UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon nonprofit corporation,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and **GINA McCARTHY**, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendants.

Case No. 3:15-cv-01151-HZ

CONSENT DECREE

WHEREAS on June 25, 2015, Plaintiff Northwest Environmental Advocates ("NWEA") brought this action pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702 *et seq*., challenging the United States Environmental Protection Agency's ("EPA") and the EPA Administrator's approval of Idaho's water quality criteria for arsenic, established by that State and submitted for EPA review under section 303 of the Clean Water Act ("CWA"), 33 U.S.C. § 1313.

WHEREAS States are required to adopt water quality criteria that protect the designated uses of a water body. 33 U.S.C. § 1313(c). Water quality criteria "must be based on sound

scientific rationale and must contain sufficient parameters or constituents to protect the designated use. . . . [and] shall support the most sensitive use." 40 C.F.R. § 131.11(a)(1).

WHEREAS, to guide the States, EPA publishes national recommended water quality criteria "accurately reflecting the latest scientific knowledge" on health effects, biological effects, and pollutant characteristics. 33 U.S.C. § 1314(a). States may base their new or revised water quality criteria on this EPA guidance, or they may use other "scientifically defensible methods" of establishing their criteria. 40 C.F.R. § 131.11(b).

WHEREAS EPA's latest national recommended human health criteria for arsenic developed under 33 U.S.C. § 1314(a), published in 1992, are 0.018 µg/L for the consumption of water and organisms, and 0.14 µg/L for the consumption of organisms only.

WHEREAS the CWA requires States to review and, where necessary, revise their water quality standards, including numeric and narrative criteria, at least every three years. 33 U.S.C. § 1313(c)(1). Revised standards must be submitted to EPA for review, and only become effective for CWA purposes if and when EPA approves them. *Id*. § 1313(c)(1), (3); 40 C.F.R. § 131.5.

WHEREAS EPA must review the submitted standards to determine whether the criteria meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5. Among other requirements, prior to approving a State water quality standard EPA must determine that the State has provided "[m]ethods used and analyses conducted to support [the] water quality standards revisions" and that the State's criteria are "sufficient to protect the designated uses" and are "based on sound scientific rationale[.]" 40 C.F.R. §§ 131.6(b), (c), 131.5(a)(5).

WHEREAS on December 22, 1992, EPA promulgated the National Toxics Rule ("NTR"), which established numeric toxic criteria for Idaho. 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.36(b)(1). The NTR arsenic criteria for the protection of human health are 0.14 µg/L for

consumption of fish only and 0.018 µg/L for consumption of both fish and water. The NTR criteria are identical to EPA's current CWA section 304(a) recommended criteria for arsenic, published in 1992, which are based on a one in a million risk of cancer and a fish consumption rate of 6.5 grams/day.

WHEREAS on August 24, 1994, Idaho adopted its own water quality standards by incorporating the NTR into Idaho's rules by reference. On June 25, 1996, EPA approved Idaho's standards for toxics and subsequently withdrew Idaho from the NTR, effective November 10, 1997. Withdrawal from Federal Regulations of Arsenic Human Health Water Quality Criteria Applicable to Idaho, 62 Fed. Reg. 52,926 (Oct. 9, 1997).

WHEREAS Idaho subsequently changed its arsenic human health criteria to 50 µg/L, which was at the time the arsenic Maximum Contaminant Level ("MCL") for drinking water under the Safe Drinking Water Act ("SDWA"). On April 23, 1999, Idaho submitted its revised arsenic criteria to EPA for approval; EPA never acted on that submission, which under EPA regulations applicable at the time made it effective for CWA purposes. *See* 40 C.F.R. § 131.21(c)(1) (1999); EPA Review and Approval of State and Tribal Water Quality Standards, 65 Fed. Reg. 24,641, 24,642 (April 27, 2000).

WHEREAS on January 22, 2001, EPA finalized a rule that lowered the arsenic MCL from 50 µg/L to 10 µg/L under the SDWA.

WHEREAS, in 2010, Idaho revised its CWA arsenic human health criteria by adopting EPA's 10 µg/L MCL under the SDWA as the criteria for both consumption of water and fish and consumption of fish only. Idaho Admin. Code § 58.01.02.210(b). Idaho submitted its revised arsenic criteria to EPA for approval on June 21, 2010.

WHEREAS, by letter dated July 7, 2010, EPA formally approved Idaho's June 21, 2010 revisions to its arsenic human health criteria pursuant to EPA's authorities and obligations under 33 U.S.C. § 1313(c)(2) and 40 C.F.R. § 131.5.

WHEREAS, EPA's guidance no longer recommends that States adopt SDWA MCLs as their human health water quality criteria for CWA purposes rather than EPA's recommended CWA criteria, especially where routes of human exposure other than drinking water—for example, consumption of fish—must be considered. *See, e.g.*, EPA, Notice of Availability of Water Quality Criteria Documents, 45 Fed. Reg. 79,318, 79,320 (Nov. 28, 1980); EPA Memorandum from Martha G. Prothro to Water Management Division Directors, Regions I-X (June 19, 1989); Revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, 65 Fed. Reg. 66,444 (Nov. 3, 2000).

WHEREAS, in December 2015 EPA published a draft Assessment Development Plan for the Integrated Risk Information System ("IRIS") Toxicological Review of Inorganic Arsenic, which set forth EPA's plan to complete the final *IRIS Toxicological Review of Inorganic Arsenic*, with an anticipated date of posting to the IRIS database in 2017. The results of this toxicological review could result in EPA's updating its CWA § 304(a) recommended criteria for arsenic.

WHEREAS, the Parties, through their authorized representatives and without any admission or final adjudication of any issues of fact or law or waiver of any factual or legal claim or defense with respect to Plaintiff's Complaint have reached a settlement of the claim against EPA that they consider to be a fair, adequate, and equitable resolution of Plaintiff's claim.

WHEREAS the Parties agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that entry of this Consent Decree is the most appropriate means of resolving this action.

WHEREAS, the Parties have separately entered into a Final Settlement Agreement that relates to the actions required by this Consent Decree, which Final Settlement Agreement is not enforceable through this Consent Decree.

NOW, THEREFORE, without the trial of any issue of fact or law, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction pursuant to the APA, 5 U.S.C. §§ 701–704, and the federal question statute, 28 U.S.C. § 1331.

2. Venue in this district and division is proper pursuant to 28 U.S.C. § 1391(e)(1)(C) and Local Rule 3-2 because no real property is involved in this action and plaintiff NWEA resides in this district and division.

II. EPA ACTION ON IDAHO'S ARSENIC CRITERIA

3. EPA's 2010 approval of Idaho's revised human health criteria for arsenic is hereby remanded to the Agency, without vacatur, for reconsideration and further action.

4. EPA shall take a new action to approve or disapprove Idaho's 2010 revised human health criteria for arsenic by September 15, 2016.

5. If EPA's action is to disapprove Idaho's 2010 submission, and Idaho does not adopt replacement criteria that EPA approves by November 15, 2018, EPA shall sign for

publication in the Federal Register a proposed regulation setting forth new human health arsenic criteria for Idaho by November 15, 2018.

6. If EPA signs proposed new arsenic criteria for Idaho by November 15, 2018, and Idaho does not adopt replacement criteria that EPA approves by July 15, 2019, EPA will sign a notice of final rulemaking action on EPA's proposed arsenic criteria for Idaho by July 15, 2019.

7. Within two (2) business days of taking any action referenced in paragraphs 4 through 6 immediately above, EPA shall provide NWEA written notice of the date on which EPA took such action, along with copies of the documents for EPA's action.

III. FEES AND COSTS

8. EPA agrees to pay, and NWEA agrees to accept $26,000 in full settlement of all claims by NWEA for its costs of litigation (including reasonable attorneys' fees and expenses) up to and including the date this Consent Decree is entered by the Court. Said payment shall be made by electronic transfer to Earthrise Law Center, and sent to Albina Community Bank:

Bank name:	Albina Community Bank
Bank address:	430 NW 10th Ave., Portland, OR 97209
ABA Routing#:	123006651
Account #:	001454692009
Name of account:	IOLTA Trust Account
Federal Tax #:	93-0386858

This electronic transfer shall be made within ninety (90) days after the Court enters the Consent Decree.

9. If EPA completes the electronic transfer required for the payment specified in Paragraph 8 within 90 days of the date on which the Court enters this Consent Decree, or if NWEA accepts such payment after that date, then such payment or acceptance constitutes full and final payment of all costs and fees incurred by NWEA in connection with the litigation for the period up to and including the date on which this Decree is entered by the Court. Upon such

payment or acceptance, NWEA shall release the United States, including EPA, from any claims regarding costs (including reasonable attorneys' fees) incurred in this litigation for the period up to and including the date on which this Decree is entered by the Court.

10. NWEA reserves the right to seek an award for reasonable attorneys' fees and costs incurred after entry of this Consent Decree in connection with any disagreement between the Parties concerning the interpretation, proposed modification, or performance of any aspect of this Consent Decree. In the event that NWEA seeks such fees and costs, the Parties shall attempt to reach agreement as to the appropriate amount of recovery. If the Parties are unable to reach agreement, NWEA may file an application with the Court for such recovery.

IV. CONTINUING JURISDICTION

11. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Consent Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance, and/or resolve any dispute regarding the terms or conditions of this Consent Decree, and for granting any further relief as the interests of justice may require, except as provided in paragraph 13 below.

12. Nothing in this Consent Decree shall be construed to limit the equitable powers of the Court to modify these terms upon a showing of good cause by any party.

13. Nothing in the terms of this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree, and nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

V. DISPUTE RESOLUTION

14. In the event of a disagreement between the Parties concerning the interpretation of any provision of this Consent Decree or performance thereof, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties agree to negotiate in good faith regarding any disagreement. If the Parties cannot resolve such disagreement within thirty (30) days after receipt of the notice by the other Party, or within such other period of time to which the Parties mutually agree, then either Party may move the Court to resolve the dispute. Pursuant to the Federal Rules of Civil Procedure and the Local Rules for the District of Oregon, the non-moving Party shall have the opportunity to respond to such motion, and either Party may seek oral argument before the Court.

15. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be filed unless the moving Party has followed the procedure set forth in Paragraph 14.

VI. MODIFICATIONS AND EXTENSIONS

16. Any term set forth in this Consent Decree (including deadlines and other terms), may be modified only by written agreement of the Parties and approval of the Court.

17. In the event EPA seeks to extend any deadline(s) set forth in Paragraphs 4, 5 or 6 above, EPA shall notify NWEA of its intent to seek such extension(s) in writing as expeditiously as practicable after so determining and as far in advance of the applicable deadline as practicable. The notice shall show good cause, by written explanation with supporting documentation, justifying EPA's request.

18. If either Party seeks to modify the terms of this Consent Decree (including deadlines and other terms), that Party shall provide the other Party with written notice of the

proposed modifications and a request for negotiations. The Parties agree to negotiate in good faith regarding any proposed modification of the Consent Decree. If the Parties agree to a proposed modification, the Parties shall jointly notify the Court of the modification and request Court approval. If the Parties cannot reach agreement regarding the proposed modification within thirty (30) days after receipt of the notice of the proposed modification by the other Party, or within such other period of time to which the Parties mutually agree, then either Party may move the Court for such modification. Pursuant to the Federal Rules of Civil Procedure and the Local Rules for the District of Oregon, the non-moving Party shall have the opportunity to respond to such motion, and either Party may seek oral argument before the Court.

VII. FORCE MAJEURE

19. The Parties recognize that the possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the timetables contained in this Consent Decree. Such situations include, but are not limited to, a government shut-down such as occurred in 1995, 1996, and 2013, or currently unforeseen catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadlines occurring within one hundred twenty (120) days of the termination of the delay shall be extended one day for each day of the delay, or more if the Parties so agree.

VIII. EFFECTIVE DATE

20. This Consent Decree shall become effective upon the date it is entered by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.

IX. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

21. This Consent Decree shall terminate after fulfillment of EPA's obligations under Paragraphs 4 through 6 of this Consent Decree. After EPA's fulfillment of those obligations, the Parties shall file a joint motion seeking termination of this Consent Decree and dismissal of this case with prejudice.

X. NOTICE AND CORRESPONDENCE

22. Any notice, including correspondence, required or made with respect to this Consent Decree, shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For NWEA:

Allison LaPlante
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6823 (tel)
(503) 768-6642 (fax)
laplante@lclark.edu

For EPA:

Elizabeth B. Dawson
Environmental Defense Section
601 D St. NW
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-8293 (tel)
(202) 514-8865 (fax)
elizabeth.dawson@usdoj.gov

Upon written notice to the other Parties, any Party may designate a successor contact person for any matter relating to this Consent Decree.

XI. RELEASE BY PLAINTIFF AND RESERVATION OF RIGHTS

23. Upon entry, this Consent Decree shall constitute a complete and final settlement of all claims asserted, or that could have been asserted, by NWEA in the Complaint, subject to the express reservations of rights in Paragraphs 24–29 herein.

24. NWEA hereby forever releases, discharges, and covenants not to assert against EPA (by way of the commencement of an action, the joinder of EPA in an existing action or in

an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity, that NWEA may have had, or may now or hereafter have, against EPA based upon the same transaction or occurrence as that at issue in the Complaint.

25. Nothing in this Decree shall limit NWEA's rights to enforce EPA's obligations set forth in and pursuant to the Parties' Final Settlement Agreement fully executed on May 19, 2016.

26. Nothing in this Decree shall limit NWEA's ability to make any legal or factual assertions necessary to support any argument, in the event that the Parties are before the Court pursuant to Paragraphs 14-15 ("Dispute Resolution") or Paragraphs 16–18 ("Modifications and Extensions").

27. Nothing in this Decree shall otherwise waive or limit NWEA's rights to challenge in a separate lawsuit the merits of any final agency action taken by EPA pursuant to this Consent Decree regarding whether EPA's final action on Idaho's arsenic criteria meets the legal requirements of the Clean Water Act, or the Administrative Procedure Act.

28. Nothing in this Decree shall otherwise waive or limit NWEA's rights to bring any actions or claims regarding EPA's obligations in States other than Idaho or to challenge any EPA action related to Idaho's water quality standards except as identified in Paragraph 25.

29. EPA and the United States reserve all defenses to such actions or claims referenced in Paragraphs 25–28.

XII. MUTUAL DRAFTING AND CONSTRUCTION

30. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by NWEA and EPA. Accordingly, the parties hereby agree that any and all rules of

construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Decree.

XIII. EFFECT OF DECREE

31. This Consent Decree shall not constitute an admission or evidence of any issue of fact or law, wrongdoing, misconduct, or liability on the part of any party.

XIV. SCOPE OF DECREE

32. Except as expressly provided in this Consent Decree, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in the terms of this Consent Decree shall be construed to limit or modify the discretion accorded EPA under the Clean Water Act, or by general principles of administrative law. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

XV. COUNTERPARTS

33. This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

XVI. APPLICABLE LAW

34. This Consent Decree shall be governed by and construed under the laws of the United States.

XVII. SEVERABILITY

35. Subsequent to entry of this Consent Decree by the Court, if any term, condition, or provision of this Consent Decree, or the application thereof to any person or circumstance,

shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States invalid, void, or unenforceable, the remainder of the terms, covenants, conditions, or provisions of this Decree, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

XVIII. ENTIRE AGREEMENT

36. This Consent Decree is the entire agreement between NWEA and EPA concerning NWEA's claims in this case. All prior conversations, meetings, discussions, drafts, and writings of any kind are specifically superseded by this Consent Decree.

XIX. COMPLIANCE WITH OTHER LAWS

37. No provision in this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA take action in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 541–551, 701–706; the Clean Water Act, 33 U.S.C. §§ 1251–1387 or any other law or regulation, either substantive or procedural.

38. The obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

XX. REPRESENTATIVE AUTHORITY

39. Each person signing this Consent Decree certifies that he or she has been duly authorized to enter into and execute the terms and conditions of this Consent Decree by the party on whose behalf it is indicated that the person is signing, and to legally bind such party to this Consent Decree. By signature below, all of the Parties consent to the entry of this Consent

Decree.

For NWEA:

5/19/16

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5/18/16

Attorneys for Defendants

ENTERED AND DATED this 7 day of May, 2016.

Hon. Marco A. Hernandez
United States District Judge