



## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OGC-2020-0507; FRL-10015-55-OGC]**

### **Proposed Settlement Agreements, Clean Water Act and Endangered Species Act**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice; request for public comment.

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**SUMMARY:** In accordance with the Environmental Protection Agency (EPA) Administrator's October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a proposed stipulated order of dismissal to address several claims in a lawsuit filed by Northwest Environmental Advocates ("Plaintiff") in the U.S. District Court for the Western District of Washington. On December 7, 2016 the Plaintiff filed a complaint alleging, among other things, that the EPA's failed to perform duties mandated by the Endangered Species Act (ESA) to consult with the Fish & Wildlife Service and the National Marine Fisheries Service (collectively "the Services") regarding its actions under the Clean Water Act (CWA) with respect to nonpoint source management programs administered by the State of Washington Department of Ecology ("Ecology"). EPA seeks public input on the proposed stipulated order of dismissal prior to its final decision-making to settle the litigation.

**DATES:** Written comments on the proposed settlement agreements must be received by **[insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** Submit your comments, identified by Docket ID number EPA-HQ-OGC-2020-0507, online at [www.regulations.gov](https://www.regulations.gov) (EPA's preferred method). For comments

submitted at [www.regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [www.regulations.gov](http://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). The EPA encourages the public to submit comments via [www.Regulations.gov](http://www.Regulations.gov), as there will be a delay in processing mail and no hand deliveries will be accepted. For additional submission methods, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>

**FOR FURTHER INFORMATION CONTACT:** Stephen Sweeney, Water Law Office (2355A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564-5491; email address: [sweeney.stephen@epa.gov](mailto:sweeney.stephen@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Additional Information About the Proposed Stipulated Dismissal**

On December 7, 2016, Plaintiff filed suit in the federal district court for the

Western District of Washington. Plaintiff's original Complaint brought six claims alleging violations of various statutes by EPA and the National Oceanic & Atmospheric Administration ("NOAA"), including Administrative Procedure Act ("APA") claims alleging violations of the Coastal Zone Management Act, the CWA, the Coastal Zone Act Reauthorization Amendments, and the ESA. The State of Washington Department of Ecology ("Ecology") also intervened as a defendant in the litigation, as did the Washington State Farm Bureau Federation and Washington Cattlemen's Association. Each party filed motions designed to resolve some of the claims in the dispute. The proposed stipulated order of dismissal would resolve the remaining claims, specifically the remaining claims against EPA under the CWA and ESA.

Plaintiff's remaining claims are that EPA: violated CWA section 319 by approving Ecology's 2015 nonpoint source program update; violated CWA section 319(h)(8) in successive determinations in 2015, 2016, and 2017 that Washington had made "satisfactory progress" in implementing its nonpoint source program over the preceding years (2014, 2015, 2016); and violated ESA section 7 by failing to consult on the preceding actions, as well as on EPA's annual awards of CWA section 319 grant funds in each year between 2011-2017.

Under the proposed stipulated order of dismissal, EPA's obligations would be as follows: EPA's approval of Ecology's 2015 program update submittal would be remanded to EPA, and EPA's reconsideration of the program update (and associated ESA procedural commitments) would be stayed pending Ecology's action (or inaction as of a date certain) in submitting its next anticipated program update under section CWA section 319. Under the proposed settlement, EPA would be obligated to make an

effects determination under ESA regulations, pursuant to 50 CFR. 402.14(a), on EPA's approval, if any, of either Ecology's 2015 Submittal or its next nonpoint source management program update, depending on whether Ecology timely submits an update and, as appropriate, request initiation of ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. Specifically, if Ecology does not submit a program update by December 31, 2021, or a mutually negotiated extension, EPA would proceed with an ESA effects determination based on the State's 2015 submittal (which EPA approved in 2015) and, as appropriate, request initiation of ESA section 7 consultation. EPA also would make an "effects determination" under the ESA for the first "satisfactory progress" determination (under CWA section 319(h)(8)) associated with issuance of the next (2022) annual federal grant award and, as appropriate, request initiation of ESA consultation with the Services. The proposed stipulated order of dismissal would not resolve NWEA's claim for attorney's fees, which Plaintiff would need to file within 30 days of entry of the stipulated order of dismissal. The proposed stipulated order of dismissal includes obligations for Ecology; those terms are outside the scope of this notice and the Agency is not soliciting comment on them.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the obligations of EPA for resolution of the claims contained in the proposed stipulated order of dismissal from persons who are not named as original parties or intervenors to the litigation in question. EPA also may hold a public hearing on whether to enter into the proposed stipulated order of dismissal. EPA or the Department of Justice may withdraw or withhold consent to the proposed stipulated order of dismissal if the comments disclose facts or considerations

that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the CWA or ESA. Unless EPA or the Department of Justice determines that consent to this proposed stipulated order of dismissal should be withdrawn, the terms of the proposed stipulated order of dismissal will be affirmed and entered with the Court.

## **II. Additional Information About Commenting on the Proposed Settlement Agreement.**

### *A. How can I get a copy of the proposed settlement agreement?*

The official public docket for this action (identified by EPA-HQ-OGC-2020-0507) contains a copy of the proposed settlement agreement. The official public docket is located at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The regular hours of the EPA Docket Center Public Reading Room are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays; however, due to the COVID-19 pandemic, there may be limited or no opportunity to enter the docket center. At the time of this printing, the docket center is closed to public visitors out of an abundance of caution for members of the public and EPA staff to reduce the risk of transmitting COVID-19. During the closure, Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services, see <https://www.epa.gov/dockets>. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available on EPA's website at [www.regulations.gov](http://www.regulations.gov). You may use [www.regulations.gov](http://www.regulations.gov) to submit or view public

comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select “search.” It is important to note that EPA’s policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at [www.regulations.gov](http://www.regulations.gov) without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket.

EPA’s policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA’s electronic public docket but will be available only in printed, paper form in the official public docket. EPA has not included any copyrighted material in the docket for this proposed settlement. If commenters submit copyrighted material in a public comment, it will be placed in the official public docket and made available for public viewing when the EPA Docket Center is open.

*B. How and to whom do I submit comments?*

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. The EPA encourages the public to submit comments via [www.Regulations.gov](http://www.Regulations.gov). There will be a delay in processing mail and no hand deliveries will be accepted due to the COVID-19 pandemic.

EPA recommends that you include your name, mailing address, and an e-mail

address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the [www.regulations.gov](http://www.regulations.gov) website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: October 6, 2020.

**Steven Neugeboren,**  
*Associate General Counsel.*

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