

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL)
ADVOCATES,)

Plaintiff,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendant,)

and)

NORTHWEST PULP & PAPER ASS'N,)
et al.)

Defendant-Intervenors)

No. 2:14-cv-0196-RSM

[PROPOSED] STIPULATED ORDER OF
PARTIAL DISMISSAL

WHEREAS, Northwest Environmental Advocates (“Plaintiff”) filed the above-entitled lawsuit against the U.S. Environmental Protection Agency (“EPA”) on February 10, 2014, and a First Amended Complaint on September 1, 2015 (Dkt. 54);

WHEREAS, the State of Washington Department of Ecology (“Washington”) intervened in this action on March 30, 2015 (Dkt. 38);

WHEREAS, Plaintiff’s First Amended Complaint asserts that certain EPA decisions, dated February 11, 2008, and May 14, 2008, approving and making other determinations under 33 U.S.C. § 1313(c) regarding Washington’s submissions of specific changes to its water quality

1 standards, were inconsistent with the federal water quality standards regulations and the Clean
2 Water Act (“CWA”), were arbitrary, capricious and otherwise contrary to law, or were made
3 without the requisite consultations under section 7 of the Endangered Species Act (“ESA”); that
4 EPA failed to reinitiate consultation under section 7 of the ESA with respect to certain decisions
5 made on February 11, 2008; and furthermore that EPA has failed to act on certain water quality
6 standards submitted by Washington in 2003 and 2006;

7 **WHEREAS**, Plaintiff, EPA, and Washington (collectively referred to as “the Parties”)
8 have agreed to resolve certain counts contained in the First Amended Complaint in the above-
9 captioned case; and

10 **WHEREAS**, the Parties and their respective counsel consent and enter into this
11 Stipulated Order of Partial Dismissal (“Stipulated Dismissal”) to resolve the First and Second
12 Claims for Relief, as well as parts of the Third and Fourth Claims for Relief, raised in the First
13 Amended Complaint without trial, adjudication, or admission of any issue of fact or law with
14 respect to Plaintiff’s claims and allegations and without admission of any fact, allegations, or
15 legal argument contained in Plaintiff’s First Amended Complaint in this action.

16 **NOW, THEREFORE, THE PARTIES STIPULATE AS FOLLOWS:**

17 1. Within three years of the Court’s entry of this Stipulated Dismissal, EPA will
18 complete an effects determination pursuant to 50 C.F.R. § 402.14(a) for its approval of
19 Washington’s December 8, 2006 submission of revisions to the State’s ammonia criteria and, as
20 appropriate, request initiation of any necessary ESA section 7 consultation with the U.S. Fish
21 and Wildlife Service and/or the National Marine Fisheries Service. Provided, however, that if
22 Washington submits revisions to the ammonia criteria for EPA’s review pursuant to CWA
23 section 303(c) and EPA proposes to approve such revisions, then EPA will instead, within one
24 year of such submission or within three years of the Court’s approval of this Stipulated
25 Dismissal, whichever date is later, complete an effects determination for its proposed approval of
26 Washington’s submission of revised ammonia criteria (rather than the criteria approved by EPA

1 on February 11, 2008) and will, as appropriate, request initiation of any necessary ESA section 7
2 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries
3 Service.

4 2. Within three years from the effective date of this Stipulated Order, Washington will
5 take the following actions:

6 a. Washington will propose a change that removes WAC 173-201A-200(1)(c)(ii)(B)
7 and 173-201A-210(1)(c)(ii)(B) from Washington's water quality standards provisions.

8 Washington will issue a final rule no later than one year after its proposed rule;

9 b. Washington will propose a criterion for fine sediments to protect salmonid redds.
10 Washington will issue a final rule no later than one year after its proposed rule. If the proposed
11 rule is a narrative criterion, Washington will concurrently issue draft guidance regarding how it
12 will interpret and apply its fine sediment criterion, including, but not limited to, its use in
13 establishing Washington's CWA section 303(d) list and, no later than 18 months following
14 issuance of the final rule, issue final guidance; and

15 c. Washington will propose a change to amend footnote dd to Table 240(3) to state
16 that an adjustment of metals criteria pursuant to footnote dd requires approval by EPA pursuant
17 to 33 U.S.C. § 1313(c). Washington will issue a final rule no later than one year after its
18 proposed rule.

19 3. Upon entry of this Stipulated Dismissal by the Court, the First and Second Claims
20 alleging ESA violations, as well as the portions of the Third Claim related to WAC 173-201A-
21 200(1)(c)(ii)(B), 173-201A-210(1)(c)(ii)(B), and WAC 173-204, Part V, and the portion of the
22 Fourth Claim related to WAC 173-201A-210(1)(c)(ii), WAC 173-201A-200(1)(e)(i) and WAC
23 173-201A-210(1)(e)(i) alleging CWA violations, in Plaintiff's First Amended Complaint against
24 EPA, along with the corresponding requests for relief for such claims, are hereby dismissed with
25 prejudice. Notwithstanding the dismissal of these claims, however, the parties hereby stipulate
26 that the Court shall retain jurisdiction to oversee compliance with the terms of this Stipulated

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1 Dismissal, modify its terms as described in paragraph 5, and resolve any disputes concerning its
2 implementation until the obligations in paragraphs 1 and 2 of this Stipulated Dismissal are
3 completed. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

4 4. Plaintiff also hereby forever releases, discharges, and covenants not to assert against
5 EPA (by way of the commencement of an action, the joinder of EPA in an existing action or in
6 any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever
7 in law or in equity, that Plaintiff may have had, or may now or hereafter have, against EPA based
8 upon the same transactions or occurrences that are at issue in the First and Second Claims for
9 Relief, and portions of the Third and Fourth Claims for Relief addressed in this Stipulated
10 Dismissal, in the First Amended Complaint. Nothing in this Stipulated Dismissal is intended to
11 waive or affect the claims the Court dismissed from this case in its July 2, 2015 Order, Dkt. 51,
12 or the Third and Fourth Claims for Relief (except as provided in Paragraph 3 above) in the First
13 Amended Complaint. NWEA reserves the right to appeal the Court's July 2, 2015 Order, Dkt.
14 51. Nothing in this Stipulated Dismissal shall affect Plaintiff's right to challenge EPA's
15 December 18, 2015 decision regarding WAC 173-204, Part V.

16 5. The Order entering this Stipulated Dismissal may be modified by the Court upon good
17 cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation
18 between the parties filed with and approved by the Court, or upon written motion filed by one of
19 the parties and granted by the Court. In the event that any party seeks to modify the terms of this
20 Stipulated Dismissal or in the event of a dispute arising out of or relating to this Stipulated
21 Dismissal, or in the event that any party believes that another party has failed to comply with any
22 term or condition of this Stipulated Dismissal, the party seeking the modification, raising the
23 dispute, or seeking enforcement shall provide the other party with notice of the claim. The party
24 raising the dispute shall commence an informal dispute resolution period to be no shorter than 30
25 days or other reasonable time under the circumstances, by giving written notice to the other party
26 stating the nature of the matter to be resolved and the position of the party asserting the

1 controversy. The Parties agree that they will meet and confer (either telephonically or in-person)
2 at the earliest possible time during the informal dispute resolution period in a good faith effort to
3 resolve the claim before seeking relief from the Court. If the parties are unable to resolve the
4 claim themselves, any party may seek relief from the Court.

5 6. In the event that Plaintiff believes that EPA or Washington has failed to comply with a
6 term of this Stipulated Dismissal and has not sought to modify it, Plaintiff's first remedy shall be
7 a motion to enforce the terms of this Stipulated Dismissal. Plaintiff shall not institute a
8 proceeding for contempt of court or request an order to show cause why EPA or Washington
9 should not be held in contempt unless and until Plaintiff demonstrates in such a request and
10 proceeding that EPA or Washington is in violation of a separate Court Order resolving a motion
11 by Plaintiff to enforce the terms of this Stipulated Dismissal.

12 7. Plaintiff reserves any claims for recovery of its attorneys' fees and costs through and
13 including the date the Court approves this Stipulated Dismissal, incurred in connection with the
14 First and Second Claims for Relief in the First Amended Complaint.

15 8. Plaintiff reserves the right to seek an award for reasonable attorneys' fees and
16 costs incurred after approval of this Stipulated Dismissal in connection with any disagreement
17 between the Parties concerning the interpretation, proposed modification, or performance of any
18 aspect of this Stipulated Dismissal. By entering this Stipulated Dismissal, EPA does not waive
19 any right to contest fees claimed by Plaintiff, including the hourly rate.

20 9. Any notice required or made with respect to this Stipulated Dismissal shall be in
21 writing. Notice shall be deemed to be given and received on the date received by facsimile or e-
22 mail transmission, if such notice is given by facsimile or e-mail transmission to all recipients
23 between 9:00 a.m. and 5:00 p.m. Eastern Standard Time or Eastern Daylight Time, as applicable,
24 on a business weekday. If notice is given by facsimile or e-mail transmission after 5:00 p.m. on
25 a weekday or on a weekend day, notice shall be deemed received on the next business day. For
26

1 any matter relating to this Stipulated Dismissal, the contact persons are:

2 For Plaintiff:

3 Allison LaPlante
4 Eartrise Law Center
5 Lewis & Clark Law School
6 10015 SW Terwilliger Blvd.
7 Portland, OR 97219
8 (503) 768-6894 (tel)
9 (503) 768-6671 (fax)
10 laplante@lclark.edu

11 For the United States, on behalf of EPA:

12 Alexander Fidis
13 Office of Regional Counsel
14 U.S. Environmental Protection Agency
15 1200 Sixth Ave, Suite 900
16 M/S ORC-113
17 Seattle, WA 98101

18 Associate General Counsel, Water Law Office
19 Office of General Counsel, 2355A
20 U.S. Environmental Protection Agency
21 1200 Pennsylvania Avenue, NW
22 Washington, DC 20460

23 John H. Martin
24 U.S. DEPARTMENT OF JUSTICE
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For Washington:

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P.O. Box 40117
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(360) 586-6751

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1 Email: ronaldi@atg.wa.gov

2 Upon written notice to the other Parties, any party may designate a successor contact person for
3 any matter relating to this Stipulated Dismissal.

4 10. No provision of this Stipulated Dismissal shall be interpreted as or constitute a
5 commitment or requirement that EPA obligate or pay funds exceeding those available, take
6 action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in
7 contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the CWA, 33
8 U.S.C. §§ 1251 et seq., the ESA, 16 U.S.C. §§ 1531 to 1544, or any other law or regulation,
9 either substantive or procedural.

10 11. The Parties recognize that the possibility exists that circumstances outside the
11 reasonable control of EPA could delay compliance with the obligations contained in this
12 Stipulated Dismissal. Such situations include, but are not limited to, a government shut-down
13 such as occurred in 1995, 1996, and 2013, or currently unforeseen catastrophic environmental
14 events requiring immediate and/or time-consuming response by EPA. Should a delay occur due
15 to such circumstances, any resulting failure to meet the obligations set forth herein shall not
16 constitute a failure to comply with the terms of this Stipulated Dismissal, and any deadlines
17 occurring within 120 days of the termination of the delay shall be extended one day for each day
18 of the delay, or more if the Parties so agree.

19 12. Nothing in the terms of this Stipulated Dismissal shall be construed to affect the
20 rights of the United States as against persons not parties to this Stipulated Dismissal, or to limit
21 or modify the discretion accorded to EPA by the CWA, the ESA, the APA, or by any general
22 principles of federal administrative or common law.

23 13. This Stipulated Dismissal does not impair any right Plaintiff may have to bring a
24 subsequent action challenging any final agency action that may arise from the Stipulated
25 Dismissal. EPA and Washington preserve all defenses to any such challenges.

26 14. This Stipulated Dismissal was negotiated between the Parties in good faith and was

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1 jointly drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of
2 construction to the effect that ambiguity is construed against the drafting party shall be
3 inapplicable in any dispute concerning the terms, meaning, or interpretation of this Stipulated
4 Dismissal.

5 15. This Stipulated Dismissal shall not constitute or be construed as an admission,
6 precedent, or adjudication of any question of fact or law with respect to any of the claims raised
7 in this matter. Nor is it an admission of violation of any law, rule, regulation, or policy by the
8 United States or EPA.

9 16. The individuals signing this Stipulated Dismissal on behalf of the Parties hereby
10 certify that they are authorized to bind their respective parties to this Stipulated Dismissal and do
11 agree to the terms herein.

12 17. This Stipulated Dismissal shall be governed and construed under the laws of the
13 United States.

14 18. The terms of this Stipulated Dismissal shall become effective upon entry of an Order
15 by the Court approving the Stipulated Dismissal.

16 19. The continuing jurisdiction of this Court over EPA specified in Paragraph 3 above
17 shall terminate upon EPA's fulfillment of its obligations under Paragraph 1 of this Stipulated
18 Dismissal. The continuing jurisdiction of this Court over Washington specified in Paragraph 3
19 above shall terminate upon Washington's fulfillment of its obligations under Paragraph 2 of this
20 this Stipulated Dismissal.

21 20. This Stipulated Dismissal constitutes the final, complete and exclusive agreement
22 and understanding between the Parties with respect to the matters addressed in this Stipulated
23 Dismissal. There are no representations, agreements or understandings relating to this Stipulated
24 Dismissal other than those expressly contained in this Stipulated Dismissal.

25 WHEREFORE, after reviewing the terms and conditions of this Stipulated Dismissal, the
26 Parties hereby consent and agree to the terms and conditions of this Stipulated Dismissal.

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1 IT IS SO STIPULATED.

2 Dated this ___ day of _____, 2018.

3 By: DRAFT
4 Allison LaPlante, OSB # 023614
5 (admitted *pro hac vice*)
6 Kevin Cassidy, OSB # 025296
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10 and

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18 *Attorneys for Plaintiff NWEA*

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4 ChrisR@atg.wa.gov

5 *Attorneys for Intervenor-Defendant*
6 *Washington*

7 IT IS SO ORDERED.

8 Dated this ____ day of _____, 2018.

9 _____
10 UNITED STATES DISTRICT JUDGE
11 RICARDO S. MARTINEZ
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CERTIFICATE OF SERVICE

I hereby certify that on XXXXXXXX, 2018, I electronically filed the foregoing Proposed Stipulated Order of Partial Dismissal with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

XXXXXXXX

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Certificate of Service:
Stipulated Dismissal
No. 2:14-cv-0196-RSM

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