

December 28, 2012

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

Dear Mses. and Messrs:

This letter provides notice that Northwest Environmental Advocates (NWEA) and the Idaho Conservation League (ICL) intend 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 Idaho 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 Idaho 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 Idaho or result in destruction or adverse modification of critical habitat. Second, for certain EPA-approved Idaho water quality standards for which EPA has initiated consultation with the Services, EPA has failed to complete consultation and failed to prevent the irreversible and irretrievable commitment of resources that would foreclose reasonable and prudent alternatives to ensure against jeopardy. Third, EPA has

Kevin Cassidy
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failed to act, as required by the CWA, on several changes to Idaho's water quality standards, including temperature standards that are key to protection of threatened and endangered salmonids. Finally, EPA has disapproved Idaho's submission with regard to the removal of the aquatic life criteria for mercury, without promulgating replacement criteria in the face of Idaho's subsequent failure to do so.

NWEA and ICL are concerned about the harm caused by EPA's failure to consult and/or complete consultation with the Services and EPA's failure to comply with its mandatory duties under the CWA to the numerous ESA-listed species that are likely to be adversely affected by the levels of pollutants currently being used for Idaho water quality regulation. EPA's failure to consult with the Services also harms the interests of NWEA and ICL by undermining the procedural requirements of the ESA, which ensure that agencies, such as EPA, make informed decisions and act in conformity with the ESA's substantive requirements. In this case, standards on which EPA took conditional action, some more than 17 years ago, are being used without the benefits of a completed ESA Section 7 consultation, and standards that Idaho submitted to EPA for approval more than 14 years ago have not been acted upon.

If EPA does not come into compliance with the ESA and the CWA, upon expiration of the 60 days NWEA and ICL intend to file suit in United States federal court in the District of Idaho against EPA pursuant to those two federal statutes. We are available to discuss potential remedies prior to the expiration of this notice.

I. Factual Background

A. Consultation Under the Endangered Species Act

IDEQ submitted new or revised water quality standards to EPA for approval in July 1994. The standards included aquatic life criteria for toxics, conventional criteria, antidegradation, designated uses, narrative criteria, a variance policy, and mixing zone policies. On June 25, 1996, EPA took action on IDEQ's submission, approving, *inter alia*, the Idaho toxic criteria, conventional criteria, antidegradation policy, variance policy, designated beneficial uses, narrative criteria, and mixing zone policy. In its action, EPA stated that its approval was subject to completion of ESA Section 7 consultation. On July 9, 1996, EPA sent a Biological Assessment ("BA") to the Services regarding the aquatic life criteria for toxics and some other aspects of the standards it had approved. Subsequently, on December 20, 1999, January 7, 2000, and again on August 9, 2000, EPA revised and finalized its BA but only for the aquatic life criteria for toxics.

On March 31, 1997, IDEQ submitted additional revisions to its water quality standards to EPA for action, moving from total to dissolved fraction for aquatic life metals criteria. On May 27, 1997, EPA approved Idaho's revised numeric criteria for toxics and its antidegradation policy. EPA's aforementioned revisions to its 1996 BA included the change to the toxic criteria but not to the antidegradation policy. On June 25, 1997, IDEQ submitted revised standards to EPA, including unclassified waters, mixing zone policies, and temperature criteria for sturgeon and

bull trout. EPA approved the revisions on July 15, 1997 without ESA consultation. On August 8, 2005, IDEQ submitted proposed revisions to human health and aquatic life criteria for nine toxic pollutants and the removal of mercury criteria. On September 30, 2005, EPA approved IDEQ's revised numeric aquatic life criteria for toxic pollutants "subject to the results of consultation under Section 7(a)(2) of the Endangered Species Act" thereby "retain[ing] its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA." The standards approved by EPA included human health criteria for antimony, methylmercury, and zinc and aquatic life criteria for arsenic, cadmium, chromium III, chromium VI, nickel, and zinc. At least two of these aquatic life criteria, nickel and zinc, are pollutants that are the subject of EPA's earlier ESA consultation for which the Services have not yet completed BiOps. EPA did not seek consultation on these criteria, nor did it update its previous August 9, 2000 BA with regard to pollutants already undergoing consultation with the Services. On December 12, 2008, EPA disapproved IDEQ's proposed removal of chronic and acute aquatic life criteria for mercury, thus leaving in place for purposes of the CWA the 1997 mercury criteria. On June 21, 2010, Idaho adopted revisions to two additional criteria, a revision of the human health criterion for arsenic and a revision of the low-end hardness cap for the cadmium aquatic life criteria. EPA approved the arsenic criteria on July 7, 2010, and the cadmium criteria on March 7, 2011. EPA submitted a BA to the Services concerning the aquatic life criteria for cadmium and the Services concurred on March 9, 2011, thus completing consultation.

EPA's failure to complete required consultations began with its decision in 1999, as a result of meetings between EPA and the Services, to develop two separate BAs for the 1997 standards. The first BA, which addressed Idaho's numeric criteria for toxic contaminants, was, as described above, completed after several revisions. EPA has not completed the second BA, which was intended to address all other aspects of the 1997 Idaho standards, including but not limited to: (1) narrative criteria for hazardous materials; toxic substances; deleterious materials; radioactive materials; floating, suspended or submerged matter; excess nutrients; oxygen-demanding materials; sediment; (2) numeric criteria for ammonia (warm and cold water biota); total residual chlorine; dissolved oxygen; intergravel dissolved oxygen for salmonid spawning; pH; temperature criteria for warm water biota, cold water biota, salmonid spawning, and Kootenai River white sturgeon; total dissolved gas; and turbidity; (3) Idaho's antidegradation policy and use designations for warm water biota, cold water biota, and salmonid spawning; and (4) general policies for mixing zones and variances. According to the July 17, 2012 EPA cover letter to a response to a Freedom of Information Act request submitted on June 27, 2011 ("EPA FOIA Response Letter"), EPA has no records that contain information on "a schedule or plan for completion of the consultation in Idaho prepared since May 12, 2009" or "plans by EPA to consult on new or revised water quality standards submitted by Idaho in 1994 that are not new or revised toxic criteria."

In addition, in 2005, EPA approved the human health criterion for antimony, a metal for which Idaho has no aquatic life criterion. Antimony has been mined extensively in Idaho. Threatened and endangered species and their designated critical habitat are present in areas of Idaho where mining has resulted in the release of antimony to the environment, where it poses a risk to those

species individually and in combination with other pollutants such as arsenic, cadmium, copper, mercury, nickel, lead, and temperature. EPA approved the Idaho antimony criterion without consulting with the Services regarding the effects of this approval on threatened and endangered species and critical habitat.

B. EPA Inaction on New or Revised Standards Submitted for Approval by IDEQ

In 1998, IDEQ submitted revised temperature standards for the protection of bull trout from temperature. In 2001, IDEQ revised these standards. In April 2000, IDEQ revised its temperature standards to address “seasonal cold water,” defined as “water quality appropriate for the protection and maintenance of a viable aquatic life community of cool and cold water species, where cold water aquatic life may be absent during, or tolerant of, seasonally warm temperatures.” The “seasonal cold” standard was revised in 2002. EPA has failed to act on the temperature submissions of 1998, 2000, 2001, and 2002. As a consequence of the “Alaska Rule,” IDEQ’s standards are in effect for CWA purposes without EPA action and related ESA consultation.

C. EPA’s Disapproval of Idaho’s Removal of the Aquatic Life Mercury Criteria

On August 8, 2005, IDEQ submitted revised standards to EPA containing the deletion of the acute and chronic numeric freshwater aquatic life criteria for mercury and replacement of those values with a footnote “g” to the state’s criteria table. Footnote “g” stated that the narrative criteria for toxics applied to mercury and that the human health criteria for methylmercury would provide adequate protection for aquatic life in most situations. On December 12, 2008, EPA disapproved IDEQ’s removal of the aquatic life mercury criteria on the basis that such removal was inconsistent with the statute and 40 C.F.R. § 131.11.

EPA informed IDEQ that EPA’s disapproval required the federal agency to specify changes that are needed to assure compliance with the statute and regulations. The disapproval letter set out four options that Idaho could consider to establish mercury criteria that are based on scientifically defensible methods and protect Idaho’s designated aquatic life uses. Although EPA included in that list the option of Idaho’s evaluating the national recommended 304(a) aquatic life criteria, EPA noted that those criteria might not be protective of important fishes in Idaho and that “further evaluation is needed when considering adoption of the chronic criterion for waters where salmonids are present.” EPA concluded its letter by noting that the previously-adopted mercury criteria for the protection of aquatic life remained effective for CWA purposes.

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 of 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 that

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

16 U.S.C. § 1536(b)(1)(A). If the Services and the action agency agree on a period of time other than the statutorily prescribed 90-day period to conclude consultation, it cannot be undefined. 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).

In addition, after the initiation of consultation, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d); *see also Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996).

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

According to EPA, in a letter dated December 20, 1999, it had not prepared a BA for “numeric criteria for conventional pollutants, narrative criteria, designated beneficial uses, antidegradation, mixing zone and variance policies.” To the best of our knowledge, EPA has never prepared a BA or requested formal consultation on these revisions to Idaho’s water quality standards and general policies. Moreover, EPA has no intention of or plans to consult on these standards and general policies. *See generally* EPA FOIA Response Letter. 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 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 Idaho water quality standards dating to 1994 on which EPA has taken action, including a wide range of numeric and narrative criteria, use designations, antidegradation, and general policies, 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 IDEQ’s revisions to its water quality standards for, *inter alia*, numeric criteria for conventional pollutants, narrative criteria, designated beneficial uses, antidegradation, mixing zone and variance policies “may affect” threatened and endangered species, triggering EPA’s duty under the ESA to consult with the Services. 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 Idaho’s water quality standards and general policies that are intended to protect or have the ability affect aquatic life, including threatened and endangered species.

Additionally, EPA was required to consult with the Services on its approval of the human health criteria for antimony, a metal for which there are no aquatic life criteria in Idaho. While generally both human health and aquatic life criteria apply to any given waterbody, the more stringent of the two criteria controls the outcome of the regulatory action. 40 C.F.R. § 131.11(a)(1). Where there are no numeric aquatic life criteria established for a particular pollutant, only applicable numeric human health criteria—either drinking water or drinking water and fish consumption together—will apply unless the regulatory agency chooses to interpret and apply its narrative criteria for the protection of aquatic life. There are few instances where states or EPA use narrative criteria for the purposes of 303(d) listing, 401 certification, NPDES issuance, or TMDL development by establishing numeric benchmarks for chemicals that could and should be regulated pursuant to narrative criteria. As a result, human health numeric criteria play a significant role in protecting aquatic life, including federally-listed threatened and endangered species. In both California and Idaho, EPA has recognized the role of human health criteria in providing at least interim protection for aquatic life for which no protective numeric criteria have been developed. For example, EPA explained that it disapproved Idaho’s deletions of aquatic life criteria for mercury because Idaho “has not demonstrated that its *human health* methylmercury criterion would protect aquatic life.” Idaho Disapproval at 2 (emphasis added). As EPA noted in that action, Idaho had not “provide[d] specific information which would demonstrate that the designated aquatic life uses in Idaho are assured protection from discharges of mercury that would adversely affect water quality and/or the attainment of the aquatic life uses.” *Id.* at 4; *see also* Letter to Felicia Marcus, Administrator, EPA Region 9, from Michael J. Spear, Manager, California/Nevada Operations Office, FWS Southwest Regional Office and Rodney R. McInnis, Acting Regional Administrator, NMFS, March 24, 2000 (hereinafter “CTR BiOP”), at 121, 145 (assessing the adequacy of California’s human health criteria for protecting listed fish and wildlife species, where existing aquatic life criteria were less protective). In sum, EPA has relied on human health criteria in Idaho and other states to provide some level of protection for aquatic life in the absence of chemical-specific numeric aquatic life criteria. Accordingly, EPA’s approval of Idaho’s human health criteria for antimony triggered EPA’s duty under the ESA to consult with the Services to ensure against jeopardy or the destruction or adverse modification of critical habitat. EPA thus violated Section 7 of the ESA and its

implementing regulations at 50 C.F.R. § 402, when it failed to consult the Services prior to approving Idaho's human health criteria for antimony, where such criteria are intended to—or by default have the effect of—protecting aquatic life.

C. EPA Has Failed to Prevent the Irreversible and Irretrievable Commitment of Resources with Respect to Certain Idaho Water Quality Standards on Which EPA Took Action and Initiated Consultation but for Which Consultation Has Not Been Completed

In addition to those standards described above on which EPA took action but has not initiated consultation, there are certain Idaho water quality standards on which EPA took action and initiated consultation but for which consultation has not been completed.¹ These actions are described in a November 29, 2012 letter to the Services, which is attached as **Exhibit A** to this letter and incorporated by reference herein. For such actions, EPA has a duty to prevent the “irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures [“RPAs”] which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d). By EPA's approving Idaho's water quality standards for which consultation has not been completed, which are the bases upon which EPA also approves Idaho's submissions of TMDLs and 303(d) lists, upon which EPA issues NPDES permits and TMDLs in Idaho, and upon which Idaho issues 401 certifications, TMDLs and 303(d) lists, EPA is violating the ESA by making irreversible or irretrievable commitments of resources that foreclose RPAs.

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 Idaho

¹ Of all of the IDEQ revisions to the state's water quality standards since 1994 there are only two instances of which NWEA and ICL are aware for which EPA and the Services have completed consultation on submitted and approved standards. The first is EPA's approval of the aquatic life criterion for cadmium, for which ESA consultation was completed March 9, 2011. The second is EPA's approval of a natural background provision approved by EPA on July 20, 2004, for which consultation also was completed.

In 1998, Idaho submitted to EPA a water quality standard for bull trout temperature, which Idaho subsequently revised in 2001. In April 2000, Idaho submitted to EPA a “seasonal cold” temperature water quality standard, which the state subsequently revised in 2002. EPA has failed to take any action on these water quality standards. In failing to take action on Idaho’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).

C. EPA Has Failed to Promulgate Replacement Mercury Criteria for the Protection of Aquatic Life

On August 8, 2005, Idaho submitted to EPA for approval revisions to its water quality standards for toxic constituents including deletion of its acute and chronic aquatic life criteria for mercury. On December 12, 2008, EPA disapproved Idaho’s submission with regard to the removal of the aquatic life criteria for mercury. EPA specified four options Idaho could use to establish mercury criteria based on scientifically defensible methods to protect Idaho’s aquatic life designated uses. Idaho did not adopt the specified changes within 90 days of EPA’s disapproval notification. Accordingly, EPA was required to promulgate an aquatic life criterion for mercury in Idaho. *See* 33 U.S.C. §§ 1313(c)(3) & (c)(4). Because EPA has failed to promulgate such a standard, it has violated the CWA.

IV. Persons Giving Notice and Representing Attorneys

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

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Notice Regarding ESA and CWA Violations Relating to Idaho Water Quality Standards

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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 and ICL intend to file suit against EPA pursuant to those two federal statutes. NWEA and ICL anticipate filing suit in the United States District Court District of Idaho, requesting declaratory and injunctive relief. We are available to discuss potential remedies prior to the expiration of this notice.

Sincerely,

/s/ Kevin Cassidy

Kevin Cassidy
Staff Attorney

cc: Curt Fransen, Director
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