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October 31, 2022

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

RECEIVED ON:

NOV 07 2022

EPA Region 10
Office of the Regional Administrator

Casey Sixkiller, Regional Administrator
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

**Re: Notice of Intent to Sue for Failure to Perform Mandatory Duties Under
Section 303(d)(2) of the Clean Water Act Pertaining to the "Clean Water Act
Assurances" of the Washington State Forest Practices Habitat Conservation Plan**

Dear Messrs. Regan and Sixkiller:

This letter provides notice that Northwest Environmental Advocates ("NWEA") intends to file suit pursuant to section 505(a)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(2), against the U.S. Environmental Protection Agency ("EPA"), the EPA Administrator, and the EPA Regional Administrator for Region 10 for violating their mandatory duties under CWA section 303(d)(2), 33 U.S.C. § 1313(d)(2), following Washington's constructive submission of the total maximum daily loads ("TMDLs") identified below.

I. Legal Background

Section 303(d)(2) of the CWA requires each state to prepare and "submit to the Administrator from time to time" a list of "waters identified and loads established under" subsections 303(d)(1)(A)-(D). 33 U.S.C. § 1313(d)(2). Waters identified under section 303(d)(1)(A) are those "for which the effluent limitations required by" sections 303(b)(1)(A) and (B) of the CWA "are not stringent enough to implement any water quality standard applicable to such waters." *Id.* § 1313(d)(1)(A). This list of waters is commonly known as a "303(d) list" or "impaired waters list."

Along with its 303(d) list, states must prepare and submit to the Administrator, in accordance with the state's priority ranking, "the total maximum daily load" (TMDL) of pollutants contributing to the impairments of such waters, "established at a level necessary to implement the applicable water quality standard with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C); *see also* 40 C.F.R. § 130.7(c)-(d). Once a state submits a TMDL, EPA must "either approve or disapprove" it "not later than thirty days after the date of submission[.]" 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. § 130.7(d)(2). EPA's obligation to review and either approve or disapprove a state-submitted TMDL is a non-discretionary duty, *see San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002), and the district courts have jurisdiction to "order the Administrator to perform such act or duty" under the CWA's citizen suit provision. 33 U.S.C. § 1365(a)(2).

The Ninth Circuit has recognized the "constructive submission" theory, holding that EPA has a non-discretionary duty under Section 303(d)(2) to develop TMDLs itself where a state has "clearly and unambiguously decided not to submit any TMDLs." *San Francisco BayKeeper*, 297 F.3d at 883 (citing *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001)). Although the *San Francisco BayKeeper* court deferred making "a broad, generic determination of the point in time at which a state's inaction may be deemed a constructive submission," it suggested that the constructive submission theory may apply where a state has failed to "establish[] a schedule for completing its remaining TMDLs." *Id.* at 883. Thus, "it would be absurd . . . to hold that a state could perpetually avoid" its TMDL obligations "under the guise of prioritization" because "the CWA does not give the EPA authority to approve an indefinite delay." *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at *7, 10 (W.D. Wash. Mar. 16, 2015); *see also Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1379 (W.D. Wash. 1992), *aff'd sub nom. Alaska Ctr. for Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994) (declaring it is the court's responsibility "to ensure prompt and attentive adherence to the mandate of the CWA" that "TMDLs were to be established for all waters designated as water quality limited segments")(internal citations omitted).

II. EPA's Violations of its Mandatory Duty to either Approve or Disapprove Washington's Constructively Submitted TMDLs under CWA § 303(d)(2)

A. A 10-Year Abeyance on TMDL Development was Established in 1999

In 1999, the Washington State Legislature passed the Salmon Recovery Funding Act (Engrossed Senate House Bill 5595) that identified forest practices as a critical component for salmon recovery. Through the Act, the Legislature recognized a report known as the Forests and Fish Report ("FFR") as being responsive to its policy directive for a collaborative, incentive-based approach to support salmon recovery; ESA coverage and regulatory certainty being key incentives of implementation of the FFR. Also in 1999, the Washington State Legislature passed the Forest Practices Salmon Recovery Act (Engrossed Senate House Bill 2091), which directed the Washington Forest Practices Board to adopt new forest practices rules, encouraging the Forest Practices Board to follow the recommendations of the FFR. The Final State Environmental Impact Statement, entitled Alternatives for Forest Practices Rules for Aquatic and Riparian Resources, was published in April 2001. The Forest Practices Board adopted new

permanent forest practices rules in 2001 based on the FFR. After 2001, the State worked with the National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service ("USFWS") to develop what has become the Forest Practices Habitat Conservation Plan ("FPHCP"), under Section 10(a)(1)(B) of the Endangered Species Act ("ESA"), based on the forest practices rules adopted in 2001. The State submitted a formal application to the Services for incidental take permits from each agency on February 9, 2005. Subsequently, the National Marine Fisheries Service and U.S. Fish and Wildlife Service engaged in ESA section 7(a) consultation on the FPHCP.¹

Part of the FPHCP agreement includes Schedule M-2, "Clean Water Act Section 303 Assurances," ("Assurances"), an unsigned copy of which is attached hereto. The Assurances state that:

EPA Region 10 and Ecology are co-stewards of the Clean Water Act. As an agreement appears to be feasible, EPA and Ecology are putting forward what have been come to be known as the CWA assurances. These assurances spell out the terms and conditions of how Section 303(d) will be applied to lands subject to the Report and its recommendations.²

* * *

EPA and Ecology acknowledge that the Report, when implemented, will significantly advance forest practices in the State of Washington, will improve water quality in the short term, and is anticipated to meet water quality standards in the longer term. The urgency of developing TMDLs for water bodies impaired by current forest practices will be reduced significantly by this Report.³

* * *

EPA and Ecology have confidence that the Report, when signed and implemented, provides the quickest and most efficient means for achieving environmental goals and State of Washington water quality standards. Accordingly, TMDLs for waters impaired by sediment, habitat degradation, flow, turbidity or temperature caused by forest practices covered in the Report and recommendations (private and state lands subject to Board regulation) affecting a current or future 303(d) listed water body, become a lower priority for EPA and Ecology. Therefore, these TMDLs need not be prepared prior to July 1, 2009 (note exceptions below). Ecology will submit its year 2000 section 303(d) list and priorities consistent with this provision. EPA will review and approve the priorities as expressed here subject to notice and comment. EPA and Ecology will not add new TMDL CWA requirements to current or future 303(d) listed water bodies subject to the FPB regulations prior to 2009,

¹ See NMFS, *Endangered Species Act Section 7 Consultation Biological Opinion and Section 10 Statement of Findings And Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation Washington State Forest Practices Habitat Conservation Plan* (June 5, 2006) at 2.

² Schedule M-2, Clean Water Act Section 303 Assurances, at 1.

³ *Id.* at 2.

except through the agreed upon adaptive management program set out in the Report, or made necessary by changes to the CWA or CWA implementing regulations.⁴

* * *

If new regulations do not support alternatives to TMDLs, EPA and Ecology, with voluntary participation of landowners at their option, will develop TMDLs on an appropriate scale beginning in 2009 and completed by 2013. Landowners may request a TMDL from Ecology for their holdings prior to 2009. Where EPA and Ecology have approved a TMDL for forested lands subject to the FPB regulations, and the prescriptions in the TMDL implementation plan differ from FPB regulations, for the purposes of the Clean Water Act, the prescriptions should qualify as an alternate plan.⁵

* * *

Any one of the following items may cause withdrawal or modification of the assurances: . . . 5. Court orders, changes to the CWA, state or federal regulatory changes that cannot be otherwise addressed.

Prior to withdrawal of these assurances, EPA and Ecology will advise the Forest Practices Board and the cooperators of the concerns. If modification of the Report would preclude the necessity for complete withdrawal of the assurances, a reasonable time period will be allowed for such modifications. Termination of the assurances will be explained in writing.⁶

* * *

While EPA will primarily look to Ecology and DNR to monitor progress and compliance with the Report, EPA will participate in periodic progress reviews to ensure that the assurances remain appropriate. EPA will pay particular attention to implementation of baseline rules, adaptive management, retention of funding for state regulatory agencies, enforcement, and monitoring results including water quality trends.⁷

As the FPHCP states pertaining to the Assurances,

One of the purposes of the Forest Practices Act is to “achieve compliance with all applicable requirements of Federal and state law with respect to non-point sources of water pollution from forest practices” (RCW 76.09.010(2)(g)). The legislature intended that the forest practices rules consistent with the FFR would fully satisfy

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 5–6.

⁷ *Id.* at 6.

the requirements of the CWA with respect to non-point sources of pollution attributable to forest practices (RCW 77.85.180(2)).⁸

The Assurances have been incorporated into Washington code, which asserts that logging practice rules “will not be subject to additional regulations or restrictions for aquatic resources except as provided in the forests and fish report.” RCW 77.85.190(1).

B. Post-2009 Continuation of the Abeyance on TMDL Development

Despite the assumption stated in the FPHCP that it would fully satisfy the requirements of the CWA with respect to non-point sources of pollution attributable to forest practices in the 10-year period established by the Assurances, such was not the case. In 2009, when the Assurances expired and Ecology determined that the original conditions upon which they had been issued had not been met in numerous regards, Ecology “conditionally extend[ed] the CWA assurances.”⁹ Numerous conditions were set out for retaining the assurances for another 10 years.¹⁰

After the expiration of the 20 years since the Assurances were first developed, Ecology issued yet another extension for two years based on Ecology’s determination that the extension “will provide ample time for Board Members to reach an agreement on the revision of the Type N rules, to protect temperature better.”¹¹

Two years later, in 2021, Ecology granted yet another extension to the Assurances noting that

Twenty-two years have passed since the adoption of the 1999 Forests and Fish Report. During the intervening years, the Department of Ecology (Ecology), with the support of the U.S. Environmental Protection Agency (EPA), has maintained the commitment to provide the Clean Water Act Assurances (Assurances) for forest practices in Washington State. The Assurances provided promised state and federal guarantees covering both the Clean Water Act as well as the Endangered Species

⁸ Forest Practices Habitat Conservation Plan at 13.

⁹ See Letter from Jay Manning, Director Department of Ecology, to Forest Practices Board Members, Re: *Forests and Fish Program – Completion of Clean Water Act Review* (Oct. 9, 2009), attaching Ecology, *2009 Clean Water Act Assurances Review of Washington’s Forest Practices Program, Examining the effectiveness of Washington’s forest practices program in bringing waters into compliance with state water quality standards and the federal Clean Water Act* (July 15, 2009).

¹⁰ See *id.*; see also *id.* at 14 (including a research schedule ending in 2018); Memorandum from Mark Hicks, Ecology, to Forest Practices Board, Re: *Clean Water Act Milestone Update* (April 22, 2019) at 2 (“Ecology conditionally extended the assurances for another ten years”).

¹¹ See Letter from Maia Bellon, Director of Ecology, to Forest Practices Board, Re: *Forest and Fish Program – End of 10 year Clean Water Extension Period* (Dec. 2, 2019) at 2.

Act, to serve as a predictable and consistent regulatory framework for the forest industry.¹²

C. The Clean Water Act Assurances Constitute a Constructive Submission of No TMDLs for Impaired Waters in Forest Lands

It has been understood from the outset of the Assurances that temperature pollution caused by inadequate logging practices for at least Type N (non fish-bearing) streams cause violations of water quality standards. After significant delay, studies from Washington's adaptive management program conclusively demonstrated that current logging practices do, in fact, cause such violations of Type N streams. *See, e.g., McIntyre et al., Effectiveness of Experimental Riparian Buffers on Perennial Non-fish-bearing Streams on Competent Lithologies in Western Washington*, CMER #18-100 (Sept. 2018). Violations of water quality standards, in turn, threaten what should be a high priority under the Clean Water Act: protecting and restoring water quality for threatened and endangered species as well as aquatic species, such as amphibians, whose populations are dwindling and making them candidates for ESA listing. The indefinite postponement of TMDLs to address such high priority impaired waters, documented by a 23-year agreement between Ecology and EPA to not develop TMDLs for waters in private forest lands, constitutes a constructive submission of no TMDLs.

III. Persons Giving Notice and Representing Attorneys

The name, address, and telephone number of the parties giving notice are:

Northwest Environmental Advocates
P.O. Box 12187
Portland, OR 97212-0187
(503) 295-0490

However, you are requested to contact NWEA through its undersigned attorneys as follows:

James N. Saul
Clinical Professor and Staff Attorney
Earthrise Law Center at
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6929
jsaul@lclark.edu

V. Conclusion

NWEA would prefer to resolve this dispute short of litigation and is willing to discuss a

¹² Letter from Laura Watson, Director of Ecology, to Forest Practices Board Members (Dec. 3, 2021) at 1.

settlement framework that would resolve the claims alleged herein to the mutual benefit of all parties. If EPA is interested in discussing settlement, we encourage EPA to contact the undersigned counsel immediately. Unless EPA has taken final action that, in NWEA's view, avoids the need for litigation on the claims alleged herein, NWEA intends to file suit against EPA pursuant to the CWA's citizen suit provision, 33 U.S.C. § 1365(a)(2), in the U.S. District Court for the Western District of Washington. If suit is filed, NWEA will seek an order compelling EPA to perform its nondiscretionary duty by taking final action to "establish [TMDLs] . . . for such waters as he determines necessary to implement the water quality standards applicable to such waters[.]" 33 U.S.C. § 1313(d)(2). NWEA will also seek an order awarding NWEA its litigation costs pursuant to 33 U.S.C. § 1365(d) and other appropriate remedies allowed by law.

Sincerely,



James N. Saul
Earthrise Law Center

cc: Merrick B. Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Laura Watson, Director
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Schedule M-2

Clean Water Act Section 303 Assurances

Background:

Forest practices on private and state-owned lands in the State of Washington are regulated by the Forest Practices Board. The Department of Ecology (Ecology) and the Forest Practices Board (FPB) jointly adopt rules, and enforcement is performed by the Department of Natural Resources (DNR). For over a decade, an advisory group known as Timber, Fish, and Wildlife (TFW) attempted to resolve disputes and put forward a consensus position which would avoid prolonged litigation and protect resources. TFW's recommendations are advisory only.

In 1997 there was a recognition that present and future listings of salmonids under the Endangered Species Act (ESA) required a new look at forest practices. TFW resolved to negotiate a new set of forest practices, and invited a federal caucus consisting of the Environmental Protection Agency (EPA), the US Fish and Wildlife Service (USFW), US Forest Service (USFS) and National Marine Fisheries Service (NMFS) to the table. The goals of TFW were to meet the Clean Water Act (CWA), the ESA, and return salmon to harvestable levels.

TFW is made up of six caucuses:

- The forest products industry, including small landowners
- Counties
- Selected state agencies
- Tribes
- Environmental groups
- Federal agencies

Negotiations continued for over a year, at which time the environmental caucus withdrew from the negotiations and insisted that if negotiations were to continue the process could not be termed TFW. The negotiations then became known as the Forestry Module.

EPA Region 10 and Ecology are co-stewards of the Clean Water Act. As an agreement appears to be feasible, EPA and Ecology are putting forward what have been come to be known as the CWA assurances. These assurances spell out the terms and conditions of how Section 303(d) will be applied to lands subject to the Report and its recommendations. EPA and Ecology make no assurances regarding Tribal lands or jurisdiction.

Attainment of water quality standards remains the goal of the agencies, and we will expect steady progress in improving water quality trends while acknowledging that meeting the standards in some cases will take many years. It is also an objective of all agencies that the CWA

and the ESA can and should act in concert. To that end, we believe that the assurances offered here are or can be made to be consistent with the ESA.

Ecology and EPA agree that forest practices in the State of Washington need considerable improvement to meet CWA concerns. The comprehensive and largely consensus-based Forests and Fish Report will result in substantial improvement in forest practices affecting water quality, and particularly salmon habitat protection. However, even if all forested lands meet water quality standards, there would still remain a large number of water bodies impaired by urban pollution, agricultural practices, hydro-power, mining, and some point source contribution. Our support of the Report addressing forest practices signals other sectors that we hold similar expectations for them and will provide similar assurances if our expectations are met.

These assurances are made with the knowledge that EPA's national Total Maximum Daily Load (TMDL) regulations are being revised and that we cannot prejudge the public process and what those regulations may say. These assurance are also made with the knowledge that many future decisions need to be made in state and federal CWA programs that are subject to notice and comment processes called for in the Administrative Procedures Act.

Structure:

These assurances are a stand-alone document and an appendix to the Forests and Fish Report which will be submitted to the Forest Practices Board for consideration. The Report referred to here is the document, approved by the authors, known as the Forests and Fish Report. This Report contains numerous appendices including the riparian strategy, roads, enforcement, adaptive management, assurances and other components.

Basis for Assurances:

EPA and Ecology acknowledge that the Report, when implemented, will significantly advance forest practices in the State of Washington, will improve water quality in the short term, and is anticipated to meet water quality standards in the longer term. The urgency of developing TMDLs for water bodies impaired by current forest practices will be reduced significantly by this Report. The Report anticipates a package of state regulations, guidance, funding, and restoration programs, plus the anticipated federal ESA 4(d) rule for aquatic species listed in the Report leading to an HCP. The State forest practice regulations when promulgated and the authority for ESA sanctions, taken together provide a basis of reasonable assurance of implementation of this Report and its recommendations.

Ten years is a reasonable minimum time frame for this initial exercise of priority-setting discretion (described below) based on the overall protectiveness of the Report, and is consistent with the schedule for TMDLs which is part of the Washington TMDL settlement agreement. Ten years will provide time to test the assumptions underlying the proposed regulatory provisions and the effectiveness of adaptive management. Ten years should be a reasonable time frame to determine some initial water quality trends resulting from the changes to forest practices.

We base this judgement on an analysis of the Report and its recommendations, and highlight the following provisions:

Monitoring and Adaptive Management: The Report's monitoring and adaptive management plan offers a significant improvement over the current program. This plan promises to provide both effectiveness and trend monitoring, and to inform a rigorous and reliable adaptive management process.

Baseline rules: New baseline rules will significantly improve riparian buffers for both fish habitat and non-fish habitat streams. Restrictions on steep and unstable slope harvest, road building maintenance and abandonment standards, and other regulations offer both enforceability and water quality improvement.

Enforcement: With the staffing requested in the funding package, and enforcement provisions contained in the Report, the baseline rules will be more effective. Nonetheless, a visible and measurable enforcement presence is necessary to maintain these assurances.

Regulatory and voluntary programs: The Forest Practices Regulations and their enforceability by DNR and Ecology, combined with the take authority provided in an enforceable ESA 4(d) rule, and eventual enforceable HCP, is a strength of the Report. Landowner incentives should complement regulatory elements, but the Report is predominately a regulatory approach rather than voluntary.

Adaptive management: We acknowledge uncertainty exists as to when water quality standards will be met. This is understandable given the scale of the Report (state and private forest lands in the State of Washington) and the long time frame necessary for natural processes to recover. We rely on monitoring and adaptive management to inform us whether the buffers and other practices are adequate and will be fully protective of functions and water quality standards. EPA and Ecology will evaluate the effectiveness of baseline rules and adaptive management for the life of the assurances.

Implementation: The Report assures implementation and as such it offers early water quality protection that precedes any TMDL or potential TMDL alternative that would be produced at a later date, should that become necessary. These early actions offer substantial environmental benefit, and these early actions should not wait for the preparation of a TMDL or potential TMDL alternative.

Assurances and Contingencies:

The assurances are contingent on:

1. The final Forests and Fish Report;
2. Passage of State legislation (if necessary), adoption of emergency or final regulations by the FPB, and appropriations for the funding package pursuant to the Report; and
3. Landowners will share water quality data collected in cooperative research, and adaptive management, and TMDL development. Landowners are further encouraged to share all pertinent water quality data to assist in water quality planning efforts.

EPA and Ecology offer these assurances:

1. EPA and Ecology have confidence that the Report, when signed and implemented, provides the quickest and most efficient means for achieving environmental goals and State of Washington water quality standards. Accordingly, TMDLs for waters impaired by sediment, habitat degradation, flow, turbidity or temperature caused by forest practices covered in the Report and recommendations (private and state lands subject to Board regulation) affecting a current or future 303(d) listed water body, become a lower priority for EPA and Ecology. Therefore, these TMDLs need not be prepared prior to July 1, 2009 (note exceptions below). Ecology will submit its year 2000 section 303(d) list and priorities consistent with this provision. EPA will review and approve the priorities as expressed here subject to notice and comment. EPA and Ecology will not add new TMDL CWA requirements to current or future 303(d) listed water bodies subject to the FPB regulations prior to 2009, except through the agreed upon adaptive management program set out in the Report, or made necessary by changes to the CWA or CWA implementing regulations.

2. If new regulations promulgated by EPA support alternatives to TMDL's, EPA and Ecology will make every reasonable effort to exercise these TMDL alternatives on a time frame consistent with the development of a Habitat Conservation Plan approved by NMFS and USFWS for this Report.

3. If new regulations do not support alternatives to TMDLs, EPA and Ecology, with voluntary participation of landowners at their option, will develop TMDLs on an appropriate scale beginning in 2009 and completed by 2013. Landowners may request a TMDL from Ecology for their holdings prior to 2009. Where EPA and Ecology have approved a TMDL for forested lands subject to the FPB regulations, and the prescriptions in the TMDL implementation plan differ from FPB regulations, for the purposes of the Clean Water Act, the prescriptions should qualify as an alternate plan.

4. Allocations or water quality targets in the TMDLs or TMDL alternatives may be expressed using measures appropriate to the characteristics of the water body and pollutants being addressed. Habitat surrogates for example, that are quantitatively linked to the attainment of water quality standards, can be used to help develop TMDLs and evaluate progress toward attaining water quality standards, especially narrative criteria.

5. TMDLs produced prior to 2009 in mixed use watersheds:

a. For mixed use watersheds with water bodies impaired by forest practices and the activities of other landowners, we expect that the landowners subject to the Forest Practices Board regulations will participate in watershed planning and restoration efforts. Consistent with the intent of the Report and these assurances, EPA and Ecology will not require more stringent forest practices in a mixed-use watershed-based TMDL before July 1, 2009 except through adaptive management and subject to reopeners. Assurances for forested landowners in mixed use and single use watersheds will be the same, and subject to the same conditions.

b. If a TMDL is produced in mixed use watersheds, and if achievement of the TMDL load allocations cannot be met through the forest practices regulations, the adjustment of those management practices will be through adaptive management as contained in the Adaptive

Management appendix of the Report. Over the long term, failure of adaptive management to meet CWA goals is a potential cause for withdrawal of the assurance. Forest landowners are encouraged to participate in broader cooperative watershed planning and restoration efforts to improve water quality impaired by land uses other than regulated forest practices. Examples of this involvement include:

- i. Attending watershed planning meeting to describe new protection measures contained in the Forests & Fish Report.
 - ii. Sharing watershed assessment data cooperatively collected as appropriate to assist in characterizing the watershed.
 - iii. Sharing data and modeling information cooperatively collected related to expected improvements in water quality in forested riparian habitat due to implementation of the Forestry Module baseline rule package.
 - iv. Collaboratively working with other watershed planning participants to prioritize restoration opportunities on forested sections of watersheds.
5. EPA and Ecology will make every effort to integrate the CWA in coordination with the Endangered Species Act. Specifically, EPA and Ecology will work with NMFS and USFWS to coordinate progress reviews, with the goal of having at least one federal-tribal-state-public review every five years.
6. EPA is developing new regulations concerning section 303(d). For the purposes of discussion, we assume that water bodies listed as impaired under 303(d) will remain listed until water quality standards are met, consistent with the recommendations of the CWA 303(d) FACA. No assertions to the contrary have been made in negotiations.
7. Landowners with individual Habitat Conservation Plans wishing CWA assurances may petition EPA and Ecology for such assurances. Landowners should expect to demonstrate in writing to the agencies that the HCP, on balance, meets or exceeds the functions provided by the prescriptions contained in the Report and will result in meeting water quality standards in a reasonable time frame. Landowners providing such a demonstration would receive the same assurances contained in this Appendix.

Reopeners, Modifications, and Causes of Withdrawal of Assurances

Any one of the following items may cause withdrawal or modification of the assurances:

Statewide:

1. New water quality standards not anticipated in this Report unless those new standards can be accommodated with adaptive management. This Report specifically targeted the State of Washington's numeric sediment and temperature criteria and narrative water quality standards relevant to aquatic habitat including anti-degradation. This Report also anticipated potentially lower temperature standards as needed to protect fish or amphibians covered by this Report.
2. Failure to implement for any reason, including:

- a. A significant loss of funding or staffing to the state regulatory agencies dedicated to forest practice regulation or monitoring.
 - b. A lack of enforcement of forest practices on the part of state regulatory agencies.
 - c. Broad scale landowner non-compliance with forest practice regulations or the Report.
 - d. Lack of final regulations consistent with the Report.
3. Weakening of enabling State statutes or regulations which affect the Report and its implementation.
 4. General failure to upgrade regulations or guidance called for in adaptive management. This includes failure to develop agreed upon resource objectives, research priorities, and compliance monitoring programs.
 5. Court orders, changes to the CWA, state or federal regulatory changes that cannot be otherwise addressed.

Prior to withdrawal of these assurances, EPA and Ecology will advise the Forest Practices Board and the cooperators of the concerns. If modification of the Report would preclude the necessity for complete withdrawal of the assurances, a reasonable time period will be allowed for such modifications. Termination of the assurances will be explained in writing.

Individual landowner:

If an individual landowner fails to implement forest management practices or demonstrates a pattern of non-compliance, such as repeated enforcement actions, the assurances may be withdrawn for that landowner. All available enforcement and other options under federal and state law will be considered. This will include, but not be limited to: the requirement for a TMDL; enforcement of water quality standards violations and forest practice laws and regulations.

Role of EPA, Ecology and the Tribes in CWA Assurances

While EPA will primarily look to Ecology and DNR to monitor progress and compliance with the Report, EPA will participate in periodic progress reviews to ensure that the assurances remain appropriate. EPA will pay particular attention to implementation of baseline rules, adaptive management, retention of funding for state regulatory agencies, enforcement, and monitoring results including water quality trends. EPA will invite affected Tribes to participate in these progress reviews.

Ecology will continue in its role of reviewing and concurring on rule changes with the Forest Practices Board, assuring compliance with the forest practice regulations with DNR, monitoring compliance with water quality standards, pursuing necessary changes through adaptive management, and participating in water quality research on forest practices. Ecology will track water bodies affected by the Report in a manner consistent with CWA 303(d) and the settlement agreement.

Department of Ecology

By: _____

Its: _____

Environmental Protection Agency, Region 10

By: _____

Its: _____