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**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re NORTHWEST ENVIRONMENTAL ADVOCATES,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL
REGAN, in his official capacity as Administrator of the United States
Environmental Protection Agency, and MICHELLE PIRZADEH, in her official
capacity as Acting Regional Administrator of the United States Environmental
Protection Agency, Region 10,

Respondents.

**PETITION FOR A WRIT OF MANDAMUS TO COMPEL
UNREASONABLY DELAYED ACTION BY THE
ENVIRONMENTAL PROTECTION AGENCY**

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RELIEF SOUGHT

Northwest Environmental Advocates (“NWEA”) requests that this Court issue a writ of mandamus compelling the United States Environmental Protection Agency (“EPA”) to respond to NWEA’s February 13, 2017 *Petition for Corrective Action or Withdrawal of Authorization from the State of Washington to Issue National Pollutant Discharge Elimination System Permits* (“Petition”) by approving or denying the Petition’s requests in writing. NWEA asks the Court to order EPA to respond within 90 days and to retain jurisdiction to ensure a complete response.

ISSUES PRESENTED

Whether EPA’s failure to respond to NWEA’s Petition for over four years was arbitrary, capricious, and contrary to the Administrative Procedure Act, 5 U.S.C. § 555(b), which requires federal agencies to conclude matters presented to them “within a reasonable time.”

JURISDICTION

Section 509 of the Clean Water Act grants U.S. Circuit Courts exclusive jurisdiction over any determination EPA makes “as to a State permit program submitted under [Section 402].” 33 U.S.C. § 1369(b)(1)(D); *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (“TRAC”) (“A statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.”). In this case, NWEA’s Petition specifically

requested that EPA make a determination as to Washington's National Permit Discharge Elimination System ("NPDES") permit program under Section 402. Appendix ("App'x") at APP003-04. Thus, this Court would have jurisdiction to hear any claim challenging EPA's ultimate decision on NWEA's Petition. *See Del. Cty. Safe Drinking Water Coal., Inc v. McGinty*, No. Civ. App. 07-1782, 2007 WL 4225580, at *5 (E.D. Pa. Nov. 27, 2007), *aff'd sub nom. Del. Cty. Safe Drinking Water Coal., Inc. v. Hanger*, 304 F. App'x 961 (3d Cir. 2008) ("[A] citizen wishing to force EPA withdrawal of a state program may file an administrative petition with the agency, then, in the event of an unfavorable response, challenge the decision in the appellate court under CWA section 509(b)(1).").

Here, NWEA alleges that EPA has unreasonably delayed responding to the Petition, and therefore unreasonably delayed making a determination as to Washington's NPDES permit program as contemplated by Section 509. Though unreasonable delay claims under the Administrative Procedure Act are ordinarily brought in District Court, *see* 28 U.S.C. § 1331; 5 U.S.C. § 706(1), the All Writs Act provides federal courts with the authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Where an agency's delay in responding to a petition indefinitely robs appellate courts of the power to review the agency's ultimate response to that petition, a writ of mandamus compelling the agency to respond may

be “necessary or appropriate” to aid the court’s jurisdiction. *See TRAC*, 750 F.2d at 75–77 (holding Circuit Courts have original, exclusive jurisdiction to determine whether such a writ of mandamus should issue); *see also Pub. Util. Comm’r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (“*Public Utility*”) (same); *In re A Cmty. Voice*, 878 F.3d 779, 783 (9th Cir. 2017) (same); *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1138 (9th Cir. 2020) (“*NRDC*”) (same).

Accordingly, this Court has jurisdiction to issue NWEA a writ of mandamus. The Clean Water Act gives Circuit Courts exclusive jurisdiction over EPA’s action as to Washington’s NPDES permit program, but if EPA continues to ignore NWEA’s Petition, this Court will never get the opportunity to review EPA’s response as Congress intended. Thus, because “any suit seeking relief that might affect the court’s future jurisdiction is subject to its exclusive review,” *Public Utility*, 767 F.2d at 626, this matter is properly before this Court and a writ of mandamus is the only adequate remedy available to NWEA. *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (citations omitted) (holding mandamus is only appropriate where plaintiffs have no other adequate remedy).

LEGAL BACKGROUND

I. The Administrative Procedure Act

The Administration Procedure Act, 5 U.S.C. §§ 500–706, requires agencies to conclude matters presented to them “within a reasonable time.” 5 U.S.C. § 555(b).

To enforce this mandate, the Act provides federal courts with the power to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). Crucially, the definition of “agency action” includes instances where an agency fails to act. *Id.* § 551(13). Any person suffering a “legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review.” *Id.* § 702.

II. The Clean Water Act and EPA’s Implementing Regulations

Congress passed the Clean Water Act, 33 U.S.C. §§ 1251–1387, with the intent to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by eliminating all water pollution. *Id.* § 1251(a). To this end, the Act prohibits the discharge of any pollutant from a point source¹ into any navigable water of the United States, except in compliance with the Act. *Id.* § 1311(a). Point sources such as wastewater treatment plants are authorized to discharge pollutants in compliance with the Act by obtaining an NPDES permit. *Id.* §§ 1311(a), 1342.

NPDES permits set forth conditions and limits to ensure that point sources comply with the requirements of the Clean Water Act and its implementing regulations. *Id.* §§ 1342(a)(1)–(2). Permits must contain effluent limits that are stringent enough to ensure such permitted discharges do not interfere with a

¹ The Clean Water Act defines “point source” as “any discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14).

receiving water’s ability to meet State water quality standards. *Id.* §§ 1311(b)(1)(C), 1342(a)(1)–(2). Water quality standards are comprised of three elements: (1) designated uses of navigable waters, such as swimming, fishing, and wildlife habitat; (2) water quality criteria—both quantitative and qualitative—necessary to maintain those uses; and (3) an antidegradation policy that prohibits the loss of instream uses. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10–12. EPA’s regulations implementing the Clean Water Act specifically mandate that effluent limits in NPDES permits control all pollutants that “cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.”² 40 C.F.R. § 122.44(d)(1)(i); *see also* 33 U.S.C. § 1342.

The Clean Water Act vests authority to issue NPDES permits in EPA’s Administrator. *Id.* § 1342(a). However, the Act also instructs the Administrator to delegate this authority to any State that demonstrates the capacity to carry out all the NPDES program’s requirements. 33 U.S.C. § 1342(b). Importantly, States must remain at all times in compliance with the Clean Water Act’s requirements and EPA

² To protect water quality, NPDES permits contain both technology-based effluent limits (“TBELs”) and water quality-based effluent limits (“WQBELs”). 33 U.S.C. § 1311(b); 40 C.F.R. § 122.44(a)(1), (b)(1), & (d). First, all permits must include TBELs requiring permittees to attain at least the degree of pollutant reduction achievable with specific pollution control technologies. *Id.* § 1311(b); 40 C.F.R. § 122.44(a)(1). Then, if TBELs alone are insufficient to ensure compliance with water quality standards, permits must also include WQBELs—limits on discharged pollutants based on the reduction of pollutants necessary to restore or maintain water quality. 33 U.S.C. § 1311(b)(1)(C).

is charged with oversight of all State permit programs. *Id.* §§ 1313(c)(3)–(4), 1319(a), 1342(c)–(d). If a State fails to meet the NPDES requirements enumerated in the Clean Water Act, EPA may withdraw approval of that State’s program after conducting a public hearing, notifying the State of its determination, and affording the State an opportunity to take “appropriate corrective action.” 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.64(b). Factors that may lead EPA to withdraw its approval include failure to exercise control over the discharge of pollutants, repeated issuance of deficient NPDES permits, insufficient inspection and monitoring efforts, lack of enforcement, and failure to maintain an adequate program for developing WQBELs. *See* 40 C.F.R. § 123.63. Withdrawal proceedings may be instigated by EPA itself or “in response to a petition from an interested person.” *Id.* § 123.64(b)(1). Crucially, EPA must respond in writing to any such petition. *Id.*

Lastly, Section 509 of the Clean Water Act provides for direct judicial review of the EPA’s action “in making any determination as to a State permit program submitted under [Section 402].” 33 U.S.C. § 1369(b)(1)(D).

III. The All Writs Act

The All Writs Act grants federal courts authority to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). Though mandamus is an “extraordinary remedy,” a writ of mandamus is warranted to correct an agency’s

“egregious” delay. *NRDC*, 956 F.3d at 1138 (quoting *In re Pesticide Action Network of N. Am.*, 798 F.3d 809, 813 (9th Cir. 2015)). Courts in this Circuit “generally employ a three-part test to determine whether to grant mandamus relief: “(1) the plaintiff’s claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.” *In re Cal. Power Exch. Corp.*, 245 F.3d at 1120 (citations omitted).

FACTUAL BACKGROUND

Puget Sound, one of the nation’s largest and most valuable estuaries, is in trouble. This iconic and once pristine waterbody has become contaminated by pollutants that endanger both humans and wildlife.³ While pollutant discharges to the Sound are many and varied, few pose as pressing a problem as sewage, including industrial wastewater discharged to sewage collection systems (collectively, “wastewater”). App’x at APP002–03.⁴ From herring and other forage fish to orca

³ *Oxygen & Nutrients in Puget Sound*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Puget-Sound/Issues-problems/Dissolved-oxygen-nitrogen> (last visited Aug. 9, 2021) (“Many parts of Puget Sound and the Salish Sea have oxygen levels that are below the levels needed for marine life to thrive.”); *Toxic Chemicals in Puget Sound*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Puget-Sound/Issues-problems/Toxic-chemicals> (last visited Aug. 9, 2021) (“Exposure to these toxic chemicals can cause harm to human health and the animals exposed to them. . . . Some toxic chemicals impair development, some affect reproduction and disrupt body chemistry, and some cause cancer.”).

⁴ *See also Issues & Problems in Puget Sound*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Puget-Sound/Issues-problems> (last

whales, the entire Puget Sound ecosystem is suffering as a consequence of these discharges. Yet, despite extensive knowledge of this pollution and the attendant risk to human and non-human life, Washington’s Department of Ecology (“Ecology”)—the agency authorized to administer Washington’s NPDES program—continues to issue permits without limits stringent enough to return the Sound to a safe, healthy state. Alarmed by the Sound’s decline, NWEA sought EPA’s assistance through a petition to initiate proceedings that would withdraw federal approval of Washington’s NPDES program. Now, after more than four years of radio silence from EPA, NWEA must enlist the help of this Court as well.

I. Wastewater Discharges are Degrading Puget Sound.

Excessive pollutants from wastewater discharges are degrading Puget Sound water quality through several mechanisms. Nutrient pollution is the catalyst for many of these harmful processes, making this class of contaminants one of—if not the—most serious threats to the Sound’s recovery. First, nutrients deplete dissolved oxygen upon which aquatic life depends. App’x at APP006, APP017, APP035–038; *see also id.* at APP121 (Performance Partnership Agreement between EPA and Ecology, noting low dissolved oxygen in Hood Canal was the “main contributing factor in massive fish kills”), APP126 (same), APP133 (same). Nitrogenous

visited Aug. 9, 2021) (listing nutrient, toxic, and bacterial pollution as key water quality challenges in the Sound).

pollutants⁵ are particularly harmful in this regard because in addition to consuming oxygen directly from the water during chemical reactions, they also feed giant algal blooms that further destabilize dissolved oxygen levels. *Id.* at APP017–18, APP026–29, APP076. Nitrogen-loving algae flourish in nutrient rich waters, blocking sunlight that would otherwise reach native plants with longer lifespans. *Id.* at APP028. As the algae die off, they sink to the bottom where they attract oxygen-consuming bacteria, further reducing dissolved oxygen and creating hazardous conditions for fish, shellfish, and smaller aquatic species. *Id.* at APP023, APP027–28.



Figure 1: Algae in Puget Sound. **Source:** Washington Department of Ecology.

⁵ Nitrogen is the primary nutrient of concern in Puget Sound. *Id.*

Second, and relatedly, while even non-toxic algal blooms are harmful, nutrient pollution also feeds several variants of algae that are toxic to humans and aquatic life. *Id.* at APP017, APP027–29, APP076.⁶ Toxic algae are especially detrimental to Washington’s lucrative shellfish industry⁷ because certain phytoplankton cause major shellfish mortality events and because consuming shellfish that have come into contact with these blooms can cause illness in humans. *Id.* at APP017, APP121.⁸

Third, nutrient pollution is contributing to the acidification of Puget Sound. *Id.* at APP031. As algae dies off and sinks to the benthic layer, its decomposition releases stored carbon dioxide. *Id.* This additional carbon dioxide lowers the Sound’s pH and endangers marine life. *Id.*⁹ As climate change is currently fueling ocean-

⁶ *Marine Algae & Plankton*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Research-Data/Monitoring-assessment/Puget-Sound-and-marine-monitoring/Marine-algae-plankton> (last visited Aug. 9, 2021); *The Effects: Human Health*, EPA, <https://www.epa.gov/nutrientpollution/effects-human-health> (last visited Aug. 9, 2021); Teri L. King et al., *Hiding in Plain Sight: Shellfish-Killing Phytoplankton in Washington State*, HARMFUL ALGAE, May 2021, at 1–3, 11 (available at <https://doi.org/10.1016/j.hal.2021.102032>).

⁷ Washington’s shellfish industry is worth hundreds of millions of dollars and employs thousands of residents. *Washington: A Shellfish State*, STATE OF WASH., <https://www.governor.wa.gov/sites/default/files/WSI%20factsheet.pdf> (last visited Aug. 9, 2021).

⁸ King et al., *supra* n.6; *Marine Algae & Plankton*, *supra* n.6.

⁹ *Acidification in Puget Sound*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Puget-Sound/Issues-problems/Acidification> (last visited Aug. 9, 2021).

wide acidification, combatting localized acidification through NPDES permits to the extent possible is especially imperative.¹⁰

Nutrient pollution in Puget Sound also disrupts the food web through species replacement. The most obvious example of a pollution-driven taxa change in the Sound is the booming growth of jellyfish populations. *Id.* at APP026, APP033–35. Unlike true fish, jellyfish thrive in hypoxic (low oxygen) conditions; but jellyfish cannot sustain salmon, seabirds, and orcas the way fatty, vitamin and mineral-rich fish do. *Id.* at APP034–35. Thus, as jellyfish blooms replace forage fish populations, animals higher up on the food web are deprived of the nutrition they need to survive.



Figure 2: Jellyfish in Puget Sound. **Source:** Washington Department of Ecology.

Similar changes are occurring on microscopic levels as well. One of the most prevalent algae plaguing the Sound is *Noctiluca*. *Id.* at APP018. Ordinarily, the tiny

¹⁰ WASH. DEP'T OF ECOLOGY, *supra* n.9.

plants and animals that feed *Noctiluca* support a variety of forage fish which then go on to feed salmon, orcas, and birds higher up in the food web. *Id.* But, just as jellyfish cannot be substituted for forage fish, *Noctiluca* cannot be substituted for the microscopic organisms that serve as keystone species in the Puget Sound ecosystem. *Id.* at APP017–19, APP029–30. At higher trophic levels that include charismatic species such as salmon and orcas, the consequence of this disadvantageous swap is starvation. *Id.*; *see also* Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903, 69,906 (Nov. 18, 2005) (EPA citing limited access to prey as justification for listing the Southern Resident orca population as endangered).¹¹

Finally, in addition to nutrients, wastewater discharges contain toxic substances that harm marine species. App’x at APP096–98. Virtually all life in the Sound is exposed to toxic pollutants such as PCBs and heavy metals because they persist on the water’s surface, in the water column, and in sediment on the Sound’s floor. *Id.* at APP094–97. Likewise, these pollutants persist in the food web, bioaccumulating from plankton to forage fish to salmon, harbor seals, and orcas. *Id.*

¹¹ *See also Species at Risk*, EPA, <https://www.epa.gov/salish-sea/marine-species-risk> (last visited Aug. 9, 2021) (EPA’s Health of the Salish Sea Ecosystem Report, noting declines in bird populations stemming from inadequate food supply); *Southern Resident Killer Whales*, EPA, <https://www.epa.gov/salish-sea/southern-resident-killer-whales> (last visited Aug. 9, 2022) (EPA’s Health of the Salish Sea Ecosystem Report, listing declining salmon populations as contributing to endangerment for orcas).

at APP094. Indeed, bioaccumulation of toxic chemicals—which can lead to immunosuppression, lesions, reproductive issues, and other impairments—is among the reasons Puget Sound’s Southern Resident killer whale population was listed as “endangered.” 70 Fed. Reg. at 69,908. Importantly, people are also at risk from toxic pollutants when they consume contaminated fish and shellfish.¹² Control of nitrogen pollution from sewage treatment plants removes significant amounts of toxic pollutants, providing significant public health benefits. App’x at APP101–02.

II. Ecology’s Implementation of Washington’s NPDES Program is Violating the Clean Water Act.

Despite the importance of Puget Sound to Washington’s commerce, recreation, and tourism industries, Ecology has repeatedly failed to implement its NPDES program in a manner that complies with the Clean Water Act. As explained above, the Act requires authorized States to issue NPDES permits with limits stringent enough to prevent loss of designated uses, exceedances of water quality standards, and general degradation. Systemically, Washington’s program is not meeting these requirements. While a comprehensive list of the program’s shortcomings is beyond the scope of this Petition, the following examples are illustrative of Ecology’s failure to comply with the Clean Water Act.

¹² *Toxic Chemicals in Puget Sound*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Water-Shorelines/Puget-Sound/Issues-problems/Toxic-chemicals> (last visited Aug. 9, 2021) (describing bioaccumulation of toxic chemicals in fatty tissue of humans).

For decades, Ecology has known that wastewater discharges are contributing to various exceedances of water quality standards in Puget Sound. For instance, one Ecology publication from 2001 documented biological stress and harm from low levels of dissolved oxygen levels and another from 2002 indicated violations of Washington’s antidegradation policy stemming from nutrient pollution. *Id.* at APP022–23; *see also id.* at APP143 (“[N]utrients discharged from wastewater treatment plants contribute to low dissolved oxygen (D.O.) levels, below state water quality criteria, in Puget Sound.”). In 2014, an Ecology study showed that anthropogenic nitrogen sources were contributing to dissolved oxygen criteria violations in Puget Sound. *Id.* at APP035–38. But, even three years after that study was released, 85 percent of Ecology-issued permits contained no limits on nitrogenous wastes whatsoever and, to this day, no permits have limits designed to ensure discharges comply with Puget Sound water quality standards. *Id.* at APP080.

The nitrogen limits Ecology *has* included in the small number of wastewater facility NPDES permits that contain them are too narrow to actually reduce nitrogen discharges or increase Puget Sound’s dissolved oxygen levels to acceptable levels. *See id.* at APP041–49 (explaining that only 7 out of 103 permits for certain nutrient dischargers to the Sound include limits that *could* target nitrogen, but even these are outdated, underinclusive, and not designed to achieve compliance with water quality standards throughout the Sound), APP051–52 (explaining why existing ammonia

limits are inadequate). And despite more than a decade's worth of Performance Partnership Agreements with EPA in which Ecology committed itself to remedying nutrient pollution in the Sound, *see, e.g., id.* at APP120–21, APP178–79, Ecology is still intent on issuing NPDES permits without adequate effluent limits. For example, when, after many years of delay, Ecology finally issued a draft of its proposed Puget Sound Nutrient General Permit in July of this year, that draft failed to establish target nutrient loads designed to *actually reduce* nutrient pollution. *See id.* at APP192–93 (explaining that each covered facility's limit is “the sum of [its] monthly nutrient loads measured over one year”).

Because many areas in Puget Sound are impaired for dissolved oxygen and otherwise not attaining water quality standards, *id.* at APP024–38, APP102, Ecology's failure to impose limits designed to remedy these deleterious impacts violates the Clean Water Act. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 556–57 (9th Cir. 1984) (holding NPDES permits must translate State water quality standards into limits necessary to achieve those standards); 40 C.F.R. §§ 122.4(d) (prohibiting permit issuance when conditions cannot ensure compliance with water quality standards), 122.44(d)(1)(i) (requiring permits to control all pollutants with the reasonable potential to cause or contribute to excursions above water quality standards); *see also* App'x at APP143 (admitting nitrogen discharges have a reasonable potential to cause or contribute to oxygen impairments in Puget Sound).

Further, Ecology's excuses for foregoing much needed nitrogen effluent limits are full of illegal justifications. For example, despite having identified water quality violations attributable to point source nitrogen loading, Ecology announced that the corresponding permits did not contain WQBELs. App'x at APP049–51; *see also id.* at APP085–87 (describing how Ecology's permitting manual condones this omission and other illegal exemptions from the Clean Water Act's requirements). Yet, the Clean Water Act unambiguously requires that NPDES permits include WQBELs where they are necessary to prevent permitted discharges from causing or contributing to exceedances of water quality standards. 33 U.S.C. §§ 1311(b)(1)(C); *see also Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 578 (2d Cir. 2015) (“Even if determining the proper standard is difficult, EPA cannot simply give up and refuse to issue more specific guidelines.”) (citations omitted); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (same); *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (same). Given this clear mandate, Ecology's decades-long practice of delaying nutrient WQBELs is plainly illegal.

III. EPA Has Not Responded to NWEA's Petition to Withdraw Approval of Washington's NPDES Program.

Recognizing that Ecology's implementation of its NPDES program was violating the Clean Water Act and causing severe water quality impairments in the Sound and its tributaries, on February 13th, 2017, NWEA filed a petition with EPA requesting that the agency either remedy Washington's program or withdraw

Ecology's authority to issue NPDES permits. *See generally* App'x at APP002–114. The Petition chronicles Ecology's longstanding practice of issuing permits that contravene the Clean Water Act by authorizing discharges that cause or contribute to water quality standard violations. *Id.* Further, the Petition specifically requests that EPA (1) either correct Washington's NPDES program or withdraw Ecology's permitting authorization; (2) respond to NWEA's petition in writing; (3) make a determination that Ecology's administration of its program is inconsistent with Federal law; (4) notify Ecology that its program is violating the Clean Water Act; and (5) schedule a public hearing on these violations. *Id.* at APP003–04. More than four years have passed since EPA received the Petition, but EPA has not responded.

ARGUMENT

I. NWEA Has Standing to Pursue a Writ of Mandamus Compelling EPA to Act.

NWEA has representational standing to pursue this action on behalf of its members. An organization has representational standing if “its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth v. Laidlaw Env'tl. Servs., Inc. (TOC)*, 528 U.S. 167, 181 (2000). Here, ensuring the protection of Puget Sound is clearly germane to NWEA's purpose as an organization devoted to protecting the waters of the Pacific Northwest. Declaration of Nina Bell

(“Bell Decl.”), ¶3–19.¹³ Further, individual members’ participation is not required for the proper resolution of this matter. *See Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1329 n.44 (D.C. Cir. 1986) (“Courts have required individual participation in circumstances where there are conflicts of interest within the organization or when a specific factual setting is needed to illuminate the issues.”). Accordingly, the only remaining question is whether NWEA’s members would have standing to sue in their own right.

Ordinarily, individuals have standing when they suffer an injury in fact that is fairly traceable to the challenged conduct and redressable by a favorable judicial decision. *NRDC v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014). However, a “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Plaintiffs seeking to remedy procedural injuries must show (1) an agency violated a procedural rule, (2) the rule is intended to protect the plaintiff’s concrete interest, and (3) it is reasonably probable that the agency’s procedural failing will threaten that concrete

¹³ NWEA has contemporaneously filed a Motion for Leave to File Standing Declarations and appended thereto four declarations (Exhibits 1–4) that establish NWEA’s standing. The Court may consider these declarations because NWEA did not have reason to submit facts sufficient to establish standing prior to this action. *See Sierra Club v. EPA*, 762 F.3d 971, 976 n.4 (9th Cir. 2014) (citing *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997)).

interest. *Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 457 F.3d 941, 949 (9th Cir. 2006). In other words, this class of plaintiffs need only show that following the procedure at issue “could protect their interest.” *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008).

Here, NWEA’s members have concrete interests “by virtue of their geographic proximity to and use of” Puget Sound and its tributaries. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003) (holding the plaintiff organization had established its members’ concrete interests with declarations describing their use and enjoyment of nearby forests); *see also* Declaration of Harry Branch (“Branch Decl.”), ¶¶ 3–4, 6–14; Declaration of Mike Karas (“Karas Decl.”), ¶¶ 4–18; Declaration of Ron Peltier (“Peltier Decl.”), ¶¶ 4–16. Moreover, the requirement that agencies respond to petitions in general, 5 U.S.C. § 555(b)—and respond to petitions like NWEA’s in particular, 40 C.F.R. § 123.64(b)(1)—is intended to protect citizens’ interests by ensuring agencies do not ignore concerns raised by the public. Thus, NWEA has satisfied the first two prongs of the procedural standing test.

As for the third prong, continued delay in responding to the Petition is reasonably likely to threaten NWEA’s members’ interests. NWEA’s members use Puget Sound and its tributaries for recreation, aesthetic enjoyment, professional pursuits, sustenance, and spiritual rejuvenation. Branch Decl., ¶¶ 4–14; Karas Decl.,

¶¶ 4–18; Peltier Decl., ¶¶4–6, 8–16. As discussed above, Washington’s unlawful implementation of its NPDES program has led to severe water quality concerns in the Sound, and those concerns are interfering and will likely continue to interfere with NWEA’s members’ interests. Branch Decl., ¶¶ 8–14; Karas Decl., ¶¶ 14–18, 20; Peltier Decl., ¶¶ 7, 10–16. If EPA does not address the issues raised in NWEA’s Petition, there is every reason to believe harm to NWEA’s members will continue unabated. Conversely, EPA’s response to NWEA’s Petition could protect the members’ interests by resolving deficiencies in Washington’s NPDES program.

As such, NWEA has standing to maintain this suit. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (holding environmental group had standing to sue over procedural injury where group established a “geographic nexus” between its members’ interests and the subject of the agency action at issue).

II. EPA Has a Discrete and Mandatory Duty to Respond to NWEA’s Petition.

Where an agency unlawfully withholds or unreasonably delays a discrete, mandatory duty, citizens may bring suit in federal court to remedy the agency’s inaction. 5 U.S.C. § 706(1); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (“[A section 706(1) claim] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.”). Here, EPA’s duty to respond to NWEA’s Petition within a reasonable amount of time is both discrete and mandatory.

The Administrative Procedure Act states that “within a reasonable time, each agency *shall* proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b) (emphasis added). Congress’ use of “shall” in a statute generally indicates a mandatory duty. *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, 837 F.3d 1055, 1064 (9th Cir. 2016) (citing cases). Moreover, EPA’s own regulations recognize that the mandatory duty to conclude matters applies to petitions seeking to initiate withdrawal proceedings against a State for improper execution of its NPDES program. 40 C.F.R. § 123.64(b)(1) (requiring EPA to “respond in writing to any petition to commence withdrawal proceedings”). Thus, EPA has a mandatory duty to respond to NWEA’s Petition. Moreover, that duty is “ministerial and so plainly prescribed as to be free from doubt,” as required for relief in the form of mandamus. *In re Cal. Power Exch. Corp.*, 245 F.3d at 1120 (citations omitted).

Additionally, EPA’s duty to respond to NWEA’s Petition is discrete. The requirement that a challenged agency action be discrete is intended to prevent “broad programmatic attack[s].” *Norton*, 542 U.S. at 64. In *Norton*, the Supreme Court held there was no discrete action compelled by the statutory obligation to manage wilderness study areas “in a manner so as not to impair the suitability of such areas for preservation as wilderness” because the non-impairment mandate was too broad. *Id.* at 65–67 (quoting 43 U.S.C. § 1782(c)). The Court was particularly concerned

about infringing upon an agency's ability to implement policy in accordance with its expertise as Congress intended. *Id.* at 66–67.

But, unlike the plaintiff in *Norton* who tried to enforce an overly broad statutory mandate, NWEA is not asking this Court to require that EPA implement any particular policy. Rather, NWEA is asking only that the Court order EPA to either grant or deny NWEA's Petition, so that the organization can move forward with its work to protect Puget Sound. Because responding to NWEA's Petition is a discrete action that EPA is legally required to take, this Court can compel EPA's response through issuance of the writ sought herein.

III. EPA Has Unreasonably Delayed Responding to NWEA's Petition.

The Administrative Procedure Act requires that agencies conclude matters presented to them within a reasonable amount of time. 5 U.S.C. § 555(b). Yet, for more than four years, EPA has not taken the straightforward action of responding to NWEA's Petition. EPA's egregious delay in concluding this matter has prejudiced NWEA, its members, and the public at large by indefinitely forestalling the intervention necessary to prevent Ecology from perpetrating further harm against human health and the environment. Accordingly, NWEA is entitled to a writ of mandamus compelling EPA to respond. *In re Pesticide Action Network N. Am.*, 798 F.3d at 813 (explaining that the “extraordinary remedy” of mandamus is warranted “when the agency's delay is ‘egregious’”) (citation omitted).

The six-factor test this Court uses to evaluate claims of unreasonable delay comes from the D.C. Circuit Court of Appeal’s decision in *TRAC*. 750 F.2d at 80; *see also, e.g., NRDC*, 956 F.3d at 1138–39 (applying the *TRAC* test). Under this approach, courts consider (1) whether the delay comports with the “rule of reason”; (2) whether Congress has indicated a timeframe it considers appropriate for the action at issue; (3) the extent to which delay could harm human health and welfare; (4) the effect expediting would have on competing agency priorities; (5) the nature and scope of interests prejudiced by delay; and (6) that impropriety on the agency’s part is not required for a finding of unreasonable delay. *TRAC*, 750 F.2d at 80. Here, the second and sixth factors do not merit further discussion because Congress has not specified any particular deadline by which EPA must respond to a petition like NWEA’s and NWEA is not alleging any impropriety underlying EPA’s delayed response. Notably, courts do not afford the four remaining factors equal weight. “The most important *TRAC* factor” is the first factor, the rule of reason.” *NRDC*, 956 F.3d at 1139 (cleaned up); *In re A Cmty. Voice*, 878 F.3d at 786.

A. EPA Has Not Complied with the Rule of Reason.

Under the first and most important *TRAC* factor, the rule of reason, “a reasonable time for agency action is typically counted in weeks or months, not years.” *NRDC*, 956 F.3d at 1139. As such, courts have regularly found agency delays spanning multiple years to be unreasonable. *See Id.* at 1139, 1143 (ten-year delay

was unreasonable); *In re A Cmty. Voice*, 878 F.3d at 787 (eight-year delay was unreasonable); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419, 419 n.12 (D.C. Cir. 2004) (holding six-year delay was “nothing less than egregious” and listing cases in which three, four, and five-year delays were also deemed unreasonable). Additionally, delays run afoul of the rule of reason when an agency has established a pattern of inaction. *NRDC*, 956 F.3d at 1140. The rule of reason is especially crucial where, as here, Congress has not provided a timeframe for the action at issue. *Cf. Indep. Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 509 (9th Cir. 1997) (disregarding past speculation about reasonableness of delay where Congress had provided a relevant timeframe for agency action).

An agency’s inaction offends the rule of reason when that agency repeatedly declines to remedy a known problem. *NRDC*, 956 F.3d at 1139–40. In *NRDC*, for example, the environmental organization NDRC petitioned EPA to cancel the registration of a dangerous pesticide. *Id.* at 1136. After nearly five years of waiting in vain for a response from EPA, NRDC sought a writ of mandamus compelling EPA’s response. *Id.* at 1137. Only with a lawsuit pending did EPA finally deny NRDC’s petition. *Id.* Shortly after issuing the denial, however, EPA revised its risk assessment, concluded the chemical was in fact hazardous to human health, and promised to issue an updated response to NRDC’s petition. *Id.* But, despite its changed position, EPA continued to delay its final decision. *Id.* at 1137–38.

Presented with yet another plea for a writ of mandamus forcing EPA to issue a final action on NRDC's petition, the Ninth Circuit granted the requested relief. *Id.* at 1143. In doing so, the Court concluded that EPA's delay was unreasonable because the agency had repeatedly "kicked the can down the road and betrayed its prior assurances of timely action, even as it. . . acknowledged that the pesticide poses widespread, serious risks" to human health. *Id.* at 1136. After considering EPA's past dealings with the subject matter of NRDC's petition, the Court called EPA's inaction a pattern of delay that frustrated NRDC's ability to access judicial review, endangered the wellbeing of children, and ignored the agency's mission to protect human health and the environment. *Id.* at 1140, 1143.

In the instant case, EPA has delayed responding to NWEA's Petition for over four years—well outside the time frame the *NRDC* Court described as typically reasonable. Moreover, the rule of reason favors judicial intervention because EPA has established a pattern of inaction with regard to its duty to oversee Washington's NPDES program for the protection of Puget Sound. In *NRDC*, the Court held years of delay were unreasonable when evidence showed that EPA knew a pesticide was dangerous, but failed to make a final determination about its registration status. Here, EPA knows about dangerous water quality impairments in Puget Sound, but has failed to make a final determination about the status of Washington's NPDES program. For more than a decade, EPA has repeatedly acknowledged that

wastewater-driven water quality issues in Puget Sound are a major problem requiring immediate intervention. *See infra*, Factual Background, Sect. II. Yet, EPA has not responded to NWEA's Petition, which links these water quality problems to Ecology's mismanagement of Washington's NPDES program and provides guidance as to how EPA might remedy those errors. EPA's delayed response to NWEA's Petition is just the latest affront in a long history of inaction in dealing with Puget Sound wastewater pollution and as such, the delay is unreasonable.

Of note, EPA's pattern of inaction in responding to petitions is not limited to those regarding Washington's abysmal water quality. Recent history is replete with instances in which EPA refused to answer petitions until sued. *See, e.g., NRDC*, 956 F.3d at 1143; *In re A Cmty. Voice*, 878 F.3d at 788; *In re Pesticide Action Network of N. Am.*, 798 F.3d at 815; Petition for Writ of Mandamus, No. 15-1799 (4th Cir. July 20, 2015); Complaint, No. 1:17-cv-00472-CWD (D. Idaho Nov. 16, 2017); *see also Gulf Restoration Network v. Jackson*, 224 F. Supp. 3d 470, 473 (E.D. La. 2016) (explaining that plaintiffs had to threaten EPA with legal action to obtain a response to their petition). This practice has been especially prejudicial to NWEA, an organization that is not new to expending valuable resources on judicial intervention just to receive a response to its requests that EPA uphold the law. *See Bell Decl.*, ¶10; *see also* Complaint for Declaratory and Injunctive Relief, No. 2:17-cv-00263 (W.D. Wash. Feb. 21, 2017) (suing EPA for failing to respond to a petition about

required updates to toxic criteria in Washington water quality standards); Complaint for Declaratory and Injunctive Relief, No. 3:01-cv-01297 (N.D. Cal. Apr. 2, 2001) (suing EPA for failing to respond to a petition about ballast water discharges). Once again, NWEA asks that this Court remedy EPA's bad habit of unreasonably delaying responses to serious environmental concerns raised by the public.

B. EPA's Delay Is Unreasonable Because Human Health Is at Risk, the Agency Is Disregarding Its Own Priorities, and the Balance of Interests Favors NWEA.

The third *TRAC* factor, impacts to human health, also favors issuance of NWEA's requested relief in this case. Courts in this Circuit have repeatedly found mandamus was warranted where EPA delayed responding to petitions raising human health concerns. *NRDC*, 956 F.3d at 1141–43; *In re Pesticide Action Network N. Am.*, 798 F.3d at 814; *see also In re A Cmty. Voice*, 878 F.3d at 787–88 (holding EPA unreasonably delayed responding to a petition about human health standards for dust-lead). In particular, delay is unreasonable when EPA itself has acknowledged an unmitigated public health risk. *NRDC*, 956 F.3d at 1142; *In re Pesticide Action Network N. Am.*, 798 F.3d at 814; *A Community Voice*, 876 F.3d at 787. Indeed, in *Pesticide Action Network*, EPA's eventual recognition that a particular chemical was hazardous to human health was a deciding factor in the Court's decision to issue a writ of mandamus where it had not just two years earlier. *Compare In re Pesticide Action Network N. Am.*, 532 Fed. App'x 649, 651 (9th Cir.

2013) (denying request for mandamus where EPA claimed current exposure to chemical was not resulting in serious harm), *with In re Pesticide Action Network N. Am.*, 798 F.3d at 814 (granting mandamus where EPA had “backtracked significantly” from its pronouncement that the chemical was safe).

Here, the human health risks attributable to wastewater discharges into Puget Sound are indisputable. *See supra* nn.4, 5, 9, 12. Just as in the factual circumstances underlying *NRDC, A Community Voice*, and the 2015 *Pesticide Action Network* decision, EPA has acknowledged these risks and even proclaimed them a priority for remedial action. *See, e.g.*, App’x at APP120–21 (setting Puget Sound cleanup as a priority and discussing health risks from toxic pollutants and pathogens in shellfish).¹⁴ Because health risks associated with wastewater discharges are a

¹⁴ *The Effects: Human Health*, EPA, <https://www.epa.gov/nutrientpollution/effects-human-health> (last visited Aug. 10, 2021) (“Excess nutrients and harmful algal blooms create toxins and compounds in water that pose danger for human health.”); *Harmful Algal Blooms*, WASH. SEA GRANT, <https://wsg.washington.edu/our-northwest/harmful-algal-blooms/> (last visited Aug. 10, 2021) (explaining that toxic algal blooms can sicken and even kill people); *Section 3. Harmful Algal Blooms*, ENCYCLOPEDIA OF PUGET SOUND, <https://www.eopugetsound.org/science-review/section-3-harmful-algal-blooms#:~:text=Bloom-forming%20algae%20that%20have%20harmful%20effects%20on%20people,of%20the%20genus%20Heterosigma%20or%20by%20ulvoid%20seaweeds> (last visited Aug. 10, 2021) (describing symptoms of contact with toxic algae); *Paralytic Shellfish Poisoning (PSP)*, WASH. STATE DEP’T OF HEALTH, <https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/RecreationalShellfish/Illnesses/Biotoxins/ParalyticShellfishPoison> (last visited Aug. 10, 2021) (cautioning against poisoning from shellfish contaminated by toxic algae);

serious, undisputed concern raised by NWEA’s Petition, *see id.* at APP017, APP095–102 (describing toxic algae effects and Ecology’s mismanagement of toxic controls in its NPDES permits), EPA’s delayed response is unreasonable.

Next, although the fourth *TRAC* factor instructs courts to consider competing agency priorities as part of the unreasonable delay inquiry, EPA does not get a “free pass” to delay its response to NWEA’s concerns just because many of its activities are somehow linked to human health. *NRDC*, 956 F.3d at 1141. In fact, the fourth factor weighs in favor of granting mandamus in this case because EPA itself has repeatedly marked toxic and nutrient pollution in Puget Sound as agency priorities, in part because of human health risks. *See, e.g.*, App’x at APP176–79. By delaying its response to NWEA’s Petition, EPA is betraying its own priority list. This too indicates that EPA’s delay is egregious and merits remedy via mandamus.

Lastly, cases involving human health impacts also implicate the fifth *TRAC* factor, the nature and extent of the interests prejudiced by delay. In *In re Pesticide Action Network*, for example, the Court granted a petition for mandamus where EPA “offer[ed] no acceptable justification for the considerable human health interests prejudiced by the delay.” 798 F.3d at 814. The same result is warranted here. Human

Toxics in the Food Web: Pacific Herring and Harbor Seals, EPA, <https://www.epa.gov/salish-sea/toxics-food-web-pacific-herring-and-harbor-seals> (last visited Aug. 10, 2021) (discussing human health implications of eating fish contaminated with toxic pollutants).

health is a top priority for everyone, but for EPA especially. *See NRDC*, 956 F.3d at 1136 (noting that EPA’s “core mission is to protect human health and the environment”) (citation omitted). Furthermore, remedying the environmental harms described herein is of critical importance for those who, like NWEA’s members, rely on the Sound for sustenance, employment, recreation, aesthetic enjoyment, and spiritual fulfillment. These interests will all be served by EPA’s completing its statutory duty to respond to NWEA’s Petition. It is unclear what interest EPA could possibly have in continuing to deny NWEA an answer, especially considering a petition response is not a resource-intensive endeavor for a federal agency. Accordingly, NWEA’s interests—and the public’s interest more broadly—outweigh any interest EPA may have in continued delay, and a writ of mandamus should issue.

IV. CONCLUSION

NWEA has made a “clear and certain” showing that EPA has unreasonably delayed fulfilling its ministerial duty to respond to NWEA’s Petition. *In re Cal. Power Exch. Corp.*, 245 F.3d at 1120 (citations omitted). Because a writ of mandamus is necessary to remedy EPA’s egregious delay, preserve this Court’s jurisdiction, provide NWEA with access to judicial relief, and protect Puget Sound and all its inhabitants, NWEA respectfully requests that this Court issue a writ of mandamus compelling EPA to respond to NWEA’s Petition within 90 days and retain jurisdiction to ensure EPA’s response is complete.

Dated this 23rd day of August, 2021.

Respectfully submitted,

s/ Danielle Replogle

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for a writ of mandamus complies with the type-volume limitation of Ninth Circuit Rule 21-2(c) because, excluding the parts listed by Federal Rules of Appellate Procedure 21(a)(2)(C) and 32(f), it does not exceed 30 pages.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 23, 2021.

I hereby certify that I served the foregoing document on each defendant on August 23, 2021 by certified mail for delivery within three calendar days. Service was sent to the following parties:

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STATEMENT OF RELATED CASES

The undersigned counsel of record for Petitioner Northwest Environmental Advocates is aware of no pending related cases.

Dated this 23rd day of August, 2021.

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Northwest Environmental Advocates hereby discloses that it is a nonprofit organization, and as such, has no parent corporation or publicly held corporation owning 10% or more of its stock.

Dated this 23rd day of August, 2021.

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