EARTHRISE
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November 1, 2013

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Sally Jewell, Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dennis McLerran, Regional Administrator
U.S. Environmental Protection Agency
Region 10
Regional Administrator's Office, RA-140
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

William W. Stelle, Jr.
Regional Administrator
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115-0070

Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Robyn Thorson, Regional Director
U.S. Fish & Wildlife Service
Pacific Region
911 NE 11th Avenue
Portland, OR 97232

Re: Supplemental Notice of Intent to Sue EPA for Endangered Species Act and Clean Water Act Violations Related to Washington Water Quality Standards

Dear Mses. and Messrs:

This letter provides notice that Northwest Environmental Advocates (NWEA) intends to file suit against the U.S. Environmental Protection Agency pursuant to Section 11(g)(1)(A) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(1)(A), for violating the ESA with regard to Washington water quality standards for temperature and dissolved oxygen (DO) and pursuant to Section 505(a)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1365(a)(2), with regard to EPA's failure to act on Washington's Sediment Management Standards (SMS).

Specifically, on February 11, 2008, EPA approved various natural conditions criteria (NCC) provisions pertaining to temperature and DO (hereinafter "2008 Approval Action"). Although EPA consulted with the National Marine Fisheries Service (NMFS) regarding the 2008 Approval Action, EPA failed to reinitiate consultation based on subsequent ESA listing and designation of critical habitat for the southern Distinct Population Segment (DPS) of Pacific eulachon (smelt) and the subsequent revised designation of critical habitat for bull trout. In addition, EPA has failed to reinitiate ESA consultation on Washington's purportedly "interim" DO standard, included in the 2008 Approval Action, after the Washington Department of Ecology (Ecology) completed a DO study in 2009 and subsequently failed to update the "interim" DO criteria.

Kevin Cassidy
Staff Attorney

Earthrise Law Center
at Lewis & Clark Law School
P.O. Box 445
Norwell, MA 02061
phone 781-659-1696
cassidy@lclark.edu
earthriselaw.org

In addition, on February 22, 2013 Ecology adopted revisions to its SMS, Chapter 173-204 WAC, and submitted them to EPA with a request that EPA concur that the revisions to Part V of the SMS, that establish sediment clean-up standards for the protection of aquatic life and human health, are no longer water quality standards requiring EPA action pursuant to CWA Section 303(c). EPA has neither approved nor disapproved the SMS rules within the statutory deadlines.

By letter dated February 26, 2013, NWEA notified EPA of its intent to sue for ESA and CWA violations related to Washington's water quality standards.[1] This supplemental notice concerns additional ESA and CWA violations of which NWEA has become aware since then.

NWEA is concerned about the harm caused by EPA's failure to reinitiate consultation with NMFS and to initiate consultation with the U.S. Fish and Wildlife Service (FWS) (together, the "Services") to the ESA-listed species that are likely to be adversely affected by inadequate DO levels allowed pursuant to Washington's water quality standards. EPA's failure to reinitiate and initiate consultation with the Services also harms NWEA and its members' interests by undermining the procedural requirements of the ESA, which ensure that agencies, such as EPA, make informed decisions and act in conformity with the ESA's substantive requirements. NWEA is also concerned about the harm to aquatic life and human health caused by EPA's failure to act under the CWA on revised SMS rules that set clean-up standards for contaminated sediment.

Upon expiration of the 60 days, NWEA intends to file suit in United States federal court in the Western District of Washington against EPA pursuant to the ESA and the CWA. However, we are available to discuss potential remedies prior to the expiration of this notice period.

I. Factual Background

A. New and Revised Water Quality Standards

As part of EPA's 2008 Approval Action, EPA approved various natural conditions criteria (NCC) provisions pertaining to temperature and DO, as well as "interim" dissolved oxygen criteria.

1. "Interim" Dissolved Oxygen Criteria

As part of the 2008 Approval Action, EPA approved purportedly "interim" dissolved oxygen criteria, WAC 173-201A-200(1)(d), on the premise that the criteria were interim, that Ecology would complete a study in 2008 to determine if the DO criteria would ensure minimum required intergravel dissolved oxygen (IGDO) levels needed for embryo development and fry emergence, and that the state would conduct further rulemaking if they did not so ensure. Ecology partially

[1] NWEA's February 26, 2013 Notice of Intent to Sue is hereby incorporated by reference.

fulfilled the condition by completing a study in late 2009,[2] but it has not updated its DO standard and there is no indication that it intends to do so. EPA has expressed concern about this inaction and urged Ecology to "identify whether they will pursue a criteria change pursuant to the findings in this report [.]" Letter from Jannine Jennings, EPA Region 10 to Becca Conklin, Ecology (Dec. 16, 2010). Ecology's inaction, however, has resulted in Washington's "interim" DO standard being used almost four years after the completion of the DO study, and five and a half years after EPA's Approval Action. NWEA is not aware of EPA's re-initiating consultation based either on the new information contained in Washington's DO study or on the new information that Washington's "interim" DO standard has become a *de facto* permanent standard.

2. Natural Conditions Criteria

In the 2008 Approval Action, EPA approved general provisions that allow purportedly "natural" conditions of temperature and DO to supersede otherwise applicable numeric criteria. These provisions are as follows: WAC 173-201A-200 (1)(c)(i) (natural temperatures supersede numeric criteria); WAC 173-201A-200 (1)(c)(v) (natural temperatures establish lake criteria); WAC 173-201A-200(1)(d)(i) (natural DO supersedes numeric criteria); WAC 173-201A-200(1)(d)(ii) (natural DO establishes lake criteria); WAC 173-201A-210(1)(c)(i) (natural temperatures supersede numeric criteria); WAC 173-201A-210(1)(c)(ii) (natural temperatures supersede numeric criteria); WAC 173-201A-210(1)(d)(i) (natural DO supersedes numeric criteria); and WAC 173-201A-260(1) (natural conditions supersede numeric criteria).

3. Sediment Management Standards

On February 22, 2013, Ecology adopted revisions to its SMS, Chapter 173-204 WAC, which became effective September 1, 2013. EPA previously approved the entire SMS rule as water quality standards in 1991. Now, Ecology has requested EPA concur that its revisions to the SMS, including revisions in Part V that establish sediment clean-up standards for the protection of aquatic life and human health, are no longer water quality standards requiring EPA action pursuant to CWA Section 303(c). EPA has undertaken tribal consultation with regard to whether it will take a CWA action on the SMS revisions. *See, e.g.,* Letter from Daniel D. Opalski, Director Office of Water and Watersheds, EPA to Greg Abrahamson, Chairman, Spokane Tribe of Indians (April 10, 2013). EPA has taken no action to date on any part of the SMS revisions, including but not limited to Part V.

B. Endangered Species Listings and Critical Habitat Designations

On February 5, 2008, NMFS completed formal consultation on EPA's 2008 Approval Action

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[2] Ecology, Washington State Dissolved Oxygen Standard: A Review and Discussion of Freshwater Intergravel Criteria Development, September 2009, Publication No. 09-03-039, available at www.ecy.wa.gov/biblio/0903039.html.

with the release of a biological opinion that concluded the approval was not likely to jeopardize several ESA-listed species of salmon and steelhead or result in the destruction or adverse modification of critical habitat. *See* February 5, 2008 NMFS Letter to EPA (hereinafter "2008 BiOp").

1. Eulachon ESA Listing and Designation of Critical Habitat

Subsequent to EPA's 2008 Approval Action, on March 18, 2010, NMFS listed as threatened under the ESA the southern DPS of Pacific eulachon (*Thaleichthys pacificus*), commonly known as smelt. *See* 75 Fed. Reg. 13012 (Mar. 18, 2010). On October 20, 2011, NMFS published a final rule designating critical habitat in Washington for the southern DPS of Pacific eulachon. 76 Fed. Reg. 65,324 (Oct. 20, 2011); *see also* 50 C.F.R. § 226.222. The 10 critical habitat areas in Washington are: Lower Columbia River, Grays River, Skamokawa Creek, Elochoman River, Cowlitz River, Toutle River, Kalama River, Lewis River, Quinault River, and Elwha River. *See* 50 C.F.R. § 226.222.

NWEA is not aware of EPA's reinitiating ESA consultation with NMFS regarding the 2008 Approval Action based on the eulachon listing or designation of eulachon critical habitat in Washington.

2. Bull Trout Designation of Critical Habitat

To NWEA's knowledge, EPA did not consult with FWS on the 2008 Approval Action. Subsequent to that action, FWS issued a final rule designating critical habitat, which represented a substantial revision from its 2005 critical habitat designations. Specifically, in the 2005 rule, 70 Fed. Reg. 56,212 (Sept. 26, 2005), FWS designated approximately 3,828 miles of streams, but in the 2010 final revised designation, FWS increased the critical habitat designated to 19,729 miles of streams, including 754 miles of marine shoreline on the Olympic Peninsula and Puget Sound and 152.4 miles of streams in the Jarbidge River basin that had previously been entirely omitted. *See* 75 Fed. Reg. 63,898 (Oct. 18, 2010). Likewise, in the 2005 rule, FWS designated 143,218 acres of lakes in Idaho, Montana, Oregon, and Washington: a surface area that FWS increased to 488,251.7 acres of reservoirs and lakes in the 2010 rule. *Id.*; *see also* 50 C.F.R. § 17.95-e (Part 4).

NWEA is not aware of EPA's reinitiating ESA consultation with FWS regarding the 2008 Approval Action based on the designation of bull trout critical habitat in Washington.

II. Clean Water Act Violations

A. Legal Framework

The CWA requires that states submit revised or newly adopted water quality standards to EPA for review and approval or disapproval. 33 U.S.C. § 1313(c)(2)(A). EPA must notify the state

within 60 days if it approves the new or revised standards as complying with the CWA. 33 U.S.C. § 1313(c)(3). If EPA concludes the state standards do not meet CWA requirements, within 90 days of the state's submission, EPA must notify the state of the disapproval and "specify the changes to meet such requirements." *Id.* If the state does not adopt the specified changes within 90 days of the notification, EPA shall itself promulgate standards for the state. *Id.*; 33 U.S.C. § 1313(c)(4).

B. EPA Has Failed to Take Action on Washington's Submission of Revised Water Quality Standards

Washington submitted revisions to its SMS rules, which EPA, since 1991, has determined to be water quality standards. EPA has not taken action to approve revisions to the SMS rules within the 60 days after the date of Ecology's submission of the standards to EPA, nor has it disapproved them within 90 days after the date of submission. EPA has, therefore, violated its mandatory duty to act pursuant to CWA Section 303(c)(3), 33 U.S.C. § 1313(c).

III. Endangered Species Act Violations

A. Legal Framework

The ESA seeks to bring about the recovery of species facing extinction by affording these species the "highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). One of the primary purposes of the ESA is to preserve the habitat upon which threatened and endangered species rely. 16 U.S.C. § 1531(b). Section 7(a)(2) of the ESA sets out two substantive mandates. First, it contains a blanket provision against any federal action that "jeopardizes the continued existence of" species listed as threatened or endangered. 16 U.S.C. § 1536(a)(2). Second, it bans federal actions that result in the "destruction or adverse modification" of designated critical habitat of listed species. *Id.* The obligation to ensure against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to the endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). An agency must initiate consultation under section 7(a)(2) whenever it undertakes an action that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of "effects of the action").

Congress established a consultation process explicitly "to ensure compliance with the [ESA's] substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Under the ESA, agencies obtain advice from the Services prior to taking actions that affect threatened or endangered species or result in destruction or adverse modification of their critical habitat. After formal consultation, the Services issue a biological opinion (BiOp) in which the Services determine whether a proposed action will jeopardize the continued existence of a species or

result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); *Idaho Dept. of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995). As the Ninth Circuit stated, "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Thomas v. Peterson*, 753 F.2d at 764 (citing *TVA v. Hill*, 437 U.S. 153); *see also Conner v. Burford*, 848 F.2d 1441, 1458 (9th Cir. 1988) (The ESA's "strict substantive provisions . . . justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions."); *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

An action agency's consultation obligations do not end with the issuance of a biological opinion. An agency must reinitiate consultation where discretionary federal involvement or control of the action is retained or is authorized by law, and when one of the following conditions is met: (1) the amount of take specified in the incidental take statement is exceeded; (2) new information reveals that the action may have effects not previously considered; (3) the action is modified in a way not previously considered; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16. After consultation is initiated or reinitiated, ESA Section 7(d) prohibits any "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any [RPAs]." 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The Section 7(d) prohibition remains "in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. § 402.09.

B. EPA Has Failed to Reinitiate Consultation Based on the ESA Listing of Species and Critical Habitat Designations for ESA-Listed Species

An action agency must reinitiate consultation when a new species is listed or critical habitat is designated that may be affected by the agency's action. 50 C.F.R. § 402.16(d). Here, subsequent to EPA's approval of Washington's water quality standards—specifically, various NCC provisions pertaining to temperature and DO and "interim" DO criteria, as described above—a new species was listed and critical habitat was designated that may be affected by EPA's approval of Ecology's water quality standards. EPA completed formal consultation on EPA's action when NMFS issued its 2008 BiOp; however, because EPA retains discretionary involvement and control over water quality standards in Washington by statute, and has explicitly retained discretionary involvement and control over those standards, EPA must reinitiate consultation in light of the listing of species and the critical habitat designation for ESA-listed species. Because EPA has failed to do so, it is in violation of the ESA.

C. EPA Has Failed to Reinitiate Consultation Based on Ecology's Completed Dissolved Oxygen Study and Failure to Update the "Interim" DO Criteria

Reinitiation of consultation is required when new information reveals effects of an agency's action that may affect species or designated critical habitat in a manner or to an extent not previously considered, as well as if the identified action is subsequently modified in a manner that causes an effect to species or critical habitat that was not considered in the biological opinion. 50 C.F.R. § 402.16(b), (c). As described above, EPA approved Ecology's DO criteria as *interim* water quality criteria. NMFS concluded, *inter alia*, that the criteria, as approved, were not adequate to ensure successful embryo development and fry emergency in salmon and trout spawning areas. Notwithstanding this and other NMFS conclusions in the 2008 BiOp concerning the adequacy of the approved criteria, NMFS did not make a jeopardy determination because, in part, it relied on Ecology's commitment to completing an already-underway DO study, which would lead to a reevaluation of the DO criteria and potential revision of the standards. Ecology completed its DO study in 2009; however, the completion of the study has not prompted a reevaluation of the DO criteria, despite the study's having concluded that assumptions relied upon by the earlier EPA recommended 304(a) criteria guidance for DO were no longer defensible. EPA's and NMFS's 2008 evaluations and actions did not consider the fact that the DO criteria would be permanent, not interim; nor did the agencies anticipate the modification of the purportedly interim criteria into a *de facto* permanent criteria. In addition, the study contains new information that has drawn into question assumptions that were relied upon in formulating the purportedly "interim," but currently in use, DO criteria. Reinitiation of consultation is thus necessary to consider the potential effects of Washington's continued use of the current DO criteria given NMFS's initial findings and the results of the 2009 study. EPA has failed to reinitiate consultation, and thus is violating the ESA.

III. Persons Giving Notice and Representing Attorneys

The full name, address, and telephone number of the parties providing this notice are:

Nina Bell, Executive Director
Northwest Environmental Advocates
P.O. Box 12187
Portland, OR 97212
(503) 295-0490

The attorneys representing the parties in this notice are:

Allison LaPlante (OSB No. 023614)
Kevin Cassidy (OSB No. 025296)
Dan Mensher (OSB No. 07463)
Earthrise Law Center at
Lewis & Clark Law School

10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768-6894 (LaPlante)
(781) 659-1696 (Cassidy)
(503) 768-6926 (Mensher)

IV. Conclusion

Upon expiration of the 60 days, NWEA intends to file suit against EPA pursuant to the ESA and CWA. NWEA anticipates filing suit in the United States District Court Western District of Washington, requesting declaratory and injunctive relief. We are available to discuss potential remedies prior to the expiration of this notice.

Sincerely,

Kevin Cassidy
Allison LaPlante

Staff Attorneys

cc: Maia Bellon, Director
Washington Department of Ecology

David Kaplan, U.S. DOJ (via e-mail)
Elizabeth Dawson, U.S. DOJ (via e-mail)