

## SETTLEMENT AGREEMENT

WHEREAS, Plaintiff Northwest Environmental Advocates (“NWEA”) filed civil action no. 3:15-cv-00663-BR in the U.S. District Court, District of Oregon, Portland Division (“Court”), on April 20, 2015, against Federal Defendants United States Environmental Protection Agency (“EPA”) and Gina McCarthy, in her official capacity as Administrator of the EPA, alleging violations of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 et seq., and seeking declaratory and injunctive relief, and attorneys’ fees and costs;

WHEREAS, pursuant to 33 U.S.C. § 1313(c)(3) and 40 C.F.R. §§ 131.5, 131.13, and 131.21(b), EPA is directed to review state-submitted water quality standards to determine whether the standards meet the requirements of the CWA;

WHEREAS, pursuant to 33 U.S.C. § 1313(c)(3), if EPA determines that such standard is not consistent with the requirements of the CWA, within 90 days of the state’s submission, EPA must notify the state and specify the changes to meet such requirements;

WHEREAS, pursuant to 33 U.S.C. § 1313(c)(3), if such changes are not adopted by the state within 90 days after the date of notification, the Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved;

WHEREAS, on July 8, 2004, Oregon submitted new and revised water quality criteria for aquatic life to the EPA for review and approval. Among these were revised acute and chronic freshwater aquatic life criteria for ammonia (“ammonia criteria”), cadmium (“cadmium criteria”), and copper (“copper criteria”), and new acute and chronic freshwater aquatic life criteria for aluminum (“aluminum criteria”);

WHEREAS, by letter dated January 31, 2013, EPA disapproved Oregon’s 2004 submission of its aluminum criteria, its ammonia criteria, its acute cadmium criterion, and its copper criteria;

WHEREAS, on January 7, 2015, Oregon adopted revisions to its ammonia criteria and EPA approved these criteria on August 4, 2015;

WHEREAS, Oregon has not adopted revisions to its aluminum criteria, its acute cadmium criterion, or its copper criteria to address EPA’s January 31, 2013 disapproval of these criteria;

WHEREAS, EPA has not proposed aluminum criteria since its January 31, 2013 disapprovals but signed a proposal for copper criteria and acute cadmium criterion on March 31, 2016;

WHEREAS, EPA and NWEA contemplate settling NWEA’s claims by requesting the Court to enter a Consent Decree (“Consent Decree,” attached as an exhibit to this agreement)

setting forth a schedule for EPA to take action to resolve its January 31, 2013 disapproval of Oregon's 2004 submission of aluminum criteria, acute cadmium criterion, and copper criteria;

WHEREAS, the acute freshwater aquatic life criterion for cadmium and the acute and chronic freshwater aquatic life copper criteria currently applicable in the State of Oregon are currently over 20 years old;

WHEREAS, on August 14, 2012, the National Marine Fisheries Service issued a biological opinion pursuant to the Endangered Species Act, finding that EPA's proposed approval of Oregon's 2004 acute cadmium criterion and copper freshwater aquatic life criteria is likely to jeopardize the continued existence of 18 endangered species and will result in the adverse modification of designated critical habitat for 16 endangered species, and acknowledging that EPA withdrew Oregon's 2004 aluminum criteria from consultation;

WHEREAS, there are currently no acute or chronic numeric aquatic life criteria for aluminum in effect for Oregon;

WHEREAS, NWEA has expressed concerns about the protectiveness of existing Oregon water quality standards during the interim period when EPA will be discharging its obligations under the Consent Decree;

WHEREAS, EPA and NWEA agree that certain further EPA commitments, not part of the Consent Decree, are also just and fair, in the public interest, and will allow the parties to proceed to finalizing the Consent Decree, thereby avoiding unnecessary litigation;

NOW, THEREFORE, NWEA and EPA agree as follows:

## **I. ACTIONS BY EPA**

### **1. DATA DEVELOPMENT FOR USE IN COPPER BLM**

EPA commits to sending a letter to the Oregon Department of Environmental Quality (DEQ), no later than 7 days after the Court enters the Consent Decree, that contains the following:

- a. A discussion of EPA's rulemaking plans for copper criteria in Oregon.
- b. A discussion of the data that are needed to generate scientifically defensible criteria when using EPA's copper biotic ligand model (BLM).
- c. EPA's recommendations regarding the development and collection of such data.
- d. A discussion of the potential application of the BLM in Oregon in the absence of such data.

- e. A discussion of the value of having site-specific data available for Oregon waters, for use in the BLM.
- f. EPA's recommendation that DEQ forward the letter to all permittees that are likely to have a detectable level of copper in their effluent discharge.
- g. EPA's recommendation that until new numeric copper criteria have been approved or promulgated by EPA for waters in Oregon, NPDES permit writers in Oregon determine whether reasonable potential exists for a proposed discharge of copper to cause or contribute to an excursion of Oregon's narrative criterion for toxic substances (OAR 340-041-0033(1)) and, if so, develop numeric effluent limitations for copper based upon the narrative criterion. The letter shall include a description of how EPA recommends DEQ should make this determination.
- h. EPA's recommendation that DEQ increase the transparency of the permit development process by making permit applications and any supplemental data used in permit development publically available on the Permit Search webpage or with the public notice of each draft permit. The letter will also include a recommendation that the data and analysis used to determine the reasonable potential to exceed copper criteria and the development of permit limitations be included in the permit fact sheet. This data and analysis recommendation is also a finding and action item in EPA's January 2016 draft report concerning EPA's Permit Quality Review of Oregon's permitting program.
- i. Given DEQ's permit backlog and age of applications, EPA will recommend that DEQ require an updated application where:
  - (i) the existing application was submitted more than 5 years before public notice of the draft permit, or
  - (ii) DEQ has knowledge of significant changes in understanding of receiving water or effluent quality with regard to copper.
- j. A reminder to DEQ of the requirements in 40 C.F.R. § 122.21(e)(3) and 40 C.F.R. § 122.44(i)(1)(iv) that, where available, EPA-approved analytical methods used for permit applications and for monitoring required in NPDES permits must be sufficiently sensitive to detect and quantify copper in effluent at levels that:
  - (i) enable DEQ to conduct a 'reasonable potential' determination (including a determination based on Oregon's narrative toxics criterion under paragraph (g), above) and, if necessary, establish water quality based effluent limitations for copper; and

(ii) assess compliance with the copper effluent limitations. See 79 Fed. Reg. at 49,003-04 (Aug. 19, 2014).

- k. EPA's recommendation that sufficiently sensitive analytical methods should also be used to determine the background concentration of copper in the receiving water.

## 2. INTERIM RECOMMENDATIONS REGARDING ALUMINUM

EPA commits to sending a letter to the Oregon Department of Environmental Quality, no later than 7 days after the Court enters the Consent Decree, that contains the following:

- a. EPA's recommendation that until numeric aluminum criteria are applicable in Oregon, the Oregon permitting authority include aluminum monitoring requirements and specific reopener clauses for the following types of NPDES permits:
  - (i) all major municipal wastewater treatment facilities that may receive indirect discharges of aluminum into the treatment system or use aluminum sulfate, and
  - (ii) all industrial permits that may have aluminum as a constituent of their effluent discharge.
- b. EPA's recommendation that in the monitoring described under a., aluminum data be collected for the effluent and the receiving water upstream of the effluent discharge.
- c. EPA's recommendation that in the monitoring described under a., that pH and hardness data be collected for the receiving water downstream of complete mix of the effluent and receiving water.
- d. EPA's recommendation that until numeric aluminum criteria are applicable in Oregon, NPDES permit writers in Oregon determine whether reasonable potential exists for a proposed discharge of aluminum to cause or contribute to an excursion of Oregon's narrative criterion for toxic substances (OAR 340-041-0033(1)) and, if so, develop numeric effluent limitations for aluminum based upon the narrative criterion. The letter shall include a description of how EPA recommends Oregon should make this determination.

## 3. OVERSIGHT WHILE EPA ACTION ON COPPER AND CADMIUM CRITERIA IS PENDING

Until EPA discharges its obligations under Section III.4 of the Consent Decree:

- a. EPA commits to screen every major draft NPDES permit that Oregon submits for public notice.
- b. EPA commits to screen every draft Oregon NPDES permit presented to EPA by any person with sufficient supporting information to show the permit may require water quality based effluent limitations for cadmium or copper.
- c. EPA commits to identify those permits from I.3.a or I.3.b. that EPA determines may require water quality based effluent limitations for cadmium or copper.
- d. EPA commits to completing a technical review of draft NPDES permits identified in I.3.c. and to submit written comments to Oregon on those draft NPDES permits, specifically identifying elements of the draft permits that EPA believes could be the basis for an EPA objection to the extent EPA's technical review identifies any such elements.
- e. Regarding the permits identified in I.3.c., to the extent that EPA's comments on draft NPDES permits under I.3.d. identify inconsistencies with the requirements of the NPDES program, EPA commits to review the proposed final NPDES permit prior to issuance and to consider whether its comments were sufficiently addressed.

#### 4. OVERSIGHT WHILE EPA ACTION ON ALUMINUM CRITERIA IS PENDING

Until EPA discharges its obligations under Section III.5 of the Consent Decree:

- a. EPA commits to screen every major draft NPDES permit that Oregon submits for public notice.
- b. EPA commits to screen every draft Oregon NPDES permit presented to EPA by any person with sufficient supporting information to show the permit may require water quality based effluent limitations for aluminum.
- c. EPA commits to identify those permits from I.4.a or I.4.b. that EPA determines may require water quality based effluent limitations for aluminum.
- d. EPA commits to completing a technical review of draft NPDES permits identified in I.4.c and to submit written comments to Oregon on those draft NPDES permits, specifically identifying elements of the draft permits that EPA believes could be the basis for an EPA objection to the extent EPA's technical review identifies any such elements.
- e. Regarding the permits identified in I.4.c., to the extent that EPA's comments on draft NPDES permits under I.4.d identified inconsistencies with the requirements of the NPDES program, EPA commits to review the proposed

final NPDES permit prior to issuance and to consider whether its comments were sufficiently addressed.

## II. GENERAL PROVISIONS

1. Effective Date. This Settlement Agreement shall become effective upon execution by the Parties and entry of the Consent Decree by the Court. If for any reason the District Court does not enter the Consent Decree, the obligations set forth in this Settlement Agreement are null and void.
2. Execution in Counterparts. The Agreement may be executed in one or more counterparts which, taken together, shall be deemed to constitute one and the same document.
3. Authority to Sign. The undersigned are authorized to execute this Agreement on behalf of their respective Parties and have read, understood, and agreed to all of the terms and conditions of this Agreement.
4. Facsimile or Email Signatures. The Parties' signatures to this Agreement transmitted by facsimile or email shall be deemed binding.
5. Integrated Settlement Agreement. All agreements, covenants, representations and warranties, express or implied, oral or written, of the Parties concerning the subject matter of this Agreement are contained herein.
6. Modification. Any term set forth in this Agreement (including deadlines and other terms) may be modified by written agreement of the Parties.
7. Severability. If any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.
8. Construction. The language in all parts of this Agreement, unless otherwise stated, shall be construed according to its plain and ordinary meaning and, because the Agreement was drafted jointly, shall not be construed to favor either party.
9. Governing Law. This Agreement shall be governed by and construed under federal law.
10. Third-Party Beneficiaries. Nothing in this Agreement shall be construed to make any other person or entity not executing this Agreement a third-party beneficiary to this Agreement.
11. No Admission of Law or Fact. Nothing in this Agreement shall constitute an admission of fact or law by any Party. This Agreement shall not be used or admitted in any proceeding against a Party over the objection of that Party.
12. No Limitation on Exercise of Discretion. Nothing in the terms of this Agreement shall be construed to affect the rights of the United States as against persons not parties to

this Agreement, or to limit or modify the discretion accorded to EPA by the CWA, the APA, or by any general principles of federal administrative or common law.

13. Reservation of Rights. Nothing in this Agreement shall be construed to waive or limit the rights of NWEA to enforce the terms of the proposed Consent Decree or to bring a separate action or suit challenging any final EPA action taken pursuant to the Consent Decree or this Settlement Agreement.
14. Anti-Deficiency. Any obligations of the United States to expend funds under this Agreement are subject to the availability of funds appropriated for such purpose. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.
15. Force Majeure. No Party shall be considered to be in default in the performance of any of its obligations under this Agreement when performance is delayed or prevented due to circumstances beyond the Party's control, or when failure to perform is materially contributed to by circumstances beyond the Party's control, including without limitation any Force Majeure event, including any act of God, war, fire, earthquake, windstorm, flood or natural catastrophe; civil disturbance, vandalism, sabotage or terrorism; restraint by court order or public authority; ) an environmental disaster that would require EPA employees to divert resources away from the project; or interruption in the regular appropriation of government funds, including a government shutdown. Any Party seeking to rely upon this paragraph shall have the burden of establishing that it could not reasonably have been expected to avoid, and which by exercise of due diligence has been unable to overcome, the failure of performance.
16. Dispute Resolution. In the event that NWEA or EPA believes that any party to this Agreement has failed to comply with any term or condition of this Agreement, or in the event that there is any dispute or controversy about any part of this Agreement, the Parties shall use their best efforts to settle and resolve the controversy. To that end, the party raising the dispute shall commence an informal dispute resolution period to be no shorter than thirty (30) days, by giving written notice to the other party stating the nature of the matter to be resolved and the position of the party asserting the controversy. The Parties shall consult and negotiate with each other in good faith and, recognizing their mutual interests in the ongoing integrity of this Agreement, attempt to reach a just and equitable solution satisfactory to all Parties. If, after implementation of the informal dispute resolution process in this Paragraph, NWEA contends that EPA has not performed the obligations established in Part I of this Agreement, NWEA's sole judicial remedy will be to challenge EPA's actions taken pursuant to Part I of the Agreement in a new action or actions.
17. Delivery or Notice of Documents. Any notices or other documents required or provided for by this Agreement or related thereto that are to be provided to any of the Parties pursuant to this Agreement shall be sent by facsimile, e-mail transmission, or first-class mail to each of the following representatives of the Parties.

For NWEA:

James N. Saul  
Allison LaPlante  
Earthrise Law Center at Lewis & Clark Law School  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219

For EPA:

Chief, Environmental Defense Section  
United States Department of Justice  
Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044

Alexander Fidis  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
1200 Sixth Ave, Suite 900  
M/S ORC-113  
Seattle, WA 98101

Associate General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel, 2355A  
1200 Pennsylvania Avenue, NW  
MC 2333-A  
Washington, DC 20460

Notice shall be deemed to be given and received on the date received by facsimile or e-mail transmission, if such notice is given by facsimile or e-mail transmission to all recipients between 9:00 a.m. and 5:00 p.m. Eastern Standard Time or Eastern Daylight Time, as applicable, on a business weekday. If notice is given by facsimile or e-mail transmission after 5:00 p.m. on a weekday or on a weekend day, notice shall be deemed received on the next business weekday.

For Northwest Environmental Advocates:

Date: May 31, 2016

s/ James N. Saul  
James N. Saul  
Allison LaPlante  
Earthrise Law Center at Lewis & Clark Law School



10015 S.W. Terwilliger Blvd.  
Portland, OR 97219  
(503) 768-6929

For United States Environmental Protection Agency:

John C. Cruden  
Assistant Attorney General  
Environment & Natural Resources Division

Date: May 25, 2016

s/ Kent E. Hanson  
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Kent E. Hanson  
United States Department of Justice  
Environment & Natural Resources Division  
Environmental Defense Section  
P.O. Box 7611  
Washington, DC 20044  
(206) 639-5544