

May 13, 2013

Bob Perciasepe, Acting Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Sally Jewell, Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street NW  
Washington, D.C. 20240

Dennis McLerran, Regional Administrator  
U.S. Environmental Protection Agency  
Region 10  
Regional Administrator's Office, RA-140  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

William W. Stelle, Jr.  
Regional Administrator  
NOAA Fisheries  
7600 Sand Point Way NE  
Seattle, WA 98115-0070

Dr. Rebecca Blank  
Acting Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Washington, D.C. 20230

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

**Re: Supplemental 60-Day Notice of Intent to Sue EPA for Endangered Species Act and Clean Water Act Violations Related to Idaho Water Quality Standards**

Dear Mses. and Messrs:

This letter provides notice that Northwest Environmental Advocates (NWEA) and the Idaho Conservation League (ICL) intend to file suit pursuant to Section 11(g)(1)(A) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(1)(A), and 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) for violating the ESA and the CWA with regard to Idaho water quality standards for various pollutants.

By letter dated December 28, 2012, NWEA and ICL notified EPA of their intent to sue for ESA and CWA violations related to Idaho's water quality standards.<sup>1</sup> This supplemental notice concerns additional ESA and CWA violations of which NWEA has become aware.

---

<sup>1</sup> NWEA and ICL's December 28, 2012 Notice of Intent to Sue is hereby incorporated by reference.

As explained in detail below, EPA's actions and inactions have failed to comply with the ESA and the CWA. First, for certain EPA-approved Idaho water quality standards, EPA has failed to comply with its ESA Section 7 obligations to consult with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) (together "the Services") to ensure that EPA's actions are not likely to jeopardize ESA-listed species in Idaho or result in destruction or adverse modification of critical habitat. Second, for certain EPA-approved Idaho water quality standards for which EPA has initiated consultation with the Services, EPA has failed to complete consultation and failed to prevent the irreversible and irretrievable commitment of resources that would foreclose reasonable and prudent alternatives to ensure against jeopardy. Third, EPA has failed to act on Idaho's revised temperature standards for specific reaches of the Mid Snake River Basin, after EPA retracted its initial disapproval of those standards.

NWEA and ICL are concerned about the harm caused by EPA's failure to consult and/or complete consultation with the Services to the numerous ESA-listed species that are likely to be adversely affected by the levels of pollutants currently being used for Idaho water quality regulation. EPA's failure to consult with the Services also harms the interests of NWEA and ICL by undermining the procedural requirements of the ESA, which ensure that agencies, such as EPA, make informed decisions and act in conformity with the ESA's substantive requirements. In this case, standards on which EPA took conditional action, some more than 17 years ago, are being used without the benefits of a completed ESA Section 7 consultation.

Upon expiration of the 60 days NWEA and ICL intend to file suit in United States federal court in the District of Idaho against EPA pursuant to the ESA and the CWA. We are available to discuss potential remedies prior to the expiration of this notice.

## **I. Factual Background<sup>2</sup>**

IDEQ submitted new or revised water quality standards to EPA for approval on or around August 24, 1994. The standards included aquatic life and human health criteria for toxics, conventional criteria, antidegradation, designated uses, narrative criteria, a variance policy, and mixing zone policies. These new and revised standards were augmented by submissions to EPA in August 1995 (revised ammonia criteria), April 1995 (human health criteria for arsenic), and February 1995 (a variance for Kinross). On June 25, 1996, EPA took action on IDEQ's submission, approving, *inter alia*, the Idaho toxic criteria, conventional criteria, antidegradation policy, variance policy, designated beneficial uses, narrative criteria, and mixing zone policy and disapproving certain provisions, including but not limited to portions of the antidegradation policy, mixing zone policy, salmonid spawning implementation, and the Kinross variance. In its action, EPA stated its approval was subject to completion of ESA Section 7 consultation, which it purported to have "initiated." On July 9, 1996, EPA sent a draft Biological Assessment

---

<sup>2</sup> The factual background represents the facts to the best of NWEA's and ICL's current knowledge and understanding. EPA is obviously in a better position than NWEA and ICL to know the factual history of its actions and failures to act with respect to Idaho's water quality standards.

Notice Regarding ESA and CWA Violations Relating to Idaho Water Quality Standards

May 13, 2013

Page 3

("BA") to the Services regarding aspects of the standards it had approved. Subsequently, on December 20, 1999, January 7, 2000, and again on August 9, 2000, EPA revised and finalized its BA but only for the aquatic life criteria for toxics. In July 1997, EPA federally promulgated use designations for five waters, bull trout temperature criteria, a variance policy, and an excluded waters provision.

On or about March 23, 1997 and March 31, 1997, IDEQ submitted to EPA revisions to its antidegradation policy (Tier III), conversion factors for dissolved fraction of toxics, and cyanide as a weak acid dissociable, along with use designations for Lindsay and the West Fork of Blackbird Creeks, and a provision on uses for unclassified waters. In May 1997, EPA took a partial action on these submissions, subject to ESA consultation, conditionally approved the changes in creek uses. It also unconditionally approved the changes to the antidegradation provisions. EPA's aforementioned revisions to its 1996 BA included the change to the toxic criteria. On or about June 19, 1997 and June 25, 1997, IDEQ submitted revised standards to EPA, including unclassified waters, mixing zone policies, use designations for 35 waterbody segments, uses, and temperature criteria for sturgeon and bull trout. EPA approved nearly all of the revisions on July 15, 1997 subject to ESA consultation. EPA also withdrew its previous 1996 disapproval of temperatures for the protection of threatened and endangered snails and disapproved Idaho's bull trout temperature criteria.

In 1997, 2000, and again on August 5, 2002, IDEQ submitted for EPA action a natural background provision, originally limited to toxic constituents. On July 20, 2004, EPA approved this provision subject to ESA consultation, which EPA purportedly "initiated" on January 21, 2004. On or about February 11, 1997 and April 10, 1998, IDEQ submitted use attainability analyses with revised designated uses for Blackbird and West Fork Blackbird Creeks, which EPA approved, subject to ESA consultation, on June 5, 2000. EPA purportedly prepared a draft BA.

On or about June 25, 1997, IDEQ submitted to EPA for approval revisions to its unclassified waters and mixing zone policies and temperature criteria for bull trout and sturgeon. On July 15, 1997, EPA approved these revisions, with the exception of the bull trout temperature criteria, subject to ESA consultation. In 1998 and again in 2001, IDEQ submitted revised temperature criteria for bull trout to EPA. EPA took no action on these submissions, which are not in effect per 40 C.F.R. § 131.21. On or about November 21, 2000, IDEQ submitted ammonia criteria for the Spokane River to EPA for approval, which EPA approved, subject to ESA consultation, on March 28, 2001.

In March 2002, IDEQ submitted lake and reservoir natural conditions provisions and revised limits on compliance schedules to EPA, which approved them on December 21, 2005 subject to ESA consultation. EPA made an ESA "no effect" finding on the natural conditions provisions and purportedly sent a letter to the Services concerning the compliance schedule rule revisions. In April 2000 and again in 2002, IDEQ submitted temperature criteria referred to as "seasonal cold" to EPA, which took no action. Such criteria are in effect pursuant to 40 C.F.R. § 131.21.

On August 5, 2002, IDEQ submitted statewide ammonia criteria, which EPA approved, subject to ESA consultation, on November 12, 2002. In December 2002, IDEQ submitted site-specific criteria for lead, cadmium, and zinc for the South Fork of the Coeur d'Alene River and its tributaries, which EPA approved, subject to ESA consultation, on February 28, 2003. In April 2003, IDEQ submitted Water Effect Ratio provisions for copper and lead in the Boise River, which EPA approved on December 22, 2005. EPA's approval letter is silent on the matter of ESA consultation.

On or about August 5, 2002, IDEQ submitted revisions to its water quality standards, including removing the general timing requirement for compliance schedules to meet water quality-based effluent limits, changes to its variance rule, uses for 35 segments of the Salmon River Basin, a use attainability analysis-based removal of spawning uses from three reservoirs in the Snake River, exemptions from numeric criteria for intermittent streams, and use designations for the South Fork of the Coeur d'Alene River. On December 21, 2005, July 17, 2006, January 12, 2006, March 29, 2006, and June 24, 2005, EPA approved nearly all of these revisions. For the revisions on compliance schedules EPA requested consultation with the Services. It made a "no effects" finding for the natural conditions rule for lakes and the use designations for the South Fork Coeur d'Alene River. It approved 30 uses subject to consultation and approved the Snake River uses and the changes to intermittent waters with no reference to consultation.

On or about June 10, 2003, IDEQ submitted uses for 135 segments and an additional 85 segments. On January 13, 2006, EPA approved the uses subject to ESA consultation. On or about February 20, 2004 and May 9, 2005, IDEQ submitted site-specific spawning criteria for temperature on the Snake River to EPA for approval. EPA approved the revisions on July 20, 2004 and June 24, 2005, subject to ESA consultation by FWS (NMFS had concurred with a Not Likely to Adversely Affect finding in 2004). On or about May 6, 2005, IDEQ submitted a site-specific criterion for dissolved oxygen (DO) in the Snake River, which EPA approved without consultation on July 8, 2005, ostensibly based on a BiOp completed on Oregon's DO criteria, which had been vacated by a court.

On or about August 8, 2005, IDEQ submitted proposed revisions to human health and aquatic life criteria for nine toxic pollutants, the removal of aquatic life mercury criteria, and the removal of the low-end hardness cap. On September 30, 2005, EPA approved IDEQ's revised numeric aquatic life criteria for toxic pollutants subject to ESA consultation. The standards approved by EPA included human health criteria for antimony, methylmercury, and zinc, and aquatic life criteria for arsenic, cadmium, chromium III, chromium VI, nickel, and zinc. At least two of these aquatic life criteria, nickel and zinc, are pollutants that are the subject of EPA's earlier ESA consultation for which the Services have not yet completed BiOps. EPA did not seek consultation on these criteria, nor did it update its previous August 9, 2000 BA with regard to pollutants already undergoing consultation with the Services. On December 12, 2008, EPA disapproved IDEQ's proposed removal of chronic and acute aquatic life criteria for mercury, thus leaving in place for purposes of the CWA the 1997 mercury criteria.

On or about May 13, 2008, IDEQ submitted a spawning times procedure to EPA, which EPA approved, subject to ESA consultation, on May 22, 2008. On or about June 8, 2009, IDEQ submitted renewed five-year variances for metals (cadmium, lead, and zinc) from three municipalities, which EPA approved on July 22, 2009. The approval letter makes no mention of ESA consultation for these variances, which were first granted in 2004.

On or about April 15, 2011, IDEQ submitted changes to its antidegradation requirements to EPA for approval, which EPA approved without consultation on August 18, 2011. Finally, on or about July 20, 2011, IDEQ submitted site-specific temperature criteria and provisions for thermal treatment on the Lower Boise River to EPA for approval. EPA approved the site-specific temperature criteria on October 27, 2011 without mention of the ESA.

EPA's failure to complete required consultations began at least in 1999, when, as a result of meetings between EPA and the Services, EPA proceeded to develop two separate BAs for the standards submitted to EPA for approval in August 1994. The first BA, which addressed Idaho's numeric criteria for toxic contaminants, was, as described above, completed after several revisions. EPA has not completed the second BA, which was intended to address all other aspects of the 1994 Idaho standards. According to the July 17, 2012 EPA cover letter to a response to a Freedom of Information Act request submitted on June 27, 2011 ("EPA FOIA Response Letter"), EPA has no records that contain information on "a schedule or plan for completion of the consultation in Idaho prepared since May 12, 2009" or "plans by EPA to consult on new or revised water quality standards submitted by Idaho in 1994 that are not new or revised toxic criteria."

## II. Endangered Species Act Violations

### A. Legal Framework

The Endangered Species Act seeks to bring about the recovery of species facing extinction by affording these species the "highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). One of the primary purposes of the ESA is to preserve the habitat upon which threatened and endangered species rely. 16 U.S.C. § 1531(b). Section 7(a)(2) of the ESA sets out two substantive mandates. First, it contains a blanket provision against any federal action that "jeopardizes the continued existence of" species listed as threatened or endangered. 16 U.S.C. § 1536(a)(2). Second, it bans federal actions that result in the "destruction or adverse modification" of designated critical habitat of listed species. *Id.* The obligation to ensure against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to the endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). An agency must initiate consultation under section 7(a)(2) whenever it undertakes an action that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of "effects of the action").

Congress established a consultation process explicitly “to ensure compliance with the [ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Under the ESA, agencies obtain advice from the Services *prior* to taking actions that affect threatened or endangered species or result in the destruction or adverse modification of their critical habitat. The end product of the ESA section 7 consultation is a biological opinion (BiOp) in which the Services determine whether a proposed action will jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); *Idaho Dept. of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995). As the Ninth Circuit stated, “If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.” *Thomas v. Peterson*, 753 F.2d at 764 (citing *TVA v. Hill*, 437 U.S. 153); *see also Conner v. Burford*, 848 F.2d 1441, 1458 (9th Cir. 1988) (The ESA’s “strict substantive provisions . . . justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”); *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

To ensure that agencies consult with the Services and that the Services issue biological opinions, Congress explicitly addressed the action agency’s and Services’ obligations to complete formal consultation. Specifically, section 7(b)(1)(A) provides that

Consultation under subsection (a)(2) with respect to an agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B) [which outlines procedures when an applicant is involved], within such other period of time as is mutually agreeable to the Secretary and the Federal Agency.

16 U.S.C. § 1536(b)(1)(A). If the Services and the action agency agree on a period of time other than the statutorily prescribed 90-day period to conclude consultation, it cannot be undefined. *See* 50 C.F.R. § 402.14(e) (“Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for *a specific period of time.*”) (emphasis added); *see also* Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and Conferences (“Consultation Handbook”), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998, at 4-7 (“The consultation timeframe cannot be ‘suspended.’ If the Services need more time to analyze the data or prepare the final opinion, or the action agency needs to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. *Extensions should not be indefinite, and should specify a schedule for completing the consultation.*”) (emphasis added).

Regulations implementing Section 7(a)(2) establish the obligations for EPA as the action agency by broadly defining the scope of agency actions subject to consultation to encompass “all

activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”). Agencies also must consult on ongoing agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. 50 C.F.R. § 402.03; 50 C.F.R. § 402.16; *see also Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-56 (9th Cir. 1994). Finally, “[e]ach Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required[.]” 50 C.F.R. § 402.14(a) (emphasis added).

In addition, after the initiation of consultation, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures [RPAs] which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d); *see also Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996).

**B. EPA Has Failed to Ensure Against Jeopardy for Certain Idaho Water Quality Standards on Which EPA Took Action but Never Initiated Consultation or on Which EPA Initiated but Failed to Complete Consultation and Failed to Prevent the Irreversible and Irretrievable Commitment of Resources That Would Foreclose RPAs**

As explained in NWEA’s and ICL’s December 26, 2012 notice of intent to sue, EPA has an obligation to consult on ongoing agency actions over which the agency retains, or is authorized to exercise, discretionary involvement or control. EPA’s ongoing failure to initiate and/or complete consultation with the Services on revisions to Idaho water quality standards dating to 1994, on which EPA has taken action, is a violation of EPA’s mandatory duty to consult with the Services to ensure against jeopardy, as set out in that letter. By failing to initiate and/or complete consultation on the 1994 standards, as well as subsequent multiple revisions to those standards, EPA has failed to consult on many of what are now current Idaho water quality standards. This letter supplements the December 26<sup>th</sup> notice with additional actions taken by EPA on which it has failed to initiate and/or complete ESA consultation, pursuant to this mandatory duty. Specifically, to the best of NWEA’s and ICL’s knowledge:

- EPA has failed to initiate and/or complete consultation on its June 25, 1996 approval of various IDEQ submissions, including, *inter alia*, the Idaho toxic criteria, conventional criteria, antidegradation policy, variance policy, designated beneficial uses, narrative criteria, and mixing zone policy. The only Idaho 1994 standards revisions for which EPA completed a BA are the aquatic life criteria for toxics.
- In May 1997, EPA approved without initiating and/or completing ESA consultation changes in creek uses for Lindsay and the West Fork of Blackbird Creeks and antidegradation provisions.
- On July 15, 1997, EPA approved without initiating and/or completing ESA consultation,

Notice Regarding ESA and CWA Violations Relating to Idaho Water Quality Standards

May 13, 2013

Page 8

revisions to unclassified waters provisions, mixing zone policies, use designations, and temperature criteria for sturgeon, and temperature criteria for the protection of threatened and endangered snails.

- On July 15, 1997, EPA approved Idaho's revisions to unclassified waters and mixing zone policies and temperature criteria for sturgeon, subject to ESA consultation, which it did not initiate and/or complete.
- EPA also has not initiated and/or completed consultation on the July 31, 1997 federal promulgation of use designations for five waters, a variance policy, and excluded language.
- On June 5, 2000, EPA approved use changes to Blackbird and West Fork Blackbird Creeks, subject to ESA consultation, which it did not initiate and/or complete but for which it purportedly prepared a draft BA.
- On March 28, 2001, EPA approved ammonia criteria for the Spokane River without initiating and/or completing ESA consultation.
- On November 12, 2002, EPA approved Idaho's statewide ammonia criteria, subject to ESA consultation, which it did not initiate and/or complete.
- On February 28, 2003, EPA approved Idaho's site-specific criteria for lead, cadmium, and zinc for the South Fork of the Coeur d'Alene River and its tributaries, subject to ESA consultation, which it did not initiate and/or complete.
- On July 20, 2004, EPA approved a natural background provision without completing ESA consultation, which it purportedly initiated on January 21, 2004.
- On July 20, 2004, EPA approved revisions to Idaho's natural conditions criteria (NCC) subject to ESA consultation, which it purportedly initiated on January 21, 2004 but failed to complete.
- On July 20, 2004 and June 24, 2005, EPA approved site-specific spawning criteria for temperature on the Snake River, subject to ESA consultation, which it did not initiate and/or complete.
- On July 8, 2005, EPA approved a site-specific criterion for dissolved oxygen (DO) in the Snake River without initiating and/or completing consultation.
- On September 30, 2005, EPA approved aquatic life criteria for nine toxic pollutants and human health criteria for antimony, without updating its BA for nickel and zinc or initiating and/or completing ESA consultation on the remaining criteria.



- On December 21, 2005, EPA approved revised limits on compliance schedules about which it purportedly sent a letter to the Services but failed to initiate and/or complete consultation.
- On December 21, 2005, EPA approved removing the general timing requirement for compliance schedules to meet water quality-based effluent limits, subject to ESA consultation, which it did not initiate and/or complete.
- On December 22, 2005, EPA approved Water Effect Ratio provisions for copper and lead in the Boise River, for which it did not initiate and/or complete ESA consultation.
- On January 13, 2006, EPA approved 30 use designations for the Salmon River Basin, subject to ESA consultation, which it did not initiate or complete.
- On January 13, 2006, EPA approved uses for 135 segments and an additional 85 segments without initiating and/or completing ESA consultation.
- On March 29, 2006, EPA approved a use attainability analysis-based removal of spawning uses from three reservoirs in the Snake River and exemptions from numeric criteria for intermittent streams without initiating and/or completing ESA consultation.
- On July 17, 2006, EPA approved revisions to changes to Idaho's variance rule without initiating and/or completing ESA consultation.
- On May 22, 2008, EPA approved a spawning times procedure for which it did not initiate and/or complete ESA consultation.
- On December 12, 2008, EPA disapproved IDEQ's proposed removal of chronic and acute aquatic life criteria for mercury, thus leaving in place for purposes of the CWA the 1997 mercury criteria, on which it did not initiate and/or complete ESA consultation.
- On July 22, 2009, EPA approved five-year variance extensions for metals (cadmium, lead, and zinc) for three municipalities without initiating and/or completing ESA consultation.
- On August 18, 2011, EPA approved antidegradation requirements without initiating and/or completing ESA consultation.
- Finally, on October 27, 2011, EPA approved site-specific temperature criteria for the Lower Boise River without initiating and/or completing ESA consultation.

EPA's ongoing failure to initiate and/or complete consultation with the Services on revisions to Idaho water quality standards dating to 1994 on which EPA has taken action, including a wide range of numeric and narrative criteria, use designations, antidegradation, and general policies, is a violation of EPA's mandatory duty to consult with the Services to ensure against jeopardy. The ESA requires that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, 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). An action agency must initiate consultation under Section 7(a)(2) whenever it undertakes an action that "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). For such actions, after the initiation of consultation, EPA has a duty to prevent the "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures ["RPAs"] which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d); *see also Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996). By EPA's approving Idaho's water quality standards for which consultation has not been completed, which are the bases upon which EPA also approves Idaho's submissions of TMDLs and 303(d) lists, upon which EPA issues NPDES permits and TMDLs in Idaho, and upon which Idaho issues 401 certifications, TMDLs and 303(d) lists, EPA is violating the ESA by making irreversible or irretrievable commitments of resources that foreclose RPAs.

It is indisputable that IDEQ's revisions to its water quality standards for, *inter alia*, numeric criteria for conventional pollutants, narrative criteria, designated beneficial uses, antidegradation, mixing zone and variance policies "may affect" threatened and endangered species, triggering EPA's duty under the ESA to consult with the Services. In its approvals of Idaho's new or revised water quality standards, EPA has explicitly acknowledged its duty to consult pursuant to ESA Section 7. EPA thus has violated and continues to violate Section 7 of the ESA, 16 U.S.C. § 1536(a)(2) and (d), and its implementing regulations at 50 C.F.R. § 402, by failing to initiate and/or complete consultation with the Services to ensure against jeopardy and adverse modification of critical habitat as a result of EPA's approval of Idaho's water quality standards and general policies that are intended to protect or have the ability affect aquatic life, including threatened and endangered species.

### **III. Clean Water Act Violations: EPA Has Failed to Act on Idaho's Revised Temperature Standards for Specific Reaches of the Mid Snake River Basin**

States must submit revised or newly adopted water quality standards to EPA for review and approval or disapproval. 33 U.S.C. § 1313(c)(2)(A). EPA must notify the state within 60 days if it approves the new or revised standards as complying with the CWA. 33 U.S.C. § 1313(c)(3).

On June 25, 1996, EPA disapproved revised temperature standards for specific reaches of the Mid Snake River Basin submitted by IDEQ on or about August 24, 1994, because they were not protective of five species of threatened and endangered freshwater aquatic snails. On July 15, 1997, EPA retracted its previous disapproval stating, "EPA will revisit this issue in future

triennial reviews as more information becomes available.” Having retracted its disapproval but not taken approval action, EPA has failed to act on Idaho’s submission of temperature criteria for specific reaches of the Snake River. In failing to take action on Idaho’s submissions of these water quality standards, EPA has violated its mandatory duty to act pursuant to CWA Section 303(c)(3), 33 U.S.C. § 1313(c).

**IV. Persons Giving Notice and Representing Attorneys**

The full name, address, and telephone number of the parties providing this notice are:

Nina Bell, Executive Director  
Northwest Environmental Advocates  
P.O. Box 12187  
Portland, OR 97212  
(503) 295-0490

Justin Hayes, Program Director  
Idaho Conservation League  
P.O. Box 844  
Boise, ID 83701  
(208) 345-6933

The attorneys representing the parties in this notice are:

Allison LaPlante (OSB No. 023614)  
Kevin Cassidy (OSB No. 025296)  
Earthrise Law Center at  
Lewis & Clark Law School  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219  
(503) 768-6894 (LaPlante)  
(781) 659-1696 (Cassidy)

///

///

///

///

///

**V. Conclusion**

As noted above, upon expiration of the 60 days NWEA and ICL intend to file suit against EPA pursuant to the ESA and the CWA. NWEA and ICL anticipate filing suit in the United States District Court District of Idaho, requesting declaratory and injunctive relief. As we have with respect to the violations set forth in the December 28, 2012 Notice of Intent, we are, of course, available to discuss potential remedies prior to the expiration of this notice.

Sincerely,



Kevin Cassidy  
Allison LaPlante  
Staff Attorneys  
Earthrise Law Center

cc: Curt Fransen, Director  
Idaho Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706

Elizabeth Dawson, USDOJ (via email)  
David Kaplan, USDOJ (via email)  
John Martin, USDOJ (via email)