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

19 CENTER FOR BIOLOGICAL
20 DIVERSITY, a non-profit organization,

21 Plaintiff,

22 v.

23 UNITED STATES ENVIRONMENTAL
24 PROTECTION ADMINISTRATION, and
25 MICHAEL S. REGAN, in his official
26 capacity,

27 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.
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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

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

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

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

24
25 7. EPA’s failure to consult with the Services in revising the cadmium Section 304(a)
26 criteria in 2016 follows a history of EPA consistently failing to consult under the ESA on the
27 adoption of water quality criteria. These significant failures, compounded over time, even further
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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
6 8. EPA’s failure to consult on the cadmium criteria revisions also does not abide by
7 the Memorandum of Agreement (MOA) it entered into with the Services on January 10, 2001.
8 *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife*
9 *Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the*
10 *Clean Water Act and Endangered Species Act*, 66 Fed. Reg. 11,202 (Feb. 22, 2001). The MOA
11 contemplates a process for EPA’s consultation with the Services on its development and adoption
12 of aquatic life criteria, including for cadmium, under the CWA Section 304(a), 33 U.S.C. §
13 1314(a). 66 Fed. Reg. at 11,212. EPA and the Services recognized that consultation on EPA’s
14 adoption of these criteria, rather than consultation on state-by-state adoption of criteria, “will
15 ensure a consistent approach to evaluating the effects of pollutants on species and identifying
16 measures that may be needed to better protect them” and “will also ensure better consideration of
17 effects on species whose ranges cross State boundaries.” *Id.*

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

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