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Attorneys for Plaintiff

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Environment & Natural Resources Division  
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Denver, CO 80294  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL  
ADVOCATES, a non-profit corporation,

Plaintiff,

v.

Civil No. 06-479-HA

**CONSENT DECREE**

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, a United States  
Government Agency,

Defendant.

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WHEREAS Plaintiff Northwest Environmental Advocates (“NWEA”) filed this action on April 7, 2006, against Federal Defendant United States Environmental Protection Agency (“EPA”), alleging violations of the Clean Water Act (“CWA”), 33 U.S.C. §§1251 *et seq.*, and seeking declaratory and injunctive relief, and attorneys fees and costs;

WHEREAS, pursuant to 33 U.S.C. §§ 1313(c)(1)&(3), states must review and revise as appropriate their water quality standards at least every three years, thereafter submitting the results of the review and all new and revised water quality standards to EPA for its approval or disapproval;

WHEREAS, pursuant to 33 U.S.C. § 1313(c)(3) and 40 C.F.R. §§ 131.5, 131.13, 131.21(b), EPA is directed to review state-submitted water quality standards to determine whether the standards meet the requirements of the CWA;

WHEREAS, pursuant to 33 U.S.C. § 1313(c)(3), if EPA approves a new or revised water quality standard, it must notify the state within 60 days of the state's submission of the standard; 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;

WHEREAS, pursuant to Endangered Species Act section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. Part 402, EPA consults with the United States Fish and Wildlife Service and/or the National Oceanic and Atmospheric Administration Fisheries Service in connection with relevant EPA final actions approving state water quality standards that EPA has determined may affect federally-listed threatened or endangered species or designated critical habitat of such species and regarding whether the action is likely to jeopardize the continued existence of such species or destroy or adversely modify its designated critical habitat;

WHEREAS on July 8, 2004, the State of Oregon submitted to EPA certain revised water quality standards, including revised water quality criteria for certain toxic pollutants for the protection of aquatic life and revised water quality criteria for certain toxic pollutants for the protection of human health;

WHEREAS on July 2, 2007, EPA acted to approve a provision submitted by the State of Oregon on July 8, 2004, that authorizes the use of compliance schedules that are consistent with the CWA requirements at 40 C.F.R. § 122.47;

WHEREAS on January 15, 2008, EPA submitted to the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration Fisheries Service a biological evaluation pursuant to section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §1536(a)(2), regarding the effects of any EPA final action to approve Oregon's revised criteria for toxic pollutants for the protection of aquatic life on federally-listed threatened or endangered species or designated critical habitat of such species;

WHEREAS EPA has not, as of the date of entry of this Consent Decree, taken final action approving and/or disapproving the remaining water quality standards the State of Oregon submitted on July 8, 2004;

WHEREAS the State of Oregon is conducting a public process to evaluate whether it will change its fish consumption rate and revise its toxic criteria for human health;

WHEREAS the State of Oregon is scheduled to make a final determination in September 2008 as to whether the State should conduct rulemaking to revise its water quality criteria for certain toxic pollutants for the protection of human health;

WHEREAS EPA has many other resource obligations it must fulfill in addition to the commitments made in this Consent Decree and enters into this Consent Decree aware of such other resource obligations;

WHEREAS the Parties agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that entry of this Consent Decree is the most appropriate means of resolving this action.

NOW, THEREFORE, without the trial of any issue of fact or law, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (CWA citizen suit provision); and 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief).

2. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in Oregon.

**II. DEFINITIONS**

3. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "NWEA" shall mean the Plaintiff in this action, Northwest Environmental Advocates.

b. "EPA" shall mean the Defendant in this action, the United States Environmental Protection Agency.

c. "Party" shall refer to either NWEA or EPA.

d. "Parties" shall collectively refer to NWEA and EPA.

e. "FWS" shall mean the United States Fish and Wildlife Service.

f. "NMFS" shall mean the National Oceanic and Atmospheric Administration Fisheries Service.

g. "Services" shall collectively refer to FWS and NMFS.

h. “Consult” or “consultation” shall refer to the process by which EPA consults with FWS or NMFS pursuant to section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §1536(a)(2), and 50 C.F.R. Part 402.

i. “Final BE” shall mean the final biological evaluation developed by EPA pursuant to section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §1536(a)(2), regarding the effects of any EPA final action to approve Oregon’s revised criteria for toxic pollutants for the protection of aquatic life – submitted by the State to EPA on July 8, 2004 – on federally-listed threatened or endangered species or designated critical habitat of such species.

j. “Final BiOp(s)” shall mean the final biological opinion(s) developed by the Services pursuant to section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §1536(a)(2), in connection with any EPA final action to approve Oregon’s revised criteria for toxic pollutants for the protection of aquatic life submitted by the State to EPA on July 8, 2004.

k. “Oregon’s submission” shall mean Oregon’s revised water quality standards provisions submitted by the State of Oregon to EPA on July 8, 2004.

l. “Aquatic life criteria” or “aquatic life criterion” shall mean Oregon’s revised criteria/criterion for toxic pollutants for the protection of aquatic life submitted by the State of Oregon to EPA on July 8, 2004.

m. “Human health criteria” or “human health criterion” shall mean Oregon’s revised criteria/criterion for toxic pollutants for the protection of human health submitted by the State of Oregon to EPA on July 8, 2004.

n. “Revised human health criteria” shall mean Oregon’s revised criteria/criterion for toxic pollutants for the protection of human health that the State of Oregon promulgates in response

to its ongoing public process to reconsider the fish consumption rate used in the human health criteria.

o. “United States” shall mean the United States of America and all of its departments, agencies, and instrumentalities, including without limitation, Federal Defendant United States Environmental Protection Agency.

### **III. SCHEDULE FOR EPA ACTION ON OREGON’S SUBMISSION**

4. EPA will endeavor to ensure that, by October 1, 2008, the Services provide EPA their Final BiOps regarding the effect of any EPA action to approve the aquatic life criteria. Within ten (10) days of receiving the Services’ Final BiOps, EPA shall provide NWEA written notice of the date on which EPA received the Final BiOps, along with copies of the Final BiOps.

5. Except as otherwise provided below, by January 15, 2009, EPA shall take final action approving and/or disapproving Oregon’s submission, including the aquatic life criteria and the human health criteria, subject to the contingencies identified in Paragraphs 6-7 and 9. Within ten (10) days of taking final action approving and/or disapproving Oregon’s submission, EPA shall provide NWEA written notice of the date on which EPA took such final action, along with copies of the decision documents for EPA’s final action.

6. If FWS and/or NMFS fail(s) to provide EPA its/their Final BiOp(s) pertaining to the aquatic life criteria by October 1, 2008, EPA may, consistent with 16 U.S.C. § 1536(b)(1)(A), withdraw its consent to allow consultation with FWS and/or NMFS to continue beyond December 30, 2008. Within ten (10) days of withdrawing consent to allow consultation with FWS and/or NMFS to continue beyond December 30, 2008, EPA shall provide NWEA a copy of EPA’s letter(s) to FWS and/or NMFS withdrawing such consent.

7. If FWS and/or NMFS fail(s) to provide EPA with its/their final BiOp(s) pertaining to the aquatic life criteria by October 1, 2008, and EPA withdraws consent to allow consultation to continue beyond December 30, 2008, in accordance with Paragraph 6 above, EPA is excused from complying with the January 15, 2009 deadline, established in Paragraph 5 above, for final approval and/or disapproval of the aquatic life criteria. In such case, EPA shall comply with the following:

a. EPA shall take final action approving and/or disapproving the aquatic life criteria within ninety (90) days of receiving the Final BiOps from the Services;

b. Except as provided in Paragraph 8 below, in no case shall EPA complete its final action approving and/or disapproving the aquatic life criteria after March 31, 2009, provided however, that in the event FWS and/or NMFS provide to EPA its/their final BiOp(s) after March 10, 2009, but prior to March 31, 2009, EPA shall have three weeks from the date the final BiOp(s) is/are provided to complete its final action; and

c. Within ten (10) days of taking final action approving and/or disapproving the aquatic life criteria, EPA shall provide NWEA written notice of the date on which EPA took such final action, along with copies of the documents for EPA's final action.

8. If, despite EPA's best efforts (meaning commitment of agency time, money, energy, and resources that EPA reasonably anticipates will result in meeting the deadlines in this Decree), EPA believes good cause exists to seek an extension of the deadlines set forth in Paragraphs 5, 7, or 9, EPA may seek relief from the Court, in accordance with Paragraphs 13 and 16-18 below.

9. EPA shall take final action approving and/or disapproving the human health criteria in accordance with the date identified in Paragraph 5. Within ten (10) days of taking final action on the human health criteria, EPA shall provide NWEA written notice that EPA has taken such final action, along with copies of the decision document for EPA's final action.

a. If, by October 30, 2008, the State of Oregon's Environmental Quality Commission (EQC) has directed the Oregon Department of Environmental Quality to initiate rulemaking to revise the toxic criteria for human health, the parties will confer as follows. EPA will consult with NWEA within 30 days of any such decision by the EQC to initiate rulemaking or by November 30, 2008, whichever is earlier, to discuss whether the Parties should establish an alternative date to the deadline in Paragraph 5 for final action in approving and/or disapproving Oregon's human health criteria. If NWEA and EPA are able to agree on an alternative date, they will seek to modify the Consent Decree as detailed in Section VII (paragraphs 16-18).

b. NWEA maintains that any future revision of Oregon's water quality standards does not, as a matter of law, excuse EPA from acting pursuant to CWA §303(c)(3) on Oregon's submission.

#### **IV. FEES AND COSTS**

10. The United States agrees to pay, and NWEA agrees to accept \$60,000 in full settlement of all claims by NWEA for its costs of litigation (including reasonable attorneys' fees and expenses) up to and including the date this Consent Decree is executed by the Parties. Said payment shall be made by electronic transfer to NWEA, and sent to Key Bank:

Bank name:	Key Bank
Bank address:	3515 SW Troy Street, Portland, OR 97219
ABA #:	123002011
Routing #:	123002011
Account #:	370181010627
Name of account:	IOLTA Trust Account
Federal Tax #:	93-0386858

This electronic transfer shall be made within one hundred twenty (120) days after the Court enters the Consent Decree.

11. NWEA reserves the right to seek an award for reasonable attorneys' fees and



costs incurred after entry of this Consent Decree in connection with any disagreement between the Parties concerning the interpretation, proposed modification, or performance of any aspect of this Consent Decree. In the event that NWEA seeks such fees and costs, the Parties shall attempt to reach agreement as to the appropriate amount of recovery. If the Parties are unable to reach agreement, NWEA may file an application with the Court for such recovery.

**V. CONTINUING JURISDICTION**

12. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the Parties to this Consent Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Consent Decree, and for granting any further relief as the interests of justice may require.

13. Nothing in this Consent Decree shall be construed to limit the equitable powers of the Court to modify those terms upon a showing of good cause by any party.

14. Nothing in the terms of this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree, and nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

**VI. DISPUTE RESOLUTION**

15. In the event of a disagreement between the Parties concerning the interpretation of any provision of this Consent Decree or performance thereof, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties agree to negotiate in good faith regarding any disagreement. If the Parties cannot resolve such disagreement

within thirty (30) days after receipt of the notice by the other Party, then either Party may move the Court to resolve the dispute. Pursuant to the Federal Rules of Civil Procedure and the Local Rules for the District of Oregon, the non-moving Party shall have the opportunity to respond to such motion, and either Party may seek oral argument before the Court.

## **VII. MODIFICATIONS AND EXTENSIONS**

16. Any term set forth in this Consent Decree (including deadlines and other terms), may be modified by written agreement of the Parties and approval of the Court.

17. In the event EPA seeks to extend any deadline(s) set forth in Paragraphs 5, 7 or 9 above, EPA shall notify NWEA of its intent to seek such extension(s) in writing as expeditiously as practicable after so determining. The notice shall show good cause, by written explanation with supporting documentation, justifying EPA's request.

18. If either Party seeks to modify the terms of this Consent Decree (including deadlines and other terms), that Party shall provide the other Party with written notice of the proposed modifications and a request for negotiations. The Parties agree to negotiate in good faith regarding any proposed modification of the Consent Decree. If the Parties agree to a proposed modification, the Parties shall jointly notify the Court of the modification and request Court approval. If the Parties cannot reach agreement regarding the proposed modification within thirty (30) days after receipt of the notice of the proposed modification by the other Party, then either Party may move the Court for such modification. Pursuant to the Federal Rules of Civil Procedure and the Local Rules for the District of Oregon, the non-moving Party shall have the opportunity to respond to such motion, and either Party may seek oral argument before the Court.

**VIII. EFFECTIVE DATE**

19. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the District Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.

**IX. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS**

20. This Consent Decree shall terminate after fulfillment of EPA's obligations under Paragraphs 5 (or Paragraphs 7 or 9 if those paragraphs are applicable) and Paragraph 10 of this Consent Decree. Upon completion of EPA's obligations under Paragraphs 5 (or Paragraphs 7 or 9 if those paragraphs are applicable) and 10 of this Consent Decree, the Parties shall file a joint motion seeking termination of this Consent Decree and dismissal of this case with prejudice.

**X. NOTICE AND CORRESPONDENCE**

21. Any notice, including correspondence, required or made with respect to this Consent Decree, shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For NWEA:

Allison LaPlante  
Pacific Environmental Advocacy Center  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219

For EPA:

Chief, Environmental Defense Section  
United States Department of Justice  
Environment & Natural Resources Division  
601 D Street, N.W., Suite 8000  
Washington, D.C. 20004

Steven E. Rusak  
United States Department of Justice  
Environment & Natural Resources Division  
1961 Stout Street, 8th Floor  
Denver, CO 80294

Associate General Counsel  
Office of General Counsel, 2355A  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave. N.W.  
Washington, D.C. 20460

Adrienne Allen  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
1200 Sixth Ave  
Seattle, WA 98101

Upon written notice to the other Parties, any Party may designate a successor contact person for any matter relating to this Consent Decree.

#### **XI. RELEASE BY PLAINTIFF AND RESERVATION OF RIGHTS**

22. Upon entry, this Consent Decree shall constitute a complete and final settlement of all claims asserted, or that could have been asserted, by NWEA in the Complaint, subject to the express reservations of rights in Paragraphs 11 and 24-27 herein.

23. NWEA hereby forever releases, discharges, and covenants not to assert against EPA (by way of the commencement of an action, the joinder of EPA in an existing action or in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity, that NWEA may have had, or may now or hereafter have, against EPA based upon the same transaction or occurrence as that at issue in the Complaint.

24. Nothing in this Decree shall limit NWEA's rights to assert the claim pleaded in NWEA's Complaint, and make any legal or factual assertions necessary to support a claim, in the event that the Parties are before the Court pursuant to Paragraph 15 ("Dispute Resolution") or Paragraphs 16-18 ("Modifications and Extensions").

25. Nothing in this Decree shall otherwise waive or limit NWEA's rights to challenge in a separate lawsuit the merits of any final agency action taken by EPA pursuant to this Consent

Decree (or any final agency action taken by the Services under the Endangered Species Act) pertaining to EPA's final action on Oregon's water quality standards pursuant to this Consent Decree, including, but not limited to, claims relating to: Endangered Species Act compliance in connection with EPA's final action on Oregon's human health criteria or revised human health criteria; any NMFS or FWS BiOp regarding EPA's final action on Oregon's water quality standards; or whether EPA's final action on Oregon's water quality standards meets the legal requirements of the Clean Water Act, the Endangered Species Act, or the Administrative Procedure Act.

26. Nothing in this Decree shall otherwise waive or limit NWEA's rights to bring any actions or claims regarding EPA's obligations in states other than Oregon or to challenge any EPA action related to Oregon's water quality standards except as identified in Paragraph 23.

27. EPA and the United States reserves all defenses to such actions or claims referenced in Paragraphs 11 and 24-26.

## **XII. FORCE MAJEURE**

28. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the deadlines specified in this decree. Such circumstances include, but are not limited to, (1) failure of Congress to appropriate agency funds necessary to meet the deadlines, (2) an environmental disaster that would require EPA employees to divert resources away from the project, or (3) a government shutdown such as occurred in 1995 and 1996. In no event shall "circumstances outside the reasonable control of EPA" include a delay by the Services in issuing final BiOps. Should a delay occur due to circumstances outside the reasonable control of EPA, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of the Consent Decree, and any deadlines occurring within one hundred twenty (120) days of the termination of the delay shall be extended one day for each day of the delay. EPA will provide

NWEA with notice as soon as is reasonably possible in the event that EPA invokes this term of the Consent Decree and will provide NWEA with an explanation of EPA's basis for invoking this paragraph. Plaintiffs may challenge the invocation of this term of the Consent Decree under the dispute resolution terms of section VI of this Consent Decree, and EPA shall bear the burden of justifying the invocation of this term.

### **XIII. MUTUAL DRAFTING AND CONSTRUCTION**

29. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by NWEA and EPA. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Decree.

### **XIV. EFFECT OF DECREE**

30. This Consent Decree shall not constitute an admission or evidence of any issue of fact or law, wrongdoing, misconduct, or liability on the part of any party.

### **XV. SCOPE OF DECREE**

31. Except as expressly provided in this Consent Decree, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in the terms of this Consent Decree shall be construed to limit or modify the discretion accorded EPA under the Clean Water Act, or the Services under the Endangered Species Act, or by general principles of administrative law. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

### **XVI. COUNTERPARTS**

32. This Consent Decree may be executed in any number of counterpart originals,

each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

**XVII. ENTIRE AGREEMENT**

33. This Consent Decree is the entire agreement between NWEA and EPA in this case. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Consent Decree.

**XVIII. APPLICABLE LAW**

34. This Consent Decree shall be governed by and construed under the laws of the United States.

**XIX. SEVERABILITY**

35. Subsequent to entry of this Consent Decree by the Court, if any term, condition or provision of this Consent Decree, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Decree, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

**XX. COMPLIANCE WITH OTHER LAWS**

36. No provision in this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA take action in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 5541-551, 701-706; the Clean Water Act, 33 U.S.C. §§ 1251-1387 or any other law or regulation, either substantive or procedural. EPA maintains that no provision of this Consent Decree shall be interpreted or constitute a commitment or requirement that EPA obligate or pay

funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable law or regulation. NWEA does not agree that the Anti-Deficiency Act applies to this court order and reserves the right to so argue in any subsequent action to enforce the terms of this Consent Decree.

**XXI. REPRESENTATIVE AUTHORITY**

37. Each person signing this Consent Decree certifies that he or she has been duly authorized to enter into and execute the terms and conditions of this Consent Decree by the party on whose behalf it is indicated that the person is signing, and to legally bind such party to this Consent Decree. By signature below, all of the Parties consent to the entry of this Consent Decree.

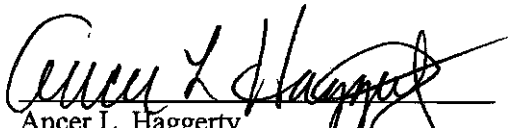
For NWEA:       /s/ Allison LaPlante        
Allison LaPlante  
Pacific Environmental Advocacy Center  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219

Date: May 23, 2008

For EPA:       /s/ Steven E. Rusak        
Steven E. Rusak, Trial Attorney  
United States Department of Justice  
Environment & Natural Resources Division  
1961 Stout Street, 8th Floor  
Denver, CO 80294

Date: May 23, 2008

ENTERED AND DATED this 29 day of May, 2008.

  
Ancer L. Haggerty  
United States District Court Chief Judge