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

PUGET SOUNDKEEPER ALLIANCE,
COLUMBIA RIVERKEEPER, SPOKANE
RIVERKEEPER, RE SOURCES, PACIFIC
COAST FEDERATION OF FISHERMEN’S
ASSOCIATIONS, INSTITUTE FOR
FISHERIES RESOURCES, and MAKAH
INDIAN TRIBE,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and ANDREW
WHEELER, Administrator, United States
Environmental Protection Agency,

Defendants.

Case No. 2:20-cv-907

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper, RE Sources, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, and the Makah Indian Tribe bring this action challenging the U.S. Environmental Protection Agency’s (“EPA’s”) decision to withdraw Washington’s protective, science-based human health criteria and impose significantly less protective water quality

1 standards on Washingtonians. EPA’s actions exceed the agency’s authority under the Federal
2 Water Pollution Control Act (“Clean Water Act” or “CWA”), and are arbitrary and capricious,
3 contrary to law, and an abuse of discretion under the Administrative Procedure Act (“APA”).

4 2. The Clean Water Act requires states to develop water quality standards necessary
5 to meet the requirements of the Clean Water Act—if a state fails to do so, EPA must promulgate
6 and adopt such standards for the state. 33 U.S.C. § 1313. In either case, a state’s water quality
7 standards must protect designated uses of water. Designated uses include the “fishable and
8 swimmable” protections of the Clean Water Act: protecting and cleaning up our nation’s waters
9 so that they are clean enough for drinking, for direct human contact, for fishing or recreation, for
10 healthy aquatic resources, and for catching and consuming fish and shellfish. Water quality
11 standards include designated uses, such as the protection of recreational contact and protection
12 and propagation of fish and wildlife, and criteria necessary to ensure that those designated uses
13 are attained and protected.

14 3. One of the ways water pollution adversely affects human health is through the
15 consumption of fish and shellfish that have accumulated toxic water pollutants in fish tissue.
16 Therefore, determining the amount of fish people in a state actually consume is a critical
17 component of setting human health water quality criteria. In setting human health water quality
18 criteria, a state must set the allowable level of toxic pollutants low enough that fish remain safe
19 to eat in quantities consumed by residents in the state. If a state uses a fish consumption rate that
20 is less than the amount of fish actually consumed by state residents as a foundation for a water
21 quality standard, the commensurate human health criteria will be too lenient and people
22 consuming fish will ingest levels of toxics that will put them at risk for adverse health
23 consequences. Failure to adopt human health criteria based on an accurate fish consumption rate
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1 is a failure to promulgate water quality standards that meet the requirements of the Clean Water
2 Act.

3 4. On November 28, 2016, EPA disapproved 143 of Washington's proposed human
4 health criteria as not adequately protective of human health and therefore contrary to the
5 purposes and requirements of the Clean Water Act, and promulgated criteria that protect
6 designated uses and otherwise meet the requirements of the Act. 81 Fed. Reg. 85,417 (Nov. 28,
7 2016); 40 C.F.R. § 131.45 (Washington's current, federally promulgated water quality
8 standards). The EPA-promulgated human health criteria became effective on December 28,
9 2016. Washington has been working to implement these criteria for the past three and a half
10 years.

11 5. On May 10, 2019, nearly two and a half years after the effective date of
12 Washington's current human health criteria, EPA unilaterally decided to revise the criteria to
13 make the state's water quality standards less protective. As detailed below, EPA did not comply
14 with 33 U.S.C. § 1313(c)(4) when it decided to revise Washington's existing human health
15 criteria. Nor did EPA explain or provide record evidence to support how the 2016 criteria that it
16 previously rejected because they would not protect designated uses are now sufficiently
17 protective. Instead, EPA decided it could rely on its "inherent authority" to reconsider its prior
18 decision, thereby ignoring the process Congress established to revise a state's existing water
19 quality standards. EPA's Reversal of the Nov. 15, 2016 Clean Water Act Section 303(c) Partial
20 Disapproval of Washington's Human Health Water Quality Criteria Submitted on August 1,
21 2016 and Decision to Approve Washington's Criteria (May 10, 2019), and accompanying
22 Technical Support Document, are available at [https://beta.regulations.gov/document/EPA-HQ-
23 OW-2015-0174-0455](https://beta.regulations.gov/document/EPA-HQ-OW-2015-0174-0455).

1 of trained volunteers to detect and report pollution. PSA actively engages government agencies
2 and businesses working to regulate pollution discharges from sewage treatment plants, industrial
3 facilities, construction sites, municipalities, and other pollution generating sites. PSA also
4 engages in administrative and permitting processes in Washington and nationally to ensure that
5 the purposes and intent of the Clean Water Act are fully realized and enforced, and that
6 regulations and permits are as stringent as required by the Act.

7 10. Plaintiff Columbia Riverkeeper is a non-profit organization incorporated under
8 the laws of Washington and recognized by the Internal Revenue Service as a tax-exempt
9 organization under Section 501(c)(3) of the Internal Revenue Code. Columbia Riverkeeper's
10 donors and supporters reside on or near or recreate on the Columbia River, including residents in
11 both the states of Washington and Oregon. Columbia Riverkeeper is located at 407 Portway
12 Avenue, Suite 301, Hood River, OR 97031. Columbia Riverkeeper's mission is to restore and
13 protect the water quality of the Columbia River and all life connected to it, from the headwaters
14 to the Pacific Ocean. To achieve its goals for the Columbia River watershed and estuary,
15 Columbia Riverkeeper uses an integrated strategy of community-based grassroots organizing,
16 public education, legal enforcement, and hands-on community involvement in tangible river
17 protection projects. Enforcement of Clean Water Act laws and permits is an integral part of
18 Columbia Riverkeeper's work on the Columbia River. In addition, a significant part of
19 Columbia Riverkeeper's mission is to encourage and promote the use of the Columbia River for
20 fishing and fish consumption. Toxic pollution due to inadequate standards undermines
21 Columbia Riverkeeper's members' ability to eat locally caught fish without fear of toxic
22 pollution.

1 11. Plaintiff Spokane Riverkeeper is a non-profit organization incorporated under the
2 laws of Washington and recognized by the Internal Revenue Service as a tax-exempt
3 organization under Section 501(c)(3) of the Internal Revenue Code. Spokane Riverkeeper's
4 donors and supporters reside on or near or recreate in the Spokane River Watershed. Spokane
5 Riverkeeper is located at 35 W. Main Avenue, Suite 308, Spokane, WA 99201. Spokane
6 Riverkeeper is dedicated to protecting and restoring the health of the Spokane River Watershed.
7 Spokane Riverkeeper accomplishes its goals by collaborating, educating, and, when necessary,
8 litigating to preserve the Spokane River's health through the Clean Water Act and other laws. A
9 significant part of Spokane Riverkeeper's mission is to encourage and promote the use of the
10 Spokane River in hopes that river users will turn into river protectors. Toxic pollution due to
11 inadequate standards degrades the river experience for Spokane Riverkeeper and its supporters.

12 12. Plaintiff RE Sources is a non-profit organization, incorporated under the laws of
13 Washington and recognized by the Internal Revenue Service as a tax-exempt organization under
14 Section 501(c)(3) of the Internal Revenue Code. RE Sources's donors and supporters reside on
15 or near or recreate on or near the northern Puget Sound. RE Sources is located at 2309 Meridian
16 Street, Bellingham, WA 98225. North Sound Baykeeper ("Baykeeper") is a program of RE
17 Sources. Baykeeper works to protect and restore the marine and nearshore habitats of the
18 northern Puget Sound region. Enforcement of Clean Water Act laws and permits is integral to
19 achieving Baykeeper's goals. RE Sources is an environmental grassroots organization and
20 Baykeeper works to fight pollution and protect waterways in Whatcom and parts of Skagit
21 counties through public education and outreach, community science and monitoring, pollution
22 patrols and community reporting, review and submission of technical comments, and when
23 necessary, litigation. Many Baykeeper supporters consume fish and/or recreationally harvest
24

1 fish and shellfish and are all at risk—in addition to the waterways of the North Sound watershed
2 that Baykeeper protects—if Washington’s water quality standards do not adequately account for
3 the amount of fish Washingtonian’s actually consume.

4 13. Plaintiff Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is a
5 trade organization of commercial fishing families that works to protect fish and fish habitat from
6 pollution and to promote restoration where fish habitat and health are degraded. PCFFA’s
7 principal place of business is in San Francisco, California, and a Northwest Regional Office is
8 located in Eugene, Oregon. PCFFA is the largest organization of commercial fishermen on the
9 West Coast. It consists of a federation of 17 smaller commercial fishermen’s vessel owners’
10 associations, trade associations, port associations, and marketing associations with membership
11 throughout Washington, Oregon, and California. PCFFA also has “at-large” members who are
12 unaffiliated with any particular fishermen’s association but have become individual members of
13 PCFFA. Collectively, PCFFA represents nearly 1,000 west coast commercial fishing families.
14 Many of PCFFA’s members derive all or part of their income from the harvesting of fish in or
15 near Washington waters or fish that originate in Washington waters. Failure to adequately
16 protect fish and fish consumers impairs the commercial interests of PCFFA and its members.

17 14. Plaintiff Institute for Fisheries Resources (“IFR”) is a California non-profit
18 organization that works to protect and restore fish populations and the human economies that
19 depend on them by establishing alliances among fishing men and women, with government
20 agencies, and with concerned citizens. IFR advocates for reforms to protect fish health and
21 habitat throughout the U.S. West Coast and has successfully advocated for dam removals,
22 improved pesticide controls, and enhanced marine and watershed conservation regulations
23 throughout the West Coast. IFR’s principle place of business is in San Francisco, California, and
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1 IFR also maintains a Northwest Regional Office in Eugene, Oregon. Most of IFR's at least 850
2 contributors are commercial fishermen. IFR and PCFFA have common Board members, general
3 membership, and staff; however, IFR is a separate organization that focuses on marine resources
4 protection and conservation. IFR and its members are directly and indirectly injured by EPA's
5 failure to adequately protect fish and fish consumers in Washington.

6 15. Plaintiff Makah Indian Tribe ("Tribe") is a sovereign federally recognized Indian
7 tribe based in Neah Bay, Washington. The Tribe is the sole tribal signatory to the 1855 Treaty of
8 Neah Bay with the United States, and in the Treaty secured rights including the "right of taking
9 fish and of whaling or sealing at usual and accustomed grounds and stations." 12 Stat. 939, at
10 Art. IV. Members of the Makah Tribe and their ancestors have resided and fished on the
11 northwest Olympic Peninsula since time immemorial. Fishing, shellfishing, and eating other
12 marine foods remain fundamental to the Tribe's subsistence and cultural identity. Fishing under
13 the Treaty right provides widespread benefits to the members of the Tribe who live on the Makah
14 Reservation, and is the Tribe's most important economic activity. The Tribe staffs a Fisheries
15 Management Department, which includes biologists, ecologists, and policy analysts, devoted to
16 the research and monitoring of environmental conditions and fisheries resources. The Tribe,
17 both independently and through the Northwest Indian Fisheries Commission, submitted
18 comments to the EPA opposing the rescission of the federal human health criteria standards and
19 instatement of deficient water quality standards that EPA previously disapproved.

20 16. Defendant United States Environmental Protection Agency ("EPA") is an agency
21 of the United States charged with overseeing and approving or disapproving state water quality
22 standards pursuant to 33 U.S.C. § 1313 to protect the public health or welfare, enhance the
23 quality of water, and serve the purposes of the Clean Water Act.

1 17. Defendant Andrew Wheeler, the Administrator of EPA, is the chief officer of
2 EPA, the federal official ultimately responsible for EPA's administration and implementation of
3 its legal duties. Administrator Wheeler is sued in his official capacity.

4 18. Plaintiffs have representational standing to bring this action. EPA's weakening of
5 Washington's water quality standards has an adverse impact on Plaintiffs and Plaintiffs'
6 members' ability to use and enjoy water bodies in Washington, and has injured the recreational,
7 environmental, aesthetic, and/or other interests of Plaintiffs and their members. These injuries
8 are traceable to EPA's unlawful approval of inadequate human health criteria, and EPA's related
9 withdrawal of Washington's current, protective criteria. Plaintiffs' injuries are capable of redress
10 by action of this Court.

11 19. Plaintiffs have organizational standing to bring this action. Plaintiffs have been
12 actively engaged in a variety of educational and advocacy efforts to improve water quality and to
13 improve protective health standards such as the fish consumption rate in Washington's waters.
14 EPA's decision to withdraw the federally promulgated criteria and approve standards that fail to
15 protect designated uses affects Plaintiffs' clean water advocacy efforts. These injuries are fairly
16 traceable to Defendants' violations and are redressable by the Court.

17 JURISDICTION AND VENUE

18 20. Plaintiffs bring this action for review pursuant to the Administrative Procedure
19 Act, 5 U.S.C. §§ 701-706, a declaratory judgment pursuant to 28 U.S.C. § 2201, and injunctive
20 relief pursuant to 5 U.S.C. § 705.

21 21. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
22 question jurisdiction), § 2201 (declaratory judgment), and § 2202 (further relief).

23 22. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because
24 Plaintiffs PSA, RE Sources, and the Makah Indian Tribe reside and maintain headquarters in the

1 Western District of Washington, and because the subject of the Complaint is EPA’s action with
2 respect to Washington’s fish consumption standards and attendant criteria for toxic
3 contaminants.

4 LEGAL AND FACTUAL BACKGROUND

5 CLEAN WATER ACT REQUIREMENTS FOR DEVELOPMENT AND PROMULGATION
6 OF WATER QUALITY STANDARDS

7 23. The Clean Water Act requires states to set water quality standards necessary to
8 achieve the requirements and serve the purposes of the Clean Water Act: to restore and maintain
9 the chemical, physical, and biological integrity of the Nation’s waters, including the protection
10 and propagation of fish and shellfish, and to prohibit pollution to water in toxic amounts. 33
11 U.S.C. §§ 1251(a) and 1313(c)(2)(A).

12 24. A state’s water quality standards must include use designations and water quality
13 criteria necessary to protect those designated uses. 40 C.F.R. §§ 131.6 and 131.10. Water
14 quality criteria must ensure that designated uses of waters—such as protection of fish and
15 wildlife, consumption of fish, and recreational uses such as fishing, and swimming and
16 boating—are achieved and maintained. *Id.* §§ 131.2 and 131.3(i). Criteria must protect the most
17 sensitive use, and must be based on “sound scientific rationale.” *Id.* § 131.11(a)(1). Criteria can
18 be narrative (describing the condition needed to support the designated uses of the waterbody) or
19 numeric. *Id.* § 131.3(b).

20 25. Whenever a state adopts a new or revised water quality standard, it must submit it
21 to the EPA for review and disapproval or approval. 33 U.S.C. § 1313(c)(2). If, within 60 days
22 of submission, EPA determines that the state-submitted standard meets all the requirements of
23 the Clean Water Act, including that criteria are adequate to protect designated uses, “such
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1 standard shall thereafter be the water quality standard for the applicable waters of that State.” *Id.*
2 § 1313(c)(3).

3 26. If EPA determines that a state’s water quality standard does not meet the
4 requirements of the Clean Water Act, and that a new or revised standard is necessary to comply
5 with the requirements of the Act, EPA must notify the state of the changes necessary to comply
6 with the requirements of the Clean Water Act. 33 U.S.C. § 1313(c)(3). If the state fails to make
7 the necessary changes within 90 days of such notification, EPA must promptly promulgate a new
8 or revised standard for that state. *Id.* § 1313(c)(4). EPA must finalize its standard within 90
9 days of publishing the proposed standard unless the state steps in and corrects the problem. *See*
10 33 U.S.C. § 1313(c)(4).

11 27. Once EPA promulgates a water quality standard for a state, the standard becomes
12 the state’s applicable water quality standard and “remains the applicable standard until EPA
13 approves a change, deletion, or addition to that water quality standard, or until EPA promulgates
14 a more stringent water quality standard.” 40 C.F.R. § 131.21(e) (emphasis added). Under this
15 regulation, EPA is only authorized to revise a state’s existing water quality standards in a way
16 that makes the standards more stringent, not less stringent.

17 28. The Clean Water Act authorizes only two avenues for EPA to revise a state’s
18 existing water quality standards. First, EPA may establish a revised or new water quality
19 standard if EPA determines that a standard submitted by a state for EPA’s review and approval is
20 not “consistent with the applicable requirements of [the Clean Water Act].” 33 U.S.C. §
21 1313(c)(4)(A). Second, EPA may revise a state’s existing water quality standard if EPA
22 “determines that a revised or new standard is necessary to meet the requirements of” the Clean
23 Water Act (necessity determination). *Id.* § 1313(c)(4)(B). In 2016, EPA relied on a necessity
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1 determination when promulgating the criteria for toxics in Washington. Absent the submission
2 of a new or revised water quality standard by a state for EPA's review, a necessity determination
3 is the only basis for EPA to revise a state's existing water quality standards.

4 29. There is no provision in the Clean Water Act that allows EPA to reconsider its
5 disapproval of a state's water quality standard in order to impose a less stringent standard on the
6 state.

7 30. The Administrative Procedure Act ("APA") authorizes courts reviewing agency
8 action to hold unlawful and set aside final agency action, findings and conclusions that are
9 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. 5
10 U.S.C. § 706(2)(A). EPA approval of state water quality standards pursuant to the substantive
11 requirements of the Clean Water Act are reviewed under this provision of the APA.

12 EPA'S GUIDANCE AND 2015 HUMAN HEALTH CRITERIA

13 31. EPA's 2000 guidance directs states to set updated fish consumption rates (and
14 attendant human health criteria) that are based on the best available data; particularly local
15 consumer surveys that reflect the amount of fish local populations actually consume in order to
16 fully protect that designated use. EPA, *Methodology for Deriving Ambient Water Quality*
17 *Criteria for the Protection of Human Health* at 1-12 (Oct. 2000), available at
18 <http://perma.cc/0Ug1xn41Q88>. Accurately determining the fish consumption rate is integral to
19 regulators' ability to set protective human health water quality standards that ensure the levels of
20 toxic pollutants in fish are low enough so that fish remains safe to eat, even for people who eat
21 greater amounts of fish than others. *Id.* If a state sets the foundational fish consumption rate
22 lower than the amounts actually consumed, the commensurate human health water quality
23 standards will be too lenient and people consuming fish may ingest levels of toxics that will put
24 them at increased and unacceptable risk for adverse health consequences. *See id.*

1 32. Shortly after EPA issued its 2000 guidance on fish consumption and human health
2 criteria, a Federal Advisory Committee to EPA issued a report regarding the need for states to
3 ensure that all populations are protected, including those that have particularly high fish
4 consumption rates for cultural, religious, social and/or economic reasons. National
5 Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice*
6 (2002), available at <http://perma.cc/0D64qSMD6s8> (“Environmental Justice Report”). The
7 Environmental Justice Report confirmed and emphasized the need for states to use data reflective
8 of actual consumption rates of various communities and to set standards that are protective of
9 consumers at those rates. *Id.* at 30-32. The Environmental Justice Report also emphasized the
10 need to consider that some consumption rates may currently be suppressed due to reduced fish
11 availability and other factors. *Id.* at 43-49.

12 33. Surveys in Washington—a number of which were cited by EPA in its 2000
13 Guidance and in the 2002 Environmental Justice Report—evaluated fish consumption by Native
14 American tribal members, members of Pacific Islander and Asian communities, recreational
15 fishermen, and other groups. These surveys show fish consumption rates of 200, 300, and over
16 500 grams per day, even without considering suppressed consumption due to severely reduced
17 stocks of salmon, shellfish, and other fish relied upon by various Washington residents. *See also*
18 Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg.
19 85,417, 85,426 (Nov. 28, 2016) (available heritage fish consumption rates range from 401 to 995
20 grams per day).

21 34. In addition to the fish consumption rate, other components of the human health
22 criteria equation are critical to ensuring adequately protective water quality standards. One such
23 component is the acceptable cancer risk rate, which represents the risk that a person consuming
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1 fish will develop cancer during his or her lifetime because of exposure to toxics that may
2 accumulate in fish. In Washington State, that number has been set at 10^{-6} , a one in one million
3 chance that the average fish consumer would develop cancer from eating fish from the state. A
4 1×10^{-6} risk factor is generally considered protective. 40 C.F.R. § 131.36(b)(1).

5 35. Additional components of the human health criteria equation are assumptions
6 about a person's body weight, lifespan, the relative amount of toxics from ingestion of fish as
7 opposed to other sources (the "relative source contribution" number), and the use of
8 bioconcentration or bioaccumulation factors.

9 36. Section 304(a)(1) of the Clean Water Act requires EPA to develop and publish
10 and, from time to time, revise criteria for protection of water quality and human health that
11 accurately reflect the latest scientific knowledge. 33 U.S.C. § 1314(a). In 2015, EPA updated its
12 criteria for 94 chemical pollutants "to reflect the latest scientific information and implementation
13 of existing EPA policies found in *Methodology for Deriving Ambient Water Quality Criteria for*
14 *the Protection of Human Health (2000)*." Final Updated Ambient Water Quality Criteria for the
15 Protection of Human Health, 80 Fed. Reg. 36,986 (June 29, 2015) ("304(a) Guidance"). "These
16 final 2015 updated section 304(a) human health criteria recommendations supersede EPA's
17 previous recommendations." *Id.*

18 37. EPA's 2015 updated 304(a) Guidance revised certain default exposure inputs.
19 The updated 304(a) Guidance assumes a body weight of 80 kg, a drinking water consumption
20 rate of 2.4 liters per day, and a fish consumption rate of 22 grams per day. EPA noted that fish
21 consumption rates vary widely by geographical location and suggested that, when available,
22 states should use local data in setting a fish consumption rate to protect highly exposed
23 population groups. EPA, *Factsheet—Human Health Ambient Water Quality Criteria: 2015*

1 *Update* (June 2015), [https://www.epa.gov/sites/production/files/2015-10/documents/human-](https://www.epa.gov/sites/production/files/2015-10/documents/human-health-2015-update-factsheet.pdf)
2 [health-2015-update-factsheet.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/human-health-2015-update-factsheet.pdf).

3 38. Following EPA's 2000 methodology, the 304(a) Guidance recommended use of
4 the more protective bioaccumulation factors ("BAFs") over bioconcentration factors. "Unlike
5 bioconcentration factors, BAFs account for more exposure pathways than direct water contact.
6 As a result, the updated criteria will better represent exposures to pollutants that affect human
7 health." *Id.*

8 39. Finally, EPA's updated 304(a) Guidance recommended chemical-specific relative
9 source contributions ("RSC") ranging between 20 and 80 percent. *Id.* EPA's 2000 methodology
10 recommended that, absent scientific data about relative contributions of sources of toxics to the
11 populations that are to be protected by the water quality standards, states should use a default 20
12 percent RSC to account for the obvious fact that not all toxics a person ingests will necessarily
13 come from fish. EPA, Human Health Ambient Water Quality Criteria and Fish Consumption
14 Rates: Frequently Asked Questions, [https://www.epa.gov/sites/production/files/2015-](https://www.epa.gov/sites/production/files/2015-12/documents/hh-fish-consumption-faqs.pdf)
15 [12/documents/hh-fish-consumption-faqs.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/hh-fish-consumption-faqs.pdf). EPA noted that if the sources of exposure to a
16 chemical are well known and documented, a state may use a calculated RSC, but EPA
17 recommended that the value not be greater than 80 percent. *Id.*

18 40. States should establish numeric water quality criteria based on "(i) [EPA's] 304(a)
19 Guidance; or (ii) [EPA's] 304(a) Guidance modified to reflect site-specific conditions; or (iii)
20 Other scientifically defensible methods." 40 C.F.R. § 131.11(b)(1).

21 EPA'S REJECTION OF WASHINGTON'S 2016 PROPOSED HUMAN HEALTH CRITERIA
22 AND PROMULGATION OF FEDERAL CRITERIA FOR WASHINGTON

23 41. In 1992, EPA issued the National Toxics Rule ("NTR"), which set human health
24 criteria for Washington and other states covered by the rule. The criteria in the NTR were based

1 on an assumed 6.5 grams per day fish consumption rate and a 10^{-6} (one in one million) cancer
2 risk level. Many people in Washington eat far more than 6.5 grams of fish per day. Indeed,
3 certain populations, such as tribal populations, eat between 200 and 500 grams of fish per day.
4 Accordingly, the NTR was insufficient to protect Washington's fish consuming populations from
5 the dangerous toxic pollutants that can accumulate in fish tissue.

6 42. On September 14, 2015, EPA made a necessity determination under the Clean
7 Water Act regarding the human health criteria in Washington's water quality standards and
8 proposed to revise the human health criteria to make them more stringent in order to protect
9 Washington residents from exposure to toxic pollutants. 80 Fed. Reg. 55,063 (Sept. 14, 2015).
10 EPA invited Washington to submit its own human health criteria before EPA took action to
11 adopt human health criteria for Washington.

12 43. On August 1, 2016, the Washington State Department of Ecology ("Ecology")
13 submitted new and revised human health criteria to EPA for review and approval or disapproval.
14 Ecology's proposed criteria used the less protective option for nearly every step of the human
15 health criteria equation, often rejecting EPA's best-science instruction and recommendations
16 from EPA's 2000 methodology and updated 304(a) Guidance.

17 44. In November 2016, pursuant to its obligation under the Clean Water Act, EPA
18 disapproved 143 of Ecology's proposed human health criteria ("2016 Disapproved Criteria") and
19 simultaneously promulgated 144 human health criteria that would adequately protect
20 Washington's people and waters. 81 Fed. Reg. 85,417, 85,419 (Nov. 28, 2016); 40 C.F.R. §
21 131.45 (Washington's current, federally promulgated water quality standards).

22 45. While the 2016 Disapproved Criteria used a fish consumption rate of 175 grams
23 per day and a one in one million-cancer risk rate, the other inputs it used resulted in a
24

1 manipulated water quality standard equation and significantly less stringent criteria that would
2 not protect the designated use of fishing and eating fish and shellfish for residents of the state.
3 Specifically, Ecology adjusted some, but not all, components of the human health water quality
4 standards equation in reference to EPA's Exposure Factors Handbook, and picked only EPA
5 recommendations that would weaken water quality standards while rejecting those that would
6 strengthen the standards.

7 46. For instance, the 2016 Disapproved Criteria assume a relative source contribution
8 value for all its calculations of 1.0—that is, it assumes with no foundation in fact or research, that
9 a person in Washington ingests toxics only from fish or shellfish and not from any other source,
10 such as drinking water. This is particularly unsupported in the cases of arsenic and PCBs; it is
11 well established that humans ingest these toxins in drinking water.

12 47. The 2016 Disapproved Criteria would also allow PCB levels to be significantly
13 less protective than dictated by science and factors such as actual fish consumption rates and
14 bioaccumulation. PCBs have been shown to cause cancer in animals, and PCB exposure is
15 associated with neurobehavioral and immunological changes in children. The 2016 Disapproved
16 Criteria retained the unprotective and inadequate 1992 NTR standard for PCBs of 0.00017 ug/L.
17 The 2016 Disapproved Criteria also use a state-specific risk level exclusively for PCBs, allowing
18 a dramatically higher cancer risk rate for PCBs—rather than one in one million, the 2016
19 Disapproved Criteria would allow a one in 25,000-cancer risk for PCBs. The 2016 Disapproved
20 Criteria did not explain why it would allow a significantly increased cancer risk—forty times
21 more—for fish-consuming residents of Washington for this known and prevalent carcinogen, and
22 produced no scientific evidence to support a decision to allow the public to be at increased risk
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1 from PCBs relative to other pollutants. The EPA promulgated human health criteria for PCBs
2 are 25 times more protective than the 2016 Disapproved Criteria for PCBs.

3 48. The EPA promulgated criteria for Washington used a 10^{-6} cancer risk level and
4 assumed a fish consumption rate of 175 grams per day, and in a significant departure from the
5 2016 Disapproved Criteria, followed the 304(a) Guidance and other EPA guidance, which
6 resulted in more stringent criteria for most pollutants. 81 Fed. Reg. at 85,421-29.

7 EPA'S WEAKENING OF WASHINGTON'S EXISTING WATER QUALITY STANDARDS

8 49. On February 21, 2017, Northwest Pulp & Paper Association, American Forest and
9 Paper Association, Association of Washington Business, Greater Spokane, Inc., Treated Wood
10 Council, Western Wood Preservers Institute, Utility Water Act Group, and Washington Farm
11 Bureau ("Industry Petitioners") filed a petition with EPA, requesting that EPA reconsider its
12 disapproval of the 2016 Disapproved Criteria and repeal Washington's current, EPA-
13 promulgated human health criteria.

14 50. On August 3, 2018, EPA sent a letter to the attorney for one of the Industry
15 Petitioners advising her that EPA had decided to reconsider the regulation it promulgated in
16 November 2016 to establish Washington's current human health criteria.

17 51. Between August 7, 2018 and May 7, 2019, former Ecology Director Maia Bellon
18 repeatedly informed EPA that Washington steadfastly opposed reconsideration and revision of
19 the state's EPA-promulgated water quality standards. Director Bellon noted that Ecology had
20 been implementing the EPA-promulgated water quality standards for over two and a half years,
21 that a revision to the criteria would create regulatory uncertainty and confusion, and that there
22 was no legal basis for EPA to revise Washington's existing human health criteria.

23 52. On May 10, 2019, relying on supposed "inherent authority to reconsider prior
24 decisions," EPA reversed course and approved the majority of the 2016 Disapproved Criteria.

1 See EPA's May 10, 2019 Technical Support Document ("2019 EPA TSD") at 4, 8. EPA
2 acknowledged that Washington asked for the federally promulgated standards to be left in place,
3 but EPA acted against the state's wishes. *Id.* at 4. EPA based its 2019 decision on the same
4 record that EPA had previously used to support its disapproval of Washington's proposed human
5 health criteria as inadequate to protect designated uses in 2016.

6 53. EPA acknowledges that its reversal will result in water quality standards that are
7 less stringent—that is, less protective of human health—than Washington's current, federally
8 promulgated criteria. 2019 EPA TSD at 24; Withdrawal of Certain Federal Water Quality
9 Criteria Applicable to Washington, 84 Fed. Reg. 38,150, 38,153 (Aug. 6, 2019); 93 Fed. Reg. at
10 28,496. Dozens of pollutants will have less protective standards than they currently have under
11 the federally promulgated standards. See 2019 EPA TSD at 25-29 (table comparing current
12 standards with standards under EPA's Proposed Reversal).

13 54. In EPA's 2016 disapproval decision, EPA found that Ecology had not adequately
14 described its rationale for departing from the EPA's 304(a) Guidance. EPA's 2019 reversal
15 decision stated that the agency's 2016 decision was "inappropriate," and concluded that "in some
16 cases, it may be appropriate to evaluate a state's water quality standards, including [human
17 health criteria], based on a combination of existing and prior 304(a) recommendations." 2019
18 EPA TSD at 8. EPA did not cite to any additional record evidence or any new or different
19 authority or requirements that would support its reversal of position.

20 55. In 2016, "the majority of cases where the EPA disapproved Ecology's [human
21 health criteria], it was because the State calculated [human health criteria] using
22 [bioconcentration factors]" instead of following EPA's 2015 304(a) Guidance and using BAFs,
23 and "because the State used an RSC value of 1 for non-carcinogens" instead of EPA's 304(a)
24

1 Guidance range of 0.2-0.8. 2019 EPA TSD at 7. The 2016 EPA found that “Ecology did not
2 demonstrate how its selection of a RSC value of 1 to derive human health criteria is scientifically
3 defensible and protective of the applicable designated uses.” *Id.* at 17.

4 56. EPA now believes that an RSC of 1.0, coupled with “more conservative inputs”
5 elsewhere in the human health criteria equation, “appropriately balanced risks and resulted in
6 [human health criteria] that are based on sound science and are protective of Washington’s
7 designated uses.” 2019 EPA TSD at 18. Again, EPA did not cite to any additional record
8 evidence or any new or different authority or requirements that would support its reversal of
9 position.

10 57. In promulgating adequately protective criteria in 2016, EPA looked to the clear
11 and scientifically supported recommendations in EPA’s 304(a) Guidance and 2000 methodology
12 and used BAFs instead of bioconcentration factors. EPA’s new and wholly unsupported position
13 is that Ecology’s use of outdated bioconcentration factors is now somehow protective of
14 designated uses when considered alongside Ecology’s other inputs—many of which are also
15 significantly less protective than those used in Washington’s current, federally promulgated
16 water quality standards. *See* 2019 EPA TSD at 15.

17 58. On May 13, 2020, EPA issued a final rule withdrawing Washington’s federally
18 promulgated criteria. 93 Fed. Reg. 28,494 (May 13, 2020). When the final rule goes into effect
19 on June 12, 2020, the 2016 Disapproved Criteria will become the effective water quality
20 standards for Washington.

CAUSES OF ACTION

I. EPA'S MAY 10, 2019 APPROVAL OF THE 2016 DISAPPROVED CRITERIA VIOLATES THE CLEAN WATER ACT AND ADMINISTRATIVE PROCEDURE ACT.

59. Plaintiffs restate and reallege all preceding paragraphs.

60. The 2016 Disapproved Criteria are based on inaccurate and arbitrarily selected human health inputs, and are inadequate to protect Plaintiffs, Plaintiffs' members, and high fish-consuming populations. Accordingly, EPA's May 10, 2019 approval of the 2016 Disapproved Criteria violates the Clean Water Act.

61. EPA's approval of the 2016 Disapproved Criteria is contrary to the entirety of the record before EPA demonstrating that the 2016 Disapproved Criteria will not protect designated uses, are contrary to sound and rational science, and are contrary to EPA's own findings.

62. EPA's approval of water quality standards that fail to protect designated uses will injure the health, recreational, environmental, aesthetic, commercial, and/or other interests of Plaintiffs and their members.

63. EPA's approval of the 2016 Disapproved Criteria is arbitrary and capricious as contrary to the law and the record.

64. Based on the foregoing, as well as 33 U.S.C. § 1313(c) and 5 U.S.C. § 706(2)(A), Plaintiffs are entitled to an order vacating EPA's May 10, 2019 approval of the 2016 Disapproved Criteria.

II. EPA'S MAY 13, 2020 WITHDRAWAL OF WASHINGTON'S FEDERALLY PROMULGATED WATER QUALITY STANDARDS VIOLATES THE CLEAN WATER ACT AND ADMINISTRATIVE PROCEDURE ACT.

65. Plaintiffs restate and reallege all preceding paragraphs.

1 66. EPA’s May 13, 2020 withdrawal of Washington’s federally promulgated water
2 quality standards will result in water quality standards for the state that fail to protect designated
3 uses and is in violation of the Clean Water Act.

4 67. EPA’s withdrawal of the federally promulgated water quality standards is
5 contrary to the entirety of the record before EPA and contrary to EPA’s own findings regarding
6 the standards necessary to protect designated uses.

7 68. EPA’s withdrawal of the protective federally promulgated standards will injure
8 the health, recreational, environmental, aesthetic, commercial, and/or other interests of Plaintiffs
9 and their members.

10 69. EPA’s May 13, 2020 withdrawal of Washington’s federally promulgated water
11 quality standards is arbitrary and capricious as contrary to the law and the record.

12 70. Based on the foregoing, as well as 33 U.S.C. § 1313(c) and 5 U.S.C. §§
13 706(2)(A), Plaintiffs are entitled to an order vacating EPA’s May 13, 2020 withdrawal of
14 Washington’s federally promulgated standards.

15 **III. EPA’S ACTIONS EXCEED THE AGENCY’S STATUTORY AUTHORITY**

16 71. Plaintiffs restate and reallege all preceding paragraphs.

17 72. The human health criteria adopted by EPA in December 2016 are part of
18 Washington’s existing water quality standards and can only be revised pursuant to the process
19 and requirements of 33 U.S.C. § 1313(c)(4).

20 73. Under 33 U.S.C. § 1313(c)(4) there are only two ways EPA can revise a state’s
21 existing water quality standards, neither of which occurred here.

22 74. First, if EPA determines that a new or revised standard submitted to EPA by a
23 state is not consistent with the applicable requirements of the Clean Water Act, EPA shall notify
24 the state “not later than the ninetieth day after the date of submission” and specify the changes

1 that are necessary to meet such requirements. 33 U.S.C. § 1313(c)(3). If the state fails to make
2 the changes within 90 days of the notification, EPA shall prepare and publish regulations setting
3 forth a revised water quality standard. *Id.* § 1313(c)(4)(A). Washington has not submitted
4 human health criteria to EPA since the Department of Ecology made its submission on August 1,
5 2016, which EPA approved in part and disapproved in part. As required by the Clean Water Act,
6 EPA adopted human health criteria for Washington to replace the 143 proposed criteria that EPA
7 disapproved. EPA’s May 10, 2019 decision to unilaterally revise Washington’s existing human
8 health criteria does not follow the process and deadlines established by Congress in 33 U.S.C. §
9 1313(c).

10 75. Second, EPA can revise a state’s existing water quality standards after
11 determining that a new or revised standard is necessary to meet the requirements of the Clean
12 Water Act. 33 U.S.C. § 1313(c)(4)(B). In doing so, EPA may only promulgate “a more
13 stringent water quality standard.” 40 C.F.R. § 131.21(e). EPA’s May 10, 2019 decision to
14 revise Washington’s existing human health criteria does not include the necessity determination
15 required by 33 U.S.C. § 1313(c)(4)(B). In addition, EPA’s withdrawal of the federally
16 promulgated criteria will make Washington’s existing human health criteria less stringent, not
17 more stringent, as required by 40 C.F.R. § 131.21(e).

18 76. EPA does not have “inherent authority” to revise Washington’s water quality
19 standards by approving the 2016 Disapproved Criteria two and a half years after submission and
20 disapproval, particularly when the record demonstrates that the 2016 Disapproved Criteria fail to
21 protect designated uses.

22 77. EPA does not have “inherent authority” to replace Washington’s existing,
23 protective criteria with less stringent criteria. Congress has clearly spoken as to the
24

1 circumstances and timeline in which EPA must approve, deny, or revise state water quality
2 standards. EPA has no power to act outside of those limits. EPA's actions exceed its statutory
3 authority under the Clean Water Act.

4 78. Based on the foregoing, as well as 33 U.S.C. § 1313(c) and 5 U.S.C. § 706(2)(C),
5 Plaintiffs are entitled to an order vacating both EPA's May 10, 2019 approval of the 2016
6 Disapproved Criteria and EPA's related May 13, 2020 withdrawal of Washington's federally
7 promulgated standards.

8 REQUEST FOR RELIEF

9 Based on the foregoing, Plaintiffs request the following relief:

10 1. A declaration that EPA's May 10, 2019 approval of Washington's 2016 proposed
11 human health criteria is arbitrary and capricious, contrary to law, and an abuse of discretion;

12 2. A declaration that EPA's May 13, 2020 withdrawal of Washington's protective
13 EPA-promulgated criteria is arbitrary and capricious, contrary to law, and an abuse of discretion;

14 3. A declaration that EPA exceeded its authority under the Clean Water Act and
15 applicable regulations when EPA approved Washington's 2016 proposed human health criteria
16 two and a half years after rejecting the criteria as failing to meet the requirements of the Clean
17 Water Act;

18 4. Vacatur of EPA's May 10, 2019 approval of Washington's proposed 2016 human
19 health criteria;

20 5. Vacatur of EPA's May 13, 2020 Withdrawal of Certain Federal Water Quality
21 Criteria Applicable to Washington;

22 6. An injunction prohibiting EPA from revising Washington's federally-
23 promulgated human health criteria unless Washington submits new or revised criteria to EPA

1 that fails to meet the requirements of the Clean Water Act, or until EPA makes a necessity
2 determination under 33 U.S.C. § 1313(c)(4)(B).

3 7. An award of Plaintiffs' costs and attorneys' fees as determined appropriate under
4 the Equal Access to Justice Act; and

5 8. Such other and further relief as the Court deems just and equitable.

6 DATED this 11th day of June, 2020.

7 s/ Marisa C. Ordonia

Marisa C. Ordonia, WSBA No. 48081

8 s/ Janette K. Brimmer

9 Janette K. Brimmer, WSBA No. 41271

EARTHJUSTICE

10 810 Third Avenue, Suite 610

Seattle, WA 98104

11 (206) 343-7340

mordonia@earthjustice.org

12 jbrimmer@earthjustice.org

13 *Attorneys for Puget Soundkeeper Alliance,*
14 *Columbia Riverkeeper, Spokane Riverkeeper, RE*
15 *Sources, Pacific Coast Federation of Fishermen's*
Associations, Institute for Fisheries Resources, and
Makah Indian Tribe

16 s/ Wyatt F. Golding

Wyatt F. Golding, WSBA No. 44412

17 s/ Brian Gruber

Brian Gruber, WSBA No. 32210

18 s/ Anna Brady

19 Anna Brady, WSBA No. 54323

ZIONTZ CHESTNUT

20 2101 Fourth Avenue, Suite 1230

Seattle, WA 98121

21 wgolding@ziontzchestnut.com

bgruber@ziontzchestnut.com

22 abrady@ziontzchestnut.com

(206) 448-1230 | Phone

23 (206) 448-0962 | Fax

24 *Attorneys for Makah Indian Tribe*