores that instructions on remand are indeed appropriate in "exceptional circumstances," though, as the Court noted, "[t]here are no bright lines on defining an 'exceptional case.'" ECF 57 at 19 (citing *Sierra Club v. U.S. E.P.A.*, 346 F.3d 955, 963 (9th Cir. 2003)).

Despite the lack of bright lines, the Court rightly found that this is, indeed, an "exceptional case" warranting instructions on remand. Specifically, the Court found that there has been "substantial and unjustified delay on the part of EPA." *Id.* at 20. The Court found that Washington's existing aquatic life criteria are woefully outdated, "last updated in 1992" with "no

[9] *See* ECF 57 (order on summary judgment) at 14 ("EPA has also not identified any way in which the necessity determination process would divert its resources in a counterproductive manner. Nor has EPA provided any evidence of how time- or resource-intensive it would be to make the necessity determination that NWEA demands").

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1 assurances of a timely set of new or revised aquatic life WQS" in the future. *Id*. The Court found
2 that "given the threats to various species that EPA has itself acknowledged, continued delay
3 *cannot* be squared with the CWA's purpose of protecting aquatic life." *Id*. (emphasis added).
4 Ultimately, "Washington's aquatic life WQS remain outdated," "future standards appear years
5 away," and "EPA has not timely acted as a backstop." *Id*. All of this justifies a specific order
6 requiring EPA to evaluate existing data and to determine whether Washington's water quality
7 criteria for toxic pollutants are adequate to protect aquatic species, many of which are critically
8 imperiled precisely because the state and EPA have failed so badly in their Congressionally-
9 mandated duties under the Clean Water Act. As the Court rightly concluded, "[t]here is *no*
10 reasoned basis to allow further delay to stand in the way of EPA making a necessity
11 determination." *Id*. at 21 (emphasis added).

12 Indeed, the Court was generous in holding that EPA could avoid the 180-day deadline by
13 moving the Court for an extension, supported by "specific, detailed explanations of why
14 additional time is necessary and what tasks remain to be performed." ECF 57 at 21.[10] EPA has
15 not availed itself of that process. But the record fully supports the Court's imposition of specific
16 instructions on remand, including that EPA must make a necessity determination—that is, that it
17 must determine whether new criteria are necessary based on sound scientific rationale.

18 Because EPA is not likely to succeed in its appeal attacking the validity of the Court's
19 remedy order—especially in light of EPA's abject failure to present evidence substantiating its
20 claims of administrative hardship—its motion for an indefinite stay should be denied.
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25 [10] *See also id*. at 21 ("EPA does not content that it cannot complete the necessity determination in
26 180 days or that it needs to engage in substantial fact finding or review that might exceed that time frame. Nor does it contend that the necessity determination requires any expertise beyond what the Agency already possesses as part of [its] mandate to implement and enforce the CWA.").

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C. EPA Fails to Present Specific Evidence of Hardship.

In Section I.B of its motion (ECF 71 at 7–9), EPA argues that if it is required to make a necessity determination—the deadline for which, it complains, is now "less than two weeks away" (*id*. at 7)—it will suffer "irreparable injury" in the form of severe administrative burdens. Yet, the evidence presented by EPA—the declaration of Deborah G. Nagle (ECF 72)—falls significantly short of proving such a claim.

First, Ms. Nagle gives no indication that EPA has undertaken *any* meaningful steps to make a necessity determination or to determine an actual, realistic scope of work. Throughout, Ms. Nagle purports to describe (counterfactually) the steps that EPA "would" or "could" take to make a determination, but nowhere does she identify steps that the agency actually has taken to date.[11] The one exception appears at paragraph 14 of her declaration, where Ms. Nagle reports that EPA has reviewed available data from the Toxics Release Inventory, state water quality assessments, and various jeopardy determinations under the federal Endangered Species Act. *See* ECF 72 at 6–7, ¶14. But there is no discussion of what actual information was gleaned or what pollutants this information relates to despite making the point that this must be a pollutant-by-pollutant assessment. EPA complains that the deadline is only two weeks away, but proffers no explanation for its failure to date to take any concrete steps to evaluate the need for new criteria for any particular pollutant or group of pollutants. This falls short of the Court's admonition that, to justify an extension, EPA must provide "specific, detailed explanations of why additional time is necessary and what tasks remain to be performed." ECF 57 at 21. The Court's order

[11] *See, e.g.,* ECF 72 at 2, ¶ 4 ("I am writing to explain the analytic steps that the Agency *would* take . . ."); *id*. at 3, ¶ 6 ("*would* be"); *id*., ¶ 7 ("*would* plan" and "*would* use"); *id*. at 4, ¶ 8 ("*could* look" and "*would* rely"); *id*. at 4 9 ("*would* assess" and "*would* entail"); *id*. at 4, ¶10 ("*would* require"); *id*. at 6, ¶13 ("*would* undergo") (emphases added).

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contemplated that EPA would take concrete action before the 180-day deadline, which EPA has failed to do.

Second, Ms. Nagle paints with an entirely broad brush. NWEA's rulemaking petition asked EPA to make a necessity determination on more than 40 pollutants ranging from naturally occurring organic compounds, to metals, pesticides and biocides, and chemicals used in the manufacturing industry.[12] Ms. Nagle focuses on one subset of these—"banned chemicals"—to illustrate the purported dearth of information concerning the presence of these toxins in Washington waters. *See* ECF 72 at 4, ¶8. But she fails to say whether EPA has sufficient data on any *other* pollutants (other than "banned chemicals") to make a necessity determination. Is the Court really to believe that the nation's top environmental agency—routinely called upon to assess the health of aquatic species in Washington and the adequacy of state water quality criteria, and routinely sounding the alarm of toxic pollution in Puget Sound and the Columbia River Basin—has *no* information about the presence of *any* toxic pollutants addressed in NWEA's petition? Such a conclusion is highly dubious, especially in light of the existing, robust scientific record concerning the profound impact that toxic pollutants are already having on the state's most iconic species, including Southern Resident killer whales, harbor seals, and salmon—much of which has come from EPA's own lips. *See generally* ECF 1-2 (NWEA follow-up letter, collecting sources).[13] An indefinite stay should only be granted (if at all) on a pollutant-

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[12] These pollutants include acrolein, aldrin, aluminum, ammonia, arsenic, cadmium, carbaryl, chloride, chlorine, chlorpyrifos, chromium III, chromium IV, copper, cyanide, DDT (and its metabolites), demeton, diazinon, kieldrin, diazinon, endrin, endosulfan, guthion, heptachlor epoxide, hexachlorocyclohexane (lindane), hydrogen sulfide, iron, lead, malathion, mercury/methylmercury, methoxychlor, mirex, nickel, nonylphenol, parathlon, pentachlorophenol (PCB), selenium, silver, toxaphene, tributyltin, zinc. *See* ECF 1 at 17–25 (Tables A–B); ECF 1-2; ECF 1-3.

[13] *See also* ECF 57 at 4–5 ("As EPA has noted, Puget Sound's Southern Resident Orcas are some of the most contaminated marine mammals in the world because they feed on contaminated marine life, particularly Chinook salmon, thereby bioaccumulating toxins that enter the water from industrial activities

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by-pollutant basis after EPA demonstrates the current state of knowledge and data, and future steps needed for each one.

Third, Ms. Nagle speculates that if EPA were to make a necessity determination for *all* of the pollutants, then it "may find" that for "some pollutants," Washington's current criteria are already protective. ECF 72 at 5, ¶11. It is damning that even based on sheer speculation, Ms. Nagle can only bring herself to opine that criteria for "some pollutants" may already be sufficient. As NWEA has repeatedly demonstrated in this case, Washington waters are facing an onslaught of toxic pollution, putting many species in jeopardy. *See, e.g.,* ECF 57 at 20 (discussing "threats to various species that EPA has itself acknowledged"). Even if EPA is correct that criteria for "some pollutants" are already protective, this does not justify an indefinite stay on all pollutants. If EPA desires a stay, then it should make some attempt to inform the Court as to which pollutants pose the greatest risk, which criteria require immediate action, and which criteria can be safely deferred without further jeopardizing the state's aquatic species.

Finally, as explained in the accompanying declaration of Nina Bell, Executive Director of NWEA ("Bell Decl."), EPA paints a "decidedly false picture" about the availability of data concerning the presence of toxic pollutants in Washington's waters, and the resources at EPA's disposal to evaluate the protectiveness of the state's existing criteria. Bell Decl., ¶28. EPA claims that information needed to conduct a necessity determination can be "challenging to obtain or non-existent." ECF 72 at 4, ¶8 (Deborah G. Nagle declaration). Yet, there are many sources of data and information relevant to EPA's necessity determination that are wholly omitted from Ms. Nagle's declaration. *See* Bell Decl., ¶¶ 7–39. This undermines EPA's claim that it will suffer

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and surface water runoff. . . .Washington, too, has identified the need to update its aquatic life standards for pollutants most harmful to killer whales and their prey.") (internal quotations omitted).

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"irreparable injury" absent an indefinite stay, *see* ECF 71 at 7, and illustrates that EPA has not even begun to evaluate the steps and resources needed to make a necessity determination.

For all of the reasons above, EPA has not demonstrated the need for an indefinite stay on all pollutants based on administrative burden. Such relief should be denied absent a more detailed evidentiary showing on the issues above.

D. NWEA Will Be Prejudiced by an Indefinite Stay. The Public Interest Also Does Not Favor an Indefinite Stay.

Finally, in Sections I.C and I.D, EPA argues that NWEA will not be prejudiced by an indefinite stay and that a stay is in the public interest. *See* ECF 71 at 9–10. Again, EPA is wrong. EPA argues that we did not request a necessity determination and so will not be harmed by a stay (*id.* at 9), but as shown above, that is simply false (the Court ordered the exact remedy we requested). EPA states that Washington has now begun its decades-overdue triennial review process, making an update to aquatic life criteria its "next priority." *Id.* But as the Court discussed, this belated process presents "no assurances of a timely set of new or revised aquatic life WQS." ECF 57 at 20. *See also* Bell Decl., ¶¶ 40–50 (discussing Washington's long delay and lack of assurances). EPA also says that the public interest does not favor imposing unnecessary administrative burdens on EPA. *See* ECF 71 at 9–10. But based on the agency's paltry evidentiary showing, the demonstrated need for new criteria, and the Congressionally-mandated priority of protecting the nation's waters in the Clean Water Act, the public interest lies in EPA performing its long-overdue role of ensuring protective criteria.

III. CONCLUSION

For the reasons above, NWEA respectfully requests that the Court deny EPA's motion for an indefinite stay on appeal.

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Dated this 22nd day of June, 2022.

Respectfully submitted,

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