

1 Richard A. Smith, WSBA #21788
2 Clare Gilbert, WSBA # 34982
3 Smith & Lowney, PLLC
4 2317 East John Street
5 Seattle, Washington 98112
6 Ph: (206) 860-2883; Fax: (206) 860-4187

7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON

9 WASHINGTON TROUT,)
10) No.
11 Plaintiff,)
12) COMPLAINT
13 v.)
14)
15 LEAVENWORTH NATIONAL)
16 FISH HATCHERY; UNITED)
17 STATES FISH AND WILDLIFE)
18 SERVICE; GAIL NORTON; U.S.)
19 ENVIRONMENTAL)
20 PROTECTION AGENCY; and)
21 STEPHEN L. JOHNSON,)
22 Defendants,)
23 _____)

24 **INTRODUCTION**

25 1. This case seeks to end almost twenty-five years of unlawful
26 discharges of pollutants to Washington's Icicle Creek from the Leavenworth
27

1 National Fish Hatchery, in violation of the Clean Water Act, 33 U.S.C. §1251 *et.*
2 *seq.*, for which Defendants bear responsibility.

3
4 2. Specifically, Plaintiff brings a citizen suit challenge to the Hatchery's
5 operations under Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. §1365,
6 *as amended*. Plaintiff challenges Defendant Leavenworth National Fish Hatchery's
7 ("Hatchery") discharge of pollutants into Icicle Creek without a valid permit or in
8 violation of its expired permit. Plaintiff seeks a declaratory judgment, injunctive
9 relief, and the award of costs, including attorney's and expert witness fees, for the
10 Hatchery's repeated and ongoing violations of the CWA.

11
12
13
14 3. Additionally, under the Administrative Procedure Act ("APA"), 5
15 U.S.C. §§ 706(2), Plaintiff challenges Defendant Environmental Protection
16 Agency's ("EPA") unlawful extension of an expired permit. Should the Court find
17 the expired permit to be lawfully extended or continued, Plaintiff seeks relief under
18 the APA, 5 U.S.C. § 706(1), to compel agency action unreasonably delayed.
19 Plaintiff seeks declaratory and injunctive relief requiring the EPA to undertake an
20 appropriate administrative process to remedy the unlawful agency action and/or to
21 act on the Hatchery's 1980 permit renewal application within strict court-ordered
22 deadlines. Plaintiff additionally seeks remedial injunctive relief to assess and
23 remedy the environmental harms caused by the Hatchery's pollutant discharges.
24
25
26
27
28

JURISDICTION AND VENUE

1
2 4. This Court has jurisdiction under 28 U.S.C. § 1331 because this action
3
4 arises under the laws of the United States, including the CWA, 33 U.S.C. § 1251
5 *et. seq.*, and the APA, 5 U.S.C. § 551 *et. seq.* This Court also has jurisdiction
6
7 under 28 U.S.C. § 1361 because this is an action to compel the EPA to perform a
8
9 duty owed to Plaintiff. Additionally, this Court has jurisdiction under Section
10
11 505(a) of the CWA, 33 U.S.C. § 1365(a), because the Hatchery is violating the
12
13 CWA by operating without a valid permit or by violating the conditions of its
14
15 expired permit.

16 5. As required by the CWA, 33 U.S.C. § 1365(b), Plaintiff provided
17
18 sixty days notice of its intent to sue through a letter sent to Defendants on April 1,
19
20 2005. A copy of the notice letter was served upon the Attorney General of the
21
22 United States and the Administrator of the EPA, as required by the CWA, 33
23
24 U.S.C. § 1365(c)(3). The notice letter is incorporated by reference, and attached as
25
26 Exhibit A.

27 6. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)
28
29 and (e) and 33 U.S.C. § 1365(c)(1) because it is where the source and a substantial
part of the events giving rise to the claim occurred.

PARTIES

1
2 7. Plaintiff WASHINGTON TROUT is a statewide, non-profit,
3
4 nonpartisan, conservation-ecology organization devoted to protection of fish
5 resources in Washington State. Its principal office is located in Duvall,
6
7 Washington. Since its founding in 1989, Plaintiff Washington Trout has sought to
8 improve conditions for all of Washington's wild fish by advocating for better
9 salmon-harvest and hatchery management and for habitat protection, conducting
10 scientific research, educating the public about the importance of biologically
11 diverse species, and developing model habitat restoration projects.
12

13
14 8. Plaintiff Washington Trout has approximately 2,400 individual
15 members. Plaintiff's members use and enjoy rivers and streams throughout the
16 state of Washington, including Icicle Creek and the Wenatchee River, for
17 recreational, aesthetic, scientific and commercial purposes through water
18 recreation, wildlife observation and study, photography, and fishing. Plaintiff's
19 members derive recreational, aesthetic, scientific, and commercial benefits from
20 the existence of healthy aquatic and marine systems and wild fish in Icicle Creek
21 and the Wenatchee River. Plaintiff's members' enjoyment of these benefits is being
22 and will continue to be harmed by Defendants' unlawful discharge of pollutants
23 into Icicle Creek.
24
25
26
27

1 9. Plaintiff Washington Trout has organizational standing to bring this
2 action. Washington Trout routinely assesses the health of Icicle Creek and its fish
3 to report relevant information to Washington Trout members, the public, and
4 government officials, to bring litigation to protect wild fish and the waters affected
5 by the Hatchery's discharges, and to issue public comment on hatchery
6 management practices. Washington Trout has undertaken scientific sampling and
7 analysis in Icicle Creek, including a sediment transport study, snorkel surveys,
8 water temperature studies, and fish behavior observation studies. Washington
9 Trout uses information provided by Defendant Hatchery to help assess the health
10 of Icicle Creek and its fish. Defendant Hatchery's failure to comply with National
11 Pollutant Discharge Elimination System permit monitoring and reporting
12 requirements, or the requirements of a valid permit, has deprived Plaintiff
13 Washington Trout of information necessary to accomplish its above-referenced
14 organizational objectives.
15
16
17
18
19
20

21 10. Defendant LEAVENWORTH NATIONAL FISH HATCHERY is a
22 federal hatchery located on Icicle Creek in Leavenworth, Washington, and
23 operated by the U.S. Fish and Wildlife Service. Defendant Hatchery is operating
24 without a valid National Pollutant Discharge Elimination System permit or is
25 violating the conditions of its expired permit.
26
27
28

1 33 U.S.C. §§ 1251(a)(1), (2). To achieve its objective and goals, the CWA utilizes
2 a staggered, "technology-forcing" approach, beginning with "best practicable
3 control technology" by 1977 and culminating with the requirement of "best
4 available technology" by 1984. 33 U.S.C. § 1311(b).

6 16. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, *inter alia*,
7 the discharge of any pollutant not authorized by, or in violation of, the terms of a
8 permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
9

11 17. Section 402 of the CWA creates the National Pollutant Discharge
12 Elimination System ("NPDES"), under which EPA is authorized to issue permits
13 for discharges of pollutants to the nation's waters according to specific
14 technological and other guidelines. 33 U.S.C. § 1342. NPDES permits are valid
15 for fixed terms not to exceed five years. 33 U.S.C. §§ 1342(a)(3) and (b)(1)(B).
16

18 18. Upon receiving an application for an NPDES permit, EPA may either
19 issue a permit for the requested discharge with such conditions as necessary to
20 meet other requirements of the CWA, or deny the permit, leaving the discharge
21 subject to the outright prohibitions of CWA § 301(a).
22

24 19. Section 301(b) of the CWA requires that NPDES permits be
25 conditioned to ensure compliance with water quality standards. 33 U.S.C. §
26 1311(b).
27

1 20. The Leavenworth National Fish Hatchery is located on Icicle Creek in
2 Leavenworth, Washington. Icicle Creek is a navigable water under the CWA, and
3 is a tributary to the Wenatchee River, which is a tributary to the Columbia River,
4 both also navigable waters. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.
5

6
7 21. Water quality in Icicle Creek is impaired. The Washington State
8 Department of Ecology and EPA have determined under Section 303(d) of the
9 Clean Water Act, 33 U.S.C. § 1313(d), that Icicle Creek does not meet water
10 quality criteria for flow, temperature, and dissolved oxygen (DO). Icicle Creek has
11 been included on the Section 303(d) list of impaired water bodies since at least
12 1998.
13

14
15 22. The Leavenworth National Fish Hatchery is subject to the prohibitions
16 and regulatory requirements of the CWA because the Hatchery continuously
17 discharges pollutants to Icicle Creek from three outfalls. *See* 33 U.S.C. §§ 1311,
18 1362(12). Specifically, the Hatchery's process waste water and cleaning effluent
19 discharged to Icicle Creek contain numerous pollutants, including, but not limited
20 to, suspended solids, settleable solids, chemicals used for disinfection, fish fecal
21 matter, uneaten fish food, nitrogen, phosphorus, antibiotics, pathogens, portions of
22 fish carcasses, and live fish. *See* Exhibit A. Additionally, the paint on several of
23 the Hatchery's concrete fish tanks contains PCBs. After a reasonable opportunity
24
25
26
27
28

1 for further investigation or discovery, Plaintiff believes the evidence will show that
2 these PCBs have been discharged from the Hatchery into Icicle Creek and have
3 contaminated Icicle Creek fish, including the PCB-contaminated mountain
4 whitefish.
5

6 23. The EPA issued NPDES Permit No. WA-000190-2 to the Hatchery on
7
8 December 30, 1974 ("1974 permit").

9 24. The 1974 permit expired by its own terms on August 31, 1979.
10

11 25. On November 12, 1980, over one year after the 1974 permit expired,
12 the Hatchery submitted an application for permit renewal. EPA's regulations
13 provide that an expiring NPDES permit will be extended if the permittee submits a
14 complete application for a new permit at least 180 days prior to the expiration of
15 the current permit. 5 U.S.C. § 558(c); 40 C.F.R. §§ 122.6 and 122.21(d)(2), in
16 1981 codified at 40 C.F.R. § 122.5. Expiring permits are extended only by
17 automatic operation of law, rather than by EPA administrative action. *Natural*
18 *Resources Defense Council v. U.S. EPA*, 859 F.2d 156, 214 (D.C. Cir. 1988). The
19 Regional Administrator of the EPA may grant permission to submit an application
20 later than the required 180 days prior to permit expiration, but may not grant such
21 permission once the permit actually expires. 40 C.F.R. § 122.21(d)(2).
22
23
24
25
26
27
28

1 26. On November 6, 1981, over two years after the 1974 permit expired,
2 EPA notified the Hatchery that the 1974 permit was "automatically extended in
3 accordance with the U.S. Administrative Procedures Act (5 U.S.C. Section 558(c))
4 and 40 CFR Part 122.5. The terms and conditions of that permit remain in effect
5 indefinitely until a decision is made to take formal action on permit reissuance"
6
7 Letter from Lloyd A. Reed, Director, EPA Enforcement Division, to Ralph
8 Malsam, Manager, Leavenworth National Fish Hatchery (Nov. 6, 1981).
9

10
11 27. As of July 6, 2005, almost twenty-five years later, the EPA still has
12 not acted on the Hatchery's 1980 permit renewal application. EPA's failure to act
13 enabled the Hatchery to continue discharging at the 1974 permit levels and to
14 avoid making technological improvements in the treatment of discharges required
15 by the CWA and its amendments. Additionally, the 1974 permit does not include
16 conditions sufficient to ensure that the discharges do not cause or contribute to
17 violations of water quality standards in Icicle Creek. These illegal and unpermitted
18 discharges continue to degrade Icicle Creek and connected waterways.
19
20

21
22 28. Even if the expired 1974 permit were still valid, Defendant Hatchery
23 has violated and continues to violate the permit and Sections 301(a) and 402 of the
24 CWA, 33 U.S.C. §§ 1311(a) and 1342, by failing to comply with the permit's
25 monitoring, reporting, recording, and records retention requirements. For the past
26
27
28

1 30. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits
2 the discharge of pollutants by any person unless in compliance with the provisions
3 of the CWA. Section 301(a) prohibits, *inter alia*, such discharges not authorized
4 by, or in violation of, the terms of a NPDES permit issued under Section 402 of the
5 CWA, 33 U.S.C. § 1342.
6

7
8 31. Given that the Hatchery's 1974 NPDES permit expired on August 31,
9 1979 and could not be lawfully extended, Defendant Hatchery has discharged, and
10 continues to discharge, pollutants to the waters of the United States from point
11 sources without a valid NPDES permit, in violation of Sections 301(a) and 402 of
12 the CWA, 33 U.S.C. §§ 1311(a) and 1342.
13

14
15 32. On information and belief, this violation is ongoing or reasonably
16 likely to continue to occur. Any and all additional violations of the CWA
17 committed after those described in Plaintiff's Notice Letter, but before a final
18 decision in this action, should be considered continuing violations subject to this
19 complaint.
20
21

22 33. This First Cause of Action is pled in the alternative to Plaintiff's
23 Second Cause of Action below.
24

25 SECOND CAUSE OF ACTION -- HATCHERY'S VIOLATION OF CWA BY
26 VIOLATION OF PERMIT CONDITONS
27

1 34. Defendant Hatchery violated Sections 301(a) and 402 of the CWA, 33
2 U.S.C. §§ 1311(a) and 1342, by failing to comply with the monitoring, reporting,
3 recording, and records retention of the 1974 NPDES permit, as explained in
4 paragraph 28 above and Plaintiff's notice of intent to sue, Exhibit A. Additionally,
5 Defendant Hatchery likely has discharged PCBs and other pollutants to Icicle
6 Creek in violation of its expired permit.
7

8
9 35. On information and belief, the violations committed by Defendant
10 Hatchery are ongoing or reasonably likely to continue to occur. Any and all
11 additional violations of the permit committed after those described in Plaintiff's
12 notice of intent to sue, but before a final decision in this action, should be
13 considered continuing violations subject to this complaint.
14
15

16
17 36. This Second Cause of Action is pled in the alternative to Plaintiff's
18 First Cause of Action above.
19

20 THIRD CAUSE OF ACTION -- APA CLAIM AGAINST EPA FOR
21 UNLAWFULLY EXTENDING AN EXPIRED PERMIT

22 37. The APA and EPA regulations authorize extensions of expiring
23 permits if the permittee submits a complete application for a new permit at least
24 180 days before the current permit expires. 5 U.S.C. § 558(c); 40 C.F.R. §§ 122.6
25
26
27
28

1 and 122.21(d)(2). Once the permit expires, the EPA has no authority to
2 administratively extend or continue the expired permit. 40 C.F.R. § 122.21(d)(2).

3
4 38. EPA's purported extension of the expired 1974 permit is arbitrary,
5 capricious, not in accordance with the law and/or in excess of its statutory
6 jurisdiction or authority. 5 U.S.C. §§ 706(2)(A), (C).
7

8 FOURTH CAUSE OF ACTION -- APA CLAIM AGAINST EPA TO COMPEL
9 ACTION UNREASONABLY DELAYED

10 39. EPA has unreasonably delayed and failed to act in issuing a final
11 decision on the Hatchery's November 1980 NPDES permit renewal application.
12 This failure to act is particularly egregious because it spans almost twenty-five
13 years and disregards the CWA's technology forcing requirements of best available
14 technology by 1984 and the national goal of eliminating pollutant discharges by
15 1985. EPA's failure allows the Hatchery to continue discharging pollutants at 1974
16 levels, contributing to the degradation and water quality impairment of Icicle
17 Creek.
18
19
20
21

22 40. EPA's unreasonable delay and failure to act violates the APA, which
23 directs each federal agency "to conclude a matter presented to it ... within a
24 reasonable time," and, with respect to a "license required by law" such as an
25
26
27
28

1 NPDES permit, to "make its decision ... within a reasonable time." 5 U.S.C. §
2 558(b), (c).

3
4 41. This Court is authorized to judicially review EPA's unreasonable
5 delay and failure to act as "final agency action" under the APA, 5 U.S.C. §
6 551(13). The APA further mandates that the court "shall compel agency action
7
8 unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

9
10 42. EPA's failure or refusal to undertake lawful and proper action as
11 required by the CWA is arbitrary, capricious, and not in accordance with the law
12 and/or constitutes agency action unreasonably delayed under the APA.

13
14 **REQUEST FOR RELIEF**

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

17
18 (a) DECLARE that Defendant Hatchery has violated and continues to be
19 in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311
20 and 1342, by operating without a valid permit and/or by violating the conditions of
21 its existing permit;
22

23
24 (b) ENJOIN Defendant Hatchery from operating in a manner that results
25 in further violations of Defendant Hatchery's NPDES permit and/or the CWA;
26

1 (c) DECLARE that Defendant EPA has violated the APA and EPA
2 regulations by unlawfully purporting to extend the 1974 permit after it had expired
3 and/or by unreasonably delaying and failing to act upon Defendant Hatchery's
4 1980 NPDES permit renewal application;
5

6 (d) ORDER Defendant EPA to issue or deny an NPDES permit after
7 public notice and comment for Defendant Hatchery within one hundred and eighty
8 days (180) of the decision by this Court;
9
10

11 (e) ORDER Defendant EPA to require Best Available Technology in any
12 permit issued or approved by Defendant EPA for Defendant Hatchery;
13

14 (f) ORDER Defendants EPA and USFWS to:

15 (1) Undertake a consensus-based joint sampling and scientific
16 investigation with Washington Trout, Washington Department of Ecology,
17 Washington Department of Fish and Wildlife, the Yakama Nation, and/or
18 other significant and willing parties as the Court determines appropriate,
19 within ninety (90) days of a ruling by this Court to determine the extent and
20 environmental significance of PCBs released into Icicle Creek, its sediments,
21 fish and other biota, and connected waterways;
22
23
24
25
26
27
28

1 (2) Jointly and publicly release the results within thirty (30) days of
2 concluding the sampling and scientific investigation of PCB contamination;
3 and
4

5 (3) Undertake actions necessary to remediate harms caused by the
6 PCB releases;
7

8 (g) ORDER Defendants EPA and USFWS to:

9 (1) Undertake a consensus-based joint sampling and scientific
10 investigation with Washington Trout, Washington Department of Ecology,
11 Washington Department of Fish and Wildlife, the Yakama Nation, and/or
12 other significant and willing parties as the Court determines appropriate,
13 within one hundred and eighty (180) days of a ruling by this Court to
14 determine the extent and environmental significance, including the
15 cumulative impact, of other pollutants released by Defendant Hatchery into
16 Icicle Creek, its sediments, fish and other biota, and connected waterways;
17
18
19
20

21 (2) Jointly and publicly release the results within sixty (60) days of
22 concluding the sampling and scientific investigation of other pollutants; and
23

24 (3) Undertake actions necessary to remediate harms caused by the
25 pollutant discharges and discharge-related activities;
26
27
28

1 (h) AWARD Plaintiff its litigation expenses, including reasonable
2 attorney's and expert witness fees, as authorized by Section 505(d) of the CWA, 33
3 U.S.C. § 1365(d), and by the Equal Access to Justice Act, 28 U.S.C. § 2412 *et.*
4 *seq.*, and all other applicable authorities; and
5

6 (i) GRANT such further and other relief as the Court deems just and
7
8 proper.
9

10
11 RESPECTFULLY SUBMITTED this 6th day of July, 2005.

12 Smith & Lowney, p.l.l.c.
13

14
15 By: _____
16 Richard A. Smith, WSBA #21788
17 Clare Gilbert, WSBA # 34982
18 Attorneys for Plaintiff
19
20
21
22
23
24
25
26
27
28