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13 ECOLOGICAL RIGHTS FOUNDATION

14 UNITED STATES DISTRICT COURT
15
16 NORTHERN DISTRICT OF CALIFORNIA

17 ECOLOGICAL RIGHTS FOUNDATION, a
18 non-profit corporation,

19 Plaintiff,

20 v.

21 UNITED STATES ENVIRONMENTAL
22 PROTECTION AGENCY, and MICHAEL S.
23 REGAN, as Administrator of the United States
24 Environmental Protection Agency,

25 Defendants.

26 COMPLAINT FOR DECLARATORY
27 AND INJUNCTIVE RELIEF

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1 Plaintiff Ecological Rights Foundation alleges as follows:

2 **INTRODUCTION**

3 1. This case concerns the United States Environmental Protection Agency and
4 Administrative Michael S. Regan’s (collectively, “EPA’s”) violation of certain mandatory duties under
5 the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.*, known as the Clean Water
6 Act (“CWA”).

7 2. On December 12, 2018, California’s primary water quality regulatory agency, the
8 California State Water Resources Control Board (“State Board”), adopted revised water quality
9 standards relating to salinity levels in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the
10 “Salinity Standards”). CWA section 303(c)(2), 33 U.S.C. § 1313(c)(2), requires each state to submit
11 such new or revised water quality standards to EPA for review and approval. On August 26, 2019, the
12 State Board submitted the Salinity Standards to EPA for review and approval.

13 3. The CWA imposed a mandatory duty on EPA to either approve or disapprove of the
14 Salinity Standards by a date certain deadline. Specifically, CWA section 303(c)(3), 33 U.S.C. §
15 1313(c)(3), required EPA to either approve of the Salinity Standards within 60 days, or disapprove of
16 them (and state the reasons for the disapproval) within 90 days.

17 4. Nearly five years has passed since the State Board submitted the Salinity Standards to
18 EPA for review and approval. However, during this time, EPA has never acted on the Salinity
19 Standards—neither approving or disapproving them. This violates the 60- or 90-day mandatory date
20 certain deadline imposed by the CWA and warrants this Court issuing declaratory and injunctive relief
21 to compel EPA to act on the submitted standards.

22 **JURISDICTION**

23 5. This is an action against the EPA alleging a failure to perform any act or duty under the
24 CWA which is not discretionary with the Administrator. Thus, this Court has jurisdiction pursuant to 33
25 U.S.C. § 1365(a)(2) (citizen suit provision of the CWA) and 28 U.S.C. § 1331 (federal question).

26 6. The requested declaratory relief is authorized by 28 U.S.C. § 2201(a) and 33 U.S.C. §
27 1365(a). The requested injunctive relief is authorized by 28 U.S.C. § 2202 and 33 U.S.C. § 1365(a).

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1 7. This Court has personal jurisdiction over EPA and its officials, including Administrator
2 Regan, because EPA is an agency of the federal government operating within the United States.

3 **NOTICE**

4 8. The CWA provides that no action may be commenced under 33 U.S.C. § 1365(a)(2) prior
5 to sixty days after the aggrieved party provides notice of such action to the EPA Administrator. *Id.* §
6 1365(b)(2). The CWA provides that notice “shall be given in such manner as the Administrator shall
7 prescribe by regulation.” *Id.* § 1365(b).

8 9. Under EPA’s notice regulations, service of notice of intent to file suit under 33 U.S.C. §
9 1365(a)(2) may be accomplished by certified mail addressed to the Administrator with a copy to the
10 United States Attorney General. 40 CFR § 135.2(b). Such service is deemed effective on the postmark
11 date. *Id.* § 135.2(c).

12 10. On April 16, 2024, Plaintiff mailed a notice letter via certified mail to Michael S. Regan,
13 Administrator of the United States Environmental Protection Agency, with copies to the United States
14 Attorney General’s office and Martha Guzman, Regional Administrator of EPA Region IX. These letters
15 were postmarked on April 16, 2024.

16 11. A true and correct copy of Plaintiff’s notice letter is attached as **Exhibit 1**.

17 12. More than 60 days have elapsed since Plaintiff properly served the notice letter on the
18 EPA Administrator and United States Attorney General in accordance with 33 U.S.C. § 1365(b)(2) and
19 EPA’s regulations.

20 13. Although more than 60 days have elapsed since Plaintiff provided notice, EPA remains in
21 violation of the law.

22 14. As EPA has failed to redress the CWA violations set forth in Plaintiff’s notice letter, there
23 exists now between the parties an actual, justiciable controversy within the meaning of the Declaratory
24 Judgment Act, 28 U.S.C. § 2201.

25 **VENUE**

26 15. Venue in the United States District Court for the Northern District of California is proper
27 under 28 U.S.C. § 1391(e) for several reasons. First, at least one defendant resides in this judicial
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1 district. EPA maintains a major regional office in San Francisco, California for EPA Region IX, and
2 therefore resides in this judicial district. Second, a substantial part of the events or omissions giving rise
3 to the claim at issue here occurred within this judicial district. This is because EPA Region IX has duties
4 to work with the Administrator to review and either approve or disapprove of water quality standards
5 submitted from states within Region IX (which includes California) in accordance with EPA's duties
6 under CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3). Thus, EPA Region IX was partly responsible for
7 EPA's failure to approve or disapprove of the applicable water quality standards at issue in this case, and
8 this violation forms the basis of the allegations in this case. Third, Plaintiff resides in this judicial
9 district, and there is no real property involved in this action. Ecological Rights Foundation is
10 headquartered, and thus resides, in Blocksburg, California, which is within this judicial district. Any of
11 these three bases standing on their own would be sufficient for venue in this judicial district as the
12 requirements are phrased in the disjunctive (they are connected by the word "or"). *See* 28 U.S.C. §
13 1391(e).

14 **INTRADISTRICT ASSIGNMENT**

15 16. Intradistrict assignment of this matter to the San Francisco Division of the Court is
16 appropriate pursuant to Civil Local Rules 3-2(c) and (d) because, as discussed above, EPA's Region IX
17 office is located in San Francisco, California, and this is thus the location where a substantial part of the
18 events or omissions giving rise to the claim occurred because this is the location within this judicial
19 district where the EPA failed to timely either approve or disapprove of the relevant water quality
20 standards at issue in this case. Further, Plaintiff's principal counsel resides in San Francisco, California
21 and EPA resides in San Francisco, California given that it maintains a major regional office in San
22 Francisco, California.

23 **THE PARTIES**

24 17. Plaintiff Ecological Rights Foundation is a non-profit public benefit corporation based in
25 Blocksburg, California. Ecological Rights Foundation's purpose is to educate the public about
26 environmental practices that cause harm to human health, the environment, and other natural resources
27 and to seek redress from those harms through litigation or alternative dispute resolution. Ecological
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1 Rights Foundation represents citizens in protecting public waterways from pollution and securing the
2 multitude of benefits that flow from clean, vibrant waters: safe drinking water; abundant and diverse
3 wildlife populations; healthy recreational opportunities; and economic prosperity from commercial
4 fishing, tourism, and other commercial activities that depend on clean water. To further its goals,
5 Ecological Rights Foundation actively seeks federal and state agency implementation of state and
6 federal environmental and water quality laws, including water quality standards under the CWA, and, as
7 necessary, directly initiates enforcement actions on behalf of itself and its members.

8 18. Ecological Rights Foundation is a non-profit corporation. Therefore, Ecological Rights
9 Foundation qualifies as a “person” within the meaning of 33 U.S.C. § 1362(5) and 33 U.S.C. § 1365(g).
10 As such, Ecological Rights Foundation may commence a civil action under 33 U.S.C. § 1365(a).

11 19. Ecological Rights Foundation brings this action on its own behalf and on behalf of its
12 adversely affected members and staff. Ecological Rights Foundation and its members have a personal
13 interest in the outcome of EPA’s review process under CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3), and
14 an enforceable right to require that EPA employ the required decision-making process. For example, as a
15 result of EPA’s failure to timely approve or disapprove of the Salinity Standards, Ecological Rights
16 Foundation and its members have suffered procedural injury. EPA’s failure to either approve or
17 disapprove of the Salinity Standards has resulted in a substantial delay in obtaining a set of water quality
18 standards applicable to salinity in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the
19 “Delta”) that is effective under the CWA. Had EPA timely approved the Salinity Standards, they would
20 now be in effect and enforceable under the CWA. Had EPA timely disapproved the Salinity Standards
21 and stated its reasons for such disapproval to the State Board, the state of California would have been
22 required to consider EPA’s guidance and approve new water quality standards in accordance therewith
23 within 90 days of being notified. 33 U.S.C. § 1313(c)(3). If the State Board failed to approve of such
24 new standards within 90 days, then EPA would have been required to promptly prepare and promulgate
25 such standards. *Id.* § 1313(c)(4). In either case, EPA’s disapproval would have accelerated the timeline
26 for achieving a compliant set of water quality standard for salinity for the Delta. EPA’s failure to take
27 any action to either approve or disapprove of the Salinity Standards has left them in an inchoate state for
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1 nearly five years, depriving Ecological Rights Foundation and its members of these procedural rights
2 afforded by the CWA.

3 20. These procedural injuries result in concrete harm to the interests of Ecological Rights
4 Foundation and its members. A final EPA approval of the Salinity Standards will render them effective
5 under the CWA and will therefore trigger numerous protections for the environment that would not
6 otherwise exist. For example, EPA-approved water quality standards can form the basis of effluent
7 limitations incorporated into National Pollutant Discharge Elimination System (“NPDES”) permits under
8 CWA section 402, 33 U.S.C. § 1342, or can form the basis of conditions placed on the approval of federally-
9 licensed activities pursuant to CWA section 401, 33 U.S.C. § 1341. An EPA disapproval will result in a
10 hastening of the time before which a revised, CWA-compliant set of water quality standards for salinity in
11 the Delta can be realized. In either instance, Ecological Rights Foundation and its members is suffering
12 concrete injury due to EPA’s failure to act on the Salinity Standards.

13 21. In addition, as a result of EPA’s failure to timely approve or disapprove of the Salinity
14 Standards, Ecological Rights Foundation and its members are deprived of the ability to challenge EPA’s
15 determination under the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2). If EPA had either approved or
16 disapproved of the Salinity Standards within the 60-day or 90-day period, Ecological Rights Foundation
17 would have been able to take enforcement action to challenge EPA’s decision, if warranted. EPA’s failure to
18 take action has therefore deprived Ecological Rights Foundation of its enforcement rights under the CWA
19 citizen suit provision, and thus caused procedural injury to Ecological Rights Foundation.

20 22. Moreover, as a result of EPA’s failure to timely approve or disapprove of the Salinity
21 Standards, Ecological Rights Foundation and its members are deprived of information that would necessarily
22 result from the approval or disapproval of the Salinity Standards by EPA. Ecological Rights Foundation and
23 its members regularly review regulatory information of the type that would be generated by an EPA
24 review and approval or disapproval of the Salinity Standards, and rely on such information as part of their
25 mission to educate their members and the general public about the activities of EPA as well as about the state
26 of water quality and the environment in their regions (including the Delta region). EPA’s failure to act on the
27 submitted Salinity Standards has deprived Ecological Rights Foundation and its members of the information
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1 that EPA's approval or disapproval would have generated, thus harming these informational interests of EPA
2 and its members.

3 23. Finally, Ecological Rights Foundation and its members have suffered concrete injury to
4 their recreational and aesthetic interests as a result of EPA's failure to act on the Salinity Standards.
5 Ecological Rights Foundation's members and staff live, work, visit, recreate, and/or conduct educational,
6 research, advocacy, and other activities in and around the various waters that are affected by the Salinity
7 Standards, including the southern Delta, Suisun Marsh, San Pablo Bay, and San Francisco Bay. The
8 Delta (along with its upstream rivers and tributaries) is a vastly important ecosystem within California
9 and is home to numerous species of fish, birds, and other and wildlife of great significance to Ecological
10 Rights Foundation and its members, including but not limited to, anadromous fish that inhabit the Delta
11 during certain life stages and birds and other estuarine species of fish and wildlife. The Salinity
12 Standards are beneficial to these fish and wildlife species. EPA's failure to timely approve the Salinity
13 Standards has prevented them from taking effect in the timelines required by the CWA, thereby resulting
14 in substantial delay in the important environmental protections they afford taking effect for CWA
15 purposes. Water quality problems are exacerbated when EPA fails to timely review and approve or
16 disapprove of state-submitted water quality standards, such as the Salinity Standards. The health,
17 wellbeing, and enjoyment of these members and staff have been and continue to be adversely affected by
18 EPA's failure to timely review the Salinity Standards in that, among other things, the Salinity Standards
19 are not subject to federal enforcement. As a result, the interests of Ecological Rights Foundation and its
20 members and staff have been, are being, and will continue to be irreparably harmed by EPA's failure to
21 review and either approve or disapprove of the Salinity Standards.

22 24. The violations alleged in this Complaint have injured and continue to injure the interests
23 of Ecological Rights Foundation and its members and staff. These injuries are traceable to the EPA's
24 failure to act as set forth herein. Granting the requested relief would redress these injuries by compelling
25 EPA to act in compliance with CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

26 25. Defendant Michael S. Regan is Administrator of the United States Environmental
27 Protection Agency. Mr. Regan is sued in his official capacity. The Administrator is charged with
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1 implementation and enforcement of the CWA. As described below, the CWA assigns the Administrator
2 certain non-discretionary duties, including the duties related to the water quality standards that serve as
3 the basis of this lawsuit, and the Administrator has failed to comply with these duties.

4 26. Defendant United States Environmental Protection Agency is an agency of the United
5 States government charged with implementation and enforcement of the CWA and the mandatory duties
6 alleged herein.

7 **LEGAL BACKGROUND**

8 27. In 1972, Congress enacted the CWA to “restore and maintain the chemical, physical and
9 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In so doing, Congress established a
10 series of ambitious goals and policies designed to clean up the nation’s waters. Among other things,
11 Congress set a national goal of eliminating the discharge of any pollutants to navigable waters by 1985,
12 and an interim goal of ensuring water quality which provides for the protection and propagation of fish,
13 shellfish, and wildlife, and provides for recreation in and on the water where attainable, by 1983. *Id.* §
14 1251(a)(1)-(2). Congress also declared that it was national policy to prohibit the discharge of toxic
15 pollutants in toxic amounts. *Id.* § 1251(a)(3).

16 28. To achieve these goals, the CWA contains numerous interrelated provisions designed to
17 tackle the problem of water pollution from a variety of angles. Among other things, the CWA includes a
18 water quality-based approach to protecting water quality. This approach focuses on the levels of
19 pollutants in waterbodies and seeks to ensure that those levels do not exceed levels conducive to the use
20 of those waters for various public purposes. Among other things, this approach relies on the
21 establishment of “water quality standards” for waterbodies. Once established, water quality standards
22 form the foundation for numerous other regulatory programs and requirements under the CWA.

23 29. The term “water quality standards” is subject to definition within the CWA itself, EPA’s
24 regulations, and relevant case law. Under CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), water
25 quality standards “shall consist of the designated uses of the navigable waters involved and the water
26 quality criteria for such waters based upon such uses.” As stated in EPA’s regulations, “[a] water quality
27 standard defines the water quality goals of a water body, or portion thereof, by designating the use or
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1 uses to be made of the water and by setting criteria that protect the designated uses.” 40 C.F.R. § 131.2.

2 More specifically, EPA regulations define “water quality standards” as:

3 [P]rovisions of State or Federal law which consist of a designated use or uses for
4 the waters of the United States and water quality criteria for such waters based
5 upon such uses. Water quality standards are to protect the public health or
welfare, enhance the quality of water and serve the purposes of the Act.

6 40 C.F.R. § 131.3(i).

7 30. In addition, water quality standards also include other components. These include
8 “antidegradation policies,” which are policies designed, in part, to ensure that existing water uses, and
9 the water quality necessary to protect those uses, is maintained. *See* 40 C.F.R. § 131.12(a)(1). In
10 addition, water quality standards can also include “policies generally affecting their application and
11 implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA
12 review and approval.” *Id.* § 131.13. Thus, water quality standards include, among other things, at least
13 the following two components: (1) a set of uses for a particular waterbody that is designated by the
14 regulator (referred to as “beneficial uses” in California, and referred to as “designated uses” under
15 federal law); and (2) a set of water quality criteria to be used to determine whether the waters are clean
16 enough to use for those beneficial uses (referred to in California as water quality “objectives,” and
17 referred to as water quality “criteria” under federal law).

18 31. The CWA contains procedural requirements for establishing and updating water quality
19 standards. *See generally* 33 U.S.C. § 1313. The CWA lays out a cooperative approach between the states
20 and the federal government. *Id.* § 1313(c). Specifically, the CWA and EPA’s regulations require that the
21 states adopt water quality standards for all intrastate navigable waters. *Id.* §§ 1313(a)(2) & (3); *see also*
22 40 C.F.R. § 131.10 (“Each State must specify appropriate water uses to be achieved and protected.”); *id.*
23 § 131.11(a)(1) (“States must adopt those water quality criteria that protect the designated use.”). Once
24 adopted, states are required to submit those water quality standards to EPA for review and approval.
25 Specifically, pursuant to CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A): “Whenever the State
26 revises or adopts a new [water quality] standard, such revised or new standard shall be submitted to the
27 Administrator.”

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1 32. The CWA then places a mandatory duty on EPA to review and take action on the new or
2 revised water quality standard. Specifically, pursuant to CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3):

3 If the Administrator, *within sixty days after the date of submission of the revised*
4 *or new standard*, determines that such standard meets the requirements of this
5 chapter, such standard shall thereafter be the water quality standard for the
6 applicable waters of that State. If the Administrator determines that any such
7 revised or new standard is not consistent with the applicable requirements of this
8 chapter, *he shall not later than the ninetieth day after the date of submission of*
9 *such standard notify the State and specify the changes to meet such requirements.*

10 (Emphasis added.) This imposes two deadlines on EPA. First, the Administrator has 60 days from the
11 date of submission of the new or revised water quality standards to determine if the new or revised
12 standard is consistent with the requirements of the CWA. If the Administrator determines that it is
13 consistent with the requirements of the CWA, then the revised or new water quality standard takes effect
14 for purposes of the CWA. Second, the Administrator has 90 days from the date of submission of the new
15 or revised water quality standards to notify the submitting state of any determination that the new or
16 revised standard does not meet the requirements of the CWA, specifying the changes needed to meet the
17 CWA's requirements.

18 33. These are mandatory (non-discretionary) duties imposed on EPA by the CWA for
19 purposes of CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2).

20 **FACTUAL BACKGROUND**

21 34. Here, EPA has violated these provisions by failing to approve or disapprove of the
22 Salinity Standards within the time periods specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

23 35. On information and belief, on December 12, 2018, the State Board adopted an
24 amendment to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta
25 Estuary ("Bay-Delta Plan"). *See* State Water Resources Control Board Resolution No. 2018-0059. These
26 2018 amendments to the Bay-Delta Plan were duly adopted by the State Board and, pursuant to
27 California law, became legally binding provisions of California law effective upon approval by the
28 California Office of Administrative Law. Among other things, these amendments established the
 Salinity Standards, which were revised water quality objectives related to salinity applicable in the
 southern portion of the Delta.

1 36. The Salinity Standards constitute “water quality standards” under the CWA. As noted
2 above, under EPA’s regulations, water quality standards “consist of a designated use or uses for the
3 waters of the United States and water quality criteria for such waters based upon such uses.” 40 C.F.R. §
4 131.3(i). The Salinity Standards establish new water quality objectives relating to salinity for the
5 protection of certain beneficial uses within the southern Delta. Under California law, the term “water
6 quality objective” is synonymous with the term “water quality criteria” as used under federal law. Thus,
7 these water quality objectives constitute new or revised “water quality standards” under CWA section
8 303(c), 33 U.S.C. § 1313(c).

9 37. On information and belief, on August 26, 2019, the State Board submitted the Salinity
10 Standards to EPA for review and approval pursuant to CWA section 303(c)(2)(A), 33 U.S.C. §
11 1313(c)(2)(A).

12 38. Because the Salinity Standards constituted new or revised water quality standards, EPA
13 had a mandatory duty to either approve them within 60 days, or disapprove them within 90 days with
14 notice to the State Board as to the changes deemed necessary to comply with the CWA.

15 39. EPA had a date certain deadline of October 25, 2019 (60 days from the August 26, 2019
16 submission date) to approve the Salinity Standards.

17 40. EPA had a date certain deadline of November 24, 2019 (90 days from the August 26,
18 2019 submission date) to disapprove of the Salinity Standards and to notify the State Board of the
19 changes needed to meet the requirements of the CWA.

20 41. However, on information and belief, EPA has failed to take either action. On information
21 and belief, to date, EPA has neither approved or disapproved of the Salinity Standards.

22 42. Even if the State Board had not submitted the Salinity Standards to EPA for review and
23 approval, EPA would still have had a legal duty to either approve or disapprove of them within the time
24 periods specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

25 43. Because EPA has neither approved or disapproved of the Salinity Standards within the
26 time periods specified by the CWA, EPA has violated, and remains in current violation, of its mandatory
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1 duty to approve or disapprove of such new or revised water quality standards within the time periods
2 specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

3 44. Because this violation is a violation of a mandatory (non-discretionary) duty, this
4 violation is actionable under CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2).

5 **FIRST CLAIM FOR RELIEF**

6 **Failure to Perform a Non-Discretionary Duty to Either Approve or Disapprove the Salinity
Standards By the Date Certain Deadlines in the CWA**

7 45. Ecological Rights Foundation repeats and incorporates by reference the allegations in the
8 above paragraphs and all paragraphs of this Complaint.

9 46. EPA has failed to either approve of the Salinity Standards within 60 days of submission,
10 or disapprove of the Salinity Standards (and notify the State Board of the changes necessary to comply
11 with the requirements of the CWA) within 90 days of their submission.

12 47. Therefore, EPA has violated CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

13 48. These violations constitute “failure[s] of the Administrator to perform any act or duty
14 under this chapter which [are] not discretionary with the Administrator,” within the meaning of the
15 CWA’s citizen suit provision. *See* 33 U.S.C. § 1365(a)(2).

16 49. EPA’s violations are ongoing and will continue unless remedied by this Court.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Ecological Rights Foundation seeks the following relief:

19 A. Enter findings and declare that EPA has violated and continues to violate CWA section
20 303(c)(3), 33 U.S.C. § 1313(c)(3), by failing to either approve of the Salinity Standards within 60 days
21 of submission, or disapprove of the Salinity Standards (and notify the State Board of the changes
22 necessary to comply with the requirements of the CWA) within 90 days of submission;

23 B. Enjoin EPA to take final action to either approve or disapprove of the Salinity Standards
24 by a date certain;

25 C. Retain jurisdiction over this matter until such time as EPA has complied with these non-
26 discretionary duties under the CWA;

1 D. Grant Ecological Right Foundation’s costs of litigation, including reasonable attorney
2 fees, pursuant to the citizen suit provision of the CWA, 33 U.S.C. § 1365(d); and

3 E. Issue any other relief, including injunctive relief, which this Court deems necessary, just,
4 or proper or relief that Ecological Right Foundation may subsequently request.

5 Dated: June 18, 2024

Respectfully submitted,

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7 By:

/s/ Brian Orion

Brian Orion

Counsel for Ecological Rights Foundation