

February 26, 2013

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Re: Notice of Intent to Sue EPA for Endangered Species Act and Clean Water Act Violations Related to Washington Water Quality Standards

Dear Mses. and Messrs:

This letter provides notice that Northwest Environmental Advocates (NWEA) intends to file suit pursuant to Section 11(g)(1)(A) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(1)(A), and Section 505(a)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1365(a)(2), against the U.S. Environmental Protection Agency (EPA) for violating the ESA and the CWA with regard to Washington water quality standards for various pollutants.

As explained in detail below, EPA's actions and inactions have failed to comply with the ESA and the CWA. First, for certain EPA-approved Washington water quality standards, EPA has failed to comply with its ESA Section 7 obligations to consult with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) (together "the Services") to ensure that EPA's actions are not likely to jeopardize ESA-listed species in Washington or result in destruction or adverse modification of critical habitat. Second, EPA has failed to act, as required by the CWA, on several changes to Washington's water quality standards.

NWEA is concerned about the harm caused by EPA's failure to consult with the Services and EPA's failure to comply with its mandatory duties under the CWA to the numerous ESA-listed

Kevin Cassidy
Staff Attorney

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species that are likely to be adversely affected by the levels of pollutants currently being used for Washington water quality regulation. EPA's failure to consult with the Services also harms NWEA and its members' interests by undermining the procedural requirements of the ESA, which ensure that agencies, such as EPA, make informed decisions and act in conformity with the ESA's substantive requirements. In this case, standards on which EPA took action, some more than 20 years ago, are being used without the benefits of a completed ESA Section 7 consultation, and standards that Washington submitted to EPA for approval more than nine years ago have not been acted upon.

Upon expiration of the 60 days NWEA intends to file suit in United States federal court in the Western District of Washington against EPA pursuant to those two federal statutes. However, we are available to discuss potential remedies prior to the expiration of this notice.

I. **Factual Background**

On November 25, 1992, the Washington State Department of Ecology ("Ecology" or "Washington") completed new and revised water quality standards that included adoption of aquatic life criteria recommended by EPA such that, while Washington was *included* in the subsequent National Toxics Rule (NTR) promulgated by EPA due to its failure to adopt human health criteria, it was largely *excluded* from the NTR for aquatic life. With notably few exceptions, Ecology has failed to update its aquatic life criteria in the ensuing 20 years and EPA has taken no action to ensure their adequacy. At the time of EPA's approval action no aquatic species were listed as threatened or endangered under the ESA. Subsequently, numerous species have been listed, including salmonids in Puget Sound and the Columbia River Basin, along with marine mammals and bull trout. EPA has not consulted on its approval of Washington's aquatic life criteria for toxics.

On June 3, 1996, Ecology submitted new or revised Sediment Management Standards (SMS) to EPA. The sediment standards included provisions governing marine finfish rearing (netpen) facilities and a variety of other provisions. Among the netpen provisions was an allowance for exemptions based on a "sediment impact zone within 100 feet from the outer edge of a netpen," which has the effect of "exempting the facilities from: marine sediment quality standards, sediment impact zone maximum criteria, and sediment impact zone standards within that zone." See EPA Letter to Ecology, September 18, 2008. EPA took action on the sediment standards on September 18, 2008, approving many of the netpen and sediment biocriteria provisions, but took no action on provisions it deemed not to be water quality standards. EPA determined that its action was not likely to adversely affect listed or threatened species, including their designated critical habitat, and submitted a Biological Assessment ("BA") to the Services to this effect on April 17, 2008 and again on August 6, 2008. The Services concurred.

Ecology submitted new or revised water quality standards to EPA for approval on December 5, 1997. These water quality standards included *inter alia* definitions, general water use and criteria classes, lake nutrient criteria, toxic substances criteria (chronic marine copper, chronic site-specific cyanide for Puget Sound, and ammonia), general considerations (fresh/salt water

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boundaries, fish passage, total dissolved gas, wetlands), short-term modifications, and specific classifications. On February 6, 1998, EPA took action on Ecology's submission, approving all of the new and revised water quality standards Washington had submitted. In its action, EPA stated that its approval was subject to completion of ESA Section 7 consultation. EPA did not prepare and send a BA to the Services regarding the 1997 new and revised standards.

On July 28 or August 1, 2003, Ecology submitted to EPA for its approval new or revised water quality standards. The standards represented a change from a classification-based to a use-based approach for freshwater uses and criteria and included, as well, use designations for aquatic life, criteria (lake nutrients, toxics narrative, temperature, dissolved oxygen, ammonia), antidegradation, and general policy procedures for variances, offsets, Use Attainability Analyses (UAA), and site-specific criteria development. On January 12, 2005, EPA approved certain aspects of these water quality standards (uses, procedures, lake nutrients, and toxics narrative). Subsequently, on February 10, 2005, EPA concluded that the compliance schedule provision for hydroelectric dams was not a water quality standard and, on March 22, 2006, issued a partial disapproval of designated uses and temperature criteria. A subsequent Ecology submission on December 8, 2006 responding primarily to the partial disapproval (and including, *inter alia*, use definitions and designations, temperature criteria, ammonia criteria) resulted in an EPA approval on February 11, 2008. By a final BA dated April 10, 2007, EPA consulted with the Services on its 2005 partial approval (with the exception of the variance procedure) and its 2008 full approval (with certain exceptions) and the ensuing BiOp of February 5, 2008 became the basis for some, but not all, of EPA's 2005 and 2008 approval actions.

Specifically, in this BA, EPA did not consult on certain new or revised standards, including provisions for variances, UAA, and site-specific criteria because it determined the provisions would have no effect on ESA-listed species until they were applied, at which time EPA would—theoretically—consult on its approval of specific actions. *See* January 12, 2005 EPA Letter to Ecology. Likewise, EPA did not consult on matters pertaining to human health, such as bacteria. EPA offered no reason, however, for failing to consult on other provisions it approved in 2005, 2007, or 2008 that remained from Ecology's earlier submissions, including revisions to Washington's rules on metals conversion factors (Water Effects Ratio). Once again, EPA did not consult on its approvals of Washington's revised ammonia criteria. In addition, most recently, on May 2, 2007, EPA approved Ecology's 2003 revisions to Washington's antidegradation provisions without consultation. And, on May 23, 2007, EPA approved Ecology's 2003 adoption of a marine chronic cyanide criterion for waters outside of Puget Sound without ESA consultation on the basis that the national cyanide consultation was underway and should be used as a "framework" for consultation. The national cyanide consultation is not completed and it is not clear that it is even continuing. On July 9, 2007, EPA amended the NTR to remove Washington's marine copper and cyanide chronic aquatic life criteria, thereby allowing Washington's criteria to become effective. *See* 72 Fed. Reg. 37109 (July 9, 2007).

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II. Endangered Species Act Violations

A. Legal Framework

The Endangered Species Act seeks to bring about the recovery of species facing extinction by affording these species the “highest of priorities.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). One of the primary purposes of the ESA is to preserve the habitat upon which threatened and endangered species rely. 16 U.S.C. § 1531(b). Section 7(a)(2) of the ESA sets out two substantive mandates. First, it contains a blanket provision against any federal action that “jeopardizes the continued existence of” species listed as threatened or endangered. 16 U.S.C. § 1536(a)(2). Second, it bans federal actions that result in the “destruction or adverse modification” of designated critical habitat of listed species. *Id.* The obligation to ensure against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to the endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). An agency must initiate consultation under section 7(a)(2) whenever it undertakes an action that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”).

Congress established a consultation process explicitly “to ensure compliance with the [ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Under the ESA, agencies obtain advice from the Services prior to taking actions that affect threatened or endangered species or result in adverse modification or destruction of their critical habitat. The end product of the ESA section 7 consultation is a biological opinion (BiOp) in which the Services determine whether a proposed action will jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); *Idaho Dept. of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995). As the Ninth Circuit stated, “If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.” *Thomas v. Peterson*, 753 F.2d at 764 (citing *TVA v. Hill*, 437 U.S. 153); *see also Conner v. Burford*, 848 F.2d 1441, 1458 (9th Cir. 1988) (The ESA’s “strict substantive provisions . . . justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”); *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

To ensure that agencies consult with the Services and that the Services issue a biological opinion, Congress explicitly addressed the action agency’s and Services’ obligations to complete formal consultation. Specifically, section 7(b)(1)(A) provides:

Consultation under subsection (a)(2) with respect to an agency action shall be concluded within the 90-day period beginning on the date on which initiated or,

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subject to subparagraph (B) [which outlines procedures when an applicant is involved], within such other period of time as is mutually agreeable to the Secretary and the Federal Agency.

16 U.S.C. § 1536(b)(1)(A). The Services and the action agency may agree to extend the time in which to conclude consultation beyond the statutorily prescribed 90-day period, but such extensions cannot be for an undefined amount of time. *See* 50 C.F.R. §§ 402.14(e) (“Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for *a specific period of time.*”) (emphasis added); *see also* Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and Conferences (“Consultation Handbook”), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998, at 4-7 (“The consultation timeframe cannot be ‘suspended.’ If the Services need more time to analyze the data or prepare the final opinion, or the action agency needs to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. *Extensions should not be indefinite, and should specify a schedule for completing the consultation.*”) (emphasis added).

B. EPA Has Failed to Ensure Against Jeopardy for Certain Washington Water Quality Standards on Which EPA Took Action but Never Initiated Consultation

As described above, to the best of our knowledge, EPA has never prepared and sent a Biological Assessment (“BA”) to the Services regarding the 1997 new and revised standards, which include now 20-year-old criteria for the protection of aquatic life. Likewise, in 1998, 2005, 2007, and 2008, EPA took actions on new and revised provisions of Washington’s water quality standards for which it failed to initiate ESA Section 7(a)(2) consultation, despite conditioning its approval actions on completion of consultation. Specifically, in 1998, EPA approved the following new or revised Washington water quality standards, but never initiated consultation: lake nutrient narrative standards, marine cyanide criteria for waters in Puget Sound, conversion factors for metals, marine copper criterion. *See* Feb. 11, 2008 EPA Letter to Ecology (approving revisions “subject to results of ESA consultation under 7(a)(2)’’); May 23, 2007 EPA Letter to Ecology (same); Feb. 6, 1998 EPA Letter to Ecology (same). Initiation of consultation was, in fact, contemplated by EPA and the Services for the copper, cyanide, nutrient, and ammonia criteria, as well as the metals conversion factors, short-term modifications, and wetlands definitions. *See Steps to Complete Washington ESA Consultation*, prepared for meeting July 6, 1999. It was not, however, either initiated or completed.

Regulations implementing Section 7(a)(2) establish the obligations for EPA as the action agency by broadly defining the scope of agency actions subject to consultation to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”). Agencies also must consult on ongoing agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. 50 C.F.R. § 402.03; 50 C.F.R. § 402.16; *see also Pacific*

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Rivers Council v. Thomas, 30 F.3d 1050, 1054-56 (9th Cir. 1994). Finally, “[e]ach Federal agency shall 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) (emphasis added).

EPA’s ongoing failure to seek consultation with the Services on revisions to Washington water quality standards dating to 1992 on which EPA has taken action, is a violation of EPA’s mandatory duty to consult with the Services to ensure against jeopardy. The ESA requires that “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, 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). An action agency must initiate consultation under Section 7(a)(2) whenever it undertakes an action that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a).

It is indisputable that Washington’s revisions to its water quality standards for, *inter alia*, chronic marine copper, ammonia, and chronic site-specific cyanide for waters inside and outside of Puget Sound “may affect” threatened and endangered species, triggering EPA’s duty under the ESA to consult with the Services. In particular, given draft and final jeopardy opinions for Idaho and Oregon toxic criteria, EPA is well aware that NMFS has found EPA’s recommended criteria for freshwater copper, cyanide, and ammonia jeopardize, by appreciably reducing the likelihood of both the survival and recovery, threatened and endangered species of salmonids. EPA thus violated Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations at 50 C.F.R. § 402, when it failed to consult with the Services to ensure against jeopardy and adverse modification of critical habitat prior to approving Washington’s water quality standards and general policies that are intended to protect or have the ability to affect aquatic life, including threatened and endangered species.

As a consequence of many years of delay, EPA must consult on its approval of Washington’s 1992 aquatic life criteria for toxics; its February 6, 1998 approval of water quality standards including, but not limited to, criteria for chronic marine copper, chronic Puget Sound cyanide, ammonia, lake nutrients, and provisions for short-term modifications (as modified by subsequent rulemaking), and metals conversion factors; its January 12, 2005 approval of provisions for variances, UAA, site-specific criteria, and ammonia criteria; its May 2, 2007 approval of antidegradation provisions; its May 23, 2007 approval of marine chronic cyanide outside Puget Sound; and its February 11, 2008 approval of ammonia criteria (as amended by the August 10, 2011 approval of footnote hh of WAC 173-201A-240(3)) and metals conversion factors.

Additional information, including information in EPA’s possession, may reveal additional EPA actions on Washington water quality standards for which EPA was required to but never initiated consultation. NWEA has thoroughly reviewed the public record in an attempt to capture all such EPA actions here, but the complexity and inconsistent nature of EPA’s actions on Washington’s standards over the course of many years leaves open the possibility that further violations will be uncovered. This letter puts EPA on notice that it is intended to cover such violations of the same

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type as described here—EPA actions on Washington water quality standards for which EPA failed to initiate consultation—that occurred during the same time period covered by this notice letter.

III. Clean Water Act Violations

A. Legal Framework

States must submit revised or newly adopted water quality standards to EPA for review and approval or disapproval. 33 U.S.C. § 1313(c)(2)(A). EPA must notify the state within 60 days if it approves the new or revised standards as complying with the CWA. 33 U.S.C. § 1313(c)(3). If EPA concludes the state standards do not meet CWA requirements, within 90 days of the state's submission, EPA must notify the state of the disapproval and "specify the changes to meet such requirements." *Id.* If the state does not adopt the specified changes within 90 days of the notification, EPA shall itself promulgate standards for the state. *Id.*; 33 U.S.C. § 1313(c)(4).

B. EPA Has Failed to Act on Water Quality Standards Submitted for Approval by Washington

On February 11, 2008, EPA approved new and revised standards submitted by Washington on July 28 or August 1, 2003, and December 8, 2006. EPA also failed to act on portions of these submitted standards. Specifically, EPA failed to take any action on the following water quality standards and rules that have the effect of altering otherwise applicable water quality standards: provisions limiting the allowable increase in temperature from nonpoint sources (WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B)); exemptions from turbidity criteria (WAC 173-201A-200(1)(e)(i) and WAC 173-201A-210(1)(e)(i)); so-called Short Term Modifications (WAC 173-210A-410); exemption from criteria based on unconditional shellfish harvest determinations (WAC 173-201A-210(2)(b)(i)); averaging periods for bacteria (WAC 173-201A-210(2)(b)(ii) and 173-201A-210(3)(b)(i)); guidelines on mixing zones and thermal plumes (WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v)); a provision that allows both temporary and permanent loss of existing uses (WAC 173-201A-300(3)); a provision that allows compliance schedules for dams (WAC 173-201A-510(5)); water quality offsets (WAC 173-201A-450); and aspects of Washington's antidegradation policy and implementation methods, including WAC 173-201A-300(3) and WAC 173-201A-330(4). In failing to take action on Washington's submissions of these water quality standards and subsequent revisions, EPA has violated its mandatory duty to act pursuant to CWA Section 303(c)(3), 33 U.S.C. § 1313(c).

IV. Persons Giving Notice and Representing Attorneys

The full name, address, and telephone number of the party providing this notice are:

Nina Bell, Executive Director
Northwest Environmental Advocates

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V. Conclusion

If EPA does not come into compliance with the Endangered Species Act and the Clean Water Act, upon expiration of the 60 days NWEA intends to file suit against EPA pursuant to those two federal statutes. NWEA anticipates filing suit in the United States District Court Western District of Washington, requesting declaratory and injunctive relief. We are available to discuss potential remedies prior to the expiration of this notice.

Sincerely,



Kevin Cassidy
Staff Attorney

cc: Ted Sturdevant, Director
Washington Department of Ecology