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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.

COMPLAINT

Pursuant to Clean Water Act Section
505(a)(2), 33 U.S.C. § 1365(a)(2)

NATURE OF THE CASE

1. This is a civil action brought by plaintiff Northwest Environmental Advocates (“NWEA”) challenging a failure by defendant United States Environmental Protection Agency (“EPA”) to discharge its nondiscretionary duty to review and either approve or disapprove a proposed Total Maximum Daily Load (“TMDL”) submitted by the State of Washington for the Deschutes River, Percival Creek, and tributaries to Budd Inlet (herein, “Deschutes TMDL”).

1 incorporated under the laws of Oregon in 1981 and organized under section 501(c)(3) of the
2 Internal Revenue Code. NWEA's principal place of business is Portland, Oregon. NWEA's
3 mission is to work through advocacy and education to protect and restore water and air quality,
4 wetlands, and wildlife habitat in the Pacific Northwest, including Washington. NWEA employs
5 advocacy with administrative agencies, community organizing, strategic partnerships, public
6 record requests, information sharing, lobbying, and litigation to ensure better implementation of
7 the laws that protect and restore the natural environment. NWEA has participated in the
8 development of CWA programs in the State of Washington for many years, including the state's
9 TMDL program by, *inter alia*, having brought suit in 1991 against EPA for its failure to establish
10 TMDLs for the State of Washington and serving on EPA's TMDL federal advisory committee
11 from 1996 to 1998.
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14 7. NWEA's members regularly use and enjoy the waters of the Deschutes River
15 basin, Capitol Lake, and Budd Inlet. NWEA's members regularly use and enjoy these waters and
16 adjacent lands and have definite future plans to continue using them for recreational, scientific,
17 aesthetic, spiritual, conservation, educational, employment, and other purposes. Many of these
18 interests revolve around viewing sensitive salmonid species and other aquatic species that are
19 under threat by pollution in the covered waters. The use and enjoyment that NWEA's members
20 derive from viewing these species, and otherwise recreating on or near and enjoying the waters of
21 the Deschutes River basin, Capitol Lake, and Budd Inlet, is diminished by the effects of pollution
22 in the covered waters, including pollution relating to temperature, human pathogens, dissolved
23 oxygen, pH, nutrients, and fine sediment. NWEA's members would derive more benefits and
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1 enjoyment from their use of these waters if these pollutants were not adversely affecting water
2 quality and aquatic and aquatic-dependent wildlife in these waters.

3 8. Some of NWEA’s members derive or used to derive recreational and aesthetic
4 benefits by fishing in the Deschutes River. These members have curtailed their fishing in the
5 Deschutes River, or no longer fish in the River, due in part to concerns regarding pollutants and
6 their effect on fisheries, including concerns relating to high water temperatures, low dissolved
7 oxygen, and high levels of fine sediment and human pathogens.

9 9. Successful completion of a TMDL to address these pollution problems is a critical
10 step in fully implementing the goals of the CWA for these waters, fully protecting salmonids and
11 other aquatic and aquatic-dependent species, and improving water quality in the covered and
12 affected waters. EPA’s failure to approve or disapprove the TMDL puts these species at risk and
13 threatens or negatively affects the interests of NWEA’s members.

14 10. The recreational, aesthetic, conservation, employment, scientific, educational,
15 spiritual, and other interests of NWEA and its members have been, are being, and unless relief is
16 granted, will continue to be adversely affected and irreparably injured by EPA’s failure to comply
17 with the CWA. NWEA’s injury-in-fact is fairly traceable to EPA’s conduct and would be
18 redressed by the requested relief.

19 11. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is
20 the federal agency charged with administration of the CWA, and specifically with approving or
21 disapproving state TMDL submissions under Section 303(d)(2) of the CWA, 33 U.S.C. §
22 1313(d)(2).

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LEGAL BACKGROUND

The Clean Water Act and Water Quality Standards

12. Congress adopted amendments to the CWA in 1972 in an effort “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The primary goal of the CWA is to eliminate the discharge of pollutants into navigable waters entirely; also established is “an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” *Id.* § 1251(a)(1–2).

13. To meet these statutory goals, the CWA requires states to develop water quality standards that establish, and then protect, the desired conditions of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards must be sufficient to “protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA].” *Id.* § 1313(c)(2)(a). Water quality standards establish the water quality goals for a waterbody. 40 C.F.R. §§ 131.2, 131.10(d). EPA is charged with approving or disapproving a state’s water quality standards. *See* 33 U.S.C. § (c)(2)(a), (3).

14. Among other things, water quality standards serve as the regulatory basis for establishing water quality-based controls over point sources, as required by sections 301 and 306 of the CWA, 33 U.S.C. §§ 1311 & 1316. A point source is a “discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges are regulated under National Pollutant Discharge Elimination System (“NPDES”) permits, which require point sources to meet both technology-based effluent limitations and “any more stringent

1 limitation . . . necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C). Water
2 quality standards are thus integral to the regulation of point source pollution.

3 15. Water quality standards also are used to establish measures to control nonpoint
4 sources pollution. Unlike point source pollution, nonpoint source pollution is generally
5 considered to be any pollution that cannot be traced to a single discrete conveyance. Examples
6 include runoff from agricultural or forestry lands and increased solar radiation caused by the loss
7 of riparian vegetation. Congress did not establish a federal permitting scheme for nonpoint
8 sources of pollution, such as pollution from timber harvesting and agriculture. Instead, Congress
9 assigned states the task of implementing water quality standards for nonpoint sources, with
10 oversight, guidance, and funding from EPA. *See, e.g.*, 33 U.S.C. §§ 1288, 1313, 1329. Even so,
11 water quality standards apply to all pollution sources, point and nonpoint alike. “[S]tates are
12 required to set water quality standards for *all* waters within their boundaries regardless of the
13 sources of the pollution entering waters.” *Pronsolino v. Nastri*, 291 F.3d 1123, 1127 (9th Cir.
14 2002) (emphasis in original).

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17 ***Total Maximum Daily Loads***

18 16. In addition to serving as the regulatory basis for NPDES permits and non-point
19 source controls, water quality standards are the benchmarks by which the quality of a waterbody
20 is measured. In particular, water bodies that do not meet applicable water quality standards, or
21 cannot meet applicable standards after the imposition of technology-based effluent limitations on
22 point sources, are deemed to be “water quality limited” or “impaired” and placed on a list of such
23 waters compiled under Section 303(d)(1)(a) of the CWA (known colloquially as the “303(d)
24 list”). *See* 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.2(j). States must then develop TMDLs for
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1 all 303(d)-listed waters in order to establish the scientific basis for cleaning up water pollution
2 that exceeds water quality standards.

3 17. A TMDL is the total daily loading of pollutants for a particular waterbody or
4 segment. *See* 40 C.F.R. §130.2(i). A TMDL “shall be established at a level necessary to
5 implement the applicable water quality standards with seasonal variation and a margin of safety
6 which takes into account any lack of knowledge concerning the relationship between effluent
7 limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C). The total amount of pollutants that
8 may enter a waterbody while still meeting water quality standards is called “loading capacity.” 40
9 C.F.R. § 130.2(f). TMDLs for individual water bodies or segments are often bundled together by
10 basin, subbasin, or watershed in the same analytical document.

11
12 18. After calculating a waterbody’s loading capacity, a TMDL then distributes
13 portions of the total loading capacity to individual sources of pollution or sectors of pollution
14 sources. These allocations include both “load allocations” and “wasteload allocations,” for point
15 and nonpoint sources of pollution respectively. 40 C.F.R. § 130.2(i). A wasteload allocation is
16 “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or
17 future point sources of pollution.” *Id.* at § 130.20(h). A load allocation is “[t]he portion of a
18 receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint
19 sources of pollution or to natural background sources.” *Id.* at § 130.20(f). In essence, the purpose
20 of load and wasteload allocations is to allocate the total amount of pollution that may enter a
21 waterbody between all the sources of pollution, including both point and nonpoint sources of
22 pollution, thereby restricting pollution inputs sufficiently to attain and maintain water quality
23 standards.
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1 19. As with water quality standards, states must submit TMDLs to EPA for approval
2 or disapproval under section 303(d) of the CWA. *See* 33 U.S.C. § 1313(d)(2). Section 303(d)
3 requires that within 30 days after submission EPA either approve the TMDLs or disapprove
4 them. *Id.* EPA's duty to either approve or disapprove the TMDLs within 30 days of submission is
5 a non-discretionary duty under the CWA.
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7 20. If EPA disapproves a state-submitted TMDL, it must then establish a replacement
8 TMDL within 30 days. *Id.*

9 21. Upon EPA approval or promulgation of a TMDL, all future NPDES permits must
10 be consistent with the TMDL's wasteload allocations for point sources. 40 C.F.R. § 130.2. The
11 approved load allocations serve as the basis for state and local programs for controlling nonpoint
12 source pollution, including state programs that receive federal funds under section 319 of the
13 CWA, 33 U.S.C. § 1329. Once EPA approves a TMDL, the state must also incorporate the
14 TMDL into its "continuing planning process" under section 303(e) of the CWA. 33 U.S.C. §
15 1313(e)(3)(C).
16

17 ***The CWA Citizen Suit Provision***

18 22. Section 505 of the CWA provides a private cause of action for citizens to enforce
19 the procedural and substantive mandates and prohibitions of the CWA. *See* 33 U.S.C. § 1365.
20 Among other things, this provision provides that "any citizen may commence a civil action on his
21 own behalf . . . against the Administrator [of EPA] where there is alleged a failure of the
22 Administrator to perform any act or duty under [the CWA] which is nondiscretionary with the
23 administrator." 33 U.S.C. § 1365(a)(2). In such an action, "[t]he district courts shall have
24 jurisdiction . . . to order the Administrator to perform such act or duty." 33 U.S.C. § 1365(a).
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23. Under Section 303(d)(2) of the CWA, EPA has a nondiscretionary duty to approve or disapprove a proposed TMDL within 30 day of submission. See 33 U.S.C. § 1313(d)(2). See also *Ohio Valley Envtl. Coal., Inc. v. McCarthy*, 2017 WL 600102 *18 (S.D. W.Va. Feb. 14, 2017) (“EPA has a nondiscretionary duty to approve or disapprove within thirty days a TMDL submission”).

FACTUAL BACKGROUND

The Deschutes TMDL

24. Washington’s Deschutes River begins in the Bald Hills of the Gifford Pinchot National Forest (west of Mt. Rainier), travels down through foothills and the cities of Tumwater and Olympia, passes a dam that converted the former estuary into Capitol Lake, and ultimately discharges to the marine waters of Budd Inlet and the Puget Sound. The Deschutes River and other tributaries to Budd Inlet are protected, *inter alia*, by Washington water quality standards for temperature, bacteria, dissolved oxygen, pH, and fine sediment. Some of these water quality standards are intended to protect human use of the covered waters (*e.g.*, bacteria). Others are intended to protect sensitive aquatic life uses such as rearing, migration, and spawning of salmon, steelhead, trout, and other aquatic life uses (*e.g.*, temperature, pH, dissolved oxygen, and fine sediment).

25. Exceedances of some of these water quality standards can be harmful to human health—for example, excess fecal coliform can indicate the presence of water-borne human illnesses and pathogens (*e.g.*, hepatitis) associated with human waste and waste from other warm-blooded animals. Exceedances of other water quality parameters can harm important fish and shellfish populations that depend on the Deschutes River watershed for survival. Such

1 exceedances result in a failure to attain the Clean Water Act’s goal of achieving water quality that
2 provides for protection and propagation of fish, shellfish, and wildlife and recreation in and on
3 the water.

4 26. For example, excess temperature can lead to depressed survival rates among
5 salmonids due to adverse physiological and behavioral changes such as increased metabolic rates,
6 reduced swimming performance, impairment of predator avoidance, and increased incidence of
7 disease. Temperature often has a synergistic or additive effect by increasing the toxicity of other
8 pollutants. Temperature also contributes to lower levels of dissolved oxygen in streams. Low
9 dissolved oxygen, in turn, can have a number of deleterious effects on salmonids and other
10 aquatic organisms, including decreased growth rates, decreased swimming ability, increased
11 susceptibility to disease, and increased sensitivity to other environmental stressors and pollutants.
12 Adverse changes to the pH of a waterbody can increase the harmful effects of water-borne toxics,
13 particularly metals common in discharges of stormwater runoff. And too much fine sediment can
14 lead to depressed fish stocks by, *inter alia*, smothering fish redds and lowering intergravel
15 dissolved oxygen levels. For all of these reasons, achieving Washington’s water quality standards
16 for these parameters is a critical component of the CWA’s goal of achieving water quality that
17 allows for human recreation and provides for the protection and propagation of fish, shellfish, and
18 wildlife. *See* 33 U.S.C. § 1251.
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1 27. Since at least the late 1980s, pollution in the Deschutes River basin and Budd Inlet
 2 has attracted the attention of federal, state, and local governments.¹ Many of the waters at issue in
 3 this lawsuit, including the Deschutes River, were added to Washington's 303(d) list of impaired
 4 waters as early as 1996 for impairments relating to excess temperature, fecal coliform, dissolved
 5 oxygen, and pH, and on later lists for fine sediment. By at least 2002, Ecology began work on a
 6 TMDL to address these impairments, as well as related impairments in Capitol Lake and the
 7 marine waters of Budd Inlet. Over the next several years, Ecology published detailed studies on
 8 the sources and severity of the impairments and the sources of the pollutants, and plans to remedy
 9 them through the TMDL process.² These studies confirmed that the impairments are caused, in
 10 large part, by anthropogenic impacts throughout the basin, including municipal discharges of
 11 treated wastewater; decreased riparian vegetation due to logging and development; deteriorating
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16 ¹ See U.S. Env'tl. Prot. Agency, *Budd Inlet Bay Action Program: 1991 Action Plan* (July
 17 1991) (reporting, *inter alia*, that EPA had identified eutrophication in southern Budd Inlet as a
 high priority as early as 1988).

18 ² See, e.g., Washington Dept. of Ecology, *Quality Assurance Project Plan – Deschutes
 19 River, Capitol Lake, and Budd Inlet Temperature, Fecal Coliform Bacteria, Dissolved Oxygen,
 20 pH, and Fine Sediment Total Maximum Daily Load Study* (Feb. 2004, Pub. No. 04-03-103);
 Ecology, *Lower Deschutes and Budd Inlet tributaries Wet Weather Monitoring Plan* (April
 21 2004); Ecology, *Assessment of Surface Water / Groundwater Interactions and Associated
 22 Nutrient Fluxes in the Deschutes and Percival Creek Watersheds, Thurston County* (Jan. 2007,
 Pub. No. 07-03-002); Ecology, *Interim Results from the Budd Inlet, Capitol Lake, and Deschutes
 23 River Dissolved Oxygen and Nutrient Study* (April 2007); Ecology, *Final Reconnaissance Study
 24 Plan for Deschutes River / Capitol Lake / Budd Inlet Total Maximum Daily Loads* (July 2003);
 Ecology, *Deschutes River, Capitol Lake, and Budd Inlet Temperature, Fecal Coliform Bacteria,
 25 Dissolved Oxygen, pH, and Fine Sediment Total Maximum Daily Load Technical Report: Water
 Quality Study Findings* (June 2012, Pub No. 12-03-008); Ecology, *Deschutes River, Capitol
 26 Lake, and Budd Inlet Temperature, Fecal Coliform Bacteria, Dissolved Oxygen, pH, and Fine
 Sediment Total Maximum Daily Load Technical Report: Water Quality Study Findings* (June
 2012, Pub No. 12-03-008).

1 sewer infrastructure; improperly maintained, poorly located, or failing on-site septic systems;
2 domestic animals; fertilizers and manure; stormwater runoff; and road building.

3 28. Finally, 13 years after it started, in September 2015, Ecology had completed a
4 draft TMDL, one that covered the fresh and marine waters of the basin including Budd Inlet. *See*
5 Ecology, *Deschutes River, Capitol Lake, and Budd Inlet Total Maximum Daily Load Study*
6 *Supplemental Modeling Scenarios* (Sept. 2015). Rather than submit the TMDL to EPA, however,
7 by December of that year, Ecology decided to split the Deschutes basin from Capitol Lake and
8 Budd Inlet, claiming that it would prepare a TMDL for the downstream portion of the watershed
9 later.

10
11 29. In December of 2015, after removing Budd Inlet and Capitol Lake, Ecology
12 submitted the Final Deschutes TMDL to EPA for review under Section 303(d)(2) of the CWA, 33
13 U.S.C. § 1313(d)(2). *See* Washington Department of Ecology, *Deschutes River, Percival Creek,*
14 *and Budd Inlet Tributaries Temperature, Fecal Coliform Bacteria, Dissolved Oxygen, pH, and*
15 *Fine Sediment Total Maximum Daily Load: Water Quality Improvement Report and*
16 *Implementation Plan – FINAL* (Dec. 2015, Pub. No. 15-10-012). The TMDL was issued after
17 extensive public input and is intended to remedy water quality impairments in the Deschutes
18 River and other freshwater tributaries to Budd Inlet.

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20 30. To date, however, EPA has failed to take action on the Deschutes TMDL, which
21 has been awaiting EPA approval or disapproval for over 22 months

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23 31. Now, over two decades since the waters were first listed as impaired and 15 years
24 since Ecology began developing the TMDL, the Deschutes River, its tributaries, and other Budd
25 Inlet tributaries continue to violate water quality standards, continue to contribute to downstream
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1 pollution in Budd Inlet and the Puget Sound, and lack the critical protections that the TMDL aims
2 to put in place to achieve Washington's water quality standards and protect its designated uses.

3 32. In short, EPA has failed to either approve or disapprove the Deschutes TMDL
4 within 30 days as required Section 303(d)(2), 33 U.S.C. § 1313(d)(2).
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6 33. To NWEA's knowledge, EPA has no plans to approve or disapprove the TMDL
7 any time in the foreseeable future.

8 **CLAIM FOR RELIEF**

9 ***Failure to Act on the Deschutes TMDL, 33 U.S.C. §1365(a)(2)***

10 34. Plaintiff NWEA realleges all preceding paragraphs.

11 35. Section 303(d)(2) of the CWA requires EPA to either approve or disapprove
12 TMDLs within thirty days after submission by a state. See 33 U.S.C. § 1313(d)(2). EPA's duty to
13 act on TMDLs within thirty days of submission is a nondiscretionary duty within the meaning of
14 section 505 of the CWA, 33 U.S.C. § 1365(a)(2), the Act's citizen suit provision.
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16 36. Nearly two years have elapsed since the Washington Department of Ecology
17 submitted the Deschutes TMDL for EPA's review. To date, EPA has neither approved nor
18 disapproved the Deschutes TMDL under section 303(d) of the CWA.

19 37. In failing to either approve or disapprove the Deschutes TMDL under section
20 303(d) of the CWA, EPA failed to perform a nondiscretionary duty within the meaning of the
21 CWA citizen suit provision, 33 U.S.C. § 1365(a)(2).
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PRAYER FOR RELIEF

WHEREFORE, plaintiff Northwest Environmental Advocates respectfully requests that this Court:

- A. Declare that EPA has violated its nondiscretionary duty under 33 U.S.C. §1313(d)(2) to approve or disapprove the Deschutes TMDL within 30 days of submission;
 - B. Enter an order directing EPA to approve or disapprove the TMDL within 30 days of the Court’s decision;
 - C. Award NWEA its reasonable costs and attorneys’ fees under 33 U.S.C. §1365(d);
- and
- D. Grant such other relief as the Court deems just and proper.

DATED this 6th day of November, 2017.

Respectfully submitted,

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EARTHRISE LAW CENTER

By: s/ Lia Comerford

Lia Comerford, *pro hac vice* application forthcoming
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