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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

1. This case challenges the Environmental Protection Agency’s (EPA) unlawful decision to revise the existing water quality standards for the state of Washington without complying with the process Congress established in the Federal Water Pollution Control Act (Clean Water Act or CWA) to revise a state’s existing water quality standards.

2. Under the Clean Water Act, there are only two ways EPA can lawfully revise a state’s existing water quality standards. First, under 33 U.S.C. § 1313(c)(4)(A), EPA may establish a revised or new water quality standard if EPA determines that a standard submitted by a state for EPA’s review and approval is not “consistent with the applicable requirements of

1 [the Clean Water Act].” Second, under 33 U.S.C. § 1313(c)(4)(B), EPA may revise a state’s
2 existing water quality standard if EPA “determines that a revised or new standard is necessary
3 to meet the requirements of [the Clean Water Act].”

4 3. Washington’s current water quality standards include human health criteria that
5 are a combination of criteria Washington submitted to EPA that were approved by EPA and
6 criteria that EPA adopted for Washington after finding that the criteria Washington submitted
7 to EPA were not consistent with the applicable requirements of the Clean Water Act. The
8 human health criteria EPA adopted for Washington became effective on December 28, 2016,
9 and are codified at 40 C.F.R. § 131.45.

10 4. On May 10, 2019, nearly two and a half years after the effective date of
11 Washington’s existing human health criteria, EPA unilaterally decided to revise Washington’s
12 human health criteria to make the criteria less protective. EPA did not comply with
13 33 U.S.C. § 1313(c)(4) when it decided to revise Washington’s existing human health criteria.
14 Instead, EPA decided it could rely on its “inherent authority” to reconsider its prior decision,
15 thereby ignoring the process Congress established to revise a state’s existing water quality
16 standards.

17 5. Prior to its decision to revise Washington’s existing water quality standards,
18 State officials informed EPA through multiple communications that the State was opposed to
19 EPA revising the standards. For example, the Director of the Washington State Department of
20 Ecology, in a May 7, 2019 letter, informed EPA that revising the standards would “only create
21 regulatory uncertainty and confusion” and that Washington “steadfastly oppose(s) any revision
22 or repeal.” In a May 8, 2019, letter, the Washington State Attorney General informed EPA that
23 Washington has “been successfully implementing” the human health criteria for over two years
24 and that “there is no legal basis for reconsideration of the current Washington water quality
25 standards.” Despite these clear statements of opposition, EPA issued a decision to revise
26 Washington’s existing human health criteria just a few days later. While EPA acknowledged

1 the need for rulemaking to implement its decision to revise Washington's existing human
2 health criteria, EPA also made it clear that it has already decided to revise Washington's
3 existing human health criteria. Accordingly, EPA's May 10, 2019 decision is final agency
4 action subject to review under 5 U.S.C. § 704.

5 6. EPA does not have inherent authority to ignore the process Congress
6 established in the Clean Water Act to revise a state's existing water quality standards.
7 Accordingly, EPA's May 10, 2019 decision to revise Washington's existing water quality
8 standards is arbitrary, capricious, not in accordance with law, and in excess of statutory
9 authority. Washington seeks a declaration invalidating and vacating EPA's May 10, 2019
10 decision and an injunction to prevent EPA from unilaterally revising Washington's existing
11 human health criteria unless EPA complies with 33 U.S.C. § 1313(c)(4).

12 II. JURISDICTION AND VENUE

13 7. Washington seeks judicial review of final agency action pursuant to
14 5 U.S.C. §§ 701–706, a declaratory judgment pursuant to 28 U.S.C. § 2201, and injunctive
15 relief pursuant to 5 U.S.C. § 705. This Court has jurisdiction pursuant to 28 U.S.C. § 1331
16 (federal question), § 2201 (declaratory judgment), and § 2202 (further relief).

17 8. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because the
18 Washington State Department of Ecology has its headquarters in the Western District of
19 Washington, a substantial part of the events or omissions giving rise to the State's claims
20 occurred in Seattle, Washington, and Defendant EPA's regional office is located in Seattle,
21 Washington.

22 III. PARTIES

23 9. Plaintiff State of Washington is a sovereign entity and brings this action to
24 protect its own sovereign and proprietary rights. The Attorney General is the chief legal
25 advisor to the State of Washington and to Washington State agencies, including the
26 Washington State Department of Ecology. The Department of Ecology is designated as the

1 water pollution control agency for all purposes under the Clean Water Act and is responsible
2 for implementing Washington's human health criteria. The Attorney General's powers and
3 duties include acting in federal court on behalf of state agencies and on matters of public
4 concern. This challenge is brought pursuant to the Attorney General's independent
5 constitutional, statutory, and common law authority to bring suit and obtain relief on behalf of
6 the State of Washington and its agencies.

7 10. Defendant United States Environmental Protection Agency is an agency of the
8 United States charged with approving or disapproving state water quality standards within the
9 timelines established in 33 U.S.C. § 1313(c). Pursuant to 33 U.S.C. § 1313(c)(4)(A) and (B),
10 EPA may only revise a state's existing water quality standards after making specific
11 determinations that EPA failed to make before its May 10, 2019 decision to revise
12 Washington's existing water quality standards. EPA's May 10, 2019 decision is final agency
13 action.

14 11. Defendant Andrew Wheeler, the Administrator of EPA, is the chief officer of
15 EPA, the federal official ultimately responsible for EPA's administration and implementation
16 of its legal duties. Administrator Wheeler is sued in his official capacity.

17 12. The State has standing to bring this action. EPA's decision to revise
18 Washington's existing human health criteria without complying with the procedures
19 established by Congress in 33 U.S.C. § 1313(c)(4) has deprived the State of the procedural
20 protection Congress gave to states before EPA may revise a state's existing water quality
21 standards. In addition, the State has relied on its existing human health criteria and has
22 expended resources to implement the existing criteria. EPA's decision to unilaterally revise
23 Washington's existing human health criteria nearly two and a half years after the criteria
24 became effective, without complying with the Clean Water Act, will cause considerable
25 confusion regarding the applicable human health criteria in Washington, will undermine the
26 State's efforts to implement its current human health criteria, and will require another

1 substantial expenditure of funds to implement the new criteria. EPA's unilateral revision will
2 also cause a delay in the Department of Ecology's issuance of updated Clean Water Act
3 permits to Washington State dischargers, thereby increasing the discharge of pollution to
4 Washington waters. These injuries are caused by Defendants' failure to comply with the
5 Clean Water Act and are redressable by this Court.

6 IV. LEGAL AND FACTUAL BACKGROUND

7 A. Revision of State Water Quality Standards Under the Clean Water Act

8 13. The objective of the Clean Water Act is "to restore and maintain the chemical,
9 physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In
10 accomplishing this objective, "[i]t is the policy of Congress to recognize, preserve, and protect
11 the primary responsibilities and rights of States to prevent, reduce, and eliminate
12 pollution" 33 U.S.C. § 1251(b). The state and federal partnership established by the Clean
13 Water Act is commonly understood as a system of cooperative federalism.

14 14. Pursuant to this system of cooperative federalism, each state proposes water
15 quality standards to EPA and EPA reviews those standards for compliance with the Clean
16 Water Act. *See generally* 33 U.S.C. § 1313(c). The Act then directs states to review their water
17 quality standards and, as appropriate, revise them at least once every three years.
18 33 U.S.C. § 1313(c)(1). If a state revises its water quality standards, the revisions are again
19 subject to EPA's review. *Id.* § 1313(c)(2)(A) and (c)(3).

20 15. The Clean Water Act establishes deadlines for EPA's review of water quality
21 standards submitted to the agency by a state. In particular, the Clean Water Act gives EPA 60
22 days to determine that the water quality standards submitted by a state meet the requirements
23 of the Clean Water Act. 33 U.S.C. § 1313(c)(3). Upon this determination, "such standard shall
24 thereafter be the water quality standard for the applicable waters of that State." *Id.*

25 16. If EPA determines that a water quality standard submitted by a state is not
26 consistent with applicable requirements of the Clean Water Act, EPA is required to notify the

1 state within 90 days of the state's submission and specify the changes that are necessary to
2 meet the requirements of the Clean Water Act. 33 U.S.C. § 1313(c)(3). The state then has 90
3 days from the date of EPA's notification to make the changes that EPA deems necessary to
4 meet the requirements of the Clean Water Act. *Id.* If the state fails to make the necessary
5 changes, EPA "shall promptly prepare and publish proposed regulations setting forth a revised
6 or new water quality standard for the navigable waters involved." *Id.* § 1313(c)(4).

7 17. The Clean Water Act limits EPA's ability to revise a state's existing water
8 quality standards. In order to revise a state's existing water quality standards, EPA must
9 determine "that a revised or new standard is necessary to meet the requirements of" the Clean
10 Water Act (necessity determination). 33 U.S.C. § 1313(c)(4)(B). Absent the submission of a
11 new or revised water quality standard by a state for EPA's review, a necessity determination is
12 the only basis for EPA to revise a state's existing water quality standards.

13 18. Once EPA promulgates a water quality standard for a state, the standard
14 becomes the applicable state water quality standard and "remains the applicable standard until
15 EPA approves a change, deletion, or addition to that water quality standard, or until EPA
16 promulgates a more stringent water quality standard." 40 C.F.R. § 131.21(e). Under this
17 regulation, EPA is not authorized to revise a state's existing water quality standards in a way
18 that makes the standards less stringent. EPA may only revise a state's existing water quality
19 standards to make the standards more stringent. EPA's regulation is consistent with the
20 necessity determination required under 33 U.S.C. § 1313(c)(4)(B), because a less stringent
21 water quality standard is never "necessary to meet the requirements of" the Clean Water Act.

22 **B. Development and Adoption of Washington's Current Human Health Criteria**

23 19. In 1992, EPA issued the National Toxics Rule which set human health criteria
24 for Washington and other states covered by the rule. The criteria in the National Toxics Rule
25 were based on an assumed 6.5 grams per day fish consumption rate and a 10^{-6} cancer risk level.
26 Many people in Washington eat more than 6.5 grams of fish per day, and certain populations,

1 such as tribal populations, eat substantially more than 6.5 grams of fish per day. There was
2 thus a general recognition that a fish consumption rate of 6.5 grams per day was insufficient to
3 protect Washington's fish consuming populations from the dangerous toxic pollutants that can
4 accumulate in fish tissue.

5 20. Beginning in December 2010, EPA sent a number of letters to the State
6 Department of Ecology informing Ecology that the State of Washington needed to make its
7 human health criteria more protective. In September 2012, the Department of Ecology began a
8 rulemaking process to adopt new human health criteria. Apparently impatient with the progress
9 being made by Ecology, several interest groups sued EPA in October 2013 arguing that EPA's
10 letters constituted a necessity determination under 33 U.S.C. § 1313(c)(4)(B), and that EPA
11 was required to promulgate its own human health criteria for Washington. In September 2014,
12 the court rejected those arguments and dismissed the lawsuit.

13 21. In the meantime, the Department of Ecology proceeded with its rulemaking.
14 Ecology initially intended to couple its human health criteria with a Governor-requested toxics
15 reduction bill that would decrease toxic pollutants at their source by decreasing toxic chemicals
16 found in products. Several industry groups opposed the Governor's toxics reduction bill, and
17 the Washington Legislature subsequently declined to pass the bill during the 2015 legislative
18 session.

19 22. On September 14, 2015, EPA made a necessity determination under the Clean
20 Water Act regarding the human health criteria in Washington's water quality standards and
21 proposed to revise the human health criteria to make them more stringent in order to protect
22 Washington residents from exposure to toxic pollutants. 80 Fed. Reg. 55063 (Sept. 14, 2015).
23 Consistent with the Clean Water Act's system of cooperative federalism, EPA invited
24 Washington to submit its own human health criteria before EPA took action to adopt human
25 health criteria for Washington.
26

1 23. On August 1, 2016, the Department of Ecology submitted new and revised
2 human health criteria to EPA for review and approval or disapproval. 81 Fed. Reg. 85417,
3 85419 (Nov. 28, 2016). EPA partially approved and partially disapproved the criteria
4 Washington submitted. *Id.* Consistent with 33 U.S.C. § 1313(c)(3) and (4), EPA adopted
5 revised human health criteria for Washington on November 28, 2016. 81 Fed. Reg. at 85417,
6 85419. The revised criteria became effective on December 28, 2016. *Id.* at 85418. No one
7 appealed the human health criteria EPA adopted for Washington, and Washington has been
8 implementing the revised human health criteria for nearly two and a half years.

9 24. On February 21, 2017, Northwest Pulp & Paper Association, American Forest
10 and Paper Association, Association of Washington Business, Greater Spokane, Inc., Treated
11 Wood Council, Western Wood Preservers Institute, Utility Water Act Group, and Washington
12 Farm Bureau (Industry Petitioners) filed a petition with EPA, requesting that EPA reconsider
13 its decision to disapprove portions of the criteria the Department of Ecology submitted in
14 August 2016, and to repeal the rule EPA promulgated in November 2016 which established
15 Washington's existing human health criteria. A true and correct copy of the petition is attached
16 hereto as Exhibit A and incorporated by this reference.

17 25. EPA took no action on the petition for almost a year and a half. On
18 August 3, 2018, EPA sent a letter to the attorney for one of the Industry Petitioners advising
19 her that EPA had decided to reconsider the regulation it promulgated in November 2016 to
20 establish human health criteria for Washington. A true and correct copy of EPA's August 3,
21 2018 letter is attached hereto as Exhibit B and incorporated by this reference.

22 26. By letter dated August 7, 2018, Ecology's Director, Maia Bellon, promptly
23 informed EPA that the State of Washington opposed reconsideration of EPA's November 2016
24 rule that established Washington's current human health criteria and preferred to focus its
25 resources on implementing the human health criteria. A true and correct copy of Director
26

1 Bellon's August 7, 2018 letter is attached hereto as Exhibit C and incorporated by this
2 reference.

3 27. EPA did not respond to Director Bellon's August 7, 2018 letter. Instead, by
4 memo dated March 20, 2019, EPA authorized the posting of EPA-HQ-0W-2015-0174 to
5 Regulations.gov, requesting public comment from April 8, 2019 to May 8, 2019, regarding
6 EPA's proposal to revise Washington's existing human health criteria. A true and correct copy
7 of EPA's March 20, 2019 memo is attached hereto as Exhibit D and incorporated by this
8 reference.

9 28. In an April 10, 2019 press release, Director Bellon expressed shock at EPA's
10 failure to engage with Washington or the state's federally recognized Tribes before proposing
11 to revise Washington's existing human health criteria. On April 11, 2019, EPA withdrew its
12 request for public comment on its proposal to revise Washington's existing human health
13 criteria, stating that the public comment period had been opened in error. A true and correct
14 copy of Director Bellon's April 10, 2019 press release is attached hereto as Exhibit E and
15 incorporated by this reference.

16 29. Despite EPA's decision not to seek public comment on its decision to revise
17 Washington's existing human health criteria, by letter dated May 7, 2019, Director Bellon
18 again wrote to EPA noting that there was no legal basis for EPA to revise Washington's
19 existing human health criteria which Ecology had been implementing for over two and a half
20 years, that a revision to the criteria would create regulatory uncertainty and confusion, and that
21 Washington was steadfastly opposed to EPA's proposed revision of Washington's existing
22 human health criteria. Washington Attorney General Bob Ferguson also wrote to EPA in a
23 May 8, 2019 letter to reinforce the concerns raised by Director Bellon, remind EPA that the
24 Clean Water Act establishes clear procedures to revise a state's existing water quality
25 standards, and since EPA had failed to comply with these procedures, there was no legal basis
26 for EPA to revise Washington's existing human health criteria. True and correct copies of

1 Director Bellon's and Attorney General Ferguson's letters are attached hereto as Exhibits F
2 and G, respectively, and incorporated by this reference.

3 30. EPA did not respond to any of the correspondence from Director Bellon or
4 Attorney General Ferguson. EPA also refused to meet with Director Bellon to discuss the
5 matter even though Director Bellon made herself available to meet with EPA representatives in
6 their Washington D.C. offices. Instead, by letter dated May 10, 2019, EPA advised Director
7 Bellon that EPA had made a decision to revise Washington's existing human health criteria to
8 make the criteria less stringent. EPA explained its decision in a 29 page Technical Support
9 Document. True and correct copies of EPA's May 10, 2019 letter and Technical Support
10 Document are attached hereto as Exhibit H and incorporated by this reference.

11 31. In the Technical Support Document, EPA alleges that it can ignore the
12 procedures Congress provided in the Clean Water Act to revise a state's existing water quality
13 standards. EPA bases this claim on alleged "inherent authority" to reconsider and revise a
14 state's existing water quality standards whenever it wants to and for reasons other than those
15 specified by Congress. EPA possess no such inherent authority under the Clean Water Act to
16 revise a state's existing water quality standards. The State of Washington brings this action to
17 preserve its existing human health criteria and avoid the regulatory uncertainty and confusion
18 caused by EPA's unlawful decision to unilaterally revise Washington's existing human health
19 criteria without complying with the procedures Congress established for such a revision.

20 V. FIRST CAUSE OF ACTION

21 32. Plaintiff restates and realleges all preceding paragraphs.

22 33. Under 33 U.S.C. § 1313(c)(4) there are only two ways EPA can revise a state's
23 existing water quality standards. If EPA determines that a new or revised standard submitted to
24 EPA by a state is not consistent with the applicable requirements of the Clean Water Act, EPA
25 shall notify the state "not later than the ninetieth day after the date of submission" and specify
26 the changes that are necessary to meet such requirements. 33 U.S.C. § 1313(c)(3). If the state

1 fails to make the changes within 90 days of the notification, EPA shall prepare and publish
2 regulations setting forth a revised water quality standard. *Id.* § 1313(c)(4)(A). Washington has
3 not submitted human health criteria to EPA since the Department of Ecology made its
4 submission on August 1, 2016. EPA approved in part and disapproved in part Ecology's 2016
5 submission. As required by the Clean Water Act, EPA adopted human health criteria for
6 Washington to replace the portion of Washington's criteria that EPA disapproved. The human
7 health criteria adopted by EPA in December 2016 are part of Washington's existing water
8 quality standards and can only be revised pursuant to the process and requirements of
9 33 U.S.C. § 1313(c)(4). EPA's May 10, 2019 decision to unilaterally revise Washington's
10 existing human health criteria is not only well outside the process and deadlines established by
11 Congress in 33 U.S.C. § 1313(c), but also fails to make the required determination that
12 Washington's existing human health criteria are not consistent with the applicable
13 requirements of the Clean Water Act. Washington is harmed by EPA's unlawful and untimely
14 decision to revise Washington's existing human health criteria without complying with the
15 deadlines and procedures Congress established in 33 U.S.C. § 1313(c)(3) and (c)(4)(A).

16 34. The second way EPA can revise a state's existing water quality standards is to
17 determine that a new or revised standard is necessary to meet the requirements of the Clean
18 Water Act. 33 U.S.C. § 1313(c)(4)(B). As EPA's regulations clarify, this option only allows
19 EPA to promulgate "a more stringent water quality standard." 40 C.F.R. § 131.21(e). EPA's
20 May 10, 2019 decision to revise Washington's existing human health criteria does not include
21 the necessity determination required by 33 U.S.C. § 1313(c)(4)(B). In addition, EPA has
22 decided to make Washington's existing human health criteria less stringent, not more stringent,
23 as required by 40 C.F.R. § 131.21(e). Washington is harmed by EPA's decision to revise
24 Washington's existing human health criteria without making the required necessity
25 determination under 33 U.S.C. § 1313(c)(4)(B), and by EPA's decision to revise Washington's
26

1 existing human health criteria by making the criteria less stringent, rather than more stringent,
2 as required by 40 C.F.R. § 131.21(e).

3 35. EPA does not have inherent authority to ignore the process established by
4 Congress under the Clean Water Act to revise Washington's existing human health criteria.

5 36. Based upon the foregoing and 33 U.S.C. § 1313(c)(4), Plaintiff is entitled to an
6 order declaring that EPA's May 10, 2019 decision to revise Washington's existing human
7 health criteria is unlawful and arbitrary and capricious. Washington is also entitled to an
8 injunction prohibiting EPA from revising Washington's human health criteria unless
9 Washington submits new or revised criteria to EPA that fail to meet the applicable
10 requirements of the Clean Water Act, or until EPA makes a necessity determination under
11 33 U.S.C. § 1313(c)(4)(B).

12 VI. REQUEST FOR RELIEF

13 WHEREFORE, Plaintiff respectfully requests the following relief:

14 A. A declaration that EPA's May 10, 2019 decision to revise Washington's
15 existing human health criteria is arbitrary, capricious, not in accordance with law, and in
16 excess of statutory authority because EPA failed to comply with 33 U.S.C. § 1313(c)(4)(A)
17 before deciding to unilaterally revise Washington's existing human health criteria.

18 B. A declaration that EPA's May 10, 2019 decision to revise Washington's
19 existing human health criteria is arbitrary, capricious, not in accordance with law, and in
20 excess of statutory authority because EPA failed to make the necessity determination required
21 by 33 U.S.C. § 1313(c)(4)(B) before deciding to unilaterally revise Washington's existing
22 human health criteria.

23 C. A declaration that EPA does not have inherent authority to revise Washington's
24 existing human health criteria without complying with the procedures and timelines established
25 by Congress in 33 U.S.C § 1313(c)(3) and (4).
26

1 D. An injunction prohibiting EPA from revising Washington's existing human
2 health criteria unless Washington submits new or revised criteria to EPA that fails to meet the
3 requirements of the Clean Water Act or until EPA makes a necessity determination under
4 33 U.S.C. § 1313(c)(4)(B).

5 RESPECTFULLY SUBMITTED this 6th day of June, 2019.

6 ROBERT W. FERGUSON
7 Attorney General

8 *s/ Ronald L. Lavigne*

9 *s/ Laura J. Watson*

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