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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

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

8 3. First, EPA has failed to insure against jeopardy as required by section 7(a)(2) of
9 the ESA, 16 U.S.C. § 1536(a)(2). Specifically, EPA has never initiated ESA consultation with
10 the Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service (“NMFS”)
11 (collectively, “the Services”) regarding water quality standards adopted by Washington in 1992,
12 1997, 1998, 2005, 2007, and 2008, as required by section 7(a)(2) of the ESA, despite its having
13 conditioned some of its approval actions on completion of consultation. In failing to consult with
14 the Services, EPA has violated its mandatory duty to insure against jeopardy under the ESA.

16 4. Second, EPA has failed to reinstate consultation, as mandated by the ESA, on
17 EPA’s 2008 approvals of various natural conditions criteria provisions pertaining to temperature
18 and dissolved oxygen, as well as Washington’s “interim” dissolved oxygen criterion. An agency
19 must reinstate consultation when, *inter alia*, discretionary federal involvement or control of the
20 action is retained or is authorized by law, new information reveals the action may have effects not
21 previously considered, or a new species is listed or critical habitat is designated that may be
22 affected by the action. 50 C.F.R. § 402.16. EPA completed formal consultation on EPA’s action
23 when NMFS issued its 2008 Biological Opinion; however, EPA has never reinstated consultation
24 based on new information and new species listings and critical habitat designations in
25 Washington. Because EPA has failed to do so, it is in violation of the ESA.
26

1 5. Third, EPA has failed to perform its non-discretionary duty to act on water quality
2 standards submitted for approval by the state of Washington as required by section 303(c)(3) of
3 the CWA, 33 U.S.C. § 1313(c). EPA explained that it did not review and take action on portions
4 of Washington's proposed criteria and rules that it believed were not technically water quality
5 standards; however, these provisions alter otherwise applicable water quality standards. As such,
6 EPA was required to review and approve or disapprove these revisions under Section 303(c) of
7 the CWA. 33 U.S.C. § 1313(c). In failing to do so, EPA has violated its mandatory duty under
8 the CWA to act on new or revised water quality standards.
9

10 6. Fourth, and in the alternative, EPA's decision not to act on certain Washington
11 water quality standards is arbitrary and capricious. Section 706(2)(A) of the APA authorizes
12 courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . .
13 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §
14 706(2)(A). EPA's inaction is premised on a mischaracterization of what constitutes a water
15 quality standard. As noted above, EPA did not take action on rules and provisions that have the
16 effect of altering the applicable water quality standards. EPA's decision not to act constitutes
17 arbitrary and capricious agency action within the meaning of the APA.
18

19 7. Fifth, EPA's approval of certain water quality standards, which serve as
20 exemptions from or over-ride otherwise applicable water quality standards, was arbitrary and
21 capricious, and contrary to the CWA and EPA's implementing regulations.
22

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

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

7
8 13. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) (venue in
9 action against officer of United States), 16 U.S.C. § 1540(g)(3)(A) (ESA citizen suit provision),
10 and LCR 3(d) because a substantial part of the events or omissions giving rise to the claims
11 occurred in Seattle, Washington, where EPA's Region 10 administrative office is located, and
12 where members of NWEA reside.

13
14 **PARTIES**

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

22 NWEA has participated in the development of CWA programs in the State of Washington for
23 many years.

24 15. NWEA's members reside near, visit, use and/or enjoy rivers, streams, estuaries,
25 wetlands, marine, and other surface waters throughout the State of Washington, including the
26

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1 Columbia and Snake Rivers and Puget Sound and their many tributaries, and waters of the Pacific
2 Ocean. Plaintiff's members regularly use and enjoy these waters and adjacent lands and have
3 definite future plans to continue to use and enjoy these waters for recreational, subsistence,
4 scientific, aesthetic, spiritual, commercial, conservation, educational, and other purposes.
5 Plaintiff's members derive benefits from their use and enjoyment of Washington's waters and the
6 fish and aquatic-dependent wildlife that rely upon Washington's waters for habitat-related
7 functions.
8

9 16. EPA's approval and use of water quality standards that have not gone through
10 ESA section 7 consultation harms Plaintiff and its members because it allows for the use and
11 implementation of water quality standards that are not protective of aquatic and aquatic-
12 dependent species. Washington's water quality standards are implemented through permits
13 issued to industrial and municipal dischargers, the state's having been authorized to do so by EPA
14 and subject to EPA's continuing oversight, through decisions by Washington and EPA regarding
15 which waters in the state are considered impaired as compared to state water quality standards,
16 and, in turn, through EPA and Washington-issued CWA clean-up plans to address those impaired
17 waters, as well as other federal decisions that require state water quality standard certifications.
18 The continued use of these water quality standards without adequate protection for threatened and
19 endangered species accomplished through ESA consultation impairs the recreational, aesthetic,
20 and other interests of Plaintiff and its members. Plaintiff's members reasonably fear that many
21 aspects and provisions of Washington water quality standards do not protect fish and wildlife,
22 including threatened and endangered species.
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25 17. Likewise, EPA's failures under the CWA to act on, and its arbitrary and capricious
26 approvals of, certain water quality standards harm Plaintiff and its members. As a result of

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

11 18. Some of Plaintiff's members derive recreational and aesthetic benefits by fishing
12 in Washington. Plaintiff's members fish in rivers, streams, and lakes in Washington and areas of
13 Puget Sound. Plaintiff's members would fish for certain species but for their protected status
14 under the ESA. Washington's native fish and shellfish populations, including threatened and
15 endangered species, are adversely affected when water quality standards are not sufficient to
16 maintain water quality at levels that protect these species and their habitat. Adverse effects to
17 Washington's native fish populations are directly related to degradation of water quality
18 throughout the state, including from toxic pollutants, both individually and in combination with
19 other forms of water pollution, such as high temperatures and low levels of dissolved oxygen.
20 For example, native fish and wildlife populations are directly harmed by toxic pollution from
21 past, present, and future industrial and urban sources. Harmful levels of pollution would be
22 addressed through more protective water quality standards or mitigated by measures identified
23 through the ESA consultation process. The harm to native fish and wildlife populations has
24 reduced and diminished Plaintiff's members' recreational and aesthetic enjoyment and
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1 opportunities related to these species. Additionally, Plaintiff's members no longer eat certain
2 species of fish that they used to catch and eat due, in part, to concerns about contamination and
3 toxic pollution.

4 19. Beyond fishing, some of Plaintiff's members enjoy clamming, swimming, wading,
5 boating, photography, bird-watching, and generally interacting recreationally and spiritually with
6 fresh and salt water systems within Washington. Additionally, some of Plaintiff's members own
7 forested land abutting Washington rivers. These members have seen first-hand the steady
8 degradation of water quality in Washington, including the northwestern corner of the Olympic
9 Peninsula, and the associated impacts on fish and wildlife. Further, NWEA and many of its
10 individual members are active in working for restoration of salmon populations and salmon
11 habitat, and in promoting appreciation and protection of salmonid species.
12

13 20. Plaintiff's members have a specific interest in the full and proper implementation
14 of environmental laws, such as the ESA and the CWA, which are designed to protect those waters
15 and the species that inhabit or otherwise depend upon them. EPA's failure to carry out its
16 statutory obligations harms Plaintiff's members' interests by undermining the procedural
17 requirements of the ESA and the CWA, which ensure that federal agencies make informed
18 decisions and act in conformity with the statutes' substantive requirements.
19

20 21. The above-described interests of Plaintiff and its members have been, are being,
21 and, unless the relief prayed for herein is granted, will continue to be harmed by Defendant
22 EPA's failure to ensure that the water quality standards in Washington will protect Washington's
23 waters, and EPA's failure to ensure the conservation and recovery of the species that depend on
24 those waters. The relief requested in this lawsuit — requiring EPA to act on certain submitted
25 water quality standards, disapprove unprotective standards, and perform ESA consultation on
26

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

5
 6 22. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY is a federal
 7 agency charged with the administration of the CWA. As a federal agency, EPA has a duty to
 8 insure against species endangerment and habitat degradation under the ESA. Additionally, it is
 9 charged with the maintenance and enforcement of other environmental statutes.

10 **LEGAL BACKGROUND**

11 **The Clean Water Act and Water Quality Standards**

12
 13 23. Congress adopted amendments to the CWA in 1972 in an effort “to restore and
 14 maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C.
 15 § 1251(a). The primary goal of the CWA was to eliminate the discharge of pollutants into navigable
 16 waters entirely; also established is “an interim goal of water quality which provides for the
 17 protection and propagation of fish, shellfish, and wildlife[.]” *Id.* § 1251(a)(1)–(2).

18
 19 24. To meet these water quality goals, the CWA requires states to develop water quality
 20 standards that establish, and then protect, the desired conditions of each waterway within the state’s
 21 regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards must be sufficient to “protect
 22 the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA].” *Id.*
 23 § 1313(c)(2)(a). They also establish attainable goals for a waterbody. 40 C.F.R. §§ 131.2,
 24 131.10(d).

25
 26 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

1 of degraded waters called the section 303(d) list. 33 U.S.C. § 1313(d). States must develop clean-up
2 plans for waters on the section 303(d) list — called Total Maximum Daily Loads (“TMDL”) — in
3 order to establish the scientific basis for restoring water pollution to levels that comply with water
4 quality standards. A TMDL comprises a calculation of the maximum amount of a pollutant a
5 particular waterbody or segment can contain while still meeting water quality standards.
6

7 26. The CWA also uses water quality standards as the regulatory basis for controlling
8 pollution discharged from “point sources,” called the National Pollutant Discharge Elimination
9 System (“NPDES”) permitting program. 33 U.S.C. §§ 1311, 1316, 1342. A point source is defined
10 as a “discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,
11 channel, tunnel, conduit, [or] well . . . from which pollutants are or may be discharged.” 33 U.S.C. §
12 1362(14). While NPDES permits impose technology-based effluent limitations on point source
13 discharges, they must also include “any more stringent limitation . . . necessary to meet water quality
14 standards.” 33 U.S.C. § 1311(b)(1)(C). No NPDES permit may be issued unless it can ensure
15 compliance with water quality standards. 40 C.F.R. § 122.4(d). Water quality standards are thus
16 integral to the regulation of both point source discharges and water quality more broadly.
17

18 27. Congress did not establish an analogous federal permitting scheme for “nonpoint
19 source” pollution, such as pollution from timber harvesting and agriculture. Instead, Congress
20 assigned states the task of implementing water quality standards for nonpoint sources, with
21 oversight, guidance, and funding from EPA. *See, e.g.*, 33 U.S.C. §§ 1288, 1313, 1329. Even so,
22 water quality standards and the TMDLs that are based upon them apply to all pollution sources,
23 point and nonpoint alike. “[S]tates are required to set water quality standards for *all* waters within
24 their boundaries regardless of the sources of the pollution entering waters.” *Pronsolino v. Nastri*,
25 291 F.3d 1123, 1127 (9th Cir. 2002) (emphasis in original).
26

Elements of Water Quality Standards

1
2 28. Water quality standards must include three elements: (1) designated uses of a
3 waterbody; (2) numeric and narrative criteria specifying the water quality conditions, such as
4 maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary
5 to protect the designated uses; and (3) an antidegradation policy that ensures that uses dating to 1975
6 are protected and high quality waters will be maintained and protected. 33 U.S.C. § 1313(c)(2),
7 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.
8

Designated Uses

9
10 29. States must designate uses based on consideration of the use and value of a
11 waterbody for public water supplies; protection and propagation of fish, shellfish, and wildlife;
12 recreation; and agricultural, industrial, and other purposes. 40 C.F.R. § 131.10(a). States retain
13 discretion in establishing designated uses, but EPA regulations cabin that discretion in several ways.
14 First, water quality standards *as a whole* must ensure the protection and propagation of fish,
15 shellfish, and wildlife, as well as recreation in and on the water. *Id.* § 131.2. Second, waste
16 assimilation or transport may never constitute designated uses for waters of the United States. *Id.*
17 Third, States may not remove existing or attainable uses from their use designations. *Id.* §
18 131.10(h). In order to remove non-existing uses that are not attainable, states must perform a Use
19 Attainability Analysis (“UAA”) consistent with CWA regulations that is subject to EPA approval.
20 *Id.* § 131.10(g), (j). Fourth, states must ensure their use designations provide for the attainment and
21 maintenance of standards for downstream waters. *Id.* § 131.10(a).
22
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Numeric and Narrative Criteria

1
2 30. States must set water quality criteria so as to protect designated uses of a waterbody.
3
4 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Criteria must be based on
5 “sound scientific rationale” and contain “sufficient parameters or constituents to protect the
6 designated use.” 40 C.F.R. § 131.11(a)(1). This means that criteria must be set at a level necessary
7 to protect the most sensitive designated use of a waterbody. *Id.* Narrative water quality criteria are
8 appropriate only when necessary “to supplement numerical criteria” or “numerical criteria cannot be
9 established.” *Id.* § 131.11(b)(2).

Antidegradation Policy and Implementation Methods

10
11 31. The antidegradation policy component of water quality standards stems from the
12 CWA’s charge to “*maintain* the chemical, physical, and biological integrity of the Nation’s waters.”
13 33 U.S.C. § 1251(a) (emphasis added). To assure that water quality meets or exceeds water quality
14 standards, the antidegradation policy provides a three-tier mechanism through which states must
15 implement protection and maintenance of various waterbodies. 40 C.F.R. § 131.12.
16

17 32. Tier 1 protections are the absolute floor, and must assure that, “[e]xisting instream
18 water uses and the level of water quality necessary to protect the existing uses shall be maintained
19 and protected.” 40 C.F.R. § 131.12(a)(1). Existing uses are those “actually attained” in a waterbody
20 by 1975, “whether or not they are included in the water quality standards.” *Id.* § 131.3(e).
21

22 33. Tier 2 protections apply when “the quality of the waters exceed[s] levels necessary to
23 support propagation of fish, shellfish, and wildlife and recreation in and on the water.” 40 C.F.R. §
24 131.12(a)(2). States must “maintain and protect” these higher quality Tier 2 waters “unless . . .
25 allowing lower water quality is necessary to accommodate important economic or social
26 development.” *Id.* If lower water quality is necessary, the state must yet assure that the quality is

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

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

8 **Review and Revision of State Water Quality Standards**

9 35. States must review and revise their water quality standards at least every three years,
 10 a process called “Triennial Review.” 33 U.S.C. § 1313(c)(1). Any revised or newly adopted water
 11 quality standards must be submitted to EPA for review and either approval or disapproval. *Id.* §
 12 1313(c)(2)(A). States must also submit for review any state-issued policies that affect water quality
 13 standards. 40 C.F.R. § 131.13, 131.20(c).

14 36. EPA must notify the state within 60 days if it approves the new or revised standards.
 15 33 U.S.C. § 1313(c)(3). If EPA concludes that state standards do not meet CWA requirements, EPA
 16 must notify the state of its disapproval within 90 days and “specify the changes to meet such
 17 requirements.” *Id.* If the state does not adopt the specified changes within 90 days of the
 18 notification, *id.*, EPA shall itself “promptly” promulgate substitute standards for the state. *Id.* §
 19 1313(c)(4).
 20

21 37. Water quality standards that were submitted for EPA approval before May 30, 2000
 22 are considered applicable water quality standards under the CWA; whereas water quality standards
 23 submitted after that date do not go into effect until EPA approves them. 40 C.F.R. § 131.21(c), (d).
 24

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

1 33 U.S.C. §1365(a). Citizens must provide 60 days' notice of any alleged violations to EPA. *Id.* §
 2 1365(b). After 60 days have passed, citizens may sue the Administrator in federal district court to
 3 enforce against violations of mandatory duties.

4 **The Endangered Species Act and Consultation**

5
 6 39. The ESA requires the Secretary of the Interior to promulgate regulations listing those
 7 species of animals that are “threatened” or “endangered” under specified criteria, and to designate
 8 their “critical habitat.” 16 U.S.C. § 1533. One of the ESA’s primary purposes is to preserve the
 9 habitat upon which “listed” species — i.e., threatened and endangered species — rely. 16 U.S.C. §
 10 1531(b). In order to bring about the recovery of species facing extinction, the ESA affords these
 11 species the “highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

12
 13 40. The ESA requires that each federal agency, including EPA, use its authorities in
 14 furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered
 15 and threatened species. 16 U.S.C. § 1536(a)(1).

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

1 listed species. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070–71
2 (9th Cir. 2004) (striking down as impermissibly narrow the portion of 50 C.F.R. § 402.02 that
3 limited the adverse modification inquiry to those physical or biological features that were the
4 original basis for the critical habitat designation).

5
6 42. The agency’s obligation to insure against “jeopardy” or “adverse modification”
7 requires that endangered species be given the “benefit of the doubt.” *Sierra Club v. Marsh*, 816 F.2d
8 1376, 1386 (9th Cir. 1987) (citing *TVA v. Hill*, 437 U.S. at 174). In other words, the burden of risk
9 and uncertainty must be placed on the proposed action, rather than on the listed species. *Id.*

10 43. Federal regulations broadly define the scope of agency actions subject to ESA
11 section 7’s requirements. Agency actions include “all activities or programs of any kind authorized,
12 funded, or carried out, in whole or in part, by Federal agencies. . . .” 50 C.F.R. § 402.02. Agencies
13 must consult on ongoing agency actions over which the agencies retain, or are authorized to exercise
14 discretionary involvement or control. *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal.*
15 *v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir.
16 1994).

17
18 44. If an agency determines that an action it proposes to take may adversely affect a
19 listed species, it must engage in formal consultation with the FWS or NMFS, depending on the
20 species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. This is commonly known as “section 7
21 consultation.” The Services must then provide the action agency with a written statement, known as
22 a “Biological Opinion,” explaining how the proposed action will affect the species or its habitat. 16
23 U.S.C. § 1536(b).

24
25 45. If the Services conclude the proposed action will jeopardize the continued existence
26 of any endangered or threatened species or result in the destruction or adverse modification of the

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

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

19 47. An action agency's consultation obligations do not end with the issuance of a
20 Biological Opinion. An agency must reinitiate consultation where discretionary federal involvement
21 or control of the action is retained or is authorized by law, and when one of the following conditions
22 is met: (1) the amount of take specified in the incidental take statement is exceeded; (2) new
23 information reveals that the action may have effects not previously considered; (3) the action is
24 modified in a way not previously considered; or (4) a new species is listed or critical habitat
25 designated that may be affected by the identified action. 50 C.F.R. § 402.16.
26

FACTUAL BACKGROUND

1
2 52. The State of Washington's Department of Ecology ("Ecology") has prepared new
3 and revised water quality standards at various intervals over the past 20-plus years. Adding to the
4 lack of protection inherent in EPA's failure to consult under the ESA on the standards that have
5 been adopted, Ecology has not updated most of its toxic criteria for the protection of aquatic life
6 since they were first adopted on November 25, 1992. In reviewing Washington's standards, EPA
7 has failed to comply with its duty to consult with the Services about the probable effects of its
8 approval of Washington's standards, it has arbitrarily and capriciously approved certain
9 standards, and it has failed to comply with its CWA requirement to review and act on other water
10 quality standards.
11

ESA Listings in Washington and Harm to Species

12
13
14 53. Both NMFS and FWS have listed various species as threatened or endangered
15 under the ESA and designated critical habitat for those species throughout Washington. FWS
16 listed bull trout as threatened throughout its entire range in the coterminous United States in
17 1999, and designated critical habitat for the species along 19,729 miles of streams throughout the
18 Columbia River and Snake River basins. Over the last fifteen or more years, NMFS has listed
19 numerous anadromous salmonid species, as well as marine fish and shellfish, and marine
20 mammals as threatened or endangered. Upper Columbia River spring Chinook salmon were
21 listed in 1999. Puget Sound Chinook, Lower Columbia River Coho, Hood Canal summer chum
22 salmon, Columbia River chum, Snake River and Lake Ozette sockeye, and Puget Sound steelhead
23 were all listed in 2005. NMFS then listed critical habitat for many species of West Coast
24 salmonids, including Puget Sound Chinook, Upper Columbia Chinook, Hood Canal summer
25 chum salmon, Snake River and Lake Ozette sockeye, and Upper Columbia steelhead. Upper
26

1 Columbia River Steelhead was listed as threatened in 2009. NMFS listed as threatened under the
2 ESA the southern DPS of Pacific eulachon (*Thaleichthys pacificus*), commonly known as smelt.
3 Subsequently, NMFS designated critical habitat for eulachon in Washington, Oregon, and
4 California. In 2010, NMFS listed the Puget Sound/Georgia Basin DPS of yelloweye rockfish and
5 canary rockfish as threatened, and bocaccio as endangered. Additionally, the Southern Resident
6 killer whale (orca) DPS was listed as an endangered species in 2005, with critical habitat
7 designated in 2006.¹

9 54. Water quality that supports all life cycle stages is necessary for the survival and
10 recovery of these ESA-listed species that depend on Washington's fresh, marine, and brackish
11 waters. Water pollutants have a wide range of harmful affects on these species. For example,
12 studies have documented high levels of PCBs in Southern Resident killer whales, among
13 chemical compounds that have the same ability to induce immune suppression, impair
14 reproduction, and cause other physiological effects. *See, e.g.*, NMFS, Recovery Plan for
15

17
18 ¹ See 64 Fed. Reg. 58,910, 58,933 (Nov. 1, 1999) (Bull Trout Listing); 75 Fed. Reg. 53,898
19 (Oct. 18, 2010) (Bull Trout Critical Habitat Designation); 64 Fed. Reg. 14,307 (March 24, 1999)
20 (Upper Columbia River Spring Chinook Listing); 70 Fed. Reg. 37,160 (June 28, 2005) (Puget Sound
21 Chinook, Lower Columbia River Coho, Hood Canal Summer Chum Salmon, Columbia River
22 Chum, Snake River and Lake Ozette Sockeye, and Puget Sound Steelhead); 70 Fed. Reg. 52630
23 (September 2, 2005) (Designation of Critical Habitat for Puget Sound Chinook, Upper Columbia
24 Chinook, Hood Canal Summer Chum Salmon, Snake River and Lake Ozette Sockeye, and Upper
25 Columbia Steelhead); 74 Fed. Reg. 42605 (August 24, 2009) (Upper Columbia River Steelhead
26 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).

1 Southern Resident Killer Whales (*Orcinus orca*) (January 17, 2008) (“Orca Recovery Plan”)² at
2 II-72. Organochlorines — including PCBs, DDT, other pesticides, dioxins, and furans — are
3 “frequently considered to pose the greatest risk to killer whales[.]” *Id.* at II-87. In addition,
4 increasing and high levels of so-called “emerging contaminants,” such as polybrominated
5 diphenyl ethers (flame retardants), that have similar negative effects, have been found in killer
6 whales, and are not yet directly regulated under the CWA. *See, e.g., id.* at II-72 to 73; *see also* II-
7 95; II-100 (Table 11). Bioaccumulation through trophic transfer (i.e., up the food chain) allows
8 concentrations of these compounds to build up in top-level marine predators, such as orca, where
9 these highly fat-soluble pollutants accumulate in fatty tissues. *Id.* According to NMFS, the
10 orca’s position atop the food web, their long life expectancy, and the fact that they consume other
11 mammals make them “especially vulnerable.” *Id.* Heavy metals, including particularly
12 mercury, cadmium, and lead, are also “recognized as problematic.” *Id.* at II-95. While toxic
13 contaminants are often passed on to future generations, *id.* at II-92 to 93, metals are not. *Id.* at II-
14 95.

17 55. Orca whales rely on other ESA-listed species as prey. *See, e.g., id.* at iv (salmon
18 restoration is key to ensuring adequate prey base), II-17. Therefore, toxic contamination in, *inter*
19 *alia*, Puget Sound Chinook salmon and yelloweye rockfish, pose a threat to the orca as well as to
20 the chinook and rockfish themselves. *See, e.g., id.* at II-96. NMFS has concluded that
21 “pollutants originating within Puget Sound and the Georgia Basin probably play a greater role” in
22 orca contamination than sources outside these areas, a “pattern [that] is apparent in Chinook
23

24
25 ² Available at [http://www.westcoast.fisheries.noaa.gov/publications/protected](http://www.westcoast.fisheries.noaa.gov/publications/protected_species/marine_mammals/cetaceans/killer_whales/esa_status/srkw-recov-plan.pdf)
26 [_species/marine_mammals/cetaceans/killer_whales/esa_status/srkw-recov-plan.pdf](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).

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

5
 6 56. For example, NMFS’ recovery plan for Puget Sound salmonids finds that “high
 7 water temperatures and low streamflows in the late summer and early fall are unfavorable for
 8 salmonids south of northern British Columbia.” *See* NMFS, Puget Sound Salmon Recovery Plan
 9 (January 19, 2007) (“Salmonid Recovery Plan”)³ at 52; *see also id.* at 80 (Fig. 3.7) (“[h]igh
 10 temperatures may stress or kill salmon outright, or limit the production of organisms they need
 11 for food.”), 86 (Fig. 3.13). Temperatures are also implicated in the outbreak and spread of
 12 diseases in salmon. *See, e.g.*, NMFS, 5-Year Review: Summary & Evaluation of Puget Sound
 13 Chinook, Hood Canal Summer Chum, Puget Sound Steelhead, 76 Fed. Reg. 50448 (Aug. 15,
 14 2011) (“Five-Year Review”)⁴ at 26. The effects of other pollutants that contribute to degraded
 15 water quality, such as toxic contaminants, pesticides, and excess sediment constitute a threat to
 16 habitat that limits recovery of Puget Sound Chinook and other salmonids. *Id.* at 22-23.

17
 18 57. Actions proposed to restore Puget Sound Chinook are, therefore, similar to those
 19 discussed for the orca whale. *See* NMFS, Salmonid Recovery Plan. NMFS’s Salmonid
 20 Recovery Plan notes the importance of water quality to Puget Sound Chinook, including the
 21 establishment and review of water quality standards. *Id.* at 387. The Plan points to the
 22

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

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

1 importance of Washington’s sediment cleanup standards “which are important to salmon because
2 a wide range of adverse impacts on the health and survival of juvenile salmonids and other
3 marine species are associated with exposure to contaminated sediments.” *Id.* at 388. NMFS also
4 cites the importance of updating water quality standards. *Id.*; *see also* Five-Year Review at 32, 24
5 (water quality concerns continue to pose a risk to species’ persistence and habitat quality is “still
6 declining” despite Washington’s 2006 improved water quality standards for temperature). NMFS
7 cites approvingly a 2001 memorandum between EPA and the Services that describes “improved
8 consultation procedures for EPA approval of State and Tribal water quality standards.” Orca
9 Recovery Plan at 101. NMFS also cites the importance of EPA regulations (40 C.F.R. §
10 122.4(d)) that prohibits the issuance of NPDES permits if discharges “cause or contribute to a
11 violation of water quality standards,” Salmonid Recovery Plan at 387, and the need to control
12 nonpoint source pollution and stormwater discharges, *id.* at 388 - 391. However, NMFS
13 concludes that “there are questions about whether permit requirements and standards are
14 sufficient to protect the habitat and wildlife.” Orca Recovery Plan at II-99. Finally, NMFS
15 writes that “there are several compelling reasons to link our clean water and salmon recovery
16 efforts to the extent possible within the legal authority granted under each Act.” Salmonid
17 Recovery Plan at 393.

21 **Section 7 History Regarding Washington Water Quality Standards**

22 58. EPA has never, to NWEA’s knowledge, consulted with the Services regarding its
23 1993 approval of Washington’s toxics standards that include criteria for the protection of aquatic
24 life. All of these 20-year-old criteria remain in effect. Likewise, in 1998, 2005, 2007, and 2008,
25 EPA took approval actions on new and revised provisions of Washington’s water quality
26

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

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

5 60. On November 25, 1992, Ecology completed new and revised water quality
6 standards that included adoption of aquatic life criteria recommended by EPA such that, while
7 Washington was *included* in the subsequent National Toxics Rule promulgated by EPA due to its
8 failure to adopt human health criteria, it was largely *excluded* from EPA's National Toxics Rule
9 for aquatic life. With notably few exceptions, Ecology has failed to update its aquatic life criteria
10 in the ensuing 20 years and EPA has taken no action to ensure their adequacy. At the time of
11 EPA's approval action in 1993 no aquatic species were listed as threatened or endangered under
12 the ESA. Subsequently, numerous species have been listed, including salmonids in Puget Sound
13 and the Columbia River Basin, along with marine mammals and bull trout. EPA has not
14 consulted on its approval of Washington's aquatic life criteria for toxics.
15

16 61. On February 6, 1998, EPA approved, *inter alia*, the following new or revised
17 Washington standards subject to completion of ESA consultation: general water use and criteria
18 classes, lake nutrient criteria, ammonia criteria, chronic marine cyanide criteria for waters in
19 Puget Sound, conversion factors for metals, and chronic marine copper criterion, general
20 considerations (fresh/salt water boundaries, fish passage, total dissolved gas, wetlands), specific
21 classifications, and provisions for short-term modifications (as modified by a subsequent
22 rulemaking).
23

24 62. On July 28 or August 1, 2003, Ecology submitted to EPA for its approval new or
25 revised water quality standards. The standards represented a change from a classification-based
26

1 to a use-based approach for freshwater uses and criteria and included, as well, use designations
2 for aquatic life, criteria (lake nutrients, toxics narrative, temperature, dissolved oxygen,
3 ammonia), antidegradation, and general policy procedures for variances, offsets, UAAs, and site-
4 specific criteria development. On January 12, 2005, EPA approved certain aspects of these water
5 quality standards (uses, procedures, lake nutrients, and toxics narrative). Subsequently, on
6 February 10, 2005, EPA concluded that the compliance schedule provision for hydroelectric
7 dams was not a water quality standard and, on March 22, 2006, issued a partial disapproval of
8 designated uses and temperature criteria. A subsequent Ecology submission on December 8, 2006
9 responding primarily to the partial disapproval (and including, *inter alia*, use definitions and
10 designations, temperature criteria, ammonia criteria) resulted in an EPA approval on February 11,
11 2008. By a final Biological Assessment dated April 10, 2007, EPA consulted with the Services
12 on its 2005 partial approval (with the exception of the variance procedure) and its 2008 full
13 approval (with certain exceptions) and the ensuing Biological Opinion of February 5, 2008
14 became the basis for some, but not all, of EPA's 2005 and 2008 approval actions.
15

16
17 63. Specifically, in this Biological Assessment, EPA did not consult on certain new or
18 revised standards, including provisions for variances, UAA, and site-specific criteria because it
19 determined the provisions would have no effect on ESA-listed species until they were applied, at
20 which time EPA would — theoretically — consult on its approval of specific actions. *See*
21 January 12, 2005 EPA Letter to Ecology. Likewise, EPA did not consult on matters pertaining to
22 human health, such as bacteria. EPA offered no reason, however, for failing to consult on other
23 provisions it approved in 2005, 2007, or 2008 that remained from Ecology's earlier submissions,
24 including revisions to Washington's rules on metals conversion factors (Water Effects Ratio).
25
26 Once again, EPA did not consult on its approvals of Washington's revised ammonia criteria. In

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

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

16 65. On February 11, 2008, EPA approved various natural conditions criteria
17 provisions pertaining to temperature and dissolved oxygen including general provisions that
18 allow purportedly "natural" conditions of temperature and dissolved oxygen to supersede
19 otherwise applicable numeric criteria or establish the basis for such criteria. These provisions are
20 as follows: WAC 173-201A-200 (1)(c)(i) (natural temperatures supersede numeric criteria);
21 WAC 173-201A-200 (1)(c)(v) (natural temperatures establish lake criteria); WAC 173-201A-
22 200(1)(d)(i) (natural dissolved oxygen supersedes numeric criteria); WAC 173-201A-
23 200(1)(d)(ii) (natural dissolved oxygen establishes lake criteria); WAC 173-201A-210(1)(c)(i)
24 (natural temperatures supersede numeric criteria); WAC 173-201A-210(1)(c)(ii) (natural
25 temperatures supersede numeric criteria); WAC 173-201A-210(1)(d)(i) (natural dissolved oxygen
26 temperatures supersede numeric criteria); WAC 173-201A-210(1)(d)(ii) (natural dissolved oxygen

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

3 66. In addition, in its 2008 approval action, EPA approved a purportedly “interim”
4 dissolved oxygen criteria on the basis that Ecology would complete an evaluation and further
5 rulemaking to ensure they were protective of salmonid embryo development and fry emergence.
6 Ecology has not updated the “interim” criteria, which have now been in place for six years and
7 EPA has failed to reinitiate consultation despite these criteria having become a *de facto*
8 permanent standard.
9

10 67. Subsequent to EPA’s 2008 approval action, on March 18, 2010, NMFS listed as
11 threatened under the ESA the southern DPS of Pacific eulachon (*Thaleichthys pacificus*),
12 commonly known as smelt. *See* 75 Fed. Reg. 13012 (Mar. 18, 2010). On October 20, 2011,
13 NMFS published a final rule designating critical habitat in Washington for the southern DPS of
14 Pacific eulachon. 76 Fed. Reg. 65,324 (Oct. 20, 2011); *see also* 50 C.F.R. § 226.222. The 10
15 critical habitat areas in Washington are: Lower Columbia River, Grays River, Skamokawa Creek,
16 Elochoman River, Cowlitz River, Toutle River, Kalama River, Lewis River, Quinault River, and
17 Elwha River. *See* 50 C.F.R. § 226.222. To the best of NWEA’s knowledge, EPA did not
18 reinitiate ESA consultation with NMFS regarding its 2008 approval based on the subsequent
19 eulachon listing or designation of eulachon critical habitat in Washington.
20

21 68. Likewise, to NWEA’s knowledge, EPA did not consult with FWS on the 2008
22 approval. Subsequent to that action, FWS issued a final rule designating critical habitat for bull
23 trout, which represented a substantial revision from its 2005 critical habitat designations.
24 Specifically, in the 2005 rule, 70 Fed. Reg. 56,212 (Sept. 26, 2005), FWS designated
25 approximately 3,828 miles of streams, but in the 2010 final revised designation, FWS increased
26

1 the critical habitat designated to 19,729 miles of streams, including 754 miles of marine shoreline
 2 on the Olympic Peninsula and Puget Sound and 152.4 miles of streams in the Jarbidge River
 3 basin that had previously been entirely omitted. *See* 75 Fed. Reg. 63,898 (Oct. 18, 2010).
 4 Likewise, in the 2005 rule, FWS designated 143,218 acres of lakes in Idaho, Montana, Oregon,
 5 and Washington: a surface area that FWS increased to 488,251.7 acres of reservoirs and lakes in
 6 the 2010 rule. *Id.*; *see also* 50 C.F.R. § 17.95-e (Part 4). To the best of NWEA's knowledge,
 7 EPA did not reinitiate ESA consultation with FWS regarding the 2008 approval based on the
 8 designation of bull trout critical habitat in Washington.
 9

10 69. On May 14, 2008, EPA approved 2003 revisions to Washington's standards that
 11 provided for exemptions from turbidity criteria that it had previously determined in its February
 12 11, 2008 action were not water quality standards. EPA revised its determination to approve the
 13 revised standards as "editorial" despite Ecology's having substantively changed the standards.
 14

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

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

18 71. On February 11, 2008, EPA approved new and revised standards submitted by
 19 Washington on July 28 or August 1, 2003, and December 8, 2006. EPA also failed to act on
 20 portions of these submitted standards. Specifically, EPA failed to take any action on the
 21 following water quality standards and rules that have the effect of altering otherwise applicable
 22 water quality standards: provisions limiting the allowable increase in temperature from nonpoint
 23 sources (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B)); so-called Short
 24 Term Modifications (WAC 173-210A-410); exemption from criteria based on unconditional
 25 shellfish harvest determinations (WAC 173-201A-210(2)(b)(i)); averaging periods for bacteria
 26

1 (WAC 173-201A-210(2)(b)(ii) and 173-201A-210(3)(b)(i)); guidelines on mixing zones and
 2 thermal plumes (WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v)); a provision
 3 that allows both temporary and permanent loss of existing uses (WAC 173-201A-300(3)); a
 4 provision that allows compliance schedules for dams (WAC 173-201A-510(5)); water quality
 5 offsets (WAC 173-201A-450); and aspects of Washington's antidegradation policy and
 6 implementation methods, including WAC 173-201A-300(3) and WAC 173-201A-330(4).
 7

8 72. On February 22, 2013, Ecology adopted revisions to its Sediment Management
 9 Standards ("SMS"), Chapter 173-204 WAC, and submitted them to EPA with a request that EPA
 10 concur that the revisions to Part V of the SMS that establish sediment clean-up standards for the
 11 protection of aquatic life and human health are no longer water quality standards requiring EPA
 12 action pursuant to CWA section 303(c). EPA previously approved the entire SMS rule as water
 13 quality standards in 1991. EPA has neither approved nor disapproved certain provisions of the
 14 revised SMS rules within the statutory deadlines.
 15

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))

17 73. Plaintiff NWEA realleges all preceding paragraphs.
 18

19 74. Section 7(a)(2) of the ESA requires agencies to insure that their actions do not
 20 jeopardize the continued existence of listed species or adversely modify critical habitat. 16
 21 U.S.C. § 1536(a)(2).
 22

23 75. To fulfill their duty under section 7(a)(2), agencies must assess whether actions
 24 they take "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a).
 25
 26

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

5 77. The Services have listed numerous species present in Washington and designated
6 various portions of their ranges as critical habitat. For example, NMFS has listed as threatened
7 several species of salmonids in the Puget Sound and the Columbia River Basin, marine turtles
8 and fish in the Puget Sound, and marine mammals such as the Southern Resident killer whale.
9 The FWS has listed bull trout as threatened and designated critical habitat along sections of
10 19,729 miles of streams in the Columbia River and Snake River basins.

11 78. Washington submitted standards for the protection of aquatic life from toxics to
12 EPA for review in 1992, and has subsequently submitted various new and revised toxics
13 standards to EPA.
14

15 79. EPA never initiated ESA consultation on at least the following of its actions, some
16 of which were subsequently amended:
17

- 18 a) 1993 approval of Washington's aquatic life criteria and related provisions for
19 toxics;
20 b) 1998 approval of the following standards: lake nutrient narrative standards, marine
21 cyanide criteria for waters in Puget Sound, use of conversion factors for metals,
22 and marine copper criterion;
23 c) January 12, 2005 approval of provisions for variances, use-attainability analysis
24 (UAA), site-specific criteria, ammonia criteria;
25 d) May 2, 2007 approval of antidegradation provisions;
26

- 1 e) May 23, 2007 approval of marine chronic cyanide outside Puget Sound; and
2 f) February 11, 2008 approval of use of metals conversion factors, and ammonia
3 criteria.

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

7 81. EPA's approvals of the revisions to Washington's water quality standards and
8 general policies are ongoing agency actions over which EPA continues to have discretionary control
9 under ESA section 7(a)(2). *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal. v. EPA*,
10 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

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

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

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

1 information reveals that the action may have effects not previously considered; (3) the action is
2 modified in a way not previously considered; or (4) a new species is listed or critical habitat
3 designated that may be affected by the identified action. 50 C.F.R. § 402.16.

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

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

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

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

16 **THIRD CLAIM FOR RELIEF: CWA VIOLATIONS**

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

19 92. Plaintiff NWEA realleges all preceding paragraphs.

20 93. States must submit any new or revised water quality standard to EPA for review.
21 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20(c). EPA has a mandatory duty to review submitted
22 standards and general policies to determine whether the standards meet the requirements of the
23 CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(b).
24
25
26

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

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

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

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

- 14 a) provisions limiting the allowable increase in temperature from nonpoint sources
15 (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B));
16 b) so-called Short Term Modifications (WAC 173-210A-410);
17 c) an exemption from criteria based on unconditional shellfish harvest determinations
18 (WAC 173-201A-210(2)(b)(i));
19 d) averaging periods for bacteria (WAC 173-201A-210(2)(b)(ii) and 173-201A-
20 210(3)(b)(i));
21 e) guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii)
22 and WAC 173-201A-210(1)(c)(v));
23
24
25
26

- 1 f) a provision that allows both temporary and permanent loss of existing uses (WAC
2 173-201A-300(3));
3 g) a provision that allows compliance schedules for dams (WAC 173-201A-510(5));
4 h) water quality offsets (WAC 173-201A-450);
5 i) aspects of Washington's antidegradation policy and implementation methods,
6 including WAC 173-201A-300(3) and WAC 173-201A-330(4); and
7 j) 2013 revisions to SMS, which establish sediment clean-up standards for the
8 protection of aquatic life and human health, WAC 173-204, Part V.

9
10 98. By failing review and act upon these state water quality standards, EPA in in
11 violation of its mandatory duties pursuant to CWA section 303(c)(3), 33 U.S.C. § 1313(c), and
12 EPA regulations.

13
14 **FOURTH (ALTERNATIVE) CLAIM FOR RELIEF**

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

17 99. Plaintiff NWEA realleges all preceding paragraphs.

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

19 101. States must submit any new or revised water quality standard to EPA for review.
20 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20(c). EPA has a mandatory duty to review submitted
21 standards and general policies to determine that the standards meet the requirements of the CWA.
22 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(b).

23 102. EPA must approve or deny any new or revised standards submitted by a state. If
24 EPA approves of a standard, it must notify the state within 60 days of its decision. 33 U.S.C. §
25 1313(c)(3). If EPA determines a standard is inconsistent with the CWA's requirements, EPA
26

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

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

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

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

- 11
- 12 a) provisions limiting the allowable increase in temperature from nonpoint sources
13 (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B));
 - 14 b) so-called Short Term Modifications (WAC 173-210A-410);
 - 15 c) an exemption from criteria based on unconditional shellfish harvest determinations
16 (WAC 173-201A-210(2)(b)(i));
 - 17 d) averaging periods for bacteria (WAC 173-201A-210(2)(b)(ii) and 173-201A-
18 210(3)(b)(i));
 - 19 e) guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii)
20 and WAC 173-201A-210(1)(c)(v));
 - 21 f) a provision that allows both temporary and permanent loss of existing uses (WAC
22 173-201A-300(3));
 - 23 g) a provision that allows compliance schedules for dams (WAC 173-201A-510(5));
 - 24 h) water quality offsets (WAC 173-201A-450);
- 25
26

- 1 i) aspects of Washington’s antidegradation policy and implementation methods,
2 including WAC 173-201A-300(3) and WAC 173-201A-330(4); and
3 j) 2013 revisions to SMS, which establish sediment clean-up standards for the
4 protection of aquatic life and human health, WAC 173-204, Part V.
5

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

9 **FIFTH CLAIM FOR RELIEF: APA**

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

12 107. Water quality criteria must be set at a level necessary to protect the designated
13 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,
14 Subpart B.

15 108. Criteria “must be based on sound scientific rationale and must contain sufficient
16 parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a)(1).
17

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

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

22 111. Narrative criteria may not “supplant[] otherwise lawful water quality standards”
23 without CWA section 303(c) review. *See Nw. Entvl. Advocates v. U.S. E.P.A.*, 855 F.Supp.2d
24 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).

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;

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

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

4 DATED this 10th day of February, 2014.

5 Respectfully submitted,

6 BRICKLIN & NEWMAN, LLP

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17 *Local Counsel for Plaintiff NWEA*

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20 By: s/ Kevin Cassidy

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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
(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
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
2 U.S. Government Defendant
3 Federal Question
4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
REAL PROPERTY
TORTS
CIVIL RIGHTS
PRISONER PETITIONS
FORFEITURE/PENALTY
LABOR
IMMIGRATION
BANKRUPTCY
SOCIAL SECURITY
FEDERAL TAX SUITS
OTHER 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
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:

Bryan Telegin 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



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

Kevin Cassidy
Staff Attorney

Notice Regarding ESA and CWA Violations Relating to Washington Water Quality Standards

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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

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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).

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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,

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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*

Notice Regarding ESA and CWA Violations Relating to Washington Water Quality Standards

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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

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February 26, 2013

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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:

Nina Bell, Executive Director
Northwest Environmental Advocates

Notice Regarding ESA and CWA Violations Relating to Washington Water Quality Standards
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The attorneys representing the party in 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



November 1, 2013

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

Sally Jewell, Secretary of the Interior
U.S. Department of the Interior
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Robyn Thorson, Regional Director
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Pacific Region
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Portland, OR 97232

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

Dear Mses. and Messrs:

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

Specifically, on February 11, 2008, EPA approved various natural conditions criteria (NCC) provisions pertaining to temperature and DO (hereinafter "2008 Approval Action"). Although EPA consulted with the National Marine Fisheries Service (NMFS) regarding the 2008 Approval Action, EPA failed to reinstate 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 reinstate ESA consultation on Washington's purportedly "interim" DO standard, included in the 2008 Approval Action, after the Washington Department of Ecology (Ecology) completed a DO study in 2009 and subsequently failed to update the "interim" DO criteria.

Kevin Cassidy
Staff Attorney

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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.

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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

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.

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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

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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

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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.

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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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The attorneys representing the parties in this notice are:

Allison LaPlante (OSB No. 023614)
Kevin Cassidy (OSB No. 025296)
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Earthrise Law Center at
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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,

A handwritten signature in blue ink, appearing to be 'Kevin Cassidy', is written over the word 'Sincerely,'.

Kevin Cassidy
Allison LaPlante

Staff Attorneys

cc: Maia Bellon, Director
Washington Department of Ecology

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