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

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation,

Plaintiff,

v.

**UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY**,

Defendant.

NO.

COMPLAINT

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

NATURE OF THE CASE

1. This is a civil action brought by plaintiff Northwest Environmental Advocates (“NWEA”) challenging a failure by defendant United States Environmental Protection Agency (“EPA”) to discharge its nondiscretionary duty to establish Total Maximum Daily Loads (“TMDLs”) for several waterbodies in Washington’s Deschutes River Basin. Pursuant to Section 303(d)(2) of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1313(d)(2), EPA was required to establish TMDLs for these waterbodies no later than July 29, 2018, but it has yet to do so.

1 wetlands, and wildlife habitat in the Northwest, including Washington. NWEA employs
2 advocacy with administrative agencies, community organizing, strategic partnerships, public
3 record requests, information sharing, lobbying, and litigation to ensure better implementation of
4 the laws that protect and restore the natural environment. NWEA has participated in the
5 development of CWA programs in the State of Washington for many years, including the state's
6 TMDL program by, *inter alia*, having brought suit in 1991 against EPA for its failure to establish
7 TMDLs for the State of Washington and serving on EPA's TMDL federal advisory committee
8 from 1996 to 1998.

10 7. NWEA's members regularly use and enjoy the waters of the Deschutes River
11 basin, Capitol Lake, and Budd Inlet. NWEA's members regularly use and enjoy these waters and
12 adjacent lands and have definite future plans to continue using them for recreational, scientific,
13 aesthetic, spiritual, conservation, educational, employment, and other purposes. Many of these
14 interests revolve around viewing sensitive salmonid species and other aquatic species that are
15 under threat by pollution in the waters at issue in this lawsuit. The use and enjoyment that
16 NWEA's members derive from viewing these species, and otherwise recreating on or near and
17 enjoying the waters of the Deschutes River basin, Capitol Lake, and Budd Inlet, is diminished by
18 the effects of pollution, including pollution relating to temperature, human pathogens, dissolved
19 oxygen, pH, nutrients, and fine sediment. NWEA's members would derive more benefits and
20 enjoyment from their use of these waters if these pollutants were not adversely affecting water
21 quality and aquatic and aquatic-dependent wildlife in these waters.

23 8. Some of NWEA's members derive or used to derive recreational and aesthetic
24 benefits by fishing in the Deschutes River. These members have curtailed their fishing in the
25 Deschutes River, or no longer fish in the River, due in part to concerns regarding pollutants and
26

1 their effect on fisheries, including concerns relating to high water temperatures, low dissolved
2 oxygen, and high levels of fine sediment and human pathogens.

3 9. Successful completion of TMDLs to address these pollution problems is a critical
4 step in fully implementing the goals of the CWA for these waters, fully protecting salmonids and
5 other aquatic and aquatic-dependent species, and improving water quality. EPA's failure to
6 establish TMDLs for the waterbodies at issue in this lawsuit puts these species at risk and
7 threatens or negatively affects the interests of NWEA's members.

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

13 11. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is
14 the federal agency charged with administration of the CWA, and specifically with establishing
15 TMDLs for the waterbodies at issue in this case under Section 303(d)(2) of the CWA, 33 U.S.C.
16 § 1313(d)(2).

17 **LEGAL BACKGROUND**

18 ***The Clean Water Act and Water Quality Standards***

19 12. Congress adopted amendments to the CWA in 1972 in an effort "to restore and
20 maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.
21 § 1251(a). The primary goal of the CWA is to eliminate the discharge of pollutants into navigable
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1 waters entirely; also established is “an interim goal of water quality which provides for the
2 protection and propagation of fish, shellfish, and wildlife.” *Id.* § 1251(a)(1–2).

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

11 14. Among other things, water quality standards serve as the regulatory basis for
12 establishing water quality-based controls over point sources, as required by sections 301 and 306
13 of the CWA, 33 U.S.C. §§ 1311 & 1316. A point source is a “discernable, confined and discrete
14 conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from
15 which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges are
16 regulated under National Pollutant Discharge Elimination System (“NPDES”) permits, which
17 require point sources to meet both technology-based effluent limitations and “any more stringent
18 limitation . . . necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C). Water
19 quality standards are thus integral to the regulation of point source pollution.
20

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

9 *Total Maximum Daily Loads*

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

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

4 18. After calculating a waterbody’s loading capacity, a TMDL then distributes
5 portions of the total loading capacity to individual sources of pollution or sectors of pollution
6 sources. These allocations include both “load allocations” and “wasteload allocations,” for point
7 and nonpoint sources of pollution respectively. 40 C.F.R. § 130.2(i). A wasteload allocation is
8 “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or
9 future point sources of pollution.” *Id.* at § 130.20(h). A load allocation is “[t]he portion of a
10 receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint
11 sources of pollution or to natural background sources.” *Id.* at § 130.20(f). In essence, the purpose
12 of load and wasteload allocations is to allocate the total amount of pollution that may enter a
13 waterbody between all the sources of pollution, including both point and nonpoint sources of
14 pollution, thereby restricting pollution inputs sufficiently to attain and maintain water quality
15 standards.
16

17 19. As with water quality standards, states must submit TMDLs to EPA for approval
18 or disapproval under section 303(d) of the CWA. *See* 33 U.S.C. § 1313(d)(2). Section 303(d)
19 requires that within 30 days after submission EPA either approve the TMDLs or disapprove
20 them. *Id.*
21

22 20. If EPA disapproves a state-submitted TMDL, it must then establish a replacement
23 TMDL within 30 days. *Id.*
24

25 21. Upon EPA approval or promulgation of a TMDL, all future NPDES permits must
26 be consistent with the TMDL’s wasteload allocations for point sources. 40 C.F.R. § 130.2. The

1 approved load allocations serve as the basis for state and local programs for controlling nonpoint
2 source pollution, including state programs that receive federal funds under section 319 of the
3 CWA, 33 U.S.C. § 1329. Once EPA approves a TMDL, the state must also incorporate the
4 TMDL into its “continuing planning process” under section 303(e) of the CWA. 33 U.S.C. §
5 1313(e)(3)(C).
6

7 ***The CWA Citizen Suit Provision***

8 22. Section 505 of the CWA provides a private cause of action for citizens to enforce
9 the procedural and substantive mandates and prohibitions of the CWA. *See* 33 U.S.C. § 1365.
10 Among other things, this provision provides that “any citizen may commence a civil action on his
11 own behalf . . . against the Administrator [of EPA] where there is alleged a failure of the
12 Administrator to perform any act or duty under [the CWA] which is nondiscretionary with the
13 administrator.” 33 U.S.C. § 1365(a)(2). In such an action, “[t]he district courts shall have
14 jurisdiction . . . to order the Administrator to perform such act or duty.” 33 U.S.C. § 1365(a).
15

16 23. Under Section 303(d)(2) of the CWA, EPA has a nondiscretionary duty to
17 establish a replacement TMDL within 30 days after it disapproves a state-submitted TMDL. *See*
18 33 U.S.C. § 1313(d)(2) (“[EPA] shall not later than thirty days after the date of such disapproval .
19 . . establish such loads for such waters as he determines necessary to implement the water quality
20 standards applicable to such waters . . .”).
21

22 **FACTUAL BACKGROUND**

23 ***The Deschutes TMDL***

24 24. Washington’s Deschutes River begins in the Bald Hills of the Gifford Pinchot
25 National Forest (west of Mt. Rainier), travels down through foothills and the cities of Tumwater
26

1 and Olympia, passes a dam that converted the former estuary into Capitol Lake, and ultimately
2 discharges to the marine waters of Budd Inlet and the Puget Sound. The Deschutes River and
3 other tributaries to Budd Inlet are protected, *inter alia*, by Washington water quality standards
4 that include numeric and narrative criteria for temperature, bacteria, dissolved oxygen, pH, and
5 fine sediment. Some of these water quality standards are intended to protect human use of the
6 covered waters (*e.g.*, bacteria). Others are intended to protect sensitive aquatic life uses such as
7 rearing, migration, and spawning of salmon, steelhead, trout, and other aquatic life uses (*e.g.*,
8 temperature, pH, dissolved oxygen, and fine sediment), which also support human uses, such as
9 recreation.
10

11 25. Exceedances of some of these water quality standards can be harmful to human
12 health. For example, excess fecal coliform can indicate the presence of water-borne human
13 illnesses and pathogens (*e.g.*, hepatitis) associated with human waste and waste from other warm-
14 blooded animals. Exceedances of other water quality parameters can harm important fish and
15 shellfish populations that depend on the Deschutes River watershed and downstream waters for
16 survival. Such exceedances result in a failure to attain the Clean Water Act's goal of achieving
17 water quality that provides for protection and propagation of fish, shellfish, and wildlife and
18 recreation in and on the water.
19

20 26. Likewise, excess temperature can lead to depressed survival rates among
21 salmonids due to adverse physiological and behavioral changes such as increased metabolic rates,
22 reduced swimming performance, impairment of predator avoidance, and increased incidence of
23 disease. Temperature often has a synergistic or additive effect by increasing the toxicity of other
24 pollutants. Temperature also contributes to lower levels of dissolved oxygen in streams and
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1 concurrently causes greater stress to aquatic life under conditions of low dissolved oxygen. Low
2 dissolved oxygen, in turn, can have a number of deleterious effects on salmonids and other
3 aquatic organisms, including decreased growth rates, decreased swimming ability, increased
4 susceptibility to disease, and increased sensitivity to other environmental stressors and pollutants.
5 Adverse changes to the pH of a waterbody can increase the harmful effects of water-borne toxics,
6 particularly metals common in discharges of stormwater runoff as well as cause lethal and
7 sublethal effects to aquatic organisms. And too much fine sediment can lead to depressed fish
8 stocks by, *inter alia*, smothering fish redds and lowering intergravel dissolved oxygen levels. For
9 all of these reasons, achieving Washington's water quality standards for these parameters is a
10 critical component of the CWA's goal of achieving water quality that allows for human
11 recreation and provides for the protection and propagation of fish, shellfish, and wildlife. *See* 33
12 U.S.C. § 1251.
13

14
15 27. Since at least the late 1980s, pollution in the Deschutes River basin and Budd Inlet
16 has attracted the attention of federal, state, and local governments.¹ Many of the waters at issue in
17 this lawsuit, including the Deschutes River, were added to Washington's 303(d) list of impaired
18 waters as early as 1996 for impairments relating to excess temperature, fecal coliform, dissolved
19 oxygen, and pH, and on later lists for fine sediment. By at least 2002, Ecology began work on a
20 TMDL package to address these impairments, as well as related impairments in Capitol Lake and
21 the marine waters of Budd Inlet. Over the next several years, Ecology published detailed studies
22 on the sources and severity of the impairments and the sources of the pollutants, and plans to
23

24
25 ¹ *See* U.S. Env'tl. Prot. Agency, *Budd Inlet Bay Action Program: 1991 Action Plan* (July
26 1991) (reporting, *inter alia*, that EPA had identified eutrophication in southern Budd Inlet as a
high priority as early as 1988).

1 remedy them through the TMDL process.² These studies confirmed that the impairments are
 2 caused, in large part, by anthropogenic impacts throughout the basin, including municipal
 3 discharges of treated wastewater; decreased riparian vegetation due to logging and development;
 4 deteriorating sewer infrastructure; improperly maintained, poorly located, or failing on-site septic
 5 systems; domestic animals; fertilizers and manure; stormwater runoff; and road building.
 6

7 28. Finally, 13 years after it started, in September 2015, Ecology completed a draft
 8 TMDL package, one that covered the fresh and marine waters of the basin including Budd Inlet.
 9 *See Ecology, Deschutes River, Capitol Lake, and Budd Inlet Total Maximum Daily Load Study*
 10 *Supplemental Modeling Scenarios* (Sept. 2015). Rather than submit the TMDL package to EPA,
 11 however, by December of that year, Ecology decided to split the Deschutes basin from Capitol
 12 Lake and Budd Inlet, claiming that it would prepare a TMDL for the downstream portion of the
 13 watershed later.
 14

15 29. In December of 2015, after removing Budd Inlet and Capitol Lake from the
 16 TMDL package, Ecology finally submitted the TMDL to EPA for review under Section 303(d)(2)

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

1 of the CWA, 33 U.S.C. § 1313(d)(2). See Washington Department of Ecology, *Deschutes River,*
2 *Percival Creek, and Budd Inlet Tributaries Temperature, Fecal Coliform Bacteria, Dissolved*
3 *Oxygen, pH, and Fine Sediment Total Maximum Daily Load: Water Quality Improvement Report*
4 *and Implementation Plan – FINAL* (Dec. 2015, Pub. No. 15-10-012) (herein, “Deschutes
5 TMDL”). The Deschutes TMDL, while referred to here in the singular, contained individual
6 TMDLs for 73 waterbodies and waterbody segments throughout the Deschutes Basin, with each
7 individual TMDL addressing one or more of the following parameters: fine sediment, fecal
8 coliform bacteria, water temperature, dissolved oxygen (“DO”), an pH.

9
10 30. By August of 2017, however, EPA had still not acted to approve or disapprove
11 Washington’s submission of the Deschutes TMDL, in direct violation of Section 303(d)(2) of the
12 CWA, which requires EPA to either approve or disapprove a proposed TMDL within 30 days of
13 submission.

14 15 ***Prior Litigation Over the Deschutes TMDL***

16 31. On August 27, 2017, NWEA gave notice to EPA under Section 505(b) of the
17 CWA of NWEA’s intent to file a lawsuit compelling EPA to either approve or disapprove the
18 Deschutes TMDL.

19 32. On November 6, 2017, NWEA filed suit against EPA in the Western District of
20 Washington to force EPA to act on the Deschutes TMDL. A copy of NWEA’s complaint in that
21 matter is attached hereto as **Exhibit 2**. The lawsuit was captioned: *Northwest Environmental*
22 *Advocates v. United States Environmental Protection Agency*, No. C17-1664RSL (W.D. Wash).
23 We refer to it here as the “First Deschutes Lawsuit.”
24
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1 33. On June 25, 2018, Judge Robert S. Lasnik granted NWEA's motion for summary
2 judgment in the First Deschutes Lawsuit, and ordered NWEA to either approve or disapprove the
3 Deschutes TMDL no later than June 29, 2018. A copy of Judge Lasnik's order is attached hereto
4 as **Exhibit 3**.

5
6 34. On June 26, 2018, Judge Lasnik issued judgment in favor of NWEA in the First
7 Deschutes Lawsuit. A copy of the final judgment is attached hereto as **Exhibit 4**.

8 ***EPA's Partial Disapproval of the Deschutes TMDL and Continuing Failure to***
9 ***Establish Replacement TMDLs***

10 35. On June 29, 2018, EPA issued a letter disapproving 37 individual segment-
11 parameter TMDLs within the Deschutes TMDL for temperature, DO, pH, fine sediment, and
12 bacteria. A copy of EPA's letter disapproving these TMDLs is attached to NWEA's notice letter
13 in this action (Exhibit 1 hereto).

14 36. Specifically, EPA disapproved individual TMDLs for the waterbodies listed below
15 in Table A. For each waterbody, Table A also identifies the pollutant that is causing the
16 impairment, and the identification numbers for each waterbody on Washington's 1996 and 2010
17 303(d) lists.
18

19 **Table A**

Waterbody	Parameter	1996 Listing ID	2010 Listing ID
Huckleberry Creek	Temperature	WA-13-1024	3757
Reichel Creek	Temperature	WA-13-1022	48666
Tempo Lake Outlet	Temperature	---	48696
Ayer (Elwanger) Creek	Temperature	WA-13-1015	(73229)

	Waterbody	Parameter	1996 Listing ID	2010 Listing ID
1				
2	Unnamed Spring to	Temperature	---	48923
3	Deschutes River			
4	Adams Creek	pH	---	50965
5	Ayer (Elwanger Creek)	pH	WA-13-1015	5850
6	Black Lake Ditch	pH	---	50990
7				
8	Deschutes River	Fine Sediment	WA-13-1020	6232
9	Ayer (Elwanger) Creek	Dissolved Oxygen	WA-13-1015	5851
10	Deschutes River	Dissolved Oxygen	WA-13-1010; WA-13-1020	10894; 47753; 47754; 47756
11				
12	Lake Lawrence Creek	Dissolved Oxygen	---	47696
13	Reichel Creek	Dissolved Oxygen	WA-13-1022	47714
14	Black Lake Ditch	Dissolved Oxygen	---	47761; 47762
15	Percival Creek	Dissolved Oxygen	WA-13-1012	48085; 48086
16	Adams Creek	Bacteria	--	45462; 45695
17	Ellis Creek	Bacteria	WA-13-0020	45480
18	Indian Creek	Bacteria	WA-13-1300	3578; 45213; 46410; (74218)
19	Mission Creek	Bacteria	WA-13-1380	45212; 46102
20	Moxlie Creek	Bacteria	WA-13-1350	3759; 3761; 45252; 46432
21	Schneider Creek	Bacteria	---	45559
22	Reichel Creek	Bacteria	WA-13-1022	3763; 45566
23				
24				
25				
26				

Waterbody	Parameter	1996 Listing ID	2010 Listing ID
Spurgeon Creek	Bacteria	WA-13-1010	46061

37. It has now been over four months since EPA disapproved Washington's submittal of TMDLs for the waterbodies in Table A. EPA has yet to establish replacement TMDLs for these waterbodies as required by Section 303(a)(2) of the CWA, 33 U.S.C. § 1313(d)(2).

38. Water quality in the Deschutes River Basin continues to be degraded, and the interests of NWEA's members continue to be put at risk, due to EPA's continuing failure to discharge its mandatory duties under the CWA with respect to the Deschutes TMDL.

CLAIM FOR RELIEF

Failure to Establish Replacement TMDLs, 33 U.S.C. §1365(a)(2)

39. Plaintiff NWEA realleges all preceding paragraphs.

40. Section 303(d)(2) of the CWA requires EPA to establish replacement TMDLs within 30 days of its disapproval of a state-submitted TMDL. *See* 33 U.S.C. § 1313(d)(2). EPA's duty to establish replacement TMDLs within this timeframe is a nondiscretionary duty within the meaning of section 505 of the CWA, 33 U.S.C. § 1365(a)(2), the Act's citizen suit provision.

41. Over four months have elapsed since the EPA disapproved Washington's submission of TMDLs for the waterbodies listed above in Table A. To date, EPA has not established replacement TMDLs for those waterbodies.

42. In failing to establish timely replacement TMDLs for the waterbodies in Table A, EPA failed to perform a nondiscretionary duty within the meaning of the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2).

1 43. EPA will remain in continuing violation of the CWA until it establishes the
2 replacement TMDLs.

3 **PRAYER FOR RELIEF**

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

6
7 A. Declare that EPA has violated its nondiscretionary duty under 33 U.S.C. §
8 1313(d)(2) to timely establish replacement TMDLs for the waterbodies listed above in Table A;

9 B. Enter an order directing EPA to establish replacement TMDLs for those
10 waterbodies, as required by Section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2);

11 C. Award NWEA its reasonable costs and attorneys' fees under 33 U.S.C. § 1365(d);

12 and

13
14 D. Grant such other relief as the Court deems just and proper.

15 DATED this 8th day of November, 2018.

16 Respectfully submitted,

17 BRICKLIN & NEWMAN, LLP

18 By: *s/ Bryan Telegin*

19 Bryan Telegin, WSBA No. 46686

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21 Seattle, WA 98101

22 Telephone: (206) 264-8600

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25 EARTHRISE LAW CENTER

26 By: *s/ Lia Comerford*

Lia Comerford, *pro hac vice* application forthcoming

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*Counsel for Plaintiff Northwest Environmental
Advocates*

Exhibit 1



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

August 27, 2018

*VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED*

Andrew Wheeler, Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Jefferson Beauregard Sessions III, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Notice of Intent to Sue for Failure to Establish Replacement TMDLs for Washington's Deschutes River Basin

Dear Mr. Wheeler and Mr. Sessions:

This letter provides notice that Northwest Environmental Advocates (“NWEA”) intends to sue the U.S. Environmental Protection Agency (“EPA”) under Section 505(a)(2) of the Clean Water Act (“CWA”) for failure to establish replacement TMDLs for several waterbodies in Washington’s Deschutes River Basin. Washington proposed TMDLs for those waterbodies in December of 2015, when it submitted its Deschutes River, Percival Creek, and Budd Inlet Tributaries Multi-parameter TMDL (“Deschutes TMDL”) for EPA’s review pursuant to Section 303(d)(2) of the CWA.¹ On June 29, 2018, EPA issued a letter disapproving 37 individual TMDLs within the Deschutes TMDL for temperature, DO, pH, fine sediment, and bacteria. Specifically, as noted in the letter, EPA disapproved the following individual TMDLs:

¹ See Deschutes River, Percival Creek, and Budd Inlet Tributaries Temperature, Fecal Coliform, Bacteria, Dissolved Oxygen, pH, and Fine Sediment Total Maximum Daily Load (Washington Department of Ecology Publication No. 15-10-012, available at <https://fortress.wa.gov/ecy/publications/documents/1510012.pdf>).

Andrew Wheeler, Acting EPA Administrator
 Jefferson Beauregard Sessions III, Attorney General
 August 27, 2018
 Page 2

Waterbody	Parameter	1996 Listing ID	2010 Listing ID
Huckleberry Creek	Temperature	WA-13-1024	3757
Reichel Creek	Temperature	WA-13-1022	48666
Tempo Lake Outlet	Temperature	---	48696
Ayer (Elwanger) Creek	Temperature	WA-13-1015	(73229)
Unnamed Spring to Deschutes River	Temperature	---	48923
Adams Creek	pH	---	50965
Ayer (Elwanger Creek)	pH	WA-13-1015	5850
Black Lake Ditch	pH	---	50990
Deschutes River	Fine Sediment	WA-13-1020	6232
Ayer (Elwanger) Creek	Dissolved Oxygen	WA-13-1015	5851
Deschutes River	Dissolved Oxygen	WA-13-1010; WA-13-1020	10894; 47753; 47754; 47756
Lake Lawrence Creek	Dissolved Oxygen	---	47696
Reichel Creek	Dissolved Oxygen	WA-13-1022	47714
Black Lake Ditch	Dissolved Oxygen	---	47761; 47762
Percival Creek	Dissolved Oxygen	WA-13-1012	48085; 48086
Adams Creek	Bacteria	--	45462; 45695
Ellis Creek	Bacteria	WA-13-0020	45480
Indian Creek	Bacteria	WA-13-1300	3578; 45213; 46410; (74218)
Mission Creek	Bacteria	WA-13-1380	45212; 46102
Moxlie Creek	Bacteria	WA-13-1350	3759; 3761; 45252; 46432
Schneider Creek	Bacteria	---	45559
Reichel Creek	Bacteria	WA-13-1022	3763; 45566

Andrew Wheeler, Acting EPA Administrator
 Jefferson Beauregard Sessions III, Attorney General
 August 27, 2018
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Waterbody	Parameter	1996 Listing ID	2010 Listing ID
Spurgeon Creek	Bacteria	WA-13-1010	46061

A copy of the June 29 letter is included herewith.

Under Section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2), EPA must establish replacement TMDLs within 30 days of disapproval. It has now been more than 30 days since EPA disapproved the 37 TMDLs identified its letter of June 29, 2018. To our knowledge, EPA has yet to establish replacement TMDLs for those waterbodies.

Section 505 of the CWA provides that any citizen may sue EPA in federal court “where there is alleged a failure of the Administrator to perform any act or duty under [the CWA] which is nondiscretionary with the Administrator.” 33 U.S.C. § 1313(a)(2). In such a case, the District Court has jurisdiction to order the EPA Administrator “to perform such act or duty.” *Id.*

Because EPA has failed to establish replacement TMDLs for the 37 TMDLs it disapproved on June 29, 2018, NWEA intends to sue EPA in federal court to enforce the requirements of Section 303(d)(2) of the CWA, and to require EPA to act in a timely fashion.

As required by 40 C.F.R. § 135.3(b), the following are the name, address, and telephone number of the party providing this notice:

Northwest Environmental Advocates
 P.O. Box 12187
 Portland, OR 97212-0187
 (503) 295-0490

As required by 40 C.F.R. § 135.3(c), the following are the name, address, and telephone number of NWEA’s legal counsel in this matter:

Bricklin & Newman, LLP
 Bryan Telegin, WSBA No. 46686
 1424 Fourth Avenue, Suite 500
 Seattle, WA 98101
 Tel: (206) 264-8600
 Email: telegin@bnd-law.com

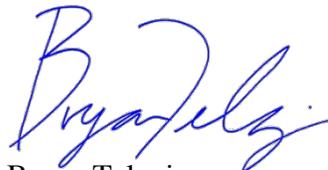
Earthrise Law Center
 Lia Comerford
 Lewis & Clark Law School
 10015 S.W. Terwilliger Blvd.
 MSC 51
 Portland, OR 97219

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NWEA is open to engaging in a constructive dialogue to obtain a workable solution in this matter. If EPA has a similar interest it should contact me as NWEA's counsel. Please expect NWEA to file suit upon the expiration of 60 days from the date of this notice.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Bryan Telegin

cc: Client

Chris Hladick, Regional Administrator
EPA Region 10
Park Place Building
1200 6th Avenue
Seattle, WA 98101



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
WATER AND WATERSHEDS

JUN 29 2018

Ms. Heather Bartlett
Water Quality Program Manager
Washington Department of Ecology
PO Box 47600
Olympia, Washington 98504-7600

Re: Final EPA Action on the *Deschutes River, Percival Creek, and Budd Inlet Tributaries Multi-parameter Total Maximum Daily Load*

Dear Ms. Bartlett:

The U.S. Environmental Protection Agency has completed its Clean Water Act ("CWA") review of the *Deschutes River, Percival Creek, and Budd Inlet Tributaries Multi-parameter Total Maximum Daily Load* ("Deschutes TMDL") that the Washington Department of Ecology ("Ecology") submitted on December 17, 2015. The Deschutes TMDL addresses impairments for temperature, dissolved oxygen ("DO"), pH, fecal coliform bacteria, and fine sediment in segments of several waterbodies, including the Deschutes River and its tributaries, and tributaries to Budd Inlet. The number of impairments and waterbody segments totals 73 unique waterbody-pollutant pairs (i.e., 73 individual TMDLs). The EPA's review also includes Ecology's July 17, 2017, letter to the EPA ("2017 submittal"), which supplemented the 2015 TMDL submittal by providing new calculations for bacteria and clarifications for temperature. The EPA's final action on the TMDL is described in this letter. A summary table of each waterbody-pollutant pair, as well as the EPA's final action on each one, is included in the enclosure.

The EPA is approving 26 of the submitted TMDLs for temperature. These TMDLs meet the statutory and regulatory requirements found in section 303(d) of the CWA and the EPA's implementing regulations at 40 C.F.R. Part 130. The EPA's review indicates that these allocations have been established at levels that, when fully implemented, will lead to the attainment of applicable water quality standards. Therefore, Ecology does not need to include these waters on the next 303(d) list of impaired waters for the applicable parameter.

The EPA finds that 14 of the bacteria TMDLs are established at levels that will attain applicable water quality standards. However, these TMDLs are based in part on new calculations provided in the 2017 submittal, which have not yet undergone public review as required by 40 C.F.R. § 130.7(c)(1)(ii). The EPA is therefore disapproving these bacteria TMDLs because they require additional public review.

The EPA is disapproving 23 additional TMDLs. These include TMDLs developed for temperature, DO, pH, fine sediment, and bacteria. According to our review, these TMDLs fail to meet the statutory and regulatory requirements found in section 303(d) of the CWA and the EPA's implementing regulations. The primary deficiencies are summarized as follows:

- Incomplete TMDL submittals: Some waterbody-pollutant pairs lack critical TMDL components (e.g., loading capacity, wasteload allocations, and load allocations), as required by 40 C.F.R. §§ 130.2 and 130.7.

- **Downstream uses not protected:** Washington's water quality standards at WAC 173-201A-260(3)(b-d) require that downstream uses be protected. Some waterbody-pollutant pair TMDL calculations allow pollutant loadings that are not protective of downstream waters. Thus, they are not consistent with requirements at 40 C.F.R. § 130.7(c)(1) that TMDLs be established at levels necessary to attain and maintain the applicable water quality standards.
- **TMDL target not protective of water quality standards:** Some waterbody-pollutant pair TMDL calculations do not provide a clear linkage analysis to demonstrate that the water quality target chosen to develop the loading capacity is protective of state water quality standards. Thus, the EPA is not able to determine whether the TMDLs are consistent with requirements at 40 C.F.R. § 130.7(c)(1) that TMDLs be established at levels necessary to attain and maintain the applicable water quality standards.

Finally, the EPA is not taking action on ten TMDLs submitted for bacteria because they were prepared for ten segments that no longer require bacteria TMDLs. These segments, previously identified as impaired for bacteria on the EPA-approved 2010 303(d) list, were included in the 2015 TMDL submittal. Following Ecology's submission of the Deschutes TMDL in 2015, the EPA approved the delisting of these ten segments based on Ecology's revised Integrated Report. These delistings were included in the EPA's approval of the 2012 303(d) list on July 22, 2016. Placement of the ten segments in Categories 1 and 2 of the Integrated Report indicates they are no longer impaired for bacteria and, thus, no longer require a TMDL. Therefore, the EPA has determined it is not required to approve or disapprove these bacteria TMDLs.

In summary, the EPA is taking the following actions on the Deschutes TMDL:

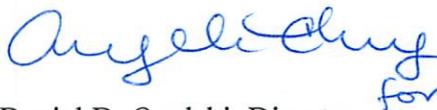
- Approval of 26 TMDLs for temperature.
- Disapproval of 14 TMDLs for bacteria (approvable upon completion of public participation process).
- Disapproval of 23 TMDLs for temperature, DO, pH, fine sediment, and bacteria.

The EPA values our working relationship with Ecology, and we appreciate the continued cooperation offered by the State as we work towards the common goal of addressing impaired waters in the State of Washington. By the EPA's final action, the approved TMDLs are now incorporated into the State's Water Quality Management Plan under section 303(e) of the CWA.

The EPA is committed to completing the work necessary to replace the remaining TMDLs for temperature, DO, pH, fine sediment, and bacteria, which the Agency is disapproving through this action. The replacement TMDLs will require technically complex modeling, and the TMDL development process will involve stakeholder review and input. The EPA intends to complete the revised TMDLs as expeditiously as possible. Additionally, the EPA is aware of a concurrent, high-priority effort to establish a fish hatchery which would likely discharge to the Deschutes River. We plan to work with Ecology to ensure the replacement TMDLs consider the needs of the hatchery, including allocations and timing.

If you have any comments or questions on this Agency action, please feel free to call me at (206) 553-1855, or you have your staff call Miranda Hodgkiss of my staff at (206) 553-0692.

Sincerely,

A handwritten signature in blue ink, appearing to read "Daniel D. Opalski".

Daniel D. Opalski, Director
Office of Water and Watersheds

Enclosure

cc: Mr. Andrew Kolosseus, Ecology (via email)
Mr. Rich Doenges, Ecology (via email)

Enclosure: Summary of Final EPA Action on Deschutes TMDL

Temperature Waterbody-pollutant Pairs

Waterbody	1996 Listing ID	2010 Listing ID ¹	Final Action
Deschutes River	WA-13-1010	6576	Approve
		7590	Approve
		48710	Approve
		48711	Approve
		48712	Approve
		48713	Approve
		48714	Approve
		48715	Approve
		48717	Approve
		48718	Approve
		9439	Approve
	WA-13-1020	7588	Approve
		7592	Approve
		7593	Approve
		7595	Approve
		48720	Approve
		48721	Approve
		48724	Approve
	48726	Approve	
Huckleberry Creek	WA-13-1024	3757	Disapprove
Reichel Creek	WA-13-1022	48666	Disapprove
Tempo Lake Outlet	---	48696	Disapprove
Ayer (Elwanger) Creek	WA-13-1015	(73229)	Disapprove
Unnamed Spring to Deschutes River	---	48923	Disapprove
Black Lake Ditch	---	48733	Approve
		48734	Approve
		48735	Approve
Percival Creek	WA-13-1012	42321	Approve
		48249	Approve
		48727	Approve
		48729	Approve

pH Waterbody-pollutant Pairs

Waterbody	1996 Listing ID	2010 Listing ID ¹	Decision
Adams Creek	---	50965	Disapprove
Ayer (Elwanger) Creek	WA-13-1015	5850	Disapprove
Black Lake Ditch	---	50990	Disapprove

Fine Sediment Waterbody-pollutant Pair

Waterbody	1996 Listing ID	2010 Listing ID ¹	Decision
Deschutes River	WA-13-1020	6232	Disapprove

¹ Listing IDs correspond to the 2010 303(d) list, except those in parentheses, which are from the 2012 303(d) list.

Enclosure: Summary of Final EPA Action on Deschutes TMDL

DO Waterbody-pollutant Pairs

Waterbody	1996 Listing ID	2010 Listing ID ¹	Decision
Ayer (Elwanger) Creek	WA-13-1015	5851	Disapprove
Deschutes River	WA-13-1010	10894	Disapprove
		47753	Disapprove
	WA-13-1020	47754	Disapprove
		47756	Disapprove
Lake Lawrence Creek	---	47696	Disapprove
Reichel Creek	WA-13-1022	47714	Disapprove
Black Lake Ditch	---	47761	Disapprove
		47762	Disapprove
Percival Creek	WA-13-1012	48085	Disapprove
		48086	Disapprove

Bacteria Waterbody-pollutant Pairs

Waterbody	1996 Listing ID	2010 Listing ID ¹	Decision
Adams Creek	---	45462	Disapprove
		45695	Disapprove
Butler Creek	---	45471	No action
Butler Creek, SW F	---	45342	No action
Ellis Creek	WA-13-0020	45480	Disapprove
Indian Creek	WA-13-1300	3758	Disapprove
		45213	Disapprove
		46410	Disapprove
		(74218)	Disapprove
Mission Creek	WA-13-1380	45212	Disapprove
		46102	Disapprove
Moxlie Creek	WA-13-1350	3759	Disapprove
		3761	Disapprove
		45252	Disapprove
		46432	Disapprove
Schneider Creek	---	45559	Disapprove
Ayer (Elwanger) Creek	WA-13-1015	5849	No action
Chambers Creek	WA-13-1014	45560	No action
Deschutes River	WA-13-1010	46499	No action
		46500	No action
		9881	No action
	WA-13-1020	46210	No action
Reichel Creek	WA-13-1022	3763	Disapprove
		45566	Disapprove
Spurgeon Creek	WA-13-1016	46061	Disapprove
Percival Creek	WA-13-1012	46103	No action
		46108	No action

Exhibit 2

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

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation,

Plaintiff,

v.

**UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY**,

Defendant.

NO.

COMPLAINT

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

NATURE OF THE CASE

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

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

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

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

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

21 11. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is
22 the federal agency charged with administration of the CWA, and specifically with approving or
23 disapproving state TMDL submissions under Section 303(d)(2) of the CWA, 33 U.S.C. §
24 1313(d)(2).

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1 **LEGAL BACKGROUND**

2 ***The Clean Water Act and Water Quality Standards***

3 12. Congress adopted amendments to the CWA in 1972 in an effort “to restore and
4 maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C.
5 § 1251(a). The primary goal of the CWA is to eliminate the discharge of pollutants into navigable
6 waters entirely; also established is “an interim goal of water quality which provides for the
7 protection and propagation of fish, shellfish, and wildlife.” *Id.* § 1251(a)(1–2).

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

17 14. Among other things, water quality standards serve as the regulatory basis for
18 establishing water quality-based controls over point sources, as required by sections 301 and 306
19 of the CWA, 33 U.S.C. §§ 1311 & 1316. A point source is a “discernable, confined and discrete
20 conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from
21 which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges are
22 regulated under National Pollutant Discharge Elimination System (“NPDES”) permits, which
23 require point sources to meet both technology-based effluent limitations and “any more stringent
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1 limitation . . . necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C). Water
2 quality standards are thus integral to the regulation of point source pollution.

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

17 *Total Maximum Daily Loads*

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

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

11 18. After calculating a waterbody’s loading capacity, a TMDL then distributes
12 portions of the total loading capacity to individual sources of pollution or sectors of pollution
13 sources. These allocations include both “load allocations” and “wasteload allocations,” for point
14 and nonpoint sources of pollution respectively. 40 C.F.R. § 130.2(i). A wasteload allocation is
15 “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or
16 future point sources of pollution.” *Id.* at § 130.20(h). A load allocation is “[t]he portion of a
17 receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint
18 sources of pollution or to natural background sources.” *Id.* at § 130.20(f). In essence, the purpose
19 of load and wasteload allocations is to allocate the total amount of pollution that may enter a
20 waterbody between all the sources of pollution, including both point and nonpoint sources of
21 pollution, thereby restricting pollution inputs sufficiently to attain and maintain water quality
22 standards.
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1 exceedances result in a failure to attain the Clean Water Act's goal of achieving water quality that
2 provides for protection and propagation of fish, shellfish, and wildlife and recreation in and on
3 the water.

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

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

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

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

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

19
20 30. To date, however, EPA has failed to take action on the Deschutes TMDL, which
21 has been awaiting EPA approval or disapproval for over 22 months

22
23 31. Now, over two decades since the waters were first listed as impaired and 15 years
24 since Ecology began developing the TMDL, the Deschutes River, its tributaries, and other Budd
25 Inlet tributaries continue to violate water quality standards, continue to contribute to downstream
26

1 pollution in Budd Inlet and the Puget Sound, and lack the critical protections that the TMDL aims
2 to put in place to achieve Washington’s water quality standards and protect its designated uses.

3 32. In short, EPA has failed to either approve or disapprove the Deschutes TMDL
4 within 30 days as required Section 303(d)(2), 33 U.S.C. § 1313(d)(2).
5

6 33. To NWEA’s knowledge, EPA has no plans to approve or disapprove the TMDL
7 any time in the foreseeable future.

8 **CLAIM FOR RELIEF**

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

10 34. Plaintiff NWEA realleges all preceding paragraphs.

11 35. Section 303(d)(2) of the CWA requires EPA to either approve or disapprove
12 TMDLs within thirty days after submission by a state. See 33 U.S.C. § 1313(d)(2). EPA’s duty to
13 act on TMDLs within thirty days of submission is a nondiscretionary duty within the meaning of
14 section 505 of the CWA, 33 U.S.C. § 1365(a)(2), the Act’s citizen suit provision.
15

16 36. Nearly two years have elapsed since the Washington Department of Ecology
17 submitted the Deschutes TMDL for EPA’s review. To date, EPA has neither approved nor
18 disapproved the Deschutes TMDL under section 303(d) of the CWA.

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

Exhibit 3

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL
ADVOCATES,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendant.

Case No. C17-1664RSL

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

This matter comes before the Court on Northwest Environmental Advocates' "Motion for Summary Judgment." Dkt. # 15. Plaintiff filed this action to force the United States Environmental Protection Agency ("EPA") to approve or disapprove the Total Maximum Daily Loads ("TMDLs") proposed by the Washington State Department of Ecology for 73 segments of the Deschutes River Basin. The parties agree (a) that the EPA had a statutory duty to review the TMDL submission and issue its decision within 30 days of December 17, 2015, and (b) that it failed to do so. The EPA now anticipates completing its review by June 29, 2018, and plaintiff seeks a Court order incorporating that deadline.

Having reviewed the memoranda, declarations, and exhibits submitted by the parties,¹

¹ This matter can be decided on the papers submitted. Plaintiff's request for oral argument is DENIED.

1 plaintiff's motion for summary judgment is GRANTED. The EPA shall, no later than June 29,
2 2018, complete its action pursuant to the Clean Water Act, 33 U.S.C. § 1313(d), on the 73
3 waterbody-pollutant combinations that constitute the State of Washington's December 2015
4 "Deschutes River, Percival Creek, and Budd Inlet Tributaries Temperature, Fecal Coliform
5 Bacteria, Dissolved Oxygen, pH, and Fine Sediment Total Maximum Daily Load."

6
7 DATED this 25th day of June, 2018.

8 
9 Robert S. Lasnik
10 United States District Judge

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Exhibit 4

United States District Court
WESTERN DISTRICT OF WASHINGTON

NORTHWEST ENVIRONMENTAL ADVOCATES,

JUDGMENT IN A CIVIL CASE

v.

CASE NUMBER: C17-1664RSL

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY.

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

Judgment is entered in favor of plaintiff and against defendant. The defendant shall, no later than June 29, 2018, complete its action pursuant to the Clean Water Act, 33 U.S.C. § 1313(d), on the 73 waterbody-pollutant combinations that constitute the State of Washington's December 2015 "Deschutes River, Percival Creek, and Budd Inlet Tributaries Temperature, Fecal Coliform Bacteria, Dissolved Oxygen, pH, and Fine Sediment Total Maximum Daily Load."

June 26, 2018

William M. McCool
Clerk

/s/Sharita Tolliver
By, Deputy Clerk

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Northwest Environmental Advocates

(b) County of Residence of First Listed Plaintiff Multnomah County, OR (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) See attached

DEFENDANTS

United States Environmental Protection Agency

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 33 U.S.C. 1365
Brief description of cause: Failure to undertake nondiscretionary duties under federal Clean Water Act, 33 U.S.C. 1313(d)(2)

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 11/07/2018 SIGNATURE OF ATTORNEY OF RECORD s/ Bryan Telegin

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

ATTACHMENT

Plaintiff's Attorneys

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Lia Comerford, pro hac vice application pending
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Lewis & Clark Law School
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Email: comerfordl@lclark.edu

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: