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Attorneys for Plaintiff Idaho Conservation League

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO CONSERVATION LEAGUE,)	No. 12-cv-2
)	
Plaintiff,)	
)	
vs.)	COMPLAINT
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Defendant.)	
)	
)	
)	
)	

NATURE OF ACTION

1. In this action, Plaintiff Idaho Conservation League (“ICL”) challenges the violation by Defendant United States Environmental Protection Agency (“EPA”) of its mandatory duty under section 303(c) of the Clean Water Act (“CWA”), 33 U.S.C. § 1313(c), to timely approve or disapprove water quality standards submitted by the State of Idaho’s Department of Environmental Quality (“IDEQ”).

2. Specifically at issue in this case is EPA’s failure to timely approve or disapprove revised toxics criteria for the protection of human health which IDEQ submitted to EPA on July 7, 2006 (“2006 Human Health Criteria”). Although CWA

section 303(c) imposes a mandatory timeframe of 60-90 days for EPA to either approve or disapprove water quality standards submitted by the states, EPA to date has failed to act upon the 2006 Human Health Criteria submitted by IDEQ.

3. On July 7, 2008, Plaintiff sent EPA a 60-day notice letter for its failure to approve or disapprove the 2006 Human Health Criteria and other water quality standards submitted by IDEQ. Thereafter, ICL and EPA entered into a settlement agreement – subsequently modified – which provided that EPA would take final action on the 2006 Human Health Criteria by January 2, 2012.

4. Because EPA has not taken action to approve or disapprove the 2006 Human Health Criteria within the extended timeframe agreed to between the parties, and because EPA is now years late in taking the required action under CWA section 303(c), Plaintiff seeks judicial relief declaring EPA to be in violation of its mandatory duty under the CWA and ordering EPA to promptly take final action on the 2006 Human Health Criteria.

JURISDICITON AND VENUE

5. This Court has jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (Clean Water Act citizen suit provision); 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). On July 7, 2008, ICL furnished EPA with written notice of its violations of the Clean Water Act, and more than 60 days has passed since this notice.

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because ICL resides in this district, EPA has an office in this district, and a substantial part of the events or omissions giving rise to the claim occurred in Idaho.

PARTIES

7. Plaintiff Idaho Conservation League is a non-profit conservation organization incorporated under the laws of Idaho with its principal place of business in Boise, Idaho. ICL's mission is to protect and restore the clean water, wildlands, and wildlife of Idaho. ICL and its approximately 20,000 supporters are dedicated to protecting and conserving Idaho's natural resources, including its water resources. ICL, as an organization and on behalf of its staff and supporters, is greatly concerned with protecting and improving the quality of the surface waters of the State of Idaho. ICL and its supporters are active in public education, administration, and legislation of conservation issues in Idaho, including water quality issues.

8. ICL and its staff and supporters use and enjoy the waters of the State of Idaho for health, recreational, scientific, and aesthetic purposes. ICL and its staff and supporters derive health, recreational, scientific, and aesthetic benefits from drinking, fishing, boating, study, contemplation, photography, and other activities in and around the waters of the state. These interests of ICL and its staff and supporters are directly affected by EPA's failure to approve or disapprove Idaho's human health criteria applicable to all waters in the state. The interests of ICL and its staff and supporters have been, are being, and unless the relief prayed for herein is granted, will continue to be irreparably injured by EPA's failure to fulfill its water quality protection responsibilities.

9. Defendant EPA is an agency of the United States charged with implementing and ensuring compliance with the Clean Water Act, among other federal environmental statutes. EPA maintains an office in Boise, Idaho.

STATUTORY BACKGROUND

10. In 1972, Congress passed the Clean Water Act in order “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a).

11. To meet these goals, section 303(c) of the CWA requires the establishment of water quality standards. Water quality standards are promulgated by the states and establish the desired condition of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a).

12. Water quality standards under the CWA are required to include three elements: (1) one or more designated “uses” of that waterway; (2) water quality “criteria” specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits and narrative form; and (3) an antidegradation policy (with implementation methods) to protect all existing uses. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

13. CWA section 303(c) directs that each state is to hold public hearings at least every three years for the purpose of reviewing water quality standards and, when appropriate, modifying and adopting standards. 33 U.S.C. § 1313(c)(1). Whenever a state revises or adopts a new standard pursuant to this review process, the state shall adopt criteria for certain toxic pollutants. 33 U.S.C. § 1313(c)(2)(B). These criteria shall be specific numerical criteria, or where such numerical criteria are not available, these criteria shall be based on biological monitoring or assessment methods consistent with methods established by the EPA Administrator. *Id.*; 33 U.S.C. § 1314(a)(8).

14. When a state revises or adopts a new standard, section 303(c) requires the state to submit the revised or new standard to the EPA Administrator for review and approval or disapproval under the minimum standards set by the CWA. 33 U.S.C. § 1313(c)(2)(A).

15. Section 303(c) also sets statutory deadlines for EPA to take final action in reviewing and either approving or disapproving state water quality standards. If EPA approves the state's new or revised water quality standard, it must so notify the state within 60 days of submission. 33 U.S.C. § 1313(c)(3). If EPA disapproves of the standard, EPA must so notify the state within 90 days and must specify the required changes. *Id.* If the state fails to adopt those changes within an additional 90-day period, EPA is required to "promptly" establish a revised standard for the state. 33 U.S.C. § 1313(c)(3) and (4)(A).

STATEMENT OF FACTS

Idaho's 2006 Human Health Criteria

16. Pursuant to CWA section 303(c), IDEQ submitted revised water quality standards (Idaho Docket Number 58-0102-0503) to EPA for review on July 7, 2006. Docket 58-0102-0503 updated most of Idaho's toxics criteria for the protection of human health ("2006 Human Health Criteria"), and adopted cadmium aquatic life criteria.

17. IDEQ explained in the cover letter to its July 7, 2006 submission to EPA for the approval of Docket 58-0102-0503 that the 2006 Human Health Criteria mostly resulted from a change in the national default fish consumption rate that goes into criteria developed to protect recreational fishers against exposure to toxins from eating fish. The cover letter also asserted that the 2006 Human Health Criteria reflected new information

in EPA's IRIS database on toxicological effects and bioaccumulation of priority toxic pollutants. The cover letter also stated that the 2006 Human Health Criteria are applied in Idaho to protect recreation and domestic water supply uses.

18. The 2006 Human Health Criteria resulted from a rulemaking initiated by IDEQ on April 6, 2005, when it published a Notice of Negotiated Rulemaking. On September 7, 2005, IDEQ published a Notice of Proposed Rule, and on January 4, 2006, IDEQ published a Notice of Pending Rule. The pending rule was adopted as a final rule by the 2006 Idaho legislature, effective April 11, 2006.

19. In the final rule, IDEQ changed the fish consumption rate from 6.5 to 17.5 grams/day and updated the toxics criteria to reflect this change in the fish consumption rate and to reflect the new information found in IRIS.

Notice Letter & Settlement

20. EPA did not take final action on the 2006 Human Health Criteria and other IDEQ water quality standards within the 60-90 day deadlines imposed by CWA section 303(c).

21. By letter dated July 7, 2008, ICL provided a notice of intent to sue ("Notice Letter") to the EPA Administrator, alleging that EPA failed to perform its nondiscretionary duties under 33 U.S.C. § 1313(c)(3) to approve or disapprove new or revised water quality standards submitted to EPA by IDEQ, including the 2006 Human Health Criteria.

22. On April 1, 2009, ICL and EPA entered into a Settlement Agreement addressing all alleged violations set forth in the Notice Letter. Among other provisions of the Settlement Agreement, EPA agreed to take action on the 2006 Human Health

Criteria by no later than 18 months from the date of execution of the Settlement Agreement, and EPA agreed not to take action on any site-specific water quality criteria adjusted based on fish consumption rates until EPA has taken action on the 2006 Human Health Criteria.

23. In January 2011, at the request of EPA, ICL agreed to a Modification of the Settlement Agreement, which granted EPA's request for a time extension to take action on the 2006 Human Health Criteria by no later than 33 months from the date of execution of the original Settlement Agreement, i.e., by January 2, 2012.

24. As of this date, EPA has not taken final action on the 2006 Human Health Criteria, in violation of both its mandatory duty under CWA section 303(c) and the terms of the modified Settlement Agreement between ICL and EPA.

CLAIM FOR RELIEF:
Violation of Clean Water Act, 33 U.S.C. § 1313(c)(3)
For Failure to Approve or Disapprove 2006 Human Health Criteria

25. Plaintiff realleges all preceding paragraphs.

26. More than five years has passed since IDEQ submitted Docket 58-0102-0503 to EPA for approval, but EPA has not taken final action to approve or disapprove the 2006 Human Health Criteria. EPA is thus in violation of its nondiscretionary duty under 33 U.S.C. § 1313(c)(3).

27. EPA has further violated its agreement, under the modified Settlement Agreement with ICL, to take final action on the 2006 Human Health Criteria by January 2, 2012, underscoring that EPA's violation of its statutory duty under the CWA constitutes an unreasonable delay and that judicial action requiring immediate action by EPA is appropriate in this case.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A. Order, declare, and adjudge that EPA is in violation of section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c)(3), by failing to take final action to approve or disapprove the 2006 Human Health Criteria;

B. Enter declaratory and/or injunctive relief requiring EPA immediately to take final action to approve or disapprove the 2006 Human Health Criteria;

C. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Clean Water Act, 33 U.S.C. § 1365, and/or all other applicable authorities; and

D. Grant such further relief as the Court deems just and proper in order to remedy Defendant's violation of the Clean Water Act.

Dated this 3rd day of January, 2012.

Respectfully submitted,

/s/ Bryan Hurlbutt
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