

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; MICHAEL REGAN**, in his
official capacity as Administrator of the
Environmental Protection Agency; and
MICHELLE PIRZADEH, in her
official capacity as Acting Regional
Administrator Environmental Protection
Agency Region 10,

Defendants.

Case No. _____

COMPLAINT

Pursuant to the Administrative
Procedure Act, Clean Water Act

NATURE OF THE CASE

1. Through this action, Plaintiff Northwest Environmental Advocates (“NWEA”) challenges the failure of Defendant United States Environmental Protection Agency (“EPA”) to ensure the protection and restoration of the marine waters of Puget Sound in the State of Washington in violation of the mandates of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1251, *et seq.*

2. For over three decades, the marine waters of Puget Sound have been known to be impaired by dangerously low levels of dissolved oxygen, caused by nitrogen pollution, and high levels of toxic pollutants. Along with oxygen depletion, nitrogen pollution fuels extensive algal

COMPLAINT

1 Western Environmental Law Center Earthrise Law Center

1402 3rd Ave., Suite 1000

1000 2nd Ave., Suite 1000

1 blooms in Puget Sound, some toxic to people, some toxic to shellfish, and some that are upending
2 the food chain that supports imperiled Chinook salmon and orca whales.

3 3. The quality of water in Puget Sound and its tributaries has degraded as population
4 has increased and is predicted to further degrade based on estimates of future population growth.
5 The Washington Department of Ecology (hereinafter “Ecology” or “Washington”) predicts a 40
6 percent increase in nitrogen levels in the next few decades. Combined with climate change, this
7 pollution increase is predicted to significantly worsen deleterious dissolved oxygen levels in
8 Puget Sound.

9 4. Nitrogen is a form of nutrient pollution that, while essential for the growth of
10 plant life, in excess leads to excessive growth of algae that die and, in decaying, consume life-
11 sustaining oxygen from water. Nitrogen causes myriad cascading environmental effects including
12 the following: more widespread and longer-lasting algal blooms; increases in harmful algal
13 blooms (“HAB”) that create toxins; depleted dissolved oxygen; increased acidification of waters
14 that, in turn, causes effects such as thinning of shellfish shells; an explosion of jellyfish
15 populations; and fundamental changes to the food web that include the growth of dinoflagellate
16 algae that ravage the diatoms and copepods that form the very base of the marine food web and,
17 in turn, starve forage fish such as herring and the species that prey upon them. These shifts lead to
18 reduced food availability for salmonids that, in turn, affect larger marine life such as the
19 endangered Southern Resident killer whale.

20 5. Ecology has continued to issue and reissue permits to sewage treatment plants
21 discharging to Puget Sound and its tributaries, none of which includes nutrient effluent limits
22 sufficient to protect Puget Sound.

23 6. Ecology has continued to issue and reissue permits to sewage treatment plants
24 discharging to Puget Sound and its tributaries, almost none of which includes effluent limits for
25 toxic pollutants and none of which includes effluent limits for a class of pollutants including but
26 not limited to pharmaceuticals, industrial and food additives, some pesticides, plasticizers, flame

1 retardants, and personal care products referred to as “contaminants of emerging concern.” Yet, in
2 2010, Ecology and EPA issued a report showing that there is a high potential for removal of such
3 toxics when nutrient removal technology is installed at sewage treatment plants.

4 7. Beyond sewage treatment plants, Ecology has no program or plan to reduce the
5 input of pollution from nonpoint sources, such as stormwater and polluted runoff from farming
6 and logging, to Puget Sound and its tributaries despite its having found that such sources are
7 significant contributors to nitrogen levels in Puget Sound.

8 8. Despite having worked for many years to develop the technical basis of Total
9 Maximum Daily Loads (“TMDL”) pursuant to the requirements of CWA section 303(d) to
10 address nitrogen in Puget Sound, Ecology has instead decided to issue a “TMDL Alternative,” an
11 action that EPA has approved in at least one document entitled “Environmental Performance
12 Partnership Agreement, State Fiscal Years 2020-2021 July 1, 2019 to June 30, 2021.”

13 9. The planned issuance of a “TMDL Alternative” in lieu of the required TMDLs
14 means that Ecology and EPA will not take regulatory actions necessary to comply with the CWA
15 and restore water quality of Puget Sound to water quality standards.

16 10. In doing so, EPA has violated its mandatory duty under CWA section 303(d), 33
17 U.S.C. § 1313(d)(2), to develop TMDLs for Puget Sound. Additionally, EPA’s decision to
18 approve Ecology’s “TMDL Alternative” in the Performance Partnership Agreement (“PPA”) was
19 arbitrary, capricious, and contrary to the CWA, within the meaning of the APA, 5 U.S.C. § 706.

20 **JURISDICTION AND VENUE**

21 11. This Court has jurisdiction pursuant to the judicial review provision of the
22 Administrative Procedure Act, 5 U.S.C. § 702, as well as the federal question statute, 28 U.S.C. §
23 1331.

24 12. On June 4, 2021, NWEA sent EPA the required notice of intent to sue, pursuant to
25 33 U.S.C. § 1365(b)(1)(A). That notice of intent to sue is attached hereto as Exhibit 1.

13. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in Seattle, Washington, where EPA's Region 10 administrative office is located.

PARTIES

14. The plaintiff in this action is NORTHWEST ENVIRONMENTAL ADVOCATES. Established in 1969, NWEA is a regional non-profit environmental organization incorporated under the laws of Oregon in 1981 and organized under section 501(c)(3) of the Internal Revenue Code. NWEA's principal place of business is in Portland, Oregon. NWEA's mission is to work through advocacy and education to protect and restore water and air quality, wetlands, and wildlife habitat in the Northwest, including Washington. NWEA employs advocacy with administrative agencies, community organizing, strategic partnerships, public record requests, information sharing, lobbying, education, expert review, and litigation to ensure better implementation of the laws that protect and restore the natural environment. NWEA has participated in the development of CWA programs to control both point and nonpoint sources in the State of Washington for many years, including the state's TMDL program by, *inter alia*, having brought suit in 1991 against EPA for its failure to establish TMDLs for the State of Washington and again in 2019; having brought suit against EPA for not acting on TMDLs for the Deschutes River basin and, later, for not replacing those TMDLs it subsequently disapproved, and not completing TMDLs for Budd Inlet and Capitol Lake; and serving on EPA's TMDL federal advisory committee from 1996 to 1998.

15. NWEA's members regularly use and enjoy the waters and adjacent lands of Puget Sound. NWEA's members have definite future plans to continue using them for recreational, scientific, aesthetic, spiritual, conservation, educational, employment, and other purposes. Many of these interests revolve around viewing sensitive salmonid species, the endangered Southern Resident killer whales, and other aquatic and aquatic-dependent species that are under threat by pollution in the waters at issue in this lawsuit. The use and enjoyment that NWEA's members

1 derive from viewing these species, and otherwise recreating on or near and enjoying the waters of
 2 Puget Sound and its tributaries, is diminished by the effects of pollution, including specifically
 3 nitrogen and toxic pollution. NWEA's members would derive more benefits and enjoyment from
 4 their use of these waters if these pollutants were not adversely affecting water quality and aquatic
 5 and aquatic-dependent species in these waters.

6 16. Some of NWEA's members derive or used to derive recreational and aesthetic
 7 benefits by fishing and shellfish gathering in Puget Sound, its embayments and tributaries. These
 8 members have curtailed their fishing and shellfish gathering in the Sound and its tributaries, or no
 9 longer fish and gather shellfish in the Sound, due in part to concerns regarding pollutants and their
 10 effect on fisheries. Successful completion of TMDLs to address these pollution problems in Puget
 11 Sound and its tributaries is a critical step in fully implementing the goals of the CWA for these
 12 waters, fully protecting salmonids, orcas, other aquatic and aquatic-dependent species, and
 13 improving water quality. EPA's failure to establish TMDLs for the waterbodies at issue in this
 14 lawsuit, along with EPA's approval of Ecology's "TMDL Alternative," puts these species at risk
 15 and threatens or negatively affects the interests of NWEA's members.

16 17. The recreational, aesthetic, conservation, employment, scientific, and other
 17 interests of NWEA and its members have been, are being, and unless relief is granted, will
 18 continue to be adversely affected and irreparably injured by EPA's failure to comply with the
 19 CWA.

20 18. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY is the federal
 21 agency charged with the administration of the CWA, and specifically with approving or
 22 disapproving state identification of impaired waters and state TMDL submissions under section
 23 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2).

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