

On September 15, 1998, EPA entered into formal consultation under section 7(a)(2) of the ESA with both NOAA Fisheries and FWS with regard to the effect of its approval decision regarding the new or revised standards on listed and endangered species including chinook, coho, sockeye, chum, coastal cutthroat, steelhead, and bull trout. On July 1, 1999, FWS issued a biological opinion that EPA's approval of the State's standards revisions was not likely to jeopardize the continued existence of listed threatened and endangered species, including bull trout. On July 7, 1999, NOAA Fisheries issued a biological opinion that EPA's approval of the standards revisions was not likely to jeopardize the continued existence of listed threatened and endangered species. Included on the Services' lists of threatened and endangered species were:

- Snake River Sockeye Salmon;
- Upper Columbia River spring chinook salmon;
- Upper Columbia River steelhead;
- Snake River spring/summer, Snake River fall, Upper Willamette River, Lower Columbia River, and Southern Oregon/California Coastal chinook salmon;
- Oregon Coast and Southern Oregon/Northern California coho salmon;
- Snake River Basin, Middle and Lower Columbia, Upper Willamette, Oregon Coast, and Klamath Mountains Province steelhead trout;
- Columbia River Chum Salmon;
- Umpqua River coastal cutthroat trout;
- Southwestern Washington/Columbia River coastal cutthroat trout; and
- Columbia River Basin and Klamath River Basin Bull Trout.

As part of the consultation action, EPA and the State of Oregon also committed to perform specific conservation measures under section 7(a)(1) of the ESA. These measures were designed to address the Services' and EPA's concerns regarding Oregon's water quality standards and also to further investigate uncertainties regarding the water temperatures necessary to protect specific life stages of endangered salmonid species.

On July 22, 1999, EPA approved all but one of the revised water quality standards submitted by Oregon, including the new and revised temperature, pH, dissolved oxygen, and bacteria standards. EPA disapproved the 20°C/68°F numeric criterion for salmonid rearing in the lower Willamette River because the State did not include a justification for how 20°C/68°F would protect salmonid rearing in

view of record information showing that 20°C/68°F is not protective of salmonid rearing. (Letter to Michael Llewellyn, Oregon Department of Environmental Quality, from Randall Smith, EPA, July 22, 1999; Memorandum to Randy Smith from Dru Keenan regarding Recommended Action, July 21, 1999). At that time, EPA took no action with respect to Oregon's existing water quality criteria for the Columbia River or its antidegradation implementation plan because Oregon had not submitted new or revised water quality standards for review on either matter.

One of the conservation measures in NOAA Fisheries' biological opinion required EPA to establish and lead a region-wide effort to conduct a comprehensive review of the temperature requirements of critical life stages of salmonids in the Pacific Northwest, and ultimately to issue guidance recommending temperature criteria for their protection, which could be used as a basis for further revision of Oregon's standards if warranted. The reason for this conservation measure was that during the formal consultation process, it became evident to EPA, NOAA Fisheries, and FWS, and others that there was scientific uncertainty regarding the precise effects of various temperature regimes on the life stages of threatened and endangered salmonids. This three year effort concluded in April 2003 with the issuance of the "EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards" (hereafter identified as the Temperature Guidance).

Both EPA's approval action and NOAA Fisheries' Biological Opinion of "no jeopardy" were challenged in 2001 by Northwest Environmental Advocates in the U.S. District Court for the District of Oregon. *Northwest Environmental Advocates v. EPA & NMFS*, 268 F.Supp.2d 1255 (D. Or., Mar. 31, 2003). The plaintiff also alleged that EPA had a non-discretionary duty to promulgate Federal water quality criteria for temperature for the lower Willamette River and the Columbia River, and to promulgate an implementation plan for Oregon's antidegradation policy.

On March 31, 2003, the U.S. District Court in Oregon ruled that EPA had violated the CWA and the ESA when it approved in 1999 certain water quality standards for the protection of salmonids that were contained in Oregon's 1996 submission. Although the court deferred to EPA's scientific judgment regarding the protectiveness of the specific numeric temperature criteria, the court found that the temperature standards that EPA

approved violated EPA's regulations and EPA's duty under section 7 of the ESA because Oregon had failed to designate "where and when" these criteria would apply. The court directed EPA to rescind its approval of the criteria because the absence of "time and place" use designations failed to protect the use categories created by Oregon, in this case salmonid rearing, bull trout rearing and bull trout spawning. The court directed EPA to propose and promulgate new temperature water quality standards, or approve new State standards, to address this deficiency.

The court also directed EPA to rescind its approval of a water quality criterion for intergravel dissolved oxygen for the protection of salmonid spawning. The court found that EPA's approval of the 6.0 mg/L criterion adopted by Oregon was arbitrary and capricious based on record information showing that 6.0 mg/L would not adequately protect salmonid spawning and because Oregon had not made time and place use designations where the criterion would apply. Thus, the court ordered EPA to promulgate a new water quality criterion for this pollutant parameter or approve a new State criterion. The court also ordered EPA to promulgate an antidegradation implementation plan for Oregon waters or approve such a plan promulgated by Oregon. Finally, the court also found arbitrary and capricious NOAA Fisheries' determination that Oregon's water quality standards for temperature and IGDO would not jeopardize threatened and endangered species.

The court ruled in favor of EPA regarding the Plaintiff's challenge to EPA's failure to establish Federal water quality criteria for temperature for the Columbia River for migration and rearing. EPA also successfully defended EPA's decision to approve certain narrative water quality criteria. Finally, the court agreed that EPA had met its obligations under ESA section 7(a)(1) to implement programs to conserve threatened salmon.

On August 13, 2003, the court ordered EPA to sign proposed regulations by October 1, 2003, and either sign final regulations or approve new State regulations by March 2, 2004, for the following:

(a) Water quality criteria for temperature for the lower Willamette River;

(b) Methods for implementing the antidegradation policy adopted by Oregon, pursuant to 40 CFR 131.12;

(c) Numeric water quality criteria for temperature for the protection of salmonid rearing and bull trout rearing