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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL  
DEFENSE CENTER, a non-profit  
corporation, NORTHWEST  
ENVIRONMENTAL ADVOCATES,  
a non-profit corporation, COLUMBIA  
RIVERKEEPER, a non-profit corporation,  
WILLAMETTE RIVERKEEPER, a  
non-profit corporation,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, a United States  
Government Agency, STEPHEN JOHNSON,  
Administrator, Environmental Protection  
Agency, and MICHAEL F. GEARHEAD,  
Director, Office of Water and Watersheds,  
Environmental Protection Agency Region 10

Defendant.

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Civil No:

**COMPLAINT FOR  
DECLARATORY  
AND INJUNCTIVE RELIEF**

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

**INTRODUCTION**

1. Through this action, Plaintiffs Northwest Environmental Defense Center, Northwest Environmental Advocates, Columbia Riverkeeper, and Willamette Riverkeeper (collectively, Plaintiffs) challenge the United States Environmental Protection Agency's (EPA) approval, under the Federal Water Pollution Control Act (hereinafter, the Clean Water Act) of an Oregon rule, "Oregon's Compliance Schedules" provision, found at OAR 340-041-0061(16).

2. This action arises under, and alleges violations of, the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, and the Endangered Species Act, 16 U.S.C. §§ 1531-1536. Specifically, this action alleges that EPA's approval under the Clean Water Act of Oregon's Compliance Schedules provision was and is arbitrary, capricious, an abuse of discretion and

otherwise not in accordance with law under 5 U.S.C. § 706(2)(A) and in excess of statutory jurisdiction, authority, or limitations under 5 U.S.C. § 706(2)(C). This action also alleges that EPA failed to perform a mandatory duty under the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(a) when EPA failed to consult with the National Marine Fisheries Service (NMFS) and United States Fish and Wildlife Service (FWS) (collectively, the Services) pursuant to the Endangered Species Act, 16 U.S.C. § 1536(a)(2), prior to its approval of Oregon's Compliance Schedules provision at OAR 340-041-0061(16).

3. Plaintiffs seek a declaration that EPA's actions as described in Paragraphs 1 and 2 of this Complaint are in violation of the Clean Water Act and the Endangered Species Act.

4. Plaintiffs also seek an injunction vacating and setting aside EPA's unlawful approval of Oregon's Compliance Schedules provision. Additionally, this action requests that this Court enjoin EPA from allowing Oregon's Compliance Schedules provision to be used for Clean Water Act permitting purposes unless and until EPA complies with its legal obligations to complete consultation under the Endangered Species Act and to conduct an adequate assessment of Oregon's Compliance Schedules provision under the Clean Water Act. Finally, this action asks the court to invalidate any Clean Water Act permits already issued in reliance upon Oregon's Compliance Schedules provision.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540 (c) and (g) (action arising under Endangered Species Act and Endangered Species Act citizen suit provision); 5 U.S.C. §§ 701-706 (APA); 28 U.S.C. §§ 1331 (federal question); 2201 (declaratory

relief), and 2202 (injunctive relief). Plaintiffs have 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), Plaintiffs furnished Defendant EPA with written notice of its violations of the Endangered Species Act more than 60 days prior to filing this complaint. This notice is attached hereto as Exhibit 1 and incorporated by reference.

6. 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. This action is appropriately filed in the Portland Division because Plaintiffs' principal places of business are Multnomah and Hood River counties. *See* Local Rule 3.3(a).

### **PARTIES**

7. Plaintiff Northwest Environmental Defense Center (“NEDC”) is an Oregon non-profit corporation that has been working on and is dedicated to preserving, protecting and improving the environmental quality of the Pacific Northwest since 1969. NEDC's principal place of business is in Portland, Oregon, within Multnomah County. NEDC and its members use Oregon's waterways for recreational, scientific, and aesthetic purposes.

8. Plaintiff Northwest Environmental Advocates (“NWEA”) was established in 1969 as a regional non-profit environmental organization incorporated under the laws of Oregon, with its principal place of business in Portland, Oregon, within Multnomah County. NWEA's mission is to work through advocacy and education to protect and restore water and air quality, wetland, and wildlife habitat in the Pacific Northwest.

9. Plaintiff Columbia Riverkeeper (“CRK”) is a non-profit corporation, with its principal business office located in Hood River County, Oregon. CRK is an organization dedicated to

protecting the ecological integrity of the Columbia River Basin and preserving the numerous ecosystems it supports, including the Columbia Slough. To achieve these objectives, CRK operates numerous programs aimed at reducing the level of pollution in the Columbia River and its tributaries and studies the impact of that pollution on these ecological systems. CRK also engages in litigation under the Clean Water Act. Key goals of CRK are to insure that environmental laws are enforced and to uphold the basic public trust on the Columbia River.

10. Plaintiff Willamette Riverkeeper (“WRK”) is an Oregon non-profit corporation formed in 1996. WRK seeks to protect and restore the water quality and habitat of the Willamette River. WRK’s mission is to make the Willamette River Watershed healthy for fish and wildlife and safe for fishing and swimming. A key goal of WRK is to insure that environmental laws are enforced, and to uphold the basic public trust on the Willamette River. Additionally, WRK has a goal of educating the public about the river and what they can do to protect it. WRK has several hundred members that utilize the Willamette River for fishing, canoeing, swimming, aesthetic and other recreational activities.

11. Plaintiffs and their members use and enjoy the waters of the State of Oregon for recreational, scientific, and aesthetic purposes. Plaintiffs and their members derive recreational, scientific, and aesthetic benefits from observing, studying, and photographing wildlife and fish species in Oregon waters. Plaintiffs’ members also enjoy recreational fishing for salmon and trout species in Oregon waters.

12. The past, present, and future enjoyment of these benefits by Plaintiffs and their members has been, is being, and will continue to be irreparably harmed by Defendant EPA’s failure to adequately consider the impact of Oregon’s Compliance Schedules provision on the

threatened and endangered fish species located in Oregon's waters. Additionally, Plaintiffs and their members reasonably fear that Oregon's Compliance Schedule provision does not adequately protect fish, wildlife and other beneficial uses of Oregon's waters, as required by the Clean Water Act. Plaintiffs reasonably fear that EPA's decision to approve Oregon's Compliance Schedules provision will expose beneficial uses of Oregon's waters to increased risks resulting from inadequate water quality.

13. The above-described aesthetic, conservation, and scientific interests of Plaintiffs and their 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 Endangered Species Act and Clean Water Act. Plaintiffs' injuries in fact are fairly traceable to Defendant's conduct and would be redressed by the relief that Plaintiffs seek in this case. Plaintiffs have no adequate remedy at law.

### **LEGAL BACKGROUND**

#### **The Endangered Species Act and Federal Agencies**

14. The purpose of the Endangered Species Act 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 Endangered Species Act 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).

15. The Endangered Species Act 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).

#### **Endangered Species Act Section 7 Duties**

16. The Endangered Species Act requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species [.]” 16 U.S.C. § 1536(a)(2).

17. Whenever a federal agency determines that a proposed action may adversely affect a listed species, it must engage in formal consultation with the Services, as delegates of the Secretaries of Commerce and the Interior. 16 U.S.C. § 1536(a)(2); 50 CFR § 402.14. 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 or both of the Services. *Id.*; 16 U.S.C. § 1536(b)(3)(A).

18. After the initiation of consultation under Endangered Species Act section 7(a)(2), 16 U.S.C. § 1536(a)(2), and prior to completion of consultation, Endangered Species Act section 7(d) prohibits federal agencies from making any irreversible or irretrievable commitment of resources if doing so would foreclose the formulation or implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d). This prohibition is not an exception to the section 7(a)(2) requirement; it remains in effect until the procedural requirements of § 7(a)(2) are satisfied. 50 C.F.R. § 402.09. Section 7(d) thus does not and cannot permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2); it does not grant permission to proceed with admittedly harmful activities while consultation is still ongoing. *See* 51 Fed. Reg. 19926, 19940 (June 3, 1986) (“section 7(d) is strictly prohibitory in nature”).

19. If one or both of the Services conclude that the proposed agency action is likely to jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of the species’ critical habitat, the biological opinion must outline any “reasonable and prudent alternatives” that the Services believe will avoid that consequence. 16 U.S.C. § 1536(b)(3)(A). If the Services believe that there is no reasonable and prudent alternative to the proposed action, their biological opinions must state so. 50 C.F.R. § 402.14(h)(3).

20. If one or both of the Services conclude that the proposed agency action is not likely to result in jeopardy or adverse habitat modification, or if one or both of the Services offer

reasonable and prudent alternatives to avoid that consequence, the Services must provide the agency with an incidental take statement (“ITS”) for any take of a listed species likely to occur. 50 C.F.R. § 402.14(i). The ITS must, among other things, “specif[y] the impact 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 Services. 50 C.F.R. §§ 402.14(i)(4) & 402.16.

## **The Clean Water Act**

### **Water Quality Standards**

21. In 1972, Congress adopted amendments to the Clean Water Act 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 Clean Water Act 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).

22. To those ends, the Clean Water Act 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 Clean Water Act].” 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 Clean Water Act.

23. 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 Clean Water Act § 303(d)(1) 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. A TMDL includes a margin of safety reflecting any lack of knowledge concerning the relationship between effluent limitations and water quality.

24. Water quality standards also serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under Clean Water Act sections 301 and 306, 33 U.S.C. §§ 1311 & 1316. A point source is a “discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges are regulated under National Pollutant Discharge Elimination System (“NPDES”) permits, which require point sources to meet both technology-based effluent limitations and, no later than July 1, 1977, “any more stringent limitation . . . necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C). Water quality standards are thus integral to regulation of point source discharges. Water quality standards are also the basis for regulatory certifications by state agencies of federal actions, such as dredging, pursuant to Clean Water Act section 401, 33 U.S.C. §1341.

### **Elements of Water Quality Standards**

25. 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. In addition, federal regulations allow states to “include in their State standards, policies generally affecting their application and implementation.” 40 C.F.R. § 131.13.

26. **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 Clean Water Act regulations, and the results are submitted to EPA for review and approval. 40 C.F.R. § 131.10(g) and (j). 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).

27. **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).

28. ***Antidegradation Policy and Implementation Methods***—The third component of water quality standards, the antidegradation policy, stems from the Clean Water Act’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. States must also develop antidegradation policy implementation methods. 40 C.F.R. § 131.12.

29. ***General Policies***—Federal regulations allow states, at their discretion, to include in their standards “policies generally affecting [the standards’] application and implementation.” 40 C.F.R. § 131.13. These policies include state rules related to mixing zones, low flows, variances, and compliance schedules. EPA must review and approve these state policies before they become applicable water quality standards for Clean Water Act permitting purposes. *Id.*

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

30. States must review and revise their water quality standards at least every three years, in a process called the “Triennial Review,” thereafter submitting the results of the review and all new and revised water quality standards to EPA for its approval or disapproval. 33 U.S.C. § 1313(c)(1)&(3). States must include in their submissions to EPA information that will assist

EPA in its review, such as methods, analyses, scientific bases, and policies that affect implementation. 40 C.F.R. § 131.6. 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).

31. 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 to EPA for review. 40 C.F.R. §§ 131.13, 131.20(c).

32. EPA must review the submitted standards and general policies to determine that the standards as a whole meet the requirements of the Clean Water Act. 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 Clean Water Act, 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 Clean Water Act. *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 Clean Water Act. 33 U.S.C. § 1313(c)(4)(B).

## FACTUAL BACKGROUND

### Status of Water Quality, Fish, and Wildlife in Oregon

33. With over 100,000 miles of rivers, 6,200 lakes, and nine estuaries, Oregon's extensive water resources provide habitat and food sources for many species of fish, birds and wildlife, and support recreational and commercial fisheries. However, many of Oregon's waterways are "water quality-limited" and therefore lack the necessary purity to protect the uses that depend on Oregon waters.

34. Several species in Oregon are listed as threatened or endangered species under the Endangered Species Act. These listed species include at least fourteen salmon and steelhead populations, several trout species, including bull trout, and several birds and mammals. Oregon waters provide some of the last remaining habitat for these imperiled species. Recent data show that 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.

35. Impaired water quality plays a significant role in the decline of salmon populations. High water temperatures, murky waterways, and conventional and toxic pollutants all place salmon at risk. Salmon, like all animal species, are subject to the properties of toxic pollutants that cause cancers, immune deficiency and reproductive disorders, and other chronic effects. Therefore, toxic pollution in salmon habitat combines with habitat degradation and other factors to put salmon survival and recovery at risk. For this reason, the National Marine Fisheries Service considers fourteen salmon and steelhead evolutionary significant units ("ESUs") in

Oregon either “in danger of extinction throughout all or a significant portion of [their] range[s]” or “likely to become” in danger of extinction “within the foreseeable future,” and in need of future protection under the Endangered Species Act.<sup>1</sup>

36. Oregon waters are also the major source of food for aquatic-dependent birds and mammals. Centuries of human use, resource extraction, and pollution have degraded Oregon’s streams and rivers, and contributed to the precipitous decline of these species. For example, poor reproductive success in bald eagles along the Lower Columbia River has been associated with high levels of dioxin, furans, PCBs and DDE. Recently, the U.S. Fish and Wildlife Service concluded that organochlorine concentrations in the bald eagle, Caspian terns, and double-crested cormorants of the Lower Columbia River exceed levels at which the animals will suffer impairment. Likewise, toxic pollutants have been implicated as the cause of impairment of piscivorous mammals such as river otters and mink in the Lower Columbia River.

37. Oregon waters are also used by humans for many purposes, including recreation in and on the water, subsistence and recreational fishing, aesthetic and spiritual enjoyment, travel,

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<sup>1</sup> 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 as drinking water sources. Many waterways in Oregon, however, are currently not able to support these uses. Residents of Portland, Oregon, are advised to avoid contact with the Willamette River whenever it rains, due to the inflow of untreated sewage and stormwater that enters the river during storm events. Many waterways in Oregon are designated “water quality-limited” for various toxic pollutants, including mercury and arsenic.

### **EPA’s Approval of Oregon’s Compliance Schedules Provision**

38. In 2004, DEQ presented to the Environmental Quality Commission (“EQC”), the environmental rulemaking body in Oregon, Oregon’s Compliance Schedules provision challenged here. Oregon’s Compliance Schedules provision is a rule that would enable DEQ to include compliance schedules for water quality standards in NPDES permits. A compliance schedule is a schedule of measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation or standard. 33 U.S.C. § 1362 (17). The EQC approved Oregon’s Compliance Schedules provision in July 2004, and DEQ submitted the provision to EPA for approval on July 8, 2004. At the same time, DEQ also submitted to EPA several revisions to Oregon’s water quality standards for toxic pollutants.

39. The Clean Water Act requires EPA to approve or disapprove water quality standards within 90 days. States may not use unapproved water quality standards in NPDES permits. 40 C.F.R. § 131.21(c). Although DEQ submitted its standards and Compliance Schedules provision in the summer of 2004, EPA did not act on the standards within the statutory time frames established by the Clean Water Act. In April 2005, after more than 18 months had passed since DEQ submitted its standards to EPA for review, NWEA sued EPA for violating the Clean Water Act. *NWEA v. EPA*, Civil No.: 06-479-HA (April 7, 2006).

40. In April 2006, DEQ renewed the NPDES permit for Blue Heron Paper Company. Over Willamette Riverkeeper's strong objection, DEQ included in the permit a compliance schedule authorizing Blue Heron to violate Oregon's water quality standard for turbidity. DEQ had previously included in Blue Heron's 2001 NPDES permit a compliance schedule, which had given Blue Heron approximately 4.75 years to comply with a water quality-based effluent limitation established to meet Oregon's turbidity water quality standard. On April 28, 2006, four days before the end of Blue Heron's 2001 compliance schedule (at which point Blue Heron would have been required to meet the turbidity effluent limitations), DEQ issued Blue Heron a renewed NPDES permit with another compliance schedule. The 2006 NPDES compliance schedule grants Blue Heron 4.5 additional years in which it need not meet the turbidity effluent limitations. As a result, Blue Heron will have 9.5 years during which it is excused from complying with the turbidity water quality standard.

41. At the time that DEQ issued Blue Heron's 2006 NPDES permit, EPA had not yet approved Oregon's Compliance Schedules provision. Nonetheless, DEQ asserted that the unapproved compliance schedule rule gave DEQ authority to include compliance schedules in NPDES permits. At depositions and in briefing, however, DEQ admitted that it did not have authority to rely on the unapproved Compliance Schedules provision in issuing the Blue Heron NPDES permit. DEQ therefore sought to rely on a separate rule, which makes no mention of compliance schedules and which EPA considers invalid for NPDES permitting purposes.

42. Willamette Riverkeeper challenged the Blue Heron permit in state court and filed an opening summary judgment brief in March, 2007 and a reply at the end of May, 2007.

43. On June 26, 2007, the administrator of DEQ's water quality division, Lauri Aunan,

sent an email to Mike Gearheard, Director of EPA Region 10 Office of Water and Watersheds. The email informed Mr. Gearheard that “[DEQ] need[s] EPA’s approval letter by July 6 [2007].”

44. Between the time that Oregon submitted Oregon’s Compliance Schedules provision to EPA on July 8, 2004, and the date on which Ms. Aunan requested EPA’s approval of the Compliance Schedules provision “no later than July 6, 2007,” EPA had repeatedly taken the position that EPA would need to review the Compliance Schedules provision for consistency with the Clean Water Act. EPA had also informed DEQ that EPA would need to complete consultation under the Endangered Species Act before EPA could approve the Compliance Schedules provision.

45. On July 2, approximately three weeks before DEQ and Blue Heron were scheduled to file their final summary judgment briefs in state court, EPA approved Oregon’s Compliance Schedules provision. EPA approved the rule without completing Endangered Species Act consultation. Moreover, although the Clean Water Act requires EPA to ensure that any state water quality standard is consistent with the Clean Water Act, EPA did not perform the necessary analysis. Specifically, EPA did not ensure that the Compliance Schedules rule is consistent with the statutory and regulatory mandates of the Clean Water Act. EPA did not analyze the impacts that the Compliance Schedules provision will have on Oregon’s existing water quality standards. EPA did not ensure that the Compliance Schedules provision, and Oregon’s water quality standards as a whole, will provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water.

## CLAIMS FOR RELIEF

### Plaintiffs' First Claim for Relief

#### **(Violation of Mandatory Duty, Endangered Species Act Section 7)**

46. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

47. Section 7(a)(2) of the Endangered Species Act requires that each federal agency shall 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 habitat of such species. 16 U.S.C. § 1536(a)(2).

48. A federal agency must review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. 50 C.F.R. § 402.14(a).

49. EPA is a federal agency within the meaning of the Endangered Species Act. 16 U.S.C. § 1536(a)(2).

\_\_\_\_ 50. On July 2, 2007, EPA approved Oregon's Compliance Schedules provision, OAR 340-041-0061(16), which authorizes extended violations of water quality standards and may affect listed species or critical habitat.

51. EPA failed to consult with the Services before approving the Oregon Compliance Schedules provision, OAR 340-041-0061(16), as a water quality standard.

52. By failing to complete consultation with the Services before approving the Oregon Compliance Schedules provision, EPA violated its mandatory obligation under the Endangered Species Act. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A).

## **Plaintiffs' 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 Oregon's Compliance Schedules Provision (OAR 340-041-0061(16))**

53. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

54. All water quality standards approved by EPA must be consistent with the requirements of the Clean Water Act. 33 U.S.C. § 1313(c).

55. Water quality standards must be sufficient to “protect the public health or welfare, enhance the quality of water, and serve the purposes of [the Clean Water Act].” 33 U.S.C. § 1313(c)(2)(A).

56. 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.

57. Water quality 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).

58. In reviewing submitted water quality standards, EPA must conduct an antidegradation review. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

59. Dischargers are required to meet water quality-based effluent limitations (*i.e.*, discharge limits that will meet water quality standards) by July 1, 1977. 33 U.S.C. § 1311(b)(1)(C). NPDES permits must insure compliance with 33 U.S.C. § 1311(b)(1)(C). 33 U.S.C. § 1342(b)(1).

60. Oregon's Compliance Schedules provision authorizes violations of the Clean Water

Act by failing to protect existing and designated uses (including threatened and endangered species) and delaying compliance with the statutory deadline of 1977.

61. EPA improperly approved Oregon's Compliance Schedule provision on July 2, 2007.

62. EPA's approval of Oregon's proposed Compliance Schedule provision was arbitrary, capricious, and not in accordance with the Clean Water Act and implementing regulations, and inconsistent with EPA's statutory authority, as provided by the APA, 5 U.S.C. § 706(2)(A)&(C).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Adjudge and declare that EPA failed to perform its mandatory duty to consult with the Services prior to its approval of Oregon's Compliance Schedules provision, in violation of 16 U.S.C. §§ 1536 (a)(2), and 1540(g)(1)(A).

2. Adjudge and declare that EPA acted arbitrarily and capriciously, and otherwise not in accordance with law, and in excess of statutory authority, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, in approving Oregon's Compliance Schedules provision;

3. Adjudge and declare that Oregon's Compliance Schedules provision, found at OAR 340-041-0061(16) is not a valid and applicable water quality standard for NPDES permitting purposes;

4. Set aside and vacate EPA's approval of OAR 340-041-0061(16);

5. Set aside and vacate any NPDES permits issued in reliance upon OAR 340-041-0061(16);

6. Enjoin EPA and any other parties, including the State of Oregon, from relying on or

otherwise using Oregon's Compliance Schedules provision in any Clean Water Act NPDES permits or other Clean Water Act actions;

7. Award Plaintiffs reasonable fees, costs, expenses, and disbursement, including attorneys' fees, associated with this litigation; and

8. Grant such additional and further relief as the Court may deem just, proper, and necessary.

Dated this 20th day of September, 2007.

Respectfully submitted,

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