



James N. Saul  
Clinical Professor & Staff Attorney

Earthrise Law Center at Lewis & Clark Law School  
10015 SW Terwilliger Blvd.  
Portland, OR 97219-7799  
*phone* 503-768-6929  
*fax* 503-768-6642  
jsaul@lclark.edu  
earthriselaw.org

May 24, 2018

**Via Certified Mail, Electronic Return Receipt Requested**

Administrator Scott Pruitt  
U.S. Environmental Protection Agency  
Office of the Administrator, 1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Secretary Ryan Zinke  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

Regional Administrator Chris Hladick  
U.S. Environmental Protection Agency  
Region 10  
Regional Administrator's Office, RA-210  
1200 Sixth Avenue  
Seattle, WA 98101

Regional Director Robyn Thorson  
U.S. Fish and Wildlife Service  
Pacific Region  
911 NE 11th Avenue  
Portland, OR 97232

**RE: Sixty Day Notice of Intent to Sue EPA for Violations of Section 7 of the Endangered Species Act for Failure to Ensure Against Jeopardy To Threatened Bull Trout, Failure to Consult, and Failure to Reinitiate Consultation**

Dear Federal Officials,

This letter serves as sixty day notice on behalf of Northwest Environmental Advocates ("NWEA") of its intent to sue the United States Environmental Protection Agency ("EPA"), pursuant to section 11(g)(1)(A) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(1)(A), for violations of the ESA.

As explained in detail below, NWEA intends to sue EPA for its January 31, 2013 approval of Oregon's revised aquatic life water quality criteria for acute and chronic

zinc and its April 11, 2014 approval of Oregon’s revised aquatic life water quality criteria for chronic arsenic and chronic selenium because the approvals violated the ESA’s requirement that federal agencies ensure that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2).

NWEA also intends to sue EPA for failing to reinitiate consultation on EPA’s approval of the acute and chronic zinc and chronic arsenic criteria in light of “new information [that] reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b). Lastly, NWEA intends to sue EPA for failing to consult on Oregon’s aquatic life criterion for chronic selenium or, in the alternative, failing to reinitiate consultation on the criterion after Oregon modified the criterion in light of EPA’s disapproval of the originally proposed criterion.

NWEA is a non-profit environmental organization founded in 1969 and based in Portland, Oregon, with members located throughout the country. NWEA’s mission is to work through advocacy and education to protect and restore water and air quality, wetlands, and wildlife habitat. NWEA has spent decades working to improve water quality and water quality programs both in the Northwest and on a national level. NWEA and its members are harmed by EPA’s January 31, 2013 and April 11, 2014 approvals of Oregon’s toxics water quality criteria for acute and chronic zinc, chronic selenium, and chronic arsenic, by EPA’s failure to reinitiate consultation on Oregon’s acute and chronic zinc and chronic arsenic criteria, and by EPA’s failure to consult on, or failure to reinitiate consultation on, Oregon’s criterion for chronic selenium.

## **I. LEGAL BACKGROUND**

### **A. The Endangered Species Act**

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species . . . .” 16 U.S.C. §§ 1531–1544; 16 U.S.C. § 1531(b). The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior, who have delegated this responsibility to FWS and the National Marine Fisheries Service (“NMFS” and collectively “the Services”), respectively. 50 C.F.R. § 402.01(b).

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “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 Act are no longer necessary.” 16 U.S.C. § 1532(3).

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with the Services 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 adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). The U.S. Supreme Court noted that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *TVA v. Hill*, 437 U.S. 153, 184 (1978).

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is broadly defined in the ESA’s implementing regulations to include “all activities . . . of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02. At the completion of consultation, FWS or NMFS issues a BiOp that determines whether the agency action is likely to jeopardize the species or adversely affect its critical habitat. The Services must use the “best scientific and commercial data available” in complying with their section 7 obligations. 16 U.S.C. § 1536(a)(2). If jeopardy, or adverse modification or destruction of critical habitat, is found, then the BiOp must specify reasonable and prudent alternatives (“RPAs”) that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b). Where an action does not jeopardize a listed species or adversely modify or destroy critical habitat, the Services must provide an incidental take statement (“ITS”) and must also provide reasonable and prudent measures (“RPMs”) to minimize the impact of any taking of listed species. 50 C.F.R. § 402.14.

Even after consultation has been completed, under certain circumstances the federal agency or the relevant Service (either FWS or NMFS) must reinstate consultation. Among other circumstances, the agency or Service must reinstate formal consultation if “discretionary Federal involvement or control over the action has been

retained or is authorized by law and . . . (b) [i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered” or “(c) [i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion[.]” 50 C.F.R. § 402.16.

## B. The Clean Water Act

The objective of the Clean Water Act (“CWA”) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA sets a “national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(2).

Under section 303(c)(3), states must set water quality standards, and then must review them every three years, and consider whether to revise their standards. 33 U.S.C. § 1313(c)(3). Water quality standards under the CWA must protect all existing uses in a waterbody. States must submit all new or revised water quality standards to EPA for review. *Id.* EPA is required to review these changes to ensure revisions to designated water uses are consistent with the CWA and that new or revised criteria protect the designated uses. If EPA disapproves a state’s water quality standards, EPA must specify “the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the State standard is not in compliance with such requirements.” 40 C.F.R. § 131.21. If the state fails to adopt the changes within 90 days, then EPA “shall promptly propose and promulgate such standard.” *Id.*

Section 303(c)(2)(B) requires states to adopt water quality criteria for toxic pollutants listed pursuant to section 307(a)(1) for which EPA has published criteria under 304(a) where the discharge or presence of these toxics could reasonably be expected to interfere with the designated uses adopted by the state. When formulating such standards, the State should establish numerical values based on (1) the 304(a) Guidance; (2) the 304(a) guidance modified to reflect site-specific conditions; or (3) other scientifically defensible methods. 40 C.F.R. § 131.11(b).

## II. FACTUAL BACKGROUND

On July 8, 2004, the Oregon Department of Environmental Quality (“DEQ”) submitted revised water quality standards for toxic pollutants to EPA for approval.<sup>1</sup> The revised standards included, among other revisions, changes to the aquatic life criteria for the toxic pollutants arsenic, selenium, and zinc. On July 30, 2012, FWS issued a BiOp for the revisions, finding no jeopardy to any species, including threatened bull trout.<sup>2</sup> On January 31, 2013, EPA approved Oregon’s revisions to the water quality criteria for acute and chronic zinc, but disapproved the revisions to the criterion for chronic selenium and took no action on the chronic arsenic criterion.<sup>3</sup> Oregon later submitted to EPA a more stringent criterion for chronic selenium and re-submitted the same chronic arsenic criterion.<sup>4</sup> EPA approved these criteria on April 11, 2014.<sup>5</sup>

On June 25, 2015, FWS issued a BiOp for Idaho’s revisions to water quality standards for toxic pollutants, which, like Oregon, included revisions to Idaho’s criteria for chronic arsenic, chronic selenium, and acute and chronic zinc.<sup>6</sup> Idaho’s proposed criteria for chronic arsenic, chronic selenium, and acute and chronic zinc were identical to or stricter than those considered by FWS in its 2012 Oregon BiOp. However, in

---

<sup>1</sup> Oregon amended its original submission on April 23, 2007 and July 21, 2011.

<sup>2</sup> See USFWS, Biological and Conference Opinion for USEPA’s Proposed Approval of Oregon Water Quality Criteria for Toxics July 30, 2012), TAILS no. 13420-2009-F-

<sup>2</sup> See USFWS, Biological and Conference Opinion for USEPA’s Proposed Approval of Oregon Water Quality Criteria for Toxics July 30, 2012), TAILS no. 13420-2009-F-0011 (hereafter “OR FWS BiOp”).

<sup>3</sup> See USEPA, Letter from Daniel D. Opalski, Director, Office of Water and Watersheds, to Greg Aldrich, Administrator, Water Quality Division, Oregon Department of Environmental Quality (Jan. 31, 2013).

<sup>4</sup> EPA could not take action on the arsenic criterion because DEQ had inadvertently removed the criteria as part of its 2007 revisions to Oregon’s water quality standards.

<sup>5</sup> See USEPA, Letter from Daniel D. Opalski, Director, Office of Water and Watersheds, to Wendy Wiles, Administrator, Environmental Solutions Division, Oregon Department of Environmental Quality (Apr. 11, 2014) (including attached Technical Support Document).

<sup>6</sup> See USFWS, Biological Opinion for the Idaho Water Quality Standards for Numeric Water Quality Criteria for Toxic Pollutants (June 25, 2015), 01EIF200-2014-F-0233 (hereafter “ID FWS BiOp”).

contrast to its conclusions in the Oregon BiOp, in Idaho FWS found that the proposed standards were likely to jeopardize the continued existence of numerous species, including threatened bull trout.

### III. EPA'S FAILURE TO ENSURE AGAINST JEOPARDY TO THREATENED BULL TROUT IN APPROVING OREGON'S TOXICS WATER QUALITY CRITERIA

ESA section 7(a)(2) imposes a strict substantive duty on federal agencies to "insure" that their actions do not cause jeopardy to endangered or threatened species. 16 U.S.C. § 1536(a)(2). "Arbitrarily and capriciously relying on a faulty Biological Opinion violates this duty." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012) (quoting *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010); see also *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) ("A federal agency cannot abrogate its responsibility to ensure that its action will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary and capricious"). An agency cannot meet its obligations under section 7 by relying on a BiOp that is legally flawed or by failing to discuss information that would undercut the BiOp's conclusions. *Ctr. for Biological Diversity*, 698 F.3d at 1127–28.

Here, FWS' BiOp was legally flawed, and FWS failed to discuss information that would undercut its conclusions regarding the effects of the proposed toxics criteria on bull trout. In comparing FWS' Oregon 2012 BiOp with FWS' Idaho 2015 BiOp, it is clear that the Oregon BiOp is arbitrary and capricious. Idaho's proposed criteria for chronic arsenic, chronic selenium, and acute and chronic zinc were identical to or stricter than those considered by FWS in its 2012 Oregon BiOp. For these four criteria, FWS reached opposite conclusions related to bull trout. FWS found no jeopardy to bull trout resulting from at least these four toxics criteria in Oregon. Three years later FWS determined that the same or stricter criteria would jeopardize bull trout in Idaho.

In many instances, FWS' conclusions in its Oregon BiOp contradict key areas of scientific consensus identified by FWS in its Idaho BiOp. For example, in Oregon FWS relied on bluegill data and used bluegill as a surrogate for bull trout when considering the proposed chronic criterion for arsenic because there was "insufficient chronic toxicity data for bull trout or any more closely related salmonid." OR FWS BiOp at 189. But in its Idaho BiOp three years later, FWS analyzed this criterion's effects on bull trout in Idaho and relied on rainbow, cutthroat, and bull trout data to support its

conclusion that “at environmentally relevant concentrations, arsenic poses significant health risks to salmonids, including reduced growth and survival, organ damage, and behavioral modifications.” ID FWS BiOp at 143. The studies that FWS relied on to reach this conclusion predate FWS’ 2012 Oregon BiOp. *Id.* at 143–44. FWS’ conclusions in Oregon regarding growth effects (based on bluegill data) directly contradict its conclusions in Idaho (based on rainbow, cutthroat, and bull trout data) that the proposed chronic criterion for arsenic is likely to cause adverse effects on bull trout in the form of reduced growth and tissue damage.

Additionally, unlike in its Oregon BiOp, in its Idaho BiOp FWS recognized that the effects of zinc on salmonids depend on the hardness of the water. Therefore, FWS’ Idaho BiOp adjusted the acute and chronic zinc toxicity data to better estimate the actual effects in Idaho, based on the hardness of its waters. *See id.* at 202–3. FWS in Idaho also considered the effects of toxics water quality criteria on bull trout prey species, which FWS had ignored in its Oregon BiOp three years earlier. *See e.g., id.* at 204.

Because EPA relied on FWS’ faulty and arbitrary and capricious BiOp to approve Oregon’s water quality criteria for chronic arsenic, acute and chronic zinc, and chronic selenium—which are intended to protect aquatic life including bull trout—EPA failed to ensure that its January 31, 2013 and April 11, 2014 approval actions are not likely to jeopardize the survival of threatened bull trout or result in the destruction or adverse modification of the species’ critical habitat, in violation of EPA’s mandatory obligation under the ESA. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A).

#### **IV. EPA’S FAILURE TO REINITIATE CONSULTATION ON OREGON’S ARSENIC AND ZINC WATER QUALITY CRITERIA**

NWEA also intends to sue EPA for failing to reinitiate consultation on Oregon’s chronic arsenic and acute and chronic zinc criteria. As noted above, EPA must reinitiate formal consultation if “discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . [i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b). Here, EPA retains or is authorized by law to have discretionary involvement or control over Oregon’s toxics water quality criteria. *See e.g.,* 33 U.S.C. § 1313(c)(4)(B) (CWA provision requiring EPA to set forth new or revised water quality standards when necessary); 40 C.F.R. §§ 131.21, 131.5, 131.22 (CWA implementing regulations); OR FWS BiOp at 360 (reinitiation

statement). And there is new information that reveals potential effects of Oregon's chronic arsenic and acute and chronic zinc criteria on bull trout or its critical habitat in a manner or to an extent not previously considered. This new information includes FWS' 2015 Idaho BiOp finding that the same criteria that EPA approved in Oregon will jeopardize bull trout in Idaho, and the studies and data related to rainbow, cutthroat, and bull trout that that existed at the time of, but were not considered in, the Oregon BiOp. Therefore, the ESA requires EPA to reinitiate consultation regarding the effects of Oregon's chronic arsenic and acute and chronic zinc criteria on threatened bull trout. Because EPA has not reinitiated such consultation, EPA is in violation of the ESA.

**V. EPA's FAILURE TO CONSULT ON OR, IN THE ALTERNATIVE, FAILURE TO REINITIATE CONSULTATION ON, OREGON'S CHRONIC SELENIUM WATER QUALITY CRITERION**

Lastly, NWEA intends to sue EPA for failing to consult on Oregon's aquatic life water quality criterion for chronic selenium or, in the alternative, failing to reinitiate consultation on the criterion. As noted above, on January 31, 2013, EPA disapproved Oregon's proposed chronic selenium criterion that FWS had considered in the 2012 Oregon BiOp. In light of this disapproval, Oregon proposed a modified criterion for chronic selenium, which EPA approved on April 11, 2014. EPA did not engage in ESA consultation on this new, different criterion, in violation of ESA section 7, 16 U.S.C. § 1536.

In the alternative, NWEA intends to sue EPA for failing to reinitiate consultation on the modified chronic selenium criterion. The ESA requires reinitiation of prior consultation if "discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . [i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion." *See* 50 C.F.R. § 402.16(c). Again, here, EPA retains or is authorized by law to have discretionary involvement or control over Oregon's toxics water quality criteria. *See e.g.*, 33 U.S.C. § 1313(c)(4)(B) (CWA provision requiring EPA to set forth new or revised water quality standards when necessary); 40 C.F.R. §§ 131.21, 131.5, 131.22 (CWA implementing regulations); OR FWS BiOp at 360 (reinitiation statement). While EPA consulted on the originally proposed chronic selenium criterion, EPA did not consult on the modified (and subsequently approved) criterion. Therefore, EPA violated the ESA by failing to reinitiate consultation on the revised chronic selenium criterion.



## VI. CONCLUSION

If EPA does not come into compliance with the Endangered Species Act, upon expiration of the 60 days NWEA intends to file suit against EPA pursuant to the ESA. NWEA anticipates filing suit in the United States District Court for the District of Oregon, requesting declaratory and injunctive relief. During the sixty day notice period, NWEA will be available to discuss effective remedies and actions that will assure the agencies' future compliance with the ESA. In addition, if EPA has any questions regarding this letter, please contact the undersigned counsel for NWEA.

Sincerely,



James N. Saul  
Allison LaPlante  
Lia Comerford  
Earthrise Law Center at  
Lewis & Clark Law School  
10015 SW Terwilliger Blvd.  
Portland, OR 97219

*Counsel for NWEA*

***Copies sent by certified mail to:***

Director Richard Whitman  
Oregon Dept. of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232-4100