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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL
ADVOCATES, a non-profit corporation,

Civil No:

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, a United States
Government Agency, NATIONAL MARINE
FISHERIES SERVICE, a part of the National
Oceanic and Atmospheric Administration, a part of
the United States Department of Commerce, and
UNITED STATES FISH AND WILDLIFE
SERVICE, a part of the United States Department
of the Interior,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Violations of the Clean Water Act and
Endangered Species Act)

INTRODUCTION

1. Plaintiff seeks review of the actions and inactions of the United States Environmental Protection Agency (“EPA”), the National Marine Fisheries Service (“NMFS”), and the United States Fish and Wildlife Service (“FWS”) with respect to the State of Oregon’s water quality standards. Defendants have failed to perform mandatory duties under the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (“CWA”) and the Endangered Species Act (“ESA”). Defendants also have acted arbitrarily, capriciously and not in accordance with law, and Plaintiff seeks judicial review of these actions pursuant to the Administrative Procedure Act (“APA”).

2. First, this action challenges EPA’s approval of Oregon’s revised water quality standards, which were submitted to EPA for review pursuant to the CWA. In March 2004, EPA approved, *inter alia*: (1) water quality standards that were promulgated in violation of federal and state procedural requirements; (2) time and place use designations that fail to protect all life cycles of salmon, steelhead and bull trout, and that remove use designations without following procedures set out in federal regulations; (3) numeric temperature criteria that fail to protect all life cycles of salmon, steelhead and bull trout; (4) narrative criteria that serve as exemptions from numeric criteria and weaken or eliminate the protections provided for designated uses; (5) an antidegradation policy that provides for little more than exemptions from antidegradation review and is inconsistent with the CWA and regulations; (6) an antidegradation “implementation plan” that is an unenforceable non-binding policy statement and is inconsistent with the CWA and regulations; (7) water quality standards that allow for the lowering of water quality but which did not go through the required antidegradation review; and (8) a numeric criterion for intergravel dissolved oxygen (“IGDO”) that will not protect salmon, steelhead, and bull trout spawning. In approving Oregon’s water quality

standards, EPA acted arbitrarily, capriciously and not in accordance with the CWA and implementing regulations.

3. Second, this action challenges EPA's failure to perform its non-discretionary duty under the CWA to act upon every water quality standard submitted for review. EPA failed to review, and ultimately disapprove, *inter alia*: (1) provisions in Oregon's water quality standards relating to logging, grazing, agriculture, and other activities that weaken and undermine the numeric and narrative criteria; and (2) changes in the water quality standards EPA erroneously concluded were insignificant, outside the scope of the court order that led to the revised standards, or did not constitute water quality standards. In failing to act upon, and disapprove, all of Oregon's new or revised water quality standards, EPA violated its nondiscretionary duty under the CWA. Alternatively, EPA's decision not to review each new or revised water quality standard and policy affecting water quality standards was arbitrary, capricious, and contrary to law.

4. Third, this action seeks review under the ESA of the Biological Opinions ("BiOps") issued in 2004 by Defendant NMFS and Defendant FWS with respect to Oregon's revised water quality standards. The 2004 NMFS BiOp concluded that, despite numerous documented adverse impacts to species that will result from implementation (or lack thereof) of Oregon's revised standards, EPA's approval of Oregon's revised water quality standards for temperature, IGDO, and antidegradation implementation methods was not likely to jeopardize threatened and endangered salmon and steelhead or adversely modify critical habitat designated for protection and recovery of these ESA-listed species. The FWS BiOp similarly concluded that EPA's approval would not jeopardize threatened bull trout. NMFS and FWS's actions were arbitrary, capricious and not in accordance with the ESA.

5. For these reasons, this action seeks a declaration that: (1) EPA's approval of Oregon's water quality standards was arbitrary, capricious and otherwise not in accordance with law, under the APA, 5 U.S.C. § 706(a)(2); (2) EPA's failure to perform its mandatory duty to act upon the entirety of the State of Oregon's submission of its water quality standards violated the CWA, 33 U.S.C. § 1313(c)(3), and alternatively, that EPA's decision not to review all water quality standards and policies affecting water quality standards was arbitrary, capricious and otherwise not in accordance with law, under the APA, 5 U.S.C. § 706(a)(2); (3) NMFS's conclusion in the 2004 NMFS BiOp that Oregon's standards are not likely to jeopardize ESA-listed species or result in the destruction or adverse modification of their critical habitat was arbitrary, capricious, and otherwise not in accordance with the law, under the APA, 5 U.S.C. § 706(a)(2); and (4) FWS's conclusion in the 2004 FWS BiOp that Oregon's standards are not likely to jeopardize ESA-listed bull trout was arbitrary, capricious, and otherwise not in accordance with the law, under the APA, 5 U.S.C. § 706(a)(2).

6. This action also seeks an injunction ordering: (1) EPA to disapprove Oregon's water quality standards and immediately promulgate federal standards that will protect existing and designated uses, including ESA-listed species; to promulgate required standards where Oregon has failed to do so; and to consult pursuant to the ESA on these promulgated standards; (2) NMFS to withdraw the 2004 NMFS BiOp and accompanying incidental take statement; and (3) FWS to withdraw the 2004 FWS BiOp and accompanying incidental take statement.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (CWA citizen suit provision); 16 U.S.C. §§ 1540(c) and (g) (action arising under ESA and ESA citizen suit

provision); 5 U.S.C. §§ 701-706 (APA); 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). Plaintiff has challenged final agency actions as defined by the APA, 5 U.S.C. § 551(13). As required by 16 U.S.C. § 1540(g)(2) and 33 U.S.C. § 1365(b), Plaintiff furnished Defendant EPA with written notice of its violations of the CWA and ESA more than 60 days prior to filing this complaint. The notice is attached hereto as Exhibits 1 and incorporated by reference.

8. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A) because a substantial part of the events or omissions giving rise to the claims occurred in Oregon.

PARTIES

9. The Plaintiff in this action is Northwest Environmental Advocates (“NWEA”). Established in 1969, NWEA is a regional non-profit environmental organization incorporated under the laws of Oregon, with its principal place of business in Portland, Oregon. NWEA’s mission is to work through advocacy and education to protect and restore water and air quality, wetlands, and wildlife habitat in the Pacific Northwest.

10. Plaintiff and its members use and enjoy the waters of the State of Oregon for recreational, scientific, aesthetic, and commercial purposes. Plaintiff and its members derive or, but for the threatened status of chinook, coho, sockeye, chum, and steelhead salmon, as well as bull trout, would derive recreational, scientific, aesthetic, and commercial benefits from the existence in the wild of these species of salmon and trout through wildlife observation, study, and photography, and recreational and commercial fishing within the Columbia and Snake River basins and the Pacific Ocean. The past, present, and future enjoyment of these benefits by Plaintiff and its members has

been, is being, and will continue to be irreparably harmed by Defendant EPA's failure to establish water quality standards that will protect and ensure the conservation and recovery of these populations.

11. The above-described aesthetic, conservation, and scientific interests of Plaintiff and its members have been, are being, and, unless the relief requested is granted, will continue to be adversely affected and irreparably injured by Defendant EPA's failure to comply with the CWA and ESA, and by Defendants NMFS and FWS's failure to comply with the ESA. For these same reasons, Plaintiff is also adversely affected and aggrieved by the actions and omissions of Defendants within the meaning of the APA. Plaintiff's injury in fact is fairly traceable to Defendants' conduct and would be redressed by the relief that the Plaintiff seeks in this case. Plaintiff has no adequate remedy at law.

12. Defendant EPA is a federal agency charged with the administration of the CWA, as well as other environmental statutes. 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 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 ("CWA") and Water Quality Standards

13. 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).

14. 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.

15. 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 § 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 and includes a margin of safety reflecting any lack of knowledge concerning the relationship between effluent limitations and water quality.

16. Water quality standards also serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under CWA §§ 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.

Elements of Water Quality Standards

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

18. **Designated Uses**—Uses must be designated based on consideration of the use and value of a waterbody for public water supplies, protection and propagation of fish, shellfish, and wildlife, recreation, and agricultural, industrial, and other purposes. 40 C.F.R. § 131.10(a). Although states retain discretion to establish designated uses, that discretion is limited by several parameters. First, water quality standards as a whole must provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water. 40 C.F.R. § 131.2. Designated uses, therefore, must be established so as to provide for these protections. 40 C.F.R. § 131.10(a). Second, waste assimilation and waste transport shall never be adopted as designated uses for any waters of the United States. *Id.* Third, although states may remove a designated use if that use cannot be attained, states may not remove a designated use if that use is also an “existing use.” 40 C.F.R. § 131.10(h). Fourth, states may remove designated uses that are not “existing uses” so long as they perform a Use Attainability Analysis (“UAA”) consistent with CWA regulations, and the results are submitted to

EPA for review and approval. 40 C.F.R. § 131.10(g) and (j). A UAA is “a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described[.]” 40 CFR § 131.3(g). Fifth, states must ensure their use designations provide for the attainment and maintenance of standards of downstream waters. 40 C.F.R. § 131.10(a).

19. ***Numeric and Narrative Criteria***—Water quality criteria must be set at a level necessary to protect the designated uses of a waterbody. 33 U.S.C. § 1313(c)(2); 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Criteria “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a)(1). The criteria must also be set at the level necessary to protect the most sensitive use of a waterbody. *Id.* States may establish narrative water quality criteria “to supplement numerical criteria.” 40 C.F.R. § 131.11(b)(2).

20. ***Antidegradation Policy and Implementation Methods***—The third component of water quality standards, the antidegradation policy, stems from the CWA’s dictate to “restore and *maintain* the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (emphasis added). The antidegradation policy must assure that water quality that meets or exceeds water quality standards is maintained and that no further degradation is allowed for waters that do not meet water quality standards. Implementation methods must be identified as part of the adoption of the policy. 40 C.F.R. § 131.12.

21. Federal regulations provide for three tiers of protection for waterbodies. *See* 40 C.F.R. § 131.12. “Tier 1” protection is considered the absolute floor of water quality. *See* Questions and Answers on: Antidegradation, EPA Office of Water Regulations and Standards, August 1985, at 4

(hereinafter “Questions and Answers”). Tier 1 protections assure that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1). Existing uses are defined as “those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards.” 40 C.F.R. § 131.3(e). An existing use can also be established by showing that “the water quality is suitable to allow such uses to occur (unless there are physical problems which prevent the use regardless of water quality).” Questions and Answers at 2.

22. “Tier 2” protections apply “[w]here the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.” 40 C.F.R. § 131.12(a)(2). Antidegradation policies and implementation methods must assure that water quality of high quality waters is “maintained and protected unless. . .allowing lower water quality is necessary to accommodate important economic or social development.” *Id.* If a state determines that lower water quality is necessary, the state must nonetheless assure, through its antidegradation policy and implementation methods, that water quality is adequate “to protect existing uses fully,” and that “there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.” *Id.*

23. “Tier 3” protections are discretionary and may be applied to waters designated by a state as Outstanding National Resource Waters (“ONRWs”). 40 C.F.R. § 131.12(a)(3). State antidegradation policies and implementation methods must assure that ONRW water quality is “maintained and protected.” *Id.*

Review and Revision of State Water Quality Standards

24. States must review and revise their water quality standards at least every three years, in a process called the “Triennial Review,” thereafter submitting all new and revised water quality standards to EPA for review and approval. 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. Water quality standards may be revised only if the revision is subject to and consistent with the state’s antidegradation policy. 33 U.S.C. § 1313(d)(4)(B).

25. 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. 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 for EPA review. 40 C.F.R. §§ 131.13, 131.20(c). EPA must review the submitted standards and general policies to determine that the standards meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.5, 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).

26. The CWA and federal regulations make clear that all new water quality standards must be revised, through notice and comment, and submitted to EPA for review and, approval or disapproval. 33 U.S.C. § 1313; 40 C.F.R. § 131.6. All water quality standards must be “duly adopted pursuant to State law.” 40 C.F.R. § 131.6. Also, under 40 C.F.R. § 131.20(b), states must hold a public hearing for the purpose of reviewing water quality standards, in accordance with provisions of State law, and public participation regulations at 40 CFR § 25. Pursuant to 40 C.F.R. § 25.5, reports, documents and data relevant to the discussion at the public hearing shall be available to the public at least 30 days before the hearing.

27. Under Oregon law, DEQ must include with any notice of intended rulemaking a list of the principal documents, reports or studies prepared by or relied on by the agency in making the rule, as well as a statement of the location at which those documents are available for public inspection. ORS 183.335(2)(b)(D). Also under Oregon law, DEQ must show all changes to the water quality standards by bracketing material to be deleted and showing all new material in boldfaced type. ORS 183.335(2)(d).

28. Finally, water quality standards submitted to EPA must be accompanied by, *inter alia*, “[m]ethods used and analyses conducted to support water quality standards revisions,” and “[g]eneral information which will aid [EPA] in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.” 40 C.F.R. § 131.6.

The Endangered Species Act (“ESA”) and Federal Agencies

29. The purpose of the ESA is to “provide a program for the conservation of . . . endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). One overarching requirement of the ESA is that all federal departments and agencies must use their authorities to conserve species that the Secretary of Interior or Commerce lists as threatened or endangered. 16 U.S.C. § 1531(c)(1). The terms “conserve” and “conservation” mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3).

30. The ESA requires the Secretary of Interior or Commerce to list species that he or she believes may become extinct in the near future as being either “threatened” or “endangered.” 16 U.S.C. § 1533. A species is endangered if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

ESA Section 7 Duties

31. Section 7 of the ESA enumerates the substantive and procedural obligations of federal agencies with respect to listed species. 16 U.S.C. § 1536. All federal agencies are under an obligation to ensure 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). The ESA’s implementing regulations define jeopardy to an endangered or threatened species as “an

appreciable reduction in the likelihood of both survival and recovery of a species.” 50 C.F.R. § 402.02. In meeting the duty to prevent jeopardy, each agency is required to use the “best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

32. Agencies must also ensure that agency actions are not likely to “result in the destruction or adverse modification of critical habitat.” *Id.*; 50 C.F.R. § 402.14(g)(4). This is a separate determination from whether the action will jeopardize the continued existence of the species. Critical habitat includes areas that are “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A). Agency regulations define destruction or adverse modification of critical habitat as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02. “Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” *Id.* However, the Ninth Circuit Court of Appeals recently found this regulation unlawful because it impermissibly narrowed the purpose of critical habitat solely to species’ survival, when the ESA mandates that critical habitat facilitate species’ recovery as well. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070-71 (9th Cir. 2004). The court made clear that, in assessing whether an action adversely modifies critical habitat, an agency must assess whether that action will impair that habitat’s ability to provide for recovery of the listed species. *Id.*

Biological Assessments and Biological Opinions

33. Whenever a federal agency determines that a proposed action may affect one or more listed species, as an “action agency,” it must consult with NMFS and/or FWS (together, the “Services”), depending on the species present. 50 C.F.R. § 402.14(a). Under this process, a federal

agency proposing an action that “may affect” a listed species, including salmon, steelhead, and bull trout, must prepare and provide to the appropriate expert agency a “biological assessment” of the effects of the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). For those actions that may adversely affect a species, the Services must review all information provided by the action agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3). This determination is set forth in a “biological opinion” from one of the Services. *Id.*; 16 U.S.C. § 1536(b)(3)(A).

34. In formulating a biological opinion, each Service must evaluate the “effects of the action” together with “cumulative effects” on the listed species. 50 C.F.R. § 402.14(g)(3)-(4). This multi-step analysis requires the Service to consider the direct, indirect, interrelated and interdependent effects of the proposed action. 50 C.F.R. § 402.02. The Service must also consider the “environmental baseline,” to which the proposed action will be added. *Id.* This baseline includes “all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress.” *Id.* Finally, the Service must consider any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.*

35. If, based upon an analysis of these factors, the Service concludes that the proposed action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat, the Service must identify and describe any reasonable and prudent alternative (“RPA”) to the proposed action

that it believes would avoid jeopardy and adverse modification. 16 U.S.C. § 1536(b)(3)(B). If the Service believes there is no reasonable and prudent alternative to the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

36. If the Service finds that either a proposed action “[]or implementation of any reasonable and prudent alternatives[] and the resultant incidental take of listed species” will not cause jeopardy or destruction or adverse modification of critical habitat, it will also issue an incidental take statement (“ITS”) for any take of a listed species that is likely to occur. 50 C.F.R. § 402.14(i). The ITS must, among other things “specif[y] the impact, i.e., the amount or extent, of such incidental taking on the species[.]” 50 C.F.R. § 402.14(i)(1). If the action agency exceeds the amount or extent of taking specified in the ITS, it is required to reinitiate formal consultation with the Service. 50 C.F.R. §§ 402.14(i)(4) & 402.16.

FACTUAL BACKGROUND

Status of Water Quality in Oregon

37. With over 100,000 miles of rivers, 6,200 lakes, and nine estuaries, Oregon is well known for its extensive water resource. Oregon’s 2003 Nonpoint Source Program Annual Report, at 5. Oregon waters provide some of the last remaining habitat for at least fourteen ESA-listed salmon and steelhead, as well as several trout species, including bull trout. Centuries of human use, resource extraction, and unregulated pollution, however, have degraded Oregon’s streams and rivers, and contributed to the precipitous decline of most cold water species.

38. Water and land management activities over the past two centuries have severely degraded the quality of Oregon’s water resource. Land-based activities, such as farming, logging, mining, urban/suburban development, and grazing, have eroded riparian habitat, removed the natural

sinuosity of streams, reduced groundwater contributions, curtailed instream flows, and contributed sediment and pollution to many streams and rivers. West of the Cascade Mountains, intensive logging of Oregon's expansive Douglas fir forests has reduced natural shading and increased soil erosion, thus adding sediment (which causes streams to become more shallow and heat up faster) and temperature to many rivers and streams.

39. Another factor in the decline of water quality in Oregon has been the construction and operation of hundreds of dams. For example, in the Columbia River, operation of the Federal Columbia River Power System has had a tremendous impact on the natural ecosystem, altering flows, reducing sediment flow, and increasing temperatures. The Columbia River has also been impacted by navigation dredging, which has deepened the Columbia River estuary to a depth of 40 feet, resulting in a substantial increase in estuary salinity. The estuary, a key habitat for migrating juvenile and adult salmon, has also suffered from extensive filling and diking of wetlands habitat.

40. The Willamette Valley has been similarly impacted by a host of factors, including dams, channelization, dredging, and pollution. In 2003, Oregon found that the Willamette Valley was the most polluted basin in Oregon, stating that the Willamette "had the highest number of stream kilometers in poor condition for aquatic life of any of the basins assessed." Oregon's 2004 Water Quality Assessment Section 305(b) Report, at 23. The report also stated that fine sediment and warm water temperature were the "leading stressors" in the Willamette Basin. *Id.*

41. Cumulatively, these activities have left Oregon's water resources significantly deteriorated. Excessive temperature is the foremost reason that impaired waters are failing to meet water quality standards in Oregon. In 2000, Oregon identified 12,102 river and stream miles as impaired due to "thermal modifications." Temperature was a factor contributing to water quality

violations in over 85 percent of impaired waters in Oregon.

42. Activities such as logging, grazing, development, and agriculture generate point and nonpoint source pollution. Nonpoint source pollution occurs when water runs diffusely off the land, carrying pollutants which eventually deposit into rivers and streams. In 2003, Oregon reported that 75 percent of its impaired watershed subbasins were primarily affected by forestry, agriculture, urban development, or other nonpoint sources of pollution. In the remaining 25 percent, nonpoint sources were a “significant” cause of pollution. Oregon’s 2003 Nonpoint Source Program Annual Report, at 10. In sum, numerous rivers and streams in Oregon are failing to meet water quality standards. This is in large part due to nonpoint sources of pollution, which are the primary contributors to elevated temperature and sediment in Oregon streams and rivers.

43. Point sources of temperature also have important negative impacts on cold-water species. Where temperatures already exceed safe levels, heat inputs in the form of thermal plumes further stress salmon and raise the lethality of the stream temperatures. NPDES permits routinely include “mixing zones” for temperature in which DEQ suspends the applicability of the temperature criteria for a certain area extending out from an outfall pipe. Migrating salmonids either seek to avoid the heated plume or swim through it, incurring the increased health risks, including shock and disorientation, associated with the higher temperatures.

Status of Anadromous Fish in Oregon

44. Spawning and rearing in fresh water, anadromous fish migrate downstream as juveniles, and then often linger in estuaries as they prepare to enter the ocean. There they spend most of their adult lives, before returning along the same path to lay their eggs. Salmon and steelhead are types of anadromous fish that, up until the last century, have thrived in rivers, streams, tributaries, and

estuaries throughout the Pacific Northwest and Oregon. In addition to steelhead, there are four main types of salmon that inhabit Oregon's rivers and streams—coho, Chinook, chum, and sockeye.

45. The most recent data show that, in the main, salmon and steelhead throughout Oregon and the Pacific Northwest have experienced considerable and consistent declines in populations. Although 10 to 16 million salmon inhabited the Columbia River over a century ago, at least 67 stocks have gone extinct in the last decade and those stocks that remain are in serious jeopardy.

46. Habitat degradation plays a significant role in the decline of salmon populations. Salmon have unique habitat requirements, and depend on cold and clean water, at sufficiently diverse times and locations to support their life cycle stages, with genetic diversity, to survive and recover.

47. Cold temperatures are especially critical to salmon survival and recovery. Excessive temperatures affect “metabolism, growth rate, and disease resistance, as well as the timing of adult salmonid migrations, fry emergence, and smoltification.” *See Biological Evaluation of the Revised Oregon Water Quality Standards for Temperature, Intergravel Dissolved Oxygen, and Antidegradation at 4-2.* Warm temperatures not only harm salmonids directly but enhance the negative effects of other pollutants, both conventional and toxic. High temperatures reduce habitat available to salmon, whereas restoring cold temperatures to overheated streams adds increased habitat for rearing and spawning.

48. Sedimentation is another significant problem for salmon because it clogs gills and respiratory surfaces, adheres to the chorion of eggs, encourages disease-related organisms, induces behavioral modifications, entombs early life stages, alters water chemistry, affects usable habitat by scouring and filling pools and riffles, reduces photosynthetic growth and primary production, and

reduces intergravel permeability and dissolved oxygen. *Id.* at 4-3.

49. Salmon are also impacted by operation of hydroelectric dams, particularly projects in the Columbia River and Willamette River, and the degraded conditions in the Columbia River Estuary. Every anadromous fish that rears in the Columbia River Basin must transverse the Columbia River and the estuary at least twice (steelhead may return to the ocean after spawning). EPA acknowledges that salmon have been “dramatically affected by the development and operation of the Federal Columbia River Power System (FCRPS).” *Id.* at 4-4. Dams cut off spawning and rearing habitat, alter natural flow patterns, change estuary temperatures, and kill juvenile salmon as they attempt to pass through the powerful turbines of hydroelectric facilities.

50. In addition to habitat concerns, the widespread use of hatcheries in the Pacific Northwest to sustain harvestable salmon populations has contributed to the decline of wild populations. Scientists now recognize that the artificial propagation of hatchery fish is detrimental to wild populations because it increases predation on and competition with wild fish, affects genetic diversity, and transmits hatchery-borne diseases to wild fish.

51. Finally, the commercial harvest of salmon and steelhead since the early 1800s has depleted numerous stocks, including spring and summer Chinook, fall Chinook, and southern Oregon/northern California coho, to name a few.

52. As a result of these factors, NMFS considers fourteen salmon and steelhead evolutionary significant units (“ESUs”) in Oregon either “in danger of extinction throughout all or a significant portion of its range” or “likely to become” in danger of extinction “within the foreseeable future,”

and in need of protection under the ESA.¹

Status of Bull Trout in Oregon

53. The bull trout is a char native to the Pacific Northwest and western Canada that once occupied a large range within this region. 2004 FWS BiOp at 20. Although bull trout remain dispersed within this range, the species has significantly declined in overall distribution and abundance during the last century. *Id.* This decline is the result of habitat degradation and fragmentation, blockages of migratory corridors, poor water quality, past fishery management, and competition from nonnative species. *Id.*

54. Bull trout exist in both resident and migratory forms, which may occupy the same habitats. 63 Fed. Reg. at 31,647. Migratory bull trout spawn in tributary streams, rear for a period of one to four years in these tributaries, and then migrate to lakes, rivers, or, in certain coastal areas, to saltwater. 2004 FWS BiOp at 22. Resident bull trout, in contrast, complete their entire life cycle in the tributary streams in which they spawn and rear. *Id.* The migratory forms of bull trout are essential to the overall success of the species. *Id.* at 20. Migratory fish have access to greater food

¹ Snake River fall Chinook salmon, listed as threatened, 57 Fed. Reg. 14,653 (April 22, 1992); Snake River spring/summer Chinook salmon, listed as threatened, 57 Fed. Reg. 14,653 (April 22, 1992); Snake River Sockeye salmon, listed as endangered, 56 Fed. Reg. 58,619 (Nov. 20, 1991); Snake River steelhead, listed as threatened, 62 Fed. Reg. 43,937 (Aug. 18, 1997); Lower Columbia River Chinook salmon, listed as threatened, 64 Fed. Reg. 14,308 (March 24, 1999); Upper Columbia River spring Chinook salmon, listed as endangered, 64 Fed. Reg. 14,308 (March 24, 1999); Upper Willamette River Chinook salmon, listed as threatened, 64 Fed. Reg. 14,308 (March 24, 1999); Columbia River chum salmon, listed as threatened, 64 Fed. Reg. 14,508 (March 25, 1999); Southern Oregon/Northern California coast coho salmon, listed as threatened, 62 Fed. Reg. 24,588 (May 6, 1997); Oregon Coast coho salmon, listed as threatened, 63 Fed. Reg. 42,587 (Aug. 10, 1998); Middle Columbia River steelhead, listed as threatened, 64 Fed. Reg. 14,517 (March 25, 1999); Lower Columbia River steelhead, listed as threatened, 63 Fed. Reg. 13,347 (March 19, 1998); Upper Willamette River steelhead, listed as threatened, 64 Fed. Reg. 14,517 (March 25, 1999); Upper Columbia River steelhead, listed as endangered, 62 Fed. Reg. 43,937 (Aug. 18, 1997).

and habitat, are likely to engage in essential genetic exchanges with other bull trout, and are able to recolonize habitats after local extirpations. *Id.* Migratory bull trout populations have also been reduced or eliminated as a result of habitat degradation, poor water quality, and other factors. *Id.*

The 1999 Water Quality Standards Approval

55. As a result of its 1992-1994 Triennial Review, Oregon revised its water quality standards for temperature, IGDO, and pH. On January 11, 1996, Oregon submitted its revised standards to EPA for review and approval as required under CWA section 303(c), 33 U.S.C. § 1313(c).

56. While EPA's review was pending, the Secretaries of Commerce and Interior listed several populations of salmon, steelhead, and bull trout in Oregon as either "threatened" or "endangered" under the ESA. EPA initiated formal ESA section 7(a)(2) consultation on Oregon's revised standards and completed a biological assessment on September 15, 1998, entitled United States Environmental Protection Agency, Biological Assessment of the Revised Oregon Water Quality Standards for Dissolved Oxygen, Temperature, and pH (hereinafter "1998 Biological Assessment"). EPA also conducted an additional, separate review of the effects of Oregon's temperature standard on listed salmonids. *See Oregon Temperature Standard Review, EPA Region 10 (1999).*

57. Both the 1998 Biological Assessment and the Oregon Temperature Standard Review found that the temperature criteria for salmonid rearing and bull trout rearing were "likely to adversely affect" and "pose a risk to the viability of" listed salmon, bull trout, and steelhead in Oregon. The 1998 Biological Assessment also found that Oregon's IGDO criterion was likely to adversely affect threatened salmon.

58. On July 7, 1999, NMFS completed its biological opinion on EPA's proposed approval

of Oregon's revised water quality standards, entitled National Marine Fisheries Service, Biological and Conference Opinion: Approval of Oregon Water Quality Standards for Dissolved Oxygen, Temperature, and pH (1999) (hereinafter "1999 NMFS BiOp"). The 1999 NMFS BiOp concurred with EPA's findings that Oregon's temperature and IGDO criteria were likely to adversely affect threatened salmon, steelhead, and bull trout. NMFS concluded, however, that the standards would not pose jeopardy to the threatened fish in light of commitments from both EPA and DEQ to implement certain voluntary conservation measures allegedly designed to mitigate the adverse effects of its water quality standards.

59. On July 22, 1999, despite deep concerns expressed by NMFS biologists and EPA's own scientists regarding the adequacy of Oregon's water quality standards, EPA approved Oregon's revised standards, with one exception; EPA disapproved Oregon's temperature criterion of 20°C for the lower Willamette River.

Litigation Concerning the 1999 Approval

60. In April of 2001, NWEA filed suit in the U.S. District Court for the District of Oregon seeking review of EPA's approval and NMFS' 1999 biological opinion. *See Northwest Environmental Advocates v. U.S. Environmental Protection Agency, et. al.*, CV-01-510-HA (filed April 12, 2001). On cross motions for summary judgment, this Court found that EPA and NMFS violated the CWA and the ESA. *See Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 268 F. Supp. 2d 1255 (D. Or. 2003).

61. First, this Court concluded that EPA had failed to perform a non-discretionary duty under the CWA when it failed to promptly promulgate a temperature standard for salmon migration in the Lower Willamette River after it had disapproved Oregon's proposed standard of 20°C (68°F). *Id.*

at 1261. Second, this Court found that EPA had acted arbitrarily and capriciously, and had provided no rational basis for its failure to promulgate an adequate antidegradation implementation plan for Oregon, in light of Oregon's submittal of a one-sentence antidegradation "policy" with no implementation methods. *Id.* at 1265. Third, although this Court found Oregon's 17.78°C (64°F) temperature criterion for salmonid rearing defensible, this Court nonetheless found EPA's approval of the 17.78°C criterion for salmonid rearing and the 10°C (50°F) criterion for bull trout rearing and spawning arbitrary and capricious because neither Oregon nor EPA had established "time and place" use designations where those criteria would apply. *Id.* at 1266-67. Fourth, this Court found EPA's approval of Oregon's 6.0 mg/L IGDO criterion arbitrary and capricious because record evidence demonstrated that the 6.0 mg/L criterion would harm salmon. *Id.* at 1268-69. Last, the Court agreed with NWEA that Oregon's "alternate mixing zone" rule had never been properly submitted to EPA and was therefore not an approved component of Oregon's water quality standards. *Id.* at 1271-72.

62. With respect to NWEA's claims against NMFS, this Court found that the 1999 NMFS BiOp was arbitrary and capricious because the evidence demonstrated and the agency's own experts had repeatedly stated that a "no jeopardy" conclusion was unsupported. *Id.* at 1272. The Court rejected NMFS' reliance on unenforceable commitments made by EPA and DEQ to perform certain conservation measures as a justification for the "no jeopardy" decision. *Id.* at 1273. This Court ordered NMFS to withdraw the 1999 NMFS BiOp, reinitiate consultation, and issue a new biological opinion. *Id.*

63. This Court then ordered EPA to rescind portions of its 1999 approval and either promulgate federal water quality standards for Oregon or approve a new Oregon submission by March 2, 2004. The order required the regulations to include: (1) water quality criteria for

temperature for the lower Willamette River; (2) methods for implementing Oregon’s antidegradation policy; (3) numeric water quality criteria for temperature for the protection of salmonid rearing and bull trout rearing and spawning, accompanied by specific time and place designations; and (4) a water quality criterion for IGDO for the protection of salmonid spawning.

The Rulemaking Process After this Court’s Order

64. Following this Court’s order, EPA and DEQ separately proposed for public review revised water quality standards for Oregon. While EPA’s proposal was generally limited to the issues raised in the previous litigation, DEQ used the process as a means to revise the entirety of Oregon’s water quality standards, rules, and policies. EPA ultimately chose to abandon its own proposed rulemaking and to review the Oregon standards pursuant to CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3).

65. On August 15, 2003, DEQ made available for public comment proposed revisions to Oregon’s water quality standards at OAR Chapter 340, Division 41. The proposed revisions were extensive, covering 87 pages, and were meant to completely replace the then-existing 270-page Division 41. In parts, the proposed rule carried forward, but often renumbered or reorganized, provisions from the then-existing Division 41. The proposed rule also included many significant changes, such as: several new or revised definitions; a largely new antidegradation policy; new or revised use designations; new numeric and narrative temperature criteria; new policies for implementing those criteria for both point and non-point sources; new criteria for IGDO; and changes that significantly affected the meaning of certain rules, including changes from the use of the word “shall” to the use of the word “may” at various points throughout the proposed rule.

66. DEQ included a statement at the beginning of the proposed rule notifying the public that

the existing rule would be replaced in its entirety. DEQ did not indicate any of its deletions through brackets or strike-through text. While DEQ did at times identify additions or alterations to the rule language with boldfaced text, it often highlighted insignificant changes (such as a changing the word “paragraph” to “section”) while leaving meaningful changes (such as substantive changes to the narrative criteria for toxic pollutants) unmarked. Similarly, although DEQ indicated in the rule’s preamble that it had changed all uses of “shall” in the existing rule to “may” or “must,” DEQ never identified where or why a particular “shall” had become a “may,” as opposed to a “must.” In fact, DEQ invited commenters to advise DEQ if it had inadvertently made a non-discretionary duty into a discretionary one, without ever identifying the changes at issue. Several commenters noted that DEQ’s failure to follow state law had made the commenting process burdensome and confusing, but DEQ maintained that it could avoid compliance with state law by labeling the revised rules a “complete substitute.”

67. DEQ’s submission of the revised water quality standards to the Environmental Quality Commission (“EQC”) was similarly deficient. In its submission of the proposed rule to the EQC, DEQ included a sample page of a document that it claimed was a strike-through version of the revised rule. Every single line, save the new introduction, was struck through. DEQ never provided the public, the EQC, or, ultimately, EPA with a complete and accurate notice of the specific changes that DEQ made throughout the proposed rule.

68. DEQ provided a 45-day public comment period on the proposed rule but did not provide the required documents and data for review. While DEQ’s proposed rule had directed commenters to its website, DEQ’s website did not contain several documents upon which DEQ relied when developing the rule. As a result, commenters did not have available all materials supporting the rule

during the notice and comment period. During that time, commenters, including NWEA, repeatedly asked DEQ for documents supporting its rulemaking. In response, DEQ acknowledged that it had not prepared relevant documents supporting its water quality standards revisions and it had not prepared written information on methodologies used in creating maps, but rather conveyed some information on the subject orally during public hearings.

EPA's 2004 Approval of Oregon's Water Quality Standards

69. On December 10, 2003, DEQ submitted to EPA its new or revised water quality standards. EPA consulted, under the ESA, with NMFS and FWS on certain parts of the revised water quality standards. It did not consult on those portions of the revised standards which it considered to be beyond its legal authority to review, despite their relevance to the entirety of the standards. On March 2, 2004, EPA approved portions of the water quality standards submitted by Oregon on December 10, 2003. EPA also concluded that DEQ had complied with state and federal laws governing the procedures for revising water quality standards.

Time and Place Use Designations

70. Pursuant to this Court's order, Oregon proposed and EPA approved time and place use designations for salmon and steelhead spawning, rearing, and migration. EPA also approved a "core cold water habitat" use designation, which is meant to serve, in effect, as a transition area between designated spawning areas and designated rearing areas. Oregon made very limited designations for core cold water habitat.

71. Through this process, Oregon also removed several designated uses, including steelhead smoltification, bull trout rearing, and other salmon, steelhead, and bull trout uses. In removing these uses, Oregon did not determine whether any of the removed uses were also existing uses that cannot

be removed. Oregon also did not perform a UAA prior to removing these designated uses.

Numeric Temperature Criteria

72. EPA approved numeric criteria for salmon and steelhead spawning, rearing, and migration, as well as a “core cold water habitat” criterion. EPA also approved a single numeric criterion for bull trout spawning and rearing. All of the criteria were established at or above the upper temperature limits deemed acceptable for protection of healthy populations of salmon, steelhead, and bull trout life stages. There is no evidence the criteria took into account the ESA-status of the species. EPA provided no margin of error should these limits themselves be underprotective, and in fact, approved numerous narrative criteria and exceptions that allow for actual instream temperatures to increase well beyond any limit that is deemed protective.

73. EPA recognized that all of the numeric criteria were set at levels that exceed the optimal temperatures necessary to support all life stages of the salmon. EPA justified its approval of the unprotective criteria based on several faulty assumptions. EPA assumed that for the applicable criteria to be met at the lowest downstream location at the hottest time of the year, the upstream reaches will necessarily be colder than the criteria. EPA then assumed that the attainment of cooler upstream criteria will necessarily result in a flushing effect, whereby cold upstream water will flush into, and thus cool, the downstream waters that are subject to less protective criteria. Based on the way the rules will work, these assumptions have no merit.

74. In setting these criteria, Oregon employed, and EPA approved, a metric called the maximum seven-day average of the daily maximum (“7DADM”), which is the average of the maximum temperatures to which fish are exposed over a week-long period. The metric is designed, in theory, to protect against short-term acute effects from high temperatures by not averaging over

too long a time period. However, a seven-day average, rather than an instantaneous maximum, allows temperatures to exceed lethal levels without triggering a regulatory response.

75. *The 20°C Numeric Criterion for Salmon and Steelhead Migration*—EPA approved Oregon’s proposed numeric criterion of 20°C for salmon and steelhead migration, even though the agency had previously disapproved that very criterion in its 1999 review of Oregon’s water quality standards. EPA recognized that the numeric portion of the criterion is not protective of salmon and steelhead migration, but justified its approval based on the faulty assumption that the narrative requirements included within the 20°C standard would offset the unacceptable harm that 20°C water will inflict upon migrating salmon. For example, the standard provides that waters subject to the 20°C criterion will also have cold water refugia sufficiently distributed so as to allow salmon and steelhead migration without significant adverse effects from higher water temperatures elsewhere in the waterbody. OAR 340-041-0028(4)(d). However, EPA does not know whether the cold water refugia exist. Even if the refugia do exist, they may be identified through an entirely extra-regulatory process after TMDLs are completed and after the unprotective 20°C criterion has been applied. Nothing in the rules establishes the processes by which cold water refugia will be identified or protected. Further, cold water refugia are defined based on a comparison with ambient temperatures, not the 20°C criterion, and thus may not be colder than 20°C.

76. *The 18°C Numeric Criterion for Salmon and Steelhead Juvenile Rearing and Migration*—EPA approved a criterion of 18°C (64.4°F) for salmon and steelhead juvenile rearing and migration. EPA recognized that 18°C offers, at best, protection at the high end of a range of optimum temperatures. EPA did not explain how a “high optimum”— a temperature defined as causing some degradation of salmonid health – level of protection is protective of threatened and

endangered species. By definition, the choice of a temperature that is warmer than optimum will increase the risk to species that can ill afford additional risk and stocks that are further declining. Nowhere in the EPA Guidance upon which Oregon relies or in EPA's evaluation of the Oregon criteria does the agency address the question of what risk level is acceptable to an ESA-listed species.

77. ***The 13°C Criterion for Salmon and Steelhead Spawning Through Fry Emergence***—EPA approved Oregon's 13°C (55.4°F) criterion for salmon and steelhead spawning through fry emergence. The 13°C criterion was set at the upper limit of recommended temperatures necessary to protect spawning. EPA assumed that the 13°C 7DADM criterion would result in a maximum weekly mean between 10°C and 12°C, though EPA did not provide any basis for this assumption. When the various temperature increases that the Oregon rules allow are added to the 13°C criterion, the criterion will not be protective of salmon.

78. ***The 16°C Core Cold Water Habitat Criterion***—EPA approved Oregon's core cold water habitat criterion of 16°C (60.8°F). "Cold Core Water Habitat Use" is defined as "waters that are expected to maintain temperatures within the range generally considered optimal for salmon and steelhead rearing, or that are suitable for bull trout migration, foraging and sub-adult rearing that occurs during the summer." OAR 340-041-0002(13). Although the Temperature Guidance had recommended extensive designation of the core cold habitat use, Oregon ultimately proposed extremely limited use designations for core cold habitat.

79. Neither the core cold water habitat criterion nor the spawning criterion will protect steelhead smoltification, which occurs downstream of the areas established for spawning, and requires lower temperatures than the core cold water habitat criterion provides.

80. *The 12°C Criterion for Bull Trout Spawning and Rearing*—EPA approved a single 12°C (53.6°F) criterion for bull trout spawning and rearing, although EPA and FWS both recognize that the highest acceptable temperature for spawning protection for bull trout is 9°C (48.2° F), and even that figure may not be adequately protective. Indeed, the Temperature Guidance makes clear that the optimal temperatures for egg incubation are between 2-6°C when measured as a constant (and thus 2.5-6.5°C when using the 7DADM metric) and that bull trout suffer “substantially reduced egg survival and size” when constant temperatures are between 6-8°C (6.5-8.5°C when using the 7DADM metric). EPA defended its approval by explaining that waters that meet the 12°C criterion at the hottest part of the summer, usually July and August, will cool when bull trout are spawning, which begins in August or September. EPA did not explain why or how the waters will meet a lower temperature during spawning season, when nothing legally requires waters to achieve a more protective threshold.

Narrative Temperature Criteria and Exemptions

81. EPA approved several narrative criteria that serve as exemptions or exceptions from the numeric temperature criteria. For example, the “Natural Conditions Criteria” exception, OAR 340-041-0028(8), provides that where DEQ determines that the natural thermal potential of a waterbody exceeds the numeric criteria discussed above, the natural thermal potential temperatures are deemed to be the applicable temperature criteria for that waterbody. Similarly, the “Statewide Narrative Criterion,” OAR 340-041-0007(2), provides that where a less stringent “natural condition” of a waterbody exceeds the otherwise applicable numeric criterion, the natural condition supercedes the numeric criterion and becomes the applicable standard. Also, the “Human Use Allowance” rule, OAR 340-041-0028(12)(b), permits each point source to exceed the applicable temperature criteria

in waters that are already water quality-limited for temperature no matter how hot the receiving water may be. The “Unidentified Tributaries” rule, OAR 340-041-0028(5), states that the applicable criteria for any waters that are not identified on the fish use maps and tables shall be the criteria that apply to the nearest downstream waterbody. The “Air Temperature Exclusion,” OAR 340-041-0028(12)(c), exempts waterbodies in areas that have high air temperatures from two primary mechanisms for protecting water quality under the CWA: (1) protections provided to water quality-limited waters listed under the § 303(d) list; and (2) enforceable protections under the CWA.

82. These and other exemptions have the practical effect of voiding or retreating from the application of the temperature standards. Additionally, these exemptions allow DEQ to effectively modify approved numeric criteria without requiring the modification to comply with public participation and CWA approval requirements for water quality standards revisions, or ESA consultation requirements.

Intergravel Dissolved Oxygen Criterion

83. Oregon revised, and EPA approved, its IGDO criterion as follows: “For water bodies identified as active spawning areas in the places and times indicated . . . , [t]he spacial median IGDO concentration must not fall below 8.0 mg/L.” OAR 340-041-0016(1)(a)(C). The “spatial median” measurement is “the value which falls in the middle of a data set of multiple IGDO measurements taken within a spawning area,” therefore “[h]alf the samples [will] be greater than, and half the samples [will] be less than [8.0 mg/L].” OAR 340-041-0002(53). The revised criterion for IGDO is unprotective because concentrations below 8.0 mg/L, which will necessarily be found in areas deemed to be in attainment with the criterion, will likely result in severe and lethal impacts to salmon according to NMFS, as discussed below.

Oregon's Antidegradation Policy

84. Oregon's antidegradation policy establishes three levels of protection based on the existing water quality of each waterbody. The "Water Quality Limited Waters Policy" prohibits further degradation of already degraded waterbodies unless DEQ determines that a lowering is necessary. OAR 340-041-0004(7). The "High Quality Waters Policy" applies to waters that meet or exceed the water quality levels necessary to support beneficial uses, and requires that level of water quality to be maintained, unless DEQ determines that the benefits of allowing a lowering of water quality outweigh the benefits of maintaining water quality. OAR 340-041-0004(6). The "Outstanding Resource Waters Policy" applies to "high quality waters" and requires the existing water quality and water quality values to be maintained and protected. OAR 340-041-0004(8).

85. Oregon's Water Quality Limited Waters Policy applies to waters that "d[o] not meet narrative or numeric water quality criteria," OAR 340-041-0002(67), and Oregon's High Quality Waters Policy applies to waters that "meet or exceed levels that are necessary to support the propagation of fish, shellfish, and wildlife; recreation in and on the water; and other designated beneficial uses." OAR 340-041-0002(22). Neither the Water Quality Limited Waters Policy nor the High Quality Waters Policy provides for the protection of "existing" uses. *See* OAR 340-041-0004(6) & OAR 340-041-0004(7). Thus, Oregon's antidegradation policy does not provide the minimum level of protection required under "Tier 1," 40 C.F.R. § 131.12(a)(1).

86. Further, Oregon effectively has changed its antidegradation policy to result in no "Tier 2" level of protection. Oregon's classification system takes what is referred to as a "designational" approach. Under this approach, Oregon's Water Quality Limited Waters Policy covers all parameters in waterbodies that exceed any criteria for a single parameter. Thus, any waterbody that

lacks adequate water quality for a single parameter is deemed water quality-limited, and subject to the lowest level of protection. In contrast, Oregon defines as “high quality” or “outstanding” only those waters that meet or exceed water quality standards for every parameter. Therefore, Oregon’s High Quality Waters Policy and Outstanding Natural Resources cover only those waters that meet or exceed criteria for *all* parameters. Oregon’s designational approach effectively results in most of Oregon’s waters being classified as “Water Quality Limited Waters” and therefore not subject to Tier 2 antidegradation analysis. Nor, as described above, are they afforded Tier I protections.

Antidegradation Exemptions

87. Oregon’s antidegradation policy consists of various exemptions from antidegradation review. For example, “nondegradation discharges,” “recurring activities,” and “short term degradation” are exempt from the antidegradation policy. Additionally, the Oregon Environmental Quality Commission (“EQC”) is given authority to grant further exceptions to the antidegradation policy.

88. **“Nondegradation Discharges”**—First, Oregon exempts from antidegradation review all new or increased discharges deemed to be “nondegradation discharges.” OAR 340-041-0004(3).

89. Under this exemption, pollutants discharged into a previously established mixing zone for a permitted source are deemed not to be a reduction in water quality, so long as: (1) the mixing zone is established in accordance with OAR 340-041-0053; (2) there are no overlapping mixing zones from other point sources; and (3) the discharger complies with all effluent limits set out in its NPDES permit. OAR 340-041-0004(3)(a). The rule does not prohibit an increase in the size of the applicable mixing zone.

90. Additionally under the nondegradation discharges exemption, increased pollutant

concentrations are exempted from antidegradation review, so long as the increase occurs as the result of a water conservation activity, the total mass load of the pollutant is not increased, and the concentration increase has no adverse effect on either beneficial uses or threatened or endangered species in the waterbody. OAR 340-041-0004(3)(b). There is no upper limit on the concentration of the pollutants discharged, no indication of how “total mass load” is defined, and no indication of what constitutes an adverse effect on uses or how it will be determined.

91. The nondegradation discharges exemption also provides that the 0.3°C (0.5°F) increase in temperature at the edge of mixing zones authorized under OAR 340-041-0028(11) and (12) (the human use allowance and thermal mixing zone provisions) will not be considered a reduction in water quality and thus is exempt from antidegradation review.

92. Finally, the nondegradation discharges exemption states that a 0.1mg/L decrease in dissolved oxygen from the upstream end of a stream reach to a downstream end will not be considered a reduction in water quality so long as it has no adverse effects on threatened and endangered species. OAR 340-041-0004(3)(d).

93. ***“Recurring Activities”***—The second major category of antidegradation review exemptions covers what DEQ considers “recurring activities.” The rules carve out three exemptions from antidegradation for three activities that are deemed to be recurring: rotating grazing pastures, agricultural crop rotations, and maintenance dredging. OAR 340-041-0004(4). DEQ claimed that, so long as the activities do not increase in frequency, intensity, duration, or geographical extent, they will not be considered new or increased discharges. EPA reviewed and approved this provision to the extent that it relates to what EPA considers “regulated discharges,” but EPA did not consider nonpoint sources or identify which parts of the regulation apply to nonpoint sources.

94. ***“Short Term” Degradation***—Oregon’s antidegradation policy also authorizes exemptions for “short term” degradation resulting from riparian restoration activities and emergency situations. *See* OAR 340-041-0004(5). Under the riparian restoration exemption, activities intended to restore the geomorphology or riparian vegetation of a waterbody or control invasive species are exempt from antidegradation review if DEQ determines that there is a net ecological benefit to the activity and reasonable measures are taken to minimize degradation. The rules do not explain what constitutes a net ecological benefit or establish limits on what “reasonable measures” must be taken to qualify for the exemption.

95. ***EQC Authority to Grant Exceptions***—Finally, the rules give the EQC authority to grant exceptions to the antidegradation policy for an even broader category of activities. *See* OAR 340-041-0004(9).

Trigger for Antidegradation Review

96. Oregon’s antidegradation policy is based on the premise that only a lowering of water quality triggers antidegradation review. The policy assumes that, so long as water quality is not lowered, existing uses are being maintained, even if that is not in fact true. The policy thus grandfathers in existing discharges, that have never themselves been subjected to antidegradation review, and exempts them from future antidegradation review.

Lack of Antidegradation Implementation Methods

97. As noted above, this Court in the previous litigation regarding Oregon’s water quality standards concluded that Oregon’s antidegradation implementation policy, which consisted of a single sentence, “[t]he standards and policies set forth in OAR 304-041-0007 through 340-041-0350 are intended to *implement* the Antidegradation Policy,” was inadequate. *See Northwest*

Environmental Advocates, 268 F. Supp. 2d at 1265 (emphasis added). In response to this decision, Oregon revised its “antidegradation policy” so that it now reads: “[t]he standards and policies set forth in OAR 304-041-0007 through 340-041-0350 are intended to *supplement* the Antidegradation Policy.” OAR 340-041-0004(1) (emphasis added). Oregon continues to lack an adequate antidegradation implementation plan or otherwise enforceable implementation methods.

98. Oregon’s antidegradation policy now refers in various places to the “Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications” (2001) (“Antidegradation IMD”). The Antidegradation IMD is an unenforceable, non-binding policy statement by DEQ that attempts to explain how DEQ will implement antidegradation review when it issues Section 401 water quality certifications and NPDES permits. The Antidegradation IMD does not apply to nonpoint sources. Although DEQ released its draft antidegradation implementation policy for public comment, it never submitted the Antidegradation IMD to the EQC for review and approval. The Antidegradation IMD thus lacks the force of law.

99. In its approval of Oregon’s revised water quality standards, EPA relies on the Antidegradation IMD, notwithstanding the fact that it was not modified to implement the revised water quality standards at issue here. Thus, changes that EPA considered significant in its approval of the recently revised standards, such as express references to threatened and endangered species in the antidegradation policy, are not addressed at all in the Antidegradation IMD.

Submitted Standards EPA Did Not Act Upon

100. Despite DEQ’s insistence that it had revised the entirety of its water quality standards, EPA did not act upon the entire submission. EPA claimed that the provisions it ignored were either

not a water quality standard or that review was not required by this Court's order, but EPA did not specify which provisions it believed fell within which of these justifications. As a result, EPA specifically declined to review at least the following: (1) exemptions from antidegradation review applicable to rotating grazing pastures and agricultural crop rotations, *see e.g.*, OAR 340-041-0004(4)(a)&(b); (2) provisions expressly related to nonpoint sources of pollution, *see, e.g.*, OAR 340-041-0007(10) and OAR 340-041-0028(12)(h); (3) provisions related to forestry and agriculture on state, private, and federal lands, *see, e.g.*, OAR 340-041-0028(12)(e),(f)&(g); and (4) other provisions directly relating to the applicability and implementation of the water quality standards that it did approve. In addition to taking no action on many changes, there is no indication that EPA took the effects of these provisions into account when reviewing those parts of the standards it chose to approve.

101. EPA also declined to take action on other revised water quality standards that EPA claimed were only non-substantive editorial changes not subject to EPA review. EPA failed to identify several substantive changes made within those same provisions that Oregon had also never identified through boldfaced text or strike-outs.

102. Finally, EPA neither took action on nor identified another subset of water quality standards that Oregon submitted for review, including additional provisions relating to forest and agriculture activities. *See, e.g.*, OAR 340-041-0061(11), (12) & (13).

EPA's Biological Evaluation

103. On February 4, 2004, EPA completed a Biological Evaluation of the impacts of Oregon's revised water quality standards for temperature, IGDO, and antidegradation implementation on salmon and steelhead in Oregon, entitled Biological Evaluation of the Revised

Oregon Water Quality Standards for Temperature, Intergravel Dissolved Oxygen, and Antidegradation (hereinafter “2004 EPA BE”). The 2004 EPA BE describes numerous adverse affects that would result from the agency’s approval of Oregon’s revised standards.

104. First, EPA acknowledged that the 18°C criterion for rearing and migrating juvenile salmon was likely to cause a “decrease in juvenile growth, increased disease risk, and increased competition with cool and warm water species during the period of summer maximum temperatures.” *Id.* at 5-20.

105. Second, EPA determined that the 20°C criterion for salmon and steelhead migration corridors and sufficiently distributed cold water refugia was likely to cause “increased disease risk, increased stress, and decreased swimming performance in migrating adults and impaired smoltification, reduced growth, and increased predation and competition for late emigrating juveniles.” *Id.* at 5-22. The 2004 EPA BE explained that EPA’s approval of Oregon’s designations of certain waters as migration corridors was likely to adversely affect listed salmon and steelhead because the designations were premised in part on the assumption that the waters would naturally reach 20°C, yet there is “uncertainty” as to whether the designated areas actually exceeded the 20°C criterion under natural conditions. *Id.* at 5-46.

106. Third, EPA concluded that the 16°C temperature criterion and use designation, designed to protect core cold water habitat, were not likely to adversely affect or would have no effect on listed salmonids, despite EPA’s recognition that no 16°C use designations were made in several river systems in the South Coast basin, which provide habitat for salmon and steelhead. *Id.* at 5-39.

107. Fourth, EPA concluded that its approval of Oregon’s 13°C criterion to protect salmon and steelhead habitat for spawning through fry emergence was not likely to adversely affect listed

species. EPA relied on Oregon's designation of the 13°C spawning use to protect smoltification, even though EPA acknowledged that spawning habitat was not designated in some areas where smoltification was likely to occur.

108. Finally, EPA concluded that its approval of Oregon's "Human Use Allowance" provision was likely to adversely affect listed salmon.

109. The 2004 EPA BE also estimated the impacts that Oregon's water quality standards for temperature and IGDO would have on bull trout. EPA acknowledged that the IGDO criterion would adversely affect developing embryos, but nonetheless concluded that the IGDO criterion would not likely adversely affect bull trout. EPA also acknowledged that the 20°C criterion and use designations established for Lahontan cutthroat trout and redband trout (species which occur in waters that bull trout may also use) would likely adversely affect bull trout. EPA erroneously concluded that the 12°C combined bull trout spawning and juvenile rearing criterion would not adversely affect bull trout.

110. EPA proposed three conservation measures to offset the adverse impacts that would result from its approval of Oregon's water quality standards. The first measure consisted of EPA's promise to establish a team of representatives from EPA, NMFS, FWS, and DEQ to develop a monitoring plan for temperature and use designations. The second conservation measure outlined a monitoring program for temperature thermal plume limitations. EPA would work with DEQ, FWS, and NMFS to select three representative NPDES permits with thermal plume limitations and design a monitoring plan and attempt to implement it, contingent on funding. The final conservation measure outlined a two-year review process, under which EPA would again work with DEQ, FWS, NMFS and Indian tribes to review Oregon's proposed rules, including implementation of the

antidegradation provisions, natural conditions provisions, thermal plume limitations, heat load limits, variances, identification of cold water refugia, progress on the effluent trading pilot program, and application of the requirement to ensure no adverse affects to threatened and endangered species as part of DEQ's antidegradation implementation methods.

111. The measures provided no concrete actions for EPA or DEQ to take should errors in temperature criteria or use designations be detected, should adverse impacts to salmon and steelhead be identified as a result of the thermal plume limitations criterion, should adverse effects to listed salmon and steelhead be identified during the two-year review process, or should the measures not be implemented.

NMFS Biological Opinion

112. On February 23, 2004, NMFS issued a biological opinion for EPA's approval of Oregon's revised water quality standards for temperature, IGDO, and antidegradation implementation methods ("2004 NMFS BiOp"). In the 2004 NMFS BiOp, NMFS acknowledged that "[a]ny further degradation" of the environmental conditions affecting salmon and steelhead in Oregon "would significantly reduce the likelihood of survival and recovery" of these species. 2004 NMFS BiOp at 24. However, the 2004 NMFS BiOp concluded that Oregon's revised water quality standards, as set forth in the 2004 EPA BE, were not likely to jeopardize the continued existence, or destroy or adversely modify the critical habitat, of fourteen salmon and steelhead ESUs. *See id.* at 53–54.

113. ***Environmental Baseline***—The 2004 NMFS BiOp explained that the environmental baseline for anadromous salmon is extremely poor, that environmental conditions must undergo "significant improvements" to meet the biological requirements for salmon and steelhead survival

and recovery, and that further degradation of environmental conditions “would significantly reduce the likelihood of survival and recovery.” *Id.* at 25. After acknowledging that the environmental baseline is poor, however, NMFS analyzed the effects of the revised water quality standards by assuming that water quality standards would be met. *Id.* at 25. The 2004 NMFS BiOp thus failed to account for the environmental baseline in its assessment of the revised water quality standards.

114. ***Migration Corridor Temperature 20°C Criterion and Use Designations***—The 2004 NMFS BiOp acknowledged that EPA’s approval of Oregon’s 20°C temperature criterion for salmon and steelhead migration will have adverse effects on listed species, including sublethal effects on listed adult and juvenile salmon and steelhead, an overall reduction in migration fitness due to cumulative stress from prolonged exposure, and elevated disease risk. *Id.* at 35-36. The 2004 NMFS BiOp also acknowledged that the 20°C criterion could improperly apply to waters used by salmon and steelhead holding and rearing, and thus cause sublethal adverse effects to these life stages. *Id.* at 45. The 2004 NMFS BiOp thus concluded that the 20°C migration corridor temperature criterion and use designations were “likely to adversely affect” threatened and endangered salmon and steelhead. *Id.* at 37, 46.

115. ***Juvenile Rearing and Migration 18°C Criterion and Use Designations***—The 2004 NMFS BiOp noted that EPA’s approval of Oregon’s 18°C temperature criterion for juvenile rearing and migration will cause sublethal effects, including increased disease risk for adult and juvenile salmon and steelhead, reduced viability of gametes in adult salmon and steelhead, and reduced growth of juvenile salmon and steelhead. *Id.* at 34. It also acknowledged that use designations could subject salmon and steelhead to temperatures that will be higher than natural conditions and that the adequacy of such use designations would not be determined until Oregon completes temperature

TMDLs for each waterway to which the 18°C criterion applies. *Id.* at 44. The 2004 NMFS BiOp speculated that development of TMDLs would result in attainment of the 18°C criterion, but also acknowledged that changes would need to be made to forestry and agricultural practices for the criterion to be met. *Id.* The 2004 NMFS BiOp did not address provisions in the rules that deem existing land management practices, such as logging and farming, to be sufficient to meet standards. The 2004 NMFS BiOp concluded that the 18°C criterion and use designations would likely adversely affect at least five ESUs and likely not adversely affect nine other ESUs.

116. ***Spawning Through Fry Emergence 13°C Criterion and Use Designations***—The 2004 NMFS BiOp concluded, by relying on the Temperature Guidance, that the 13°C criterion would likely not adversely affect threatened and endangered salmon species. *Id.* at 33. The 2004 NMFS BiOp also upheld the use designations for steelhead and salmon spawning, even though the designations allow chinook spawning to be unprotected for up to two weeks after spawning begins. *Id.* at 40. The 2004 NMFS BiOp also approved Oregon’s proposal to allow spawning and fry emergence use designations to serve as proxies for protecting salmon and steelhead smoltification even though the 13°C criterion may not protect smoltification in the John Day River. *Id.* at 41. The 2004 NMFS BiOp did not state a conclusion regarding the specific effects that the failure to protect smoltification would have on salmon and steelhead.

117. ***Core Cold Water Habitat 16°C Criterion and Use Designations***—The 2004 NMFS BiOp concluded that EPA’s approval of Oregon’s designation of the core cold water habitat use would likely adversely affect five ESUs, because Oregon had failed to designate this use in a sufficient range of waterways. *Id.* at 43. The 2004 NMFS BiOp stated that the 16°C criterion was developed to provide “optimal or near-optimal conditions for rearing of juvenile salmon and

steelhead.” *Id.* at 41. Although the Temperature Guidance had recommended extensive designation of the optimal core cold habitat use, Oregon ultimately proposed extremely limited use designations for core cold habitat. NMFS commented on Oregon’s limited use designations, noting that salmon and steelhead populations would not be protected if core cold habitat were not adequately designated. NMFS similarly stated that “in an ideal situation,” waters would be designated as core cold water habitat use for each distinct population. *Id.* at 42. The 2004 NMFS BiOp concluded that the under-designation of the core cold habitat use would result in elevated disease risk, reduced viability of gametes, and reduced juvenile growth among five salmon and steelhead ESUs. *Id.* at 43-44.

118. ***Natural Conditions, Protecting Cold Water, Human Use Allowance, and Thermal Plume Limitations***—The 2004 NMFS BiOp reviewed various narrative criteria - natural conditions, protecting cold water, human use allowance, and thermal plume limitations - that allow Oregon to supercede the otherwise applicable numeric criteria. In sanctioning each of these less stringent narrative criteria, the 2004 NMFS BiOp admitted that uncertainty remained about the manner in which Oregon would implement the criteria and about the impacts that the criteria would have. *See* 2004 BiOp at 47-52. Nonetheless, based on NMFS’ understanding of the exemptions, the 2004 NMFS BiOp acknowledged that the human use allowance and thermal plume limitations would cause elevated disease risk, reduced growth, thermal shock, delayed migration, increased predation susceptibility, and decreased survival in all the salmon and steelhead ESUs affected by Oregon’s water quality standards. *Id.* at 49, 51-52.

119. ***Unreviewed Water Quality Standards***— The 2004 NMFS BiOp did not analyze the impacts that Oregon’s various exemptions for forestry, agriculture, grazing, and other point and nonpoint sources would have on listed species. Although the 2004 NMFS BiOp occasionally

referenced the poor state of Oregon’s nonpoint source controls and recognized the lack of adequate regulation over forestry and agricultural sources of pollution, (*see, e.g.*, 2004 NMFS BiOp at 43 n.6, 44 n. 7), the 2004 NMFS BiOp ignored any assessment of the many exemptions for these pollution sources in Oregon’s revised water quality standards. The 2004 NMFS BiOp thus failed to consider all direct and indirect and cumulative effects of EPA’s review and approval of Oregon’s water quality standards.

120. ***Intergravel Dissolved Oxygen***—The 2004 NMFS BiOp stated that the 8.0 mg/L criterion for IGDO approved by EPA likely was not protective enough for salmon and steelhead, because the criterion “may not provide adequate levels of IGDO for embryos and alevins of listed salmon and steelhead at all times.” *Id.* at 32. The 2004 NMFS BiOp instead recognized that the 8.0 mg/L criterion would likely cause severe impacts to salmon and steelhead because stream reaches meeting the criterion would necessarily include areas with IGDO levels below 8.0 mg/L. *Id.* at 32. For waters below 8.0 mg/L, the 2004 NMFS BiOp chronicled numerous adverse affects to fish, including “much lower survival,” and recovery of “few or no steelhead sac fry.” *Id.* at 31.

121. Despite these reported effects, the 2004 NMFS BiOp stated that harm to salmon and steelhead could be minimized by implementation of the standard and establishment of a “consistent monitoring and sampling protocol” which could provide “much-needed information regarding existing IGDO concentrations in Oregon rivers with various amounts of fine substrate sediment and stream velocities.” *Id.* at 32. Yet, EPA’s proposed conservation measures relate only to temperature and use designation monitoring. *Id.* at 5-6. Similarly, the 2004 NMFS BiOp’s incidental take statement, which identified EPA’s approval of the IGDO criterion as causing take of salmon and steelhead, did not include a reasonable and prudent measure to offset harms caused by the IGDO

criterion. *Id.* at 56-57. The 2004 NMFS BiOp thus sanctioned EPA’s approval of an admittedly harmful IGDO criterion without mandating any mitigation measures that would reduce the harms caused by EPA’s approval.

122. ***Conservation Measures***– As a basis for the BiOp’s no jeopardy conclusion, NMFS relied on EPA’s promise to work with NMFS, FWS, and DEQ to implement three conservation measures to monitor and reduce uncertainties inherent in Oregon’s implementation of its revised water quality standards. *Id.* at 53. The conservation measures simply call for ongoing monitoring to “validate” EPA’s assumptions with respect to temperature criteria, beneficial use designations, and thermal plume limitations, and to “review” implementation of numerous provisions in the standards. *Id.* at 5–6. The measures do not provide for any concrete action that EPA must undertake to mitigate adverse effects should EPA’s assumptions be proven false during the course of the monitoring and review. Moreover, the conservation measures are entirely speculative because, as with conservation measure 2, EPA’s ability to secure funding is a precondition to implementation of the measure.

123. ***Failure to Assess Additive Effects***– Although the 2004 NMFS BiOp acknowledged that approval of various components of the revised water quality standards would have adverse effects at various life stages of salmon and steelhead, the 2004 NMFS BiOp did not adequately consider or explain additive effects that would result from EPA’s action regarding the entire revised water quality standard package. The 2004 NMFS BiOp thus ignored the significant additive harms that salmon and steelhead will suffer due to Oregon’s adoption of standards that fail to protect each life stage.

124. ***Failure to Protect Critical Habitat***– The 2004 NMFS BiOp failed to provide any

independent assessment of the impacts that EPA's approval of Oregon's revised water quality standards would have on designated critical habitat and critical habitat's effect on salmon and steelhead survival *and* recovery. Instead, the 2004 NMFS BiOp stated that effects to critical habitat would be similar to the effects on listed salmon and steelhead ESUs.

125. In reliance on speculative monitoring and mitigation, and despite its own conclusions that a number of the temperature criteria, designated uses, and narrative criteria will have significant adverse impacts on listed salmon and steelhead, NMFS issued a no jeopardy biological opinion for EPA's approval of Oregon's water quality standards. By purposefully assuming in its analysis that listed fish are exposed to waters achieving water quality standards, NMFS disregarded the environmental baseline and failed to account for the degraded state of salmon and steelhead habitat in Oregon. Thus, the 2004 NMFS BiOp's conclusion that EPA's approval of Oregon's water quality standards would not cause jeopardy to listed species or result in adverse modification of critical habitat is legally and factually unsupportable.

FWS Biological Opinion

126. On February 24, 2004, FWS issued a Biological Opinion ("2004 FWS BiOp") discussing the effects that EPA's approval of Oregon's revised water quality standards would have on various species, including bull trout. The 2004 FWS BiOp noted that bull trout populations have drastically declined during the last century due in part to habitat degradation and fragmentation, blockage of migratory corridors, and poor water quality. 2004 FWS BiOp at 20. The 2004 FWS BiOp further noted that, due to bull trout's need for very cold waters and long egg incubation times, bull trout are more sensitive to high water temperatures and poor water quality than many other salmonids, and that bull trout's continued survival is threatened. *Id.* at 26. The 2004 FWS BiOp

thus defined habitat restoration and maintenance as key components of bull trout recovery. *Id.* at 27. The 2004 FWS BiOp nonetheless sanctioned EPA's approval of Oregon's revised water quality standards for temperature and IGDO, even though the standards are set at levels beyond the optimal ranges necessary to ensure bull trout survival.

127. ***Environmental Baseline*** – The 2004 FWS BiOp described the environmental baseline for bull trout as including water quality that is “typically poor, or very poor” in most areas in Oregon and explained that most waterbodies in Oregon do not meet required temperature standards. *Id.* at 39. The 2004 FWS BiOp failed to discuss, however, how EPA's approval of Oregon's revised water quality standards would affect bull trout in light of the degraded environmental baseline.

128. ***Intergravel Dissolved Oxygen*** – The 2004 FWS BiOp noted that the IGDO criterion would result in localized impairment to bull trout growth and development. *Id.* at 47. The 2004 FWS BiOp also acknowledged that, due to inadequate use designations for bull trout spawning, bull trout would be exposed to inadequate levels of IGDO. The 2004 FWS BiOp thus rejected EPA's determination that approval of the 8.0 mg/L intergravel dissolved oxygen criterion would not adversely affect bull trout. *Id.* at 48.

129. ***Bull Trout Spawning and Juvenile Rearing Criterion and Use Designations*** – The 2004 FWS BiOp cited a number of scientific studies that demonstrate that bull trout require very cold water for successful spawning and egg hatching. *Id.* at 51. The 2004 FWS BiOp noted that these studies show that bull trout require temperatures below 9°C for spawning, that bull trout spawn most successfully in 4-6°C waters, and that bull trout egg survival rates are highest in very cold waters. *Id.* The 2004 FWS BiOp also noted that egg survival rates fall precipitously as water temperatures warm to 10°C. *Id.* The 2004 FWS BiOp also acknowledged that the 12°C criterion is

outside the optimal temperature requirements for bull trout spawning. *Id.* Nonetheless, the 2004 FWS BiOp concluded that the 12°C criterion would not adversely affect bull trout. *Id.* at 52-53.

130. ***Salmonid Use Designations and Spawning, Rearing, and Migration Criteria*** – Oregon’s revised water quality standards recommended that Lahontan cutthroat and redband trout uses, but not bull trout uses, be designated in certain waters in the Powder, Malheur, and Klamath Basins. *Id.* at 71. These waterways are subject to a 20°C criterion, even though bull trout also use these waters and require much colder water temperatures. *Id.* at 71-72. FWS thus concluded that the use designations in these three basins are likely to adversely affect bull trout. *Id.* at 72.

131. The 2004 FWS BiOp also reviewed various criteria established primarily for salmonid uses, due to overlapping habitat uses between bull trout and salmon and steelhead. The 2004 FWS BiOp noted that the 16°C, 18°C, and 20°C criteria all exceed temperatures necessary to protect bull trout uses. *Id.* at 55-58. The 2004 FWS BiOp noted in particular that approval of the 18°C criterion would cause growth impairment, reduced disease resistance, and altered behavioral patterns. *Id.* at 56. The 2004 FWS BiOp ultimately concluded that approval of the 18°C criterion would likely adversely affect bull trout, but that approval of the 16°C and 20°C criteria would not.

132. ***Narrative Criteria***–The 2004 FWS BiOp also reviewed the effects expected from approval of various narrative criteria, including the natural conditions criteria, the protecting cold water criteria, the human use allowance, the air temperature exclusion, and the thermal plume limitations. The 2004 FWS BiOp concluded that certain negative impacts, such as delayed migration, sublethal physiological effects, and thermal shock, would likely result from EPA’s approval of the human use allowance and thermal plume limitations, and that these narrative criteria would likely adversely affect bull trout. *Id.* at 66-68. The 2004 FWS BiOp concluded that other

narrative provisions would not have adverse effects.

133. ***Unreviewed Water Quality Standards***—The 2004 FWS BiOp did not analyze the impacts that Oregon’s various exemptions for forestry, agriculture, grazing, and other point and nonpoint sources would have on listed species covered in the 2004 BiOp. Although the 2004 FWS BiOp repeatedly noted that poor water quality and poor habitat were responsible for bull trout decline, the 2004 FWS BiOp ignored any assessment of the many exemptions for these pollution sources in Oregon’s revised water quality standards. The 2004 BiOp thus failed to consider all direct and indirect, interrelated, and cumulative effects of EPA’s review and approval of Oregon’s water quality standards.

134. ***Incidental Take and Conservation Measures***—The 2004 FWS BiOp noted that approval of various criteria would result in an unknown amount of take of listed bull trout. *Id.* at 79-80. The criteria that FWS identified as likely to cause take include the IGDO criterion, the 18°C salmon and steelhead juvenile rearing migration criterion, the 20°C Lahontan cutthroat and redband trout criterion and use designations, and the human use and thermal plume limitations narrative criteria. *Id.* To mitigate the effects of the take, FWS directed EPA to implement the conservation measures identified in EPA’s BE. *Id.* at 80.

135. The conservation measures simply call for ongoing monitoring to “validate” EPA’s assumptions with respect to temperature criteria, beneficial use designations, and thermal plume limitations, and to “review” implementation of numerous provisions in the standards. The measures do not provide for any concrete action that EPA must undertake to mitigate adverse effects should EPA’s assumptions be proven false during the course of the monitoring and review. Moreover, the conservation measures are entirely speculative because, as with conservation measure 2, EPA’s

ability to secure funding is a precondition to implementation of the monitoring.

136. *Failure to Assess Additive Effects*– Although the 2004 FWS BiOp acknowledged that approval of various components of the revised water quality standards would have adverse effects at various life stages of bull trout, the 2004 FWS BiOp did not adequately consider or explain additive effects that would result from EPA’s action regarding the entire revised water quality standard package. The 2004 FWS BiOp thus ignored the significant additive harms that bull trout will suffer due to Oregon’s adoption of standards that fail to protect each life stage. The 2004 FWS BiOp’s conclusion that EPA’s approval of Oregon’s water quality standards would not cause jeopardy to listed bull trout is thus legally and factually unsupportable.

CLAIMS FOR RELIEF

Plaintiff’s First Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of Procedurally Deficient Standards

137. Plaintiff realleges all preceding paragraphs.

138. Pursuant to 40 C.F.R. § 131.20(b), in the course of setting water quality standards, a state must hold a public hearing for the purpose of reviewing water quality standards, in accordance with provisions of state law, and public participation regulations at 40 C.F.R. § 25.

139. Pursuant to 40 C.F.R. § 25.5, reports, documents and data relevant to the discussion at the public hearing shall be available to the public at least 30 days before the hearing.

140. Under Oregon law, DEQ must include with any notice of intended rulemaking a list of the principal documents, reports or studies prepared by or relied on by the agency in making the rule, as well as a statement of the location at which those documents are available for public inspection.

ORS 183.335(2)(b)(D).

141. Under Oregon law, DEQ also must show all changes to the water quality standards by bracketing material to be deleted and showing all new material in boldfaced type. ORS 183.335(2)(d).

142. Pursuant to 40 C.F.R. § 131.6, water quality standards submitted to EPA must be accompanied by, *inter alia*, “[m]ethods used and analyses conducted to support water quality standards revisions,” and “[g]eneral information which will aid [EPA] in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.”

143. DEQ did not prepare, submit to EPA, or provide for public review a supporting analysis of its new or revised water quality standards.

144. DEQ did not make all reports, documents and data relevant to the public hearings available 30 days before the public hearings.

145. DEQ did not list and make available for public inspection principle documents, reports, or studies that it relied on in making the water quality standards rule when it gave notice of the intended rulemaking.

146. DEQ did not produce a document showing all proposed changes to the water quality standards by bracketing material to be deleted and bolding new material.

147. DEQ’s water quality standards submission to EPA did not include the methods used and analyses conducted to support DEQ’s water quality standards revisions.

148. DEQ’s water quality standards submission to EPA did not include information to aid

EPA in determining the adequacy of the scientific basis of the standards which do not include the uses specified in CWA section 101(a)(2), 33 U.S.C. § 1251(a)(2).

149. DEQ's water quality standards submission to EPA did not include information on general policies which may affect the application and implementation of Oregon's water quality standards.

150. Thus, the revised water quality standards that Oregon submitted for EPA's approval on December 10, 2003 do not comply with the requirements of 40 C.F.R. § 131.20(b) and 40 C.F.R. § 131.6.

151. EPA approved Oregon's new or revised water quality standards on March 2, 2004, even though DEQ failed to comply with the requirements of 40 C.F.R. § 131.20(b) and 40 C.F.R. § 131.6.

152. EPA's approval of Oregon's procedurally deficient water quality standards was therefore arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff's Second Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA's Approval of Time and Place Use Designations

153. Plaintiff realleges all preceding paragraphs.

154. Water quality standards must provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water. 33 U.S.C. § 1251(a)(2); 40 C.F.R. § 131.2.

155. Designated uses must be established so as to provide for these protections. 40 C.F.R. § 131.10(a).

156. Existing uses must also be protected. 40 C.F.R. Part 131, Subpart B.

157. Although states may remove a designated use if that use cannot be attained, states may not remove a designated use if that use is also an existing use. 40 C.F.R. § 131.10(h).

158. States may remove designated uses that are not existing uses so long as they perform a Use Attainability Analysis (“UAA”) consistent with the regulations and the results are submitted to EPA for review and approval. 40 C.F.R. § 131.10(g) and (j).

159. Oregon removed several designated uses in its revised water quality standards, including steelhead smoltification, bull trout rearing, and other salmon, steelhead, and bull trout uses.

160. In removing designated salmon, steelhead, and bull trout uses, Oregon did not determine whether any of the removed uses were existing uses that cannot be removed.

161. Oregon also did not perform a UAA prior to removing these designated uses.

162. EPA approved Oregon’s use designations despite the fact that Oregon removed designated uses that were also existing uses and despite the fact that Oregon did not perform a UAA.

163. EPA’s approval of Oregon’s use designations was therefore arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Third Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of 20°C Temperature Criterion for Salmon and Steelhead Migration

164. Plaintiff realleges all preceding paragraphs.

165. Water quality criteria must be set at a level necessary to protect the designated uses of

a waterbody. 33 U.S.C. § 1313(c)(2), 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

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

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

168. Oregon proposed a criterion of “20°C (68°F) and Sufficiently Distributed Cold Water Refugia” for salmon and steelhead migration. *See* OAR 340-041-0028(4)(d).

169. Oregon’s criterion of “20°C (68°F) and Sufficiently Distributed Cold Water Refugia” does not protect designated uses, including threatened and endangered species.

170. EPA approved Oregon’s proposed criterion of “20°C (68°F) and Sufficiently Distributed Cold Water Refugia.”

171. EPA’s approval of Oregon’s “20°C (68°F) and Sufficiently Distributed Cold Water Refugia” criterion for salmon and steelhead migration was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Fourth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of 18°C Temperature Criterion for Salmon and Steelhead Juvenile Rearing and Migration

172. Plaintiff realleges all preceding paragraphs.

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

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

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

176. Oregon proposed a numeric criterion of 18°C (64°C) for salmon and steelhead juvenile rearing and migration. *See* OAR 340-041-0028(4)(c).

177. Oregon’s 18°C criterion does not protect designated uses, including threatened and endangered species.

178. EPA approved Oregon’s proposed numeric criterion of 18°C for salmon and steelhead juvenile rearing and migration.

179. EPA’s approval of Oregon’s numeric criterion of 18°C for salmon and steelhead juvenile rearing and migration was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Fifth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of 13°C Temperature Criterion for Salmon and Steelhead Spawning Through Fry Emergence

180. Plaintiff realleges all preceding paragraphs.

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

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

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

184. Oregon proposed a numeric criterion of 13°C (55.4 °F) for salmon and steelhead spawning through fry emergence. *See* OAR 340-041-0028(4)(a).

185. Oregon’s numeric criterion of 13°C does not protect designated uses, including threatened and endangered species.

186. EPA approved Oregon’s numeric criterion of 13°C for salmon and steelhead spawning through fry emergence.

187. EPA’s approval of Oregon’s numeric criterion of 13°C for salmon and steelhead spawning through fry emergence was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Sixth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of 12°C Temperature Criterion for Bull Trout Rearing and Spawning

188. Plaintiff realleges all preceding paragraphs.

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

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

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

192. Oregon proposed a numeric criterion of 12°C (53.6°F) for bull trout spawning and rearing.

193. Oregon’s numeric criterion of 12°C does not protect designated uses, including threatened and endangered species.

194. EPA approved Oregon’s proposed numeric criterion of 12°C for bull trout spawning and rearing.

195. EPA’s approval of Oregon’s numeric criterion of 12°C for both bull trout spawning and rearing was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Seventh Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of Exemptions from Compliance with Numeric Temperature Criteria

196. Plaintiff realleges all preceding paragraphs.

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

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

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

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

201. Oregon proposed, and EPA approved, narrative criteria, including at least the following:

- (a). “Natural Conditions Criteria,” OAR 340-041-0028(8);
- (b). “Human Use Allowance” rule, OAR 340-041-0028(12)(b);
- (c). “Unidentified Tributaries” rule, OAR 340-041-0028(5);
- (d). “Air Temperature Exclusion,” OAR 340-041-0028(12)(c); and
- (e) “Statewide Narrative Criteria,” OAR 340-041-0007(2).

202. The narrative criteria serve as exemptions from the numeric temperature criteria.

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

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

Plaintiff’s Eighth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of Oregon’s Antidegradation Policy

205. Plaintiff realleges all preceding paragraphs.

206. Pursuant to 40 C.F.R § 131.6, state water quality standards submitted to the EPA for review must include an antidegradation policy consistent with 40 C.F.R. § 131.12.

207. 40 C.F.R. § 131.12 establishes three levels of water quality protection: “Tier 1” protection (40 C.F.R. § 131.12(a)(1)); “Tier 2” protection (40 C.F.R. § 131.12(a)(2)); and “Tier 3” protection (40 C.F.R. § 131.12(a)(3)).

208. Antidegradation policies must ensure that existing uses will be “maintained and protected.” 40 C.F.R. § 131.12(a)(1).

209. Antidegradation policies must include implementation methods. 40 C.F.R. § 131.12.

210. Oregon’s antidegradation policy does not require protection of existing uses.

211. Oregon’s antidegradation policy eliminates Tier 2 protections.

212. Oregon’s antidegradation policy contains numerous exemptions, including, the “nondegradation discharges” exemption, OAR 340-041-0004(3), the “recurring activities” exemption, OAR 340-041-0004(4), the “short term” degradation exemption, OAR 340-041-0004(5), and EQC’s authority to grant additional exceptions to the antidegradation policy, OAR 340-041-0004(9).

213. Oregon’s antidegradation policy lacks adequate implementation methods.

214. EPA approved Oregon’s proposed antidegradation policy.

215. EPA’s approval of Oregon’s antidegradation policy was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Ninth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA’s Approval of Oregon’s Antidegradation Policy Implementation Plan

216. Antidegradation policies must include implementation methods. 40 C.F.R. § 131.12.

217. Oregon’s antidegradation policy submitted to EPA for approval refers to the “Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications” (2001) (“Antidegradation IMD”).

218. The Antidegradation IMD is an unenforceable, non-binding policy statement by DEQ that lacks the force of law, does not apply to nonpoint sources, and was never reviewed or approved by the EQC.

219. The antidegradation IMD was not modified to implement the revised water quality standards submitted to EPA on December 10, 2003.

220. EPA approved Oregon’s antidegradation policy and Oregon’s antidegradation policy implementation plan.

221. EPA’s approval of Oregon’s antidegradation policy implementation plan was arbitrary, capricious and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff’s Tenth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

Approval of Standards that Failed to Go Through Antidegradation Review

222. Plaintiff realleges all preceding paragraphs.

223. Water quality standards may be revised only if the revision is subject to and consistent with the state’s antidegradation policy. 33 U.S.C. § 1313(d)(4)(B).

224. A state may only lower the quality of Tier 2 waters if the state finds that allowing lower water quality is necessary to accommodate important economic or social development. 40 C.F.R. § 131.12(a)(2).

225. Oregon's revised water quality standards result in a lowering of water quality.

226. Oregon did not conduct an antidegradation analysis when it revised its water quality standards.

227. EPA approved Oregon's revised water quality standards.

228. EPA's approval of Oregon's water quality standards was arbitrary, capricious and not in accordance with the CWA and implementing regulations, as provided by APA, 5 U.S.C. § 706(2)(A), because Oregon's water quality standards allow for the lowering of water quality without having gone through antidegradation review.

Plaintiff's Eleventh Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA's Approval of Revised IGDO Criterion

229. Plaintiff realleges all preceding paragraphs.

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

231. Criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1).

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

233. Oregon revised its IGDO criterion as follows: "For water bodies identified as active spawning areas in the places and times indicated . . . , [t]he spacial median IGDO concentration must not fall below 8.0 mg/L." OAR 340-041-0016(1)(a)(C).

234. Oregon's 8.0 mg/L IGDO criterion does not protect designated uses, including threatened and endangered species.

235. EPA approved Oregon's proposed 8.0 mg/L IGDO criterion.

236. EPA's approval of Oregon's 8.0 mg/L IGDO criterion was arbitrary, capricious, and otherwise not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff's Twelfth Claim for Relief

(Violation of Mandatory Duty, CWA Section 303(c) and Regulations)

EPA's Failure to Act on, and Disapprove, Certain Water Quality Standards

237. Plaintiff realleges all preceding paragraphs.

238. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c).

239. EPA has a mandatory duty to review submitted standards and general policies to determine that the standards meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5; 40 C.F.R. § 131.21(b).

240. 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).

241. 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.*

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

243. On December 10, 2003, Oregon submitted its entire set of new or revised water quality standards to EPA for review and approval.

244. More than 90 days have past since Oregon submitted its entire set of water quality standards to EPA.

245. EPA has not reviewed or take action on at least the following provisions of Oregon's water quality standards submission:

(a). exemptions from antidegradation review applicable to rotating grazing pastures and agricultural crop rotations, *see, e.g.*, OAR 340-041-0004(4)(a)&(b);

(b). provisions expressly related to nonpoint sources of pollution, *see, e.g.*, OAR 340-041-0007(10) and OAR 340-041-0028(12)(h);

(c). provisions related to forestry and agriculture on state, private, and federal lands, *see, e.g.*, OAR 340-041-0028(12)(e),(f)&(g);

(d). other provisions relating to forest and agriculture activities, *see, e.g.*, OAR 340-041-0061(11),(12)&(13);

(e). provisions directly relating to the applicability and implementation of the water quality standards that EPA did approve; and

(f). water quality standards that EPA erroneously claimed represented non-substantive editorial changes not subject to EPA review.

246. By failing to act upon, and specifically, failing to disapprove standards as inconsistent with the CWA, EPA has violated its mandatory duties under 33 U.S.C. § 1313(c)(3) and EPA's regulations.

Plaintiff's (Alternative) Thirteenth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

EPA's Decision Not to Act Upon, and Disapprove, Certain Water Quality Standards

247. Plaintiff realleges all preceding paragraphs.

248. In the alternative to Plaintiff's Twelfth Claim for Relief, Plaintiff alleges as follows.

249. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.20(c).

250. States must submit any state-issued policies that affect water quality standards for EPA review. 40 C.F.R. § 131.13; 40 C.F.R. § 131.20(c).

251. EPA must review submitted standards and general policies to determine that the standards meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5; 40 C.F.R. § 131.13; 40 C.F.R. § 131.21(b).

252. 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).

253. 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.*

254. On December 10, 2003, Oregon submitted its entire set of new and revised water quality standards to EPA for review and approval.

255. On March 2, 2004, EPA approved numerous provisions of Oregon's water quality standards but EPA decided it would not review or act upon at least the following provisions of Oregon's water quality standards submission, despite the fact that these provisions affect Oregon's water quality standards:

(a). exemptions from antidegradation review applicable to rotating grazing pastures and agricultural crop rotations, *see, e.g.*, OAR 340-041-0004(4)(a)&(b);

(b). provisions expressly related to nonpoint sources of pollution, *see, e.g.*, OAR 340-041-0007(10) and OAR 340-041-0028(12)(h);

(c). provisions related to forestry and agriculture on state, private, and federal lands, *see, e.g.*, OAR 340-041-0028(12)(e),(f)&(g);

(d). provisions directly relating to the applicability and implementation of the water quality standards that EPA did approve; and

(e). water quality standards that EPA erroneously claimed represented non-substantive editorial changes not subject to EPA review.

256. EPA's decision not to act upon, and disapprove, each and every provision of Oregon's submission affecting water quality standards was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff's Fourteenth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))
EPA's Approval of Oregon's Revised Water Quality Standards

257. Plaintiff realleges all preceding paragraphs.

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

259. Criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1).

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

261. Oregon's revised water quality standards for temperature and IGDO, when considered cumulatively, will not protect designated uses in Oregon waterbodies or enhance water quality in the state of Oregon.

262. EPA approved Oregon's revised water quality standards for temperature and IGDO.

263. EPA's approval of Oregon's revised water quality standards for temperature and IGDO was arbitrary, capricious, and not in accordance with the CWA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff's Fifteenth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

NMFS Violation of ESA section 7(a)(2)

264. Plaintiff realleges all preceding paragraphs.

265. The ESA imposes a duty on NMFS to insure that federal actions are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).

266. The ESA's implementing regulations define jeopardy to an endangered or threatened species as "an appreciable reduction in the likelihood of both survival and recovery of a species." 50 C.F.R. § 402.02.

267. In meeting the duty to prevent jeopardy, each agency is required to use the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

268. Agencies must also ensure that agency actions are not likely to result in the destruction

or adverse modification of critical habitat, which includes areas that are essential for the conservation of the species. 16 U.S.C. § § 1536(a)(2) and 1532(5)(A).

269. EPA's approval of Oregon's revised water quality standards is likely to jeopardize listed salmon and steelhead and to result in the destruction or adverse modification of critical habitat.

270. In its 2004 BiOp, NMFS concluded that EPA's approval of Oregon's revised water quality standards was not likely to jeopardize listed salmon and steelhead or result in the destruction or adverse modification of their critical habitat.

271. NMFS' conclusion that EPA's approval of Oregon's revised water quality standards was not likely to jeopardize listed salmon and steelhead or result in the destruction or adverse modification of their critical habitat was arbitrary, capricious and not in accordance with Section 7(a)(2) of the ESA and implementing regulation, as provided by the APA, 5 U.S.C. § 706(2)(A).

Plaintiff's Sixteenth Claim for Relief

(Action arbitrary and capricious and otherwise not in accordance with law, as provided by the APA, 5 U.S.C. § 706(2)(A))

FWS Violation of ESA section 7(a)(2)

272. Plaintiff realleges all preceding paragraphs.

273. The ESA imposes a duty on FWS to insure that federal actions are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).

274. The ESA's implementing regulations define jeopardy to an endangered or threatened species as "an appreciable reduction in the likelihood of both survival and recovery of a species." 50 C.F.R. § 402.02.

275. In meeting the duty to prevent jeopardy, each agency is required to use the "best

scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

276. EPA’s approval of Oregon’s revised water quality standards is likely to jeopardize listed bull trout.

277. In the 2004 FWS BiOp, FWS concluded that EPA’s approval of Oregon’s revised water quality standards was not likely to jeopardize listed bull trout.

278. FWS’ conclusion that EPA’s approval of Oregon’s revised water quality standards was not likely to jeopardize listed bull trout was arbitrary, capricious and not in accordance with Section 7(a)(2) of the ESA and implementing regulations, as provided by the APA, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that EPA’s approval of Oregon’s water quality standards was arbitrary, capricious and otherwise not in accordance with law, under the APA, 5 U.S.C. § 706(a)(2);
2. Declare that EPA’s failure to perform its mandatory duty to act upon the entirety of the State of Oregon’s submission of its water quality standards violated the CWA, 33 U.S.C. § 1313(c)(3), and alternatively, that EPA’s decision not to review all water quality standards and policies affecting water quality standards was arbitrary, capricious and otherwise not in accordance with law, under the APA, 5 U.S.C. § 706(a)(2);
3. Declare that NMFS’s conclusion in the 2004 NMFS BiOp that Oregon’s standards are not likely to jeopardize ESA-listed species or result in the destruction or adverse modification of their critical habitat was arbitrary, capricious, and otherwise not in accordance with the law, under the APA, 5 U.S.C. § 706(a)(2);
4. Declare that FWS’s conclusion in the 2004 FWS BiOp that Oregon’s standards are not

likely to jeopardize ESA-listed bull trout was arbitrary, capricious, and otherwise not in accordance with the law, under the APA, 5 U.S.C. § 706(a)(2);

5. Order EPA to withdraw its approval of Oregon’s water quality standards, disapprove Oregon’s water quality standards, and immediately promulgate federal standards that will protect existing and designated uses, including listed species, to promulgate required standards where Oregon has failed to do so, and consult pursuant to the ESA on these promulgated standards;

6. Order NMFS to withdraw its 2004 BiOp and its accompanying incidental take statement and prepare a new biological opinion for Oregon’s water quality standards that complies with the ESA;

7. Order FWS to withdraw the 2004 FWS BiOp and accompanying incidental take statement and prepare a new biological opinion for Oregon’s water quality standards that complies with the ESA;

8. Award Plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys’ fees, associated with this litigation; and,

9. Grant such other and further relief as the Court may deem just and proper.

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Dated this 13th day of December, 2005.

Respectfully submitted,

/s/ Allison LaPlante

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