

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL
ADVOCATES, a non-profit corporation,

Case No: 3:05-cv-1876-AC

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, a United States
Government Agency, NATIONAL
MARINE FISHERIES SERVICE, a part of
the National Oceanic and Atmospheric
Administration, a part of the United States
Department of Commerce, and UNITED
STATES FISH AND WILDLIFE
SERVICE, a part of the United States
Department of the Interior,

**STIPULATED ORDER ON
NONPOINT SOURCE AND
ENDANGERED SPECIES ACT
REMEDIES**

Defendants, and

THE STATE OF OREGON, and
NORTHWEST PULP AND PAPER
ASSOCIATION,

Intervenor-Defendants.

ACOSTA, Magistrate Judge:

On February 28, 2012, this Court issued an Opinion and Order granting in part and denying in part the parties' cross motions for summary judgment. Docket No. 290. The Court also ordered the parties to confer regarding the appropriate remedies in this case. The parties have reached agreement on the remedies for certain claims on which

STIPULATED ORDER ON NONPOINT SOURCE AND ENDANGERED
SPECIES ACT REMEDIES

1.

Plaintiff Northwest Environmental Advocates (“NWEA”) prevailed. *Id.* The Court enters the following Order adopting the parties’ agreement, as set forth below:

A. Nonpoint Source Provisions

1. The United States Environmental Protection Agency’s (“EPA’s”) obligation to review Oregon’s water quality standards provisions pertaining to nonpoint sources is stayed, except as provided in Paragraphs 4 and 5 below.
2. The Oregon Department of Environmental Quality (“DEQ”) shall convene an advisory committee and request that it recommend that the Environmental Quality Commission (“EQC”) amend its regulations on or before the EQC’s June 2013 meeting, in the following manner:
 - a. Amend OAR 340-041-0028 to remove subsections (e), (f), and (g) of section 12 of the rule.
 - b. Amend OAR 340-041-0028 to remove paragraph (D) of subsection (h) of section 12 of the rule.
 - c. Amend OAR 340-041-0061 to remove sections (10), (11), and (12) of the rule.
3. Regardless of whether the advisory committee recommends amending the regulations in accordance with Paragraph 2, DEQ shall draft proposed regulations, for presentation to the EQC in sufficient time for the EQC’s June 2013 meeting, which reflect the amendments set forth in Paragraph 2.
4. If the EQC decides not to amend its regulations in accordance with Paragraph 2, then the stay on EPA’s obligation to review the nonpoint source provisions terminates. DEQ shall notify all parties as soon as practicable, and in no event

later than five working days after the EQC's June 2013 meeting, if the EQC decides not to amend its regulations in accordance with Paragraph 2. Within 90 days of such notification, EPA shall take final action under the Clean Water Act approving and/or disapproving the provisions that EQC decides not to amend, as described in Paragraph 2, and such review and final action shall be pursuant to the requirements in 33 U.S.C. § 1313(c), EPA's implementing regulations, the February 28, ²⁰¹²~~2102~~ Opinion and Order (Dkt 290) and the Order on the United States' Motion for Clarification (Dkt 314).

5. Finally, EPA will review and approve or disapprove OAR 340-041-0004(4) in accordance with the schedule, and pursuant to the requirements, set forth in Paragraph 4 (and accordingly, in no event later than 95 days after the conclusion of the EQC's June 2013 meeting).

B. Endangered Species Act Claims

1. The National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") 2004 Biological Opinions and accompanying Incidental Take Statements on the effects of EPA's approval of Oregon's temperature water quality standards are set aside and remanded for further consideration consistent with the Court's February 28, 2012 Opinion and Order.
2. EPA shall complete and submit to NMFS and FWS an amended Biological Evaluation regarding its approval of Oregon's temperature water quality standards within nine months of the entry of this Order.
3. NMFS shall complete consultation on the impacts of EPA's approval of Oregon's temperature water quality standards on listed species and designated critical

habitat, including the 14 Evolutionarily Significant Units (“ESUs”) of salmonids at issue in this case, and issue a Biological Opinion, within 14 months of receiving a Biological Evaluation from EPA.¹

4. FWS shall complete consultation on the impacts of EPA’s approval of Oregon’s temperature water quality standards on listed species and designated critical habitat, including the two Distinct Population Segments (“DPSs”) of Bull Trout at issue in this case, and issue a Biological Opinion, within 12 months of receiving a Biological Evaluation from EPA.
5. EPA shall take any final actions necessary on the water quality standards subject to the consultations pursuant to the following schedule: if the Biological Opinions find EPA’s approval of the water quality standards does not jeopardize any of the listed species or result in adverse modification of any listed species’ critical habitat, EPA will act (if necessary) within 60 days of receiving the second of the two Biological Opinions. If either or both Biological Opinions find that EPA’s approval of the water quality standards jeopardizes any of the listed species or results in adverse modification of any listed species’ critical habitat, EPA will act (if necessary) within 120 days of receiving the second of the two Biological Opinions.
6. EPA, NMFS, and FWS have submitted to the Court work plans setting forth the agencies’ current estimates of the steps that must be taken to complete consultation, and the approximate allocation of time for each step. The work

¹ EPA and the Services must engage in formal consultation, resulting in a biological opinion, only where they determine that the action is likely to adversely affect a listed species or critical habitat. See 50 C.F.R. § 402.13 (informal consultation) and 50 C.F.R. § 402.14 (formal consultation).

plans are attached as Exhibits A, B, and C to this Order. Federal Defendants currently anticipate taking the steps set forth in the attached work plans on the schedules set forth therein. However, Federal Defendants' work plans and schedules may change during the course of the consultation. Accordingly, only the final deadlines for completion of EPA's Biological Evaluation and NMFS's and FWS's Biological Opinions shall be enforceable.

7. NMFS and FWS will provide written reports to NWEA, seven and six months after receiving the EPA Biological Evaluation, respectively, describing the status of the consultations, including information regarding the agencies' progress with respect to the individual work items and schedules set forth in their work plans and the deadlines for completion of the consultations provided for in this Order.

C. Preclusion

Nothing in this order shall preclude NWEA's challenging any final agency actions taken pursuant to this Order. Should NWEA choose to challenge any final agency actions taken pursuant to this Order, it shall file any such challenges in a separate action.

D. Extensions of Time

Federal Defendants and the Oregon DEQ have stipulated to the deadlines in this Order based on their current assessment of the agency resources needed and available to meet the deadlines, and for Federal Defendants, based also on their intent to take the steps set forth in the attached work plans on the schedules set forth therein. Therefore, the Federal Defendants and the Oregon DEQ shall make good-faith efforts to comply with the deadlines set forth in this Order. If, however, due to unforeseen circumstances,

such as a change in EPA's action on which it seeks consultation, Federal Defendants or DEQ are unable to meet the deadlines, they may seek reasonable modifications of the deadlines. In such a case, Federal Defendants or DEQ shall notify all other parties of the requested modification and the reasons therefor. The parties will meet and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the request before pursuing relief from the Court. In the event a resolution is reached, the parties shall jointly move the Court to modify this Order. If the parties are unable to agree, Federal Defendants or DEQ may file a motion with this Court.

E. Final Agreement, Scope and Effect of Order, and Subsequent Remedies

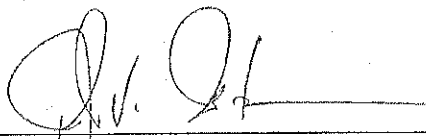
1. This Stipulated Order constitutes the final, complete, and exclusive agreement and understanding among the parties regarding the settlement embodied in this Order.
2. Except as expressly provided in this Stipulated Order, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in the terms of this Consent Decree shall be construed to limit or modify the discretion accorded EPA, FWS, NMFS, or Oregon DEQ under the Clean Water Act or Endangered Species Act, or by general principles of administrative law.
3. No provision in this Stipulated Order shall be interpreted as or constitute a commitment or requirement that EPA, NMFS or FWS 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. No provision of this Order shall be interpreted to constitute a commitment or requirement that EPA obligate or pay funds in

contravention of the Anti-Deficiency Act, 33 U.S.C. § 1341, or any other applicable law or regulation.

4. No provision in this Stipulated Order shall be interpreted as or constitute a commitment or requirement that Oregon DEQ take action in contravention of the Oregon Administrative Procedure Act (ORS 183.310 *et seq.*) or any other state or federal law or regulation, either substantive or procedural. No provision of this Order shall be interpreted to constitute a commitment or requirement that Oregon DEQ pay funds exceeding an amount appropriated by the legislature and available to Oregon DEQ.
5. In the event that EPA, FWS, NMFS or Oregon DEQ fail to meet a deadline set forth in section A or B above, Plaintiffs' first remedy shall be a motion to enforce the terms of this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

IT IS SO ORDERED.

DATED this 7th day of January, 2012³.



John V. Acosta
United States Magistrate Judge

EPA Workplan for Completion of Amended BE for EPA's approval of Oregon's 2003 Temperature Water Quality Standards

Task 1 - Identify and assign staff to accomplish specific tasks for revising the BE. Because EPA staff resources are very limited, staff must be assigned to work on revising the BE after the final order is entered. The first task after entry of the order will be to identify work related to other projects, such as permits and water quality standards, that will be delayed in order to re-assign work to the BE. This process typically takes a month or two because work on other discrete projects often needs to be finished before staff can be re-assigned.

Task 2 - Define the scope of the action. EPA will clarify (in cooperation with the Services) the scope of the proposed action for ESA review.

Task 3 - Identify and evaluate new scientific studies and scientific rationales developed after 2004 related to the proposed action. For example, EPA will need to review new research on temperature effects to salmonids and new research on cold water refugia. EPA also will need to review new temperature data in Oregon. EPA will synthesize this information in a revised effects analysis for the various elements of the proposed action.

Task 4 - Evaluate the science and make effects determinations for newly listed species or critical habitat. EPA will need to evaluate the temperature studies related to newly listed species, such as green sturgeon and smelt, and write up an effects analysis for these species.

Task 5 - Develop any conservation measures. This task will involve coordination with the Services.

Task 6 - Internal review and briefing. The various elements of the amended BE will need to be assembled, reviewed, and edited by an EPA review team. Management will be briefed on the final draft.

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End of Month

Task 1 -----
Task 2 -----
Task 3 -----
Task 4 -----
Task 5 -----
Task 6 -----

NMFS Revised Schedule and Work Plan**Estimated Timeline for Biological Opinion on EPA's Approval of Revised Oregon Water Quality Standards for Temperature and Dissolved Oxygen (On Remand)**

Cumulative Time After Start Date	Task Completed by End of Period
<i>Pre-Consultation/Information Gathering (with Action Agency)</i>	
02.00 months	Compile, review, and synthesize scientific literature and data on status of new species and critical habitat (eulachon, green sturgeon, and critical habitat for ten salmonid species); update status information for species and critical habitat considered in 2004 BiOp (Snake River fall chinook + critical habitat; Snake River spring/summer chinook + critical habitat; Snake River sockeye + critical habitat; Snake River steelhead; Lower Columbia River chinook; Upper Columbia River spring chinook; Upper Willamette River chinook; Columbia River chum; Southern Oregon/Northern California Coasts coho + critical habitat; Oregon Coast coho; Mid Columbia River steelhead; Lower Columbia River steelhead; Upper Willamette River steelhead; Upper Columbia River steelhead).
02.50 months	Compile data and develop GIS products as needed; may include NPDES discharge maps with fish population overlays, 303(d) maps for all relevant Oregon water bodies.
03.50 months	Compile, review and synthesize scientific literature on temperature and dissolved oxygen effects on salmon, steelhead, eulachon, and green sturgeon.
04.00 months	Compile and synthesize data related to assumptions about seasonal thermal patterns of all relevant Oregon water bodies.
04.00 months	Total time for pre-consultation/information gathering
<i>Formal Consultation/Biological Opinion</i>	
00.25 months	Develop section on consultation history and description of proposed action.
00.50 months	Develop section describing action area, with maps as needed.
01.00 months	Develop section on status of the species range-wide and critical habitat at the scale of the designation. May include species maps by population, abundance data, etc.
01.25 months	Develop section on conceptual approach to the analysis of effects.
01.75 months	Develop section on status of environmental baseline, including status of environment, species and critical habitat in the action area.
02.75 months	Analyze effects on the environment of narrative and numeric criteria, antidegradation provisions, and beneficial use designations.
04.50 months	Develop analysis of effects on individual fish of each ESA-listed species from changes to the environment, which may include behavior, physiology, growth, disease incidence, distribution, and abundance, as applicable.
05.50 months	Develop analysis of effects on critical habitat.
06.00 months	Develop analysis of cumulative effects.
06.75 months	Develop integration and synthesis of effects, including effect on populations and likelihood of jeopardy and adverse modification of critical habitat.
07.25 months	Develop conclusions for each species and its critical habitat, where designated
08.25 months	Develop reasonable and prudent alternative(s) and discuss with action agency if needed.
08.75 months	Develop amount or extent of take.
09.25 months	Develop reasonable and prudent measures and terms and conditions.
09.50 months	Develop literature cited section, finalize internal draft biological opinion; begin internal review process, including NW Fisheries Science Center review.
10.25 months	First level of internal review and Science Center review complete; begin revisions of draft

	biological opinion based on comments.
10.75 months	Complete initial revisions; begin second level of internal review (QA/QC).
11.25 months	Second level of internal review complete; begin revisions of draft biological opinion based on comments.
11.75 months	Complete revisions based on second level review; begin legal review process.
12.25 months	Legal review complete; begin revisions of draft biological opinion based on comments.
12.75 months	Complete revisions of draft biological opinion based on legal review and provide to EPA for review.
13.00 months	EPA comments received; begin revisions to document as appropriate.
13.25 months	Complete revisions based on EPA comments; begin final internal and legal reviews.
14.00 months	Issue final document.
14.00 months	Total time for formal consultation/writing biological opinion

USFWS Schedule and Work Plan**Estimated Timeline for Biological Opinion on EPA's Approval of Revised Oregon Water Quality Standards for Temperature and Dissolved Oxygen (On Remand)**

Cumulative Time After Start Date	Task Completed by End of Period
<i>Pre-Consultation/Information Gathering (with EPA)</i>	
04.00 months	Assist EPA with development of their biological evaluation (BE), in particular relevant information since completion of the 2004 opinion that would inform the <i>status of the species, environmental baseline</i> and <i>effects</i> sections of the new BE (e.g., new listings or changes to listing status', new critical habitat designations).
04.00 months	Total time for assisting EPA in BE development
<i>Formal Consultation/Biological Opinion</i>	
00.25 months	Gather all relevant information that has become available since 2004 including, but not limited to, 5-year reviews, changes to listing status' and new critical habitat designations for listed aquatic species in Oregon.
00.50 months	Develop section on consultation history and description of proposed action.
00.75 months	Develop section describing action area, with maps as needed.
01.25 months	Develop section on status of the species range-wide and critical habitat at the scale of the designation. May include species maps by population, abundance data, etc.
01.75 months	Develop section on conceptual approach to the analysis of effects (consultation framework)
02.75 months	Develop section on status of environmental baseline, including status of environment, species and critical habitat in the action area.
03.75 months	Develop analysis of effects on the seven federally listed fish species in Oregon under the jurisdiction of the FWS. For bull trout analyze separately the effect of the temperature standard on two different DPS's of bull trout in Oregon (Columbia River and Klamath) to comply with the preamble of the 1998 bull trout listing rule in which the FWS stated that it would continue to treat the five populations of bull trout as distinct population segments for purposes of consultation and recovery.
04.00 months	Develop analysis of effects on critical habitat.
04.50 months	Develop analysis of cumulative effects.
05.00 months	Develop integration and synthesis of effects, including effect on populations and likelihood of jeopardy and adverse modification of critical habitat.
05.25 months	Develop conclusions for each species and its critical habitat, where designated
06.25 months	Develop reasonable and prudent alternative(s) or reasonable and prudent measure(s) and associated terms and conditions.
07.00 months	Develop amount or extent of take.
07.50 months	Develop literature cited section, finalize internal draft biological opinion; begin internal review process.
08.25 months	First level of internal review complete; begin revisions of draft biological opinion based on comments.
08.75 months	Complete initial revisions; begin second level of internal review.
09.25 months	Second level of internal review complete; begin revisions of draft biological opinion based on comments.

09.75 months	Complete revisions based on second level review; begin legal review process.
10.25 months	Legal review complete; begin revisions of draft biological opinion based on comments.
10.50 months	Complete revisions of draft biological opinion based on legal review and provide to EPA for review.
11.00 months	EPA comments received; begin revisions to document as appropriate.
11.25 months	Complete revisions based on EPA comments; begin final internal and legal reviews.
12.00 months	Issue final document.
12.00 months	Total time for formal consultation/writing biological opinion