

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL
ADVOCATES, a non-profit corporation,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, a United States
Government Agency,

Defendant,

and

STATE OF OREGON; OREGON WATER
QUALITY STANDARDS GROUP; THE
FRESHWATER TRUST,

Intervenors-Defendants.

Case No.: 3:12-cv-01751-AC

FINDINGS AND
RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiff Northwest Environmental Advocates, a non-profit environmental organization (“NWEA”), challenges the actions taken by the United States Environmental Protection Agency (“EPA”) with regard to numerous total maximum daily loads (“TMDLs”) submitted by the State of Oregon (“Oregon”) for review under the Federal Water Pollution Control Act (commonly known as the Clean Water Act), 33 U.S.C. §§ 1251-1387 (2016) (“CWA”). NWEA and the EPA, the original parties to the action, as well as intervenor defendants State of Oregon, Oregon Water Quality Standards Group (“Water Quality Group”), and Freshwater Trust (“Trust”) (collectively the “Intervenor Defendants”), move for summary judgment or for remand on all TMDLs at issue. In this Findings and Recommendation, the court resolves the issues related to NWEA’s challenges to fourteen temperature TMDLs. The court will address the EPA’s motion for remand of the Willamette Basin mercury TMDL and the Klamath Basin temperature TMDL in a separate Findings and Recommendation.

First, the court finds NWEA’s claims based on TMDLs approved by the EPA prior to September 27, 2006, are barred by the applicable statute of limitations on all claims except NWEA’s Second Claim for Relief under the CWA. Second, the court finds the EPA acted arbitrarily and capriciously, and violated the CWA, by approving the TMDLs which did not implement the applicable water quality standards and, in fact, established new temperature criteria. Further, the EPA did not engage in an affirmative agency action in approving the TMDLs, and was entitled to rely on the environmental assessments, opinions, and consultations performed with regard to the relevant water quality standards, relieving it of its duty to consult under the Endangered Species Act,

35 U.S.C. §§ 1531-1544 (2016) (“ESA”). Accordingly, NWEA’s motion for summary judgment on its First and Second Claims for Relief should be granted, the EPA and Intervenor Defendants’ motions for summary judgment should be granted with regard to NWEA’s Sixth and Seventh Claims for Relief, and NWEA’s Third, Fourth, and Fifth Claims for Relief should be denied as moot. The parties should be directed to discuss appropriate remedies and suggest a briefing schedule, if necessary, on such remedies.

Background

“The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In furtherance of this objective, the CWA requires each state to develop water quality standards for all water bodies, or water segments, within its jurisdiction. 33 U.S.C. § 1313(a). These standards designate specific uses for the waters involved, and establish numeric¹ and narrative² water quality criteria to protect those uses. 33 U.S.C. § 1313(c). Each state must review and appropriately modify its water quality standards at least once every three years, and submit revised standards to the EPA. 33 U.S.C. § 1313(c)(1)-(2). The EPA then reviews the state water quality standards and approves those standards that sufficiently meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3).

The CWA also mandates each state identify any waters within its borders that fail to meet “any water quality standard applicable to such waters” and establish TMDLs for those impaired

¹Numeric water quality criteria set out the levels and concentrations of specific chemical pollutants or constituents in water that cannot be exceeded in order for a water body to achieve its designated use. Numeric criteria are often written in terms of maximum concentrations of a pollutant that are allowable over a given period of time.

²Narrative water quality criteria are statements that describe the general conditions that must exist or cannot exist in a water body in order for it to attain or maintain its designated use.

waters. 33 U.S.C. § 1313(d) (2016). A TMDL identifies, and then allocates, the total amount of a pollutant that can be discharged to a water body from all sources without violating “the applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C). The CWA requires that a TMDL set “limits on a pollutant sufficient to reduce contamination to levels necessary to satisfy the narrative and numeric water quality criteria and protect all designated uses applicable to the water body.” *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 224 (D.D.C. 2011). The states must also submit their TMDLs to the EPA for approval. 33 U.S.C. 1313(d)(2). Once a state submits a TMDL to the EPA for approval, the EPA must approve or disapprove the provisions within thirty days. 33 U.S.C. 1313(d)(2).

In December 2003, Oregon revised its existing water quality standards for temperature and submitted them to the EPA for review under 33 U.S.C. § 1313(c). *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 855 F. Supp. 2d 1199, 1207 (D. Or. 2012). The water quality standards established new designated uses with regard to various trout and salmon species, many of which were identified as threatened or endangered under the ESA, and biologically-based numerical temperature criteria (“Biologically-Based Criteria”) intended to protect the newly designated uses. (Second Am. Compl., ECF No. 11, (“Compl.”) ¶ 43.); OR. ADMIN. R. 340-041-028(4) (2015). The water quality standards also incorporated a natural conditions criteria, which allowed Oregon to increase the temperature criteria after determining the water temperatures that existed naturally before human interference exceeded the biologically-based criteria (“NCC”). The NCC specifically provided that:

[w]here the department determines that the natural thermal potential of all or a portion of a water body exceeds the biologically-based criteria in section (4) of this rule, the natural thermal potential temperatures supercede the biologically-based criteria, and are deemed to be the applicable temperature criteria for that water body.

OR. ADMIN. R. 340-041-028(8) (2015).

The EPA approved the water quality standards, including the NCC, on March 2, 2004. *Nw. Env'tl.*, 855 F. Supp. 2d at 1207. The EPA acknowledged the NCC-based temperature criteria (“NCC-Based Criteria”) may exceed the Biologically-Based Criteria and that temperatures above optimal levels may adversely effect salmonids, but “viewed ‘temperature criteria based on natural conditions to be fully protective of salmonid uses’ because salmonids had historically thrived under natural conditions.” *Id.* at 1216 (quoting administrative record).

In December 2005, NWEA filed a lawsuit in this court challenging, in part, the EPA’s approval of the NCC as a “water quality standard.” *Id.* at 1207. NWEA argued the NCC, a narrative criteria, swallowed the Biologically-Based Criteria, a numerical criteria, allowing Oregon to revise water quality standards without proper EPA review. *Id.* at 1216. NWEA further contended the methodology for determining NCC-Based Criteria was seriously flawed. *Id.* at 1217. The court found the EPA’s approval of the NCC as a water quality standard violated the CWA’s water quality standards review, and was arbitrary and capricious. *Id.* at 1217.

While the CWA specifically allows states to establish narrative criteria “where numerical criteria cannot be established or to supplement [numerical] criteria,” the court found the NCC was a narrative criteria which improperly supplanted established numerical criteria, namely the Biologically-Based Criteria, in violation of the CWA. *Id.* at 1217-18 (quoting 40 C.F.R. § 131.1(b)(2)). The court explained: “the NCC supplants rather than supplements the numeric criteria by allowing Oregon to replace the numeric criteria (determined to be protective of salmonids) with a new numeric standard during the TMDL process. The replacement of one numeric standard with another less protective numeric standard cannot be viewed as ‘supplementing’ the first standard.”

Id.

The court also questioned the use of historical water temperatures while ignoring or discounting other historical changes to Oregon's water bodies and fish populations, such as lost shorelines and side channels offering rearing habitat. *Id.* at 1218. "The record clearly demonstrates that many of Oregon's waterbodies have undergone dramatic changes and are no longer the rivers they once were. The NCC attempts to restore one aspect of Oregon's historical water conditions (higher temperatures in some waterbodies) without restoring the other conditions that allowed salmonids to survive." *Id.* Accordingly, the court found the EPA failed to articulate a rational basis for its approval of the NCC. *Id.*

The court granted NWEA's motion for summary judgment and directed the parties to confer regarding appropriate remedies. *Id.* at 1218, 1231. On April 10, 2013, the court entered a stipulated order setting aside the EPA's approval of the NCC and directed the EPA to take action on the NCC pursuant to the summary judgment ruling, the CWA, and the EPA's implementing regulations within 120 days ("Stipulated Order"). (Stipulated Order on Narrative Water Quality Criteria and Antidegradation Internal Management Directive, ECF No. 370, at 2.) The EPA disapproved the NCC on remand, leaving the Biologically-Based Criteria as the sole water quality standard. (EPA's Brief re Cross-Motions for Summ. J., ECF No. 88, at 16.)

From 2004 to 2010, after the EPA's approval of the NCC and before vacation of such approval by the court, Oregon submitted numerous TMDLs introducing NCC-Based Criteria that exceeded, and consequently superceded, the Biologically-Based Criteria to the EPA for review under 33 U.S.C. 1313(d). The EPA approved all of the relevant TMDLs.

In the Second Amended Complaint filed by NWEA on October 28, 2012 ("Complaint"),

NWEA challenges the EPA's approval of fourteen TMDLs containing NCC-Based Criteria. These TMDLs are identified as the:

1. Rogue Basin, Applegate Subbasin TMDL ("Applegate Subbasin TMDL");
2. Snake River, Hells Canyon TMDL ("Snake River TMDL");
3. Sandy Basin TMDL;
4. Umatilla Basin, Walla Walla Subbasin TMDL ("Walla Walla Subbasin TMDL");
5. Willamette Basin TMDL;
6. Umatilla Basin, Willow Creek Subbasin TMDL ("Willow Creek Subbasin TMDL");
7. Umpqua Basin TMDL;
8. Rogue Basin, Middle Rogue Subbasin and Bear Creek Watershed TMDL ("Middle Rogue Subbasin TMDL");
9. Willamette Basin, Molalla Pudding Subbasin TMDL ("Molalla Pudding Subbasin TMDL");
10. Rogue Basin TMDL;
11. Middle Columbia/Hood Basin, Miles Creek Subbasin TMDL ("Middle Columbia/Hood Basin TMDL");
12. Grand Ronde, Lower Grand Ronde Subbasin TMDL ("Grand Ronde TMDL");
13. Malheur Basin TMDL; and
14. John Day Basin TMDL.

NWEA alleges the TMDLs set revised water quality standards which the EPA was obligated to review under 33 U.S.C. § 1313(c), and the EPA's approval of the TMDLs under 33 U.S.C. § 1313(d) violated the CWA or was arbitrary and capricious. Alternatively, assuming the EPA

properly considered the TMDLs under 33 U.S.C. §1313(d), NWEA asserts the TMDLs are deficient in that they fail to address all applicable water quality standards or incorporate appropriate safety margins. Finally, NWEA contends the EPA violated the ESA by failing to consider the possible effect of the TMDLs on threatened or endangered salmon or trout species, or consult with the Services to ensure the TMDLs will not jeopardize the continued existence of such species.

Currently before the court are the parties' cross-motions for summary judgment on these claims. In the Complaint, NWEA requested a judgment declaring the EPA violated the CWA and the ESA, or acted arbitrarily and capriciously, in approving the TMDLs; an order vacating the EPA's approval of the TMDLs; and an order directing the EPA to review the TMDLs under 33 U.S.C. § 1313(c) and evaluate whether approval of the TMDLs may affect listed species. However, in its motion for summary judgment NWEA seeks only a determination of the EPA's liability for its alleged errors at this time. NWEA asks the court to allow the parties to confer on appropriate remedies and, if necessary, propose a briefing schedule for issues relating to such remedies.

Legal Standards

I. Administrative Procedure Act.

Summary judgment is appropriate where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (2016). When reviewing an agency's final decision, the court's duty on summary judgment is to determine whether the evidence in the administrative record permitted the agency to make that decision as a matter of law. *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985). Such review is governed by the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2016) ("APA"). 5 U.S.C. § 706(2)(A); *Ariz. Cattle Growers' Ass'n v.*

U.S. Fish & Wildlife, 273 F.3d 1229, 1235 (9th Cir. 2001). This standard is “highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision.” *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006)(quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)).

The court may set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). To determine whether an agency decision is arbitrary and capricious, the court should “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)(quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). After considering the relevant factors, the agency must articulate a satisfactory explanation for its action, including a rational connection between the facts found and the agency’s conclusions. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008); *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007)(citation omitted).

An arbitrary and capricious finding is necessary if the agency “relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010)(quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008), *abrogated on other grounds by Winter v. Natural Res. Def. Ctr.*, 555 U.S. 7 (2008)). Under the arbitrary and capricious standard of review, an agency’s decision “need only be reasonable, not the best or most reasonable, decision.” *River Runners for Wilderness v. Martin*, 593

F.3d 1064, 1070 (9th Cir. 2010).

The court must be “at its most deferential” when reviewing an agency’s scientific determinations under the arbitrary and capricious standard. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Even if an agency decision is based on “admittedly weak best available science,” the court is not allowed to “substitute [its] judgment for that of the agency.” *ALCOA v. BPA*, 175 F.3d 1156, 1160-61 (9th Cir. 1999). Courts are not to “act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering the agency to explain every possible scientific uncertainty.” *Lands Council*, 537 F.3d at 987 (internal quotation marks and brackets omitted). Ultimately, review under the arbitrary and capricious standard is narrow, and the court may not substitute its judgment for the judgment of the agency. *Lands Council*, 629 F.3d at 1070.

II. Clean Water Act.

The CWA explicitly authorizes private citizens to commence a civil action against the United States and any other governmental agency for specified violations of the CWA. 33 U.S.C. § 1365 (2016). A citizen suit alleging a failure by the EPA to perform in accordance with the CWA will lie only if the EPA failed to exercise a non-discretionary duty. 33 U.S.C. § 1365(a)(2); *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001). Such non-discretionary duty must be “‘readily ascertainable’ and not ‘only [] the product of a set of inferences based on the overall statutory scheme.’” *Our Children’s Earth Found. v. U.S. Env’t Prot. Agency*, 527 F.3d 842, 851 (9th Cir. 2008)(quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)).

III. Endangered Species Act.

Under the ESA, the United States Fish and Wildlife Service (“FWS”) is required to maintain

lists of endangered and threatened species. 16 U.S.C. § 1533(c)(1). The ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification” of such species’ critical habitat. 16 U.S.C. § 1536(a)(2). Whenever a federal agency, for example the EPA, determines a proposed action “may affect listed species or critical habitat,” that agency must prepare a biological assessment on the effects of the action and consult with the FWS and the National Marine Fisheries Service (“NMFS”)(collectively “Services”) to determine whether the agency action is likely to result in jeopardy to that species or its critical habitat. 50 C.F.R. § 402.14(a) (2016); 16 U.S.C. § 1536(a). “A plaintiffs’ burden in establishing a procedural violation is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed. . . . It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.” *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985), *abrogated on other grounds in Cottonwood Env’tl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1091-92 (9th Cir. 2015).

Discussion

I. Statute of Limitations.

The EPA argues NWEA’s claims under the APA and the ESA³ challenging TMDLs approved by the EPA six years prior to the filing of this action are barred by the applicable statute of limitations. This action was filed September 27, 2012. Consequently, the EPA argues the four

³The EPA does not argue as untimely NWEA’s Second Claim for Relief alleging the EPA failed to perform non-discretionary duties under the CWA.

temperature TMDLs approved by EPA prior to September 27, 2006, specifically the: Applegate Subbasin TDML approved in February 2004; Snake River TMDL approved in March 2004⁴; Sandy Basin TMDL approved in April 2005; and Walla Walla Subbasin TMDL in September 2005; are barred. (AR 1 at 1; AR 25 at 605; AR 62 at 3720; AR 81 at 4169)

NWEA concedes these four TMDLs are time-barred under the APA and, in fact, expressly excluded them from their First, Third and Fifth Claims seeking relief under the APA for violations of the CWA. However, NWEA did not exclude the four TMDLs from its Fourth Claim for Relief, in which it alleges that “by approving TMDLs that would not result in the attainment of all applicable criteria, EPA acted arbitrarily, capriciously, and in violation of the CWA and the APA, 5 U.S.C. § 706 (2)(A).” (Compl. ¶ 100.)

As the APA does not contain a specific statute of limitations, the general civil action statute of limitations found in 28 U.S.C. § 2401(a) applies to actions brought under the APA for review of an agency action. *Wind River Mining Corp v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). Section 2401(a) provides that every civil action against the United States “shall be barred unless the complaint is filed within six years after the right of action first accrues.” A right of action first accrues under § 2014(a) when an administrative action becomes final. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 522 (1967). NWEA has offered no evidence establishing approval of the TMDLs was not a final agency action. Accordingly, the four TMDLs approved prior to September 27, 2006, are time-barred and should be dismissed from NWEA’s Fourth Claim for

⁴NWEA represents the Snake River TMDL was approved in September 2004. It appears from the record the Snake River TMDL was approved on March 1, 2004, while a TMDL related to phosphorus, dissolved oxygen, and sediments for the Snake River - Hells Canyon Reach was approved on September 9, 2004. (AR 19 at 562; AR 25 at 605.)

Relief.

The EPA also asserts NWEA's claims alleging violations of the ESA are untimely. The general civil action statute of limitations found in 28 U.S.C. § 2401(a) also applies to actions brought against the federal government under the ESA. *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1160 (D. Or. 2001). As with the APA claims, to the extent NWEA's ESA claims accrued prior to September 27, 2016, they are time-barred.

In its Sixth and Seventh Claims for Relief, NWEA alleges the EPA violated the ESA when it failed to properly consult with the Services before approving the TMDLs at issue. NWEA's Seventh Claim for Relief is based on the EPA's failure to determine whether new criteria contained in the Willamette Basin TMDL would have an effect on listed species. (Compl. ¶¶ 108-111.) The EPA does not identify the Willamette Basin TMDL as one of those approved prior to the September 27, 2006 deadline and, in fact, the Willamette Basin TMDL was approved on September 29, 2006. (AR 98 at 4626.) NWEA's Seventh Claim for Relief is timely.

In its Sixth Claim for Relief, NWEA alleges the "EPA's approvals of the TMDLs listed in Table 1 are "actions" within the meaning of the ESA" which "may affect, either negatively or beneficially, some or all of the species listed in Table 2." (Compl. ¶ 105.) Accordingly, the EPA's failure to consult with the Services, prepare biological assessments, or make a "no effects" determination prior to approving the TMDL, violated the ESA. (Compl. ¶¶ 106-07.) NWEA specifically excluded the Snake River TMDL from this claim, leaving only the Applegate Subbasin, Sandy Basin, and Walla Walla Subbasin TMDLs as relevant TMDLs approved prior to September 27, 2006. (Compl. at 38 n.13.)

NWEA characterizes its Sixth Claim for Relief as alleging an ongoing failure by the EPA to

comply with a mandatory duty under the ESA. NWEA contends each day an agency fails to perform a mandatory duty is a discrete, actionable violation which defeats the EPA's statute of limitation argument with regard to this claim. NWEA relies on a ruling by Judge Brown of this district that the six-year statute of limitations did not apply to claims alleging the FWS failed to perform a mandatory, statutory duty to designate critical habitat. *Inst. for Wildlife Prot. v. United States Fish and Wildlife Serv.*, No. 07-CV-358-PK, 2007 WL 4117978, at *6 (D. Or. Nov. 16, 2007). Judge Brown adopted the reasoning of the District of Columbia Circuit set forth in *Wilderness Soc'y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006), wherein the court found the six-year statute of limitations "inapplicable because the plaintiff did not 'complain about what the agency has done but rather about what the agency has yet to do' in order to comply with its binding statutory duty to identify and manage wilderness in the national park system." *Wildlife Prot.*, 2007 WL 4117978, at *5 (quoting *Wilderness Soc'y*, 434 F.3d at 588.) Judge Brown explained that "[b]ecause the FWS's mandatory, statutory duty to designate critical habitat did not expire in October 1994 when the agency first violated the ESA or at any time thereafter, the Court concludes each day that FWS does not designate critical habitat for the Oregon chub as required constitutes a single, discrete violation of the statute." *Wildlife Prot.*, 2007 WL 4117978, at *6.

In *Wildlife Prot.* and *Wilderness Society*, the court considered an agency's ongoing obligation to perform a statutory duty. In *Wildlife Prot.*, the ESA required the FWS to designate critical habitat within a year after listing a species as endangered and perform status reviews of the listed species every five years, which the FWS failed to do in the fourteen years after listing the Oregon chub as endangered. *Wildlife Prot.*, 2007 WL 4117978, at *1. In *Wilderness Society*, plaintiff alleged the National Park Service failed to "conduct wilderness assessments, forward

wilderness recommendations to the President, prepare wilderness management plans, revisit legally-insufficient wilderness assessments, and otherwise to take required measures to protect wilderness resources in this country” in violation of the Wilderness Act. *Wilderness Society*, 434 F.3d at 587. In both cases, the plaintiff sought an order from the court compelling the federal agency to perform mandatory, ongoing duties under the relevant statutes. Additionally, the plaintiffs objected to an agency’s failure to act, not a final action taken by an agency in violation of its statutory duties.

Here, despite NWEA’s characterization, the Sixth Claim for Relief does not allege the EPA failed perform, or seek to compel the EPA to perform, an ongoing, non-discretionary statutory obligation. Rather, NWEA alleges the EPA’s “actions in approving” the TMDLs violated the ESA and seeks a declaratory judgment the EPA violated the ESA “by failing to evaluate whether its actions may effect ESA-listed species or otherwise consult with the Services before approving Oregon’s temperature TMDLs.” (Compl. at 43.) NWEA complains about actions the EPA was required to take before issuing a final action. An agency’s obligation to comply with the ESA’s consultation requirement is triggered only when making an affirmative act or authorization, and is not an ongoing agency obligation. *Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006, 1021 (9th Cir. 2012); *Ctr. For Biological Diversity v. Env’tl Prot. Agency*, No. 11-cv-002930JCVS, 2013 WL 1729573, *22 (N. D. Cal. April 22, 2013). NWEA’s claim for violation of the ESA asserted in its Sixth Claim for Relief accrued when the EPA approved the TMDLs. TMDLs approved prior to September 27, 2006, are time-barred. Accordingly, the Applegate Subbasin, Sandy Basin, and Walla Walla Subbasin TMDLs should be dismissed from NWEA’s Sixth Claim for Relief.

II. Application of *Nw. Env’tl. Advocates*.

NWEA’s first three claims for relief are all based on the premise the TMDLs created under

the NCC revised existing water quality standards with regard to numerical temperature criteria. Accordingly, NWEA argues the EPA was obligated to review the TMDLs as revised water quality standards under 33 U.S.C. § 1313(c) or as implementing the Biologically-Based Criteria under 33 U.S.C. 1313(d). By considering and approving the TMDLs under 33 U.S.C. §1313(d) and establishing NCC-Based Criteria which superceded the Biologically-Based Criteria, the EPA allegedly acted arbitrarily and capriciously and violated the CWA.

In its First Claim for Relief, NWEA asserts the TMDLs implemented revised numerical criteria based on the NCC which differed from the Biologically-Based Criteria approved by the EPA in March 2004. In light of the EPA's disapproval of the NCC, the natural thermal potential temperatures in the TMDLs should have been considered with regard to the applicable water quality standard – the Biologically-Based Criteria. Because the TMDLs failed to implement the Biologically-Based Criteria, the EPA's approval of the TMDLs under 33 U.S.C. § 1313(d) was arbitrary and capricious, and thus improper under the APA.

In its Second Claim for Relief, NWEA alleges Oregon's submission of the TMDLs to the EPA triggered the EPA's duties under 33 U.S.C. § 1313(c). The EPA had a non-discretionary duty to timely review and either approve or disapprove the revised water quality standards created by the TMDLs. The EPA's failure to perform the non-discretionary duty was a violation of the CWA actionable under the citizen suit provision. NWEA's alternative claim, found in the Third Claim for Relief, asserts the EPA's decision to not consider the natural thermal potential temperatures in the TMDLs as revised water quality standards, and its subsequent failure to review the TMDLs under 33 U.S.C. 1313(c), were arbitrary and capricious, and violated the APA.

It is clear from the summary judgment briefing, if not from the express allegations of the

Complaint, that NWEA's first three claims are grounded in this court's ruling that natural thermal temperatures determined under the NCC improperly supplant, rather than supplement, the Biologically-Based Criteria, the Stipulated Order setting aside the EPA's approval of the NCC, and the EPA's subsequent withdrawal of its approval of the NCC. *See Nw. Env'tl.*, 855 F. Supp. 2d at 1217-18. NWEA's allegations assume this ruling effectively vacated the EPA's approval of the NCC *ab initio*, making the Biologically-Based Criteria the only applicable water quality standard during the relevant period. Accordingly, any numerical criteria which altered these Biologically-Based Criteria revised the existing water quality standards and was subject to review by the EPA under 33 U.S.C. § 1313(c).

A. Collateral estoppel.

NWEA argues the prior ruling resolved all issues related to the legality of the NCC and the EPA is collaterally estopped from relitigating those issues again in this action. Collateral estoppel bars relitigation of issues adjudicated in an earlier proceeding if three requirements are met: "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (quoting *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005)). Collateral estoppel applies only "to those matters or points which were in issue or controverted and upon determination of which the initial judgment necessarily depended." *In re Westgate-California Corp.*, 642 F.2d 1174, 1176 (9th Cir. 1981). "The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th

Cir. 1992).

Here, the latter two requirements are unquestionably met. The court issued a final judgment on the merits in *Nw. Envtl.* and the parties to the two actions are the same as those here. Accordingly, only the first element is at issue.

The first prong considers the similarity between the issues presently before the court and the issues previously litigated. NWEA contends the issue before the court is “does the NCC allow Oregon to adopt new, less protective, standards in the TMDLs in violation of [28 U.S.C. 1313(c)].” (Pl.’s Resp./Reply on Summ. J., ECF No. 102 (“NWEA’s Reply”), at 13.) According to NWEA, this precise issue was previously decided by this court and cannot be relitigated. The EPA argues the issue before the court is whether it properly approved the TMDLs, which interpreted and applied the NCC, a water quality standard then in effect. The EPA asserts that, as the court addressed only the propriety of the approval of the NCC as a water quality standard in the previous action, the validity of the TMDLs interpreting the NCC was not resolved.

In *Nw. Envtl.*, NWEA alleged the EPA’s approval of the NCC was arbitrary and capricious and not in accordance with the CWA, and asked the court to set aside such approval. In support of its motion for summary judgment, NWEA argued the NCC allowed Oregon to set new numerical temperature criteria without additional EPA approval upon determining the natural thermal potential of a water body exceeded the relevant Biologically-Based Criteria. (Second Telegin Decl. dated April 25, 2015, ECF No. 103 (“Second Telegin Decl.”) Ex. A, at 5, 8-9.) NWEA further asserted the EPA relied on flawed and unreliable historical temperature condition models or evidence which did not estimate real historical natural conditions and failed to consider whether the natural thermal potential would provide adequate protection for salmonids in light of the current condition of the

water ways, including the absence of cold water refugia. (Second Telegin Decl. Ex. A, at 5-8.)

Despite acknowledging Oregon had issued temperature TMDLs under the NCC and would likely be preparing such TMDLs for every river in the state, NWEA did not argue, or ask the court to consider whether, the EPA's approval of such TMDLs also violated the CWA or the APA. (Second Telegin Decl. Ex. B, at 4 n.9.) In fact, NWEA characterized as meritless the EPA's argument that the EPA remained involved in the implementation of the NCC through its review of TMDLs and other processes, and specifically distinguished the EPA's review of water quality standards and TMDLs. (Second Telegin Decl. Ex. B, at 8.) NWEA was clearly focused on the legality of the EPA's approval of the NCC in *Nw. Envtl.*, and did not, in any way, address the effect such legality had on the TMDLs generated in accordance with the NCC.

Similarly, the court did not directly consider the legality of TMDLs identifying the natural thermal potential of a water body under the NCC. The court summarized NWEA's claim as a challenge to the EPA's approval of the NCC, not a challenge to the NCC and all TMDLs generated thereunder. *Nw. Envtl.*, 855 F. Supp. 2d at 1216. Further, the court specifically found "the EPA's approval of the NCC was arbitrary and capricious for a number of reasons," "the NCC violates the CWA's § 303(c) water quality standards review," and the "EPA has been unable to articulate a rational bases for its approval of the NCC." *Id.* at 1218. The court did not make any finding with regard to the legality of TMDLs created under the NCC but merely referenced TMDLs in passing in its analysis. The reference is insufficient to support collateral estoppel. *See Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading*, 873 F.2d 229, 233 (9th Cir. 1989) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding.").

The court relied on 40 C.F.R. § 131.11(b)(2), which authorized the states to “[e]stablish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.” It then acknowledged the existence of the Biologically-Based Criteria and considered whether the NCC supplemented or supplanted this established numerical criteria. The court reasoned the NCC, which allowed Oregon to replace the established Biologically-Based Criteria with less-protective natural thermal potential temperature criteria during the TMDL process, should be viewed as supplanting, rather than supplementing, the biologically-based standard in violation of the federal regulation. While this holding may instruct the court’s consideration of TMDLs issued in conformance with the NCC, it does not necessarily equate to a finding that all TMDLs issued under the NCC violate the CWA. The doctrine of collateral estoppel does not bar the EPA from asserting the TMDLs at issue were properly approved under the CWA.

B. Judicial estoppel.

The EPA argues the court must determine whether its approval of the TMDLs was proper in light of the water quality standards in existence at the time the TMDLs were submitted. The EPA asserts the doctrine of judicial estoppel bars NWEA from claiming the NCC was not a water quality standard under the CWA.

Judicial estoppel is an equitable doctrine invoked at the discretion of the court and the determination to invoke it is “driven by the specific facts of the case.” *Johnson v. State of Oregon*, 141 F.3d 1361, 1368 (9th Cir. 1998). The doctrine “precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). Application of

judicial estoppel is not reducible to a set formula. Rather:

several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party’s later position must be “clearly” inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001) (internal citations omitted). Judicial estoppel is designed to protect the integrity of the courts, including “general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings . . . [and] is intended to protect against a litigant playing fast and loose with the courts.” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). Accordingly, the doctrine is not designed to protect the interests of individual parties. *In re Coastal Plains, Inc. v. Mims*, 179 F.3d 197, 205 (5th Cir. 1999) (“Because the doctrine is intended to protect the judicial system, *rather than the litigants*, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary.”) (emphasis in original).

In *Nw. Envtl.*, NWEA characterized the NCC as “water quality criteria,” “narrative criteria” and a “standard” improperly approved by the EPA under 33 U.S.C. § 1313(c). In fact, NWEA concedes it argued the NCC was a “water quality standard” in *Nw. Envtl.* (NWEA’s Reply at 13 n.14.) So, while NWEA does not necessarily assert the NCC was not properly characterized as a water quality standard when it was submitted by Oregon and approved by the EPA in March 2004, NWEA is judicially estopped from asserting anything to the contrary in this action. However, the characterization of the NCC as a water quality standard approved in the 2004 does not negate this court’s finding the NCC violated the CWA and the setting aside of the EPA’s approval of the NCC in *Nw. Envtl.*, or the effect thereof.

C. Retroactivity.

Next, the EPA contends the TMDLs were properly considered under 33 U.S.C. 1313(d) as implementing the NCC, a water quality standard in effect at the time the TMDLs were submitted. The EPA notes it approved the NCC in March 2004 and argues the NCC remained a viable water quality standard until this court set aside the approval in the Stipulated Order on April 10, 2013. NWEA asserts the court's findings in *Nw. Envtl.* should be applied retroactively, invalidating the NCC as of the date of its approval, and leaving the Biologically-Based Criteria as the only water quality standard for temperature in Oregon from 2004 to present.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-06 (1971), the United States Supreme Court clarified the Court's long-standing application of the doctrine of nonretroactivity to civil actions. The Court explained the question of whether to apply a decision nonretroactively historically required the consideration of three separate factors.

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that “we must * * * weigh the merits and demerits in each case, by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” Finally, we have weighed the inequity imposed by retroactive application, for “where a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.”

Id. at 106-07 (internal citations omitted).

Twenty years later, the Court altered course, recognizing that “[b]oth the common law and our decisions’ have ‘recognized a general rule of retrospective effect for the constitutional decisions of this Court.’” *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 94 (1993) (citation omitted). The court acknowledged previously permitting “the denial of retroactive effect to a ‘new principle of law’

if such a limitation would avoid ‘injustice or hardship’ without unduly undermining the ‘purpose and effect’ of the new rule,” but reinforced the more recent finding by a majority of the Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), that “a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all court adjudicating federal law.” *Harper*, 509 U.S. at 96. The Court specifically adopted a new rule that “[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” *Id.* at 97. The Court did expressly recognize a narrow exception to the presumption of retroactivity where the Court reserves the question of whether its holding should be applied to the parties before it. *Id.*

The Ninth Circuit does not view *Harper* as rejecting the *Chevron Oil* test entirely or requiring all new rules of law be applied retroactively. Rather, the Ninth Circuit interprets *Harper* as limiting, “in two relevant ways, the circumstances in which the *Chevron Oil* test applies.” *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011). “First, a court announcing a new rule of law must decide between pure prospectivity and full retroactivity” – weighing equities on a case-by-case basis is not allowed. *Id.* “Second, in cases in which the new rule of law strips the courts of jurisdiction, the courts must apply that new rule of law retroactively.” *Id.* at 691. The Ninth Circuit concluded the *Chevron Oil* three-pronged test still applies: “(1) in a civil case; (2) when we announce a new rule of law, as distinct from applying a new rule that we or the Supreme Court previously announced; (3) and when the new rule does not concern our jurisdiction.” *Id.*

Applying the Ninth Circuit’s analysis, the court in *Nw Env’t l* issued an opinion in a civil case

announcing a new rule of law that did not concern jurisdiction. Accordingly, the court in *Nw Env't'l* could have considered the new ruling announced therein under the *Chevron Oil* test. However, the parties did not raise the issue before the court and the court impliedly, if not expressly, applied its ruling retroactively to the parties before it when it set aside the EPA's approval of the NCC. *See Harper*, 509 U.S. at 97 (quoting *Beam*, 501 U.S. at 539) (“When [the] Court does ‘not reserve the question whether its holding should be applied to the parties before it,’ . . . an opinion announcing a rule of federal law ‘is properly understood to have followed the normal rule of retroactive application’ and must be ‘read to hold . . . that its rule should apply retroactively to the litigants then before the Court.’”)

Here, the court is faced with the task of determining whether a rule of law announced previously in *Nw Env't'l* should be applied retroactively in this case. The court is not announcing a new rule of law with regard to the NCC's compliance with the CWA and its implementing regulations, or the propriety of the EPA in approving the NCC, but rather applying a rule of law first established in a different action, albeit involving the same parties. In this scenario, the court must follow the precedent established in *Nw Env't'l* and apply the ruling retroactively. *See Harper*, 509 U.S. at 96-97 (quoting *Beam*, 501 U.S. at 540) (“After the case announcing any rule of federal law has ‘appl[ied] that rule with respect to the litigants’ before the court, no court may refuse to apply [that] rule . . . retroactively. . . . Furthermore, the legal imperative to ‘apply a rule of federal law retroactively after the case announcing the rule has already done so’ must ‘prevail over any claim based on a *Chevron Oil* analysis.’”)

Applying the new ruling in *Nw Env't'l* retroactively, the court must view the setting aside of the EPA's approval of the NCC in 2004 as invalidating the NCC *ab initio*. “‘Setting aside’ is a term

of art that means vacating; ‘no other meaning is apparent.’” *Olympic Forest Coalition v. U.S. Forest Serv.*, 556 F. Supp. 2d 1198, 1205 (W. D. Wa. 2008)(citations omitted).

In *Olympic Forest*, the plaintiff challenged an environmental assessment prepared by the defendant pursuant to a 2004 Record of Decision (“2004 ROD”). *Id.* at 1200, 1202. The 2004 ROD amended certain provisions of the 1994 Record of Decision (“1994 ROD”) and relieved the Forest Service of a duty to comply with nine Aquatic Conservation Strategies (“ACS”) present in the 1994 ROD. *Id.* at 1201. In September 2006, the Forest Service issued an environmental assessment under the 2004 ROD which failed to assess compliance with the ACS objectives contained in the 1994 ROD. *Id.* at 1202. Six months later, the district court set aside the ACS amendments adopted in the 2004 ROD, finding the biological opinions and environmental impact statements supporting the amendment to the ACS to be arbitrary and capricious, and contrary to the National Environmental Policy Act, the ESA, and the APA. *Id.* at 1201.

The *Olympic Forest* court was forced to consider the ramifications of the decision setting aside the 2004 ROD on the environmental assessment prepared while the 2004 ROD was the applicable standard. The court held “the effect of this decision was to reinstate the legal standards previously in force, namely the 1994 ROD.” *Id.* Accordingly, the court found “the Forest Service was obligated to go back and analyze the project under the 1994 ROD.” *Id.* at 1204-05.

As in *Olympic Forest*, this court must consider the effect of a prior decision setting aside the NCC on TMDLs implementing the objectives of the NCC. In doing so, the court must view the prior decision as vacating the NCC, making the Biologically-Based Criteria the only relevant water quality standard during the period the TMDLs were submitted to, and approved by, the EPA.

The EPA’s reliance on 40 C.F.R. § 131.21 is inapposite. Section 131.21(e) provides that “[a]

State or authorized Tribe’s applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard.” The setting aside of the EPA’s approval of the NCC defeats any argument the NCC was an “applicable water quality standard for purposes of the Act.” The Biologically-Based Criteria is the relevant water quality standard for the State of Oregon during the period in question. With this in mind, the court will address NWEA’s First, Second, and Third Claims for Relief independently.

III. First Claim for Relief.

The EPA reviewed and approved ten TMDLs between September 29, 2006, and December 17, 2010, identifying new temperature criteria under the NCC and establishing allocations for thermal loads to existing or future point sources of pollution (“wasteload allocation”) or to existing or future non-point sources, and natural background sources, of pollution (“load allocation”) designed to attain the NCC-Based Criteria. NWEA alleges the TMDLs implemented revised numerical criteria which exceeded the Biologically-Based Criteria approved by the EPA in March 2004. Accordingly, the TMDLs failed to set limits on thermal loads necessary to satisfy the applicable water quality standard – the Biologically-Based Criteria. NWEA asserts the EPA’s approval of the TMDLs was “therefore arbitrary, capricious, and not in accordance with the CWA and the APA.” (Compl. ¶ 88.)

Water quality standards define water quality goals for a water body by “designating the use or uses to be made of the water and by setting criteria that protect the designated uses.” 40 C.F.R. § 131.2 (2016). The standards protect “public health or welfare” and “provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water . .

..” *Id.* To do so, states develop narrative or numerical criteria to support and protect the designated uses. 40 C.F.R. § 131.3 (2016).

The stated purpose for Oregon’s relevant water quality standards “is to protect designated temperature-sensitive, beneficial uses, including specific salmonid life cycle stages in the waters of the State.” OR. ADMIN. R. 340-41-028(3) (2015). The Biologically-Based Criteria approved by the EPA in 2004 establish seven-day average maximum requirements for all waters supporting salmonid fishes. OR. ADMIN. R. 340-41-028(4) (2015). Specifically, the temperature criteria for each designated use are as follows:

(a) A stream identified as having salmon and steelhead spawning use may not exceed 13.0 degrees Celsius (55.4 degrees Fahrenheit) during the period identified in specified maps and tables;

(b) A stream identified as having cold core water habitat may not exceed 16.0 degree Celsius (60.8 degrees Fahrenheit);

(c) A stream identified as having salmon and trout rearing and migration use may not exceed 18.0 degrees Celsius (64.4 degrees Fahrenheit) during the period identified in specified maps and tables;

(d) A stream identified as having a migration corridor may not exceed 20.0 degrees Celsius (68.0 degrees Fahrenheit); must have sufficient cold water refugia to avoid adverse effects from higher water temperatures elsewhere in the water body, and must reflect the natural seasonal thermal pattern;

(e) A stream identified as Lahontan cutthroat trout or redband trout use may not exceed 20.0 degrees Celsius (68.0 degrees Fahrenheit); and

(f) A stream identified as having bull trout spawning and juvenile rearing use may not exceed 12.0 degree Celsius (53.6 degrees Fahrenheit) with limitations on increases in water temperature in specified areas based on relevant seven-day average stream temperatures.

OR. ADMIN. R. 340-41-028(4)(a)-(f).

While these narrative and numerical standards establish water quality goals for water bodies, they also provide a regulatory basis for setting effluent limits for point sources discharging pollutants

into those water bodies. 33 U.S.C. §§ 1311, 1316. A point source is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point sources are regulated through the National Pollutant Discharge Elimination System (“NPDES”), under which permits are issued for discharge into navigable waters. 33 U.S.C. 1342. Alternatively, non-point source pollution, though undefined in the CWA, arises “from many dispersed activities over large areas, and is not traceable to any single discrete source.” *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds, Decker v. Nw. Env'tl. Def. Ctr.*, _____ U.S. _____, 133 S.Ct. 1326 (2013).

TMDLs are the vehicle used by states to allocate pollutant loads to point and non-point sources of pollution. A TMDL includes the best estimate of pollution from non-point sources or natural background sources and the amount of pollution from specific point sources. 40 C.F.R. §130.2(i) (2016). Specifically, each TMDL must be set at such a level as:

to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

33 U.S.C. § 1313(d)(1)(D). These limits inform each water segment’s “loading capacity,” which describes the “greatest amount of loading that a water can receive without violating water quality standards.” 40 C.F.R. § 130.2(f) (2016). Consequently, TMDLs for waters identified by Oregon as temperature-impaired must assign wasteload and load allocations for sources of heat to assure the Biologically-Based Criteria are met, with proper consideration of the few narrative criteria contained therein. 33 U.S.C. § 1313(d)(1)(D).

NWEA alleges that in each TMDL at issue, “Oregon impliedly or explicitly determined the waters of the various basins would naturally have exceeded the State’s biologically-based numeric criteria.” (Compl. ¶ 56.) In its motion for summary judgment, NWEA represents “Oregon erased its existing temperature standards and replaced them with new, less protective standards purportedly reflecting natural conditions” in the relevant TMDLs. (Pl.’s Mot. for Summ. J., ECF No. 78 (“NWEA’s Mot.”), at 1-2.)

In support of these claims, NWEA provides an exhibit comparing the Biologically-Based Criteria with the corresponding highest NCC-Based Criteria for “each modeled river and stream in the temperature TMDLs at issue in this case.” (Telegin Decl. dated Nov. 25, 2014, ECF No. 86 (“First Telegin Decl.”) at ¶¶ 2-4.) Telegin indicates he obtained these temperatures directly from the relevant TMDLs, or by comparing Oregon’s designated use maps and the corresponding criteria provided in the Oregon Administrative Rules. (First Telegin Decl. at ¶¶ 3-4.) In the absence of any objection by the EPA or any intervenor defendant, and in light of the 26,000 page record of which the parties have intimate knowledge, the court relies on the accuracy of the temperatures set forth in Exhibit A to the declaration of Bryan Telegin (the “Table”), and Telegin’s representation the Table provides information for all relevant water bodies.

The Table makes clear the NCC-Based Criteria exceed the Biologically-Based Criteria for the water bodies identified in the TMDLs in every instance. Consequently, the TMDLs do not assign wasteload and load allocations for sources of heat to assure the applicable water quality standards – the Biologically-Based Criteria – are met. The EPA did not provide a rational basis for approving – and, in fact, barely discussed – the effect of the higher temperatures implemented in the TMDLs. Accordingly, approval of the TMDLs by the EPA under 33 U.S.C. § 1313(d) was arbitrary and

capricious. NWEA is entitled to summary judgment on its First Claim for Relief for violation of the CWA and the APA.

IV. Second Claim for Relief.

In its Second Claim for Relief, NWEA asserts the EPA violated a non-discretionary duty to consider the higher temperatures in the TMDLs as revised water quality standards and timely review them under 33 U.S.C. § 1313(c). NWEA contends the EPA's failure to properly consider the new or revised water quality standards was a violation of the CWA actionable under the citizens suit provision. The EPA's obligation to review any new or revised state water quality standard is a mandatory, non-discretionary duty for the purposes of the CWA's citizens suit provision. *Miccosukee Tribe of Indians of Fla. v. United States*, 105 F.3d 599, 602 (11th Cir. 1997). Consequently, the pivotal question for this claim is whether the TMDLs revised existing water quality standards and are, therefore, subject to such mandatory review under 33 U.S.C. § 1313(c).

“A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.” 40 C.F.R. § 131.2. The term “criteria” is defined as “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” 40 C.F.R. § 131.3. Generally, criteria are identified as numerical values. 40 C.F.R. § 131.11(b) (2016). However, states may establish narrative criteria “where numerical criteria cannot be established or to supplement numerical criteria.” *Id.*

On the other hand, a TMDL establishes the maximum quantitative amount of a pollutant which may be released from point and non-point sources without violating the established narrative

and numerical water quality standards. 40 C.F.R. § 130.2(i); 40 C.F.R. §130.7(c)(2). A TMDL includes three distinct but interrelated components: wasteload allocations, load allocations, and a requisite margin of safety. 33 U.S.C. § 1313(d)(1)(D); 40 C.F.R. § 130.2(g)-(i).

NWEA's position is that to the extent the TMDLs implemented numerical temperature criteria that exceeded the Biologically-Based Criteria, the TMDLs effectively revised the existing water quality standards and are subject to review under 33 U.S.C. § 1313(c). The court's ruling in *Nw. Envtl.* is instructive.

In *Nw. Envtl.*, the court addressed the issue of whether the NCC, a narrative criteria, supplemented or supplanted the Biologically-Based Criteria. *Nw. Envtl.*, 855 at 1217-1218. The court found the NCC allowed Oregon to substitute a higher numerical temperature criteria identified as the natural thermal condition of a water body for the EPA-approved Biologically-Based Criteria. *Id.* The court concluded: "the NCC supplants rather than supplements the numeric criteria (determined to be protective of salmonids) with a new numeric standard during the TMDL process" in violation of the CWA and its implementing regulations. *Id.* at 1217-18.

Applying this holding to the issue before the court, the TMDLs, which all contain higher numerical temperature criteria than the Biologically-Based Criteria, supplant the applicable water quality standards. The term "supplant" is defined as "1. To usurp the place of, especially through intrigue or underhanded tactics. 2. To displace and substitute for (another)." THE AMERICAN HERITAGE DICTIONARY (3d ed. 1996). Consequently, the higher numerical temperature criteria contained in the TMDLs effectively revised the Biologically-Based Criteria.

The *Nw. Envtl.* court also found the EPA is obligated to review state actions that effect whether and how water quality standards are applied, or that may enable or disable the attainment

of a water quality criteria. *Nw. Env'tl.*, 855 at 1211. “The EPA looked at the plain language of the challenged provisions, saw that they were not traditional water quality standards, and did not review the potential effects the provisions may have to supplant or otherwise delay the implementation of Oregon’s water quality standards. Without a searching review of the challenged provisions, the EPA was not entitled to make that decision.” *Id.*

While the load and wasteload allocations identified in the TMDLs were proper for review under 33 U.S.C. § 1313(d), the numerical temperature criteria contained therein revised the existing water quality standard and should have been reviewed under 33 U.S.C. § 1313(c). The EPA’s failure to recognize the higher numerical temperature criteria as a change to the Biologically-Based Criteria and, therefore, a revision of the relevant water quality standard requiring review under 33 U.S.C. § 1313(c), was a violation of the EPA’s mandatory, non-discretionary duty to review all revisions to a water quality standard under the stricter review required by 33 U.S.C. § 1313(c). NWEA is entitled to summary judgment on its Second Claim for Relief under the citizens suit provision of the CWA.

V. Third Claim for Relief.

NWEA’s alternative claim, found in its Third Claim for Relief, asserts the EPA’s failure to consider the numerical temperature criteria identified in the TMDLs as new or revised water quality standards and subsequent failure to review the TMDLs under 33 U.S.C. 1313(c) was arbitrary and capricious and a violation of the APA. Because the court found in NWEA’s favor on its Second Claim for Relief, its alternative claim is moot and need not be addressed.

VI. Fourth Claim for Relief.

In its Fourth Claim for Relief under the APA, NWEA argues the TMDLs did not implement all applicable water quality standards as required by 33 U.S.C. § 1313(d). Accordingly, NWEA

argues the EPA's approval of the TMDLs was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.

NWEA's Fourth Claim for Relief relies on the NCC-Based Criteria established pursuant to the NCC. NWEA alleges the NCC-Based Criteria fail to attain the minimum water temperatures required to protect of designated uses, seasonal temperature standards, and cold-water refugia. (Compl. ¶99.) The court has determined its finding in *Nw. Env'tl.* that the NCC violates the CWA, and the resulting Stipulated Order setting aside the EPA's approval of the NCC, should be applied retroactively. Consequently, consideration of the alleged errors in the Fourth Claim for Relief would require analysis of the TMDLs under water quality standards that are no longer relevant or effective. Such an endeavor would result in no benefit to any party, would be useless, and is unnecessary.

Additionally, NWEA does not seek any unique relief in its Fourth Claim for Relief. With regard to alleged violations of the CWA, NWEA asks the court for a declaratory judgment the EPA acted arbitrarily and capriciously, and violated 33 U.S.C. § 1313(c), by adopting the TMDLs, an order vacating the EPA's approvals of the TMDLs, and an order directing the EPA to review the new numeric and narrative criteria contained in the TMDLs pursuant to 33 U.S.C. § 1313(c). As NWEA is entitled to all of these remedies under its First and Second Claims for Relief, consideration and resolution of the allegations found in the Fourth Claim for Relief would not result in additional benefit to NWEA. Accordingly, the court finds NWEA's Fourth Claim for Relief moot.

VII. Fifth Claim for Relief.

NWEA's Fifth Claim for Relief alleges Oregon's estimates of natural thermal conditions, as set forth in the TMDLs, do not contain the margins of safety required by the CWA. Again, this claim is based on NCC-Based Criteria determined under the NCC and does not seek any unique

remedies. For the reasons set forth above, the court finds NWEA's Fifth Claim for Relief moot.

VIII. Sixth Claim for Relief.

The Sixth Claim for Relief is based on alleged violations of the ESA, specifically 16 U.S.C. §1536(a)(2). There is no dispute the EPA failed to consult with the Services, prepare biological assessments, or make a "no effects" finding before approving all but the Willamette Basin TMDL.⁵ NWEA alleges the TMDLs, and the establishment of new temperature criteria exceeding Oregon's Biologically-Based Criteria, may have had an effect, either adversely or beneficially, on a number of species listed as threatened or endangered. (Compl. ¶¶ 105, 106.) Accordingly, NWEA contends EPA's approval of the TMDLs violated the ESA. The EPA argues it lacked discretion to disapprove the TMDLs once it determined they complied with the NCC and, therefore, had no obligation under the ESA to consider possible effects on protected species. Alternatively, the EPA contends because the TMDLs were based on the NCC, it properly relied on the biological opinions prepared by the Services with regard to the NCC. Similarly, the EPA argues the biological assessment prepared with regard to the Willamette TMDL established the implementation of temperature criteria based on natural thermal conditions would necessarily have no effect on protected species.

The purposes of the ESA are to "provide a means whereby the ecosystems upon which the endangered species and threatened species may be conserved," and "to provide a program for the conservation" of such species. 16 U.S.C. § 1531(b). The ESA requires federal agencies to take measures to insure their actions will not "jeopardize the continued existence of any endangered or

⁵The EPA made a "no effect" finding with regard to the Snake River TMDL. However, such finding was made in a biological evaluation dated September 9, 2003, and confirmed by the FWS on February 26, 2004, both prior to the EPA's approval of the NCC in March 2004, and is not relevant to the issues currently before the court. (See AR 57; AR 61.)

threatened species or result in the destruction of or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). These measures include preparing a biological assessment and consulting with the Services if the agency determines their action is likely to result in jeopardy to protected species or critical habitat. 50 C.F.R. § 402.14(a). Such consultation provides the federal agency with the expertise of wildlife agencies with regard to the likely effect of its intended action, and reasonable and prudent alternatives to avoid unfavorable impacts. *Karuk*, 681 F.3d at 1020 (citing *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003)).

The obligation of a federal agency to consult is based on a two-fold inquiry. “First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species.” *Karuk*, 681 F.3d at 1021.

A. Discretion to influence for benefit of protected species.

A federal agency need not consult with regard to actions “an agency is required by statute to undertake once certain specified triggering events have occurred.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007)(citation omitted). A federal agency’s duties under 16 U.S.C. § 1536(a)(2) cover only discretionary actions. *Id.* Discretion is defined as “the power or right to decide or act according to one’s own judgment; freedom of judgment or choice.” *Id.* at 668. “To trigger the ESA consultation requirements, the discretionary control retained by the federal agency also must have the capacity to inure to the benefit of a protected species.” *Karuk*, 681 F. 3d at 1024.

The EPA argues it does not have authority to disapprove a TMDL that meets the factors

specified in 33 U.S.C. § 1313, which requires, in part, a TMDL “be established at a level necessary to implement the applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C). The court has found the NCC-Based Criteria contained in the TMDLs do not implement the applicable water quality standards. Consequently, the EPA had the discretion to disapprove the TMDLs. In fact, the EPA impliedly concedes this issue in the final biological evaluation of the NCC issued on February 4, 2004 (“NCC BiEv”). In the NCC BiEv, the EPA recognized it had the authority to disapprove a TMDL if the natural thermal potential determination contained therein was inconsistent with the Oregon’s applicable water quality standards. (AR 464 at 25681.)

Alternatively, the court found the NCC-Based Criteria set forth in the TMDLs revised the existing water quality standard and should have been considered under 33 U.S.C. § 1313(c). Based on evidence in the record the EPA consulted with the Services before approving Oregon’s water quality standards in 2004, it appears the EPA acknowledges a duty to consult with regard to water quality standards and, impliedly, had the discretion to deny such water quality standards for the benefit of a protected species.

The court finds the EPA had the discretion to disapprove the TMDLs as not complying with the applicable water quality standards under 33 U.S.C. § 1313(d), or as a revised water quality standard under 33 U.S.C. 1313(c). Accordingly, the court finds the EPA had the requisite discretion to influence of change the activities authorized in the TMDL for the benefit of a protected species.

B. Affirmatively authorized, funded, or carried out underlying activity.

The EPA asserts approval of a TMDL does not authorize activity but merely sets loads to implement a previously approved water quality standard. Alternatively, the EPA argues the consultation on the underlying water quality standards subsumed any obligation to engage in

additional consultation with regard to TMDLs written at levels necessary to met such standards.

A federal agency's duty to consult under the ESA is triggered only when the agency takes affirmative action." *Id.* Examples of such "affirmative action" include, but are not limited to: "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2016).

The Ninth Circuit has characterized TMDLs as a method for implementing water quality standards. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). Specifically,

TMDLs are primarily information tools that allow the states to proceed from the identification of water requiring additional planning to the required plans. As such, TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters.

Id. (internal citation omitted). As described by NWEA, "a TMDL is a blueprint for cleaning up impaired waters; its purpose is to determine the total amount of pollution that may enter a waterbody on a daily basis while still meeting applicable water quality standards." (NWEA's Reply at 3.) TMDLs must be implemented, if at all, through other regulatory and non-regulatory programs. *Pronsolino*, 291 F.3d at 1140.

Relying on this description, the court finds TMDLs are substantially similar to the annual operating procedures ("AOP") at issue in *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164 PCT-DGC, 2008 WL 4417227 (D. Ariz. Sept. 26, 2008). In *Grand Canyon*, the court addressed the question of whether preparation of an AOP by a federal agency with regard to the operation of a dam constituted an agency action which triggered an obligation to consult under the

ESA. The court first examined the agency's action with regard to the underlying operating criteria for the dam and, specifically, the related environmental impact statement in which the agency considered ten different water-release alternatives. *Id.* at *12. The agency recommended a modified low fluctuating flow water-release procedure which allowed for low monthly flows in the Spring and high monthly flows in the Summer to correspond with electricity demand. *Id.* at *13. The Secretary of Interior adopted the agency's recommendation as the relevant operating criteria. *Id.* at *13. The court noted precise monthly flow volumes could not be set in the operating criteria given the uncertainties of yearly precipitation and power demands. *Id.*

In the AOP, the agency projected water releases from various reservoirs during a single water year based on the operating criteria. *Id.* at *14. The plaintiff claimed each AOP was an affirmative agency action requiring annual consultation with the FWS under the ESA. *Id.* at *8. More specifically, the plaintiff claimed the AOP was the vehicle in which the agency made monthly flow decisions. *Id.* at *15. The court disagreed, finding the AOP merely projected, or provided an educated guess of, how much water would be released, and that actual release decisions would be governed by the operating criteria and the conditions existing at the time of a release. *Id.* at *15. The court concluded the "AOP does not constitute the kind of affirmative agency action contemplated by the language of the statute or the implementing regulations." *Id.* at *16.

Similar to the AOP in *Grand Canyon*, which were intended to implement the operating criteria, TMDLs are issued to implement established water quality standards. Water quality standards are a state's "operating criteria," designating specific uses and establishing numerical and narrative water quality standards to protect those uses. EPA approval of water quality standards constitutes an affirmative act requiring appropriate consultation under the ESA. However, a TMDL

does nothing more than implement the numerical and narrative criteria created in the water quality standards. When the EPA approves a TMDL, it merely confirms the loading capacity and load allocations contained therein comply with the applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C). Such approval does not qualify as an affirmative agency action. *See Shell Gulf of Mexico v. Center for Biological Diversity, Inc.*, Case No. 3:12-CV-00048-RRB, Order on Summ. J. at 34, ECF No. 159 (D. Alaska Aug. 5, 2013)(approvals stating that oil spill response plans met statutory and regulatory requirements did not authorize activity, project, or program and were not the type of agency action that triggered ESA consultation).

Even assuming EPA approval of NCC-Based Criteria contained in the TMDLs could be viewed as an affirmative agency action, the environmental consultation with regard to the Oregon's water quality standards, including the NCC, applies to the NCC-Based Criteria. The ESA requires consultation only once on an environmental impact. *Center for Biological Diversity v. Jackson*, No. C 12-01920 WHA, 2012 WL 3835097, *3 (N.D. Cal. 2012). Agency approvals of actions that were contemplated in the prior approval of an action subject to an ESA consultation are subsumed within the prior consultation. *Shell*, Order at 35.

In the NCC BiEv, the EPA viewed “criteria based on natural conditions to be fully protective of salmonid uses, even if the natural conditions are higher than the numeric criteria for some waterbodies, because river temperatures prior to human impacts clearly supported healthy salmonid populations.” (AR 464 at 25680.) The EPA found the NCC would result in criteria truly reflecting conditions absent human impacts and would be determined using best methods and required Oregon to document the methodology and resulting estimates of natural thermal potential in the TMDLs. (AR 464 at 26580-81.) The EPA acknowledged it had the authority to disapprove a TMDL if the

temperature criteria contained therein did not attain the applicable water quality standard and that such action may include an ESA consultation. (AR 464 at 25681.)

The EPA explained:

approval of the natural conditions criteria is likely to result in temperatures i[n] some waters that lead to adverse effects on listed species, but those adverse effects would be naturally occurring and could not be avoided or minimized without artificial measures to lower temperatures. It is also important to recognize, however, that use of the natural background criteria in a TMDL context will in almost all cases result in criteria that is beneficial to the listed species relative to current baseline conditions because the natural thermal potential is colder than current temperature conditions in waterbodies that are currently impacted by human activities.

(AR 464 at 25681.) It then concluded the NCC may affect, but is not likely to adversely affect, several salmonid species in the Upper, Middle, and Lower Columbia River, Snake River and Basin, and Upper Willamette River; Columbia River Basin and Klamath Basin bull trout; and lahontan cutthroat trout. (AR 464 at 25681-82.)

In its biological opinion issued on February 24, 2004 (“FWS BiOp”), the FWS agreed with the EPA’s conclusion.

The Service believes that the natural condition is part of the baseline condition of the environment that is not likely to change as a result of this action. EPA’s approval of the standard allows the natural baseline to be adopted as the standard which may then cause effects to the subject species. We concur with EPA’s determination of may affect, not likely to adversely affect the subject species. Natural conditions can create situations which are adverse to a species; however, the extent of this adverse effect is not anticipated to cause significant harm or injury.

(AR 465 at 25796-97.) NMFS similarly agreed with the EPA’s conclusion in its biological opinion issued February 23, 2004 (“NMFS BiOp.”)

The temperature Guidance recommends “natural conditions” criteria fully support salmonids by reflecting conditions absent human impacts, and that the criteria not allow temperatures changes due to past human activities to be considered as part of the natural condition. The Temperature Guidance includes what EPA and [NMFS] consider to be the best available methods to estimate the natural conditions for

temperature.

ODEQ has described methods it may use to determine natural conditions for temperature in the December 19, 2003, [sic] letter to Randy Smith, EPA from Mike Llewellyn, ODEQ . . . (BE Appendix G). Depending upon the specific situation, ODEQ may use different methods for determining natural conditions; however, the methods described to date are consistent with the recommendations in the Temperature Guidance. Conservation measure 3 offers an additional opportunity to confirm that ODEQ is implementing the natural background provisions in a manner this is consistent with the scope of the analysis of effects and conclusion described in this Opinion.

In its BE, EPA determined that the natural condition and state wide narrative criteria may affect, but is not likely to adversely affect, the subject threatened and endangered species. Based on the above consistency of this criterion with the Temperature Guidance, and CM 3, [NMFS] concurs with EPA's determination of the effect.

(AR466 at 25876.)

It is clear both the EPA and the Services considered the possibility the NCC-Based Criteria would exceed the Biologically-Based Criteria and would lead to adverse effects on listed species.⁶ While acknowledging such adverse effects would be naturally occurring and would not cause significant harm or injury, they concluded the NCC, and any NCC-Criteria adopted thereunder, may affect, but is not likely to adversely affect, the listed species.

In *Shell*, the plaintiff claimed the approval of two oil spill response plans ("Plans") prepared pursuant to the Oil Pollution Act's amendments to the CWA violated the ESA due to lack of consultation. The court found the approvals constituted a small part of a larger exploration plan considered in a prior ESA consultation and that such prior ESA consultation covered the Plans.

⁶The retroactive application of *Nw. Envtl*, specifically the setting aside of the EPA's approval of the NCC, did not invalidate the NCC BiEv, the FWS BiOp, the NMFS BiOp, the consultation between the EPA and the Service, or the "no adverse effect" finding with regard to the NCC. Additionally, the court did not set aside, but merely remanded the FWS BiOp and NMFS BiOp for additional consideration in that case.

Shell, Order at 35.

Here, the ESA consultation on Oregon's water quality standards found NCC-Based Criteria determined under the NCC using appropriate methods was not likely to adversely affect the listed species. In approving the TMDLs, the EPA found they were written to attain applicable water quality standards, including the NCC. Accordingly, the ESA consultation on the NCC subsumed the subsequent approval of the TMDLs issued pursuant to the NCC.

NWEA argues the EPA's approval of the TMDLs resulted in changes to NPDES permitting requirements, the lifting of a CWA prohibition on new discharges to impaired water bodies, and alterations to the obligations of nonpoint sources. Accordingly, the approval of the TMDLs was an affirmative action from which legal rights and obligations flow. However, each of these "legal rights" were created by statutes or regulations existing at the time of the EPA's approval of the NCC and would have been considered by the EPA and the Services during the ESA consultation. The subsequent approval of the TMDLs triggering these legal rights and obligations were covered by the ESA consultation on the NCC and did not require a second consultation with regard to the TMDLs.

The court finds the EPA's approval of the TMDLs was not a affirmative action for the purposes of the ESA. Alternatively, the court finds the ESA consultation with regard to Oregon's water quality standards, including the NCC, covers the TMDLs subsequently approved by the EPA as implementing the NCC, thereby eliminating the need for a second ESA consultation on TMDL implementing NCC-Based Criteria..

C. No effect on listed species.

The EPA also argues that, based on the biological opinions issued with regard to the NCC, and the subsequent determination by the EPA that approval of the TMDLs implementing the NCC

would have “no effect” on listed species, the EPA was not required to consult with the Services on the TMDLs. The ESA requires consultation when an agency’s action is likely to result in jeopardy to protected species or critical habitat. 50 C.F.R. § 402.14(a). However, where the agency makes a determination the action will have no effect on the listed species, formal consultation is not required. *Sw Center for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996); *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994)(“[I]f the agency determined that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.”).

With regard to the Willamette Basin TMDL,⁷ the EPA found Oregon “utilized methodologies and information which were the best available and utilized the best available information as required by the criteria (OAR 340-041-002(35))” in determining the natural thermal potential of the various water bodies under the NCC. (AR 99 at 4631, 4657.) The EPA explained in the biological assessment issued in September 2006, for the Willamette Basin TMDL, its approval of a TMDL “relates only to the State’s mathematical calculation of the appropriate allocations necessary to meet water quality standards” and that “no physical alteration to the environment results from this action.” (AR 151 at 8516.) Accordingly, the EPA concluded “approval of the Willamette Basin TMDL[s] **will have no effect on the spring Chinook, winter steelhead, Oregon chub, bull trout, and bald eagle.**” (AR 151 at 8517 (emphasis in original).)

In a letter dated September 25, 2006, the EPA advised the FWS of the “no effect” determination with regard to its approval of the Willamette Basin TMDLs. (AR 150.) The EPA

⁷The TMDL consists of 208 separate TMDLs addressing mercury, bacteria and temperature impairments to the mainstream Willamette River and twelve subbasins. (AR 99 at 4628.)

explained it:

prepared an assessment of the potential impacts of this action on the listed species in the basin and shared the documents with your staff. Numerous conversations and meetings have occurred to ensure your staff understood the pending action and its potential effects. Following these discussions EPA determined that approval of these TMDLs will have “no effect” on listed [threatened and endangered species]. This determination is discussed in the enclosed “No Effects Determination, Willamette Basin Total Maximum Daily Loads.”

The enclosed assessment documents EPA’s “no effect” determination. As discussed in the assessment, EPA has determined that there will be no direct effects to listed species or their habitat from EPA’s approval of the Willamette Basin TMDLs. These TMDLs contain calculations of loading capacities and load allocations as required by the Clean Water Act and 40 CFR 130.2 and 130.7. EPA’s approval does not extend beyond the scope of the statutory and regulatory requirements for TMDLs. EPA’s approval of these TMDLs does not include a determination on the adequacy of the underlying water quality standards nor on the sufficiency of the implementation actions that may be taken in the future to achieve reductions in loading consistent with the allocations called for in the TMDLs.

(AR 150 at 8510-11.) It does not appear the FWS responded in any way to this letter. The EPA approved the Willamette Basin TMDL on September 29, 2006. (AR 98.)

The EPA clearly made a “no effect” finding for the Willamette Basin TMDL. However, it neglected to engage in the same analysis in the subsequent TMDLs. EPA urges the court to apply the rationale for the Willamette Basin TMDL “no effect” finding to the other TMDLs, arguing once the finding was made, there was no reason to document identical findings with regard to subsequent TMDLs. The court declines to take this leap for the EPA. The duty to consult under the ESA is relieved only when the agency makes a determination their action will have no effect on listed species. While the rationale of the Willamette Basin TMDL “no effect” finding may apply to the subsequent TMDLs, the EPA, not the court, is obligated to engage in such analysis. The “no effect” finding for the Willamette Basin TMDL does not automatically apply to all subsequent TMDLs.

Applying the ruling in *Nw Env’t* retroactively, the EPA had the discretion to disapprove the

TMDLs as not complying with the Biologically-Based Criteria or as a revision to such criteria for the benefit of listed species. Also, the court finds the “no effect” finding for the Willamette Basin TMDL does not automatically apply to all subsequent TMDLs or relieve the EPA of its duty to either make a “no effect” determination or engage in consultation under the ESA. However, the EPA’s approval of the TMDLs served merely to ensure the load capacity and load allocations complied with the NCC and was not an affirmative action for the purposes of the ESA. Additionally, the ESA consultation on the NCC, in which the EPA and the Services concluded NCC-Based Criteria determined in accordance with the NCC would have no adverse effect on listed species, relieved the ESA of its duty to consult with regard to TMDLs implementing such NCC-Based Criteria. Consequently, the court finds the ESA approvals of the TMDLs did not require consultation and did not violate the ESA. The EPA is entitled to summary judgment on NWEA’s Sixth Claim for Relief.

IX. Seventh Claim for Relief.

While conceding the EPA made a “no effect” finding on the Willamette Basin TMDL, NWEA asserts the finding was with regard to the loading capacity and load allocations, not the NCC-Based Criteria. In its Seventh Claim for Relief, NWEA claims the EPA violated the ESA by failing to determine if the NCC-Based Criteria may affect listed species.

For the reasons discussed above, the EPA and Services consultation on Oregon’s water quality standards and conclusion that NCC-Based Criteria determined pursuant to the NCC would not adversely affect listed species covers the EPA’s approval of the Willamette Basin TMDL, which the EPA found properly implemented the NCC. Additionally, the approval of the Willamette Basin TMDL was not an affirmative agency action but rather a determination the TMDL met statutory and regulatory requirements. Consequently, the court finds the EPA was not required to consult under

the ESA. The EPA is entitled to summary judgment on NWEA's Seventh Claim for Relief.

Conclusion

NWEA's motion (ECF No. 78) for summary judgment should be GRANTED with regard to the First and Second Claims for Relief with the exception of NWEA's First Claim for Relief based on TMDLs approved by the EPA prior to September 27, 2006; DENIED with regard to the Sixth and Seventh Claims for Relief; and DENIED as moot with regard to the Third, Fourth, and Fifth Claims for Relief. The EPA's cross-motion (ECF No. 88) for summary judgment, and Intervenor Defendants' cross-motions (ECF Nos. 92, 95, and 96) for summary judgment joining in the EPA's cross-motion, should be GRANTED with regard to NWEA's Sixth and Seventh Claims for Relief, and NWEA's First Claim for Relief based on TMDLs approved by the EPA prior to September 27, 2006, and DENIED in all other respects. The parties should be directed to discuss appropriate remedies and suggest a briefing schedule, if necessary, on such remedies.

Scheduling Order

The Findings and Recommendation will be referred to a district judge for review. Objections, if any, are due **October 31, 2016**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 12th day of October, 2016.

/s/ John V. Acosta
JOHN V. ACOSTA
United States Magistrate Judge