

1 Smith & Lowney PLLC
2 Richard A. Smith (WSBA No. 21788)*
3 Claire Tonry (WSBA No. 44497)*
4 2317 E. John St.
5 Seattle, WA 98112
6 Tel: (206) 805-0857
7 richard@smithandlowney.com
8 claire@smithandlowney.com

9 Center for Biological Diversity
10 Hannah Connor (VSB No. 74785)*
11 1411 K Street NW, Suite 1300
12 Washington, DC 20005
13 Tel: (202) 681-1676
14 hconnor@biologicaldiversity.org

15 *Attorneys for Plaintiff*
16 *Seeking Admission pro hac vice

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.

28 Case No.:

29 **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
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
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
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
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

1 program by instituting protocols to track and respond to the collective impacts of the program. *Id.*
2 This programmatic review provides the only way to avoid piecemeal destruction of species and
3 habitat. *See* 80 Fed. Reg. 26,832, 26,836 (May 11, 2015). That is because the aggregate impacts
4 of the water quality criteria can be analyzed and meaningfully addressed only through
5 programmatic review, which is necessary to ensure the effects of the program as a whole do not
6 jeopardize listed species through death by a thousand small cuts. *See id., and see e.g.*, 66 Fed. Reg.
7 at 11,212.
8

9 13. Plaintiff therefore seeks a declaration that EPA is in violation of ESA Section 7 for
10 promulgating cadmium water quality criteria in 2016 without consultation, an order remanding
11 those criteria and vacating the less protective chronic freshwater criterion, and any other
12 appropriate relief.
13

14 JURISDICTION AND VENUE

15 14. This case arises under the ESA, 16 U.S.C. §§ 1531-1544, and the Court has
16 jurisdiction under the ESA citizen suit provision, 16 U.S.C. §§ 1540(c), (g).
17

18 15. By written notice to Defendants dated December 16, 2020, Plaintiff provided notice
19 of its intent to file suit more than sixty days prior to the filing of this complaint, as required by the
20 ESA. 16 U.S.C. § 1540(g). Plaintiff's notice letter demanded that Defendants initiate and complete
21 programmatic ESA consultation on EPA's 2016 promulgation of revised Section 304(a) water
22 quality criteria for cadmium. Because Defendants failed to respond or remedy the alleged
23 violation, an actual, justiciable controversy exists within the meaning of 28 U.S.C. § 2201(a).
24

25 16. This Court has the authority to grant declaratory relief pursuant to the Declaratory
26 Judgment Act, 28 U.S.C. § 2201. This Court further has authority to grant injunctive relief under
27 28 U.S.C. § 2202 and 16 U.S.C. 1540(g)(1). The ESA's citizen suit provision allows the Court to
28
29

1 enjoin a federal agency that is in violation of the ESA and thereby compel compliance with the
2 ESA's requirements, including the duty to consult under Section 7. 16 U.S.C. § 1640(g).

3 17. Venue is appropriate in this Court under 28 U.S.C. § 1391(e)(1) because Plaintiff's
4 principal place of business is Tucson, Arizona, thus Plaintiff resides in this District.

5
6 **PARTIES**

7 **Plaintiff**

8 18. Plaintiff Center for Biological Diversity is a national nonprofit conservation
9 organization that works through science, law, and policy to secure a future for all species, great or
10 small, especially those hovering on the brink of extinction. The Center has more than 1.6 million
11 supporters worldwide, including approximately 89,610 members. The Center has worked for
12 decades to safeguard water and aquatic habitats for people, plants, and animals. The Center's
13 members and staff value and benefit from rare species' continued existence in the wild and are
14 harmed by water degradation that threatens wild species' survival and recovery. The Center has
15 worked for years to protect imperiled species that may be harmed by exposure to toxic chemicals
16 and heavy metals such as cadmium. The Center brings this action on behalf of itself and its
17 members.
18

19
20 19. The Center and its members are harmed by EPA's failure to consult with FWS and
21 NMFS on the effects of its revision of the cadmium criteria on species listed as threatened or
22 endangered under the ESA.

23
24 20. The Center's members derive aesthetic, recreational, emotional, and spiritual
25 benefits from aquatic species, including salmon, sturgeon, amphibians, reptiles such as sea turtles,
26 mussels, and birds, and their continued existence in their native habitats. The Center's members
27
28
29

1 include individuals who regularly visit natural areas occupied by threatened and/or endangered
2 species impacted by EPA's cadmium criteria.

3 21. The Center's members include individuals who derive aesthetic, spiritual,
4 recreational, and professional benefits from endangered loggerhead sea turtles, Atlantic sturgeon,
5 and pallid sturgeon, and threatened green sturgeon, delta smelt, salmon, steelhead, and mussels.
6 These members enjoy swimming, snorkeling, boating, and walking the shores and banks of
7 waterways seeking opportunities to learn about and view these species. However, their enjoyment
8 is diminished by actions that reduce the abundance and fitness of these species.
9

10 22. The Center's has members, for example, that derive aesthetic and recreational
11 benefits from observing Atlantic sturgeon, which can grow to over 500 pounds and like to breach
12 above the water's surface during spawning season. However, these members' enjoyment is
13 lessened when there are fewer sturgeon to observe and when the sturgeons' health and vigor is
14 impaired. Similarly, the Center has members who regularly visit areas where the southern
15 population of green sturgeon is known to occur in hopes of seeing these fish in the wild, but their
16 efforts and aesthetic, recreational, and spiritual enjoyment is frustrated by the green sturgeon's
17 scarcity, which is due in part to water pollution.
18

19 23. The populations of endangered and threatened species from which the Center's
20 members benefit, including loggerhead sea turtles, Atlantic sturgeon, pallid sturgeon, green
21 sturgeon, salmon, and steelhead, range across state lines and are impacted by cadmium pollution.
22 Atlantic sturgeon, for instance, are exposed to anthropogenic cadmium contamination in
23 Chesapeake Bay and the James River, where Center members go to observe the fish.
24
25
26
27
28
29

1 24. Several of these species, including sea turtles and sturgeon, are also long-lived and
2 therefore particularly susceptible to chronic cadmium pollution and adverse impacts from
3 cadmium accumulating in tissue over many decades.

4 25. EPA's failure to consult with the Services on the cumulative, interstate, and range-
5 wide impacts of its revised cadmium criteria on such species bypasses substantive safeguards the
6 Services can apply to avoid jeopardy to the species and avoid the likelihood of adverse effects, to
7 the detriment of the species, and ultimately to the Center's members who benefit from these
8 species' health and survival. For example, had EPA consulted the Services, it would have had to
9 take into account the totality of the impact of increasing the freshwater chronic cadmium criterion
10 on long-lived species that inhabit waterways that cross state lines, and which are exposed to
11 cadmium pollution in multiple forms from multiple pathways. This assessment would present
12 multiple opportunities—and likely trigger obligations—for EPA and the Services to modify the
13 criteria to be more protective of endangered and threatened species. At least 18 states, territories,
14 and/or tribes would then be implementing more protective criteria in their CWA programs.

15 26. Plaintiff has also suffered a procedural injury from Defendants' failure to comply
16 with Section 7 of the ESA. Because compliance with the Section 7 consultation process is essential
17 to protecting listed species and critical habitats—to which the Center's members have concrete
18 interests, Defendants' procedural failure to comply with Section 7 is causing current and ongoing
19 harm to Plaintiff's substantive recreational, scientific, spiritual, and aesthetic interests. The Center
20 relies on Defendants' compliance with Section 7 to achieve the Center's organizational purposes
21 on behalf of itself and its members, including monitoring the impacts of agency actions on the
22 environment and listed species; monitoring legal compliance concerning environmental
23
24
25
26
27
28
29

1 management; educating members, directors, staff, and the public concerning species management
2 and the state of the environment; and advocating for policies that protect habitats and wildlife.

3 27. Plaintiff is a non-profit conservation organization with limited resources that can
4 be dedicated to its core mission to protect the environment, imperiled species, and the habitats they
5 rely on. Defendants' actions impede Plaintiff's ability to carry out its fundamental mission, and
6 directly undercuts decades of successful work by Plaintiff to enforce environmental laws that
7 protect waterways and listed species.
8

9 28. Defendants' failure to comply with the ESA is causing actual, concrete injuries to
10 the Center and its members. The interests and organizational purposes of the Center and its
11 members are directly and irreparably injured by Defendants' violations of law as described in this
12 Complaint. Unless this Court grants the requested relief, harm to the environment and protected
13 species will continue to accrue, and the aesthetic, recreational, educational, professional, scientific,
14 spiritual, and conservation interests of Plaintiff and its members will continue to be adversely
15 affected.
16
17

18 29. The relief Plaintiff seeks in this lawsuit will redress its injuries by requiring EPA
19 to comply with the ESA. This relief will protect Plaintiff's interests by ensuring that listed species
20 will not be jeopardized by the revision of the cadmium criteria, as the ESA requires, and give
21 Plaintiff and its members more comprehensive and complete information regarding the revision's
22 threats to waterways, protected species, and other valued resources. It will allow Plaintiff, its
23 members and supporters, and others who are injured by less stringent regulation of toxic water
24 pollution, to participate and advocate more effectively for changes to mitigate the adverse impacts
25 of the cadmium criteria revision.
26
27
28
29

Defendants

1
2 30. Defendant United States Environmental Protection Agency is an independent
3 agency of the executive branch of the United States government. EPA is the federal agency
4 responsible for applying and implementing the CWA at the national level.
5

6 31. Defendant Michael S. Regan is the Administrator of EPA and has authority over its
7 actions. Plaintiff brings this action against Administrator Regan in his official capacity only.
8

LEGAL BACKGROUND

The Endangered Species Act

9
10 32. With the ESA, Congress intended endangered species to be afforded the highest of
11 priorities. The ESA’s purpose is “to provide a means whereby the ecosystems upon which
12 endangered species and threatened species depend may be conserved, [and] to provide a program
13 for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).
14

15 33. The ESA assigns responsibility to implement the statute to the Secretaries of
16 Commerce and Interior, which in turn have delegated responsibility to NMFS and FWS,
17 respectively. 50 C.F.R. § 402.01.
18

19 34. To fulfill the substantive purposes of the ESA, federal agencies are required to
20 engage in Section 7 consultation with the Services to “insure that any action authorized, funded,
21 or carried out by such agency . . . is not likely to jeopardize the continued existence of any
22 endangered species or threatened species or result in the destruction or adverse modification of
23 habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). Formal
24 consultation is required if an agency determines that any of its actions “may affect listed species
25 or critical habitat.” 50 C.F.R. § 402.14(a).
26
27
28
29

1 35. The ESA’s regulatory definition of “action” is broad and includes “all activities or
2 programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies
3 in the United States or upon the high seas,” such as the promulgation of regulations, or any “actions
4 directly or indirectly causing modifications to the land, water, or air.” *Id.*

5 36. Section 7 consultation is required for all such actions “in which there is
6 discretionary Federal involvement or control.” 50 C.F.R. § 402.03. When an agency “had some
7 discretion to influence or change the activity for the benefit of a protected species” the action
8 involves sufficient discretion to require Section 7 consultation. *Karuk Tribe of Cal. v. United States*
9 *Forest Service*, 681 F.3d 1006, 1024 (9th Cir. 2012).

10 37. Section 7(a)(2) and its implementing regulations set forth a detailed process that
11 must be followed before agencies take or approve actions that may affect threatened or endangered
12 species or critical habitat.
13

14 38. Each federal agency must “review its actions at the earliest possible time to
15 determine whether any action may affect listed species or critical habitat” in the action area and
16 thus whether consultation is required. 50 C.F.R. § 402.14(a). The term “may affect” is broadly
17 construed to include “[a]ny possible effect, whether beneficial, benign, adverse, or of an
18 undetermined character,” and thus is easily triggered. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).
19 The “action area” includes all areas that would be “affected directly or indirectly by the Federal
20 action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. Only if an
21 action agency makes a non-arbitrary “no effect” determination can the agency proceed without
22 consultation.
23

24 39. If listed species or critical habitat may be present in the action area, the agency must
25 analyze the proposed action’s effects. It may do so by first engaging in “informal consultation”
26
27
28
29

1 with the Service(s). *See* 50 C.F.R. §§ 402.12, 402.13, 402.14(b)(1). If the agency concludes, in a
2 biological assessment, that the action is “not likely to adversely affect” listed species—and the
3 Service lawfully concurs in writing—then the consultation process is completed. *Id.* § 403.13(c).
4 Conversely, if the action is “likely to adversely affect” listed species, the agency must enter into
5 “formal consultation” with the Service(s), a more extensive and protective process to consider the
6 action’s impacts. *Id.* §§ 402.12(k), 402.14(a).

8 40. Formal ESA consultation commences with the action agency’s written request for
9 consultation and concludes with the Services’ issuance of a “biological opinion.” *Id.* §§ 402.02;
10 402.14(c), (g)(4).

12 41. The biological opinion is the heart of the formal consultation process and states the
13 Services’ opinion as to whether the effects of the action are “likely to jeopardize the continued
14 existence of listed species or result in the destruction or adverse modification of critical habitat.”
15 *Id.* § 402.14(g)(4), (h)(3); *see* 16 U.S.C. § 1536(a)(2), (b)(3)(A).

17 42. If the Services determine that the action is likely to jeopardize a species, the
18 biological opinion must outline “reasonable and prudent alternatives” to the action, if any exist,
19 that will avoid jeopardy and “which [the agency] believes would not violate [Section 7(a)(2)].”
20 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). The Services must also provide “those
21 reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize
22 such impact. 16 U.S.C. § 1536(b)(4)(ii).

24 43. The Services’ ESA implementing regulations anticipate “programmatic
25 consultation” for federal programs that may affect listed species, such as the adoption of water
26 quality criteria under the CWA. Programmatic consultation is defined as “a consultation
27 addressing an agency’s multiple actions on a program, region, or other basis” and allows the
28

1 Services to guide the implementation of such programs by establishing standards, guidelines, or
2 governing criteria to avoid, minimize, or offset the effects of the program on listed species and
3 critical habitat, and to establish protocols to track and respond to the collective impacts of actions
4 taken pursuant to the program. *See* 50 C.F.R. § 402.02; *id.* § 402.14(c)(4) (requiring Federal
5 agencies to consider “the effects of the action or actions as a whole”). The Services’ regulations
6 provide that for federal programs, programmatic consultations and project-specific consultations
7 work in tandem, with each playing a vital role in protecting imperiled species. *See* 84 Fed. Reg.
8 44,976, 44,997 (Aug. 27, 2019).

9
10 44. Foregoing ESA Section 7 consultation on an agency action that may affect broad-
11 ranging, long-lived species, such as promulgation of national water quality criteria, in favor of
12 disjointed consultation on individual states’ adoption of water quality standards results in an
13 incomplete consideration of the action in a manner inconsistent with the ESA’s requirements.
14

15 The Clean Water Act

16 **Overview**

17
18 45. Congress adopted the CWA in 1972 “to restore and maintain the chemical,
19 physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA prohibits
20 the discharge of pollutants to waters absent an authorization under the Act. 33 U.S.C. § 1311(a).
21 Authorizations to discharge pollutants from point sources to navigable waters are issued by EPA
22 or a state with an EPA-delegated permit program under the National Pollutant Discharge
23 Elimination System (NPDES). NPDES permits and, generally, other activities authorized by the
24 CWA must ensure that water quality standards are not violated. 33 U.S.C. § 1311(b)(1)(C).
25

26 46. “Water quality standards are provisions of State or Federal law which consist of a
27 designated use or uses for the waters of the United States and water quality criteria for such waters
28
29

1 based upon such uses. Water quality standards are to protect the public health or welfare, enhance
2 the quality of water and serve the purposes of the Act.” 30 C.F.R. § 131(3)(i). “Such standards
3 serve the dual purposes of establishing the water quality goals for a specific water body and serve
4 as the regulatory basis for the establishment of water-quality-based treatment controls and
5 strategies beyond the technology-based levels of treatment” also required by the CWA. 40 C.F.R.
6 § 131.2.
7

8 47. Water quality standards also serve as a target for CWA restoration activities such
9 as total maximum daily loads (TMDLs). CWA Section 303 requires states to identify waterbodies
10 that fail to attain water quality standards and TMDLs must be developed and implemented for
11 these waters. A TMDL represents the maximum amount of pollutant loading that a waterbody can
12 receive from all combined sources without exceeding applicable water quality standards,
13 sometimes described as the “pollution budget.” From this information, opportunities for reducing
14 excessive loads can be identified and implemented, individual contributions can be capped, and
15 additional loading prevented. TMDL-derived effluent limitations on pollutants of concern must be
16 included in NPDES permits. TMDLs are also a primary mechanism for development and
17 implementation of controls on non-point source pollution (unregulated by the pollutant discharge
18 permit system) under the CWA. In sum, water quality standards form a key legal basis for
19 controlling pollutants entering the waters of the United States. Because ensuring that waterbodies
20 are of sufficient quality to support designated aquatic life uses (e.g., fish and shellfish spawning
21 and rearing) is crucial to the protection of threatened and endangered aquatic species, water quality
22 standards are important for achievement of ESA goals.
23
24
25

26 48. Water quality criteria are a component of water quality standards that represent the
27 conditions (e.g., concentrations of particular chemicals, levels of certain parameters) sufficient to
28
29

1 restore and maintain the chemical, physical, and biological integrity of water bodies and protect
2 applicable designated uses. If a water quality criterion is exceeded, the water quality may pose an
3 ecological (or human health) risk, and protective or remedial action may be needed.

4 **EPA's Promulgation of Section 304(a) Water Quality Criteria**

5 49. EPA publishes, and from time-to-time revises, criteria for water quality under CWA
6 Section 304(a), 33 U.S.C. § 1314(a), that must reflect the latest scientific knowledge. EPA's
7 Section 304(a) national criteria recommendations ("304(a) criteria") provide quantitative
8 concentrations or levels and/or qualitative measures of pollutants that, if not exceeded, will
9 generally ensure adequate water quality for protection of a designated use. Separate water quality
10 criteria for a particular pollutant are typically established based on 1) human health protection, 2)
11 recreational use standards, and 3) protection of aquatic life, as well as other common designated
12 water body uses.
13
14

15 50. EPA uses its *Guidelines for Deriving Numerical National Water Quality Criteria*
16 *for the Protection of Aquatic Organisms and Their Uses* (1985) (commonly referred to as the
17 "1985 Guidelines" or "Aquatic Life Guidelines") to derive Section 304(a) criteria to protect
18 aquatic life from the effects of toxic pollutants. EPA Office of Water, *Water Quality Standards*
19 *Handbook Chapter 3: Water Quality Criteria*, Pub. EPA 823 B 17 001, at 14 (2017). The Aquatic
20 Life Guidelines provide suggestions for the development, selection, and consideration of scientific
21 data to inform the derivation of aquatic life water quality criteria, as well as options and factors for
22 consideration in the expression of such criteria. Expression of criteria comprises magnitude (e.g.,
23 pollutant concentration limitation in water, usually a maximum concentration), frequency (e.g.,
24 how often the magnitude limit may be exceeded), and duration (how often the magnitude limit
25
26
27
28
29

1 may be exceeded). Substantial discretion is used by EPA in its expression of criteria with these
2 components.

3 51. According to the Aquatic Life Guidelines, the optimal method for establishing
4 criteria would involve impractical field tests:

5
6 If it were feasible, a freshwater (or saltwater) numerical aquatic life
7 [304(a) criteria] for a material should be determined by conducting
8 field tests on a wide variety of unpolluted bodies of fresh (or salt)
9 water. It would be necessary to add various amounts of the material
10 to each body of water in order to determine the highest concentration
11 that would not cause any unacceptable long-term or short-term
12 effect on the aquatic organisms or their uses. The lowest of these
13 highest concentrations would become the freshwater (or saltwater)
14 [304(a) criterion] for that material, unless one or more of the lowest
15 concentrations were judged to be outliers.

16 Aquatic Life Guidelines at 1. Because it is not feasible to conduct such field tests, the Aquatic Life
17 Guidelines set forth suggestions for collection, review, and analysis of “appropriate” data and the
18 exclusion of “questionable” data. *Id.* at 11 – 14. For instance, the Aquatic Life Guidelines indicate
19 that the development of aquatic life criteria be based on EPA’s discretionary selections of data
20 concerning toxicity tests conducted on sets of various categories of test species. *Id.* at 12 – 13. The
21 use of additional data is deemed “desirable” but discretionary. *Id.* at 14.

22 52. Such criteria should be numeric unless numeric criteria cannot be developed. 40
23 C.F.R. § 131.11(b).

24 53. While the Aquatic Life Guidelines provide substantial guidance,

25 ... much of the guidance is necessarily qualitative rather than
26 quantitative; *much judgment will usually be required to derive a*
27 *water quality criterion for aquatic organisms and their uses.* In
28 addition, although [the Aquatic Life Guidelines] attempts to cover
29 all major questions that have arisen during use of previous versions
and drafts, it undoubtedly does not cover all situations that might
occur in the future. All necessary decisions should be based on a
thorough knowledge of aquatic toxicology and an understanding of
these Guidelines and should be consistent with the spirit of these

1 Guidelines, i.e., to make best use of the available data to derive the
2 most appropriate criteria. [The Aquatic Life Guidelines] should be
3 modified whenever sound scientific evidence indicates that a
4 national criterion produced using these Guidelines would probably
5 be substantially overprotective or underprotective of the aquatic
6 organisms and their uses on a national basis. Derivation of numeric
7 national water quality criteria for aquatic organisms and their uses
8 is a complex process and requires knowledge in many areas of
9 aquatic toxicology; any deviation from these Guidelines should be
10 carefully considered to ensure that it is consistent with other parts of
11 these Guidelines.

12 Aquatic Life Guidelines at 9 (*italics added*).

13 54. Once EPA promulgates draft Section 304(a) criteria, the public and other
14 government entities have an opportunity to comment. EPA exercises its discretion to alter its draft
15 criteria in response to such comments.

16 55. In summary, while EPA's discretion is not unfettered and must comply with the
17 ESA's and CWA's requirements, EPA exercises discretion at each step of the Section 304(a)
18 criteria setting process: 1) EPA determines whether existing criteria warrant revisions, 2) EPA
19 decides which data are reliable, how much weight to give various data sources, and what
20 assumptions are appropriate, 3) EPA decides whether deviation from procedures in its own internal
21 guidance is warranted to, e.g., better protect aquatic organisms on a national basis, 4) EPA selects
22 how the criteria should be expressed, and 5) EPA decides whether its scientific analysis should be
23 altered in response to public comments.

24 **State Water Quality Criteria**

25 56. States are primarily responsible for reviewing, establishing, and revising water
26 quality standards, including water quality criteria. 40 C.F.R. § 131.4(a). However, every three
27 years, states must consider any new or revised water quality criteria promulgated by EPA. 40
28 C.F.R. § 131.20.

1 the 1,669 most serious hazardous waste sites on the National Priorities List. Of these 1,014 sites,
2 cadmium was identified in surface waters at 354 sites, and in ground water at 675 sites.

3 60. Cadmium, which has no beneficial biological function in living organisms, is toxic
4 at low concentrations to plants, fish, birds, mammals (including humans), and microorganisms.
5 This heavy metal causes a range of impacts, including both acute and sublethal effects, on aquatic
6 organisms. Cadmium is a teratogen, meaning that it causes malformations of embryos, and is also
7 a carcinogen. In aquatic organisms, exposure adversely effects growth, reproduction, immune and
8 endocrine systems, development, and behavior. In a 2005 study that compared the acute toxicity
9 of 63 heavy metals to a widespread crustacean found in both fresh and brackish water, cadmium
10 was the most toxic.
11

12
13 61. Cadmium bioaccumulates in all levels of the food chain in both aquatic and
14 terrestrial organisms. In both freshwater and marine animals, cadmium can bioaccumulate to
15 concentrations hundreds to thousands of times higher than in the water. Bioconcentration factors
16 range from 3 to 4,190 in freshwater organisms and from 5 to 3,160 in saltwater organisms.
17

18 62. A 1985 Department of the Interior study examined concentrations of cadmium in a
19 variety of aquatic and terrestrial flora and fauna, and identified the following trends relevant here:
20 1) in general, marine organisms contain “significantly higher cadmium residues” than freshwater
21 organisms; 2) cadmium tends to concentrate in the liver and kidneys of vertebrates; 3) cadmium
22 concentrations are higher in older organisms, especially in marine vertebrates; and 4) cadmium
23 concentrations are “dependent upon the species analyzed, the season of collection, ambient
24 cadmium levels, and the sex of the organism.” U.S. Dep’t of Health & Human Servs., Public Health
25 Serv. Agency for Toxic Substances and Disease Registry, Toxicological Profile for Cadmium 29,
26 304 (2012), available at <https://www.atsdr.cdc.gov/toxprofiles/tp5.pdf>.
27
28
29

1 63. Cadmium is considered one of the most toxic metals to fish and causes a range of
2 impacts. Acutely, cadmium causes gill toxicity leading to the organism's inability to breathe.
3 Cadmium also causes a range of sublethal effects in fish. For example, cadmium competes with
4 calcium uptake because the two chemicals are similar, which can cause skeletal malformations and
5 acute hypocalcemia, which is characterized by cadmium accumulation in tissues and decreased
6 calcium concentrations in plasma. Cadmium also causes disease of the gill, liver, and kidneys in
7 fish, renal tubular damage, alterations of free radical production and the antioxidant defense
8 system, immunosuppression, and structural effects on invertebrate gills. Cadmium pollution has
9 also been shown to negatively impact certain species' physiological processes and ability to
10 withstand stress. This heavy metal also causes neurotoxic effects in fish that can manifest in altered
11 behavior, the most widely observed of which is hyperactivity. Hyperactivity makes fish more
12 likely to be seen and attacked by predatory fish. In predatory fish, hyperactivity results in lower
13 success rates for detecting, orienting to, and swallowing prey. Indeed, most fish that exhibited
14 hyperactive behavior as a result of long-term exposures ultimately perished.

15
16
17
18 64. Salmonid species appear to be particularly sensitive to cadmium. Cadmium is
19 known to disrupt the endocrine functions of endangered Atlantic salmon, as well as other
20 threatened and endangered salmon and steelhead species in the Pacific northwest and is thereby
21 negatively impacting the reproductive capabilities of these endangered species.

22
23 65. Elevated concentrations of cadmium have been identified in federally endangered
24 shortnose sturgeon collected from the Delaware and Kennebec Rivers, which had total toxicity
25 equivalent concentrations of cadmium above adverse effect concentration levels. In addition, a
26 study identified cadmium levels above background in the kidneys of Missouri River Pallid
27 sturgeon.
28
29

1 66. Numerous studies have identified elevated levels of cadmium in sea turtles. A 2017
2 paper review of the available scientific literature on metals contamination in sea turtles found that
3 of the most toxic metals (lead, mercury, and cadmium), the concentration of cadmium in sea turtle
4 blood was the highest. Among the non-essential metals, cadmium was found in all reported tissues,
5 with the highest concentrations found in the kidneys. Similarly, a 2018 study of 137 specimens of
6 green sea turtles collected from around the world identified cadmium in all the samples, with the
7 highest bioconcentration in the kidneys. Specimens from the Pacific Ocean had higher cadmium
8 concentrations in the liver than samples from the Atlantic Ocean. Cadmium concentrations
9 measured in tissues were generally greater than concentrations found in other marine organisms,
10 including dolphins.
11

12 67. Cadmium also negatively impacts mussels, including protected freshwater mussels.
13 The recovery plan for the Cumberland and Tennessee River mussels explains that many
14 endangered freshwater mussels are “among the most intolerant organisms to heavy metals,” and
15 “[c]admium appears to be the heavy metal most toxic to mussels.” Cadmium has been correlated
16 with the decline of the dwarf wedgemussel, and FWS has identified cadmium as “acutely toxic”
17 to juvenile mapleleaf mussels. Alarmingly, FWS has noted that, “[v]irtually nothing is known
18 about the sublethal impacts in mussels to long-term exposure to metals at low concentration. . . .
19 Sublethal effects are frequently observed at concentrations only one-half the lethal concentration,
20 which indicates that freshwater mussels become stressed at metal concentrations much lower than
21 those reported in acute toxicity tests.” Thus, even small amounts of cadmium may have
22 disproportionately adverse effects for endangered species as they tend to bioaccumulate
23 contaminants rather than metabolizing and releasing them.
24
25
26
27
28
29

1 70. In 1985, EPA updated the freshwater acute exposure criterion to 1.8 µg/L total
2 recoverable cadmium as a one-hour average that should not be exceeded more than once every
3 three years, and the freshwater chronic exposure criterion at 0.66 µg/L as a four-day average that
4 should not be exceeded more than once every three years, normalized to a hardness of 50 mg/L as
5 calcium carbonate. EPA noted that the criteria may not protect brook trout, brown trout, or striped
6 bass. For saltwater concentrations, the acute exposure criterion was set at 43 µg/L as a one-hour
7 average that should not be exceeded more than once every three years and the chronic exposure
8 criterion at 9.3 µg/L as a four-day average that should not be exceeded more than once every three
9 years.
10

11 71. In 1995, EPA updated the freshwater acute exposure criterion to 2.067 µg/L total
12 recoverable cadmium as a one-hour average that should not be exceeded more than once every
13 three years, and the freshwater chronic exposure criterion to 1.429 ug/L as a four-day average that
14 should not be exceeded more than once every three years, normalized to a hardness of 50 mg/L as
15 calcium carbonate. The revisions to the freshwater criteria thus represented a weakened standard
16 compared to the 1985 criteria. EPA did not update the saltwater criteria in 1995.
17

18 72. In 2001, EPA updated the freshwater acute exposure criterion to 2.0 µg/L dissolved
19 cadmium as a one-hour average that should not be exceeded more than once every three years, and
20 the freshwater chronic exposure criterion to 0.25 µg/L as a four-day average that should not be
21 exceeded more than once every three years, normalized to a total hardness of 100 mg/L as calcium
22 carbonate. For saltwater concentrations, the criteria were set at 40 µg/L for acute toxicity as a 24-
23 hour average that should not be exceeded more than once every three years and 8.8 µg/L for
24 chronic toxicity as a four-day average that should not be exceeded more than once every three
25 years.
26
27
28
29

1 years. Beginning with this revision, EPA used dissolved cadmium versus total recoverable
2 cadmium in setting the water quality criteria.

3 73. In 2015, EPA proposed to revise the aquatic life ambient water quality criteria for
4 cadmium, including by relaxing the freshwater chronic criteria nearly threefold. Specifically, EPA
5 proposed to update the freshwater acute exposure criterion to 2.1 µg/L as a one-hour average that
6 should not be exceeded more than once every three years, and the freshwater chronic exposure to
7 0.73 µg/L, as a four-day average that should not be exceeded more than once every three years
8 normalized to a total hardness of 100 mg/L as calcium carbonate. EPA proposed to revise the acute
9 saltwater criteria to 35 µg/L as a one-hour average that should not be exceeded more than once
10 every three years and the chronic saltwater criteria to 8.3 µg/L as a four-day average that should
11 not be exceeded more than once every three years. Following an external peer review, EPA
12 released the draft criteria for public comment.

13
14
15 74. In responding to public comments on the draft revised cadmium Section 304(a)
16 criteria, EPA exercised its discretion to make various changes to its scientific analysis. For
17 instance, in response to comments from the U.S. Geological Survey, EPA agreed to include
18 artificial stream study data describing cadmium effect concentrations on behavior and predator-
19 prey interactions, to re-evaluate the test data used for calculating effects values for rainbow trout
20 and Chinook salmon, and to delete certain unpublished data in revised calculations of the criteria.
21 EPA chose to either include or exclude other additional scientific data offered by the U.S.
22 Geological Survey in revisions to the draft revised cadmium criteria.

23
24
25 75. Following the public comments, EPA finalized the draft criteria in 2016 and revised
26 the freshwater acute exposure criterion to 1.8 µg/L dissolved cadmium as a one-hour average that
27 should not be exceeded more than once every three years and 0.72 µg/L for freshwater chronic
28
29

1 exposure, as a four-day average that should not be exceeded more than once every three years,
2 normalized to a total hardness of 100 mg/L as calcium carbonate. For saltwater concentrations, the
3 acute exposure criterion was set at 33 µg/L as a one-hour average that should not be exceeded
4 more than once every three years and the chronic exposure criterion was set at 7.9 µg/L, as a four-
5 day average that should not be exceeded more than once every three years. Overall, the revised
6 criteria were slightly stronger for marine/estuarine waters and acute freshwater exposure, but a
7 weaker standard for chronic freshwater exposure.
8

9 76. In response to the proposed 2016 revisions, NMFS submitted comments to EPA,
10 expressing concern that the proposed criteria may not be sufficient to protect listed species and
11 alerting EPA that it did not concur with its assessment regarding EPA’s duties under Section 7 of
12 the Act:
13

14 EPA’s reliance on ESA Section 7 consultation only when the agency approves
15 state-proposed water quality criteria results in a piecemeal approach when
16 considering implications of such guidelines for broadly ranging species. The
17 segmentation of an action under ESA section 7 leads to an incomplete consideration
18 of the effects of the action that is legally vulnerable. Both agencies need to agree
19 on and implement an assessment strategy that takes into account the aggregate
20 effects of EPA’s authorizations of state-proposed water quality criteria such that
21 EPA can ensure that these authorizations, taken together, do not jeopardize the
22 continued existence of ESA-listed species or adversely modify designated critical
23 habitat. Given the scope of the guidelines, the conclusions of such an assessment
24 and any associated implementation guidance would need to have the same
25 authority/regulatory implications of a section 7 consultation.
26

27 77. The Center also recommended in its comments that EPA consult with the Services
28 to ensure that the criteria are fully protective of ESA-listed species.
29

30 78. Instead, in its response to comments, EPA replied that consultation is not “legally
31 necessary” because the criteria “do[] not impose any legally binding requirements on states.” EPA
32 also stated that “national-level efforts to consult . . . would be neither efficient, likely to ensure a
33

1 consistent approach to evaluating the effects of pollutants on species, nor necessary to address the
2 effects of [the] action on species whose ranges cross state boundaries.”

3 79. EPA did not issue or make a “no effect” determination under 50 C.F.R. § 402.02,
4 nor did it initiate formal or informal consultation as part of its 2016 revision of the Section 304(a)
5 cadmium criteria.

6
7 80. EPA has previously acknowledged the benefits of nationwide consultations and
8 agreed with the Services to consult on its water quality criteria. In 2001, EPA and the Services
9 signed the *Memorandum of Agreement Between the EPA, FWS and NMFS Regarding Enhanced*
10 *Coordination Under the CWA and ESA* to affirm where and how EPA would ensure compliance
11 with the ESA. 66 Fed. Reg. 11,202 (Feb. 22, 2001). At this time, EPA committed to consult with
12 the Services when it develops water quality criteria. EPA also recognized that consulting on its
13 water quality criteria is beneficial:
14

15 [C]onducting consultations on a State-by-State basis is not the most efficient
16 approach to evaluating the effects of water pollution on endangered and threatened
17 species throughout the country. National 304(a) consultations will ensure a
18 consistent approach to evaluating the effects of pollutants on species and
19 identifying measures that may be needed to better protect them. National
20 consultations will also ensure better consideration of effects on species whose
21 ranges cross State boundaries.

22 **Impacts to ESA-Listed Species from EPA’s Revision of the Cadmium Criteria**

23 81. EPA’s establishment of Section 304(a) water quality criteria, which are published
24 in the Federal Register, is a discretionary agency “action” within the meaning of the ESA that has
25 effects that result in modification to water by ultimately causing revisions or updates to every
26 state’s water quality standards and the pollution control and restoration requirements that derive
27 from water quality standards.

28 82. States are required to update their water quality standards every three years. 33
29 U.S.C. § 1313(c). If EPA has published updated water quality criteria since a state’s last triennial

1 review, there are substantive impacts from that publication. States are then required to consider
2 EPA's new criteria and either adopt updated water quality standards or explain the decision not to
3 do so in their submission to EPA. 40 C.F.R. § 131.20(a).

4 83. More often than not, states choose to simply adopt EPA's 304(a) criteria, given the
5 resources that EPA invests in developing the criteria and that states are submitting water quality
6 standards for approval to EPA – the very same agency that develops the water quality criteria.
7 Therefore, EPA's decision to update the water quality criteria implicates impacts to ESA-listed
8 species and their habitat.
9

10 84. Indeed, at least eleven states, the District of Columbia, two territories, and four
11 tribes have developed revised cadmium water quality standards and submitted them to EPA for
12 approval since EPA published the 2016 cadmium water quality criteria. In every single case, these
13 entities proposed to use EPA's water quality criteria, and EPA universally approved that choice.
14 In addition, when EPA promulgated cadmium water quality standards for the state of Oregon, it
15 used its 2016 cadmium water quality criteria.
16
17

18 85. EPA's issuance of the cadmium criteria, therefore, clearly results in modifications
19 to water quality standards and water quality itself, which "may affect" listed species that rely on
20 those waters.
21

22 86. For instance, fish, including ESA-listed species, can experience adverse behavioral
23 and health effects from chronic exposure to elevated cadmium concentrations of 0.1 µg/L. Low
24 level increases in cadmium may also have negative impacts on fish reproduction, such as a
25 decrease in egg production, brood size, and hatching success. Listed fish that consume cadmium
26 contaminated prey and sediments are especially vulnerable to any additional body burden of
27 cadmium, including from low levels of cadmium pollution in the water column. Furthermore, in
28
29

1 its consultation over Oregon's cadmium criteria NMFS determined that a 2.0 µg/L freshwater acute
2 criterion would jeopardize the continued existence of ESA-listed species occurring in that state,
3 several of which occur in other states. NMFS's analyses also indicated exposure to 0.25 µg/L
4 cadmium would result in sublethal effects to listed species, and EPA's proposed national criteria
5 of nearly three times that concentration would have more severe effects. NMFS went on to raise
6 specific concerns about EPA's cadmium criteria's potential effects on ESA-listed sea turtles,
7 sturgeon, smalltooth sawfish, and corals.
8

9 87. EPA's issuance of the criteria is therefore an agency action subject to ESA
10 consultation. Consultation on the overarching framework established by EPA's cadmium criteria
11 is necessary to ensure that the Services analyze the cumulative impact of EPA's decision and issue
12 programmatic biological opinions establishing appropriate program-wide criteria that ensure
13 protection of threatened and endangered species.
14

15 **CLAIM FOR RELIEF**

16 **Violation of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and applicable** 17 **regulations.**

18 88. Plaintiff realleges, as if fully set forth herein, each and every allegation contained
19 in the preceding paragraphs.
20

21 89. EPA has a duty pursuant to ESA Section 7(a)(2) to ensure that its actions are not
22 likely to jeopardize the continued existence of endangered and threatened species or result in the
23 destruction or adverse modification of such species critical habitat. 16 U.S.C. § 1536(a)(2). To
24 fulfill this duty, EPA must initiate and complete ESA Section 7 consultation on its revision of
25 cadmium criteria under the CWA.
26

27 90. Under the ESA's implementing regulations, whenever a proposed action "may
28 affect" listed species, the agency must initiate and complete Section 7 consultation, 50 C.F.R. §§
29

1 402.02, 402.14(a). EPA’s revision of the cadmium criteria certainly “may affect” listed species or
2 designated critical habitat. Elevated levels of cadmium in waters are likely to harm various ESA-
3 listed species, including fish that face grave threats even from very low levels of cadmium, and
4 long-lived species like listed sturgeons and sea turtles that accumulate increasingly harmful levels
5 of cadmium in their tissues over time.
6

7 91. EPA’s revision of the cadmium criteria is a discretionary agency action. EPA used
8 its discretion in setting the cadmium criteria to, among other things, make judgments about the
9 relationship between cadmium concentrations and potential environmental effects; select from a
10 range of options, rationales, analyses, and conclusions to arrive at the final content of the proposed
11 criteria; and accept suggested modifications to its scientific analysis from some commentators (like
12 U.S. Geological Survey) but not others (like NMFS).
13

14 92. Consultation on the revision of cadmium criteria is necessary to afford the Services
15 the opportunity to identify where implementation of the revised criteria may be problematic for
16 ESA-listed species or critical habitat, and to provide reasonable and prudent measures to minimize
17 take, such as measures to ensure that EPA gathers and analyzes sufficient data to prevent jeopardy
18 to listed species, and to ensure that incidental take does not occur at unsustainable levels.
19

20 93. EPA’s failure to undertake and complete consultation on the revised cadmium
21 criteria with the Services constitutes a failure to ensure, as mandated by the ESA, that EPA’s
22 actions are not likely to jeopardize the existence of ESA-listed species or result in destruction or
23 adverse modification of critical habitat, in violation of Section 7 of the ESA, 16 U.S.C. § 1536,
24 and the ESA’s implementing regulations.
25

26 //
27

28 //
29

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a) Declare that EPA is in violation of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to complete consultation necessary to ensure that its action related to the cadmium criteria is not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat;
- b) Vacate EPA’s 2016 adoption of Section 304(a) freshwater chronic criterion for cadmium;
- c) Remand EPA’s 2016 adoption of Section 304(a) criteria for cadmium to the agency;
- d) Award Plaintiff its costs, expenses, and attorneys’ fees under applicable law; and
- e) Provide for such other relief as the Court deems just and appropriate.

Dated: March 22, 2022

Respectfully submitted,

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

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

Attorneys for Plaintiff
*Seeking admission pro hac vice