

Smith & Lowney PLLC  
Richard A. Smith (WSBA No. 21788)\*  
Claire Tonry (WSBA No. 44497)\*  
2317 E. John St.  
Seattle, WA 98112  
Tel: (206) 805-0857  
richard@smithandlowney.com  
claire@smithandlowney.com

Center for Biological Diversity  
Hannah Connor (VSB No. 74785)\*  
1411 K Street NW, Suite 1300  
Washington, DC 20005  
Tel: (202) 681-1676  
hconnor@biologicaldiversity.org

*Attorneys for Plaintiff*

\*Seeking Admission pro hac vice

**IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ARIZONA**

CENTER FOR BIOLOGICAL  
DIVERSITY, a non-profit organization,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION ADMINISTRATION, and  
MICHAEL S. REGAN, in his official  
capacity,

Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

## INTRODUCTION

1  
2 1. In this action, the Center for Biological Diversity (Center)—an environmental  
3 conservation organization that works to protect native species and their habitats against harm from  
4 threats such as toxic pollution—challenges the failure of the United States Environmental  
5 Protection Agency (EPA) to consult under Section 7 of the Endangered Species Act (ESA) on the  
6 effects to wildlife of its revisions that weakened the aquatic life water quality criteria for the heavy  
7 metal cadmium in 2016, 81 Fed. Reg. 19,176. In doing so, EPA put at greater risk many  
8 endangered species, including salmon, sturgeon, freshwater mussels, sea turtles and other species  
9 that are sensitive to cadmium pollution.  
10

11  
12 2. Section 7(a)(2) of the ESA requires EPA to ensure that any action it authorizes will  
13 not jeopardize the survival and recovery of endangered and threatened species or adversely modify  
14 habitat deemed essential to their survival and recovery. 16 U.S.C. § 1536 (a)(2). To fulfill the  
15 substantive mandates of the ESA, the action agency—the agency undertaking or authorizing an  
16 action, in this case EPA—must consult with scientists and other experts with the United States  
17 Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the  
18 “Services”)—agencies that specialize in the conservation and protection of threatened and  
19 endangered species in marine and non-marine environments—to both ensure against jeopardizing  
20 the species and to minimize potential for an action to harm ESA-listed species or their habitats.  
21

22  
23 3. Subject to its authority under the Clean Water Act (CWA), EPA is responsible for  
24 setting water quality criteria based on its evaluation of scientific information regarding the impacts  
25 of pollutants in any body of water. 33 U.S.C. § 1314(a). In setting criteria, EPA considers water  
26 quality effects that fall into two main categories, those designed to protect human health and those  
27 designed to protect aquatic life. The decisions EPA makes in setting national water quality criteria  
28  
29

1 profoundly affect water quality and riparian habitats across the country by influencing when and  
2 to what extent the presence of a pollutant—in this case, cadmium—can be considered safe in a  
3 waterway. These national criteria are commonly known as “304(a)” criteria, in reference to Section  
4 304(a) of the CWA, 33 U.S.C. § 1314(a).

5 4. In 2016, EPA finalized a revised set of ambient water quality criteria relating to  
6 effects of cadmium on aquatic organisms based upon EPA’s assessment of cadmium’s ecological  
7 effects. These criteria are less protective of water quality than prior iterations of the criteria for  
8 chronic freshwater exposure.  
9

10 5. Once finalized, states are required to consider EPA’s revised cadmium criteria  
11 during their triennial re-examination of their water quality standards, and either adopt EPA’s  
12 revised Section 304(a) criteria for cadmium or explain their reasons for not doing so. 40 C.F.R. §  
13 131.20. At least 18 states, territories, and/or tribes have adopted EPA’s revised cadmium criteria  
14 since they were promulgated in 2016, effectively weakening protections from cadmium exposure  
15 across the country as a result.  
16

17 6. EPA took this action without consulting with the Services as required by Section 7  
18 of the ESA. This is a clear violation of EPA’s obligations to engage the Services in consultation  
19 to insure EPA’s action “is not likely to jeopardize the continued existence of any endangered  
20 species or threatened species or result in the destruction or adverse modification of habitat of such  
21 species.” 16 U.S.C. § 1536(a)(2). *See also* 50 C.F.R. § 402.14(a) (Requiring formal consultation  
22 for agency actions that “may affect listed species or critical habitat.”)  
23

24 7. EPA’s failure to consult with the Services in revising the cadmium Section 304(a)  
25 criteria in 2016 follows a history of EPA consistently failing to consult under the ESA on the  
26 adoption of water quality criteria. These significant failures, compounded over time, even further  
27  
28  
29

1 put imperiled species at risk and certainly do not satisfy the objectives of the ESA, which is “to  
2 provide a means whereby the ecosystems upon which endangered species and threatened species  
3 depend may be conserved, [and] to provide a program for the conservation of such endangered  
4 species and threatened species.” 16 U.S.C. § 1531(b).

5 8. EPA’s failure to consult on the cadmium criteria revisions also does not abide by  
6 the Memorandum of Agreement (MOA) it entered into with the Services on January 10, 2001.  
7 *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife*  
8 *Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the*  
9 *Clean Water Act and Endangered Species Act*, 66 Fed. Reg. 11,202 (Feb. 22, 2001). The MOA  
10 contemplates a process for EPA’s consultation with the Services on its development and adoption  
11 of aquatic life criteria, including for cadmium, under the CWA Section 304(a), 33 U.S.C. §  
12 1314(a). 66 Fed. Reg. at 11,212. EPA and the Services recognized that consultation on EPA’s  
13 adoption of these criteria, rather than consultation on state-by-state adoption of criteria, “will  
14 ensure a consistent approach to evaluating the effects of pollutants on species and identifying  
15 measures that may be needed to better protect them” and “will also ensure better consideration of  
16 effects on species whose ranges cross State boundaries.” *Id.*

17 9. The seriousness of EPA’s legal error in failing to consult with the Services on this  
18 action is compounded by the significance of the increased risk to threatened and endangered  
19 species from cadmium pollution as a result of this action. Cadmium is a toxic heavy metal that is  
20 found in mineral deposits and often used in manufacturing batteries, coatings, and electronics.  
21 Cadmium can be mined, and is also found in fossil fuels, iron and steel, cement, fertilizers, and in  
22 wastes from lead, copper, zinc, and coal mining. Among other methods, cadmium enters the  
23 environment through natural sources such as weathering and erosion of rocks and soil and through  
24  
25  
26  
27  
28  
29

1 human-caused sources such as mining, agriculture, and waste streams from industrial processes,  
2 manufacturing, coal ash ponds, fossil fuel combustion, incineration, and municipal activities.

3 10. Cadmium has no beneficial biological function and is harmful at any exposure  
4 level. Acute exposure to cadmium can cause increased mortality in aquatic and marine life, which  
5 can include species listed as threatened or endangered under the ESA. Chronic exposure can  
6 further result in adverse effects on growth, reproduction, immune and endocrine systems, and  
7 development and behavior in these aquatic species.  
8

9 11. In its comments on the draft cadmium criteria, NMFS expressed concerns about  
10 EPA's "piecemeal approach" of foregoing consultation for "considering implications of such  
11 guidelines for broadly ranging species." In particular, NMFS expressed concern about the impacts  
12 of the less protective chronic criteria on salmon, sea turtles, sturgeon, and sawfish. NMFS's  
13 explanation of its concern with regard to sea turtles is instructive:  
14

15 EPA's cadmium guidelines apply to all waters of the US, so exposures would occur  
16 throughout the US portion of sea turtle ranges. Further, cadmium accumulates in  
17 tissue with age, and sea turtles are understood to be very long lived species. For  
18 example, green turtles reach sexual maturity between 20 and 50 years of age. For  
19 such long lived species we would need to consider whether cadmium accumulation  
20 from US waters over a lifespan would reach tissue concentrations directly resulting  
21 in or contributing to adverse effects.

22 12. The Services' consultation regulations address this type of "piecemeal approach"  
23 head-on by providing that formal consultation "may encompass . . . a number of similar individual  
24 actions within a given geographical area," but this "does not relieve the Federal agency of the  
25 requirements for considering the effects of the action as a whole." 50 C.F.R. § 402.14(c). Indeed,  
26 for federal programs that affect ESA-listed species, such as EPA's adoption of Section 304(a)  
27 water quality criteria under the CWA, programmatic consultation is required to allow the Services  
28 to establish standards, guidelines, and governing criteria to avoid or minimize the effects of the  
29

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.