

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation,

Plaintiff,

v.

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

Defendants.

NO.:

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

(Pursuant to Administrative Procedure
Act, 5 U.S.C. §§ 555(b) & 706(1))

NATURE OF THE CASE

1. This is an action against the National Marine Fisheries Service (“NMFS” or “Fisheries Service”) and the U.S. Fish & Wildlife Service (“FWS” or “Wildlife Service”) (together, the “Services”) for failing to carry out mandatory statutory duties designed to protect Washington’s waters and aquatic and aquatic-dependent species, including threatened and

1 community organizing, strategic partnerships, public record requests, information sharing,
2 lobbying, and litigation to ensure better implementation of the laws that protect and restore the
3 natural environment. NWEA has participated in the development of Clean Water Act (“CWA”)
4 programs in the State of Washington for many years.

5
6 7. NWEA’s members reside near, visit, use and/or enjoy rivers, streams, estuaries,
7 wetlands, marine, and other surface waters throughout the State of Washington, including the
8 Columbia and Snake Rivers, Puget Sound, and the Pacific Ocean, and their many tributaries.
9 Plaintiff’s members regularly use and enjoy these waters and adjacent lands and have definite
10 future plans to continue to use and enjoy these waters for recreational, subsistence, scientific,
11 aesthetic, spiritual, commercial, conservation, educational, employment, and other purposes.
12 Plaintiff’s members derive benefits from their use and enjoyment of Washington’s waters and the
13 fish and aquatic-dependent wildlife that rely upon Washington’s waters for habitat-related
14 functions.
15

16 8. The Services’ failures harm Plaintiff and its members because they allow for the
17 implementation of water quality standards that may not protect species that are facing extinction.
18 Washington’s water quality standards are implemented through discharge permits issued to
19 industrial and municipal dischargers, the state’s having been authorized to do so by EPA and
20 subject to EPA’s continuing oversight. The standards are also implemented through the programs
21 established by section 303(d) of the CWA in which the state compares water quality data to the
22 standards in order to identify which waters are considered impaired and to establish clean-up
23 plans for them, subject to EPA oversight. Finally, the state is required to establish management
24 practices to control nonpoint source runoff to meet water quality standards and issues state water
25 quality certifications of projects with federal permits to ensure compliance with water quality
26

1 standards. The continued use of these water quality standards without ensuring that adequate
2 protection for threatened and endangered species is accomplished through ESA consultation
3 impairs the recreational, aesthetic, and other interests of Plaintiff and its members. Plaintiff's
4 members reasonably fear that many aspects and provisions of Washington water quality standards
5 do not protect fish and wildlife, including threatened and endangered species.
6

7 9. The Services' failure to complete consultation and issue final biological opinions
8 likely has resulted in EPA's allowing less protective cyanide criteria than would otherwise be in
9 place. The draft biological opinions issued in 2010 by the Services found that EPA's approval of
10 Washington's cyanide criteria for freshwater and marine waters outside of Puget Sound likely
11 jeopardize or destroy or adversely modify designated critical habitat of the following threatened
12 and endangered species present in Washington's waters: Upper Columbia River spring chinook,
13 Puget Sound chinook, Lower Columbia River coho, Hood Canal summer chum, Columbia River
14 chum, Snake River sockeye, Lake Ozette sockeye, Puget Sound steelhead, Upper Columbia River
15 steelhead, Lower Columbia River Chinook, Snake River fall-run Chinook, Snake River
16 spring/summer-run Chinook salmon, southern green sturgeon, Lower Columbia River steelhead,
17 Middle Columbia River steelhead, Snake River steelhead, Upper Willamette River Chinook,
18 Upper Willamette River steelhead, the Southern Resident killer whale, and bull trout. Even less
19 protective cyanide criteria are in place inside Puget Sound.
20
21

22 10. The Services' failure to complete consultation and issue final biological opinions
23 likely has resulted in EPA's allowing less protective marine copper criteria than would otherwise
24 be in place for Washington waters. In its consultation on EPA's approval of Oregon's water
25 quality standards, the Fisheries Service concluded that ESA-listed species exposed to waters at
26 the EPA-recommended marine copper criteria will suffer moderate levels of acute or chronic

1 toxic effects including mortality and reproductive failure. NMFS routinely raises concerns about
2 copper discharges to Puget Sound because of the toxicity of copper and its being combined with
3 high levels of other toxic contaminants. The agency has also expressed alarm at the longer
4 residence times of toxics within the system due to Puget Sound's hydrologic isolation and poor
5 flushing. The entrainment of toxics in Puget Sound can result in biota being exposed to increased
6 levels of contaminants for a given input, compared to other large estuaries, a problem that is
7 exacerbated by a high degree of residency by many marine species, all of which results in a more
8 protracted exposure to contaminants.
9

10 11. As a result of the Services' failures, less protective water quality standards for
11 cyanide and copper are in use in Washington than would otherwise be applicable. These water
12 quality standards adversely affect aquatic and aquatic-dependent species. Plaintiff's members
13 would derive more benefits from their use of Washington waters and adjacent lands if pollution
14 were not adversely affecting water quality, and aquatic and aquatic-dependent wildlife, including
15 specifically aquatic species listed as threatened or endangered under the ESA.
16

17 12. Washington's native fish and shellfish populations, including threatened and
18 endangered species, are adversely affected when water quality standards are not sufficient to
19 maintain water quality at levels that protect these species and their habitat. Adverse effects to
20 Washington's native fish populations are directly related to degradation of water quality
21 throughout the state, including the presence of toxic pollutants, both individually and in
22 combination with other forms of water pollution, such as high temperatures and low levels of
23 dissolved oxygen. For example, native fish and wildlife populations are directly harmed by toxic
24 pollution from past, present, and future industrial and urban sources. Harmful levels of pollution
25 would be addressed through more protective water quality standards or mitigated by measures
26

1 identified through the ESA consultation process.

2 13. The harm to native fish and wildlife populations has reduced and diminished
3 Plaintiff's members' recreational, aesthetic, and employment opportunities related to these
4 species. For example, some of Plaintiff's members derive these benefits by fishing in
5 Washington. Plaintiff's members fish in rivers, streams, and lakes in Washington and areas of
6 Puget Sound. Plaintiff's members would fish for certain species but for their protected status
7 under the ESA and their related scarcity. Additionally, Plaintiff's members no longer eat certain
8 species of fish that they used to catch and eat due, in part, to concerns about contamination and
9 toxic pollution.
10

11 14. Beyond fishing, some of Plaintiff's members enjoy clamming, swimming, wading,
12 boating, photography, bird- and wildlife-watching, and generally interacting recreationally,
13 spiritually, and in terms of their employment, with fresh and salt water systems within
14 Washington, many of which are designated critical habitat for ESA-listed species. Further,
15 NWEA and many of its individual members are active in working for restoration of salmon
16 populations and salmon habitat, and in promoting appreciation and protection of salmonid
17 species, and the species that rely upon salmonids as prey, such as the killer whale.
18

19 15. Plaintiff's members have a specific interest in the full and proper implementation
20 of environmental laws, such as the ESA and the CWA, which are designed to protect those waters
21 that NWEA's members use and the species that inhabit or otherwise depend upon them. The
22 Services' failure to carry out their statutory obligations harms Plaintiff's members' interests by
23 undermining the procedural requirements of the ESA and the CWA, which ensure that federal
24 agencies make informed decisions and act in conformity with the statutes' substantive
25 requirements.
26

1 16. The above-described interests of Plaintiff and its members have been, are being,
2 and, unless the relief prayed for herein is granted, will continue to be affected by Defendants'
3 disregard of their statutory duties under the Administrative Procedure Act, and the ESA, and by
4 the unlawful harm imposed on water quality and fish and wildlife habitat that results from their
5 inaction.

6
7 17. By failing to complete ESA consultation on EPA's approvals of Washington's
8 water quality standards submissions of cyanide and copper criteria, Defendants are failing to
9 ensure that Washington's water quality standards protect the beneficial uses of Washington's
10 waters, including threatened and endangered species and their habitat. The relief requested in this
11 lawsuit—requiring the Services to complete ESA consultation on EPA's actions and to issue final
12 biological opinions on water quality standards that EPA has already approved—can redress these
13 injuries because it will ensure that water quality standards used and implemented in Washington
14 are sufficiently protective of threatened and endangered species and their habitat. This would, in
15 turn, improve Plaintiff's members' use and enjoyment of Washington's waters and the species
16 that depend upon the quality of those waters.

17
18 18. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency of the
19 United States and a subdivision of the Department of Commerce. NMFS is responsible for the
20 conservation of living marine resources, including some of the ESA-listed species that are likely
21 to be adversely affected by EPA's approval of Washington's copper and cyanide criteria.

22
23 19. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency of
24 the United States and a subdivision of the Department of the Interior. FWS is responsible for the
25 conservation of fish and wildlife, including some of the ESA-listed species that are likely to be
26 adversely affected by EPA's approval of Washington's copper and cyanide criteria.

1 **JURISDICTION AND VENUE**

2 20. Plaintiffs bring this action pursuant to the Administrative Procedure Act (“APA”),
3 5 U.S.C. § 500, *et seq.* and §§ 701-706. This court has jurisdiction pursuant to 28 U.S.C. § 1331
4 (federal question). Plaintiff has challenged final agency actions as defined by the APA, 5 U.S.C.
5 § 551(13). An actual, justiciable controversy exists between Plaintiff and Defendants. The
6 requested relief is proper under 28 U.S.C. §§ 2201 (declaratory judgment), 2202 (further
7 necessary or proper injunctive relief).
8

9 21. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) (venue in
10 action against officer of United States), and LCR 3(d)(1) because a substantial part of the events
11 or omissions giving rise to the claims occurred in the Seattle Division, where Defendant NMFS’s
12 regional office is located, and where members of NWEA reside.
13

14 **LEGAL BACKGROUND**

15 **The Administrative Procedure Act**

16 22. The APA authorizes courts to hold unlawful and set aside any agency action that is
17 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §
18 706(2)(A). The APA requires agencies to conclude issues presented to them “within a reasonable
19 time” and empowers reviewing courts to “compel agency action unlawfully withheld or
20 unreasonably delayed[.]” 5 U.S.C. §§ 555(b), 706(1).
21

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

23 24. Because the ESA contains no internal standard of review, the APA provides the
24 standard for actions taken pursuant to the statute. *See* 5 U.S.C. § 706; *Idaho Farm Bureau v. Babbitt*,
25 58 F.3d 1392, 1401 (9th Cir. 1984).
26

The Endangered Species Act and Consultation

1
2 25. The ESA requires the Secretary of the Interior to promulgate regulations listing those
3 species of animals that are “threatened” or “endangered” under specified criteria, and to designate
4 their “critical habitat.” 16 U.S.C. § 1533. One of the ESA’s primary purposes is to preserve the
5 habitat upon which “listed” species—i.e., threatened and endangered species—rely. 16 U.S.C. §
6 1531(b). In order to bring about the recovery of species facing extinction, the ESA affords these
7 species the “highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).
8

9 26. The ESA requires that each federal agency use its authorities in furtherance of the
10 purposes of the ESA by carrying out programs for the conservation of endangered and threatened
11 species. 16 U.S.C. § 1536(a)(1).
12

13 27. Section 7 of the ESA enumerates the substantive and procedural obligations of
14 federal agencies with respect to listed species. 16 U.S.C. § 1536. Two of the ESA’s primary
15 mandates are set out in section 7(a)(2). First, federal agencies must insure that their actions do not
16 “jeopardize the continued existence of” species listed as threatened or endangered. 16 U.S.C. §
17 1536(a)(2). Second, federal actions must not result in “destruction or adverse modification” of
18 habitat designated as critical for listed species. *Id.* Critical habitat includes areas that are “essential
19 for the conservation of the species.” *Id.* § 1532(5)(A). Destruction or adverse modification of critical
20 habitat means “a direct or indirect alteration that appreciably diminishes the value of critical habitat
21 for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02. An agency must therefore
22 assess whether its actions will impair the habitat’s ability to provide for the recovery of listed
23 species. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070–71 (9th Cir.
24 2004) (striking down as impermissibly narrow the portion of 50 C.F.R. § 402.02 that limited the
25
26

1 adverse modification inquiry to those physical or biological features that were the original basis for
2 the critical habitat designation).

3 28. The agency's obligation to insure against "jeopardy" or "adverse modification"
4 requires that endangered species be given the "benefit of the doubt." *Sierra Club v. Marsh*, 816 F.2d
5 1376, 1386 (9th Cir. 1987) (citing *TVA v. Hill*, 437 U.S. at 174). In other words, the burden of risk
6 and uncertainty must be placed on the proposed action, rather than on the listed species. *Id.*

7 29. Federal regulations broadly define the scope of agency actions subject to ESA
8 section 7's requirements. Agency actions include "all activities or programs of any kind authorized,
9 funded, or carried out, in whole or in part, by Federal agencies[.]" 50 C.F.R. § 402.02. Agencies
10 must consult on ongoing agency actions over which the agencies retain, or are authorized to exercise
11 discretionary involvement or control. *See* 50 C.F.R. §§ 402.02, 402.03, 402.16; *Wash. Toxics Coal.*
12 *v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir.
13 1994).

14 30. If a federal agency determines that an action it proposes to take may adversely affect
15 a listed species, it must engage in formal consultation with the FWS or NMFS, depending on the
16 species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. This is commonly known as "section 7
17 consultation." The Services must then provide the action agency with a written statement, known as
18 a "Biological Opinion," explaining how the proposed action will affect the species or its habitat. 16
19 U.S.C. § 1536(b).

20 31. If the Services conclude the proposed action will jeopardize the continued existence
21 of any threatened or endangered species or result in the destruction or adverse modification of the
22 species' critical habitat, the Biological Opinion must outline any "reasonable and prudent
23 alternatives" that the Services deem necessary to avoid that result. 16 U.S.C. § 1536(b)(3)(A).
24
25
26

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

9 32. Section 7 consultation, which results in the Biological Opinion, is generally initiated
10 when the action agency requests consultation and/or submits a Biological Assessment (“BA”) or
11 Biological Evaluation (“BE”) to the consulting agencies. 50 C.F.R. § 402.14(c). Consultation shall
12 be concluded within the 90-day period beginning on the date initiated or within such other period of
13 time as is mutually agreeable to the consulting agency and the action agency. 16 U.S.C. §
14 1536(b)(1)(A); 50 C.F.R. § 402.14(e) (the Services shall deliver a Biological Opinion to the federal
15 action agency within 45 days after concluding formal consultation).

17 33. An action agency’s consultation obligations do not end with the issuance of a
18 Biological Opinion. An agency must reinstate consultation where discretionary federal involvement
19 or control of the action is retained or is authorized by law, and when one of the following conditions
20 is met: (1) the amount of take specified in the incidental take statement is exceeded; (2) new
21 information reveals that the action may have effects not previously considered; (3) the action is
22 modified in a way not previously considered; or (4) a new species is listed or critical habitat
23 designated that may be affected by the identified action. 50 C.F.R. § 402.16.

25 34. After consultation is initiated or reinstated, ESA section 7(d) prohibits any
26 “irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the

1 formulation or implementation of any reasonable and prudent alternative[s]” to the agency action. 16
2 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The section 7(d) prohibition remains “in force during the
3 consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R.
4 § 402.09.

5
6 35. Violation of ESA section 7’s procedural requirements is, in effect, a violation of the
7 ESA’s substantive provisions. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (“If a
8 project is allowed to proceed without substantial compliance with those procedural requirements,
9 there can be no assurance that a violation of the ESA’s substantive provisions will not result.”)

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

11 36. Congress adopted amendments to the CWA in 1972 in an effort “to restore and
12 maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C.
13 § 1251(a). The primary goal of the CWA was to eliminate the discharge of pollutants into
14 navigable waters entirely; it also established “an interim goal of water quality which provides for
15 the protection and propagation of fish, shellfish, and wildlife[.]” *Id.* § 1251(a)(1)–(2).

17 37. To meet these water quality goals, the CWA requires states to develop water
18 quality standards that establish, and then protect, the desired conditions of each waterway within
19 the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards must be sufficient
20 to “protect the public health or welfare, enhance the quality of water, and serve the purposes of
21 [the CWA].” *Id.* § 1313(c)(2)(a). They also establish attainable goals for a water body. 40 C.F.R.
22 §§ 131.2, 131.10(d).

24 38. Water quality standards thus provide the regulatory basis for measuring the quality
25 of waterbodies; those that do not meet the standards are identified as “impaired” and placed on a
26 list of degraded waters called the section 303(d) list. 33 U.S.C. § 1313(d). States must develop

1 clean-up plans for waters on the section 303(d) list—called Total Maximum Daily Loads
2 (“TMDL”)—in order to establish the scientific basis for restoring water pollution to levels that
3 comply with water quality standards. A TMDL comprises, *inter alia*, a calculation of the
4 maximum amount of a pollutant a particular waterbody or segment can contain while still
5 meeting water quality standards.
6

7 39. The CWA also uses water quality standards as the regulatory basis for controlling
8 pollution discharged from “point sources,” called the National Pollutant Discharge Elimination
9 System (“NPDES”) permitting program. 33 U.S.C. §§ 1311, 1316, 1342. A point source is
10 defined as a “discernible, confined and discrete conveyance, including but not limited to any
11 pipe, ditch, channel, tunnel, conduit, [or] well . . . from which pollutants are or may be
12 discharged.” 33 U.S.C. § 1362(14). While NPDES permits impose technology-based effluent
13 limitations on point source discharges, they must also include “any more stringent limitation . . .
14 necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C). No NPDES permit may
15 be issued unless it can ensure compliance with water quality standards. 40 C.F.R. § 122.4(d).
16 Water quality standards are thus integral to the regulation of both point source discharges and
17 water quality more broadly.
18

19 40. Congress did not establish an analogous federal permitting scheme for “nonpoint
20 source” pollution, such as pollution from timber harvesting and agriculture. Instead, Congress
21 assigned states the task of implementing water quality standards for nonpoint sources, with
22 oversight, guidance, and funding from EPA. *See, e.g.*, 33 U.S.C. §§ 1288, 1313, 1329. Even so,
23 water quality standards and the TMDLs that are based upon them apply to all pollution sources,
24 point and nonpoint alike. “[S]tates are required to set water quality standards for *all* waters within
25
26

1 their boundaries regardless of the sources of the pollution entering waters.” *Pronsolino v. Nastro*,
2 291 F.3d 1123, 1127 (9th Cir. 2002) (emphasis in original).

3 41. Water quality standards must include three elements: (1) designated uses of a
4 waterbody; (2) numeric and narrative criteria specifying the water quality conditions, such as
5 maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are
6 necessary to protect the designated uses; and (3) an antidegradation policy that ensures that uses
7 dating to 1975 are protected and high quality waters will be maintained and protected. 33 U.S.C.
8 § 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

9 42. States must designate appropriate uses of waterbodies to be achieved. 40 C.F.R. §
10 131.10(a). States must then set water quality criteria to protect the designated uses of a
11 waterbody. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Criteria must
12 be based on “sound scientific rationale” and contain “sufficient parameters or constituents to
13 protect the designated use.” 40 C.F.R. § 131.11(a)(1). This means that criteria must be set at a
14 level necessary to protect the most sensitive designated use of a waterbody. *Id.* Frequently states
15 rely upon EPA’s recommended criteria issued as guidance under CWA section 304(a). Narrative
16 water quality criteria are appropriate only when necessary “to supplement numerical criteria” or
17 when “numerical criteria cannot be established.” *Id.* § 131.11(b)(2).

18 43. States must review and revise their water quality standards at least every three
19 years, a process called “Triennial Review.” 33 U.S.C. § 1313(c)(1). Any revised or newly
20 adopted water quality standards must be submitted to EPA for review and either approval or
21 disapproval. *Id.* § 1313(c)(2)(A). States must also submit for review any state-issued policies that
22 affect water quality standards. 40 C.F.R. § 131.13, 131.20(c).

1 in many fresh and marine waters in Washington. Data from the U.S. National Urban Runoff
2 Program in 1982 revealed that 16% of urban runoff samples collected from four cities—including
3 Bellevue, Washington—contained cyanide concentrations ranging from 2 to 33 µg/l.

4 48. Copper is released to waterbodies from many human activities such as mining and
5 smelting, industrial emissions and effluent, municipal waste and sewage sludge, and stormwater.
6 Copper is also used as a biocide and is found in agricultural fertilizers, medical products, and the
7 food industry. Copper is among the most toxic of the heavy metals and often accumulates and
8 causes irreversible harm, interfering with osmoregulation, gill function, metabolism, immune
9 function, reproduction, and behavior of aquatic species. The bioavailability and toxicity of copper
10 to aquatic organisms depends on the total concentration of copper, its speciation, salinity, water
11 hardness, temperature, pH, the total organic content in the aquatic system, and many other water
12 quality parameters. Its accumulation and toxicity also varies depending upon the life cycle stage
13 of the exposed organisms.

14 49. In promulgating water quality standards, states may, and must under some
15 circumstances, adopt numeric criteria for the protection of aquatic life in four categories: marine
16 chronic and acute criteria and freshwater chronic and acute criteria. States may also adopt site-
17 specific criteria that apply to specific geographic regions or waterbodies. This litigation concerns
18 the Services' failure to complete ESA consultation on EPA's 1993 approval of Washington's
19 freshwater (acute and chronic) and marine acute cyanide criteria, its 1998 approval of marine
20 (acute and chronic) cyanide criteria for waters inside Puget Sound¹ and marine (acute and
21 chronic) copper criteria, and its 2007 approval of marine chronic cyanide criteria.
22
23
24
25

26 ¹ The inside-Puget Sound site-specific criteria apply to waters that are "east of a line from Point
Roberts to Lawrence Point, to Green Point to Deception Pass; and south from Deception Pass and
of a line from Partridge Point to Point Wilson." WAC 173-201A-240 Table 240(3) footnote mm.

1 50. On November 25, 1992, Washington submitted certain aquatic life criteria for
2 toxics to EPA for review and approval, including freshwater acute (22.0 µg/l) and chronic (5.2
3 µg/l) criteria and a marine acute criterion (1.0 µg/l) for cyanide and marine acute criterion (2.5
4 µg/l) for copper. EPA approved these criteria on March 18, 1993.

5
6 51. On February 5, 1993, EPA promulgated the National Toxics Rule that established
7 numeric criteria for toxic pollutants for 12 states and two territories, including Washington,
8 which had failed to adopt their own water quality criteria. The rule established numeric criteria
9 for toxic pollutants to ensure that all states were in compliance with section 303(c)(2)(B) of the
10 CWA. *See* 57 Fed. Reg. 60848, 60848 (Dec. 22, 1992). Although Washington had submitted
11 numeric criteria for the protection of aquatic life from toxics by EPA's deadline, it had failed to
12 adopt criteria for marine chronic cyanide and marine chronic copper, as well as human health
13 criteria for toxics. As a consequence, Washington was included in EPA's promulgation of water
14 quality standards in the National Toxics Rule for the marine chronic cyanide and marine chronic
15 copper criteria.

16
17 52. On December 5, 1997, Washington submitted water quality standards revisions to
18 EPA for approval, including less stringent site-specific marine cyanide criteria applicable to
19 waters *inside* Puget Sound (2.8 µg/l acute and 9.1 µg/l chronic) and less stringent marine copper
20 criteria (4.8 µg/l acute and 3.1 µg/l chronic). On February 6, 1998, EPA approved the revisions
21 conditional upon the "outcome of the ESA consultations" with the Services.
22

23 53. By letter dated June 27, 2001, EPA initiated consultation with the Services
24 regarding EPA's 1998 approval of Washington's marine inside-Puget Sound cyanide and marine
25 copper criteria.
26

1 54. Also in 2001, EPA signed a Memorandum of Agreement with the Services
2 (hereinafter “National Agreement”) regarding enhanced coordination under the CWA and ESA.
3 In the agreement, EPA and the Services planned to complete national consultation on water
4 quality standards by implementing greater coordination efforts to result in more productive and
5 timely actions by the agencies. *See* 66 Fed. Reg. 11202 (Feb. 22, 2001). Specifically, the agencies
6 agreed that EPA, where possible, would seek consultation on its national recommended criteria
7 issued pursuant to section 304(a) of the CWA upon which states often rely.
8

9 55. In July 2002, EPA Region 10 transmitted a BA to the Services pertaining to its
10 1998 conditional approval of Washington’s marine inside-Puget Sound (acute and chronic)
11 criteria for cyanide and marine (acute and chronic) criteria for copper. In its assessment, EPA
12 found that the marine copper criteria were not likely to adversely affect fish and bird species but
13 that they may be likely to adversely affect the humpback, blue, fine, sei, and sperm whale; Steller
14 sea lion; and green, leatherback, loggerhead, and Olive Ridley sea turtles. EPA found that the
15 site-specific Puget Sound cyanide criteria were not likely to adversely affect ESA-listed fish and
16 bird species but that they may be likely to adversely affect the humpback whale, Steller sea lion,
17 and leatherback sea turtle.
18

19 56. On August 1, 2003, the Washington Department of Ecology (“Ecology”)
20 submitted revised water quality standards to EPA for approval, including a marine chronic
21 criterion for cyanide identical to the National Toxics Rule value.
22

23 57. Pursuant to the National Agreement, on June 29, 2006, EPA headquarters initiated
24 ESA consultation on EPA’s approval of state or promulgation of federal cyanide criteria equal to
25 or more stringent than its CWA section 304(a) recommended criteria by transmitting a final BE
26 to the Services and seeking concurrence from the Services with EPA’s findings pursuant to 50

1 C.F.R. § 402.12(j). The consultation does not include less protective criteria such as and
2 including Washington's marine inside-Puget Sound cyanide criteria. It does cover Washington's
3 freshwater (acute and chronic) and marine (acute and chronic) cyanide criteria.

4 58. On March 23, 2007, EPA sent a revised final BE on cyanide criteria to the
5 Services.

6 59. In a letter to Ecology, dated May 23, 2007, EPA conditionally approved
7 Washington's 2003 marine chronic cyanide criterion, subject to the results of ESA consultation.
8 In a memorandum to the record on the same date, EPA stated that it was "relying on this [national
9 ESA] consultation as the framework for consultation" in Washington. EPA's approval action
10 allowed EPA to subsequently remove Washington's cyanide criteria from the National Toxics
11 Rule. 72 Fed. Reg. 37109 (July 9, 2007).

12 60. On February 25, 2010, the Wildlife Service transmitted a draft Biological Opinion,
13 dated January 15, 2010, to EPA, concluding that EPA's proposed action of continuing approval
14 of state or promulgation of federal cyanide criteria consistent with the EPA national 304(a)
15 recommended criteria² likely jeopardizes the continued existence of 178 species listed as
16 threatened or endangered under the ESA and destroys or adversely modifies critical habitats
17 designated for 84 such species. ESA-listed species present in Washington waters covered in the
18 biological opinion include bull trout.³

19 61. On April 27, 2010, the Fisheries Service transmitted an undated draft biological
20 opinion to EPA, concluding that EPA's proposed action of continuing approval of state or
21 promulgation of federal cyanide criteria consistent with the EPA national 304(a) recommended
22
23
24
25

26 ² EPA recommended criteria are as follows: 22 µg/l freshwater acute; 5.2 µg/l freshwater chronic;
1.0 µg/l marine (acute and chronic).

³ See 64 Fed. Reg. 58,910, 58,933 (Nov. 1, 1999); 75 Fed. Reg. 53, 898 (Oct. 18, 2010).

1 criteria is likely to jeopardize the continued existence of 32 threatened and endangered species
 2 and is likely to destroy or adversely modify designated critical habitat of 28 such species. NMFS
 3 identified the following species and/or their habitat affected in Washington waters: Upper
 4 Columbia River spring chinook, Puget Sound chinook, Lower Columbia River coho, Hood Canal
 5 summer chum, Columbia River chum, Snake River and Lake Ozette sockeye, Puget Sound
 6 steelhead, Upper Columbia River steelhead, Lower Columbia River Chinook, Snake River fall-
 7 run Chinook, Snake River spring/summer-run Chinook salmon, southern green sturgeon, Lower
 8 Columbia River steelhead, Middle Columbia River steelhead, Snake River steelhead, Upper
 9 Willamette River Chinook, Upper Willamette River steelhead, and the Southern Resident killer
 10 whale DPS.⁴

12 62. Since the initiation of consultation, several new species have been listed as
 13 threatened or endangered; the Services have not analyzed the effect of EPA's actions on these
 14 species.
 15

16 63. To date, the Fisheries Service has not completed its section 7 consultation on
 17 EPA's approval of Washington's marine acute and chronic criteria for cyanide, approved in 1993
 18

19 ⁴ See 64 Fed. Reg. 14,307 (March 24, 1999) (Upper Columbia River Spring Chinook Listing); 70
 20 Fed. Reg. 37,160 (June 28, 2005) (Puget Sound Chinook, Lower Columbia River Coho, Hood Canal
 21 Summer Chum Salmon, Columbia River Chum, Snake River and Lake Ozette Sockeye, Puget
 22 Sound Steelhead, Lower Columbia River Chinook and Upper Willamette River Chinook Listing);
 23 74 Fed. Reg. 42,605 (August 24, 2009) (Upper Columbia River Steelhead Listing); 70 Fed. Reg.
 24 52,630 (September 2, 2005) (Designation of Critical Habitat for Puget Sound Chinook, Upper
 25 Columbia Chinook, Hood Canal Summer Chum Salmon, Snake River and Lake Ozette Sockeye,
 26 and Upper Columbia Steelhead); 74 Fed. Reg. 42,605 (August 24, 2009) (Upper Columbia River
 Steelhead Listing); 70 Fed. Reg. 69,903 (November 18, 2005) (Southern Resident Killer Whale DPS
 Listing); 71 Fed. Reg. 69,054 (November 29, 2006) (Critical Habitat Designation of Southern
 Resident Killer Whale DPS); 57 Fed. Reg. 14,658 (April 22, 1992) (Snake River Fall-Run Chinook
 and Snake River Summer/Spring-Run Chinook Listing); 71 Fed. Reg. 834 (January 5, 2006) (Lower
 Columbia River Steelhead, Middle Columbia River Steelhead and Snake River Basin Steelhead
 Listing); 71 Fed. Reg. 17,757 (April 7, 2006) (Southern Green Sturgeon Listing).

1 and 2007 respectively; its freshwater acute and chronic cyanide criteria approved in 1993; and its
2 site-specific marine acute and chronic cyanide criteria for inside Puget Sound and marine acute
3 and chronic copper criteria approved in 1998.

4 64. To date, the Wildlife Service has not completed its section 7 consultation on
5 EPA's approval of Washington's marine acute and chronic criteria for cyanide, approved in 1993
6 and 2007 respectively; its freshwater acute and chronic cyanide criteria approved in 1993; and its
7 site-specific marine acute and chronic cyanide criteria for inside Puget Sound and marine acute
8 and chronic copper criteria approved in 1998.

9
10 **CLAIMS FOR RELIEF**

11 **FIRST CLAIM FOR RELIEF**

12 **NMFS Actions Unreasonably Delayed or Unlawfully Withheld**

13 65. Plaintiff hereby alleges and incorporates by reference all of the preceding
14 paragraphs.

15 66. NMFS is a federal agency within the meaning of the APA, 5 U.S.C. §§ 551(1),
16 701(b)(1).

17 67. NMFS has a mandatory duty to complete ESA section 7 consultation in a timely
18 manner and to issue a Biological Opinion promptly after the completion of consultation. 16
19 U.S.C. §§ 1536(b)(1)(A), 1536(b)(3). A Biological Opinion is an agency action within the
20 meaning of the APA. 5 U.S.C. § 551(13).

21 68. The ESA imposes a 90-day period for completion of most consultations. 16 U.S.C.
22 § 1536(b)(1).

23 69. To date, NMFS has not completed its section 7 consultation on EPA's approval of
24 Washington's marine acute and chronic criteria for cyanide, approved in 1993 and 2007
25

26 respectively; its freshwater acute and chronic cyanide criteria approved in 1993; and its site-

1 specific marine acute and chronic cyanide criteria for inside Puget Sound and marine acute and
2 chronic copper criteria approved in 1998.

3 70. The APA requires that “within a reasonable time, each agency shall proceed to
4 conclude a matter presented to it.” 5 U.S.C. § 555(b). Likewise, the APA also provides that
5 reviewing courts “shall – (1) compel agency action unlawfully withheld or unreasonably
6 delayed.” 5 U.S.C. § 706(1).
7

8 71. NMFS has unreasonably delayed or unlawfully withheld completion of ESA
9 section 7 consultation with EPA and issuance of a Biological Opinion or Biological Opinions. 5
10 U.S.C. §§ 555(b), 706(1).
11

12 **SECOND CLAIM FOR RELIEF**
FWS Actions Unreasonably Delayed or Unlawfully Withheld

13 72. Plaintiff hereby alleges and incorporates by reference all of the preceding
14 paragraphs.

15 73. FWS is a federal agency within the meaning of the APA, 5 U.S.C. §§ 551(1),
16 701(b)(1).
17

18 74. FWS has a mandatory duty to complete ESA section 7 consultation in a timely
19 manner and to issue a Biological Opinion promptly after the completion of consultation. 16
20 U.S.C. §§ 1536(b)(1)(A), 1536(b)(3). A Biological Opinion is an agency action within the
21 meaning of the APA. 5 U.S.C. § 551(13).
22

23 75. To date, FWS has not completed its section 7 consultation on EPA’s approval of
24 Washington’s marine acute and chronic criteria for cyanide, approved in 1993 and 2007
25 respectively; its freshwater acute and chronic cyanide criteria approved in 1993; and its site-
26 specific marine acute and chronic cyanide criteria for inside Puget Sound and marine acute and
chronic copper criteria approved in 1998.

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

5
6 77. FWS has unreasonably delayed or unlawfully withheld completion of ESA section
7 7 consultation with EPA and issuance of a Biological Opinion or Biological Opinions. 5 U.S.C.
8 §§ 555(b), 706(1).

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff Northwest Environmental Advocates respectfully requests that
11 this Court:

12 A. Declare that NMFS and FWS failed to perform their mandatory duties to complete
13 ESA section 7 consultation on EPA’s approval of Washington’s marine acute and chronic criteria
14 for cyanide, approved in 1993 and 2007 respectively; its freshwater acute and chronic cyanide
15 criteria approved in 1993; and its site-specific marine acute and chronic cyanide criteria for inside
16 Puget Sound and marine acute and chronic copper criteria approved in 1998, and to produce a
17 Biological Opinion or Biological Opinions, constituting agency actions unreasonably delayed or
18 unlawfully withheld, within the meaning of 5 U.S.C. §§ 555(b), 706(1);

19 B. Order NMFS and FWS to complete ESA section 7 consultation and issue a
20 Biological Opinion or Biological Opinions by a date certain;

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

23 ///

24 ///

1 D. Grant such other and further relief as this Court deems just and proper.

2 DATED this 13th day of January, 2016.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Respectfully Submitted,

BRICKLIN & NEWMAN, LLP.

By: s/ Bryan Telegin

Bryan Telegin, WSBA No. 46686
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
Telephone: (206) 264-8600
Fax: (206) 264-9300
E-mail: telegin@bnd-law.com

Local Counsel for Plaintiff NWEA

EARTHRISE LAW CENTER

By: s/ Allison LaPlante

By: s/ Kevin Cassidy

Allison LaPlante, *pro hac vice* application forthcoming
Kevin Cassidy, *pro hac vice* application forthcoming
Lewis & Clark Law School
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
Telephone: (503) 768-6894
Fax: (503) 768-6642
E-mail: laplante@lclark.edu
cassidy@lclark.edu

Counsel for Plaintiff NWEA