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July 31, 2000

Ms. Carol Browner, Administrator
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Via Certified Mail

RE: 60-DAY NOTICE OF INTENT TO SUE FOR FAILURE TO PERFORM MANDATORY DUTIES UNDER
THE CLEAN WATER ACT AND ENDANGERED SPECIES ACT.

Dear Ms. Browner:

I represent Northwest Environmental Advocates (NWEA) regarding a lawsuit NWEA intends to file. This letter constitutes a 60-day notice of intent to file a citizen's suit pursuant to section 505(a)(2) of the Clean Water Act and section 11(g)(1)(A) of the Endangered Species Act on behalf of Northwest Environmental Advocates (NWEA) against the Administrator of the United States Environmental Protection Agency (EPA) and the National Marine Fisheries Service (NMFS). NWEA's offices are located at 133 S.W. Second Ave., Suite 302, Portland, Oregon 97204 and can be reached by telephone on (503) 295-0490. This suit concerns EPA's 1999 approval of Oregon's 1996 water quality standards for temperature and dissolved oxygen. NWEA has been very active in the development and implementation of Oregon's water quality standards. As a member of the Oregon Department of Environmental Quality's (DEQ) Policy Advisory Committee (PAC) on Oregon's 1992-1994 Triennial Review that led to the 1996 standards, NWEA participated in every meeting of the committee and its subcommittees in long hours of negotiation and advocacy.

This suit will concern EPA's failure to perform certain mandatory duties under both the Clean Water Act and Endangered Species Act. Specifically, EPA is presently under a mandatory duty to:

1. promulgate a revised water quality standard for temperature for the lower Willamette River under section 303(c)(4)(A) of the Clean Water Act;
2. promulgate a revised water quality standard for temperature for the lower Columbia River under section 303(c)(4)(B) of the Clean Water Act;
3. remedy Oregon's failure to develop and submit an antidegradation plan, required under EPA regulations; and

60-DAY NOTICE OF INTENT TO SUE FOR FAILURE TO PERFORM MANDATORY DUTIES UNDER THE
CLEAN WATER ACT AND ENDANGERED SPECIES ACT.

PAGE 1

4. develop a plan for the conservation of threatened and endangered Oregon salmon under section 7(a)(1) of the Endangered Species Act.

This suit will also challenge EPA's approval of Oregon's water quality standards as arbitrary and capricious under the Administrative Procedure Act. These include Oregon's temperature criterion of 64 degrees F, intergravel dissolved oxygen criterion of 6.0 mg/L, and lack of protective corridors for bull trout migration. In addition, this suit will challenge EPA's substantive duty to prevent jeopardy to threatened and endangered species in Oregon. Finally, this suit will challenge as arbitrary and capricious the National Marine Fisheries Service's conclusions in its "no-jeopardy" Biological Opinion regarding EPA's approval of Oregon's water quality standards.

I. Statutory Requirements

A. Clean Water Act

In 1972, Congress passed the Clean Water Act (CWA) in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a) (1994 & Supp. 1997). In addition, the Act establishes an interim goal of water quality that is sufficient to protect fish, wildlife, and human health. 33 U.S.C. § 1251(a)(2).

In order to meet these goals, the law requires the establishment of water quality standards. These are promulgated by the EPA and restrict quantities, rates, and concentrations of specified substances that are discharged from point sources. 33 U.S.C §§ 1311, 1314. "Water quality standards" are promulgated by the states and establish the desired condition of the waterway. 33 U.S.C. § 1313. The EPA provides states with substantial guidance in drafting water quality standards, and the states must submit the standards to EPA for review and approval. Water quality standards under the CWA are required to include three elements: 1) one or more designated "uses" of that waterway; 2) water quality "criteria" specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits and narrative form; and 3) an antidegradation policy. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B).

States are required to review and revise their water quality standards at least every three years, and submit all revised and existing water quality standards to EPA for review and approval. 33 U.S.C. § 1313(c)(1). New or revised standards are to be established "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A). EPA must notify the state within 60 days if it approves the new or revised standard as complying with the Act. 33 U.S.C. § 1313(c)(3). If EPA disapproves the standard, it must then notify the state of required

changes within 90 days. 33 U.S.C. § 1313(c)(3). Should the state fail to remedy the defect(s) within an additional 90-day period, EPA is required to “promptly” establish a revised standard for the state. 33 U.S.C. § 1313(c)(4)(A). EPA is also required to establish a new or revised standard wherever the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. 33 U.S.C. § 1313(c)(4)(B).

B. Endangered Species Act

The purpose of the Endangered Species Act (ESA) is to “provide a program for the conservation of...endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b) (1994 & Supp. 1997). The overarching policy of the ESA is that all federal departments and agencies must use their authorities to conserve species that the Secretary of Interior or Commerce lists as threatened or endangered. 16 U.S.C. § 1531(c)(1). The terms “conserve” and “conservation” mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3).

The ESA requires the Secretary of Interior or Commerce to list species that he believes may become extinct in the near future as either “threatened” or “endangered.” 16 U.S.C. § 1533. A species is endangered if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). The Secretary defines jeopardy to an endangered or threatened species as “an appreciable reduction in the likelihood of both survival and recovery of a species.” 50 C.F.R. § 402.02 (1999).

Section 7 of the ESA enumerates the substantive and procedural obligations of federal agencies with respect to listed species. 16 U.S.C. § 1536. First, all federal agencies are under an affirmative duty to use their authorities in consultation with the Secretary of Interior or Commerce to conserve listed species. Second, all federal agencies are under an obligation to insure that “any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species....” 16 U.S.C. § 1536(a)(2). In meeting this duty to prevent jeopardy, each agency is required to use the best scientifically and commercially available data. *Id.*

Whenever an “action agency” determines that a proposed action may affect one or more listed species, it must consult with either the National Marine Fisheries Service (NMFS) and/or the Fish and Wildlife Service (FWS) (depending on the species present). 50 C.F.R. § 402.14(a). The relevant Service must then prepare a formal Biological Opinion discussing the effects of the

proposed action on the listed species or critical habitat. 50 C.F.R. § 402.14(h). The Biological Opinion must include the Service's opinion on whether the action is likely to jeopardize the continued existence of any listed species or adversely modify any critical habitat. *Id.* If jeopardy or adverse modification is found, the relevant Service must suggest reasonable and prudent alternatives which it believes would avoid either of these outcomes. 16 U.S.C. § 1536(b). In the end, however, the action agency has an independent duty to ensure that its action will neither jeopardize any listed species nor adversely modify any critical habitat. 16 U.S.C. § 1536(b).

II. Background

The Oregon Department of Environmental Quality (ODEQ) has responsibility for establishing and implementing water quality standards for Oregon's waters. ODEQ completed its water quality standards 1992-1994 Triennial Review, revising water quality standards for temperature, dissolved oxygen, and pH on January 11, 1996.

The temperature standards submitted consist of changes to numeric criteria and narrative provisions that could be characterized as anti-degradation policies and narrative criteria. The numeric criteria are as follows:

- (a) 20 degrees celsius (C) (68 degrees fahrenheit (F)) for the Lower Willamette River;
- (b) 17.8 degrees C (64 degrees F) for all other waters supporting salmonid rearing;
- (c) 12.8 degrees C (55 degrees F) for all waters supporting salmonid spawning; and
- (d) 10 degrees C (50 degrees F) for all waters supporting bull trout rearing.

The dissolved oxygen standards consists of

- (a) a cold-water criterion of 11 mg/L;
- (b) an intergravel dissolved oxygen criterion (IGDO) of 6.0 mg/L for waters during salmonid spawning periods;
- (c) a criterion of 8 mg/L for non-spawning times.
- (d) a criterion of 6.5 mg/L for basins designated as cool-water; and
- (e) 5.5 mg/L for basins designated as warm-water.

Changes to the pH standard were nominal. On July 11, 1996, Oregon submitted its revised standards to EPA for review and approval as required under section 303(c).

After Oregon submitted its standards for EPA's review, and while that review was pending, the Secretary of Interior listed several populations of salmon, steelhead, and bull trout in Oregon as either "threatened" or "endangered" under the ESA. These listings occurred between 1996 and 1999.* In total, the Secretary listed 14 Oregon populations as threatened or

* Specifically, Umpqua River Cutthroat Trout were listed on August 9, 1996; Southern Oregon, Northern California Coho Salmon were listed on May 6, 1997; Snake River Basin Steelhead and Upper Columbia River Steelhead were listed on August 18, 1997; Lower Columbia River Steelhead were listed on March 19, 1998; Oregon Coast Coho Salmon were listed on August 10, 1998; Upper Willamette River Chinook and Middle Willamette River Chinook

endangered over the three years since Oregon adopted its standards.

On January 15, 1997 EPA requested a list of threatened and endangered species in Oregon from NMFS and FWS. EPA subsequently initiated formal ESA section 7 consultation on Oregon's revised standards. EPA completed a Biological Assessment as required under section 7(c) of the Endangered Species Act on September 15, 1998 and submitted the Assessment to the NMFS and FWS for their review. EPA also conducted an additional, separate review of the effects of Oregon's temperature standard on listed salmonids (hereinafter, Oregon Temperature Standard Review). Both the Biological Assessment and Oregon Temperature Standard Review found that the temperature criterion for salmonid rearing and bull trout rearing were "likely to adversely affect" and "pose a risk to the viability of" listed salmon, trout, and steelhead in Oregon. The Biological Assessment also found that Oregon's intergravel dissolved oxygen criterion was likely to adversely affect threatened salmon.

NMFS completed its Biological Opinion on EPA's proposed approval of Oregon's revised water quality standards for temperature, dissolved oxygen, and pH on July 7, 1999. The Biological Opinion concurred with EPA's findings that Oregon's temperature and intergravel dissolved oxygen criteria were likely to adversely affect threatened salmon, steelhead, and trout. However, NMFS concluded that the standards would not pose jeopardy to the threatened fish in light of commitments from both EPA and ODEQ to implement certain conservation measures designed to mitigate the adverse effects of its water quality standards.

In spite of deep concerns expressed by NMFS biologists and EPA's own scientists regarding the adequacy of Oregon's water quality standards, EPA approved those standards, with one exception, on July 22, 1999. EPA approved the temperature standard of 17.8 degrees C for waters supporting salmonid rearing and 12.8 degrees C for salmonid spawning. EPA also approved the dissolved oxygen standard, including the intergravel dissolved oxygen criterion (IGDO) of 6.0 mg/L for waters supporting salmonid fry emergence. EPA disapproved Oregon's revised temperature criterion of 20 degrees C for the lower Willamette River. Oregon did not take any action either to modify or to resubmit its 20 degrees C criterion for the lower Columbia River; EPA took no action in the face of DEQ's inaction in this regard.

III. Claims

A. Clean Water Act

1. Citizen Suit Claims

a. Willamette River Temperature Criterion

were listed on March 24, 1999, Upper Willamette River Steelhead, Middle Willamette River Steelhead; and Columbia River Chum Salmon were listed on March 25, 1999.

Section 303(c)(3) requires that EPA approve state revisions to its water quality standards within 60 days of submission, or disapprove them within 90 days of submission and notify the state of required changes. 33 U.S.C. § 1313(c)(3). If EPA disapproves a water quality standard, the Act grants the state 90 days to remedy the defect. *Id.* If it fails to do so, EPA then must promulgate a revised standard within 90 days. 33 U.S.C. § 1313(c)(4)(A).

The Oregon Environmental Quality Commission adopted, among other revised water quality standards, an amendment to the temperature standard for the Lower Willamette River on January 11, 1996. The revision to the temperature standard subsequently became effective on July 1, 1996. The revision, in part, consisted of a criterion of 20 degrees C for the use of the Willamette River for salmonid migration and rearing. EPA disapproved that temperature criterion on July 22, 1999 as failing to protect those uses. The state failed to remedy the defect within the statutorily allotted time period. Oregon's failure to act triggered EPA's duty to promulgate, and EPA has subsequently failed to establish a revised water quality standard within the required 90 days. As a result, EPA is under a nondiscretionary duty to establish new temperature criterion for the Lower Willamette River.

b. Columbia River Temperature Criterion

As mentioned above, EPA disapproved the temperature criterion of 20 degrees C for the Lower Willamette River because EPA determined that it would not protect the designated uses of salmonid migration and rearing. These same uses occur in the Lower Columbia. Accordingly, EPA's finding with respect to the inadequacy of a 20 degrees C criterion necessarily also applies to the Lower Columbia. Thus, once EPA made a finding that the 20 degrees C criterion did not protect those designated uses, it had a mandatory duty to establish a revised standard for the Lower Columbia under § 303(c)(4)(B). EPA has failed to perform this nondiscretionary duty.

c. Lack of Antidegradation Implementation Plan

This lawsuit will also concern EPA's failure to establish an implementation plan for Oregon's antidegradation policy. States implementing a water quality standards program under the Clean Water Act are required to develop an antidegradation policy and a plan for implementing that policy. 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12(a)(1) (1999). Oregon has failed to produce an antidegradation implementation plan. Failure to submit an antidegradation implementation plan is a violation of EPA's regulations, and equates to a failure by ODEQ to implement its existing statewide antidegradation policy. EPA has "clear authority under the Clean Water Act to disapprove and federally promulgate all or part of an implementation process if...the state's process...can be implemented in such a way as to circumvent the intent and purpose of the antidegradation policy." EPA, WATER QUALITY STANDARDS HANDBOOK, Ch. 4, 2 (1994). Oregon's lack of an implementation plan circumvents the purpose of the antidegradation policy. EPA is under a nondiscretionary duty according to section 303(c)(4)(B) to remedy this defect in Oregon's antidegradation policy.

2. Administrative Procedure Act Claims

a. Rearing Criterion of 17.8 Degrees C for all Waters Supporting Salmonid Rearing and Growth

EPA's approval of Oregon's temperature criterion of 17.8 degrees C is arbitrary, capricious, and contrary to law in violation of § 706(2)(A) of the Administrative Procedure Act (APA). Oregon's rearing temperature criterion of 17.8 degrees C fails to protect salmonid rearing and juvenile growth as a designated use, and therefore does not meet the requirements of the CWA. EPA's own scientists determined that Oregon's rearing criterion would be likely to adversely affect juvenile salmonids. Studies summarized by EPA showed that the optimal temperature range for salmonids is 10-14 degrees C and that most salmonids feel the effects of stress at or around 15 degrees C, far below the approved criterion of 17.8 degrees C. U.S. ENVIRONMENTAL PROTECTION AGENCY, BIOLOGICAL ASSESSMENT OF THE REVISED OREGON WATER QUALITY STANDARDS FOR DISSOLVED OXYGEN, TEMPERATURE, AND PH, 81-95, (1998) (*hereinafter* BIOLOGICAL ASSESSMENT). EPA enumerated the lethal and sublethal adverse effects to salmon populations at the individual, population, and species levels caused by the 17.8 degrees C criterion. These include reproductive failure, pre-spawning mortality, residualization and delay of smolts, decreased competitive success, and decreased disease resistance. BIOLOGICAL ASSESSMENT, at 81-95. Based on its review of scientific literature, EPA stated that it has reason to believe that many, if not all, of these adverse effects will occur.

In its Biological Opinion, NMFS concurred with EPA's findings that the 17.8 degrees C criterion would adversely affect threatened salmon. Specifically, NMFS stated that the criterion would not likely meet the biological requirements of listed salmon, and enumerated additional lethal and sublethal effects to salmon populations. These include, for example, increased pre-hatch mortalities and developmental abnormalities, smaller eggs due to sub-optimal incubation temperatures, increased disease risk for adults and juveniles, reduced growth of juveniles, interruption of smoltification in late migrating juveniles, increase disease virulence, mortality of adults, and so forth. NATIONAL MARINE FISHERIES SERVICE, BIOLOGICAL AND CONFERENCE OPINION: APPROVAL OF OREGON WATER QUALITY STANDARDS FOR DISSOLVED OXYGEN, TEMPERATURE, AND PH, 25-36 (1999) (*hereinafter* BIOLOGICAL OPINION). It is without question that all federal agency experts that have reviewed Oregon's water quality standards have determined that the temperature 17.8 degrees C is inadequate to protect threatened salmon as a beneficial use.

Although EPA has stated that the 17.8 degrees C criterion is protective of designated uses when evaluated in the context of all other temperature criteria, including the 12.8 degrees C spawning criterion and other narrative criteria, the agency has provided no analysis to validate this conclusion. It is simply an assertion, unsupported and invented post hoc to the Endangered Species Act consultation process. The basis on which EPA has determined that designated uses

will be protected is arbitrary and capricious compared to the overwhelming evidence that threatened salmon will be considerably harmed by the criterion.

Designated use protection under the CWA does not permit such high levels of risk to any uses, and certainly not already imperiled species. EPA was required to disapprove the 17.8 degrees C rearing criterion, notify the state of required changes, and promulgate a substitute criterion that is protective of designated uses in the absence of state action.

b. Narrative Criteria and Use Designations

EPA's approval of the temperature criterion is also fatally flawed because the Oregon scheme is riddled with exceptions that undermine even the 17.8 degrees C standard. For example, under Oregon's submittal all dischargers whose discharges might affect temperature loads are required to develop surface water temperature management plans. If they do so, however, they are exempted from meeting the temperature criterion "after all feasible steps have been taken." OR ADMIN. R. § 340-041-0026(3)(a)(D)(ii). The Oregon regulations do not define what this last phrase means. However, they do provide that, so long as a source has an ODEQ-approved plan, that source shall not be deemed to be "causing or contributing to a violation of the numeric criterion if the surface water exceeds the criterion." OAR § 340-041-0026(a)(D)(vi). This blanket exception creates an "enforcement shield" dynamic that undermines the very standard itself. Nothing in the CWA grants states the power to tie their own enforcement hands by absolving those who are contributing to ongoing violations of water quality standards from enforcement actions. The net effect of such a blanket exception is that both the State and EPA could be powerless to compel a given source to take corrective measures even where it is clear that the source is causing or contributing to a violation of the 17.8 degrees C criterion.

EPA itself has found that this enforcement-shield dynamic creates "burden of proof" problems. *Letter from Philip Milliam, EPA Region 10, to Russell Harding, ODEQ, November 14, 1995.* For example, it may be difficult, if not impossible, to distinguish between natural and anthropogenic causes of the temperature increases, and the regulations do not specify where the burden of proving the cause lies. Also, ODEQ regulations do not specify the criteria by which the surface water temperature management plans will be evaluated, what information must be included in the plan, and what department has jurisdiction to approve or disapprove the plan.

Additionally, point sources in Oregon are allowed an additional 1.0 degree F cumulative increase in already temperature limited streams as the surface water temperature management plan is developed and implemented. The point source need only show that the cumulative increase will "not conflict with or impair the ability of a surface water temperature management plan to achieve the numeric temperature criteria" and there will be "no measurable impact on beneficial uses." OAR § 340-041-0026(3)(a)(F)(i) and (ii). The latter finding seems redundant:

ODEQ has already found that beneficial uses are not protected by designating the water body as limited for temperature. In fact, the 1.0 degree F cumulative increase could result in lethal temperatures in water quality limited streams. It is but another layer in the enforcement shield for point sources in Oregon.

EPA's approval of the temperature criterion is also flawed in light of Oregon's failure to properly designate uses for waterbodies. This is because both EPA and NMFS have found that Oregon's designation of uses with regard to temperature is inaccurate and unprotective of threatened and endangered salmonids. U.S. ENVIRONMENTAL PROTECTION AGENCY, OREGON TEMPERATURE STANDARD REVIEW, 53 (1998) (*hereinafter* OREGON TEMPERATURE STANDARD REVIEW). BIOLOGICAL OPINION, at 20. EPA noted that the protectiveness of the standard is wholly dependent ODEQ's ability to accurately locate spawning, incubation, and rearing locations for native salmon. According to EPA, there are waterbodies in Oregon where no information exists on spawning times. OREGON TEMPERATURE STANDARD REVIEW, at 53. What little protectiveness the spawning criterion of 12.8 degrees C may provide is made illusory by ODEQ's lack of information on where it should apply. Further, NMFS has stated that where Oregon *has* identified spawning locations and times, it misses the mark by a month or more. BIOLOGICAL OPINION, at 20. As a result, ODEQ is not clear on where the more protective spawning criterion of 12.8 degrees C should apply relative to the apparently harmful 17.8 degrees C criterion. EPA's approval of the 17.8 degrees C rearing criterion is arbitrary and capricious given the incorrect information, or lack thereof, on where and when the criterion should apply.

In addition, Oregon has exempted portions of water bodies designated as providing "warm water" habitat from the 17.8 degrees C rearing criterion. However, EPA recognizes that these waters historically have supported salmonid populations that are now extinct. OREGON TEMPERATURE STANDARD REVIEW, at 52. Oregon has failed to fully protect beneficial uses because its standards only focus on current conditions and salmonid distributions. EPA has stated that to fully protect beneficial uses and restore endangered salmonid populations, Oregon's temperature standard should include areas of historical distribution. *Id.* Oregon's failure to properly identify and map designated uses should have triggered EPA's duty to disapprove the temperature standard as a whole and require Oregon to correct this defect. EPA's failure to do so is arbitrary, capricious, and contrary to the CWA.

c. Bull Trout Migration Corridors

EPA's approval of Oregon's temperature criterion of 10 degrees C for bull trout rearing and spawning is arbitrary and capricious in violation of § 706(2)(A) of the APA. The criterion does not allow for protection of migratory corridors, and therefore is not protective of bull trout rearing and spawning as a designated use. EPA found that the failure to protect migration corridors is likely to adversely affect bull trout populations. Specifically, EPA noted in its Oregon Temperature Standard Review that "migration corridors must be adequately protected to

safeguard remaining populations and to restore species distribution and integrity.” OREGON TEMPERATURE STANDARD REVIEW, at 47. These corridors help prevent isolation and fragmentation of populations. *Id.* Population fragmentation leads to a decrease in species fitness and viability. *Id.* For EPA to approve a measure that its own scientists have determined will not protect endangered species is arbitrary and capricious, and not in accordance with the law.

d. Intergravel Dissolved Oxygen (IGDO) Criterion for Salmonid Fry Emergence

Approval of the IGDO criterion is arbitrary and capricious in violation of § 706(2)(A). The numeric criterion does not provide sufficient dissolved oxygen for salmonid embryos. According to EPA, Oregon’s IGDO criterion of a spatial median of 6.0 mg/L is likely to adversely affect listed threatened and endangered salmonids. BIOLOGICAL ASSESSMENT, at 65. The early life stages of fish are recognized as being the most sensitive and requiring relatively high dissolved oxygen (DO) concentrations. *Id.*, at 64. This is compounded by the fact that as temperature increases, demands by fish for DO increase. *Id.* However, elevated temperatures also decrease the ability of the water column to hold DO, which in turn decreases the rate of seepage into the gravel. *Id.* In addition, the rate of seepage is slowed by siltation and layering of fines over the gravel. *Id.*, at 65. Studies summarized in EPA’s Biological Assessment found that adverse effects on embryos of oxygen deprivation begin at about 8.0 mg/L and that 5.0 mg/L is lethal. *Id.* Therefore, Oregon’s IGDO criterion of 6.0 mg/L does not protect the designated use of salmonid spawning until fry emergence, and should have triggered EPA’s duty to disapprove the criterion.

As with the 12.8 degrees C temperature criterion, EPA’s approval of the IGDO standard is further flawed because ODEQ has not identified the geographic areas and time periods in which the IGDO criterion applies. NMFS and EPA both found that ODEQ’s coldwater criterion of 6.0 mg/L for IGDO is likely to adversely affect all anadromous fish species on which EPA requested consultation, especially in streams with high levels of sedimentation. BIOLOGICAL ASSESSMENT, at 65; BIOLOGICAL OPINION, at 22. According to NMFS, identification of spawning and incubation areas in time and space determine the applicability of the IGDO criterion and thereby affects the criterion’s ability to avoid and minimize adverse effects. BIOLOGICAL OPINION, at 20. NMFS’ examination of salmonid life histories in its Biological Opinion found that spawning and incubation are likely to occur almost year round in some of the basins. According to NMFS, this makes it difficult for Oregon, as it currently does, to continue to apply water quality criteria for spawning and rearing across entire basins. *Id.*, at 22. Although Oregon has stated that it will protect site-specific differences in spawning periods through implementation of its antidegradation policy, both NMFS and EPA have acknowledged that Oregon’s lack of implementation guidance “impairs the effectiveness of the antidegradation policy.” *Id.* More importantly, NMFS noted that even if the antidegradation policy is implemented properly, the policy will not ensure that the criterion for IGDO is fully protective. *Id.*

0 Endangered Species Act

1. Citizen suit claim

a. EPA's Duty to Conserve Under Section 7(a)(1)

This suit will also concern EPA's failure to comply with its mandatory duty to develop and implement a plan for the recovery and conservation of each threatened salmonid population in Oregon. Section 7(a)(1) of the ESA requires all federal agencies to use their authorities in consultation with the Secretary of Interior or Commerce to further the goals of the ESA by developing and implementing programs for the conservation of endangered and threatened species. 16 U.S.C. § 1536(a)(1) (1994 & Supp. 1997). The ESA defines "conserve" and "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures are no longer necessary." 16 U.S.C. § 1532(3).

EPA has not satisfied its mandatory duties under section 7(a)(1) of the ESA. Under that provision, EPA is required to consult with the FWS and NMFS on the development and implementation of a plan for the conservation and recovery of each salmonid population listed as threatened in Oregon by FWS and NMFS. The program must be species-specific, addressing the biological requirements of each individually-listed salmonid population. Further, the program must aim towards achieving the eventual recovery of threatened salmonids in Oregon.

EPA's 1997-1999 consultation with the Services under section 7(a)(2) regarding Oregon's revised water quality standards was not sufficient to meet its section 7(a)(1) duties. That consultation addressed only its section 7(a)(2) procedural duty to consult and substantive duty to prevent jeopardy to threatened Oregon salmonids. Further, the conservation measures recommended by the Services and adopted by EPA were not species-specific, and were established only to mitigate adverse effects on threatened and endangered species rather than promote their recovery. Section 7(a)(1) imposes a separate, mandatory duty on EPA to consult with FWS and NMFS on the development and implementation of a species-specific conservation plan. EPA's failure to develop such a plan for threatened salmon in Oregon frustrates both the spirit and intent of section 7(a)(1) of the ESA.

2. Administrative Procedure Act claims

a. NMFS' Arbitrary and Capricious No-Jeopardy Finding Under Section 7(a)(2)

Both NMFS and EPA have violated their duties under section 7(a)(2) of the ESA. NWEA intends to challenge as arbitrary and capricious NMFS' conclusion in its Biological Opinion that Oregon's rearing criterion of 17.8 degrees C will not cause jeopardy to listed salmon in Oregon. NMFS has stated that the 17.8 degrees C criterion is likely to cause a parade

of adverse effects to salmon populations, such as increases in mortality of adults, pre-hatch mortalities and developmental abnormalities, reduced disease resistance, increased disease resistance, and other effects. BIOLOGICAL OPINION, 25-36.

NMFS has concluded that 17.8 degrees C will not cause jeopardy in part because of EPA's commitment to conduct a Regional Temperature Review over the next three years. That review will include an examination of the existing Oregon, Washington, and Idaho temperature standards. NMFS also draws this conclusion in part based on Oregon's commitment to implement various conservation measures. These include developing guidance for its antidegradation policy, and identifying the timing and location of salmonid spawning habitat, and others.

EPA's commitment to conduct a Regional Temperature Review will accomplish little in mitigating the adverse effects of the 17.8 degrees C criterion to salmon between now and whenever, if ever, the criterion is once again revised. A series of meetings between state and federal agencies over a three-year period does nothing to protect listed salmonids over the course of that period. Although a more protective standard may result at the end of that process, there is still an additional three-year period during which EPA does not ensure any on- the-ground implementation to make the standard more protective.

Additionally, NMFS' reliance on ODEQ's commitment to implement various conservation measures also have little value in mitigating adverse effects of the rearing criterion to listed salmon. For example, Conservation Measure 4 commits Oregon to identifying the "geographic area and time period to which the spawning criteria for temperature and dissolved oxygen apply, and will propose appropriate beneficial use designations, *provided adequate information is available.*" BIOLOGICAL OPINION, Attachment 3 (emphasis added). Oregon is already required under the CWA to properly designate beneficial uses. Further, the conservation measure only commits Oregon to extent that "adequate information is available." Finally, neither this conservation measure nor any other mitigates adverse affects to threatened and endangered species caused by the 17.8 degrees C criterion.

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b. EPA's Failure to Prevent Jeopardy Under Section 7(a)(2)

This lawsuit will concern EPA's violation of its substantive duty under Section 7(a)(2) of the ESA to insure that its actions are not likely to jeopardize the continued existence of threatened or endangered salmon in Oregon. Although EPA complied with its duty to consult with NFMS and FWS in approving Oregon's water quality standards, EPA may not rely solely on that procedural compliance to show that it has complied with its substantive duty to prevent jeopardy. EPA and NMFS have determined that 17.8 degrees C will not meet the biological

requirements of listed salmon in Oregon. A wealth of scientific information developed and reviewed by EPA exists to support that determination, and no other determination to the contrary. There is no evidence in the Biological Assessment, Oregon Temperature Standard Review, or Biological Opinion that 17.8 degrees C will ensure the survival and recovery of listed salmon populations. As a result, EPA's approval of the 17.8 degrees C criterion, IGDO criterion, and other components of Oregon's water quality standards is likely to jeopardize the continued existence of all affected salmon populations in Oregon.

EPA has also violated its procedural duty to reinitiate consultation under 50 C.F.R. § 402.16(b) when new information reveals effects not previously considered. EPA stated in an internal agency communication that it had recently realized that the temperature criterion of 17.8 degrees C should be considered in the context of all other temperature criteria, rather than in isolation. EPA discredited its own findings in the Biological Assessment, as well as those of NMFS in the Biological Opinion, by stating that both documents failed to consider the "sum of the whole" of the temperature standard. EPA further stated that both documents "may have over-represented" the full extent of the adverse affects to salmon. If so, then federal regulations require EPA to reinitiate section 7(a)(2) consultation with NMFS and FWS to satisfy this defect in the ESA jeopardy analysis.

IV. Conclusion

EPA has failed to meet the requirements of the Clean Water Act and Endangered Species Act. The Clean Water Act demands water quality sufficient to protect beneficial uses, and such use protection must include the survival and eventual recovery of listed species. The Endangered Species Act demands that EPA take affirmative steps to not only to prevent jeopardy to Oregon's salmon populations, but also to insure their conservation and recovery. In contrast, EPA has failed to promulgate temperature criteria for the Willamette or Columbia Rivers to replace inadequate State criteria. The temperature criterion for all other waters poses an unacceptable risk to salmon, as do the narrative temperature criteria, intergravel dissolved oxygen criterion, and failure to develop an implementation plan for the State's antidegradation policy. Further, EPA has taken no action to meet its substantive obligation to develop a conservation plan for threatened salmon in Oregon, and its efforts to prevent jeopardy are inadequate.

NWEA wishes to engage EPA in a constructive dialogue that will lead a workable solution for both the agency, Oregon, and NWEA's members. As such, my client is very interested in negotiating a resolution either before or after a complaint is filed, provided that NWEA is convinced that EPA has committed to meeting the requirements of both the Clean Water Act and

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Endangered Species Act in the near future. I hope that either you or your staff will contact me as soon as possible to begin this process. I can be reached on (503) 221-8651. My offices are located at 900 American Bank Building 621 SW Morrison Street, Portland, Oregon 97205.

Sincerely,

Bart A. Brush

cc: Janet Reno, Attorney General
United States Department of Justice

Charles C. Clarke, Administrator
U.S.E.P.A. Region 10

John Kitzhaber, Governor
State of Oregon

Langdon Marsh, Director
Oregon Department of Environmental Quality

Bruce H. Babbitt, Secretary of Interior
United States Department of Interior

William M. Daley, Secretary of Commerce
United States Department of Commerce

Dan Glickman, Secretary of Agriculture
United States Department of Agriculture