

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

**FLORIDA CLEAN WATER NETWORK,
INC.,**

Plaintiff,

CIVIL ACTION NO.

vs.

**GINA McCARTHY, ADMINISTRATOR
OF THE UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,**

Defendant.

_____ /

COMPLAINT

Nature of Action

1. This is an action to compel the Administrator of the United States Environmental Protection Agency to take action, heretofore withheld or unreasonably delayed, on a rulemaking petition submitted by the Florida Clean Water Network, Inc. more than seven years and six months ago which seeks to have the United States Environmental Protection Agency establish new or revised water quality criteria as are determined by the Agency to be necessary and sufficient to protect the designated uses of Florida's waters and human health.

Parties

2. Defendant Gina McCarthy is the Administrator of the United States Environmental Protection Agency. The Administrator of the United States Environmental Protection Agency is authorized to propose and promulgate regulations establishing such new and revised water quality criteria as are determined to be necessary and sufficient to protect the designated uses of Florida's waters and human health.

3. Plaintiff Florida Clean Water Network, Inc. is a Florida non-profit corporation and an alliance of individuals, and local and state conservation, recreation and civic groups, with a common interest in protecting Florida's water resources. Florida Clean Water Network, Inc. works to strengthen state and national water policy; to protect and restore Florida's water resources; and to encourage and enable citizens to play an active role in the decision-making which affects waters in their local communities. Members of Florida Clean Water Network, Inc. reside all across the state.

4. Members of Florida Clean Water Network, Inc., including Linda Young, often consume water, fish and shellfish taken from Florida's waters that are designated for use as potable water supplies and for consumption of fish and shellfish. However, the Administrator's failure to propose and promulgate new

and revised water quality criteria sufficient to protect the designated uses of Florida's waters and human health as requested in Florida Clean Water Network, Inc.'s *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida* has caused members of Florida Clean Water Network, Inc., including Linda Young, to be concerned about excessive water, fish and shellfish contamination and to restrict their consumption of water, fish and shellfish from Florida's waters. Members of Florida Clean Water Network, Inc., including Linda Young, would consume more water, fish and shellfish from Florida's waters if the Administrator would propose and promulgate regulations establishing new and revised water quality criteria for priority toxic pollutants in Florida's waters sufficient to protect the designated uses of those waters and human health.

Jurisdiction and Venue

5. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §1331 (federal question) and 28 U.S.C. § 1361 (mandamus). This action arises under 5 U.S.C. §§ 555(b) ("within a reasonable time, each agency shall proceed to conclude a matter presented to it"), 702 ("A person . . . adversely affected or aggrieved by agency action [including an agency's "failure to act"] within the meaning of a relevant statute, is entitled to judicial review thereof"),

and 706 (“The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed”).

6. Florida Clean Water Network, Inc. maintains its principal office in Navarre, Santa Rosa County, Florida within the Northern District of Florida, Pensacola Division. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(3).

Legal Context

7. The Clean Water Act establishes as a national goal “water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable.” Clean Water Act § 101(a)(2), 33 U.S.C. § 1251(a)(2). These are commonly referred to as the “fishable/swimmable” goals of the Clean Water Act. The United States Environmental Protection Agency interprets the uses under Clean Water Act § 101(a)(2), 33 U.S.C. § 1251(a)(2), to mean that not only can fish and shellfish thrive in a water body, but when caught, they can also be safely eaten by humans. *E.g., Water Quality Standards Regulatory Revisions – Final rule*, 80 Fed. Reg. 51020, 51027 (Aug. 21, 2015).

8. To achieve the goal of the Clean Water Act, the Act directs states to adopt water quality standards for navigable waters with their jurisdiction, subject

to review and approval by the United States Environmental Protection Agency. Clean Water Act § 303(c), 33 U.S.C. §1313(c). Two of the core components of water quality standards are designated uses of waters and water quality criteria. Designated uses specify the appropriate uses of a water body to be achieved and protected. 40 C.F.R. §§ 131.3(f), 131.10. Water quality criteria define the minimum water quality conditions necessary to support a particular use. 40 C.F.R. §§ 131.3(b), 131.11.

9. Water quality criteria must be “sufficient to protect the designated uses.” 40 C.F.R. §§ 131.6(c), 131.11(a)(2). “Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a)(1). “For waters with multiple use designations, the criteria shall support the most sensitive use.” 40 C.F.R. § 131.11(a)(1). In addition, “[i]n designating uses of a water body and the appropriate criteria for those uses, the state shall take into consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.” 40 C.F.R. § 131.10(b).

10. Under Clean Water Act § 304(a), 33 U.S.C. § 1314(a), the United States Environmental Protection Agency periodically publishes recommended

water quality criteria for states to consider when adopting water quality criteria for particular pollutants to protect the goal uses specified in Clean Water Act § 101(a)(2), 33 U.S.C. § 1251(a)(2). Where the United States Environmental Protection Agency has published recommended criteria, states should establish numeric water quality criteria based on the Agency's recommended criteria, the Agency's recommended criteria modified to reflect site-specific conditions, or other scientifically defensible methods. 40 C.F.R. § 131.11(b)(1). In all cases, criteria must be sufficient to protect the designated use of a water body, and be based on sound scientific rationale. 40 C.F.R. § 131.11(a)(1). States are required to adopt numeric criteria for all toxic pollutants listed pursuant to Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1), for which EPA has published recommended criteria, as necessary to support the states' designated uses. Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B).

11. Whenever a State revises or adopts new water quality standards pursuant to Clean Water Act § 303(c)(2), 33 U.S.C. § 1313(c)(2), such State is required to adopt criteria for all toxic pollutants listed pursuant to Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1), for which recommended criteria have been published under Clean Water Act § 304(a), 33 U.S.C. § 1314(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere

with those designated uses adopted by the State, as necessary to support such designated uses. Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B). A State is required to submit any revised water quality standards (including water quality criteria for priority toxic pollutants) to the United States Environmental Protection Agency for review and approval within 30 days of the final State action to adopt and certify the revised standard. 40 C.F.R. § 131.20(c).

12. States are required to review applicable water quality standards (including water quality criteria for priority toxic pollutants) at least once every three years and, if appropriate, revise or adopt new standards. Clean Water Act § 303(c)(1), 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20(a). Whenever a State reviews water quality standards pursuant this requirement, such State is required to adopt criteria for all toxic pollutants listed pursuant to Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1), for which recommended criteria have been published under Clean Water Act § 304(a), 33 U.S.C. § 1314(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B). A State is required to submit the results of the review and any revisions of the standards to United States Environmental Protection Agency for review and

approval within 30 days of the final State action to adopt and certify the revised standard, or if no revisions to standards are made as a result of the review, within 30 days of the completion of the review. 40 C.F.R. § 131.20(c).

13. “It is important to note that, although a state . . . may have fully complied with the requirements of Section 303(c)(2)(B) [33 U.S.C. § 1313(c)(2)(B)] previously, states and tribes may be required to adopt new toxic criteria in the following situations:

- The EPA publishes new Section 304(a) [33 U.S.C. § 1314(a)] national criteria recommendations for a priority pollutant.
- New information on existing water quality and pollution sources indicates that a toxic pollutant for which a state or tribe had not previously adopted criteria could now be reasonably expected to interfere with the designated uses adopted by the state or tribe.”

Water Quality Standards Handbook (EPA 820-B-14-003, Aug. 2014) at § 6.1.6 [available at <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>].

See *Water Quality Standards Handbook* (EPA 823-B-94-005a, Aug. 1994) at § 3.4.1 (“[E]ven if a State has complied with Section 303(c)(2)(B) [33 U.S.C. § 1313(c)(2)(B)], the State must review its standards each triennium to ensure that Section 303 (c)(2)(B) [33 U.S.C. § 1313(c)(2)(B)] requirements continue to be

met, considering that EPA may have published additional Section 304(a) [33 U.S.C. § 1314(a)] criteria documents and that the State will have new information on existing water quality and on pollution sources.”) [*available at* <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>].

14. New or revised water quality standards adopted by a state after May 30, 2000 are not applicable for purposes of the Clean Water Act until approved by the United States Environmental Protection Agency. Clean Water Act § 303(c)(3), 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(c).

15. Before adopting new or revised water quality standards, a state must follow applicable legal procedures. 40 C.F.R. §§ 131.5(a)(6), 131.5(b). One such applicable legal procedure is found in 40 C.F.R. § 131.20(b) which requires that “[t]he State shall hold one or more public hearings . . . when revising water quality standards, in accordance with EPA’s public participation regulation (40 CFR part 25).” 40 C.F.R. Part 25 “sets forth minimum requirements . . . for public participation in activities under the Clean Water Act . . .” 40 C.F.R. § 25.1. Such activities include “State rulemaking under the Clean Water Act . . .” 40 C.F.R. § 25.2(a)(1). 40 C.F.R. § 25.5(b) provides that notice of hearings to revise water quality standards must be provided at least 45 days prior to the date of the hearing and that reports, documents and data relevant to the discussion at the public

hearing shall be available to the public at least 30 days before the hearing. *See Water Quality Standards Regulatory Revisions – Final rule*, 80 Fed. Reg. 51020, 51043 (Aug. 21, 2015).

16. If the United States Environmental Protection Agency disapproves a state's new or revised water quality standard, the Clean Water Act provides the state 90 days to adopt a revised water quality standard that meets Clean Water Act requirements, and if it fails to do so, the Agency shall promptly propose and then within 90 days promulgate such standard unless the Agency approves a state replacement water quality standard first. Clean Water Act § 303(c)(3) and (c)(4)(A), 33 U.S.C. § 1313(c)(3) and (c)(4)(A).

17. Clean Water Act § 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), also authorizes the Administrator of the United States Environmental Protection Agency to determine that a new or revised standard is necessary to meet Clean Water Act requirements. Upon making such a determination, the Clean Water Act specifies that the Administrator shall promptly propose, and then within 90 days promulgate, any such new or revised standard unless prior to such promulgation, the state has adopted a revised or new water quality standard that the United States Environmental Protection Agency determines to be in accordance with the Clean Water Act.

Allegations of Fact

18. The United States Environmental Protection Agency has published a list 65 toxic pollutant compounds and families of compounds pursuant to Clean Water Act § 307(a), 33 U.S.C. § 1317(a)(1). 40 C.F.R. § 401.15. “For regulatory purposes, EPA has translated the 65 compounds and families of compounds listed pursuant to section 307(a) [33 U.S.C. § 1317(a)] into 126 more specific substances, which the Agency refers to as ‘priority toxic pollutants.’” *Water Quality Standards Handbook* (EPA 823-B-94-005a, Aug. 1994) at § 3.4 [*available at* <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>]. The 126 priority toxic pollutants are listed at 40 C.F.R. Part 423, Appendix A. The United States Environmental Protection Agency has published recommended water quality criteria pursuant to Clean Water Act § 304(a), 33 U.S.C. § 1314(a), for 103 priority toxic pollutants based on human health. *National Recommended Water Quality Criteria - Human Health Criteria Table* [*available at* <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table>].

19. Fla. Admin. Code r. 62-302.400 provides:

(1) All surface waters of the State have been classified according to designated uses as follows:

CLASS I Potable Water Supplies

CLASS II	Shellfish Propagation or Harvesting
CLASS III	Fish Consumption; Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife
CLASS III-Limited	Fish Consumption; Recreation or Limited Recreation; and/or Propagation and Maintenance of a Limited Population of Fish and Wildlife
CLASS IV	Agricultural Water Supplies
CLASS V	Navigation, Utility and Industrial Use

(2) Classification of a waterbody according to a particular designated use or uses does not preclude use of the water for other purposes.

20. Florida waters classified as Class II, Class III, and Class III-Limited include the designated uses of fish and/or shellfish consumption. Florida waters classified as Class I include the designated uses of water, fish and shellfish consumption.

21. In 1992, the Florida Department of Environmental Regulation (now Florida Department of Environmental Protection) adopted and updated water quality criteria for many priority toxic pollutants to protect the designated uses of water, fish and shellfish consumption. Fla. Admin. Code r. 17-302.530 (Feb. 13, 1992 and June 17, 1992) (now Fla. Admin. Code r. 62-302.530). *See Technical Support Document: Derivation of Human Health-Based Criteria and Risk Impact Statement* (Fla. Dep't of Env'tl. Protection, June 2016) at 41 ("Human health-based

criteria currently listed in Rule 62-302, F.A.C., were adopted and last updated in 1992 . . .”) [*available at* http://www.dep.state.fl.us/water/wqssp/docs/health/HH_TSD.pdf]. The criteria applicable to the consumption of fish and shellfish were based on a national average per capita freshwater and estuarine fish consumption rate of 6.5 grams per day developed by the United States Environmental Protection Agency in 1980 based on data collected in 1973-1974. *Id.* at 2. *See Water Quality Criteria Documents; Availability – Notice of Water Quality Criteria Documents*, 45 Fed. Reg. 79318, 79323-24 & 79347-48 (Nov. 28, 1980) (EPA recommended criteria based on consumption rate of 6.5 grams per day); *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States’ Compliance*, 57 Fed. Reg. 60848, 60867 (Dec. 22, 1992) (EPA promulgated criteria based on consumption rate of 6.5 grams per day).

22. The United States Environmental Protection Agency approved the water quality criteria for the priority toxic pollutants adopted by the Florida Department of Environmental Regulation (now Florida Department of Environmental Protection) in 1992.

23. On August 31, 1994, the Florida Agricultural Market Research Center at the University of Florida, under contract with the Florida Department of Environmental Protection, published *Per Capita Fish and Shellfish Consumption*

in Florida (Industry Report 94-2, Aug. 1994) which concluded that the average per capita finfish and shellfish consumption rate among the general population in Florida was 46 grams per day – seven times the 6.5 grams per day fish and shellfish consumption rate on which the water quality criteria adopted by the Florida Department of Environmental Regulation in 1992 were based.

24. On July 21, 1995, the Legal Environmental Assistance Foundation, Inc., Florida Wildlife Federation, Florida League of Anglers, Inc., and Sierra Club - Florida Chapter petitioned the Florida Department of Environmental Protection to amend the water quality criteria for priority toxic pollutants identified in Fla. Admin. Code r. 62-302.530 that may have an adverse affect on human health. The petitioners proposed that water quality criteria for priority toxic pollutants that may adversely affect human health be revised based on the 46 grams per day average finfish and shellfish consumption rate presented in *Per Capita Fish and Shellfish Consumption in Florida*.

25. On October 25, 1995, Florida Department of Environmental Protection Secretary Virginia B. Wetherall partially granted and partially denied the petition. The Secretary noted:

The Department is actively evaluating the data presented in the University of Florida report entitled Per Capita Fish and Shellfish Consumption in Florida, Agricultural Market Research Center,

Industry Report 94-2 (August 1994). Because of incomplete statistical information, the Department commissioned a follow-up study from the University of Florida, the results of which will be complete in November of 1995. While the Department has already begun rule development to adopt stricter surface water quality criteria based on the results of the study cited above, it would be inappropriate for the Department to publish a notice of proposed rulemaking to amend such criteria when the results of a follow-up study are still pending.

The Secretary concluded:

The Department shall conduct public workshops to discuss modification of the Department's human health-based surface water quality criteria, following completion of the follow-up study by the University of Florida, at which time proposed revisions to rule 62-302.530 of the Florida Administrative Code will be addressed.

26. Between October 25, 1995 and June 18, 2009, the Florida Department of Environmental Protection performed numerous statistical analyses of data and conducted no less than fourteen rule development workshops. During that time, the Department proposed using different fish and shellfish consumption rates to establish revised water quality criteria for priority toxic pollutants that may adversely affect human health: In January 2003, Department officials proposed a rate of 71.4 grams per day; in September 2003, the Department proposed a rate of 63.5 grams per day; in January 2005, the Department proposed a rate of 47 grams per day; and in July 2008, the Department proposed a rate of 32 grams per day.

27. On November 3, 2000, the United States Environmental Protection Agency published *Revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000) – Notice of Availability*, 65 Fed. Reg. 66444 (Nov. 3, 2000). Therein, the Agency announced that the national default fish and shellfish consumption rate for developing recommended water quality criteria was revised to 17.5 grams per day – 2.7 times the fish and shellfish consumption rate used by the Florida Department of Environmental Regulation to develop the 1992 water quality criteria for priority toxic pollutants that may adversely affect human health. *Id.* at 66452, 66465, 66467-69. *See Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (EPA-822-B-00-004, Oct. 2000) at 1-12, 4-24 [available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/20003D2R.PDF?Dockey=20003D2R.PDF>].

28. On June 18, 2009, the Florida Clean Water Network, Inc. submitted to the Administrator of the United States Environmental Protection Agency a *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida* with fifteen exhibits. Another nineteen additional exhibits were submitted to the Agency on October 7, 2015. The *Petition* concludes:

Petitioners request that the Administrator of the United States Environmental Protection Agency propose and promulgate a regulation amending 40 C.F.R. § 131.36(d)(6), setting forth new or revised water quality criteria for toxic pollutants in the State of Florida which are necessary to protect the public health. Such criteria should reflect a fish consumption rate appropriate to Florida.

The *Petition* (less the exhibits) is attached hereto as Exhibit A.

29. On June 17, 2011, the Florida Clean Water Network, Inc. served a letter on the Administrator of the United States Environmental Protection Agency advising her that it had received no response to the *Petition* and warning her that if immediate action was not forthcoming, a lawsuit to compel agency action would be filed.

30. Between June 17, 2011 and April 4, 2012, representatives of the United States Environmental Protection Agency and the Florida Clean Water Network, Inc. had numerous discussions. These discussions culminated in an exchange of letters on April 4, 2012 wherein the United States Environmental Protection Agency indicated that it “expects to respond to your petition on or before December 15, 2012 and the Florida Clean Water Network, Inc. agreed to forebear filing a lawsuit until after December 15, 2012.

31. On June 29, 2015, the United States Environmental Protection Agency issued *Final Updated Ambient Water Quality Criteria for the Protection*

of Human Health – Notice of Availability, 80 Fed. Reg. 36986 (June 29, 2015).

For 87 priority toxic pollutants that may adversely affect human health, the Agency published new or revised recommended criteria incorporating many advances in science, including an increase in the national default fish and shellfish consumption rate to 22 grams per day – 3.4 times the fish and shellfish consumption rate used by the Florida Department of Environmental Regulation to develop the 1992 water quality criteria for priority toxic pollutants that may adversely affect human health.

32. Between August 31, 1994 and October 28, 2016, the Florida Department of Environmental Protection conducted triennial reviews of State water quality standards as required by Clean Water Act § 303(c)(1), 33 U.S.C. § 1313(c)(1), on numerous occasions. *See e.g.*, 34 Fla. Admin. Wkly. 3498 (July 3, 2008) (notice of triennial review hearing); 38 Fla. Admin. Wkly. 1685 (April 27, 2012) (same). During that time, however, the Department did not adopt new or revised water quality criteria for all priority toxic pollutants listed pursuant to Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1), for which criteria have been published under Clean Water Act § 304(a), 33 U.S.C. § 1314(a), the discharge or presence of which in affected waters could reasonably be expected to interfere

with the designated uses adopted by the State, as necessary to support such designated uses. Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B).

33. Between August 31, 1994 and October 28, 2016, the Florida Department of Environmental Protection adopted new or revised water quality standards pursuant to Clean Water Act § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), on numerous occasions. During that time, however, the Department did not adopt water quality criteria for all toxic pollutants listed pursuant to Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1), for which criteria have been published under Clean Water Act § 304(a), 33 U.S.C. § 1314(a), the discharge or presence of which in affected waters could reasonably be expected to interfere with the designated uses adopted by the State, as necessary to support such designated uses. Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B).

34. On June 30, 2016, the Florida Department of Environmental Protection published notice of a public hearing on the proposed adoption of new and revised water quality criteria for the protection of human health. 42 Fla. Admin. Reg. 2873 (June 30, 2016). The notice did not state that any reports, documents and data relevant to the discussion at the public hearing (*e.g.*, *Technical Support Document: Derivation of Human Health-Based Criteria and Risk Impact Statement* (Fla. Dep't of Env'tl. Protection, June 2016) were available

to the public. The public hearing was conducted by the Environmental Regulation Commission on July 26, 2016. Immediately after the conclusion of the hearing, the Commission approved the proposed adoption of new and revised water quality criteria for the protection of human health.

35. On October 28, 2016, the Florida Department of Environmental Protection “adopted” the new and revised water quality criteria approved by the Environmental Regulation Commission on July 26, 2016 by filing the same with the Florida Department of State. *See Fla. Stat. § 120.54(3)(e)6.* (“The proposed rule shall be adopted on being filed with the Department of State . . .”). However, the Florida Department of Environmental Protection has not submitted the new and revised water quality criteria to the United States Environmental Protection Agency for review and the United States Environmental Protection Agency has not approved the new and revised criteria.

36. The new and revised water quality criteria adopted by the Florida Department of Environmental Protection are not applicable for purposes of the Clean Water Act until approved by the United States Environmental Protection Agency. Clean Water Act § 303(c)(3); 40 C.F.R. § 131.21(c). Thus, the new and revised criteria may not be used for identifying impaired waters and calculating Total Maximum Daily Loads (TMDLs) under Clean Water Act § 303(d), 33 U.S.C

§ 1313(d), developing National Pollutant Discharge Elimination System (NPDES) permit limitations under Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), evaluating proposed discharges of dredged or fill material under Clean Water Act § 404, 33 U.S.C. § 1344, or in issuing certifications under Clean Water Act § 401, 33 U.S.C. § 1341. Until the new and revised water quality criteria are approved by the United States Environmental Protection Agency, the criteria adopted by the Florida Department of Environmental Regulation in 1992 remain the applicable criteria for purposes of the Clean Water Act.

37. The water quality criteria for priority toxic pollutants adopted by the Florida Department of Environmental Regulation in 1992 are not sufficient to protect the designated uses of water, fish and shellfish consumption; do not reflect advances in science since 1992; do not reflect fish and shellfish consumption rates in Florida; and are not sufficient to protect human health.

Claim

38. Florida Clean Water Network, Inc. incorporates by reference paragraphs 1 through 37 hereof.

39. More than seven years and six months after the Florida Clean Water Network, Inc. served the *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida* on the

Administrator of the United States Environmental Protection Agency, she has still not granted or denied the *Petition*.

40. In the 1987 amendments to the Clean Water Act (Pub. L. No. 100-4, 101 Stat. 7 (1987)), Congress demanded that whenever a state conducts a triennial review of water quality standards or adopts new or revised water quality standards, the state shall adopt, as necessary, water quality criteria for priority toxic pollutants for which recommended criteria have been published by the United States Environmental Protection Agency, the discharge or presence of which could reasonably be expected to interfere with the designated uses of waters. Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B).

41. The Florida Department of Environmental Protection failed to comply with the requirements of Clean Water Act § 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B), on multiple occasions by failing to adopt new and revised water quality criteria for priority toxic pollutants which could reasonably be expected to interfere with the designated uses of waters whenever it conducted a triennial review of water quality standards or adopted new or revised water quality standards.

42. The Florida Department of Environmental Protection failed to comply with the requirements of 40 C.F.R. §§ 131.20(b) and 25.5(b) by not providing at

least 45-days public notice of the Environmental Regulation Commission's July 26, 2016 public hearing on the proposed adoption of new and revised water quality criteria for priority toxic pollutants that may adversely affect human health.

43. The Florida Department of Environmental Protection failed to comply with the requirements of 40 C.F.R § 131.20(c) by failing to submit adopted new and revised water quality criteria for priority toxic pollutants that may adversely affect human health to the United States Environmental Protection Agency for review and approval by the Agency within 30 days after adoption.

44. The Administrator of United States Environmental Protection Agency's delay in acting on the Florida Clean Water Network, Inc.'s *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida* for more than seven years and six months might be reasonable in the sphere of economic regulation, but it is much less tolerable when human health is at stake as it is here.

45. The interests of members of Florida Clean Water Network, Inc. in consuming water, fish, and shellfish has been and will be prejudiced by the Administrator's continued failure to grant or deny Florida Clean Water Network, Inc.'s *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida*.

46. The Administrator of the United States Environmental Protection Agency has withheld or unreasonably delayed Agency action on Florida Clean Water Network's *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida*.

Demand for Relief

Florida Clean Water Network, Inc. prays that the Court grant the following relief:

A. A judgment declaring that the Administrator of the United States Environmental Protection Agency has withheld or unreasonably delayed Agency action on Florida Clean Water Network, Inc.'s *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida*;

B. An order directing the Administrator of the United States Environmental Protection Agency to grant or deny Florida Clean Water Network, Inc.'s *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida* without further delay;

C. An order directing the Administrator of the United States Environmental Protection Agency to promptly prepare and publish proposed regulations setting forth new or revised water quality standards for the navigable

waters in Florida if the Administrator grants Florida Clean Water Network, Inc.'s *Petition for Proposal and Promulgation of Water Quality Criteria for the Protection of Human Health in the State of Florida*;

D. An order awarding Florida Clean Water Network, Inc. the costs of litigation pursuant to 28 U.S.C. § 1920 and reasonable attorney fees pursuant to 28 U.S.C. § 2412(d)(1)(A); and

E. Such other relief to which Florida Clean Water Network, Inc. is entitled.

Respectfully submitted,

s/ David A. Ludder

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