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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL
ADVOCATES, a non-profit organization,

Case No. 3:21-cv-01591

Plaintiff,

v.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

UNITED STATES NATIONAL MARINE
FISHERIES SERVICE, a United States
Government Agency, and BARRY THOM, in
his official capacity as NMFS Regional
Administrator for the West Coast Region,

(Pursuant to Administrative Procedure Act)

Defendants.

INTRODUCTION

1. Plaintiff Northwest Environmental Advocates (“NWEA”) brings this action for declaratory and injunctive relief against the United States National Marine Fisheries Service (“NMFS”) pursuant to the judicial review provision of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702.

2. Actions taken by the United States Environmental Protection Agency (“EPA”) related to its proposed approval of water quality standards developed by the State of Oregon under the federal Clean Water Act (“CWA”) for temperature and intragravel dissolved oxygen run the risk of jeopardizing threatened and endangered species that depend upon habitat of the Willamette and Columbia Rivers. Specifically, EPA’s actions impact Lower Columbia River Chinook salmon (“LCR Chinook”), Upper Willamette River Chinook salmon (“UWR Chinook”), Lower Columbia River steelhead (“LCR steelhead”), Middle Columbia River steelhead (“MCR steelhead”), Upper Columbia River steelhead (“UCR steelhead”), and Upper Willamette River steelhead (“UWR steelhead”) (collectively, “imperiled salmon and steelhead” or the “impacted species”)—among the Pacific Northwest’s iconic salmonid species that depend on cold, clean water for their survival.

3. Under the federal Endangered Species Act (“ESA”), EPA was required to “consult” with NMFS regarding the impacts to ESA-listed species from EPA’s decision to approve Oregon’s temperature water quality standards. On November 3, 2015, NMFS rendered its biological opinion for EPA’s action. That biological opinion is arbitrary, capricious, and not in accordance with law under section 706(a)(2) of the APA, 5 U.S.C. § 706(2)(A), because it (among other flaws) incorrectly concluded that the salmon and steelhead migration criterion in Oregon’s temperature water quality standard would not jeopardize the imperiled species when

modified by NMFS's reasonable and prudent alternative ("RPA") because that RPA was insufficient to impact baseline conditions underlying the initial finding of jeopardy, because it failed to explain how the RPA would avoid jeopardy, and because its finding of no jeopardy relied upon improper factors.

4. NWEA seeks an order holding unlawful and setting aside relevant portions of NMFS's 2015 biological opinion and awarding NWEA its costs of litigation, including its reasonable attorney fees, pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A).

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. §§ 701 *et seq.* (APA judicial review). NWEA has challenged a final agency action as defined by the APA, 5 U.S.C. § 551(13).

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in Oregon.

7. Pursuant to Local Rule 3-2(b), Divisional Venue is proper in this Court because a substantial part of the events and omissions giving rise to NWEA's claims occurred in Multnomah County.

PARTIES

8. NWEA is a non-profit environmental organization founded in 1969 and based in Portland, Oregon. NWEA's mission is to work through advocacy and education to protect and restore water quality and wildlife habitat in the Pacific Northwest and nationwide. NWEA has spent decades working to improve water quality programs and protect threatened and endangered species from water pollution and degraded habitat, in particular water temperatures unsafe for cold-water species including salmon and steelhead.

9. NWEA and its members use and enjoy the waters of Oregon for recreational, scientific, aesthetic, and commercial purposes. NWEA and its members particularly enjoy observing, studying, and photographing endangered and threatened species such as salmon and steelhead. A number of NWEA's members would like to recreationally fish for salmon and steelhead, but do not currently do so due to the threatened and endangered status of these species.

10. NWEA and its members are harmed by NMFS's insufficient biological opinion addressing EPA's approval of Oregon's temperature water quality standard. The imperiled salmon and steelhead are particularly sensitive to water temperature, and thus NMFS's failure to issue a legally and scientifically sound biological opinion and NMFS's failure to ensure that Oregon's temperature water quality standard does not jeopardize the impacted species are directly contributing to the continued decline of those species' populations in Oregon and their enjoyment by NWEA and its members.

11. NWEA and its members have experienced, and without the relief sought by this complaint will continue to experience, the impairment of their ability to observe and someday recreationally engage with the imperiled salmon and steelhead species in their native habitat; diminished aesthetic, recreational, and spiritual enjoyment of waters known to provide habitat to those species resulting from their knowledge that the species are in jeopardy of extinction; and other injuries stemming from the increased risk of harm to the imperiled salmon and steelhead species because Oregon's EPA-approved temperature water quality standard is likely to jeopardize the continued existence of these species and negatively impact their critical habitat absent modification by an RPA or other action that sufficiently mitigates the underlying adverse baseline conditions. Unless the relief requested is granted, NWEA and its members will continue

to be adversely affected and irreparably injured by the continued harm to these very important fish.

12. NWEA's injuries are fairly traceable to NMFS's conduct. NMFS's issuance of the flawed biological opinion, and NMFS's resulting failure to ensure against jeopardy to the imperiled salmon and steelhead species or adverse modification to the species' habitat, has allowed adoption of, without proper mitigation measures in place, less protective water quality standards for temperature than are needed for the species to survive and flourish, thereby exposing the species to excessive high river temperatures; increasing the risk of their continued decline; and impairing NWEA and its members' aesthetic, recreational, and other interests in the impacted species.

13. NWEA's injuries would be redressed by the relief that NWEA seeks in this case. Vacatur and remand of the unlawful portions of the biological opinion would require NMFS to revise or reissue the biological opinion after fully considering the best available science, potentially resulting the issuance of a sufficiently protective RPA to further protect the species, thereby reducing the temperature pollution threats to Columbia and Willamette River salmon and steelhead and redressing NWEA's and its members' injuries.

14. The defendants in this action are the United States National Marine Fisheries Service ("NMFS") and Barry Thom, in his official capacity. NMFS is an agency of the United States Department of Commerce responsible for administering the provisions of the Endangered Species Act for threatened and endangered marine and anadromous species, including the species of threatened and endangered salmon and steelhead that inhabit the Willamette River and the Columbia River, its estuary, and the Pacific Ocean. Barry Thom is sued only in his official capacity as the NMFS Regional Administrator for the West Coast Region, as successor in

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