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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation,

Plaintiff,

v.

**THE NATIONAL MARINE FISHERIES
SERVICE**, a division of the United States
Department of Commerce, and **THE UNITED
STATES FISH AND WILDLIFE SERVICE**,
a bureau of the United States Department of
the Interior,

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Endangered Species Act, Administrative
Procedure Act)

NATURE OF THE CASE

1. This case involves 17 years of delay by the National Marine Fisheries Service (“NMFS”) and the United States Fish and Wildlife Service (“FWS”) in carrying out mandatory statutory duties designed to protect Idaho’s waters and aquatic and aquatic-dependent species, including threatened and endangered salmon and steelhead.

2. The years of delay relate to the Environmental Protection Agency’s (“EPA”) issuing approvals of Idaho’s water quality standards that are conditional upon completion of consultation required under the Endangered Species Act (“ESA”). Despite initiating ESA consultation as early as 1996, NMFS and FWS (collectively “the Services”) still have not completed the required ESA consultation or issued final Biological Opinions.

3. The Services have unlawfully withheld or unreasonably delayed completion of ESA Section 7 consultation on EPA’s completed actions approving Idaho’s new or revised water quality criteria for 23 individual toxic pollutants. The Services thus have not complied with their mandatory duties to consult with EPA under ESA Section 7 to produce a final Biological Opinion or to produce a final Biological Opinion within a reasonable period of time.

4. Plaintiff seeks declaratory, injunctive and other appropriate relief.

JURISDICTION AND VENUE

5. Plaintiff brings this action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 500 et seq. and §§ 701–706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question).

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391 because the Plaintiff organization has members who reside in this district, the Defendants also have offices in this district, and a substantial part of the events or omissions occurred in Idaho.

PARTIES

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

8. Plaintiff’s members reside near, visit, use and/or enjoy rivers, streams, and other surface waters, including wetlands, in the state of Idaho. Plaintiff’s members have used and enjoyed these waters and adjacent lands in the past and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, conservation, and other purposes. Plaintiff’s members derive benefits from their use and enjoyment of Idaho’s waters and the aquatic and aquatic-dependent fish and wildlife that depend upon them for habitat-related functions, and therefore have a specific interest in the full and proper implementation of environmental laws designed to protect those waters and the species that inhabit or otherwise depend upon them, such as the ESA and the Clean Water Act. Plaintiff’s members would derive more benefits from their use of Idaho waters and adjacent lands if pollution were not adversely affecting water quality and species listed as threatened or endangered under the ESA, such as three species of salmon, one species of steelhead trout, Kootenai River white sturgeon, bull trout, and four species of snails. Plaintiff’s members reasonably fear that certain toxic criteria in Idaho water quality standards do not protect fish and wildlife, including threatened and endangered species.

9. Some of the recreational and aesthetic benefits and enjoyment Plaintiff's members derive from their use of Idaho's rivers, streams and lakes involves fishing. Plaintiff's members fish in rivers, streams and lakes throughout Idaho. Plaintiff's members would fish for certain species but for their protected status under the ESA. Plaintiff's members reasonably believe that decreases in Idaho's native fish populations are directly related to degradation of water quality throughout the state, including from toxic pollutants, both individually and in combination with other forms of water pollution. Plaintiff's members reasonably believe that native fish and wildlife populations are directly harmed by increases in toxic pollution from past, present and future mining operations, which they believe should and would be addressed through more protective water quality standards. These declines in native fish populations have reduced Plaintiff's members' recreational and aesthetic enjoyment and opportunities. Moreover, Plaintiff's members work toward improving water quality in Idaho and believe that protecting and enhancing the water quality of Idaho's rivers, streams and lakes will benefit fish species and thereby increase Plaintiff's members use and enjoyment of those waters.

10. The above-described interests of Plaintiff's members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected by Defendants' disregard of their statutory duties under the ESA and the APA and by the unlawful harm imposed on water quality and fish and wildlife habitat that results. By failing to complete consultation on EPA's approval of Idaho's water quality standards submissions, NMFS and FWS are failing to ensure that Idaho's water quality standards protect the beneficial uses of Idaho's waters, including threatened and endangered species. The relief requested in this lawsuit can redress these injuries.

11. Defendant NMFS is a federal agency and part of the United States Department of Commerce. NMFS is charged with administration of the ESA as it relates to anadromous fish and marine wildlife. Defendant FWS is a federal agency within the United States Department of the Interior. FWS is charged with administration of the ESA as it relates to inland species, including inland fish.

LEGAL BACKGROUND

The Clean Water Act and Water Quality Standards

12. In 1972, Congress adopted amendments to the CWA in an effort “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA establishes an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]” 33 U.S.C. § 1251(a)(2).

13. To those ends, the CWA requires states to develop water quality standards that establish, and then protect, the desired conditions of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards must be sufficient to “protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA].” 33 U.S.C. § 1313(c)(2)(A). State water quality standards must be reviewed and ultimately approved by EPA before they become a component of the state’s regulatory scheme deemed consistent with the federal CWA. 40 C.F.R. § 131.21(c).

14. Water quality standards establish the water quality goals for a waterbody. 40 C.F.R. § 131.2. They are the benchmarks by which the quality of waterbodies is measured; waterbodies that do not meet these benchmarks are deemed “water quality-limited” and placed on the CWA Section 303(d) list. States must develop total maximum daily loads (“TMDLs”) for all 303(d)-listed waters in order to establish the scientific basis for cleaning up water pollution

that exceeds water quality standards. A TMDL is the total daily loading of pollutants for a particular waterbody or segment that will implement the applicable water quality standards.

15. Water quality standards also serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under CWA Sections 301 and 306. 33 U.S.C. §§ 1311 & 1316. A point source is a “discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges are regulated under National Pollutant Discharge Elimination System (“NPDES”) permits, which require point sources to meet both technology-based effluent limitations and “any more stringent limitation . . . necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C). Water quality standards are thus integral to regulation of point source discharges. Water quality standards are also the basis for regulatory certifications by state agencies of federal actions, such as dredging, pursuant to CWA Section 401. 33 U.S.C. §1341.

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

17. Water quality standards must include three elements: (1) one or more designated uses of a waterway; (2) numeric and narrative criteria specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that

are necessary to protect the designated uses; and (3) antidegradation policy requirements that ensure that uses dating to 1975 are protected and that high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

Review and Revision of State Water Quality Standards

18. States must review and revise their water quality standards at least every three years, in a process called the “Triennial Review,” thereafter submitting the results of the review and all new and revised water quality standards to EPA for its approval or disapproval. 33 U.S.C. § 1313(c)(1)&(3). States must include in their submissions to EPA information that will assist EPA in its review, such as methods, analyses, scientific bases, and policies that affect implementation. 40 C.F.R. § 131.6.

19. A state-developed water quality standard, as well as any state policy affecting water quality standards, does not become effective until EPA approves the standard or policy. 40 C.F.R. § 131.21(c). States must submit any new or revised water quality standard to EPA for review and action. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c). States must also submit any state-issued policies that affect water quality standards to EPA for review. *See* 40 C.F.R. §§ 131.13, 131.20(c).

20. EPA must review the submitted standards and general policies to determine that the standards as a whole meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.5, 131.13, 131.21(b). If EPA approves a new or revised standard, it must notify the state within 60 days of the state’s submission of the standard. 33 U.S.C. § 1313(c)(3). If EPA determines that a standard is not consistent with the requirements of the CWA, within 90 days of the state’s submission, EPA must notify the state of EPA’s intent to disapprove the standard and specify changes to the standard that are necessary to comply with the CWA. *Id.* If the state does

not cure the problems with the standard within a second 90-day period, EPA must “promptly” promulgate a substitute standard. *Id.*; 33 U.S.C. § 1313(c)(4)(A). EPA must also establish new or revised water quality standards whenever the agency determines that new or revised standards are necessary to meet the requirements of the CWA. 33 U.S.C. § 1313(c)(4)(B).

The Endangered Species Act

21. The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are “threatened” or “endangered” under specified criteria, and to designate their “critical habitat.” 16 U.S.C. § 1533.

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

23. The ESA requires each federal agency to “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 habitat of such species which is determined by the Secretary . . . to be critical.” 16 U.S.C. § 1536(a)(2).

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

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

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

27. The Services interpret the ESA to require timely completion of consultation. *See* 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 page 4–7.

The Administrative Procedure Act

28. 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).

29. Agency action includes the failure to act. 5 U.S.C. § 551(13).

30. Because the ESA contains no internal standard of review, the APA provides that standard for actions taken pursuant to the 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.”).

FACTUAL BACKGROUND

31. Idaho waters are habitat to and provide food for numerous ESA-listed species, including Snake River sockeye salmon, Snake River spring/summer Chinook salmon, Snake River fall Chinook salmon, Snake River steelhead, five species of aquatic snails, bull trout, and Kootenai River white sturgeon.¹ Many or all of these species are likely to be adversely affected by the Services’ failure to complete consultation and issue a Biological Opinion or Biological Opinions on Idaho’s toxic criteria.

¹ The endangered and threatened species in Idaho primarily at issue in this case, their listing status, and the dates when they were listed under the ESA are as follows: Snake River sockeye salmon (*Oncorhynchus nerka*) Endangered 56 Fed. Reg. 58619 (Nov. 20, 1991); Snake River spring/summer Chinook (*Oncorhynchus tshawytscha*) Threatened 57 Fed. Reg. 14652 (April 22, 1992); Snake River fall Chinook salmon (*Oncorhynchus tshawytscha*) Threatened 57 Fed. Reg. 14652 (April 22, 1992); Snake River steelhead trout (*Oncorhynchus mykiss*) Threatened 62 Fed. Reg. 43937 (Aug. 18, 1997); Snake River physa snail (*Haitia (Physa) natricina*) Endangered 57 Fed. Reg. 59244 (Dec. 14, 1992); Banbury Springs lanx (*Lanx sp.*) Endangered 57 Fed. Reg. 59244 (Dec. 14, 1992); Bruneau hot springsnail (*Pyrgulopsis bruneauensis*) Endangered 57 Fed. Reg. 59244 (Dec. 14, 1992); Bliss Rapids snail (*Taylorconcha serpenticola*) Threatened 57 Fed. Reg. 59244 (Dec. 14, 1992); Idaho springsnail (*pyrgulopsis (--Fontelicella) Idahoensis*) 57 Fed. Reg. 59244 (Dec. 14, 1992); Kootenai River white sturgeon (*Acipenser transmontanus*) Endangered 59 Fed. Reg. 45989 (Sept. 6, 1994); Bull trout (*Salvelinus confluentus*) Threatened 64 Fed. Reg. 58910 (Nov. 1, 1999).

32. The Idaho Division of Environmental Quality (“IDEQ”) completed its 1992-1994 triennial review of the state’s water quality standards and submitted its new and revised standards to EPA Region 10 for approval in July 1994. The standards package was sweeping in scope and included numeric toxic criteria for the protection of aquatic life. IDEQ subsequently, on or about March 31, 1997, submitted additional revisions to numeric toxic criteria, including conversion factors and equations for aquatic life metals criteria and a cyanide criterion.

33. On June 25, 1996, and May 27, 1997, EPA took actions on IDEQ’s 1994 and 1997 submissions, approving, *inter alia*, toxic criteria for acute and chronic effects of 23 individual pollutants (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) and the metals conversion factors and equations (hereinafter “1996/97 Toxics Approval”). In its action, EPA stated its approval was subject to completion of ESA Section 7 consultation.

34. On July 9, 1996, EPA sent a draft Biological Assessment (hereinafter “First Draft BA”) to the Services covering the entire scope of the approval action it had completed, including the toxic criteria, and requesting the Services’ concurrence under informal consultation. On August 14, 1996, FWS wrote EPA that it did not concur with EPA’s determination that the revised standards would not likely adversely affect threatened and endangered species in Idaho. FWS and EPA then agreed to begin formal consultation in September 1996.

35. In 1999, EPA and the Services agreed to bifurcate the Idaho consultation and that EPA would develop two separate BAs for its 1996 and 1997 approval actions, one for toxics and one for all other standards. On August 9, 2000, EPA submitted its final BA for the 1996/97

Toxics Approval (hereinafter “Final Toxics BA”) to the Services and, once again, requested initiation of formal consultation under ESA Section 7. The Final Toxics BA from EPA concluded that all but two of the approved toxic criteria were “not likely to adversely affect” four species of salmon and steelhead trout.

36. In July 2002, NMFS completed a draft Biological Opinion, which determined the 1996/97 Toxics Approval was likely to jeopardize all threatened and endangered salmon and steelhead in the state. On July 8, 2002, FWS prepared a draft document entitled “Draft Jeopardy/Adverse Modification for Approval of Numeric Criteria for Priority Toxic Pollutants for the State of Idaho” that concluded the 1996/97 Toxics Approval “will not provide sufficient protection for the Snake River aquatic snails, bull trout, Kootenai River white sturgeon, and Kootenai River white sturgeon habitat.”

37. Though the Services have not completed the Biological Opinions, Idaho’s new or revised aquatic life criteria for toxic pollutants are currently effective. Idaho has been implementing and continues to implement toxic criteria that likely do not protect threatened and endangered species through various Clean Water Act (“CWA”) regulatory programs, including the identification of impaired waters pursuant to CWA Section 303(d)(1), development of TMDL clean-up plans for impaired waters pursuant to CWA Section 303(d)(1), and the issuance of CWA Section 401 water quality certifications of federal projects. In addition, EPA is implementing the toxic criteria through the issuance of water quality-based effluent limitations in NPDES permits under CWA Section 402.

38. By letter dated and postmarked November 29, 2012, as a courtesy, Plaintiff notified Defendants, the Services, of its intent to sue pursuant to the APA to compel the completion of agency actions unreasonably delayed or unlawfully withheld.

39. To date, the Services have not produced a Biological Opinion or Biological Opinions and there is no binding schedule for the Services to timely complete the Biological Opinion or Biological Opinions.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

NMFS action unreasonably delayed or unlawfully withheld

40. Plaintiff hereby alleges and incorporates by reference all of the preceding paragraphs.

41. NMFS is a federal agency within the meaning of the APA, 5 U.S.C. §§ 551(1), 701(b)(1).

42. In or about July 1997, EPA and NMFS initiated formal consultation on EPA's 1996 and 1997 approvals of Idaho's new and revised water quality standards for toxics. NMFS has a mandatory duty to complete ESA Section 7 consultation and to issue a Biological Opinion promptly after the completion of consultation. 16 U.S.C. §§ 1536(b)(1)(A), 1536(b)(3). Despite the 90-day timeframe for completion of consultation provided in ESA Section 7(b) for most consultations, NMFS still has not completed consultation.

43. A Biological Opinion is an agency action within the meaning of the APA. 5 U.S.C. § 551(13).

44. The APA requires that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Likewise, the APA also provides that reviewing courts "shall - (1) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (1).

45. NMFS has unlawfully withheld or unreasonably delayed completion of ESA Section 7 consultation with EPA and issuance of a Biological Opinion. 5 U.S.C. §§ 555(b), 706(1).

SECOND CLAIM FOR RELIEF
FWS action unreasonably delayed or unlawfully withheld

46. Plaintiff hereby alleges and incorporates by reference all of the preceding paragraphs.

47. FWS is a federal agency within the meaning of the APA, 5 U.S.C. §§ 551(1), 701(b)(1).

48. In or about September 1996, EPA and FWS initiated formal consultation on EPA's 1996 approvals of Idaho's new and revised water quality standards for toxics. FWS has a mandatory duty to complete ESA Section 7 consultation and to issue a Biological Opinion promptly after the completion of consultation. 16 U.S.C. §§ 1536(b)(1)(A), 1536(b)(3). Despite the 90-day timeframe for completion of consultation provided in ESA Section 7(b) for most consultations, FWS still has not completed consultation.

49. A Biological Opinion is an agency action within the meaning of the APA. 5 U.S.C. § 551(13).

50. The APA requires that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Likewise, the APA also provides that reviewing courts "shall - (1) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (1).

51. FWS has unlawfully withheld or unreasonably delayed completion of ESA Section 7 consultation with EPA and issuance of a Biological Opinion. 5 U.S.C. §§ 555(b), 706(1).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that NMFS and FWS failed to perform their mandatory duties to complete ESA Section 7 consultation on EPA's approvals of Idaho's new and revised water quality standards for toxics and to produce a Biological Opinion or Biological Opinions, constituting agency actions unreasonably delayed or unlawfully withheld, within the meaning of 5 U.S.C. §§ 555(b), 706(1);
2. Order NMFS and FWS to complete ESA Section 7 consultation and issue a Biological Opinion or Biological Opinions by a date certain;
3. Award Plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation; and,
4. Grant such other and further relief as this Court deems just and proper.

DATED this 14th day of June, 2013.

Respectfully submitted,

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