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

**NORTHWEST ENVIRONMENTAL  
ADVOCATES**, an Oregon non-profit  
corporation, **IDAHO CONSERVATION  
LEAGUE**, an Idaho non-profit corporation,

Plaintiffs,

v.

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

Defendants.

**Case No. 1:13-cv-00263-EJL**

**FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

(Endangered Species Act, Clean Water Act,  
Administrative Procedure Act)

### NATURE OF THE CASE

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

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

3. The Services have unlawfully withheld or unreasonably delayed completion of ESA Section 7 consultation on EPA’s actions approving Idaho’s new or revised aquatic life water quality criteria for 23 individual toxic pollutants (“toxics criteria”) adopted in 1994 and 1997. The Services thus have not complied with their mandatory duties to consult with EPA under ESA Section 7, to produce a final Biological Opinion, or to produce a final Biological Opinion within a reasonable period of time.

4. For those 1994/1997 toxics criteria for which EPA has initiated ESA Section 7 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 to several ESA threatened and endangered species in Idaho.

5. For other new or revised Idaho water quality standards, EPA has failed to initiate

ESA Section 7 consultation, while maintaining that its approval actions were conditional upon completion of consultation, and thus has failed to comply with its mandatory duty under the ESA to ensure that its approval actions are not likely to jeopardize ESA-listed species in Idaho or result in destruction or adverse modification of critical habitat designated for such species. These water quality standards, which have not been through the required ESA consultation, form the regulatory basis for innumerable agency actions.

6. EPA also has failed to act, as required by the Clean Water Act (“CWA”), on Idaho’s revised temperature standards for specific reaches of the Mid Snake River Basin, as well as certain other temperature standards, submitted by Idaho to EPA for approval.

7. Finally, EPA has failed to promulgate, as required by the CWA, replacement mercury criteria in Idaho for the protection of aquatic life after having disapproved Idaho’s mercury criteria.

8. Both individually and cumulatively, the actions and inactions by Defendants have harmed and are continuing to harm the Plaintiffs’ interests in having clean and unpolluted waters in Idaho that are fit habitat for aquatic and aquatic-dependent species, such as threatened and endangered salmon, steelhead, and bull trout.

9. Plaintiffs seek declaratory, injunctive and other appropriate relief.

#### **JURISDICTION AND VENUE**

10. Plaintiffs bring this action pursuant to the ESA, 16 U.S.C. §§ 1536 and 1540(c) and (g), the CWA, 33 U.S.C. §1365(a), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 500, *et seq.* and §§ 701–706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question).

11. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391 because the

Plaintiff organizations have members who reside in this district, Plaintiff Idaho Conservation League (“ICL”) and Defendants also have offices in this district, and a substantial part of the events or omissions occurred in Idaho.

12. By letters dated and postmarked December 26, 2012 (attached hereto as Exhibit 1) and May 13, 2013 (attached hereto as Exhibit 2), Plaintiffs notified Defendants of their violations of the CWA and the ESA and of Plaintiffs’ intent to sue for those violations. Also, though no notice letter was required, as a courtesy, by letter dated and postmarked November 29, 2012 (attached hereto as Exhibit 3), Plaintiff Northwest Environmental Advocates (“NWEA”) notified Defendants, the Services, of their violations of the APA and of Plaintiffs’ intent to sue for those violations.

### **PARTIES**

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

14. Plaintiff IDAHO CONSERVATION LEAGUE is an Idaho non-profit corporation with its principal place of business in Boise, Idaho. ICL was founded in 1973 and is dedicated to protecting Idaho’s environment. ICL and its members are interested in and work to protect Idaho’s water, air, wilderness, and public lands. ICL has more than 20,000 supporters, many of whom have a deep personal interest in protecting and restoring water quality throughout Idaho.

15. Plaintiffs' members reside near, visit, use and/or enjoy rivers, streams, and other surface waters, including wetlands, throughout the state of Idaho, including the Boise River, Clearwater River, Salmon River, Snake River, and their many tributaries. Plaintiffs' members regularly use and enjoy these waters and adjacent lands and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, conservation, educational, and other purposes. Plaintiffs' members derive benefits from their use and enjoyment of Idaho's waters and the fish and aquatic-dependent wildlife that rely upon Idaho's waters for habitat-related functions.

16. EPA's approval and use of water quality standards that have not gone through ESA Section 7 consultation harms Plaintiffs and their members because it allows for the use and implementation of water quality standards that are not protective of aquatic and aquatic-dependent species. Idaho's water quality standards are implemented through EPA-issued permits to industrial and municipal dischargers, through decisions by Idaho and EPA regarding which waters in the state are impaired and, in turn, through EPA and Idaho CWA clean-up plans to address those impaired waters, as well as other federal decisions that require state water quality standard certifications. The continued use of these water quality standards without adequate protection for threatened and endangered species accomplished through ESA consultation impairs the recreational, aesthetic and other interests of Plaintiffs and their members. Plaintiffs' members reasonably fear that many aspects and provisions of Idaho water quality standards do not protect fish and wildlife, including threatened and endangered species.

17. Likewise, EPA's failures to act on certain water quality standards submitted by Idaho harms Plaintiffs and their members. As a result of EPA's failures, less protective water quality standards are in use in Idaho than would otherwise be applicable, which adversely affects

aquatic and aquatic-dependent species. Plaintiffs' members would derive more benefits from their use of Idaho waters and adjacent lands if pollution were not adversely affecting water quality and aquatic species listed as threatened or endangered under the ESA, such as three species of salmon, one species of steelhead trout, Kootenai River white sturgeon, bull trout, and four species of snails.

18. Plaintiffs' members have a specific interest in the full and proper implementation of environmental laws, such as the ESA and the CWA, which are designed to protect those waters and the species that inhabit or otherwise depend upon them. Defendants' failures to carry out their statutory obligations harms Plaintiffs' members' interests by undermining the procedural requirements of the ESA and the CWA, which ensure that federal agencies make informed decisions and act in conformity with the statutes' substantive requirements.

19. Some of the recreational and aesthetic benefits and enjoyment Plaintiffs' members derive from their use of Idaho's rivers, streams and lakes involve fishing. Plaintiffs' members fish in rivers, streams and lakes throughout Idaho. Plaintiffs' members would fish for certain species but for their protected status under the ESA. Idaho's native fish populations, including threatened and endangered species, are adversely affected when water quality standards are not sufficient to maintain water quality at levels that protect these species and their habitat. Adverse effects to Idaho's native fish populations are directly related to degradation of water quality throughout the state, including from toxic pollutants, both individually and in combination with other forms of water pollution. For example, native fish and wildlife populations are directly harmed by toxic pollution from past, present, and future mining operations. Harmful levels of pollution would be addressed through more protective water quality standards or mitigated by measures identified through the ESA consultation process. The harm to native fish populations

has reduced and diminished Plaintiffs' members' recreational and aesthetic enjoyment and opportunities related to these species. Additionally, Plaintiffs' members no longer eat certain species of fish that they used to catch and eat due, in part, to concerns about contamination and toxic pollution.

20. The above-described interests of Plaintiffs' members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected by Defendants' disregard of their statutory duties under the ESA, the CWA and the APA, and by the unlawful harm imposed on water quality and fish and wildlife habitat that results from their action and inaction. By failing to act on Idaho's water quality standards submissions and by failing to complete ESA consultation on EPA's approval of Idaho's water quality standards submissions, Defendants are failing to ensure that Idaho's water quality standards protect the beneficial uses of Idaho's waters, including threatened and endangered species and their habitat. The relief requested in this lawsuit—requiring EPA to act on certain submitted water quality standards (and perform ESA consultation on those actions) and requiring Defendants to complete consultation on water quality standards EPA has approved—can redress these injuries because it will ensure that water quality standards used and implemented in Idaho are sufficiently protective of threatened and endangered species and their habitat.

### **LEGAL BACKGROUND**

#### **The Clean Water Act and Water Quality Standards**

21. 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).

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

23. Water quality standards establish the water quality goals for a waterbody. 40 C.F.R. § 131.2. Water quality standards also serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under CWA Sections 301 and 306. 33 U.S.C. §§ 1311 & 1316. A point source is a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Point source discharges are regulated under CWA Section 402's 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), 1342. Water quality standards are thus integral to regulation of point source discharges.

24. Idaho is one of the few states in the country that is not authorized by EPA to administer the NPDES permit program in the state, for which reason EPA issues NPDES permits for point source discharges in Idaho.

25. Congress did not establish an analogous federal permitting scheme for "nonpoint source" pollution, such as pollution from timber harvesting and agriculture that does not enter a

waterbody through a discrete conveyance. Instead, Congress assigned states the task of implementing water quality standards for nonpoint sources, with oversight, guidance, and funding from EPA. *See, e.g.*, 33 U.S.C. §§ 1288, 1313, 1329. Irrespective of implementation methods, water quality standards apply to all sources of pollution, point and nonpoint alike. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123, 1127 (9th Cir. 2002) (“[S]tates are required to set water quality standards for *all* waters within their boundaries regardless of the sources of the pollution entering waters.”) (emphasis in original).

26. Water quality standards must include three elements: (1) one or more designated uses of a waterway; (2) numeric and narrative criteria specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses; and (3) antidegradation policy requirements that ensure that uses dating to 1975 are protected and that high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

27. For waters with multiple use designations, the criteria must support the most sensitive use. 40 C.F.R. § 131.11(a)(1). Thus, human health criteria play a significant role in protecting aquatic life, including federally-listed threatened and endangered species. 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 pollutant-specific numeric aquatic life criteria. When there are no numeric aquatic life criteria established for a particular pollutant, only applicable numeric human health criteria will apply unless the agency chooses to interpret and apply its narrative criteria for the protection of aquatic life.

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

28. 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

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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.

29. 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). Prior to May 30, 2000, state-developed water quality standards became effective prior to EPA approval. *Id.* States must submit any new or revised water quality standard, as well as state-issued policies that affect water quality standards, to EPA for review and action. 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.13, 131.20(c).

30. 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 also must 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).

### **Impaired Waters and Total Maximum Daily Loads (“TMDLs”)**

31. In addition to serving as the regulatory basis for NPDES permits and nonpoint source controls, water quality standards are the benchmarks by which the quality of a waterbody is measured. In particular, waterbodies that do not meet applicable water quality standards, or cannot meet applicable standards after the imposition of technology-based effluent limitations on point sources, are deemed to be “impaired” and placed on the CWA Section 303(d) list. *See* 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.2(j). States must then 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.

32. A TMDL is the total daily loading of pollutants for a particular waterbody or waterbody segment, and “shall be established at a level necessary to implement the applicable water quality standards with seasonal variation and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 131.21(c), (d).

33. A TMDL consists of both load allocations and wasteload allocations for point and nonpoint sources of pollution respectively. 40 C.F.R. § 130.2(i). A wasteload allocation is “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution.” *Id.* at § 130.20(h). A load allocation is “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.” *Id.* at § 130.20(f). Therefore, the load and wasteload allocations in a TMDL interpret water quality standards for individual sources of pollution so that collectively the sources together attain and maintain water quality standards.

34. As with water quality standards, states submit TMDLs to EPA for approval or

disapproval. *See* 33 U.S.C. § 1313(d)(2). In turn, section 303(d) requires that within 30 days after submission EPA must either approve the TMDLs or disapprove them and establish its own TMDLs for the affected waterbodies. *Id.*

35. Once EPA approves a TMDL, all future NPDES permits must be consistent with the TMDL's wasteload allocations for point sources and the assumptions and requirements of the wasteload allocations. 40 C.F.R. §§ 130.2; 122.44(d)(1)(vii)(B). Additionally, the approved load allocations for nonpoint sources serve as the basis for state and local programs, including state programs that receive federal funds under CWA Section 319, 33 U.S.C. § 1329.

### **The Endangered Species Act**

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

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

38. The ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2).

39. Federal regulations broadly define the scope of agency actions subject to ESA Section 7's requirements. Agency actions include "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. Agencies must consult on ongoing agency actions over which the agencies retain, or are authorized to exercise discretionary involvement or control. *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

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

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

42. Section 7 consultation, which results in the Biological Opinion, generally is

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

43. The Services interpret the ESA to require timely completion of consultation. *See* Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and Conferences (“Consultation Handbook”), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998 at pages 4–7.

#### **The Administrative Procedure Act**

44. The APA requires agencies to conclude issues presented to them “within a reasonable time” and empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed[.]” 5 U.S.C. §§ 555(b), 706(1).

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

46. Because the ESA contains no internal standard of review, the APA provides the standard for actions taken pursuant to the statute. *See* 5 U.S.C. § 706; *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1984) (“Because the ESA contains no internal standard of review, section 706 of the [APA] governs review of the Secretary’s actions.”).

#### **FACTUAL BACKGROUND**

47. Idaho waters are habitat to and provide food for numerous ESA-listed species, including Snake River sockeye salmon, Snake River spring/summer Chinook salmon, Snake River fall Chinook salmon, Snake River steelhead, five species of aquatic snails, bull trout, and

Kootenai River white sturgeon.<sup>1</sup> Many or all of these species are likely to be adversely affected by EPA's failure to initiate consultation and the Services' failure to complete consultation and issue a Biological Opinion or Biological Opinions on Idaho's water quality standards.

**Federal Agencies' Failure to Complete ESA Section 7 Consultation  
on Idaho's 1994/97 Toxics Criteria**

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

49. On June 25, 1996, and May 27, 1997, EPA took actions on IDEQ's 1994 and 1997 submissions, approving, *inter alia*, toxic criteria for acute and chronic effects of 23 individual pollutants (aldrin, dieldrin, chlordane, DDT, endrin, heptachlor, lindane, PCBs, pentachlorophenol (PCP), toxaphene, trivalent and hexavalent chromium, nickel, silver, arsenic, cadmium, copper, cyanide, endosulfan, lead, zinc, and the acute criteria for mercury and selenium) and the metals conversion factors and equations (hereinafter "1996/97 Toxics

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

Approval”). In its action, EPA stated its approval was subject to completion of ESA Section 7 consultation.

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

51. In 1999, EPA and the Services agreed to bifurcate the Idaho consultation and they agreed that EPA would develop two separate BAs for its 1996 and 1997 approval actions, one for toxics and one for all other standards. On August 9, 2000, EPA submitted its final BA for the 1996/97 Toxics Approval (hereinafter “Final Toxics BA”) to the Services and, once again, requested initiation of formal consultation under ESA Section 7. The Final Toxics BA from EPA concluded that all but two of the approved toxic criteria were “not likely to adversely affect” four species of salmon and steelhead trout.

52. In July 2002, NMFS completed a draft Biological Opinion, which determined the 1996/97 Toxics Approval was likely to jeopardize all threatened and endangered salmon and steelhead in the state. On July 8, 2002, FWS prepared a document entitled “Draft Jeopardy/Adverse Modification for Approval of Numeric Criteria for Priority Toxic Pollutants for the State of Idaho” that concluded the 1996/97 Toxics Approval “will not provide sufficient protection for the Snake River aquatic snails, bull trout, Kootenai River white sturgeon, and Kootenai River white sturgeon habitat.” The draft Biological Opinions have never been finalized.

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

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

#### **Federal Agencies' Failure to Consult on Other Idaho Water Quality Standards**

55. In addition to new or revised toxics criteria, Idaho's August 1994 submission to EPA included conventional and non-conventional (e.g., ammonia) criteria for the protection of aquatic life; revisions to the Idaho antidegradation requirements; beneficial use designations; narrative criteria for the protection of designated uses (including exemptions for nonpoint sources); a variance policy to allow temporary downgrades to standards; and mixing zone policies to allow permitted dischargers a zone in which water quality criteria are suspended. On August 15, 1995, IDEQ submitted revised chronic criteria for ammonia to protect both cold- and warm-water species.

56. EPA's June 25, 1996 action approved most, but not all, of Idaho's submitted standards from 1994 and 1995.

57. On or about March 23 and 31, 1997, IDEQ submitted water quality standards to

EPA for action, including revisions to its antidegradation policy and designated uses for two creeks. On May 27, 1997, EPA approved, subject to completion of ESA consultation, which EPA did not initiate or complete, the use designations and antidegradation policy revisions.

58. On or about June 19 and 26, 1997, IDEQ submitted further revisions to its water quality standards, including unclassified waters and mixing zone policies, temperature criteria for Kootenai River white sturgeon and bull trout, and the addition of designated uses. On July 15, 1997, EPA approved the revisions subject to completion of ESA consultation.

59. On July 15, 1997, EPA also withdrew its 1996 disapproval of Idaho's temperature standards for the protection of threatened and endangered snails, thus making them effective for CWA purposes pursuant to 40 C.F.R. § 131.21(c), but failed to initiate or complete ESA consultation on them.

60. In 1997, IDEQ established a natural background provision in its water quality standards, which it revised in 2000, and revised again and resubmitted to EPA on August 5, 2002. On July 20, 2004, EPA approved this provision subject to completion of ESA consultation. Consultation was purportedly initiated on January 21, 2004. EPA and the Services have not completed this consultation.

61. On or about February 11, 1997 and April 10, 1998, IDEQ submitted designated use removals for two creeks, approved by EPA, on June 5, 2000, subject to completion of ESA consultation. A draft BA constitutes the last step completed in the consultation process and consultation was not completed.

62. On or about June 25, 1997, IDEQ submitted revised policies to EPA for approval concerning unclassified waters and mixing zones, and temperature criteria for Kootenai River white sturgeon. On July 15, 1997, EPA approved the policies and sturgeon criteria subject to

completion of ESA consultation. Consultation was not initiated or completed.

63. On or about November 21, 2000, IDEQ submitted ammonia criteria for the Spokane River to EPA for approval. On March 28, 2001, EPA approved the criteria subject to completion of ESA consultation. Consultation was not initiated or completed.

64. In March 2002, IDEQ submitted natural conditions provisions for lakes and reservoirs and revised limits for compliance schedules to EPA for approval. On December 21, 2005, EPA approved the provisions subject to completion of ESA consultation. EPA and the Services failed to complete consultation on the compliance schedule provisions.

65. On or about August 5, 2002, IDEQ submitted revisions to its statewide ammonia criteria to EPA for approval. On November 12, 2002, EPA approved the revisions subject to completion of ESA consultation. EPA has not initiated or completed consultation.

66. On or about August 5, 2002, IDEQ submitted revised standards to EPA for approval, including changes to its variance policy and changes to designated uses. On January 13, 2006, EPA approved the designation of uses for the Salmon River basin subject to completion of ESA consultation. On March 29, 2006, EPA approved the removal of uses from the Snake River and a rule that exempts intermittent waters from numeric criteria. On July 17, 2006, EPA approved the changes to the variance policy. EPA has not initiated or completed consultation on Salmon River basin designated uses, the intermittent waters policy, or Idaho's variance policy.

67. In December 2002, IDEQ submitted site-specific criteria for lead, cadmium, and zinc for the South Fork of the Coeur d'Alene River and its tributaries to EPA for approval. On February 28, 2003, EPA approved the site-specific criteria subject to completion of ESA consultation. EPA neither initiated nor completed consultation.

68. In April 2003, IDEQ submitted Water Effect Ratios for copper and lead criteria applicable to the Boise River to EPA for approval. On December 22, 2005, EPA approved the Water Effect Ratios. EPA has not initiated or completed consultation.

69. On or about June 10, 2003, IDEQ submitted use designations for 135 and 85 stream segments to EPA for approval. On January 13, 2006, EPA approved the use designations subject to the completion of ESA consultation. EPA has not initiated or completed consultation.

70. On or about February 20, 2004, and May 9, 2005, IDEQ submitted site-specific spawning criteria for temperature for the Snake River to EPA for approval. On July 20, 2004, and June 24, 2005, EPA approved the site-specific criteria subject to completion of ESA consultation. FWS has failed to complete consultation.

71. On or about May 6, 2005, IDEQ submitted site-specific Snake River dissolved oxygen criteria to EPA for approval. On July 8, 2005, EPA approved the criteria concluding no ESA consultation was required because in 1999 the Services completed Biological Opinions for dissolved oxygen in the same river in consulting on EPA's proposed approval of Oregon's water quality standards. EPA cannot rely on the Oregon Biological Opinions because those Opinions did not analyze or take into account the combined effects of Idaho water quality standards, such as temperature and dissolved oxygen standards, on species. Therefore EPA has not initiated or completed consultation on the dissolved oxygen criteria.

72. On August 8, 2005, IDEQ submitted proposed revisions to human health and aquatic life criteria for nine toxic pollutants, the removal of a low-end hardness cap on metals, and the removal of Idaho's aquatic life criteria for mercury. On September 30, 2005, EPA approved IDEQ's revised numeric aquatic life criteria for toxic pollutants and the hardness cap subject to completion of ESA consultation. Two of the aquatic life criteria, for nickel and zinc,

are the subject of EPA's earlier ESA consultation for which the Services have not yet completed Biological Opinions. EPA has not initiated or completed consultation on these aquatic life criteria or the hardness cap, nor did it update its previous August 9, 2000 BA with regard to nickel and zinc.

73. Among the human health criteria approved on September 30, 2005, were criteria for antimony, a metal for which Idaho has no aquatic life criteria. EPA approved the antimony criteria for human health without consulting with the Services regarding the effects of this approval on threatened and endangered species and critical habitat.

74. On or about May 13, 2008, IDEQ submitted revisions to its spawning timing procedure to EPA for approval. On May 22, 2008, EPA approved the spawning procedure subject to completion of ESA consultation. EPA has not initiated or completed consultation on this procedure.

75. On or about June 8, 2009, IDEQ submitted renewed five-year variances for cadmium, lead, and zinc for three municipalities to EPA for approval as temporary changes to water quality standards. On July 22, 2009, EPA approved the variances, which it first approved in 2004. EPA has not initiated or completed consultation on these variances.

76. On or about April 15, 2011, IDEQ submitted revisions to its antidegradation requirements to EPA for approval. On August 18, 2011, EPA approved the antidegradation implementation methods. EPA did not consult under the ESA.

77. On or about July 20, 2011, IDEQ submitted site-specific spawning temperature criteria and thermal treatment requirements for the Lower Boise River to EPA for approval. On October 27, 2011, EPA approved the site-specific criteria. EPA has not initiated or completed consultation on these site-specific criteria.

78. As described above, sometime in 1999, EPA and the Services agreed to bifurcate the Idaho consultation and that EPA would develop two separate BAs for its 1996 and 1997 approval actions on the 1994/97 Idaho standards, one for toxics and one for all other standards.

79. EPA never completed the second BA, which was intended to address all non-toxics related criteria of the 1994/97 Idaho standards, including but not limited to: (1) narrative criteria for the protection of aquatic life, including exemptions for nonpoint sources (IDAPA 58.01.02.200.01, .02, .03, and .05); (2) numeric criteria for ammonia, total residual chlorine, dissolved oxygen; intergravel dissolved oxygen for salmonid spawning, pH, total dissolved gas, turbidity, and temperature criteria for cold and warm water biota, salmonid spawning, and Kootenai River white sturgeon; (3) Idaho's antidegradation policy; (4) use designations for warm water biota, cold water biota, and salmonid spawning; and (5) general policies for mixing zones and variances.

80. To date, EPA has not consulted with the Services on numeric criteria for conventional and non-conventional pollutants, toxic criteria other than those adopted by Idaho in 1994 and 1997, narrative criteria, designated beneficial uses, antidegradation requirements, mixing zone and variance policies, or on its approval of the human health criteria for antimony.

81. To date, the Services have not produced a Biological Opinion or Biological Opinions and there is no evidence of any binding schedule of completion or evidence of a timetable for the Services to complete the Biological Opinion or Biological Opinions.

#### **EPA's Failure to Take CWA Action on Idaho's Revised Water Quality Standards**

82. On or about August 24, 1994, IDEQ submitted revisions to its temperature criteria for ESA-listed snails. On June 25, 1996, EPA disapproved these criteria but, on July 15, 1997, EPA withdrew its previous 1996 disapproval of Idaho's temperature standards for threatened and

endangered snails. EPA subsequently failed to take action on the temperature standards for snails, standards that are in place for CWA purposes pursuant to 40 C.F.R. § 131.21(c).

83. In April 2000, and revised in 2001, IDEQ submitted temperature standards to EPA for approval to address “seasonal cold water.” *See* ID ADC 58.01.02.250.03. EPA failed to act on this submission, which is in effect for CWA purposes pursuant to 40 C.F.R. § 131.21(c).

84. On or about August 8, 2005, IDEQ submitted to EPA for approval a rule removing the aquatic life criteria for mercury. On December 12, 2008, EPA disapproved IDEQ’s proposed removal and specified four options Idaho could use to establish mercury criteria based on scientifically defensible methods to protect Idaho’s aquatic life designated uses. Neither EPA nor Idaho has taken action to remedy the deficient aquatic life mercury criteria.

#### **Implementation of Water Quality Standards in Idaho**

85. EPA-approved water quality standards are the foundation of Idaho’s water quality program, including the protection and restoration of water quality. Idaho compares water quality data collected by numerous agencies to its water quality standards to determine if the standards are met. Idaho then places each assessed waterbody segment in a category describing its status for each pollutant or parameter assessed. As of 2010, approximately 36 percent of Idaho streams and 56 percent of lakes have been identified as not meeting water quality standards. *See* IDEQ, Integrated Report, <http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx> (last visited September 20, 2013). Thirty-five and forty percent of streams and lakes, respectively, have not been assessed. *Id.*

86. EPA approved Idaho’s 2010 identification of 912 impaired waters (also referred to as a 303(d) list) still requiring the development of a TMDL on September 29, 2011. *See* EPA

Region 10, Approval of Idaho's Final 2010 303(d) list, <http://www.deq.idaho.gov/media/725918-2010-integrated-report-epa-approval-letter-092911.pdf> (last visited September 20, 2013). Prior to that, in 2008 EPA partially approved and partially disapproved Idaho's 303(d) list and subsequently added two waters as impaired, the Lower Boise River for nutrients and Hem Creek for temperature. *See* EPA Region 10, Partial Approval/Partial Disapproval of Idaho's Final 2008 303(d) List, <http://www.deq.idaho.gov/media/773642-2008-ir-epa-approval-disapproval-020409.pdf> (last visited September 20, 2013).

87. EPA has approved hundreds of TMDLs for the State of Idaho, most of which implement the water quality standards at issue in this case for which EPA has not initiated or completed ESA consultation. *See* IDEQ, Table of Subbasin Assessments, TMDLs, Implementation Plans, and Five-Year Reviews, <http://www.deq.idaho.gov/water-quality/surface-water/tmdls/table-of-sbas-tmdls.aspx> (last visited September 20, 2013).

88. TMDLs are key to pollution control activities in Idaho to restrict nonpoint source contributions of pollutants to achieve the goal of meeting water quality standards. Idaho Code § 39-3612 ("Upon completion of total maximum daily load processes as set forth in section 39-3611, Idaho Code, the director shall integrate such processes into the state's water quality management plan developed pursuant to the federal clean water act. Total maximum daily load processes shall be used by all designated agencies for achieving water quality standards."). Moreover, the overarching goal of Idaho's nonpoint source programs is to meet state water quality standards. *See, e.g.*, Idaho Nonpoint Source Management Plan 1 (December 1999) [http://www.deq.idaho.gov/media/458860-management\\_plan\\_entire.pdf](http://www.deq.idaho.gov/media/458860-management_plan_entire.pdf) (last viewed September 20, 2013).

89. Water quality standards also play a critical role in the NPDES permitting context.

EPA routinely issues NPDES permits in Idaho to industrial and municipal dischargers. *See* EPA Region 10, Current NPDES Permits in Idaho, <http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319> (last viewed September 20, 2013). Such NPDES permits purport to ensure the protection of threatened and endangered species because they require compliance with Idaho's water quality standards, despite the fact that most of Idaho's water quality standards have not been the subject of completed ESA consultations. Even where EPA engages in ESA consultation on the issuance of a particular NPDES permit, it does not include ESA consultation on the underlying water quality standards themselves. EPA-issued NPDES permits contain effluent limits for pollutants and parameters that may affect threatened and endangered species, such as temperature, biological oxygen demand, toxics, metals, nutrients, residual chlorine, and ammonia.

90. Water quality standards are also the basis for regulatory certifications by state agencies of federal actions, such as dredging and permitting of hydroelectric dams, pursuant to CWA Section 401. 33 U.S.C. §1341. Because EPA is the NPDES permitting agency for Idaho point source dischargers, Idaho may and routinely does issue Section 401 certifications to ensure that EPA permits are adequate to meet state water quality standards prior to the permit's being finalized. *See* IDEQ, §401 Certifications: NPDES Permits, <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401-certifications-npdes-permits.aspx>. Additionally, the use of mixing zones—areas within a waterbody in which compliance with water quality standards is suspended—is only authorized through Idaho's 401 certifications of EPA-issued NPDES permits. EPA has not completed ESA consultation on mixing zone policies included in Idaho's water quality standards that allow greater contributions of pollutants in discharge effluents pursuant to EPA permits than EPA would otherwise allow.

91. Idaho also issues Section 401 certifications for U.S. Army Corps of Engineers' dredge and fill permits based on Idaho's water quality standards. *See* IDEQ, §401 Certifications: Dredge & Fill, <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401-certifications-dredge-fill.aspx> (last visited September 20, 2013). Likewise, Idaho issues Section 401 certifications for hydroelectric dams permitted by federal agencies, such as the Hells Canyon Complex. *See* IDEQ, §401 Certification of Hells Canyon Complex Hydroelectric Project, <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/hells-canyon-complex-project.aspx> (last visited September 20, 2013). Such certifications seek to ensure that hydroelectric projects comply with state water quality standards, including through TMDLs where available, for Idaho standards such as temperature, dissolved oxygen, nuisance algae, and toxics.

92. Finally EPA oversees and directs other actions, including clean-up and removal projects, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as Superfund, that apply the water quality criteria to sources of pollution.

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

#### **NMFS Action Unreasonably Delayed or Unlawfully Withheld**

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

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

95. NMFS has a mandatory duty to complete ESA Section 7 consultation in a timely manner and to issue a Biological Opinion promptly after the completion of consultation. 16

U.S.C. §§ 1536(b)(1)(A), 1536(b)(3). A Biological Opinion is an agency action within the meaning of the APA. 5 U.S.C. § 551(13).

96. The ESA imposes a 90-day period for completion of most consultations. 16 U.S.C. § 1536(b)(1).

97. In or around July 1997, EPA and NMFS initiated formal consultation on EPA's 1996 and 1997 approvals of Idaho's new and revised water quality standards for toxics.

98. In or around January 2004, EPA initiated formal consultation on EPA's 2004 approval of Idaho's new and revised natural background water quality standards provision.

99. In or around December 2005, EPA initiated formal consultation on EPA's December 21, 2005 approval of revised limits on compliance schedules.

100. NMFS still has not completed consultation on any of these approval actions.

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

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

**SECOND CLAIM FOR RELIEF**  
**FWS Action Unreasonably Delayed or Unlawfully Withheld**

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

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

105. FWS has a mandatory duty to complete ESA Section 7 consultation and to issue a Biological Opinion promptly after the completion of consultation. 16 U.S.C. §§ 1536(b)(1)(A), 1536(b)(3). A Biological Opinion is an agency action within the meaning of the APA. 5 U.S.C. § 551(13).

106. In or around September 1996, EPA and FWS initiated formal consultation on EPA's 1996 and 1997 approvals of Idaho's new and revised water quality standards for toxics. In 2004, EPA submitted a Not Likely to Adversely Affect ("NLAA") finding to FWS.

107. In or around January 2004, EPA initiated formal consultation on EPA's 2004 approval of Idaho's new and revised natural background water quality standards provision.

108. In or around December 2005, EPA initiated formal consultation on EPA's December 21, 2005 approval of revised limits on compliance schedules.

109. FWS still has not completed any of these consultations or concurred on the NLAA finding.

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

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

**THIRD CLAIM FOR RELIEF**  
**EPA Violation of the ESA for Failure to Consult on Idaho Revisions  
of Water Quality Standards**

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

paragraphs.

113. Section 7(a)(2) of the ESA 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).

114. 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).

115. Federal 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.

116. EPA is a federal agency within the meaning of the ESA. 16 U.S.C. § 1536(a)(2).

117. IDEQ's revisions to its water quality standards for, *inter alia*, numeric criteria for conventional, non-conventional, and toxic pollutants and criteria methodologies; narrative criteria including nonpoint source exemptions and superseding criteria based on natural conditions; site-specific criteria; variances; designated beneficial uses and designation policies including exemptions and procedures; antidegradation requirements; and mixing zone, compliance schedule, and variance policies "may affect" threatened and endangered species, triggering EPA's duty under the ESA to consult with the Services.<sup>2</sup>

118. EPA has never prepared a BA or requested consultation on these revisions to Idaho's water quality standards and general policies.

119. EPA's approvals of the revisions to Idaho's water quality standards and general

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<sup>2</sup> With respect to EPA's approval of IDEQ's revised limits on compliance schedules and its natural conditions provision, Claim Three is pleaded in the alternative to Claims One and Two.

policies are ongoing agency actions over which EPA continues to have discretionary control under ESA Section 7(a)(2). *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

120. Additionally, EPA continues to take affirmative actions, including, *inter alia*, the issuance of NPDES permits that apply these water quality standards and policies to point sources of pollution, the approval of 303(d) lists and TMDLs that implement these water quality standards and policies as to point and nonpoint sources of pollution, and the issuance of federal permits or licenses that require state certification, including the imposition of conditions on the federal permits or licenses, to ensure compliance with these water quality standards and policies.

121. By failing to complete consultation with the Services on IDEQ's revisions to these water quality standards and policies, EPA is failing to ensure that its actions are 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, in violation of its mandatory obligation under the ESA. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A).

**FOURTH CLAIM FOR RELIEF**  
**EPA Violation of the ESA for Failure to Consult on Approval  
of Human Health Criteria for Antimony**

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

123. Both human health and aquatic life criteria apply to any given waterbody; however, the more stringent of the two criteria controls the outcome of the regulatory action. 40 C.F.R. § 131.11(a)(1).

124. Antimony is a metal for which Idaho has no aquatic life criteria. Thus the human

health criteria are the applicable criteria for CWA purposes.

125. EPA's approval of revisions to Idaho's water quality standards and general policies is an ongoing agency action over which EPA continues to have discretionary control under ESA section 7(a)(2). *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

126. Additionally, EPA continues to take affirmative actions, including, *inter alia*, clean-up and removal projects pursuant to CERCLA, that apply the antimony water quality criteria to sources of pollution.

127. EPA's approval of Idaho's human health criteria for antimony is an action that "may affect" a listed species, triggering EPA's duty under the ESA to consult with the Services to ensure against jeopardy or the destruction or adverse modification of critical habitat.

128. EPA has not prepared a BA or requested consultation for its approval of Idaho's human health criteria for antimony.

129. By failing to complete consultation with the Services on its approval of Idaho's human health criteria for antimony, where such criteria are intended to protect, or have the effect of protecting, aquatic life, EPA is failing to ensure that its actions are 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, in violation of its mandatory obligation under the ESA. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A).

#### **FIFTH CLAIM FOR RELIEF**

#### **EPA Violation of the ESA for Irreversible and Irretrievable Commitment of Resources Foreclosing Reasonable and Prudent Alternatives**

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

paragraphs.

131. Once an agency has initiated consultation but has not completed consultation, Section 7(d) of the ESA prevents the agency from making 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).

132. There are certain Idaho water quality standards on which EPA took action and initiated consultation but for which consultation has not been completed. EPA’s actions involve the irreversible and irretrievable commitment of resources that foreclose RPAs because the water quality standards are, *inter alia*, 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.

133. By approving Idaho water quality standards for which consultation has not been completed, EPA is violating the ESA by making irreversible and irretrievable commitments of resources that foreclose RPAs. 16 U.S.C. § 1536(d).

**SIXTH CLAIM FOR RELIEF**

**EPA Violation of the CWA for Failure to Promulgate an Aquatic Life Criterion for Mercury in Idaho**

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

135. Once EPA disapproves a state’s water quality standard and specifies changes to meet CWA requirements, if the state does not adopt the specified changes within 90 days of the notification, EPA shall itself promulgate the standard for the state. 33 U.S.C. § 1313(c)(3), (c)(4).

136. 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.

137. Idaho did not adopt the specified changes within 90 days of EPA's disapproval notification, triggering EPA's duty to promulgate a standard for Idaho.

138. By failing to promulgate an aquatic life criterion for mercury in Idaho, EPA has violated the CWA. 33 U.S.C. § 1313(c)(3), (c)(4).

#### **SEVENTH CLAIM FOR RELIEF**

##### **EPA Violation of the CWA for Failure to Take Action on Idaho's Standards**

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

140. 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).

141. On June 25, 1996, EPA disapproved revised temperature standards for specific reaches of the Mid Snake River Basin submitted by IDEQ on or about August 24, 1994, because they were not protective of five species of threatened and endangered freshwater aquatic snails. On July 15, 1997, EPA retracted its previous disapproval stating, "EPA will revisit this issue in future triennial reviews as more information becomes available."

142. Having retracted its disapproval but not taken approval action, EPA has failed to act on Idaho's submission of temperature criteria for specific reaches of the Snake River.

143. In 2000 and 2002, IDEQ submitted "seasonal cold water" temperature standards

to EPA. EPA failed to take action on these standards.

144. In failing to take action on Idaho's submissions of these water quality standards, EPA has violated its mandatory duty to act pursuant to CWA Section 303(c)(3), 33 U.S.C. § 1313(c).

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### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully requests that this Court:

1. Declare that EPA has failed to ensure against jeopardy or destruction or adverse modification of critical habitat regarding its approvals of certain Idaho revisions to water quality standards for which EPA never initiated consultation, in violation of 16 U.S.C. §§ 1536(a)(2), and 1540(g)(1)(A).
2. Declare that EPA has failed to ensure against jeopardy or destruction or adverse modification of critical habitat regarding its approval of human health criteria for antimony for which EPA never initiated consultation, in violation of 16 U.S.C. §§ 1536(a)(2), and 1540(g)(1)(A).
3. Declare that EPA has failed to prevent the irreversible and irretrievable commitment of resources with respect to its approvals of certain Idaho water quality standards for which EPA initiated—but did not complete—consultation, in violation of 16 U.S.C. §§ 1536(d).
4. Declare that EPA has failed to perform its mandatory duty to act upon the State of Idaho's submission of water quality standards, in violation of 33 U.S.C. § 1313(c)(3).

5. Declare that EPA has failed to perform its mandatory duty to promulgate replacement mercury criteria for the protection of aquatic life for the State of Idaho, in violation of 33 U.S.C. §§ 1313 (c)(3) and (c)(4).
6. Order EPA to immediately initiate consultation regarding certain Idaho water quality standards.
7. Order EPA to cease using certain Idaho water quality standards as the bases for future actions until consultation is complete, and enjoin other actions that are based on these water quality standards.
8. Order EPA to immediately approve or disapprove Idaho's water quality standards for which it has not completed the required CWA review.
9. Order EPA to promulgate a replacement aquatic life criterion for mercury in Idaho.
10. Declare that NMFS and FWS failed to perform their mandatory duties to complete ESA Section 7 consultation on EPA's approvals of Idaho's new and revised water quality standards for toxics and to produce a Biological Opinion or Biological Opinions, constituting agency actions unreasonably delayed or unlawfully withheld, within the meaning of 5 U.S.C. §§ 555(b), 706(1).
11. Order NMFS and FWS to complete ESA Section 7 consultation and issue a Biological Opinion or Biological Opinions by a date certain.
12. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation.
13. Grant such other and further relief as this Court deems just and proper.

DATED this 24th day of September, 2013.

Respectfully submitted,

s/ Allison LaPlante

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