IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation, Plaintiff, v. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**, Defendant.	NO. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Pursuant to Endangered Species Act, 16 U.S.C. § 1536(a)(2), Clean Water Act, 33 U.S.C. § 1313(c), Administrative Procedure Act, 5 U.S.C. § 706(2)(A))

NATURE OF THE CASE

1. This case involves many years of delay by the United States Environmental Protection Agency ("EPA") in carrying out mandatory statutory duties designed to protect Washington's waters and aquatic and aquatic-dependent species, including threatened and endangered salmon, steelhead, bull trout, eulachon, rockfish, and orca whales.

2. Plaintiff Northwest Environmental Advocates ("NWEA") seeks review of the EPA's failure to properly act on the State of Washington's water quality standards. Defendant EPA has neglected to perform mandatory duties under the Endangered Species Act ("ESA"), 16

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U.S.C. §§ 1531, *et seq.*, and the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251, *et seq.* NWEA brings this citizen suit under section 11(g)(1)(A) of the ESA and section 505(a)(1) of the CWA. EPA has also acted arbitrarily, capriciously, and not in accordance with law with respect to Washington's water quality standards. Plaintiff seeks judicial review of certain EPA actions pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*

3. First, EPA has failed to insure against jeopardy as required by section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). Specifically, EPA has never initiated ESA consultation with the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (collectively, "the Services") regarding water quality standards adopted by Washington in 1992, 1997, 1998, 2005, 2007, and 2008, as required by section 7(a)(2) of the ESA, despite its having conditioned some of its approval actions on completion of consultation. In failing to consult with the Services, EPA has violated its mandatory duty to insure against jeopardy under the ESA.

4. Second, EPA has failed to reinitiate consultation, as mandated by the ESA, on EPA's 2008 approvals of various natural conditions criteria provisions pertaining to temperature and dissolved oxygen, as well as Washington's "interim" dissolved oxygen criterion. An agency must reinitiate consultation when, *inter alia*, discretionary federal involvement or control of the action is retained or is authorized by law, new information reveals the action may have effects not previously considered, or a new species is listed or critical habitat is designated that may be affected by the action. 50 C.F.R. § 402.16. EPA completed formal consultation on EPA's action when NMFS issued its 2008 Biological Opinion; however, EPA has never reinitiated consultation based on new information and new species listings and critical habitat designations in Washington. Because EPA has failed to do so, it is in violation of the ESA.

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5. Third, EPA has failed to perform its non-discretionary duty to act on water quality standards submitted for approval by the state of Washington as required by section 303(c)(3) of the CWA, 33 U.S.C. § 1313(c). EPA explained that it did not review and take action on portions of Washington's proposed criteria and rules that it believed were not technically water quality standards; however, these provisions alter otherwise applicable water quality standards. As such, EPA was required to review and approve or disapprove these revisions under Section 303(c) of the CWA. 33 U.S.C. § 1313(c). In failing to do so, EPA has violated its mandatory duty under the CWA to act on new or revised water quality standards.

6. Fourth, and in the alternative, EPA's decision not to act on certain Washington water quality standards is arbitrary and capricious. Section 706(2)(A) of the APA authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). EPA's inaction is premised on a mischaracterization of what constitutes a water quality standard. As noted above, EPA did not take action on rules and provisions that have the effect of altering the applicable water quality standards. EPA's decision not to act constitutes arbitrary and capricious agency action within the meaning of the APA.

7. Fifth, EPA's approval of certain water quality standards, which serve as exemptions from or over-ride otherwise applicable water quality standards, was arbitrary and capricious, and contrary to the CWA and EPA's implementing regulations.

8. Both individually and cumulatively, the actions and inactions by EPA have harmed and are continuing to harm Plaintiff's interests in having clean and unpolluted waters in Washington that are fit habitat for aquatic and aquatic-dependent species, such as threatened and endangered salmon, steelhead, bull trout, eulachon, rockfish, and orca whales.

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9. For these reasons, Plaintiff seeks a declaration that: (1) EPA violated the ESA by failing to consult with the Services on certain water quality standards, thereby failing to insure against jeopardy; (2) EPA violated the ESA by failing to reinitiate consultation with the Services on certain water quality standards, thereby failing to insure against jeopardy; (3) EPA violated the CWA by failing to take action on Washington's proposed new and revised water quality standards; (4) in the alternative, EPA acted arbitrarily, capriciously, and contrary to the CWA by deciding not to take action on portions of Washington's water quality standards; and (5) EPA acted arbitrarily, capriciously, and contrary to the CWA by approving certain portions of Washington's water quality standards.

10. Plaintiff also seeks an order requiring EPA to take actions on Washington's water quality standards and to initiate and reinitiate the consultation process on Washington's water quality standards. Plaintiff also seeks an order setting aside certain EPA approval decisions. Finally, Plaintiff seeks attorney fees and costs, pursuant to 33 U.S.C. § 1365(d) (CWA) and 16 U.S.C. § 1540(g)(4) (ESA).

JURISDICTION AND VENUE

11. This court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 16 U.S.C. § 1540(c), (g)(1)(A) (action arising under ESA, and ESA citizen suit provision); 5 U.S.C. §§ 701–706 (APA); and 33 U.S.C. § 1365(a) (CWA citizen suit provision). Plaintiff has challenged final agency actions as defined by the APA, 5 U.S.C. § 551(13). An actual, justiciable controversy exists between Plaintiff and Defendant. The requested relief is proper under 28 U.S.C. §§ 2201 (declaratory judgment), 2202 (further necessary or proper injunctive relief).

12. As required by CWA section 505(b), 33 U.S.C. § 1365(b), and ESA section 11(g)(2)(A), 16 U.S.C. § 1540(g)(2), Plaintiff gave notice of the violations alleged in this

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complaint and Plaintiff's intent to sue under the CWA and ESA more than 60 days prior to commencement of this suit. A copy of Plaintiff's original notice letter, dated February 26, 2013, is attached to this Complaint as Exhibit 1, and a copy of Plaintiff's supplemental notice letter, dated November 1, 2013, is attached to this Complaint as Exhibit 2, and both are incorporated by reference. Defendant has not remedied the violations alleged in this Complaint, and Defendant's violations are continuing in nature.

13. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) (venue in action against officer of United States), 16 U.S.C. § 1540(g)(3)(A) (ESA citizen suit provision), and LCR 3(d) because a substantial part of the events or omissions giving rise to the claims occurred in Seattle, Washington, where EPA's Region 10 administrative office is located, and where members of NWEA reside.

PARTIES

14. Plaintiff NORTHWEST ENVIRONMENTAL ADVOCATES is a non-profit entity organized under section 501(c)(3) of the Internal Revenue Code, with its principal place of business in Portland, Oregon. Founded in 1969, NWEA actively works to protect and restore water and air quality, wetlands, and wildlife habitat in the Northwest, including Washington, and nationally. NWEA employs advocacy with administrative agencies, community organizing, strategic partnerships, public record requests, information sharing, lobbying, and litigation to ensure better implementation of the laws that protect and restore the natural environment. NWEA has participated in the development of CWA programs in the State of Washington for many years.

15. NWEA's members reside near, visit, use and/or enjoy rivers, streams, estuaries, wetlands, marine, and other surface waters throughout the State of Washington, including the

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Columbia and Snake Rivers and Puget Sound and their many tributaries, and waters of the Pacific Ocean. Plaintiff's members regularly use and enjoy these waters and adjacent lands and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, conservation, educational, and other purposes. Plaintiff's members derive benefits from their use and enjoyment of Washington's waters and the fish and aquatic-dependent wildlife that rely upon Washington's waters for habitat-related functions.

16. EPA's approval and use of water quality standards that have not gone through ESA section 7 consultation harms Plaintiff and its members because it allows for the use and implementation of water quality standards that are not protective of aquatic and aquatic-dependent species. Washington's water quality standards are implemented through permits issued to industrial and municipal dischargers, the state's having been authorized to do so by EPA and subject to EPA's continuing oversight, through decisions by Washington and EPA regarding which waters in the state are considered impaired as compared to state water quality standards, and, in turn, through EPA and Washington-issued CWA clean-up plans to address those impaired waters, as well as other federal decisions that require state water quality standard certifications. The continued use of these water quality standards without adequate protection for threatened and endangered species accomplished through ESA consultation impairs the recreational, aesthetic, and other interests of Plaintiff and its members. Plaintiff's members reasonably fear that many aspects and provisions of Washington water quality standards do not protect fish and wildlife, including threatened and endangered species.

17. Likewise, EPA's failures under the CWA to act on, and its arbitrary and capricious approvals of, certain water quality standards harm Plaintiff and its members. As a result of

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EPA's failures, less protective water quality standards are in use in Washington than would otherwise be applicable, which adversely affects aquatic and aquatic-dependent species and human health. Plaintiff's members would derive more benefits from their use of Washington waters and adjacent lands if pollution were not adversely affecting water quality, aquatic and aquatic-dependent wildlife, including specifically aquatic species listed as threatened or endangered under the ESA including, *inter alia*, Columbia River and coastal Puget Sound bull trout; Puget Sound canary and yelloweye rockfish; Columbia and Puget Sound Chinook salmon; Columbia chum, Columbia Coho salmon; Snake River and Ozette Lake sockeye; Puget Sound, Snake River, and Columbia steelhead; and orca whale.

18. Some of Plaintiff's members derive recreational and aesthetic benefits by fishing in Washington. Plaintiff's members fish in rivers, streams, and lakes in Washington and areas of Puget Sound. Plaintiff's members would fish for certain species but for their protected status under the ESA. Washington's native fish and shellfish populations, including threatened and endangered species, are adversely affected when water quality standards are not sufficient to maintain water quality at levels that protect these species and their habitat. Adverse effects to Washington's native fish populations are directly related to degradation of water quality throughout the state, including from toxic pollutants, both individually and in combination with other forms of water pollution, such as high temperatures and low levels of dissolved oxygen. For example, native fish and wildlife populations are directly harmed by toxic pollution from past, present, and future industrial and urban sources. Harmful levels of pollution would be addressed through more protective water quality standards or mitigated by measures identified through the ESA consultation process. The harm to native fish and wildlife populations has reduced and diminished Plaintiff's members' recreational and aesthetic enjoyment and

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opportunities related to these species. Additionally, Plaintiff's members no longer eat certain species of fish that they used to catch and eat due, in part, to concerns about contamination and toxic pollution.

19. Beyond fishing, some of Plaintiff's members enjoy clamming, swimming, wading, boating, photography, bird-watching, and generally interacting recreationally and spiritually with fresh and salt water systems within Washington. Additionally, some of Plaintiff's members own forested land abutting Washington rivers. These members have seen first-hand the steady degradation of water quality in Washington, including the northwestern corner of the Olympic Peninsula, and the associated impacts on fish and wildlife. Further, NWEA and many of its individual members are active in working for restoration of salmon populations and salmon habitat, and in promoting appreciation and protection of salmonid species.

20. Plaintiff's members have a specific interest in the full and proper implementation of environmental laws, such as the ESA and the CWA, which are designed to protect those waters and the species that inhabit or otherwise depend upon them. EPA's failure to carry out its statutory obligations harms Plaintiff's members' interests by undermining the procedural requirements of the ESA and the CWA, which ensure that federal agencies make informed decisions and act in conformity with the statutes' substantive requirements.

21. The above-described interests of Plaintiff and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be harmed by Defendant EPA's failure to ensure that the water quality standards in Washington will protect Washington's waters, and EPA's failure to ensure the conservation and recovery of the species that depend on those waters. The relief requested in this lawsuit — requiring EPA to act on certain submitted water quality standards, disapprove unprotective standards, and perform ESA consultation on

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water quality standards — can redress these injuries because it will ensure that water quality standards used and implemented in Washington are sufficiently protective of aquatic and aquatic-dependent species, including threatened and endangered species and their habitat, and human health.

22. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY is a federal agency charged with the administration of the CWA. As a federal agency, EPA has a duty to insure against species endangerment and habitat degradation under the ESA. Additionally, it is charged with the maintenance and enforcement of other environmental statutes.

LEGAL BACKGROUND

The Clean Water Act and Water Quality Standards

23. Congress adopted amendments to the CWA in 1972 in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The primary goal of the CWA was to eliminate the discharge of pollutants into navigable waters entirely; also established is "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]" *Id.* § 1251(a)(1)–(2).

24. To meet these water quality goals, the CWA requires states to develop water quality standards that establish, and then protect, the desired conditions of each waterway within the state's regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards must be sufficient to "protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA]." *Id.* § 1313(c)(2)(a). They also establish attainable goals for a waterbody. 40 C.F.R. §§ 131.2, 131.10(d).

25. Water quality standards thus provide the regulatory basis for measuring the quality of waterbodies; those that do not meet the standards are identified as "impaired" and placed on a list

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of degraded waters called the section 303(d) list. 33 U.S.C. § 1313(d). States must develop clean-up plans for waters on the section 303(d) list — called Total Maximum Daily Loads ("TMDL") — in order to establish the scientific basis for restoring water pollution to levels that comply with water quality standards. A TMDL comprises a calculation of the maximum amount of a pollutant a particular waterbody or segment can contain while still meeting water quality standards.

26. The CWA also uses water quality standards as the regulatory basis for controlling pollution discharged from "point sources," called the National Pollutant Discharge Elimination System ("NPDES") permitting program. 33 U.S.C. §§ 1311, 1316, 1342. A point source is defined as a "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). While NPDES permits impose technology-based effluent limitations on point source discharges, they must also include "any more stringent limitation . . . necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). No NPDES permit may be issued unless it can ensure compliance with water quality standards. 40 C.F.R. § 122.4(d). Water quality standards are thus integral to the regulation of both point source discharges and water quality more broadly.

27. Congress did not establish an analogous federal permitting scheme for "nonpoint source" pollution, such as pollution from timber harvesting and agriculture. Instead, Congress assigned states the task of implementing water quality standards for nonpoint sources, with oversight, guidance, and funding from EPA. *See, e.g.*, 33 U.S.C. §§ 1288, 1313, 1329. Even so, water quality standards and the TMDLs that are based upon them apply to all pollution sources, point and nonpoint alike. "[S]tates are required to set water quality standards for *all* waters within their boundaries regardless of the sources of the pollution entering waters." *Pronsolino v. Nastri*, 291 F.3d 1123, 1127 (9th Cir. 2002) (emphasis in original).

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Elements of Water Quality Standards

28. Water quality standards must include three elements: (1) designated uses of a waterbody; (2) numeric and narrative criteria specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses; and (3) an antidegradation policy that ensures that uses dating to 1975 are protected and high quality waters will be maintained and protected. 33 U.S.C. § 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

Designated Uses

29. States must designate uses based on consideration of the use and value of a waterbody for public water supplies; protection and propagation of fish, shellfish, and wildlife; recreation; and agricultural, industrial, and other purposes. 40 C.F.R. § 131.10(a). States retain discretion in establishing designated uses, but EPA regulations cabin that discretion in several ways. First, water quality standards *as a whole* must ensure the protection and propagation of fish, shellfish, and wildlife, as well as recreation in and on the water. *Id.* § 131.2. Second, waste assimilation or transport may never constitute designated uses for waters of the United States. *Id.* Third, States may not remove existing or attainable uses from their use designations. *Id.* § 131.10(h). In order to remove non-existing uses that are not attainable, states must perform a Use Attainability Analysis ("UAA") consistent with CWA regulations that is subject to EPA approval. *Id.* § 131.10(g), (j). Fourth, states must ensure their use designations provide for the attainment and maintenance of standards for downstream waters. *Id.* § 131.10(a).

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Numeric and Narrative Criteria

30. States must set water quality criteria so as to protect designated uses of a waterbody. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Criteria must be based on "sound scientific rationale" and contain "sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). This means that criteria must be set at a level necessary to protect the most sensitive designated use of a waterbody. *Id.* Narrative water quality criteria are appropriate only when necessary "to supplement numerical criteria" or "numerical criteria cannot be established." *Id.* § 131.11(b)(2).

Antidegradation Policy and Implementation Methods

31. The antidegradation policy component of water quality standards stems from the CWA's charge to "*maintain* the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). To assure that water quality meets or exceeds water quality standards, the antidegradation policy provides a three-tier mechanism through which states must implement protection and maintenance of various waterbodies. 40 C.F.R. § 131.12.

32. Tier 1 protections are the absolute floor, and must assure that, "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). Existing uses are those "actually attained" in a waterbody by 1975, "whether or not they are included in the water quality standards." *Id.* § 131.3(e).

33. Tier 2 protections apply when "the quality of the waters exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 C.F.R. § 131.12(a)(2). States must "maintain and protect" these higher quality Tier 2 waters "unless . . . allowing lower water quality is necessary to accommodate important economic or social development." *Id.* If lower water quality is necessary, the state must yet assure that the quality is

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adequate "to protect existing uses fully." *Id.* States must also achieve for Tier 2 waters "the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." *Id.*

34. Tier 3 protections are discretionary; they may be applied to waters designated by a state as Outstanding National Resource Waters (ONRWs). 40 C.F.R. § 131.12(a)(3). States must assure that ONRW water quality is "maintained and protected." *Id.*

Review and Revision of State Water Quality Standards

35. States must review and revise their water quality standards at least every three years, a process called "Triennial Review." 33 U.S.C. § 1313(c)(1). Any revised or newly adopted water quality standards must be submitted to EPA for review and either approval or disapproval. *Id.* § 1313(c)(2)(A). States must also submit for review any state-issued policies that affect water quality standards. 40 C.F.R. § 131.13, 131.20(c).

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

37. Water quality standards that were submitted for EPA approval before May 30, 2000 are considered applicable water quality standards under the CWA; whereas water quality standards submitted after that date do not go into effect until EPA approves them. 40 C.F.R. § 131.21(c), (d).

38. Individual citizens may enforce CWA violations, including "where there is alleged a failure of the Administrator to perform any act or duty under [the CWA] which is not discretionary."

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33 U.S.C. §1365(a). Citizens must provide 60 days' notice of any alleged violations to EPA. *Id.* § 1365(b). After 60 days have passed, citizens may sue the Administrator in federal district court to enforce against violations of mandatory duties.

The Endangered Species Act and Consultation

39. The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are "threatened" or "endangered" under specified criteria, and to designate their "critical habitat." 16 U.S.C. § 1533. One of the ESA's primary purposes is to preserve the habitat upon which "listed" species — i.e., threatened and endangered species — rely. 16 U.S.C. § 1531(b). In order to bring about the recovery of species facing extinction, the ESA affords these species the "highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

40. The ESA requires that each federal agency, including EPA, use its authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered and threatened species. 16 U.S.C. § 1536(a)(1).

41. Section 7 of the ESA enumerates the substantive and procedural obligations of federal agencies with respect to listed species. 16 U.S.C. § 1536. Two the ESA's primary mandates are set out in section 7(a)(2). First, federal agencies must insure that their actions do not "jeopardize the continued existence of" species listed as threatened or endangered. 16 U.S.C. § 1536(a)(2). Second, federal actions must not result in "destruction or adverse modification" of habitat designated as critical for listed species. *Id.* Critical habitat includes areas that are "essential for the conservation of the species." *Id.* § 1532(5)(A). Destruction or adverse modification of critical habitat means "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. An agency must therefore assess whether its actions will impair the habitat's ability to provide for the recovery of

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listed species. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070–71 (9th Cir. 2004) (striking down as impermissibly narrow the portion of 50 C.F.R. § 402.02 that limited the adverse modification inquiry to those physical or biological features that were the original basis for the critical habitat designation).

42. The agency's obligation to insure against "jeopardy" or "adverse modification" requires that endangered species be given the "benefit of the doubt." *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (citing *TVA v. Hill*, 437 U.S. at 174). In other words, the burden of risk and uncertainty must be placed on the proposed action, rather than on the listed species. *Id.*

43. Federal regulations broadly define the scope of agency actions subject to ESA section 7's requirements. Agency actions include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . ." 50 C.F.R. § 402.02. Agencies must consult on ongoing agency actions over which the agencies retain, or are authorized to exercise discretionary involvement or control. *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

44. If an agency determines that an action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the FWS or NMFS, depending on the species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. This is commonly known as "section 7 consultation." The Services must then provide the action agency with a written statement, known as a "Biological Opinion," explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(b).

45. If the Services conclude the proposed action will jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the

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species' critical habitat, the Biological Opinion must outline any "reasonable and prudent alternatives" that the Services deem necessary to avoid that result. 16 U.S.C. § 1536(b)(3)(A). Additionally, if the Biological Opinion concludes the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Services must provide the agency with a written statement, known as an "Incidental Take Statement," specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions . . . that must be complied with by the Federal agency . . . to implement [those measures]." 16 U.S.C. § 1536(b)(4).

46. Section 7 consultation, which results in the Biological Opinion, generally is initiated when the action agency submits a Biological Assessment ("BA") to the consulting agencies. 50 C.F.R. § 402.14(c). Consultation shall be concluded within the 90-day period beginning on the date initiated or within such other period of time as is mutually agreeable to the consulting agency and the action agency. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e) (the Services shall deliver a Biological Opinion to the federal action agency within 45 days after concluding formal consultation).

47. 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.

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48. 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 [reasonable potential analysis]." 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.

49. Violation of ESA section 7's procedural requirements is, in effect, a violation of the ESA's substantive provisions. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("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.")

50. Individual citizens may enforce ESA violations in order "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A). Citizens must provide 60 days' notice of any alleged violations to the alleged violator and the Secretary of the Interior. *Id.* § 1540(g)(2)(A)(i). After 60 days have passed, citizens may sue in federal district court to enforce against violations of the ESA. *Id.* § 1540(g)(3)(A).

The Administrative Procedure Act

51. The APA authorizes courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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FACTUAL BACKGROUND

52. The State of Washington's Department of Ecology ("Ecology") has prepared new and revised water quality standards at various intervals over the past 20-plus years. Adding to the lack of protection inherent in EPA's failure to consult under the ESA on the standards that have been adopted, Ecology has not updated most of its toxic criteria for the protection of aquatic life since they were first adopted on November 25, 1992. In reviewing Washington's standards, EPA has failed to comply with its duty to consult with the Services about the probable effects of its approval of Washington's standards, it has arbitrarily and capriciously approved certain standards, and it has failed to comply with its CWA requirement to review and act on other water quality standards.

ESA Listings in Washington and Harm to Species

53. Both NMFS and FWS have listed various species as threatened or endangered under the ESA and designated critical habitat for those species throughout Washington. FWS listed bull trout as threatened throughout its entire range in the coterminous United States in 1999, and designated critical habitat for the species along 19,729 miles of streams throughout the Columbia River and Snake River basins. Over the last fifteen or more years, NMFS has listed numerous anadromous salmonid species, as well as marine fish and shellfish, and marine mammals as threatened or endangered. Upper Columbia River spring Chinook salmon were listed in 1999. Puget Sound Chinook, Lower Columbia River Coho, Hood Canal summer chum salmon, Columbia River chum, Snake River and Lake Ozette sockeye, and Puget Sound steelhead were all listed in 2005. NMFS then listed critical habitat for many species of West Coast salmonids, including Puget Sound Chinook, Upper Columbia Chinook, Hood Canal summer chum salmon, Snake River and Lake Ozette sockeye, and Upper Columbia steelhead. Upper

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Columbia River Steelhead was listed as threatened in 2009. NMFS listed as threatened under the ESA the southern DPS of Pacific eulachon (*Thaleichthys pacificus*), commonly known as smelt. Subsequently, NMFS designated critical habitat for eulachon in Washington, Oregon, and California. In 2010, NMFS listed the Puget Sound/Georgia Basin DPS of yelloweye rockfish and canary rockfish as threatened, and bocaccio as endangered. Additionally, the Southern Resident killer whale (orca) DPS was listed as an endangered species in 2005, with critical habitat designated in 2006.[1]

54. Water quality that supports all life cycle stages is necessary for the survival and recovery of these ESA-listed species that depend on Washington's fresh, marine, and brackish waters. Water pollutants have a wide range of harmful affects on these species. For example, studies have documented high levels of PCBs in Southern Resident killer whales, among chemical compounds that have the same ability to induce immune suppression, impair reproduction, and cause other physiological effects. *See, e.g.,* NMFS, Recovery Plan for

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[1] *See* 64 Fed. Reg. 58,910, 58,933 (Nov. 1, 1999) (Bull Trout Listing); 75 Fed. Reg. 53,898 (Oct. 18, 2010) (Bull Trout Critical Habitat Designation); 64 Fed. Reg. 14,307 (March 24, 1999) (Upper Columbia River Spring Chinook Listing); 70 Fed. Reg. 37,160 (June 28, 2005) (Puget Sound Chinook, Lower Columbia River Coho, Hood Canal Summer Chum Salmon, Columbia River Chum, Snake River and Lake Ozette Sockeye, and Puget Sound Steelhead); 70 Fed. Reg. 52630 (September 2, 2005) (Designation of Critical Habitat for Puget Sound Chinook, Upper Columbia Chinook, Hood Canal Summer Chum Salmon, Snake River and Lake Ozette Sockeye, and Upper Columbia Steelhead); 74 Fed. Reg. 42605 (August 24, 2009) (Upper Columbia River Steelhead Listing); 75 Fed. Reg. 13012 (Mar. 18, 2010) (Pacific Eulachon Listing); 76 Fed. Reg. 65324 (October 20, 2011) (Critical Habitat Designation for Pacific Eulachon); 75 Fed. Reg. 22276 (April 28, 2010) (Puget Sound/Georgia Basin DPS of Yelloweye Rockfish, Canary Rockfish, and Bocaccio Listing); 70 Fed. Reg. 69903 (November 18, 2005) (Southern Resident Killer Whale DPS Listing); 71 Fed. Reg. 69054 (November 29, 2006) (Critical Habitat Designation of Southern Resident Killer Whale DPS).

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Southern Resident Killer Whales (*Orcinus orca*) (January 17, 2008) ("Orca Recovery Plan")[2] at II-72. Organochlorines — including PCBs, DDT, other pesticides, dioxins, and furans — are "frequently considered to pose the greatest risk to killer whales[.]" *Id.* at II-87. In addition, increasing and high levels of so-called "emerging contaminants," such as polybrominated diphenyl ethers (flame retardants), that have similar negative effects, have been found in killer whales, and are not yet directly regulated under the CWA. *See, e.g., id.* at II-72 to 73; *see also* II-95; II-100 (Table 11). Bioaccumulation through trophic transfer (i.e., up the food chain) allows concentrations of these compounds to build up in top-level marine predators, such as orca, where these highly fat-soluble pollutants accumulate in fatty tissues. *Id.* According to NMFS, the orca's position atop the food web, their long life expectancy, and the fact that they consume other mammals make them "especially vulnerable." *Id.* Heavy metals, including particularly mercury, cadmium, and lead, are also "recognized as problematic." *Id.* at II-95. While toxic contaminants are often passed on to future generations, *id.* at II-92 to 93, metals are not. *Id.* at II-95.

55. Orca whales rely on other ESA-listed species as prey. *See, e.g., id.* at iv (salmon restoration is key to ensuring adequate prey base), II-17. Therefore, toxic contamination in, *inter alia*, Puget Sound Chinook salmon and yelloweye rockfish, pose a threat to the orca as well as to the chinook and rockfish themselves. *See, e.g., id.* at II-96. NMFS has concluded that "pollutants originating within Puget Sound and the Georgia Basin probably play a greater role" in orca contamination than sources outside these areas, a "pattern [that] is apparent in Chinook

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[2] *Available at* http://www.westcoast.fisheries.noaa.gov/publications/protected_species/marine_mammals/cetaceans/killer_whales/esa_status/srkw-recov-plan.pdf (last visited February 10, 2014).

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salmon with longer residency periods in Puget Sound[.]" *Id.* at II-98. Likewise, other pollutants, such as temperature and dissolved oxygen, that affect the populations of fish species alone, make these species more vulnerable to extinction and reduce their role as prey for orcas. *See, e.g.,* Orca Recovery Plan at iv.

56. For example, NMFS' recovery plan for Puget Sound salmonids finds that "high water temperatures and low streamflows in the late summer and early fall are unfavorable for salmonids south of northern British Columbia." *See* NMFS, Puget Sound Salmon Recovery Plan (January 19, 2007) ("Salmonid Recovery Plan")[3] at 52; *see also id.* at 80 (Fig. 3.7) ("[h]igh temperatures may stress or kill salmon outright, or limit the production of organisms they need for food."), 86 (Fig. 3.13). Temperatures are also implicated in the outbreak and spread of diseases in salmon. *See, e.g.*, NMFS, 5-Year Review: Summary & Evaluation of Puget Sound Chinook, Hood Canal Summer Chum, Puget Sound Steelhead, 76 Fed. Reg. 50448 (Aug. 15, 2011) ("Five-Year Review")[4] at 26. The effects of other pollutants that contribute to degraded water quality, such as toxic contaminants, pesticides, and excess sediment constitute a threat to habitat that limits recovery of Puget Sound Chinook and other salmonids. *Id.* at 22-23.

57. Actions proposed to restore Puget Sound Chinook are, therefore, similar to those discussed for the orca whale. *See* NMFS, Salmonid Recovery Plan. NMFS's Salmonid Recovery Plan notes the importance of water quality to Puget Sound Chinook, including the establishment and review of water quality standards. *Id.* at 387. The Plan points to the

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[3] *Available at* http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/puget_sound/chinook/pugetsoundchinookrecoveryplan.pdf (last visited February 10, 2014).

[4] *Available at* http://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/multiple_species/5-yr-ps.pdf (last visited February 10, 2014).

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importance of Washington's sediment cleanup standards "which are important to salmon because a wide range of adverse impacts on the health and survival of juvenile salmonids and other marine species are associated with exposure to contaminated sediments." *Id.* at 388. NMFS also cites the importance of updating water quality standards. *Id*; *see also* Five-Year Review at 32, 24 (water quality concerns continue to pose a risk to species' persistence and habitat quality is "still declining" despite Washington's 2006 improved water quality standards for temperature). NMFS cites approvingly a 2001 memorandum between EPA and the Services that describes "improved consultation procedures for EPA approval of State and Tribal water quality standards." Orca Recovery Plan at 101. NMFS also cites the importance of EPA regulations (40 C.F.R. § 122.4(d)) that prohibits the issuance of NPDES permits if discharges "cause or contribute to a violation of water quality standards," Salmonid Recovery Plan at 387, and the need to control nonpoint source pollution and stormwater discharges, *id.* at 388 - 391. However, NMFS concludes that "there are questions about whether permit requirements and standards are sufficient to protect the habitat and wildlife." Orca Recovery Plan at II-99. Finally, NMFS writes that "there are several compelling reasons to link our clean water and salmon recovery efforts to the extent possible within the legal authority granted under each Act." Salmonid Recovery Plan at 393.

Section 7 History Regarding Washington Water Quality Standards

58. EPA has never, to NWEA's knowledge, consulted with the Services regarding its 1993 approval of Washington's toxics standards that include criteria for the protection of aquatic life. All of these 20-year-old criteria remain in effect. Likewise, in 1998, 2005, 2007, and 2008, EPA took approval actions on new and revised provisions of Washington's water quality

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standards. Despite conditioning its approval of certain standards on completion of consultation, EPA has failed to initiate such consultation.

59. Ecology has adopted and EPA has approved or failed to approve/disapprove water quality standards for the State of Washington on at least the following occasions:

60. On November 25, 1992, Ecology completed new and revised water quality standards that included adoption of aquatic life criteria recommended by EPA such that, while Washington was *included* in the subsequent National Toxics Rule promulgated by EPA due to its failure to adopt human health criteria, it was largely *excluded* from EPA's National Toxics Rule for aquatic life. With notably few exceptions, Ecology has failed to update its aquatic life criteria in the ensuing 20 years and EPA has taken no action to ensure their adequacy. At the time of EPA's approval action in 1993 no aquatic species were listed as threatened or endangered under the ESA. Subsequently, numerous species have been listed, including salmonids in Puget Sound and the Columbia River Basin, along with marine mammals and bull trout. EPA has not consulted on its approval of Washington's aquatic life criteria for toxics.

61. On February 6, 1998, EPA approved, *inter alia*, the following new or revised Washington standards subject to completion of ESA consultation: general water use and criteria classes, lake nutrient criteria, ammonia criteria, chronic marine cyanide criteria for waters in Puget Sound, conversion factors for metals, and chronic marine copper criterion, general considerations (fresh/salt water boundaries, fish passage, total dissolved gas, wetlands), specific classifications, and provisions for short-term modifications (as modified by a subsequent rulemaking).

62. On July 28 or August 1, 2003, Ecology submitted to EPA for its approval new or revised water quality standards. The standards represented a change from a classification-based

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to a use-based approach for freshwater uses and criteria and included, as well, use designations for aquatic life, criteria (lake nutrients, toxics narrative, temperature, dissolved oxygen, ammonia), antidegradation, and general policy procedures for variances, offsets, UAAs, and site-specific criteria development. On January 12, 2005, EPA approved certain aspects of these water quality standards (uses, procedures, lake nutrients, and toxics narrative). Subsequently, on February 10, 2005, EPA concluded that the compliance schedule provision for hydroelectric dams was not a water quality standard and, on March 22, 2006, issued a partial disapproval of designated uses and temperature criteria. A subsequent Ecology submission on December 8, 2006 responding primarily to the partial disapproval (and including, *inter alia*, use definitions and designations, temperature criteria, ammonia criteria) resulted in an EPA approval on February 11, 2008. By a final Biological Assessment dated April 10, 2007, EPA consulted with the Services on its 2005 partial approval (with the exception of the variance procedure) and its 2008 full approval (with certain exceptions) and the ensuing Biological Opinion of February 5, 2008 became the basis for some, but not all, of EPA's 2005 and 2008 approval actions.

63. Specifically, in this Biological Assessment, EPA did not consult on certain new or revised standards, including provisions for variances, UAA, and site-specific criteria because it determined the provisions would have no effect on ESA-listed species until they were applied, at which time EPA would — theoretically — consult on its approval of specific actions. *See* January 12, 2005 EPA Letter to Ecology. Likewise, EPA did not consult on matters pertaining to human health, such as bacteria. EPA offered no reason, however, for failing to consult on other provisions it approved in 2005, 2007, or 2008 that remained from Ecology's earlier submissions, including revisions to Washington's rules on metals conversion factors (Water Effects Ratio). Once again, EPA did not consult on its approvals of Washington's revised ammonia criteria. In

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addition, on May 2, 2007, EPA approved Ecology's 2003 revisions to Washington's antidegradation provisions without consultation. And, on May 23, 2007, EPA approved Ecology's 2003 adoption of a marine chronic cyanide criterion for waters outside of Puget Sound without ESA consultation on the basis that the national cyanide consultation was underway and should be used as a "framework" for consultation. The national cyanide consultation is not completed and it is not clear that it is even continuing. On July 9, 2007, EPA amended the National Toxics Rule to remove Washington's marine copper and cyanide chronic aquatic life criteria, based on its previous 1998 and 2007 approvals, thereby allowing Washington's criteria to become effective. *See* 72 Fed. Reg. 37109 (July 9, 2007).

64. ESA consultation was neither initiated nor completed on any of these standards and criteria. *See* Letter from EPA Region 10 to Ecology (Feb. 11, 2008) (approving revisions "subject to results of ESA consultation under 7(a)(2)"); Letter from EPA Region 10 to Ecology (May 23, 2007) (same); Letter from EPA Region 10 to Ecology (Feb. 6, 1998) (same).

65. On February 11, 2008, EPA approved various natural conditions criteria provisions pertaining to temperature and dissolved oxygen including general provisions that allow purportedly "natural" conditions of temperature and dissolved oxygen to supersede otherwise applicable numeric criteria or establish the basis for such 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 dissolved oxygen supersedes numeric criteria); WAC 173-201A-200(1)(d)(ii) (natural dissolved oxygen 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 dissolved oxygen

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supersedes numeric criteria); and WAC 173-201A-260(1) (natural conditions supersede numeric criteria).

66. In addition, in its 2008 approval action, EPA approved a purportedly "interim" dissolved oxygen criteria on the basis that Ecology would complete an evaluation and further rulemaking to ensure they were protective of salmonid embryo development and fry emergence. Ecology has not updated the "interim" criteria, which have now been in place for six years and EPA has failed to reinitiate consultation despite these criteria having become a *de facto* permanent standard.

67. 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. To the best of NWEA's knowledge, EPA did not reinitiate ESA consultation with NMFS regarding its 2008 approval based on the subsequent eulachon listing or designation of eulachon critical habitat in Washington.

68. Likewise, to NWEA's knowledge, EPA did not consult with FWS on the 2008 approval. Subsequent to that action, FWS issued a final rule designating critical habitat for bull trout, 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

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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). To the best of NWEA's knowledge, EPA did not reinitiate ESA consultation with FWS regarding the 2008 approval based on the designation of bull trout critical habitat in Washington.

69. On May 14, 2008, EPA approved 2003 revisions to Washington's standards that provided for exemptions from turbidity criteria that it had previously determined in its February 11, 2008 action were not water quality standards. EPA revised its determination to approve the revised standards as "editorial" despite Ecology's having substantively changed the standards.

EPA's Failure to Act under the CWA on Washington's Water Quality Standards

70. In addition, EPA also took no action under the CWA on certain provisions submitted to it by Washington.

71. On February 11, 2008, EPA approved new and revised standards submitted by Washington on July 28 or August 1, 2003, and December 8, 2006. EPA also failed to act on portions of these submitted standards. Specifically, EPA failed to take any action on the following water quality standards and rules that have the effect of altering otherwise applicable water quality standards: provisions limiting the allowable increase in temperature from nonpoint sources (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B)); so-called Short Term Modifications (WAC 173-210A-410); exemption from criteria based on unconditional shellfish harvest determinations (WAC 173-201A-210(2)(b)(i)); averaging periods for bacteria

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(WAC 173-201A-210(2)(b)(ii) and 173-201A-210(3)(b)(i)); guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v)); a provision that allows both temporary and permanent loss of existing uses (WAC 173-201A-300(3)); a provision that allows compliance schedules for dams (WAC 173-201A-510(5)); water quality offsets (WAC 173-201A-450); and aspects of Washington's antidegradation policy and implementation methods, including WAC 173-201A-300(3) and WAC 173-201A-330(4).

72. On February 22, 2013, Ecology adopted revisions to its Sediment Management Standards ("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 previously approved the entire SMS rule as water quality standards in 1991. EPA has neither approved nor disapproved certain provisions of the revised SMS rules within the statutory deadlines.

FIRST CLAIM FOR RELIEF: ESA VIOLATIONS

(Failure to Insure Against Jeopardy for Certain Washington Water Quality Standards on Which EPA Took Action but Never Initiated Consultation, 16 U.S.C. § 1536(a)(2))

73. Plaintiff NWEA realleges all preceding paragraphs.

74. Section 7(a)(2) of the ESA requires agencies to insure that their actions do not jeopardize the continued existence of listed species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2).

75. To fulfill their duty under section 7(a)(2), agencies must assess whether actions they take "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a).

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76. Unless the action agency determines that its action is not likely to adversely affect listed species — a determination to be made through either informal consultation with the Services or by preparation of a biological assessment in which the Services concur — the agency *must* engage in formal consultation with the Services. *Id.*

77. The Services have listed numerous species present in Washington and designated various portions of their ranges as critical habitat. For example, NMFS has listed as threatened several species of salmonids in the Puget Sound and the Columbia River Basin, marine turtles and fish in the Puget Sound, and marine mammals such as the Southern Resident killer whale. The FWS has listed bull trout as threatened and designated critical habitat along sections of 19,729 miles of streams in the Columbia River and Snake River basins.

78. Washington submitted standards for the protection of aquatic life from toxics to EPA for review in 1992, and has subsequently submitted various new and revised toxics standards to EPA.

79. EPA never initiated ESA consultation on at least the following of its actions, some of which were subsequently amended:

a) 1993 approval of Washington's aquatic life criteria and related provisions for toxics;

b) 1998 approval of the following standards: lake nutrient narrative standards, marine cyanide criteria for waters in Puget Sound, use of conversion factors for metals, and marine copper criterion;

c) January 12, 2005 approval of provisions for variances, use-attainability analysis (UAA), site-specific criteria, ammonia criteria;

d) May 2, 2007 approval of antidegradation provisions;

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e) May 23, 2007 approval of marine chronic cyanide outside Puget Sound; and

f) February 11, 2008 approval of use of metals conversion factors, and ammonia criteria.

80. EPA's failure to initiate consultation on its approvals of Washington's water quality standards violates its duty under section 7(a)(2) of the ESA to insure against jeopardy to listed species and adverse modification of critical habitat.

81. EPA's approvals of the revisions to Washington's water quality standards and general policies are ongoing agency actions over which EPA continues to have discretionary control under ESA section 7(a)(2). *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

82. Additionally, EPA continues to take affirmative actions, including, *inter alia*, the approval of 303(d) lists and TMDLs that implement these water quality standards and policies as to point and nonpoint sources of pollution, the issuance of NPDES permits to federal facilities, and the issuance of federal permits or licenses that require state certification, including the imposition of conditions on the federal permits or licenses, to insure compliance with these water quality standards and policies.

83. By failing to initiate and/or complete consultation with the Services on Washington's revisions to these water quality standards and policies, EPA is failing to insure that its actions are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species, in violation of its mandatory obligation under the ESA. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A).

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SECOND CLAIM FOR RELIEF: ESA VIOLATIONS

(Failure to Reinitiate Consultation of Water Quality Standards to Insure Against Jeopardy; 16 U.S.C. § 1536(a)(2))

84. Plaintiff NWEA realleges all preceding paragraphs.

85. On February 11, 2008, EPA approved various natural conditions criteria provisions pertaining to temperature and dissolved oxygen, including general provisions that allow purportedly "natural" conditions of temperature and dissolved oxygen to supersede otherwise applicable numeric criteria. These provisions are as follows:

a) WAC 173-201A-200 (1)(c)(i) (natural temperatures supersede numeric criteria);

b) WAC 173-201A-200 (1)(c)(v) (natural temperatures establish lake criteria);

c) WAC 173-201A-200(1)(d)(i) (natural dissolved oxygen supersedes numeric criteria);

d) WAC 173-201A-200(1)(d)(ii) (natural dissolved oxygen establishes lake criteria);

e) WAC 173-201A-210(1)(c)(i) (natural temperatures supersede numeric criteria);

f) WAC 173-201A-210(1)(c)(ii) (natural temperatures supersede numeric criteria);

g) WAC 173-201A-210(1)(d)(i) (natural dissolved oxygen supersedes numeric criteria); and

h) WAC 173-201A-260(1) (natural conditions supersede numeric criteria).

86. In addition, in its 2008 approval action, EPA approved a purportedly "interim" dissolved oxygen criteria.

87. 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

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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.

88. The listing of the Pacific eulachon and designation of critical habitat for Pacific eulachon and bull trout subsequent to the 2008 Biological Opinion requires reinitiation of consultation pursuant to 50 C.F.R. § 402.16.

89. Ecology's completion of a 2009 study regarding dissolved oxygen, Ecology's failure to complete a reevaluation of the dissolved oxygen criteria after the study, and its *de facto* rendering of the "interim criteria" as permanent dissolved oxygen criteria, all constitute "new information" requiring the reinitiation of consultation pursuant to 50 C.F.R. § 402.16.

90. EPA retains discretionary control over Washington's water quality standards.

91. EPA has failed insure against jeopardy by failing to reinitiate consultation on its approval of the natural conditions provisions pertaining to temperature and dissolved oxygen and the "interim" dissolved oxygen criteria for Washington, in violation of 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.16.

THIRD CLAIM FOR RELIEF: CWA VIOLATIONS

(Failure to Act on Certain State Water Quality Standards Submitted for Approval by Washington, 33 U.S.C. § 1313(c))

92. Plaintiff NWEA realleges all preceding paragraphs.

93. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20(c). EPA has a mandatory duty to review submitted standards and general policies to determine whether the standards meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(b).

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94. EPA must approve or deny a new or revised standard submitted by a state. If EPA approves of the standard, it must notify the state within 60 days of its decision. 33 U.S.C. § 1313(c)(3). If EPA determines the standard is inconsistent with the CWA's requirements, EPA must notify the state of its intent to disapprove the standard within 90 days and specify changes it believes are necessary. *Id.*

95. EPA must therefore take *some* action on a state's submission of each water quality standard within 90 days of its submission.

96. On July 28 or August 1, 2003, and December 8, 2006, Washington submitted various new and revised water quality standards to EPA for review. EPA did not act on portions of these standards. More than 90 days have passed since Washington submitted these standards. EPA has failed to take action on these standards.

97. EPA did not review or take action on at least the following standards and rules that have the effect of altering otherwise applicable water quality standards:

a) provisions limiting the allowable increase in temperature from nonpoint sources (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B));

b) so-called Short Term Modifications (WAC 173-210A-410);

c) an exemption from criteria based on unconditional shellfish harvest determinations (WAC 173-201A-210(2)(b)(i));

d) averaging periods for bacteria (WAC 173-201A-210(2)(b)(ii) and 173-201A-210(3)(b)(i));

e) guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v));

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f) a provision that allows both temporary and permanent loss of existing uses (WAC 173-201A-300(3));

g) a provision that allows compliance schedules for dams (WAC 173-201A-510(5));

h) water quality offsets (WAC 173-201A-450);

i) aspects of Washington's antidegradation policy and implementation methods, including WAC 173-201A-300(3) and WAC 173-201A-330(4); and

j) 2013 revisions to SMS, which establish sediment clean-up standards for the protection of aquatic life and human health, WAC 173-204, Part V.

98. By failing review and act upon these state water quality standards, EPA in in violation of its mandatory duties pursuant to CWA section 303(c)(3), 33 U.S.C. § 1313(c), and EPA regulations.

FOURTH (ALTERNATIVE) CLAIM FOR RELIEF

(Arbitrary and Capricious Decision to Not Act on Certain State Water Quality Standards Submitted for Approval by Washington, 5 U.S.C. § 706(2)(A))

99. Plaintiff NWEA realleges all preceding paragraphs.

100. In the alternative to its THIRD CLAIM FOR RELIEF, Plaintiff alleges as follows.

101. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20(c). EPA has a mandatory duty to review submitted standards and general policies to determine that the standards meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(b).

102. EPA must approve or deny any new or revised standards submitted by a state. If EPA approves of a standard, it must notify the state within 60 days of its decision. 33 U.S.C. § 1313(c)(3). If EPA determines a standard is inconsistent with the CWA's requirements, EPA

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must notify the state of its intent to disapprove the standard within 90 days and specify changes that it believes are necessary. *Id.*

103. EPA must therefore take *some* action on a state's submission of each water quality standard within 90 days of its submission.

104. On July 28 or August 1, 2003, and December 8, 2006, Washington submitted various new and revised water quality standards to EPA for review. EPA did not act on portions of these standards. More than 90 days have passed since Washington submitted these standards. EPA has incorrectly failed to take action on these standards.

105. EPA did not review or take action on at least the following standards and rules that have the effect of altering otherwise applicable water quality standards:

a) provisions limiting the allowable increase in temperature from nonpoint sources (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B));

b) so-called Short Term Modifications (WAC 173-210A-410);

c) an exemption from criteria based on unconditional shellfish harvest determinations (WAC 173-201A-210(2)(b)(i));

d) averaging periods for bacteria (WAC 173-201A-210(2)(b)(ii) and 173-201A-210(3)(b)(i));

e) guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v));

f) a provision that allows both temporary and permanent loss of existing uses (WAC 173-201A-300(3));

g) a provision that allows compliance schedules for dams (WAC 173-201A-510(5));

h) water quality offsets (WAC 173-201A-450);

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i) aspects of Washington's antidegradation policy and implementation methods, including WAC 173-201A-300(3) and WAC 173-201A-330(4); and

j) 2013 revisions to SMS, which establish sediment clean-up standards for the protection of aquatic life and human health, WAC 173-204, Part V.

106. EPA's decision to not to act upon and Washington's water quality provisions that affect water quality standards was arbitrary, capricious, and not in accordance with the CWA and its implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

FIFTH CLAIM FOR RELIEF: APA

(Arbitrary and Capricious Decision to Approve Certain Washington Water Quality Standards, 5 U.S.C. § 706(2)(A))

107. Water quality criteria must be set at a level necessary to protect the designated uses of a waterbody. 33 U.S.C.§ 1313(c)(2); 33 U.S.C.§ 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

108. 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).

109. The criteria must also be set at the level necessary to protect the most sensitive use of a waterbody. *Id.*

110. States may establish narrative water quality criteria "to supplement numerical criteria." 40 C.F.R. § 131.11(b)(2).

111. Narrative criteria may not "supplant[] otherwise lawful water quality standards" without CWA section 303(c) review. *See Nw. Entvl. Advocates v. U.S. E.P.A.*, 855 F.Supp.2d 1199, 1217-18 (D. Or. 2012).

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112. Washington proposed, and EPA approved, narrative criteria, including at least the following provisions:

a) WAC 173-201A-200 (1)(c)(i), WAC 173-201A-210(1)(c)(i), WAC 173-201A-210(1)(c)(ii) (natural temperatures supersede numeric criteria);

b) WAC 173-201A-200 (1)(c)(v) (natural temperatures establish lake criteria);

c) WAC 173-201A-200(1)(d)(i), WAC 173-201A-210(1)(d)(i) (natural dissolved oxygen supersedes numeric criteria);

d) WAC 173-201A-200(1)(d)(ii) (natural dissolved oxygen establishes lake criteria);

e) WAC 173-201A-260(1) (natural conditions supersede numeric criteria); and

f) WAC 173-201A- 200(1)(e)(i), WAC 173-201A- 210(1)(e)(i) (exemptions from turbidity criteria).

113. The narrative criteria serve as exemptions from or over-ride the otherwise applicable water quality standards, thereby impermissibly supplanting rather than supplementing other water quality standards.

114. The narrative criteria do not protect designated uses, including threatened and endangered species.

115. EPA's approval of these provisions was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by APA, 5 U.S.C. § 706(2)(A).

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REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Declare that, by failing to initiate and/or complete consultation on Washington water quality standards, EPA has violated its mandatory duty to insure against jeopardy as required by ESA section 7(a)(2);

B. Declare that EPA failed to reinitiate consultation on certain Washington water quality standards, as required by ESA section 7(a)(2) and 50 C.F.R. § 402.16;

C. Declare that EPA failed to take action on Washington's proposed new and revised water quality standards in violation of CWA section 303(c) or, alternatively, declare that EPA's failure to take action on Washington's standards was arbitrary and capricious and not in accordance with the CWA and its implementing regulations, pursuant to the APA, 5 U.S.C. § 706(2)(A);

D. Declare that EPA acted arbitrarily, capriciously, and contrary to the CWA and implementing regulations in approving Washington's provisions pertaining to natural conditions criteria for temperature and dissolved oxygen and Washington's turbidity exemptions;

E. Provide injunctive relief requiring EPA to initiate and reinitiate the consultation process on those standards EPA has approved, and requiring EPA to consult on the water quality standards it is required to review and act on under the CWA;

F. Provide injunctive relief requiring EPA to take action on certain of Washington's water quality standards;

G. Set aside EPA's approval of Washington's provisions pertaining to natural conditions criteria for temperature and dissolved oxygen and Washington's turbidity exemptions;

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H. Award Plaintiff NWEA costs of this action and attorney fees, pursuant to 33 U.S.C. § 1365(d) (CWA) and 16 U.S.C. § 1540(g)(4) (ESA); and

I. Grant such other relief as the Court deems just and proper.

DATED this 10th day of February, 2014.

Respectfully submitted,

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By: s/ Bryan Telegin

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Local Counsel for Plaintiff NWEA

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By: s/ Kevin Cassidy

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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Northwest Environmental Advocates

(b) County of Residence of First Listed Plaintiff Multnomah County, OR
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Bricklin & Newman, LLP
1001 4th Ave.
Seattle, WA 98154

DEFENDANTS

United States Environmental Protection Agency

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☒ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Clean Water Act (CWA): 33 USC 1365; Endangered Species Act (ESA): 16 USC 1536(b); APA: 5 USC 702

Brief description of cause:
Failure to take action on state water quality standards, failure to insure against jeopardy of ESA-listed species

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
02/11/2014

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Washington

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation, *Plaintiff(s)* v. U.S. ENVIRONMENTAL PROTECTION AGENCY *Defendant(s)*	))))))))))))	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

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David Bricklin
Bricklin & Newman, LLP
1001 4th Ave, Ste. 3303
Seattle, WA 98154

Allison LaPlante
Kevin Cassidy
Earthrise Law Center, Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 02/10/2014

Signature of Clerk or Deputy Clerk

EARTHRISE
law center

February 26, 2013

Bob Perciasepe, Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Kenneth Salazar, 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
NOAA Fisheries
7600 Sand Point Way NE
Seattle, WA 98115-0070

Dr. Rebecca Blank
Acting 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: 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 pursuant to Section 11(g)(1)(A) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(1)(A), and Section 505(a)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1365(a)(2), against the U.S. Environmental Protection Agency (EPA) for violating the ESA and the CWA with regard to Washington water quality standards for various pollutants.

As explained in detail below, EPA's actions and inactions have failed to comply with the ESA and the CWA. First, for certain EPA-approved Washington water quality standards, EPA has failed to comply with its ESA Section 7 obligations to consult with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) (together "the Services") to ensure that EPA's actions are not likely to jeopardize ESA-listed species in Washington or result in destruction or adverse modification of critical habitat. Second, EPA has failed to act, as required by the CWA, on several changes to Washington's water quality standards.

NWEA is concerned about the harm caused by EPA's failure to consult with the Services and EPA's failure to comply with its mandatory duties under the CWA to the numerous ESA-listed

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Exhibit 1

species that are likely to be adversely affected by the levels of pollutants currently being used for Washington water quality regulation. EPA's failure to consult 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. In this case, standards on which EPA took action, some more than 20 years ago, are being used without the benefits of a completed ESA Section 7 consultation, and standards that Washington submitted to EPA for approval more than nine years ago have not been acted upon.

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 those two federal statutes. However, we are available to discuss potential remedies prior to the expiration of this notice.

I. Factual Background

On November 25, 1992, the Washington State Department of Ecology ("Ecology" or "Washington") completed new and revised water quality standards that included adoption of aquatic life criteria recommended by EPA such that, while Washington was *included* in the subsequent National Toxics Rule (NTR) promulgated by EPA due to its failure to adopt human health criteria, it was largely *excluded* from the NTR for aquatic life. With notably few exceptions, Ecology has failed to update its aquatic life criteria in the ensuing 20 years and EPA has taken no action to ensure their adequacy. At the time of EPA's approval action no aquatic species were listed as threatened or endangered under the ESA. Subsequently, numerous species have been listed, including salmonids in Puget Sound and the Columbia River Basin, along with marine mammals and bull trout. EPA has not consulted on its approval of Washington's aquatic life criteria for toxics.

On June 3, 1996, Ecology submitted new or revised Sediment Management Standards (SMS) to EPA. The sediment standards included provisions governing marine finfish rearing (netpen) facilities and a variety of other provisions. Among the netpen provisions was an allowance for exemptions based on a "sediment impact zone within 100 feet from the outer edge of a netpen," which has the effect of "exempting the facilities from: marine sediment quality standards, sediment impact zone maximum criteria, and sediment impact zone standards within that zone." *See* EPA Letter to Ecology, September 18, 2008. EPA took action on the sediment standards on September 18, 2008, approving many of the netpen and sediment biocriteria provisions, but took no action on provisions it deemed not to be water quality standards. EPA determined that its action was not likely to adversely affect listed or threatened species, including their designated critical habitat, and submitted a Biological Assessment ("BA") to the Services to this effect on April 17, 2008 and again on August 6, 2008. The Services concurred.

Ecology submitted new or revised water quality standards to EPA for approval on December 5, 1997. These water quality standards included *inter alia* definitions, general water use and criteria classes, lake nutrient criteria, toxic substances criteria (chronic marine copper, chronic site-specific cyanide for Puget Sound, and ammonia), general considerations (fresh/salt water

boundaries, fish passage, total dissolved gas, wetlands), short-term modifications, and specific classifications. On February 6, 1998, EPA took action on Ecology's submission, approving all of the new and revised water quality standards Washington had submitted. In its action, EPA stated that its approval was subject to completion of ESA Section 7 consultation. EPA did not prepare and send a BA to the Services regarding the 1997 new and revised standards.

On July 28 or August 1, 2003, Ecology submitted to EPA for its approval new or revised water quality standards. The standards represented a change from a classification-based to a use-based approach for freshwater uses and criteria and included, as well, use designations for aquatic life, criteria (lake nutrients, toxics narrative, temperature, dissolved oxygen, ammonia), antidegradation, and general policy procedures for variances, offsets, Use Attainability Analyses (UAA), and site-specific criteria development. On January 12, 2005, EPA approved certain aspects of these water quality standards (uses, procedures, lake nutrients, and toxics narrative). Subsequently, on February 10, 2005, EPA concluded that the compliance schedule provision for hydroelectric dams was not a water quality standard and, on March 22, 2006, issued a partial disapproval of designated uses and temperature criteria. A subsequent Ecology submission on December 8, 2006 responding primarily to the partial disapproval (and including, *inter alia*, use definitions and designations, temperature criteria, ammonia criteria) resulted in an EPA approval on February 11, 2008. By a final BA dated April 10, 2007, EPA consulted with the Services on its 2005 partial approval (with the exception of the variance procedure) and its 2008 full approval (with certain exceptions) and the ensuing BiOp of February 5, 2008 became the basis for some, but not all, of EPA's 2005 and 2008 approval actions.

Specifically, in this BA, EPA did not consult on certain new or revised standards, including provisions for variances, UAA, and site-specific criteria because it determined the provisions would have no effect on ESA-listed species until they were applied, at which time EPA would—theoretically—consult on its approval of specific actions. *See* January 12, 2005 EPA Letter to Ecology. Likewise, EPA did not consult on matters pertaining to human health, such as bacteria. EPA offered no reason, however, for failing to consult on other provisions it approved in 2005, 2007, or 2008 that remained from Ecology's earlier submissions, including revisions to Washington's rules on metals conversion factors (Water Effects Ratio). Once again, EPA did not consult on its approvals of Washington's revised ammonia criteria. In addition, most recently, on May 2, 2007, EPA approved Ecology's 2003 revisions to Washington's antidegradation provisions without consultation. And, on May 23, 2007, EPA approved Ecology's 2003 adoption of a marine chronic cyanide criterion for waters outside of Puget Sound without ESA consultation on the basis that the national cyanide consultation was underway and should be used as a "framework" for consultation. The national cyanide consultation is not completed and it is not clear that it is even continuing. On July 9, 2007, EPA amended the NTR to remove Washington's marine copper and cyanide chronic aquatic life criteria, thereby allowing Washington's criteria to become effective. *See* 72 Fed. Reg. 37109 (July 9, 2007).

II. Endangered Species Act Violations

A. Legal Framework

The Endangered Species Act 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 adverse modification or destruction of their critical habitat. The end product of the ESA section 7 consultation is 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).

To ensure that agencies consult with the Services and that the Services issue a biological opinion, Congress explicitly addressed the action agency's and Services' obligations to complete formal consultation. Specifically, section 7(b)(1)(A) provides:

> Consultation under subsection (a)(2) with respect to an agency action shall be concluded within the 90-day period beginning on the date on which initiated or,

> subject to subparagraph (B) [which outlines procedures when an applicant is involved], within such other period of time as is mutually agreeable to the Secretary and the Federal Agency.

16 U.S.C. § 1536(b)(1)(A). The Services and the action agency may agree to extend the time in which to conclude consultation beyond the statutorily prescribed 90-day period, but such extensions cannot be for an undefined amount of time. *See* 50 C.F.R. §§ 402.14(e) ("Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for *a specific period of time*.") (emphasis added); *see also* Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and Conferences ("Consultation Handbook"), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998, at 4-7 ("The consultation timeframe cannot be 'suspended.' If the Services need more time to analyze the data or prepare the final opinion, or the action agency needs to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. *Extensions should not be indefinite, and should specify a schedule for completing the consultation*.") (emphasis added).

B. EPA Has Failed to Ensure Against Jeopardy for Certain Washington Water Quality Standards on Which EPA Took Action but Never Initiated Consultation

As described above, to the best of our knowledge, EPA has never prepared and sent a Biological Assessment ("BA") to the Services regarding the 1997 new and revised standards, which include now 20-year-old criteria for the protection of aquatic life. Likewise, in 1998, 2005, 2007, and 2008, EPA took actions on new and revised provisions of Washington's water quality standards for which it failed to initiate ESA Section 7(a)(2) consultation, despite conditioning its approval actions on completion of consultation. Specifically, in 1998, EPA approved the following new or revised Washington water quality standards, but never initiated consultation: lake nutrient narrative standards, marine cyanide criteria for waters in Puget Sound, conversion factors for metals, marine copper criterion. *See* Feb. 11, 2008 EPA Letter to Ecology (approving revisions "subject to results of ESA consultation under 7(a)(2)"); May 23, 2007 EPA Letter to Ecology (same); Feb. 6, 1998 EPA Letter to Ecology (same). Initiation of consultation was, in fact, *contemplated* by EPA and the Services for the copper, cyanide, nutrient, and ammonia criteria, as well as the metals conversion factors, short-term modifications, and wetlands definitions. *See Steps to Complete Washington ESA Consultation*, prepared for meeting July 6, 1999. It was not, however, either initiated or completed.

Regulations implementing Section 7(a)(2) establish the obligations for EPA as the action agency by broadly defining the scope of agency actions subject to consultation to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (definition of "action"). Agencies also must consult on ongoing agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. 50 C.F.R. § 402.03; 50 C.F.R. § 402.16; *see also Pacific*

Rivers Council v. Thomas, 30 F.3d 1050, 1054-56 (9th Cir. 1994). Finally, "[e]ach Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required[.]" 50 C.F.R. § 402.14(a) (emphasis added).

EPA's ongoing failure to seek consultation with the Services on revisions to Washington water quality standards dating to 1992 on which EPA has taken action, is a violation of EPA's mandatory duty to consult with the Services to ensure against jeopardy. The ESA requires that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). An action 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).

It is indisputable that Washington's revisions to its water quality standards for, *inter alia*, chronic marine copper, ammonia, and chronic site-specific cyanide for waters inside and outside of Puget Sound "may affect" threatened and endangered species, triggering EPA's duty under the ESA to consult with the Services. In particular, given draft and final jeopardy opinions for Idaho and Oregon toxic criteria, EPA is well aware that NMFS has found EPA's recommended criteria for freshwater copper, cyanide, and ammonia jeopardize, by appreciably reducing the likelihood of both the survival and recovery, threatened and endangered species of salmonids. EPA thus violated Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations at 50 C.F.R. § 402, when it failed to consult with the Services to ensure against jeopardy and adverse modification of critical habitat prior to approving Washington's water quality standards and general policies that are intended to protect or have the ability to affect aquatic life, including threatened and endangered species.

As a consequence of many years of delay, EPA must consult on its approval of Washington's 1992 aquatic life criteria for toxics; its February 6, 1998 approval of water quality standards including, but not limited to, criteria for chronic marine copper, chronic Puget Sound cyanide, ammonia, lake nutrients, and provisions for short-term modifications (as modified by subsequent rulemaking), and metals conversion factors; its January 12, 2005 approval of provisions for variances, UAA, site-specific criteria, and ammonia criteria; its May 2, 2007 approval of antidegradation provisions; its May 23, 2007 approval of marine chronic cyanide outside Puget Sound; and its February 11, 2008 approval of ammonia criteria (as amended by the August 10, 2011 approval of footnote hh of WAC 173-201A-240(3)) and metals conversion factors.

Additional information, including information in EPA's possession, may reveal additional EPA actions on Washington water quality standards for which EPA was required to but never initiated consultation. NWEA has thoroughly reviewed the public record in an attempt to capture all such EPA actions here, but the complexity and inconsistent nature of EPA's actions on Washington's standards over the course of many years leaves open the possibility that further violations will be uncovered. This letter puts EPA on notice that it is intended to cover such violations of the same

type as described here—EPA actions on Washington water quality standards for which EPA failed to initiate consultation—that occurred during the same time period covered by this notice letter.

III. Clean Water Act Violations

A. Legal Framework

States must 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 Act on Water Quality Standards Submitted for Approval by Washington

On February 11, 2008, EPA approved new and revised standards submitted by Washington on July 28 or August 1, 2003, and December 8, 2006. EPA also failed to act on portions of these submitted standards. Specifically, EPA failed to take any action on the following water quality standards and rules that have the effect of altering otherwise applicable water quality standards: provisions limiting the allowable increase in temperature from nonpoint sources (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B)); exemptions from turbidity criteria (WAC 173-201A- 200(1)(e)(i) and WAC 173-201A- 210(1)(e)(i)); so-called Short Term Modifications (WAC 173-210A-410); exemption from criteria based on unconditional shellfish harvest determinations (WAC 173-201A-210(2)(b)(i)); averaging periods for bacteria (WAC 173-201A-210(2)(b)(ii) and 173-201A-210(3)(b)(i)); guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v)); a provision that allows both temporary and permanent loss of existing uses (WAC 173-201A-300(3)); a provision that allows compliance schedules for dams (WAC 173-201A-510(5)); water quality offsets (WAC 173-201A-450); and aspects of Washington's antidegradation policy and implementation methods, including WAC 173-201A-300(3) and WAC 173-201A-330(4). In failing to take action on Washington's submissions of these water quality standards and subsequent revisions, EPA has violated its mandatory duty to act pursuant to CWA Section 303(c)(3), 33 U.S.C. § 1313(c).

IV. Persons Giving Notice and Representing Attorneys

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

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V. Conclusion

If EPA does not come into compliance with the Endangered Species Act and the Clean Water Act, upon expiration of the 60 days NWEA intends to file suit against EPA pursuant to those two federal statutes. 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
Staff Attorney

cc: Ted Sturdevant, Director
Washington Department of Ecology

EARTHRISE
law center

November 1, 2013

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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.

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Exhibit 2

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:

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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
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