

November 29, 2012

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Re: **Notice of Intent to Sue NMFS and FWS for Unreasonable Delay in Completing a Biological Opinion for EPA Action on Idaho Water Quality Standards for Toxic Pollutants**

Dear Mses. and Messrs:

On behalf of Northwest Environmental Advocates ("NWEA"), this letter provides notice of intent to sue the National Marine Fisheries Services ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") (together the "Services") under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, for unlawfully withholding or unreasonably delaying completion of Endangered Species Act ("ESA") consultation on the U.S. Environmental Protection Agency's ("EPA") completed and pending actions under the Clean Water Act ("CWA") on certain new or revised water quality standards for toxic pollutants for the protection of aquatic life and human health submitted to EPA by the State of Idaho. The Services have not complied with their nondiscretionary duty to consult with EPA under ESA section 7 and produce a final biological opinion ("BiOp") or to produce a final biological opinion within a reasonable period of time. Sections 7(b)(1)(A) and (b)(3)(A) of the ESA grant the Services discretion as to the timeframe for producing a biological opinion, but the APA requires reasonable timeliness once an obligation to produce a BiOp attaches. Because any legal right of action would be brought pursuant to the APA, not pursuant to the ESA citizen suit provision, notice of intent to sue is not

Allison LaPlante
Staff Attorney and Clinical Professor

required. NWEA provides this notice as a courtesy, however, and is willing to forgo commencement of any action for 60 days from the date of this letter.

NWEA is concerned about the harm caused by the Services' unreasonable delay in issuing BiOps to the numerous ESA-listed species that are likely to be adversely affected by the levels of toxic contaminants allowed by the Idaho water quality standards submitted to EPA in 1994 and subsequent to that date, for which EPA has developed and submitted to the Services a biological assessment ("BA"). Additionally, the Services' unreasonable delay in issuing the BiOps harms the interests of NWEA 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 conditional action more than 16 years ago are being used without the benefits of completed ESA section 7 consultation.

I. Factual Background

IDEQ completed its 1992-94 triennial review of water quality standards on June 24, 1994. The standards included aquatic life criteria for arsenic, cadmium, copper, cyanide, endosulfan, lead, mercury, selenium, zinc, aldrin/dieldrin, chlordane, chromium (III) chromium (VI), DDT, endrin, heptachlor, lindane (gamma-BHC), nickel, PCBs, pentachlorophenol, silver, and toxaphene, as well as changes and additions to Idaho's water quality standards for conventional pollutants, narrative criteria, designated beneficial uses, antidegradation, mixing zone policies, and variance policies. IDEQ submitted its revised standards for action to EPA Region 10 in July 1994. On June 25, 1996, EPA took action on IDEQ's submission, both approving, *inter alia*, the Idaho toxic criteria, conventional criteria, antidegradation policy, variance policy, designated beneficial uses, narrative criteria, mixing zone policy, and disapproving various provisions, and stating that its approval was subject to completion of ESA section 7 consultation. On July 9, 1996, EPA sent a BA to the Services regarding the aquatic life criteria for toxics and some other aspects of the standards it had approved. Subsequently, on December 20, 1999, January 7, 2000, and again on August 9, 2000, EPA revised its BA but only for the aquatic life criteria for toxics.

On March 31, 1997, IDEQ submitted additional revisions to its water quality standards to EPA for action, moving from total to dissolved fraction for aquatic life metals criteria. On May 27, 1997, EPA approved Idaho's revised numeric criteria for toxics and its antidegradation policy. The aforementioned revisions to the 1996 BA addressed the change to the toxic criteria but not to the antidegradation policy. On August 8, 2005, IDEQ submitted proposed revisions to human health and aquatic life criteria for nine toxic pollutants and the removal of mercury criteria. On September 30, 2005, EPA approved IDEQ's revised numeric aquatic life criteria for toxic pollutants "subject to the results of consultation under Section 7(a)(2) of the Endangered Species Act" thereby "retain[ing] its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA." The standards approved by EPA included human health criteria for antimony, methylmercury, and zinc and aquatic life criteria for arsenic, cadmium, chromium III, chromium VI, nickel, and zinc. At least two of these aquatic life criteria, nickel and zinc, are pollutants that are the subject of EPA's earlier ESA consultation for which the Services have not yet completed BiOps. On December 12, 2008, EPA disapproved IDEQ's proposed removal of chronic and acute aquatic life criteria for mercury. On

the date of the last day of the 2010 Idaho legislative session, Idaho adopted revisions to two additional criteria, a revision of the human health criterion for arsenic and a revision of the low-end hardness cap for the cadmium aquatic life criteria. EPA approved the arsenic criteria on July 7, 2010 and the cadmium criteria on March 7, 2011. EPA submitted a BA to the Services concerning the aquatic life criteria for cadmium, for which consultation was completed.

The path of these incomplete consultations has been long and convoluted. On October 21, 1993, in response to its request, EPA received from FWS a list of threatened and endangered species in Idaho. On September 2, 1994, EPA received a species list for Idaho from NMFS. On July 9, 1996, EPA transmitted a BA for all the revisions to Idaho's standards to the Services and requested concurrence under informal consultation. On August 14, 1996, FWS wrote EPA stating it did not concur with EPA's determination that the revised standards would not likely adversely affect threatened and endangered species in Idaho. EPA and FWS subsequently agreed to begin formal consultation in September 1996. In 1999, as a result of several meetings between EPA and the Services, it was agreed that two BAs would be developed. The first BA would address Idaho's numeric criteria for toxic contaminants, while the second BA would address all other criteria, standards, general policies, etc. EPA has not prepared or completed this second BA. According to EPA, the agency had not prepared a BA for "numeric criteria for conventional pollutants, narrative criteria, designated beneficial uses, and antidegradation, mixing zone and variance policies." EPA letter 12/20/1999.

For Idaho's numeric criteria for toxic contaminants, EPA sent the Services a final BA and request to initiate formal consultation on December 20, 1999, and January 7, 2000. This BA covered revisions to Idaho's water quality criteria for aquatic life for the following pollutants: arsenic, cadmium, copper, cyanide, endosulfan, lead, mercury, selenium, zinc, aldrin/dieldrin, chlordane, chromium (III), chromium (VI), DDT, endrin, heptachlor, lindane (gamma-BHC), nickel, PCBs, pentachlorophenol, silver, and toxaphene. On May 2, 2000, the Services informed EPA the BA was inadequate. On August 9, 2000, EPA submitted its final revised BA to the Services addressing only the aquatic life toxic criteria and, once again, requested initiation of formal consultation under ESA section 7. The BA concluded that the proposed criteria were "not likely to adversely affect" Snake River sockeye salmon, Snake River spring/summer chinook salmon, Snake River fall chinook salmon, and Snake River steelhead for the criteria associated with the following toxic contaminants: aldrin/dieldrin, chlordane, DDT, endrin, heptachlor, lindane, PCBs, pentachlorophenol (PCP), toxaphene, trivalent and hexavalent chromium, nickel, silver, arsenic, cadmium, copper, cyanide, endosulfan, lead, zinc, and the acute criteria for mercury, and selenium. EPA's BA concluded Idaho's revised numeric criteria were "likely to adversely affect" Snake River sockeye salmon, Snake River spring/summer chinook salmon, Snake River fall chinook salmon, and Snake River steelhead, for the chronic criteria for mercury and selenium.

In July 2002, NMFS completed a "discussion draft BiOp," which proposed findings of jeopardy for several fish species. On July 8, 2002, FWS prepared a draft "Early Alert" titled "Draft Jeopardy/Adverse Modification for Approval of Numeric Criteria for Priority Toxic Pollutants for the State of Idaho." This document concluded that the criteria approved by EPA in 1996 "will not provide sufficient protection for the Snake River aquatic snails, bull trout, Kootenai

River white sturgeon, and Kootenai River white sturgeon habitat.” The document indicates that at that time FWS had prepared draft reasonable and prudent alternatives to “avoid the likelihood of jeopardizing the continued existence of the species.” The Early Alert also stated “it is unknown if EPA will modify their action, or promulgate new criteria.” Additionally, FWS stated “we anticipate the State legislature and Idaho’s Office of Species Conservation will be actively opposed to the Services position on the effects of Idaho’s toxics criteria and any suggestions to develop more restrictive numeric values.” On February 14, 2003, NMFS made its draft BiOp available for agency reviewers. In July 2003, EPA and the Services put the consultation on hold in order to seek consensus on conservation measures by working with Triangle Associates, an alternative dispute resolution contractor. On March 17, 2004, FWS provided EPA with a draft “analysis” document. However, by December 2004, EPA decided to take a “time out” from the process with Triangle Associates, which marked the end of the agencies’ actively working together. In April 2005, EPA provided NMFS with comments on the discussion draft BiOp. Subsequent correspondence between and internal to the agencies indicates that EPA was concerned about possible jeopardy determinations by the Services. For their part, the Services seem unwilling or incapable of completing the BiOps without “consensus” with the action agency. Over the course of the next seven years deadlines and approaches were sporadically proposed, all with no apparent movement or action by the agencies. The Services have not produced final biological opinions on any of EPA’s actions on Idaho’s water quality standards for which EPA has sought consultation.

II. Legal Framework

A. **The Endangered Species Act**

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 “insure” 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 of or destruction of their critical habitat. The end product of the ESA section 7 consultation is a biological opinion 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 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 that

Consultation under subsection (a)(2) with respect to an agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B) [which outlines procedures when an applicant is involved], within such other period of time as is mutually agreeable to the Secretary and the Federal Agency.

In addition, ESA section 7(b)(3)(A) states:

Promptly after conclusion of consultation under (2) and (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and applicant, if any, a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.

Therefore, section 7 requires the Secretary of the Interior and the Secretary of Commerce, who delegated their ESA duties to the Services, to consult with the action agencies and produce a biological opinion.

Additionally, the Services’ section 7 implementing regulations address the Services’ obligations during and after consultation. *See generally* 50 C.F.R. §§ 402.14, 402.16. In particular, the regulations address the Services’ obligation to timely complete consultation, stating: “[f]ormal consultation shall not be initiated until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12 [which addresses biological assessments].” 50 C.F.R. §402.14(c) (initiation of consultation). Further, section 7’s implementing regulations contemplate a limited, defined time frame for completing consultation. *Id.* at 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).

Indeed, the Services recognize that the ESA’s goals, design and plain language do not allow for indefinite consultations. In particular, the Services interpret section 7 to impose a nondiscretionary duty to timely complete a biological opinion in their joint Consultation Handbook, which provides internal guidance and establishes national policy. 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. The Consultation Handbook notes that “[t]he Services ensure the biological opinion, including the incidental take statement, is prepared and delivered within 135 days of initiation of formal consultation.” *Id.* at 4-7. Moreover, the Services interpret the ESA to require the timely completion of consultation:

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.*

Id. (emphasis added). Thus, the Consultation Handbook affirms that the Services themselves do not interpret section 7 as creating unchecked discretion for when and whether the Services will complete consultation.

B. The Administrative Procedure Act

The Administrative Procedure Act requires agencies to conclude issues presented to them “within a reasonable time” and empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed[.]” 5 U.S.C. § 555(b), 706(1). Because the ESA contains no internal standard of review, the APA provides the standard of review for actions taken pursuant to that statute. *See* 5 U.S.C. § 706; *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir 1984) (“Because the ESA contains no internal standard of review, section 706 of the [APA] governs review of the Secretary’s actions.”); *see also Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1, 7-8 (D.C. Cir. 2003) (“when a statute grants some degree of discretion to an agency as to the timing of a required action, thereby imposing “merely a general duty of timeliness,” suit should be brought as a claim for unreasonably delay under the APA.”) (citations omitted). By its terms, the APA section 704 provides for judicial review of final agency actions and applies universally “except to the extent that —(1) statutes preclude judicial review; or agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a); *see Bennett v. Spear*, 520 U.S. 154, 175 (1997) (discussing application of APA to review of agency action under the ESA).

Agency action includes the failure to act. 5 U.S.C. § 551(13). If a reviewing court finds an agency’s failure to act is “arbitrary, capricious, an abuse of discretion or otherwise not in

accordance with the law,” the court may hold unlawful and set aside the agency’s decision. 5 U.S.C. § 706(2); *see Center for Biological Diversity v. Evans*, 2005 WL 1514102, slip op. at *5 (N.D.Cal. 2005) (NMFS’s failure to make a decision to designate or not to designate critical habitat, a statutory duty, “not only amounted to an unreasonable delay, but was ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.’”) (citing 5 U.S.C. § 706).

Courts reviewing an “unreasonable delay” claim typically look at factors including: (1) the length of time that has elapsed since the agency came under a duty to act; (2) the reasonableness of the delay in the context of the ESA; (3) the consequence of delay and consequences of further delay; and (4) administrative error, practical difficulty in carrying out legislative mandate, or the need for an agency to prioritize in the face of limited resources. *Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1, 12-13 (D.C. Cir 2003) (citing *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992); *see also National Wildlife Federation v. Cosgriffe*, 21 F. Supp. 2d 1211, 1218 (D. Or. 1998) (citing *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984)).

III. The Services Failed to Comply with the ESA and Have Unreasonably Delayed Producing Biological Opinions

A. The Services have Unlawfully Withheld a Discrete and Nondiscretionary Duty to Consult with an Action Agency and Complete Biological Opinions.

By failing to complete BiOps on EPA’s approval of Idaho’s water quality standards for aquatic life criteria for which EPA completed a BA on August 9, 2000, the Services have not complied with their mandatory duty to produce BiOps. The Services’ nondiscretionary duty to consult with action agencies and produce BiOps is the keystone to achieving the substantive goal of consultation: to ensure that federal actions do not jeopardize the continued existence of listed species or adversely modify the species’ critical habitat. 16 U.S.C. § 1536(a)(2). Because the action agencies rely on the Services’ BiOps to meet the substantive requirements of the ESA, the ESA imposes a mandatory, nondiscretionary duty for the Services to consult with the action agencies and produce BiOps.

First, under the ESA, the Services have a duty to consult with federal agencies and to produce BiOps. The ESA’s plain language contains directives to the Services preceded by the word “shall” that demand the Services arrive at a certain outcome: biological opinions. See 16 U.S.C. §§ 7(b)(1)(A), 7(b)(3)(A); *cf. Oregon Natural Desert Assoc’n v. U.S. Forest Service*, 312 F. Supp. 2d 1337, 1346 (describing the plain language of the Wild and Scenic River Act and the mandatory duty the Act imposes on the Forest Service). Congress’ deliberate use of the directive “shall” imposes a mandatory duty on the Services to consult with the action agencies to produce BiOps. Moreover, a contrary interpretation would undermine the ESA’s statutory design and goals. Congress crafted the ESA to achieve the goal of recovery of species facing extinction. In furtherance of that goal, Congress imposed a discrete and mandatory duty on the Secretaries of the Interior and Commerce, who delegated this duty to the expert agencies, to consult with the action agencies and produce BiOps.

Second, the Services' duty to consult and produce BiOps is not discretionary. While the Services retain some discretion regarding the timeline for producing their BiOps, the discretion does not extend to deciding whether to produce a BiOp or indefinitely delaying a BiOp. 16 U.S.C. § 1536(b)(3)(A); *cf. Idaho Conservation League v. Browner*, 968 F. Suppl. 546, 548-49 (W.D. Wash. 1997) (holding that EPA violated its nondiscretionary duty under the CWA to "promptly" promulgate water quality standards by failing to approve or disapprove a state submission of water quality standards two years earlier). As the Ninth Circuit stated, "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *ONRC Action v. BLM*, 150 F.3d 1132, 1137 (9th Cir. 1998). Thus, the Services do not have the discretion to avoid discharging their ESA duties to produce BiOps.

Additionally, the Services' implementing regulations affirm that the ESA imposes a mandatory duty on the Services to consult with action agencies and produce BiOps. 50 C.F.R. § 402.14(e). As explained above, extensions may only be for a "specific period of time" if there is mutual agreement among the agencies. The Consultation Handbook at 4-7 notes that consultation cannot be "suspended" and extensions should not be indefinite and a schedule should exist to complete the consultation. In sum, the ESA's goals, plain language, and implementing rules and guidance do not permit indefinite consultation.

B. The Services Have Unreasonably Delayed and Continue to Unreasonably Delay Completing Biological Opinions on EPA's Decision to Approve Idaho's Water Quality Standards for Toxics

As set out above, IDEQ first submitted revised water quality standards to EPA for its action in 1994, more than 18 years ago for which consultation has not yet been completed by the Services. Where it approved revisions to Idaho's standards, EPA did so on the basis that its approval was subject to completion of ESA consultation.

EPA first initiated formal ESA section 7 consultation on Idaho's revised standards in 1996, more than 16 years ago. EPA sent the Services a final BA on aquatic life criteria for toxic pollutants on December 20, 1999, and on January 7, 2000. On May 2, 2000 the Services informed EPA the BA was inadequate. On August 9, 2000, EPA submitted its final revised BA to the Services and, once again, requested initiation of formal consultation under ESA section 7. Conservatively, the Services have had more than 12 years since having received EPA's final BA during which time they have not produced final biological opinions. The Services have not completed BiOps in the eight years since December 2004 when EPA ended the alternative dispute resolution process. Communications after this point have been sporadic. Despite meetings, the hiring of a professional mediator, telephone calls, and emails, the consultation on the Idaho water quality standards revisions has not been completed. There is no evidence of any schedule of completion or evidence of a timetable to complete the BiOps. Correspondence between and within the federal agencies indicates confusion, frustration, and indecision but no plan to complete the required and long overdue BiOps.

The Services' failure to comply with their statutory duty to complete BiOps on EPA's approval and disapproval and pending action on Idaho's water quality standards constitutes an unreasonable delay under the APA section 706(1). First, as noted above, the Services have a mandatory duty under section 7 of the ESA to produce BiOps. *See Center for Biodiversity v. Veneman*, 335 F.3d 849, 854 (9th Cir. 2003) (plaintiff must identify a statutory provision mandating agency action to establish a right of review under 706(1)).

Second, the Services' unreasonable delay has and continues to fundamentally undermine the ESA's statutory scheme to protect and recover listed species. The Services' failure to produce BiOps deprives threatened and endangered aquatic and aquatic-dependent species of the ESA protections designed to ensure species' recovery. Indeed, the Act does not contemplate consultation as an afterthought in the conservation of species; the ESA's procedural provisions are an essential component to ensuring that federal actions do not jeopardize the continued existence of listed species or adversely modify the species' critical habitat. 16 U.S.C. § 1536(a). Given Idaho's ongoing implementation of its water quality standards due to their having been promulgated by the state prior to May 30, 2000, and therefore constituting applicable standards pursuant to 40 C.F.R. 131.31(c), and due to EPA's conditional approval of Idaho's standards subject to consultation, the Services' delay is particularly egregious. Here, the Services' failure to comply with the procedural duties wholly undermines the ESA's statutory scheme to give the "highest of priorities" to threatened and endangered species. *Tennessee Valley Authority v. Hill*, 437 U.S. at 174.

Third, the consequence of the Services' further delaying BiOps brings the threatened and endangered species closer to extinction. Further delaying BiOps clearly has consequences on the listed species because Idaho is implementing criteria that may or may not protect threatened and endangered species through the identification of impaired waters pursuant to CWA section 303(d)(1), development of Total Maximum Daily Loads ("TMDL") pursuant to CWA section 303(d)(1), and 401 certifications of federal projects. And EPA is implementing the criteria through the issuance of water quality-based effluent limitations in National Pollutant Discharge Elimination System ("NPDES") permits pursuant to CWA section 402. In addition, the Services' unreasonable delay in completing the BiOps harms the public interest by undermining the procedural requirements of the ESA, which ensure that agencies make informed decisions and act in conformity with the ESA's substantive requirements.

The Services have failed to produce BiOps for more than 12 years from initiation of consultation. EPA has not agreed to another period of time in which to complete the consultation and has not withdrawn its request to the Services for consultation. This is unreasonable delay and does not comply with the APA requirement that agencies conclude issues presented to them "within a reasonable time." 5 U.S.C. § 555(b).

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C. The Services' Failure to Complete Biological Opinions on EPA's Proposal to Approve Idaho's Water Quality Standards for Toxics is Arbitrary, Capricious, and an Abuse of Discretion and Otherwise Not in Accordance with the ESA.

The Services' failure to complete BiOps for more than 12 years since receiving EPA's final BA months is "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2). EPA submitted the final BA to the Services on July 9, 1996 and/or August 9, 2000. To date, the Services have not issued BiOps, nor do they have any specific timetable for doing so. EPA has not agreed to another period of time in which to complete the consultation, communication between the agencies having broken down since at least 2004. The Services' failure to produce BiOps, a statutory duty, not only amounts to unreasonable delay, but constitutes an arbitrary and capricious failure to act "promptly" under the section 7 of the ESA and its implementing regulations. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14; *see Center for Biological Diversity v. Evans*, slip op. at *5 (NMFS failure to make a decision to designate or not to designate critical habitat, a statutory duty, "not only amounted to an unreasonable delay, but was 'arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law.'" (citing 5 U.S.C. § 706).

Moreover, the fact that the action agency bears the ultimate duty for following through on consultation does not make the Services' failure to complete consultation any less arbitrary. The ESA and the section 7 implementing regulations create a discrete, nondiscretionary duty for the Services to complete biological opinions. 16 U.S.C. §§ 1536(b)(1)(A), (b)(3)(A); 50 C.F.R. § 402.14; *see Miccosukee Tribe of Indians of Florida v. U.S. Fish & Wildlife Service*, 430 F. Supp. 2d. 1328, 1333 (S.D. Fla. 2006) (FWS could be held accountable for failure to reinstate consultation even though the Army Corps of Engineers was the action agency). In failing to produce a biological opinion for more than 12 years after the action agency completed BiOps, the Services unreasonable delay amounts to arbitrary and capricious inaction that is not in accordance with the ESA.

IV. 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:

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VI. Conclusion

Upon expiration of the courtesy 60-day notice period, NWEA intends to file suit against NMFS and FWS pursuant to the Administrative Procedure Act, as set forth herein. NWEA anticipates filing suit in the United States District Court District of Idaho, requesting declaratory and injunctive relief. If you would like to discuss potential remedies prior to the expiration of this courtesy notice period, however, please do not hesitate to contact us.

Sincerely,



Allison LaPlante
Counsel for NWEA

cc: Curt Fransen, Director
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