

STEPHANIE M. PARENT, OSB #92590
parentlaw@gmail.com
4685 S.W. Flower Place
Portland, Oregon 97221
(503) 320-3235

PAUL KAMPMEIER, WSBA #31560
Pro hac vice application pending
pkampmeier@wflc.org
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
(206) 223-4088 x 4
(206) 223-4280 [fax]

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES,
an Oregon non-profit corporation,

Plaintiff,

v.

CARLOS M. GUTIERREZ, Secretary of the U.S.
Department of Commerce; **WILLIAM J. BRENNAN**,
Acting Administrator of the National Oceanic and
Atmospheric Administration; and **STEPHEN L.**
JOHNSON, Administrator of the U.S. Environmental
Protection Agency,

Defendants.

Civ. No.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action against the Secretary of Commerce and the Acting Administrator of the National Oceanic and Atmospheric Administration (collectively “NOAA”), and the Administrator of the U.S. Environmental Protection Agency (“EPA”), in their official capacities, for violations of the Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. § 1455b (“CZARA”). This complaint also alleges that EPA has violated the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”).

2. CZARA generally requires certain states to develop and implement coastal nonpoint source pollution control programs that meet statutory criteria and federal guidance. Nonpoint source pollution is caused by precipitation runoff that moves over the ground, carrying away pollutants and depositing them into lakes, rivers, wetlands, and other waters. Because eliminating nonpoint source pollution is practically and politically difficult, Congress created incentives to encourage states to tackle the problem: in CZARA, Congress required EPA and NOAA to withhold a percentage of Clean Water Act and Coastal Zone Management Act grant funds from states that fail to submit coastal nonpoint programs that meet applicable criteria and protect water quality.

3. Plaintiff brings this action because although EPA and NOAA have repeatedly found that Oregon has failed to submit an approvable coastal nonpoint program, they have failed to disapprove Oregon’s program or withhold the grant funds, as required. Defendants’ delay in implementing CZARA undermines Congress’ plan for eliminating nonpoint source pollution in America’s coastal areas. Consequently, more than thirteen years after submittal, Oregon’s coastal nonpoint program—especially its forest practices component—still does not protect water quality.

4. Plaintiff seeks a declaration that defendants have violated the law by failing to

issue a final decision on Oregon's coastal nonpoint program and by failing to withhold grant funds from Oregon. Plaintiff also seeks a declaration that EPA has violated the FOIA. Plaintiff seeks an order of the court compelling defendants to comply with these laws and requiring defendants to pay plaintiff's costs and attorneys' fees.

JURISDICTION AND VENUE

5. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Freedom of Information Act, 5 U.S.C. § 552. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 2201 (declaratory judgment), § 2202 (further relief), and 5 U.S.C. § 552(a)(4)(B).

6. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B) because the plaintiff resides and has its principal place of business in this district and no real property is involved in this action.

PARTIES

7. 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, Northwest Environmental Advocates has actively worked to protect and restore water quality and fish habitat in the Pacific Northwest for nearly twenty-five years. Northwest Environmental Advocates employs community organizing, strategic partnerships, public records requests, information sharing, advocacy with administrative agencies, lobbying, and litigation to ensure better implementation of the laws that preserve the natural environment and protect water quality.

8. Plaintiff and its members reside near, visit, use, and/or enjoy rivers, streams, and other surface waters in the State of Oregon, including waters in Oregon's coastal areas and areas west of the Coast Range crest. Plaintiff and its members use and enjoy these waters and adjacent

lands for recreational, subsistence, scientific, aesthetic, spiritual, commercial, conservation, and other purposes, including wildlife observation, study, and photography, and recreational and commercial fishing. Plaintiff and its members derive benefits from their use and enjoyment of Oregon's waters, especially waters in Oregon's coastal areas, and therefore have a specific interest in the full and proper implementation of water pollution control laws such as CZARA. Plaintiff and its members would derive more benefits from their use of Oregon's coastal waters if logging and other pollution generating activities were not adversely impacting water quality and native species of fish such as chinook, coho, sockeye, chum, steelhead salmon, and bull trout. Plaintiff and its members also derive benefits from federal agencies' compliance with the FOIA and from its receipt of public records.

9. The above-described interests of plaintiff and its 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 CZARA and by the unlawful harm imposed on water quality and fish habitat that results. Defendants' failure to fully implement CZARA injures the interests of plaintiff and its members. Additionally, plaintiff has been adversely affected and aggrieved by EPA's failure to comply with the FOIA. The relief requested in this lawsuit can redress these injuries.

10. Defendants in this action are:

A. CARLOS M. GUTIERREZ, the Secretary of Commerce, who is charged with implementing CZARA;

B. WILLIAM J. BRENNAN, the Acting Administrator of the National Oceanic and Atmospheric Administration, who has been delegated authority to implement CZARA on behalf of the Secretary of Commerce; and

C. STEPHEN L. JOHNSON, the Administrator of the U.S. Environmental Protection Agency, who is charged with implementing CZARA and the FOIA.

11. The U.S. Department of Commerce, the National Oceanic and Atmospheric Administration, and the U.S. Environmental Protection Agency are agencies within the meaning of the APA, 5 U.S.C. §§ 701 & 702. EPA is an agency subject to the FOIA.

STATUTORY FRAMEWORK

12. CZARA requires each state with an approved coastal zone management plan to submit a Coastal Nonpoint Pollution Control Program (hereinafter “Coastal Nonpoint Program” or “Program”) to EPA and NOAA for approval. 16 U.S.C. § 1455b(a)(1). The purpose of the program is “to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities.” *Id.*

13. CZARA requires state Coastal Nonpoint Programs to comply with certain statutory criteria and nonpoint source pollution control guidance published by EPA. 16 U.S.C. § 1455b(b) & (g). As required by CZARA, 16 U.S.C. § 1455b(g), EPA issued *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* in January 1993 (hereinafter “EPA’s 1993 Guidance”). In Chapter 3 of EPA’s 1993 Guidance, EPA set forth extensive management measures to limit nonpoint source pollution and protect coastal waters from forest practices like timber harvest, timber hauling, and other related activities.

14. Where compliance with EPA’s 1993 Guidance is not expected to achieve and maintain water quality standards and protect designated uses, CZARA requires states to take the additional step of developing and implementing “additional management measures.” 16 U.S.C.

§ 1455b(b)(3). These additional management measures must be part of a state's Coastal Nonpoint Program. *Id.*

15. State Coastal Nonpoint Programs developed under CZARA are to be coordinated closely with state and local water quality plans developed under the Clean Water Act ("CWA") and the Coastal Zone Management Act ("CZMA"). 16 U.S.C. § 1455b(a)(2). CWA section 319 requires states to submit a nonpoint source management program to EPA, approval of which makes a state eligible for CWA section 319 grant funds. 33 U.S.C. § 1329. Similarly, federal approval of a state CZMA management program makes a state eligible for CZMA section 306 grant funds. 16 U.S.C. §§ 1454, 1455. The CZMA requires state CZMA management programs to contain "enforceable policies and mechanisms" to implement the Coastal Nonpoint Programs developed under CZARA. 16 U.S.C. § 1455(d)(16).

16. CZARA required states to submit their Coastal Nonpoint Programs to EPA and NOAA within 30 months of the publication of EPA's 1993 Guidance, (i.e., by July 1995). 16 U.S.C. § 1455b(a)(1). CZARA required EPA and NOAA to review state Coastal Nonpoint Programs within six months of submittal. 16 U.S.C. § 1455b(c)(1).

17. CZARA requires EPA and NOAA to approve a state's Coastal Nonpoint Program if the agencies determine that the portions of the program under their respective authorities meet the requirements of the Act. *Id.* In practice, NOAA and EPA coordinate their review of Coastal Nonpoint Programs. Neither agency will approve a state's Program until it meets all federal approval requirements as determined by both agencies.

18. If EPA and NOAA find that "a coastal state has failed to submit an approvable program," NOAA "shall withhold for each fiscal year until such a program is submitted a portion of grants otherwise available to the State" under CZMA section 306, and the EPA "shall

withhold” a portion of grants available to the state under CWA section 319. 16 U.S.C. § 1455b(c)(3) and (4). For states that fail to submit an approvable Program, CZARA required NOAA and EPA to begin withholding the grant funds beginning in 1996. *Id.* at § 1455b(c)(3)(D) and (4)(D). For fiscal years 1999 and thereafter, CZARA requires NOAA to withhold 30 percent of CZMA grant funds, and requires EPA to withhold 30 percent of CWA grant funds, from states that failed to submit an approvable Program. *Id.*

19. CZARA requires EPA and NOAA to make funds withheld under CZARA available to coastal states that have approved Coastal Nonpoint Programs. 16 U.S.C. § 1455b(c)(3) and (4).

20. Once approved, states are required to implement their Coastal Nonpoint Programs through changes to their CWA section 319 and CZMA section 306 plans. 16 U.S.C. § 1455b(c)(2).

FACTS

A. EPA and NOAA “Conditionally Approve” Deficient Coastal Nonpoint Programs.

21. Notwithstanding the statutory requirements to withhold grant funds from states that fail to submit an approvable program, EPA and NOAA have indefinitely delayed disapproving deficient Coastal Nonpoint Programs and indefinitely delayed withholding CWA and CZMA grant funds from Oregon and other states that fail to submit approvable Programs. EPA and NOAA accomplished this delay through the “conditional approval” of state Programs. In general, where a state submits a Coastal Nonpoint Program that does not meet the applicable criteria, EPA and NOAA note deficiencies in the Program—they determine that the state has not submitted an approvable program—and identify conditions that need to be satisfied before the state can obtain full program approval. EPA and NOAA then “conditionally approve” the

deficient program and continue full CWA and CZMA funding pending completion of the conditions and final program approval.

22. In their *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*, issued in January 1993, EPA and NOAA indicated that “conditional approvals” would be utilized to give states two additional years to obtain the enforceable policies and mechanisms required by the CZMA, 16 U.S.C. § 1455(d)(16).

23. After completing threshold reviews of the states’ Coastal Nonpoint Programs, NOAA and EPA agreed to make several changes to provide additional time and flexibility to states subject to CZARA. Then on March 16, 1995, NOAA and EPA issued a document entitled *Flexibility for State Coastal Nonpoint Programs*, which was intended to clarify the January 1993 *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*.

24. In the *Flexibility for State Coastal Nonpoint Programs* document, EPA and NOAA noted that they would grant “conditional approval” to Coastal Nonpoint Programs that are not yet fully approvable, thereby affording states more time to fully develop their Programs. In the *Flexibility for State Coastal Nonpoint Programs* document, NOAA and EPA expanded the availability of “conditional approvals” by making them available not just to states that needed more time to develop the enforceable policies and mechanisms required by the CZMA, 16 U.S.C. § 1455(d)(16), but also to any state that needed more time to complete any element of the Coastal Nonpoint Program required by CZARA. Additionally, in the *Flexibility for State Coastal Nonpoint Programs* document, NOAA and EPA increased the duration of “conditional approvals” from two years to up to five years. The *Flexibility for State Coastal Nonpoint Programs* document also established “one schedule for all coastal nonpoint programs,” which scheduled for 2001 the withholding of grant funds from states without final program approval.

25. On October 16, 1998, NOAA and EPA issued *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990*. There, the agencies reiterated that the timeframes for conditional approval would remain the same as those specified in the March 16, 1995, *Flexibility for State Coastal Nonpoint Programs*, e.g., up to five years after conditional approval to meet conditions, with an evaluation of progress after three years.

26. CZARA requires at least 34 states and territories to develop Coastal Nonpoint Programs. All states' Coastal Nonpoint Programs were initially "conditionally approved." EPA and NOAA have not issued any final decisions disapproving a state's Coastal Nonpoint Program.

27. The "conditional approvals" that EPA and NOAA issue are interim decisions that EPA and NOAA use to avoid withholding CWA and CZMA funds from states that have failed to submit an approvable Coastal Nonpoint Program. The "conditional approvals" contravene CZARA, especially the grant fund withholding provisions in 16 U.S.C. § 1455b(c)(3) and (4). EPA and NOAA sometimes communicate the "conditional approval" of a state's Coastal Nonpoint Program via letter. States receive full approval for their Coastal Nonpoint Programs once they have satisfied all their conditions. When NOAA and EPA make the decision to fully approve a state Coastal Nonpoint Program, they develop a Full Approval Decision Memorandum and publish a notice of intent in the Federal Register. A 30-day public comment period is provided before full approval is granted.

B. EPA and NOAA Found That Oregon Failed to Submit an Approvable Program.

28. Oregon has a CZMA management program that has been approved pursuant to CZMA section 306.

29. In July 1995, Oregon submitted its Coastal Nonpoint Program to EPA and NOAA for review. The plan was entitled *Pollution Prevention and Control Program for Oregon's Coastal Waters*. Since then Oregon has submitted additional and/or revised program elements to EPA and NOAA.

30. EPA and NOAA have not developed a Full Approval Decision Memorandum for Oregon's Coastal Nonpoint Program. EPA and NOAA have not published in the Federal Register a notice of intent to give full program approval to Oregon's Coastal Nonpoint Program. EPA and NOAA have not given full program approval to Oregon's Coastal Nonpoint Program. Instead, EPA and NOAA have repeatedly found that Oregon has failed to submit an approvable Coastal Nonpoint Program.

31. On January 13, 1998, EPA and NOAA found many components of Oregon's Coastal Nonpoint Program to be deficient. Notwithstanding the deficiencies, EPA and NOAA gave preliminary approval to Oregon's Program, subject to certain conditions "that will need to be met for Oregon to receive final approval of its program." In Table 1 of an April 1999 document entitled *A Pollution Prevention and Control Program for Oregon's Coastal Waters: Supplemental Information in Response to the Federal Findings of January 1998*, Oregon identified 40 conditions it needed to meet to obtain full approval for its Coastal Nonpoint Program. Most of the conditions established in NOAA's and EPA's 1998 conditional approval for Oregon required compliance by January 13, 2001.

32. Forestry is the dominant land use in the area subject to Oregon's Coastal Nonpoint Program. As to forestry, in their January 13, 1998 findings, EPA and NOAA determined that Oregon's Coastal Nonpoint Program included management measures in conformity with EPA's 1993 Guidance and enforceable policies and mechanisms to ensure

implementation throughout the coastal management area. However, EPA and NOAA also found that, “additional management measures are necessary to attain and maintain water quality standards and fully protect beneficial uses.” In their January 13, 1998 findings, EPA and NOAA stated:

Although Oregon has the basic legal and programmatic tools to implement a forestry program in conformity with [CZARA], these tools are inadequate to ensure that water quality standards are attained and maintained and beneficial uses protected. This conclusion is based on best available information, including the most recent 303(d) listings for Oregon waters, which indicate water quality impairments from forestry. Related to these water quality impairments, Oregon has a number of aquatic species, in particular anadromous salmonids, that are endangered, threatened, or otherwise seriously at risk, due in part to forestry activities that impair coastal water quality and beneficial uses, including salmon spawning, rearing, and migration habitat....

[CZARA] recognizes that implementation of [EPA’s 1993 Guidance] measures alone may not always be adequate to protect coastal waters from nonpoint sources of pollution. In these cases, [CZARA] requires the identification and implementation of additional management measures. Thus, Oregon will need to adopt additional management measures for forestry in areas adjacent to coastal waters not attaining or maintaining applicable water quality standards or protecting beneficial uses, or that are threatened by reasonably foreseeable increases in pollutant loadings from new or expanding forestry operations....

33. As of 1998, EPA and NOAA had identified numerous areas where existing forest practices on non-federal land in Oregon needed to be strengthened to attain water quality standards and fully support beneficial uses. These areas included protection of medium, small, and non-fish bearing streams, including intermittent streams; protection of areas at high risk for landslides; the ability of forest practices to address cumulative impacts of forestry activities; road density and maintenance, particularly on so-called “legacy” roads; and the adequacy of stream buffers for application of certain chemicals. As a condition of final Program approval, EPA and NOAA required Oregon to identify and begin applying additional management measures for forestry by January 13, 2000.

34. On December 21, 2000, NOAA and EPA sent a letter to Oregon state officials extending the conditional approval of Oregon's Coastal Nonpoint Program to January 13, 2003.

35. In October 2002 and March 2003, Oregon submitted supplemental information to EPA and NOAA in response to the agencies' January 1998 findings, including information related to Oregon's forest practices regulations. Oregon submitted a report from the Independent Multidisciplinary Science Team, which was convened under the Oregon Plan for Salmon and Watersheds and which investigated forest practices in Oregon and recommended seventeen water-quality-related changes to Oregon's forest practices rules. Oregon also submitted a June 2002 draft of the Sufficiency Analysis, a report by the Oregon Departments of Forestry and Environmental Quality that summarized their statewide evaluation of the effectiveness of the Oregon Forest Practices Act in protecting water quality, and that resulted in twelve recommendations for change to Oregon's Forest Practices Act. In 2002 Oregon claimed that these reports, some work done between 1997 and 2001, and some amendments to its forest practices rules were sufficient to meet the condition for additional management measures for forestry on non-federal forestlands in Oregon.

36. By letter dated April 20, 2004, EPA and NOAA transmitted their April 2004 findings and interim decision on Oregon's Coastal Nonpoint Program. In the April 2004 findings, EPA and NOAA found that "Oregon has not satisfied the condition for additional management measures for forestry." In the April 20, 2004 letter, EPA and NOAA stated:

This document addresses each condition, conveys NOAA/EPA findings, presents a rationale for our decisions, and recommends actions the State can take to achieve full approval.

...

Please note that NOAA and EPA's final decision on these conditions is contingent upon a public notice and opportunity to comment on our intent to fully approve Oregon's CNPCP. This process will occur once NOAA and EPA conclude that Oregon has met all of the conditions under [CZARA]. The final decisions may also be subject to Tribal and ESA consultation. In addition, this letter should not preclude the use of (1) Clean Water Act Section 319 funding to further support any of the conditions placed on your program; and (2) Coastal Zone Management Act Section 310 funding to support implementation of approved elements of your program.

37. In November 2007, Oregon submitted to EPA and NOAA a document entitled *Pollution Prevention and Control Program for Oregon's Coastal Waters; Supplemental information in response to Federal Findings of 2004*, in which Oregon again asserted it had demonstrated compliance with the additional management measures for forestry.

38. In a June 25, 2008 letter to Oregon state officials concerning Oregon's Coastal Nonpoint Program, EPA and NOAA concluded that they could not give final approval to Oregon's Program because it still did not satisfy the conditions for additional management measures for forestry, among others.

39. Attached to the June 25, 2008 letter to the Oregon state officials was a document dated June 12, 2008 and entitled *NOAA and EPA Preliminary Decisions on Information Submitted by Oregon to Meet Coastal Nonpoint Program Conditions of Approval*. On page ten of the June 12, 2008 document, EPA and NOAA found that "Oregon has not satisfied the condition for additional management measures for forestry." Also on page ten of the June 12, 2008 document, EPA and NOAA stated:

Based on Oregon's recent submittal and our understanding of Oregon's Forestry Program, EPA and NOAA still believe that Oregon lacks adequate management measures under the Oregon Forest Practices Act (FPA) rules for protecting water quality and the degradation of beneficial uses from forestry activities. EPA and NOAA's primary concerns, stated in the 1998 conditional findings and reiterated in the 2004 interim decision document, remain. Oregon still lacks adequate measures for protecting riparian areas of medium, small and non-fish bearing streams, high risk landslide areas, and for addressing the impacts of legacy roads.

A broad body of science continues to demonstrate that the FPA rules do not adequately protect water quality.

C. The Agencies' Delay Perpetuates Oregon's Harmful Forest Practices Program.

40. Since 1998, NOAA has not withheld from Oregon the portions of CZMA section 306 grant funds required by 16 U.S.C. § 1455b(c)(3). Between 1998 and 2008, NOAA awarded Oregon approximately \$18,360,000 in CZMA section 306 funds.

41. Since 1998, EPA has not withheld from Oregon the portions of CWA section 319 funds required by 16 U.S.C. § 1455b(c)(4). Between 1998 and 2008, EPA awarded Oregon approximately \$30,730,151 in CWA section 319 funds.

42. NOAA's failure to withhold the required amount of CZMA section 306 funds, and EPA's failure to withhold the required amount of CWA section 319 funds, has contributed to Oregon's delay in meeting all conditions for final approval of its Coastal Nonpoint Program. In a September 20, 2006, email to Robert Baumgartner, Amanda Punton, then an Oregon state official associated with the Oregon Coastal Nonpoint Program, stated:

We have not made any effort in the past year or so to seek approval of outstanding management measures. Koto has contacted me a few times, and I think I have responded to her questions and requests, but I then do not hear back from her. (This is not meant as a criticism.) When discussing this topic with the feds I plan on saying that we have lost our motivation to pursue full program approval for three reasons: 1) we do not see how our current efforts to develop and implement strategies that address nonpoint pollution would benefit from full program approval; 2) there is no longer any consequence of not having full program approval; and 3) our last efforts to work with the feds on finding workable solutions to meeting management measures were not fruitful.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Against all Defendants)

Violation of 16 U.S.C. § 1455b and the Administrative Procedure Act:
Failure to Finally Approve or Disapprove Oregon's Program

43. Plaintiff hereby re-alleges and incorporates by reference all of the preceding paragraphs.

44. CZARA requires EPA and NOAA to disapprove a state's Coastal Nonpoint Program if it does not meet applicable criteria and guidance.

45. EPA and NOAA have not issued a final decision approving or disapproving Oregon's Coastal Nonpoint Program. A final decision approving or disapproving Oregon's Coastal Nonpoint Program is final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).

46. Defendants' failure to issue a final decision approving or disapproving Oregon's Coastal Nonpoint Program constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

47. Alternatively, if EPA's and NOAA's April 2004 and June 2008 letters, findings, and interim decisions regarding Oregon's Coastal Nonpoint Program constitute final decisions on Oregon's Program, those decisions are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things they do not comply with CZARA or defendants' policies.

SECOND CLAIM FOR RELIEF

(Against Defendants Gutierrez and Brennan)

Violation of 16 U.S.C. § 1455b(c)(3) and the Administrative Procedure Act:
NOAA's Failure to Withhold the Required Portions of CZMA Grant funds

48. Plaintiff hereby re-alleges and incorporates by reference all of the preceding paragraphs.

49. NOAA has found that Oregon failed to submit an approvable Coastal Nonpoint Program. Nonetheless, NOAA has failed to withhold CZMA grant funds from Oregon as

required by CZARA, 16 U.S.C. § 1455b(c)(3). Unless relief is granted in this lawsuit, NOAA will continue failing to withhold the required portions of CZMA grant funds from Oregon, in violation of 16 U.S.C. § 1455b(c)(3).

50. The withholding of CZMA grant funds is final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).

51. NOAA's failure to withhold CZMA grant funds as required by 16 U.S.C. § 1455b(c)(3) constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

52. Alternatively, NOAA's 2003, 2004, 2005, 2006, 2007, and 2008 CZMA grants to Oregon are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things they do not comply with CZARA or defendants' policies.

THIRD CLAIM FOR RELIEF

(Against Defendant Johnson)

Violation of 16 U.S.C. § 1455b(c)(4) and the Administrative Procedure Act:
EPA's Failure to Withhold the Required Portions of CWA Grant Funds

53. Plaintiff hereby re-alleges and incorporates by reference all of the preceding paragraphs.

54. EPA has found that Oregon failed to submit an approvable Coastal Nonpoint Program. Nonetheless, EPA has failed to withhold CWA grant funds from Oregon as required by CZARA, 16 U.S.C. § 1455b(c)(4). Unless relief is granted in this lawsuit, EPA will continue failing to withhold the required portions of CWA grant funds from Oregon, in violation of 16 U.S.C. § 1455b(c)(4).

55. The withholding of CWA grant funds is final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).

56. EPA's failure to withhold CWA grant funds as required by 16 U.S.C. § 1455b(c)(4) constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

57. Alternatively, EPA's 2003, 2004, 2005, 2006, 2007, and 2008 CWA grants to Oregon are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things they do not comply with CZARA or defendants' policies.

FOURTH CLAIM FOR RELIEF

(Against Defendant Johnson)

Violation of the Freedom of Information Act:
EPA's Failure to Provide a Determination or the Requested Records

58. Plaintiff hereby re-alleges and incorporates by reference all of the preceding paragraphs.

59. On July 21, 2008, by certified mail and on behalf of plaintiff Northwest Environmental Advocates, plaintiff's counsel sent a Freedom of Information Act request to EPA headquarters in Washington, D.C. (hereinafter "the Request"). The Request sought records related to the Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. § 1455b, and the Coastal Nonpoint Programs for the states of Oregon and Washington. The Request included a request for a fee waiver. EPA received the Request on July 28, 2008.

60. Under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), EPA had twenty business days to determine whether to comply with the Request and to inform plaintiff of that determination.

61. Since sending the Request, plaintiff's counsel has sent at least two letters to EPA headquarters asking EPA to issue a determination on whether EPA will comply with the Request and asking EPA to provide a timeline for responding to the Request.

62. EPA has not provided plaintiff with the determination required by the FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Nor has EPA provided plaintiff with a timeline for making the determination required by 5 U.S.C. § 552(a)(6)(A)(i). By letter dated September 23, 2008, EPA acknowledged receipt of the Request, assigned it Request Number HQ-RIN-02105-08, and stated that the Request "has been forwarded to OW for processing." By letter dated September 25, 2008, EPA granted the requested fee waiver and stated that "EPA Headquarters Office of Water will be responding" to the Request for the agency. Neither the September 23, 2008 letter nor the September 25, 2008 letter qualify as the determination required by 5 U.S.C. § 552(a)(6)(A)(i) because among other things they do not state that EPA will comply with the Request or provide the requested records.

63. Under the FOIA, 5 U.S.C. § 552(a)(3)(A), each agency is required to make requested records "promptly available" to the requester.

64. EPA headquarters has not provided plaintiff with any records, documents, or information in response to the Request. EPA has not provided plaintiff with a timeline for making the requested records available to plaintiff. EPA has no legal basis for withholding the records subject to the Request.

65. EPA has violated the FOIA by failing to timely make and inform plaintiff of the determination required by 5 U.S.C. § 552(a)(6)(A)(i) and by failing to make promptly available to plaintiff the records subject to the Request.

66. Plaintiff is entitled to reasonable attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E).

FIFTH CLAIM FOR RELIEF

(In the Alternative to the Fourth Claim for Relief and Against Defendant Johnson)

Violation of the Administrative Procedure Act:
EPA's Failure to Provide a Determination or the Requested Records

67. Plaintiff hereby re-alleges and incorporates by reference all of the preceding paragraphs.

68. EPA has failed to provide plaintiff with the determination required by 5 U.S.C. § 552(a)(6)(A)(i) or the records subject to the Request, as required by the FOIA.

69. Providing plaintiff with the determination required by 5 U.S.C. § 552(a)(6)(A)(i) and providing the records subject to the Request are final agency actions that can be compelled under the APA, 5 U.S.C. § 706(1).

70. EPA's failures to provide plaintiff with the determination required by 5 U.S.C. § 552(a)(6)(A)(i) and the records subject to the Request constitute agency actions unlawfully withheld or unreasonably delayed within the meaning of the APA.

71. Alternatively, EPA's failures to provide plaintiff with the determination required by 5 U.S.C. § 552(a)(6)(A)(i) and the records subject to the Request are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things those actions do not comply with the FOIA or EPA's regulations or policies.

72. Plaintiff is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the Court:

- A. Adjudge and declare that EPA and NOAA have violated CZARA, 16 U.S.C. § 1455b, by unlawfully withholding or unreasonably delaying final approval or disapproval of Oregon's Coastal Nonpoint Pollution Control Program;
- B. Order and compel EPA and NOAA to finally approve or disapprove Oregon's Coastal Nonpoint Program within ninety days of a judgment in this case;
- C. Adjudge and declare that NOAA has violated CZARA, 16 U.S.C. § 1455b(c)(3), by unlawfully withholding or unreasonably delaying the withholding of CZMA grant funds;
- D. Order and compel NOAA to withhold the statutorily required portion of CZMA grant funds until NOAA determines that Oregon has submitted an approvable Coastal Nonpoint Pollution Control Program;
- E. Adjudge and declare that EPA has violated CZARA, 16 U.S.C. § 1455b(c)(4), by unlawfully withholding or unreasonably delaying the withholding of CWA grant funds;
- F. Order and compel EPA to withhold the statutorily required portion of CWA grant funds until EPA determines that Oregon has submitted an approvable Coastal Nonpoint Pollution Control Program;
- G. Declare that EPA has violated the FOIA, 5 U.S.C. § 552; that EPA has unlawfully withheld or unreasonably delayed compliance with the FOIA, in violation of 5 U.S.C. § 706(1); and/or that EPA's actions with respect to plaintiff's July 21, 2008 FOIA request are arbitrary, capricious, an abuse of discretion, not in accordance with law, and/or otherwise in violation of 5 U.S.C. § 706(2);
- H. Order EPA to comply immediately with the FOIA and to provide plaintiff with the required determination and the records subject to the July 21, 2008 FOIA request;

I. Declare, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, that plaintiff is the prevailing party; that the position of the government in this action was not substantially justified; and that there are no special circumstances that make an award of costs and reasonable attorneys' fees to plaintiff unjust;

J. Award plaintiff its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or award plaintiff its reasonable attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E); and

K. Grant plaintiff such further and additional relief as the Court may deem just and proper.

Respectfully submitted this ___ day of January, 2009.

STEPHANIE M. PARENT (OSB #92590)
4685 S.W. Flower Place
Portland, Oregon 97221
(503) 320-3235
parentlaw@gmail.com

PAUL KAMPMEIER (WSBA #31560)
Pro hac vice application pending
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
(206) 223-4088 x 4
(206) 223-4280 [fax]
pkampmeier@wflc.org

Attorneys for Plaintiff