

Washington Law Review

Volume 88

Number 2 *Symposium: The Disclosure Crisis*

6-1-2013

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Recommended Citation

Oliver Stiefel, Comments, *All Carrot and No Stick: Why Washington's Clean Water Act Assurances Violate State and Federal Water Quality Laws*, 88 Wash. L. Rev. 683 (2013).

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ALL CARROT AND NO STICK: WHY WASHINGTON'S CLEAN WATER ACT ASSURANCES VIOLATE STATE AND FEDERAL WATER QUALITY LAWS

Oliver Stiefel*

Abstract: Current Washington State rules governing timber activities—including logging, road construction, and timber processing—were achieved through negotiated compromise. In response to growing concern over the decline of several salmonid species, stakeholders from government agencies, environmental groups, and the timber industry negotiated a plan for regulating timber activities to better meet the needs of aquatic species, while maintaining a robust and sustainable timber industry. The rivers and streams flowing through Washington's forests provide habitat for numerous aquatic species, including several species of anadromous salmonids. Timber activities, however, pose a threat to healthy habitat. In the 1990s, degraded forest habitat in Washington necessitated a change in policy. Without such a change, stakeholders would face a difficult dilemma: if those conducting timber activities continued under the status quo, they would risk costly litigation brought under the federal Endangered Species Act (ESA) and Clean Water Act (CWA), dramatic regulatory modifications in the future that would make timber operations economically impracticable, or both.

Stakeholders opted for a middle ground, devising and implementing a two-part framework for managing timber activities. First, they strengthened rules in order to provide better species protection. Second, they obtained assurances from the federal government that the new rules were strong enough that they provided those conducting timber activities in Washington (1) with immunity from lawsuits under the ESA and the CWA and (2) with regulatory certainty—that is, that no additional, more protective restrictions would attach to the new rules. While this regulatory framework is permissible under the ESA, an assurance of compliance with state and federal water quality laws does not square with the clear mandates of the CWA.

INTRODUCTION

Forests, and the rivers and streams flowing through them, are the lifeblood of the Pacific Northwest. In addition to providing habitat for a vast array of species¹ like the iconic salmon, forests also contribute ecosystem services like carbon sequestration.² In addition, the forestry

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1. See *Conservation*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/conservation/cwcs/> (last visited Apr. 26, 2013).

2. *Ecosystem Services*, U.S. FOREST SERVICE, <http://www.fs.fed.us/ecosystemservices/> (last visited Feb. 11, 2013).

industry provides jobs and bolsters the regional economy.³ Balancing the value of forests as habitat and for their ecosystem services against the value of forests as sources of jobs and commodities can present a variety of challenges.⁴ Uncompromising protection of forests for ecological purposes would threaten the viability of a sustainable forestry industry.⁵ Concerns about unpredictable regulations weigh heavily in decisions about converting forestland to uses that have greater ecological consequences, like residential development.⁶ Providing a regulatory climate more likely to keep landowners from converting forestlands thus remains an important objective for all parties.⁷ Despite the benefit of retaining forestland, there are also costs. Timber activities such as logging and forest road construction can adversely affect aquatic habitat,⁸ for example, by reducing habitat complexity.⁹

In the late 1980s, stakeholders from industry, government, and conservation groups in Washington State turned to negotiation as the procedure for finding an appropriate balance between a robust forestry industry and healthy forest habitat.¹⁰ An alternative to competitive

3. See WASH. REV. CODE. § 76.09.010(1) (2012) (“[A] viable forest products industry is of prime importance to the state’s economy”); WASH. STATE DEP’T OF NATURAL RES., FOREST PRACTICES HABITAT CONSERVATION PLAN (FINAL) 41 (2005) [hereinafter FOREST PRACTICES HABITAT CONSERVATION PLAN], available at http://www.dnr.wa.gov/businesspermits/topics/forestpracticeshcp/pages/fp_hcp.aspx (“Throughout Washington’s history, forests have produced timber and supplied family-wage jobs in both urban and rural areas of the state”); WASH. STATE DEP’T OF NATURAL RES., THE FUTURE OF WASHINGTON FORESTS 27–30 (2007) [hereinafter THE FUTURE OF WASHINGTON FORESTS], available at <http://www.dnr.wa.gov/ResearchScience/Topics/ForestResearch/Pages/futureofwashingtonsforest.aspx> (noting that the forest sector contributed \$15.6 billion dollars to the state economy in 2005 and remains the dominant employer in many rural communities).

4. See FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 41.

5. THE FUTURE OF WASHINGTON FORESTS, *supra* note 3, at 67 (“[R]egulations can make forestry operations more costly and can act as an incentive for non-industrial and industrial landowners to convert forest to other uses.”).

6. *Id.* at 66, 68.

7. See FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 4 (discussing tools for salmon recovery).

8. NAT’L MARINE FISHERIES SERV. & FISH AND WILDLIFE SERV., ENDANGERED SPECIES ACT SECTION 7 CONSULTATION BIOLOGICAL OPINION AND SECTION 10 STATEMENT OF FINDINGS AND MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT ESSENTIAL FISH HABITAT CONSULTATION 261 (2006) [hereinafter NOAA FISHERIES BiOP], available at http://www.dnr.wa.gov/Publications/fp_hcp_nmfs_bo_findings.pdf.

9. MICHAEL L. MURPHY, FORESTRY IMPACTS ON FRESHWATER HABITAT OF ANADROMOUS SALMONIDS IN THE PACIFIC NORTHWEST AND ALASKA—REQUIREMENTS FOR PROTECTION AND RESTORATION xvii (1995).

10. WASH. STATE DEP’T OF NATURAL RES. ET AL., FORESTS AND FISH REPORT 2–3 (1999) [hereinafter FORESTS AND FISH REPORT], available at <http://www.dnr.wa.gov/Publications/>

lobbying and court cases, negotiations began to shape policies regarding the management of forestlands.¹¹ In 1996, however, several events caused stakeholders to reevaluate the negotiated policies. At that time, the federal government listed several species of Pacific salmon under the Endangered Species Act (ESA),¹² and included 660 Washington stream segments on a Clean Water Act (CWA)¹³ list of waterbodies with documented water quality problems.¹⁴ Again turning to negotiation in lieu of political wrangling and protracted litigation, representatives from Northwest tribes, state and federal agencies, the timber industry, and environmental groups convened to devise a plan to protect aquatic species and their forest habitat.¹⁵

The talks led to the amendment of statutes and regulations governing timber activities in Washington, known as Forest Practices Rules.¹⁶ The new rules were designed to provide better protection for aquatic species and riparian habitat, while providing landowners and agencies a predictable and consistent regulatory system.¹⁷ Because regulatory complexity and uncertainty can drive up the cost of forestry operations,¹⁸ a critical foundation of the comprehensive new program was a guarantee that abiding by the new regulations would satisfy federal requirements for protecting aquatic species and preserving water quality under the ESA and CWA.¹⁹ The strategy for obtaining this guarantee was to seek

fp_rules_forestsandfish.pdf; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 45 (noting that the negotiations marked “a historic effort to resolve increasingly contentious natural resource protection issues without lengthy and costly lawsuits . . .”).

11. FORESTS AND FISH REPORT, *supra* note 10, at 2–3.

12. 16 U.S.C. §§ 1531–44 (2006).

13. 33 U.S.C. §§ 1251–1387 (2006).

14. FORESTS AND FISH REPORT, *supra* note 10, at 2–3.

15. *Id.* at 3.

16. *See, e.g.*, WASH. REV. CODE § 77.85.180 (2012); WASH. ADMIN. CODE § 222-08-010 (2012); *see also* FORESTS AND FISH REPORT, *supra* note 10, at 3.

17. *See* FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 1.

18. THE FUTURE OF WASHINGTON FORESTS, *supra* note 3, at 59, 67.

19. WASH. REV. CODE § 77.85.190; *see also* WASH. STATE DEP’T OF ECOLOGY, 2009 CLEAN WATER ACT ASSURANCES REVIEW OF WASHINGTON’S FOREST PRACTICES PROGRAM: EXAMINING THE EFFECTIVENESS OF WASHINGTON’S FOREST PRACTICES PROGRAM IN BRINGING WATERS INTO COMPLIANCE WITH STATE WATER QUALITY STANDARDS AND THE FEDERAL CLEAN WATER ACT 3 (2009) [hereinafter CWA ASSURANCES REVIEW], *available at* <http://www.ecy.wa.gov/programs/wq/nonpoint/ForestPractices/CWAassurances-FinalRevPaper071509-W97.pdf>. The specific goals were as follows: (1) to provide compliance with the ESA for aquatic and riparian-dependent species on non-federal forest lands; (2) to restore and maintain riparian habitat on non-federal forest lands to support a harvestable supply of fish; (3) to meet the requirements of the CWA for water quality on non-federal forest lands; and (4) to keep the timber industry economically viable in Washington State. FORESTS AND FISH REPORT, *supra* note 10, at 2.

assurances²⁰ from federal agencies that timber activities conducted in accordance with the Forest Practices Rules would satisfy the applicable provisions of the ESA and the CWA.²¹

To meet the requirements of the ESA, the state applied for and was issued a fifty-year Incidental Take Permit (ITP).²² This permit allows applicants to take²³ endangered or threatened species if such taking is incidental to an otherwise lawful activity.²⁴ For example, an otherwise lawful timber harvest may cause significant erosion of soils into a forest waterbody.²⁵ This sedimentation can impair aquatic species' behavioral patterns; in other words, such sedimentation may constitute a take.²⁶ But such an activity is allowable under a valid ITP; if the federal agency reviewing a permit application finds that several criteria are met—including sufficient minimization and mitigation measures—an ITP must be issued.²⁷ Upon finding that the Washington Forest Practices Rules were expected to minimize and mitigate impacts on endangered

20. The purpose of the new regulatory scheme was to assure those conducting forest practices that they will be in compliance with the ESA. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 1. Similarly, assurances of compliance with the CWA was also central to the program. *Id.* at 13. The term “assurances,” as used throughout the relevant documents, is thus used throughout this Comment.

21. Both the ESA and the CWA contain citizen-suit provisions that empower private citizens to file enforcement lawsuits. *See* 16 U.S.C. § 1540(g) (2006) (ESA); 33 U.S.C. § 1365(a) (2006) (CWA). The ESA contains an immunity clause, so to speak, that shields parties with a valid permit from liability. *See* 16 U.S.C. § 1539. This is the ESA's “assurance.” *See* FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 4. The extent to which the term has any legal meaning in the CWA context is the focus of this Comment.

22. *See* NOAA, NOAA'S NATIONAL MARINE FISHERIES SERVICE PERMIT FOR INCIDENTAL TAKE OF ENDANGERED/THREATENED SPECIES (June 5, 2006) [hereinafter NOAA FISHERIES ITP], available at http://www.nwr.noaa.gov/habitat/habitat_conservation_plans/wa_dnr_state_forest_practices_hcp.html (Permit Number 1573); FINDINGS AND RECOMMENDATIONS FOR ISSUANCE OF A SECTION 10(A)(1)(B) INCIDENTAL TAKE PERMIT (PERMIT NO. PRT-TE121202-0) ASSOCIATED WITH THE STATE OF WASHINGTON FOREST PRACTICES HABITAT CONSERVATION PLAN (June 5, 2006) [hereinafter USFWS ITP], available at http://www.dnr.wa.gov/Publications/fp_hcp_usfws_bo_findings.pdf.

23. The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Without a valid ITP, the ESA prohibits the take of endangered or threatened species. *See id.* § 1538(a).

24. *See id.* § 1539(a)(1)(B).

25. *See* MURPHY, *supra* note 9, at 35.

26. *See* Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 707 (1995) (O'Connor, J., concurring); MURPHY, *supra* note 9, at 23 (noting that juvenile coho salmon stop feeding at a certain level of turbidity); *id.* at 14 (“High turbidity can cause fish to delay migration . . .”).

27. The “minimize and mitigate” standard is prescribed by the ESA. 16 U.S.C. § 1539(a)(2)(B)(ii). A permit must issue if this standard is met. *See id.* § 1539(a)(2)(B).

and threatened fish species, federal agencies issued an ITP to the state.²⁸ The permit extends to all parties engaged in timber activities pursuant to Washington Forest Practices Rules.²⁹

To meet the requirements of the CWA, state and federal agencies promulgated Clean Water Act Assurances (CWA Assurances).³⁰ These CWA Assurances stipulate that compliance with Washington Forest Practices Rules is a means of meeting the requirements of the CWA with regard to nonpoint source pollution.³¹ In short, on the assumption that the new rules would improve water quality, the CWA Assurances exempt forest waterbodies from the standard regulatory process required for waterbodies that do not meet water quality standards.³²

This regulatory structure remains in force today, and the rules governing timber activities in Washington continue to provide a framework for compliance with the two federal statutes. There is, however, a statutory collision between the ESA and the CWA in this Washington context: while the ESA permits the incidental taking of protected species,³³ the CWA does not contain such a provision. In fact,

28. See NOAA FISHERIES ITP, *supra* note 22; USFWS ITP, *supra* note 22.

29. NOAA FISHERIES ITP, *supra* note 22, at 1. The specifics of the ITP, and the controversies that arose during the process for obtaining it, are beyond the scope of this Comment. See, e.g., NAT'L MARINE FISHERIES SERV. & FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED ISSUANCE OF MULTIPLE SPECIES INCIDENTAL TAKE PERMITS OR 4(D) RULES FOR THE WASHINGTON STATE FOREST PRACTICES HABITAT CONSERVATION PLAN (2006) [hereinafter FEIS], available at http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesHCP/Pages/fp_hcp_feis.aspx (a comprehensive document addressing the environmental impacts of the ITP issuance, which contains a 258-page supplemental index dedicated to responding to public comments over the issuance of the ITP).

It should be noted, however, that parties from the conservation community, the timber industry, and the State recently entered into a settlement agreement whereby conservation groups covenanted not to sue over the issuance of the ITP. See Settlement Agreement: Conservation Caucus, State of Wash., and Wash. Forest Protection Ass'n at ¶ 1.1, 2.1 (May 24, 2012) (on file with author). In the settlement, the conservation groups also consented to not take legal action for a period of three-and-a-half years over a failure to comply with CWA requirements. *Id.* at ¶ 2.2.

30. FORESTS AND FISH REPORT, *supra* note 10, at 167; see also CWA ASSURANCES REVIEW, *supra* note 19, at 3; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 13.

31. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3. Nonpoint source pollution is pollution that is not channeled through a discrete conveyance, in contrast to point source pollution, which is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14) (2006).

32. See 33 U.S.C. § 1313; FORESTS AND FISH REPORT, *supra* note 10, at 170 (declaring that Total Maximum Daily Loads (TMDLs) need not be prepared for waters impaired by forest practices); CWA ASSURANCES REVIEW, *supra* note 19, at 3 (extending the CWA assurances).

33. See *supra* text accompanying notes 23–24.

the CWA specifically requires that existing water quality be maintained.³⁴ Washington water quality standards—modeled after the CWA—are similarly restrictive.³⁵ In particular, the propagation and protection of aquatic life is a critical aspect of the measure of water quality.³⁶ Specific water quality criteria such as acceptable levels of turbidity and dissolved oxygen have been adopted to achieve this goal.³⁷ Unlike under the ESA, the take of aquatic species—for example, through the deterioration of aquatic habitat—is not permitted under state and federal water quality laws.³⁸

This Comment argues that while agencies may permit the take of aquatic species under the ESA, such permission is *prima facie* evidence that state and federal antidegradation laws³⁹ are being violated. In other words, the take of aquatic species is a degradation of water quality. Moreover, neither state nor federal agencies have the authority to exempt Washington timber activities from the CWA. Finally, because the assurances disrupt the statutorily prescribed process for achieving water quality standards, they violate section 303 of the CWA.⁴⁰

Part I begins with a brief history of the Washington Forest Practices Rules, first explaining how timber activities can adversely affect healthy habitat conditions and next describing how the rules were developed in response to concerns over degraded habitat. Part II provides a detailed summary of the relationship between the Forest Practices Rules—which are designed to minimize and mitigate adverse effects of timber activities—and the ESA on the one hand and the CWA on the other.

34. 40 C.F.R. § 131.12(a)(1) (2012) (mandating that water quality levels necessary to protect existing uses must be maintained).

35. WASH. ADMIN. CODE § 173-201A-310 (2012) (“No degradation may be allowed that would interfere with, or become injurious to, existing or designated uses . . .”).

36. *See, e.g., id.* § 173-201A-200; *see also* PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology, 511 U.S. 700, 714–15 (1994) (“Under the [CWA] a water quality standard must consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses . . . Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.”) (internal quotations omitted) (emphasis added).

37. *See* WASH. ADMIN. CODE § 173-201A-200(1)(c) (temperature); *id.* § 173-201A-200(1)(d) (dissolved oxygen).

38. *See infra* Part III.A.0.

39. *See, e.g.,* WASH. ADMIN. CODE § 173-201A-300 (seeking to “restore and maintain the highest possible quality of the surface waters of Washington”).

40. Section 303 of the CWA, 33 U.S.C. § 1313(d) (2006), has been called the “the Act’s carrot-and-stick approach to attaining acceptable water quality.” *Barnum Timber Co. v. EPA*, 633 F.3d 894, 896 (9th Cir. 2011) (citing *Pronsolino v. Nastri*, 291 F.3d 1123, 1127 (9th Cir. 2002)). In effect, the CWA Assurances have eliminated the “stick”—the compliance mechanism aimed at ensuring that states meet water quality standards.

Finally, Part III highlights the tension that has arisen between the ESA and the CWA in terms of Washington's regulatory scheme, addressing the legal consequences of providing assurances under the CWA. It contends that, in light of the ITP, the CWA Assurances must be revoked and the regulatory processes established by the CWA restored in order to comply with the requirements of state and federal water quality laws.

I. CURRENT WASHINGTON FOREST PRACTICES RULES ARE THE RESULT OF EFFORTS TO ACHIEVE A BALANCE BETWEEN ENVIRONMENTAL PROTECTION AND A SUSTAINABLE TIMBER INDUSTRY

Timber activities are highly regulated in Washington, with rules aimed at fostering an appropriate balance between a profitable industry and thriving fish populations. Contemporary rules have dramatically altered timber practices from what they once were, but the effort to achieve consensus has been a decades-long battle. The dominant paradigm throughout this history has been the delicate relationship between timber activities and healthy habitat; this Part chronicles the development of Washington Forest Practices Rules in this context.

A. *Washington Forests Provide Essential Salmonid Habitat, but Timber Activities Can Threaten Healthy Habitat*

The Washington Forest Practices Act⁴¹ and the rules promulgated by the Washington Forest Practices Board⁴² govern timber activities on the 9.3 million acres of non-federal forestland in Washington.⁴³ There are approximately 265,129 miles of streams in Washington; of these, 98,433 are located on lands subject to the Washington Forest Practices Rules.⁴⁴

41. WASH. REV. CODE §§ 76.09.010–935 (2012); *see also* Johnson Forestry Contracting, Inc. v. Wash. State Dep't of Natural Res., 131 Wash. App. 13, 23, 126 P.3d 45, 49 (Wash. Ct. App. 2005) (“The Forest Practices Act is a statewide system of laws designed to manage and protect the State’s natural resources and to ensure a viable commercial timber industry.”).

42. *Rules Overview*, WASH. STATE DEP'T OF NATURAL RES., http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesRules/Pages/fp_rules.aspx (last visited Mar. 29, 2013).

43. U.S. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE’S BIOLOGICAL AND CONFERENCE OPINION FOR THE PROPOSED ISSUANCE OF A SECTION 10(A)(1)(B) INCIDENTAL TAKE PERMIT (PRT-TE-X121202-0) TO THE STATE OF WASHINGTON FOR THE FOREST PRACTICES HABITAT CONSERVATION PLAN 3 (2006) [hereinafter USFWS BiOP], *available at* http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesHCP/Pages/fp_hcp_bo.aspx.

Forestland means: “all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing.” WASH. REV. CODE § 76.09.020(15).

44. USFWS BiOP, *supra* note 43, at 37.

All forestlands in Washington have surface water features—streams, rivers, and wetlands—many of which support complex aquatic ecosystems.⁴⁵ Many aquatic species rely on the diverse habitat characteristics that forests provide,⁴⁶ but timber activities can produce significant detrimental effects.⁴⁷

Among those species dependent on high water quality in forested landscapes are a number of different salmonids, a taxonomic family that includes salmon and trout.⁴⁸ Salmonid species have different biological requirements at various life cycle stages; Washington forests provide habitat characteristics that support most of these stages.⁴⁹ Unfortunately, throughout the Pacific Northwest, the population of anadromous salmonids has declined considerably in the past century.⁵⁰ For instance, one report suggests that at least 106 species of salmonids on the west coast are extinct, 101 species are at a high risk of extinction, fifty-eight are at a moderate risk of extinction, and fifty-four are of “special concern.”⁵¹ Stemming from status assessments in the early 1990s, the federal government had listed twenty-six evolutionarily significant units of salmonids as threatened or endangered under the ESA by 2003.⁵²

One of the principal factors contributing to this substantial decrease in

45. FEIS, *supra* note 29, at 3–39.

46. *See, e.g.*, Dean Rae Berg et al., *Restoring Floodplain Forests*, in RESTORATION OF PUGET SOUND RIVERS 248, 250–51 (David R. Montgomery et al. eds., 2003).

47. *See, e.g.*, MURPHY, *supra* note 9, at 29–54.

48. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1098 (11th ed. 2005), available at <http://www.merriam-webster.com/dictionary/salmonid>. For illustration purposes, this Comment uses salmonid species as a proxy, although other types of aquatic species are also dependent on high water quality in forested landscapes. This approach stems from the fact that all seventeen of the species that Washington Forest Practices Rules are designed to protect are salmonids. *See* FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 23.

49. NOAA FISHERIES BIOP, *supra* note 8, at 87. Life cycle stages present in forestlands include: adult spawning, embryonic incubation, emergence, juvenile rearing, holding, migration, and freshwater and nearshore marine feeding. *Id.* Those salmonids that spend the majority of their life in the ocean, but return to the river or stream of their birth for their own breeding purposes, are “anadromous” species. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 48, at 44, available at <http://www.merriam-webster.com/dictionary/anadromous> (explaining that “anadromous” means “ascending rivers from the sea for breeding”). In Washington, forests encompass salmonid habitat from headwaters to river mouth. *See* MURPHY, *supra* note 9, at xvi.

50. *See* MURPHY, *supra* note 9, at 1; Berg, *supra* note 46, at 249.

51. Willa Nehlsen et al., *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and Washington*, FISHERIES, Mar.–Apr. 1991, at 10, 16.

52. E. Ashley Steel et al., *Marine Matters: Pacific Salmon Recovery Planning and the Salmonid Watershed Analysis Model: A Broad-Scale Tool for Assisting in the Development of Habitat Recovery Plans*, 20 ENDANGERED SPECIES UPDATE 3, 3 (2003), available at <http://www.nwfsc.noaa.gov/research/divisions/fed/wpg/documents/pacificsalmon.pdf>.

population is habitat destruction.⁵³ Loss of habitat and its attendant consequences are seen as the largest threat to endangered species in the U.S.⁵⁴ Timber activities are not the only cause of habitat damage, but they are a significant contributing factor.⁵⁵ Timber activities can have multiple effects on salmonid habitat,⁵⁶ and historical logging practices have left a scarred legacy.⁵⁷

For example, logging road construction can affect water flow by “collecting subsurface and road-surface water that routes directly to stream channels,” which can increase peak flows during rainstorms.⁵⁸ Increased peak flow is detrimental for fish habitat, as higher flows scour stream channels, killing incubating eggs and displacing juvenile salmonids from winter cover.⁵⁹ In addition, riparian timber harvest, logging road construction, and the removal of wood from channels reduce the amount of available large woody debris (LWD).⁶⁰ Historical logging practices have greatly exacerbated this problem.⁶¹ Loss of LWD can reduce stream habitat complexity.⁶² Removal of LWD also eliminates pools and cover.⁶³ Importantly, the effects of timber harvest in riparian areas on LWD recruitment can last hundreds of years.⁶⁴ This

53. MURPHY, *supra* note 9, at 6; NOAA FISHERIES BIOP, *supra* note 8, at 172 (“In recent years, the decline and extinction of Pacific salmon populations and other fish species has been linked to habitat loss and degradation in their spawning and rearing streams.”).

54. Michelle M. McClure et al., *Evolutionary Consequences of Habitat Loss for Pacific Anadromous Salmonids*, 1 EVOLUTIONARY APPLICATIONS 300, 300 (2008).

55. *See* MURPHY, *supra* note 9, at 7. For instance, “[t]imber harvest reduces vegetation in and near riparian areas, affecting shade (and thus, water temperature), the extent of large wood available for recruitment to streams (affecting structural components of instream habitat), detrital inputs (affecting salmonid food sources), and sediment capture (affecting water quality while suspended and substrate when deposited). Road construction and maintenance enables erosional processes that also deliver sediment to streams.” NOAA FISHERIES BIOP, *supra* note 8, at 244. All of these effects of timber activities negatively impact the habitat on which salmonids rely at every life cycle stage. *Id.*

56. MURPHY, *supra* note 9, at 29.

57. *Id.* at 9–10.

58. NOAA FISHERIES BIOP, *supra* note 8, at 182; *see also* FEIS, *supra* note 29, at 3–50.

59. MURPHY, *supra* note 9, at 43.

60. NOAA FISHERIES BIOP, *supra* note 8, at 186. Removal of down wood in streams, rivers, and riparian areas is known as salvage logging. *See id.* at 190.

61. *Id.* at 186 (“Since the mid- to late-1880s, much of the large wood has been lost to human-related activities, including timber harvest and removal of LWD to establish and maintain safe navigation channels.”).

62. USFWS BIOP, *supra* note 43, at 278. The presence of a diverse and complex freshwater ecosystem is the most important element for species survival. MURPHY, *supra* note 9, at 14.

63. MURPHY, *supra* note 9, at 43.

64. *Id.* at 44.

can be particularly problematic because LWD plays an integral role in “providing structure to the stream ecosystem and important habitat for salmonids.”⁶⁵

B. Washington Forest Practices Rules Were Developed to Address the Historically Unfavorable Condition of Washington Forest Waterbodies

In 1974, the Washington State Legislature passed the Forest Practices Act,⁶⁶ specifically noting the importance of protecting forest soils, fisheries, wildlife, and water and air quality.⁶⁷ Recognizing the “interrelationship among forest practices and other resources,”⁶⁸ the Legislature intended to regulate forestry activities as a means of protecting valuable forest resources.⁶⁹ Implementation of the Act and research on the effects of timber activities on aquatic species brought about new concerns in the 1980s.⁷⁰ In light of court decisions and ensuing discussions regarding the adequacy of the Forest Practices’ Rules’ environmental protections,⁷¹ representatives of tribes, state agencies, the timber industry, and environmental interests convened to develop a new regulatory structure for better forest management.⁷² These talks resulted in the 1987 Timber Fish Wildlife (TFW) Agreement,⁷³ a framework for successfully managing forests so as to meet the needs of a viable timber industry while protecting public resources like fish, wildlife, and water.⁷⁴ The TFW Agreement led to significant rule revisions.⁷⁵

In the mid-1990s, however, several issues emerged indicating that

65. *Id.* at 43.

66. Forest Practices Act of 1974, ch. 137, 1974 Wash. Sess. Laws 401 (codified as amended at WASH. REV. CODE §§ 76.09.010–.935 (2012)).

67. *Id.* at 401–402 (codified as amended at WASH. REV. CODE § 76.09.010).

68. FINAL BILL REPORT, ESHB 2091, H.R. 56-2091, 1st Spec. Sess., at 1 (Wash. 1999) [hereinafter 2091 FINAL BILL REPORT], available at <http://apps.leg.wa.gov/documents/billdocs/1999-00/Pdf/Bill%20Reports/House/2091-S.FBR.pdf>.

69. *Id.*

70. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 44–45.

71. *Id.* at 45; 2091 FINAL BILL REPORT, *supra* note 68, at 1.

72. TIMBER/FISH/WILDLIFE AGREEMENT: A BETTER FUTURE IN OUR WOODS AND STREAMS—FINAL REPORT (1987), available at http://www.dnr.wa.gov/Publications/fp_tfw_agreement_19870217.pdf.

73. *Id.*

74. *Id.* at 1.

75. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 45.

Forest Practices Rules were again not adequately protecting aquatic species or water quality on Washington forestlands.⁷⁶ Among them were the growing number of streams included on Washington's list of waterbodies not meeting water quality standards, and the pending listing of several species of salmonids as threatened or endangered under the ESA.⁷⁷ In 1997, TFW caucuses—with the addition of federal agency representatives—reconvened to address species protection on forestlands.⁷⁸ Dissatisfied with the process and direction of negotiations, the environmental community ultimately withdrew.⁷⁹ Planning continued, however, and the remaining participants developed what they termed a “science-based” Forests and Fish Report (FFR).⁸⁰ The FFR addressed the recovery of salmon and other aquatic species on the approximately ten million acres of forestlands regulated under the Forest Practices Act.⁸¹ In effect, the FFR was a summary of recommendations for the development and implementation of new rules, statutes, and programs to improve and protect riparian habitat.⁸²

In 1999, the state legislature memorialized these recommendations by adopting the FFR and directing the Washington Forest Practices Board to develop rules consistent with it.⁸³ The legislature took this action with the intention that compliance with the Forest Practices Rules and the implementation of recommendations in the FFR would satisfy federal requirements under the ESA and the CWA.⁸⁴ The Board adopted new

76. *Id.* at 49.

77. *Id.*

78. 2091 FINAL BILL REPORT, *supra* note 68, at 1.

79. FORESTS AND FISH REPORT, *supra* note 10, at 3. Because of the environmental community's departure, no formal TFW agreement was reached. *Id.*

80. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 50.

81. 2091 FINAL BILL REPORT, *supra* note 68, at 2; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 50.

82. FORESTS AND FISH REPORT, *supra* note 10, at 2.

83. Forest Practices—Salmon Recovery Act of 1999, 1999 Wash. Sess. Laws 2302 (codified at WASH. REV. CODE § 77.85.180 (2012)) (“When adopting permanent rules under this section, the forest practices board is strongly encouraged to follow the recommendations of the forests and fish report If the forest practices board chooses to adopt rules under this section that are [inconsistent with the FFR], the board must notify the appropriate legislative committees of the proposed deviations, the reasons for the proposed deviations, and whether the parties to the forests and fish report still support the agreement.”); *see also* FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3.

84. *See* WASH. REV. CODE § 77.85.190; *id.* § 77.85.180(2) (“[Forest Practices] are intended to fully satisfy the requirements of the endangered species act . . . with respect to incidental take of salmon and other aquatic resources and the clean water act . . . with respect to nonpoint source pollution attributable to forest practices.”) (internal citations omitted); *id.* § 76.09.010(2)(g) (declaring that one of the purposes of the Forest Practices Act is to “[a]chieve compliance with all

rules pursuant to the FFR in 2001.⁸⁵

While protection of aquatic species remained central to the new forest practices regime,⁸⁶ an overarching goal was also regulatory consistency; a regulatory structure that satisfied the requirements of the ESA and CWA was the critical feature of the FFR and the statutes and regulations derived from it.⁸⁷ To this end, Washington sought to assure those parties conducting timber activities subject to Forest Practices Rules that they would be in compliance with the ESA for aquatic species and the CWA for water quality.⁸⁸ The next Part discusses this core element of the Forest Practices Rules: the assurances of compliance with the ESA and CWA.

II. WASHINGTON FOREST PRACTICES RULES ARE DESIGNED TO SATISFY THE REQUIREMENTS OF THE ESA FOR AQUATIC SPECIES AND THE PRESCRIPTIONS OF THE CWA

In Washington, the federal ESA and CWA, along with state forest practices⁸⁹ and water quality regulations,⁹⁰ combine to form a comprehensive regulatory scheme designed to protect aquatic species⁹¹ while maintaining a viable commercial forestry industry.⁹² As explained in this Part, the Forest Practices Rules are, above all, shaped by ESA standards. Although water quality laws prescribe a different set of standards, these standards are diluted within this regulatory matrix.

applicable requirements of federal and state law with respect to nonpoint sources of water pollution from forest practices”); *see also* FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3 (observing that assurances under the ESA and CWA are intended to recognize that the Forest Practices program and rules effectively meet Federal ESA and CWA requirements).

85. *See* WASH. ADMIN. CODE § 222-12-010 (2012); FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3.

86. FORESTS AND FISH REPORT, *supra* note 10, at 2.

87. *Id.*; *see also* FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 4.

88. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 1.

89. WASH. REV. CODE §§ 76.09.010–.935; WASH. ADMIN. CODE §§ 222-08-010 to 222-50-060. The term “forest practice” is statutorily defined in Washington as “any activity conducted on or directly pertaining to forest land and related to growing, harvesting, or processing timber.” WASH. REV. CODE § 76.09.020(17). This Comment uses “forest practices” synonymously with the term “timber activities.”

90. WASH. REV. CODE §§ 90.48.010–.906; WASH. ADMIN. CODE §§ 173-201A-010 to -616.

91. *See* WASH. REV. CODE § 90.48.010.

92. WASH. REV. CODE § 77.85.180(1) (2012).

A. *The Washington Forest Practices HCP Is a Plan for Addressing the Needs of Aquatic Species Affected by Timber Activities by Meeting the Requirements of the ESA*

The first goal of the FFR was to “provide compliance with the Endangered Species Act for aquatic and riparian-dependent species on non-Federal forestlands.”⁹³ Timber activities can adversely impact aquatic species,⁹⁴ and the ESA prohibits the take of listed species.⁹⁵ The ESA provides mechanisms for the authorization of an incidental take, however, thereby permitting the take of species that results from, but is not the purpose of, carrying out an otherwise lawful activity.⁹⁶ This Part discusses Washington stakeholders’ reliance on this strategy for providing an assurance of ESA compliance for activities conducted under the Forest Practices Rules.

1. *The ESA Prohibits the Take of Listed Species, Except under Limited Circumstances*

The ESA prohibits any person⁹⁷ from taking any listed species.⁹⁸ “Take” in this context means, inter alia, to harass, harm, hunt, wound, kill, or capture, or to attempt to engage in any such conduct.⁹⁹ The term “harm” in the definition includes significant habitat modification or degradation that actually kills or injures wildlife.¹⁰⁰ This can occur by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migration, feeding, or sheltering.¹⁰¹

Section 10 of the ESA contains an exception to the “no take” provision. That section provides that the Secretary¹⁰² may permit any

93. FORESTS AND FISH REPORT, *supra* note 10, at 2.

94. *See generally* MURPHY, *supra* note 9.

95. 16 U.S.C. § 1536(a)(2) (2006).

96. *See* 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 402.02 (2012).

97. Under the ESA, “person” is defined as “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. § 1532(13).

98. *Id.* § 1538(a)(1)(B).

99. *See supra* note 23.

100. 50 C.F.R. § 17.3. The validity of this definition was upheld by the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 (1995).

101. *See id.* at 710 (O’Connor, J., concurring); 50 C.F.R. § 17.3.

102. The term “Secretary” in the ESA context refers either to the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The United States Fish and Wildlife Service

taking otherwise prohibited under the ESA if “such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”¹⁰³ The process for obtaining a permit involves compiling a Habitat Conservation Plan (HCP), an extensive report that specifies impacts of the taking, proposed mitigation efforts, and alternatives considered¹⁰⁴—essentially, how the applicant plans to “minimize and mitigate” the adverse impact of the protected species.¹⁰⁵ Approval of an HCP results in the Secretary issuing an ITP.¹⁰⁶

2. *The Forest Practices HCP Provided the Basis for the Issuance of ITPs*

The story about Washington’s process for obtaining assurances under the ESA—the issuance of ITPs—is a complicated tale of agency action. After the passage of the amended Forest Practices Act and Forest Practices Rules—based on the FFR—the state and federal agencies began to develop an HCP in 2001.¹⁰⁷ Because take authorizations were sought for species under the jurisdiction of both the United States Fish and Wildlife Service (USFWS) (terrestrial and aquatic species and non-anadromous fish) and the National Oceanic Atmospheric Association’s National Marine Fisheries Service (NOAA Fisheries) (anadromous fish), the two agencies acted as joint project leads.¹⁰⁸ In connection with Washington State’s development of the Forest Practices HCP, the

(USFWS) administers the ESA with respect to terrestrial species under the jurisdiction of the Secretary of the Interior, while the National Oceanic Atmospheric Association’s National Marine Fisheries Services (NOAA Fisheries) administers the ESA with respect to marine species under the jurisdiction of the Secretary of Commerce. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651 (2007). For the purposes of the Washington State ITP, most anadromous fish species fall within the jurisdiction of NOAA Fisheries, while some anadromous fish, non-anadromous fish, and amphibians are covered by USFWS. FEIS, *supra* note 29, at S-1. This Comment refers to the USFWS and NOAA Fisheries collectively as “the Services.”

103. 16 U.S.C. § 1539(a)(1)(B).

104. *Id.* § 1539(a)(2)(A); 50 C.F.R. § 17.3; *see also* *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001).

105. *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1128 (S.D. Cal. 2006) (quoting 16 U.S.C. § 1539(a)(2)(A)).

106. *See, e.g.*, 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 695 (1995); *Simpson Timber*, 255 F.3d at 1077. The Secretary must issue an ITP upon finding the presence of five factors: (1) that the taking will be incidental; (2) that the applicant will minimize and mitigate impacts; (3) that the applicant will ensure that adequate funding will be provided; (4) that the taking will not appreciably reduce the likelihood of survival and recovery of the species; and (5) that any other measures required by the Secretary in the preparation of the HCP will be met. 16 U.S.C. § 1539(a)(2)(B).

107. NOAA FISHERIES BIOP, *supra* note 8, at 2.

108. *See* FEIS, *supra* note 29, at 1-4.

Services prepared an Environmental Impact Statement (EIS).¹⁰⁹ This was due to the fact that the issuance of the ITPs had the potential to affect the human environment, making such issuances subject to the National Environmental Policy Act.¹¹⁰ The final Forest Practices HCP and final EIS were made available in 2006.¹¹¹

The thrust of the Forest Practices HCP is that the protective measures of the Washington Forest Practices Rules, in concert with the recommendations of the FFR, would “improve riparian habitat function and increase protection for aquatic species while maintaining a viable forest products industry”¹¹² The Forest Practices HCP applies to timber activities¹¹³ on the approximately 9.3 million acres of non-federal forestland in Washington.¹¹⁴ It covers seventeen sub-populations of five listed anadromous salmonids and forty-eight other unlisted fish and aquatic species.¹¹⁵

The Forest Practices HCP is a “programmatic plan,”¹¹⁶ designed to support the long-term viability of aquatic species and meet or exceed water quality standards.¹¹⁷ It consists of two parts: an administrative framework that “supports the development, implementation and refinement of the Forest Practices program,” and protection measures that “include all forest practices laws, rules and guidance designed to minimize and mitigate forestry-related impacts and conserve habitat for covered species.”¹¹⁸

The administrative framework outlines the process by which

109. See 42 U.S.C. § 4332(C) (2006); FEIS, *supra* note 29, at S-2.

110. 42 U.S.C. §§ 4321–4370; FEIS, *supra* note 29, at 1–11.

111. USFWS BiOP, *supra* note 43, at 2. By its own terms, the scope and scale of the Forest Practices HCP is unprecedented. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at viii. Generally, HCPs cover a defined land base and ownership. *Id.* at 1. In contrast, the Forest Practices HCP is linked to Washington’s Forest Practices program. *Id.*

112. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3.

113. *Id.* at 14–15. Covered activities include timber harvesting, road construction, road maintenance and abandonment, reforestation, site preparation, and research and monitoring.

114. *Id.* at 16.

115. *Id.* at 23.

116. *Id.* at 3 (“Given the broad geographic range of forestlands subject to the state’s Forest Practices Act and rules, the large number of landowners involved, the multiple species included and regulatory nature of the planning effort, the state has developed the FPHCP as a programmatic plan. . . . Whereas most habitat conservation plans approved to date represent direct agreements between the Services and an individual landowner, the programmatic nature of the FPHCP links forest landowners to the Services through the state of Washington’s Forest Practices program.”).

117. *Id.* at 6.

118. *Id.* at 133.

participants in the Forest Practices program¹¹⁹ cooperatively work to execute the Forest Practices program over time.¹²⁰ At the heart of the administrative framework is the Adaptive Management program.¹²¹ The Adaptive Management program injects Washington Forest Practices Rules with a certain degree of fluidity: the effectiveness of forest practices—specifically in regard to salmon recovery—is measured against technical and science-based recommendations developed by the Adaptive Management participants.¹²² Based on these recommendations, the Board of Forest Practices determines when it is necessary or advisable to modify rules and guidelines not meeting aquatic resource objectives.¹²³

The protection measures described by the Forest Practices HCP are those procedures designed to “restore and maintain riparian processes that create aquatic habitat.”¹²⁴ The framework for the protection measures was the development of a water-typing classification system.¹²⁵ This system forms the basis for determining the appropriate degree of protection measures for specific streams, including the establishment of zones adjacent to a stream where no timber harvest or road construction is permitted (buffer zones).¹²⁶ Other protection measures include requirements to provide adequate shade,¹²⁷ restrictions on LWD removal,¹²⁸ and mandates to maintain stream-bank integrity.¹²⁹

119. Participants include the legislatively appointed boards, the Forest Practices Board and the Forest Practices Appeals Board, certain programs within the Washington Department of Natural Resources, cooperating agencies, tribes, natural resource organizations and the general public. *Id.* at 137.

120. *Id.*

121. WASH. ADMIN. CODE § 222-08-160 (2012); *id.* § 222-12-045; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 6.

122. WASH. ADMIN. CODE § 222-12-045; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 6.

123. WASH. ADMIN. CODE § 222-12-045; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 6.

124. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 181.

125. *Id.* at 185–87.

126. *Id.* at 188.

127. *Id.* at 204–05.

128. *Id.* at 205–07.

129. *Id.* at 207–08. Several other protection measures are provided for in the Forest Practices HCP, related to wetland protection, tree felling, equipment use, and cable yarding. *Id.* at 208–14.

3. *The Services Issued ITPs upon Finding that Species Would Not Be Jeopardized*

The issuance of an ITP constitutes an agency action under § 7(a)(2) of the ESA.¹³⁰ A federal agency must consult with the USFWS or NOAA Fisheries, as appropriate, to ensure that the agency's actions are not likely to jeopardize the continued existence of listed species or adversely destroy or modify their critical habitat.¹³¹ Therefore, the Services here were called on to prepare biological opinions documenting effects on listed species under their respective jurisdictions with regard to their own actions—the issuance of ITPs.¹³² Both agencies concluded that the proposed action was not likely to jeopardize the continued existence of listed species and was not likely to adversely modify critical habitat.¹³³ On these grounds, the agencies issued ITPs for the listed species in June 2006.¹³⁴

In preparing their respective biological opinions, the Services considered the environmental baseline¹³⁵ of the action area, all of the potential effects of the proposed action, and cumulative effects.¹³⁶ Environmental baseline conditions, the Services found, were not particularly favorable for aquatic species habitat.¹³⁷ Historic timber harvest and road construction, combined with the effects of other land uses like agriculture, conversion, and hydropower development, have “decreas[ed] the function of riparian and other related habitat systems on forestlands.”¹³⁸ The Services concluded, however, that implementation of the Forest Practices Rules, when added to baseline conditions, would

130. 16 U.S.C. § 1536(a)(2) (2006); USFWS BIOP, *supra* note 43, at 95.

131. 16 U.S.C. § 1536(a)(2); NOAA FISHERIES BIOP, *supra* note 8, at 31.

132. See NOAA FISHERIES BIOP, *supra* note 8, at 1; USFWS BIOP, *supra* note 43, at 1.

133. NOAA FISHERIES BIOP, *supra* note 8, at 272; USFWS BIOP, *supra* note 43, at 862.

134. See NOAA FISHERIES ITP, *supra* note 22, at 1, 6; USFWS ITP, *supra* note 22, at 69.

135. The “environmental baseline” includes the past and present impacts of government and private activities in the action area. 50 C.F.R. § 402.02 (2012).

136. NOAA FISHERIES BIOP, *supra* note 8, at 31; USFWS BIOP, *supra* note 43, at 94 (“In determining whether an action is likely to jeopardize a species or destroy or adversely modify critical habitat, the [US]FWS analyzes the effect of the action, and the effect of other activities that are interrelated or interdependent with the action, in the context of the environmental baseline and cumulative effects.”).

137. See, e.g., NOAA FISHERIES BIOP, *supra* note 8, at 195 (“A review of the environmental baseline for each WRIA suggests that nearly all areas suffer from high loads of coarse and fine sediment from past activities. Many of the streams in the action area have been listed under the Federal Clean Water Act as impaired due to sediment and/or turbidity.”).

138. *Id.* at 92.

improve species habitat.¹³⁹

The Services observed that “many forestry activities have the potential to adversely affect aquatic habitat,”¹⁴⁰ and that even with the minimization and mitigation measures of the Forest Practices HCP, adverse impacts would still occur.¹⁴¹ Timber activities under the Forest Practices HCP, for example, pose some risk to the upper portions of some fish-bearing streams due to the expected reduction of LWD recruitment and some increases in stream temperature and sediment input in these areas.¹⁴²

Nonetheless, the Services concluded that the proposed action would “meet the biological requirements of listed species.”¹⁴³ Noting that the Forest Practices HCP prescribes wider buffers in more places, NOAA Fisheries pointed out that such a prescription would increase shade, detrital input, and the availability of large wood, improvements that would increase forage and cover and lower water temperatures.¹⁴⁴ In addition, implementation of the Forest Practices Rules would result in reductions in fine sediment, lowered water temperatures, and increased LWD, in comparison to baseline conditions.¹⁴⁵ Significantly, NOAA Fisheries found that the effects of timber activities conducted under the Forest Practices HCP would be at a frequency and rate “not expected to increase the rate of systemic habitat change outside the normal rate of variation, and thus . . . should not diminish the ability of salmonids to respond to the changes in their environments.”¹⁴⁶

The Services noted that cumulative effects, like impacts from increased population and development, “have the potential to overwhelm the benefits” of the Forest Practices HCP.¹⁴⁷ Indeed, adverse cumulative effects—from causes like climate change—are likely to increase, NOAA Fisheries warned.¹⁴⁸ Overall, however, as a result of the Forest Practices

139. *See, e.g., id.* at 185 (noting that the implementation of the Forest Practices Rules will “result in slightly greater rates of recovery of hydrologic processes, given the greater emphasis on improving fish passage and passage of floods and wood through water-crossing structures; and on the repair of existing road faults and improvement in design of new roads”).

140. *Id.* at 172.

141. For example, the USFWS noted that “sediment is expected to be generated by timber harvest activities and will enter streams in a number of cases.” USFWS BIOP, *supra* note 43, at 205.

142. *Id.* at 810.

143. NOAA FISHERIES BIOP, *supra* note 8, at 267.

144. *Id.* at 244.

145. *Id.* at 267–68.

146. *Id.* at 244.

147. USFWS BIOP, *supra* note 43, at 94.

148. NOAA FISHERIES BIOP, *supra* note 8, at 252–53.

HCP, the Services expected “improvements in riparian and aquatic habitat quality and function, that would provide conservation benefits to covered species when compared to current baseline conditions.”¹⁴⁹ All covered species, the USFWS found, were expected to be sufficiently resilient to any adverse effects, “with no appreciable reduction in their likelihood of survival and recovery resulting from this action.”¹⁵⁰ On these grounds, the Services issued the ITPs—which apply to the state and all persons conducting timber activities subject to Washington Forest Practices Rules—for the incidental take of sixteen listed and fifteen unlisted species under NOAA Fisheries’ jurisdiction,¹⁵¹ as well as one listed and forty-six unlisted species under the jurisdiction of the USFWS.¹⁵²

B. Washington’s CWA Assurances: Compliance with Forest Practices Rules Is a Means of Meeting the Requirements of the CWA

Protection of water quality is a central feature of the Washington Forest Practices Rules.¹⁵³ Given the comprehensive amendments to the program aimed at protecting aquatic species—and meeting the requirements of the ESA¹⁵⁴—the legislature intended that Forest Practices Rules also would fully satisfy water quality requirements.¹⁵⁵ This concept was integrated into the Forest Practices HCP.¹⁵⁶

Because timber activities affect waterbodies as nonpoint sources of pollution,¹⁵⁷ however, they are subject to regulation under State water

149. USFWS BiOp, *supra* note 43, at 811.

150. *Id.* at 810.

151. NOAA FISHERIES ITP, *supra* note 22.

152. USFWS ITP, *supra* note 22.

153. WASH. REV. CODE § 76.09.010(1) (2012).

154. *See supra* Part II.A.

155. WASH. REV. CODE § 77.85.180(2).

156. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3.

157. MURPHY, *supra* note 9, at 35 (“Road construction and maintenance, log hauling, tree felling, yarding, slash disposal, and site preparation for replanting are all potential nonpoint sources of fine sediment pollution.”). The term “pollutant” is defined broadly under the CWA to include all biological materials, rocks, and sand. 33 U.S.C. § 1362(6) (2006). The CWA targets point sources of pollution, *id.* § 1362(14) (“The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel”), through the National Pollutant Discharge Elimination System (NPDES) permit program, but leaves open the definition of a source of pollution that is nonpoint. THE CLEAN WATER ACT HANDBOOK 194 (Mark A. Ryan ed., 3d ed. 2011) (“The CWA does not provide a statutory definition of nonpoint source pollution Anything that is not a point source and yet conveys pollutants to our nation’s waters is a nonpoint source.”).

Some timber activities, however, affect waterbodies as point sources of pollution. The EPA

quality standards (WQSs).¹⁵⁸ Nevertheless, as part of the Forest Practices regulatory regime, Ecology and the EPA jointly promulgated CWA Assurances.¹⁵⁹ On the grounds that compliance with the Forest Practices Rules are a means of meeting the requirements of the CWA with regard to nonpoint sources of pollution,¹⁶⁰ the CWA Assurances exempt impaired forest waterbodies from the CWA regulatory process required for waterbodies that do not meet water quality standards.¹⁶¹ This section describes the statutorily prescribed process, and explains how the plan for addressing water quality issues for forest waterbodies in Washington deviates from it.

1. State WQSs Are the CWA's Strategy for Managing Nonpoint Sources of Pollution

Established to sustain “public health and public enjoyment of the waters, and the propagation and protection of fish, shellfish, and

specifically defines any “discernible, confined and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities” as a point sources. 40 C.F.R. § 122.27(b)(1) (2012). This is a narrow subset, however, and some point sources associated with logging, such as channeled stormwater from logging roads, do not require NPDES permits. *See Decker v. Nw. Env'tl. Def. Ctr.*, Nos. 11–338, 11–347, 2013 WL 1131708, at *12 (U.S. Mar. 20, 2013). For the purposes of this Comment, it suffices to note that the strategy for dealing with water pollution from timber activities generally does not rely on the NPDES permit program. *Cf. Nw. Env'tl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1208 (D. Or. 2012) (describing forestry as a nonpoint source of pollution).

158. *See, e.g.*, 33 U.S.C. §§ 1313(d)(1)(A), (C). Unlike point sources, the EPA lacks the direct authority to regulate nonpoint sources of pollution. *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) (“Unlike point source pollutants, the EPA lacks the authority to control nonpoint source discharges through a permitting process . . .”); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1197 (10th Cir. 2001). One court has observed that nonpoint sources “cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point.” *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) (citing 33 U.S.C. § 1313(a)–(c)).

The Washington Department of Ecology (Ecology) is the agency responsible for establishing WQSs, WASH. REV. CODE § 90.48.420 (2012), and for carrying out provisions of the CWA. *Id.* § 90.48.260. To ensure compliance with water quality laws and regulations, Ecology has review power over Forest Practices Rules pertaining to water quality protection. *Id.* § 90.48.420(1) (“Adoption of forest practices rules pertaining to water quality by the forest practices board shall be accomplished after reaching agreement with the director of the department or the director’s designee on the board. Adoption shall be accomplished so that compliance with such forest practice[s] rules will achieve compliance with water pollution control laws.”).

159. FORESTS AND FISH REPORT, *supra* note 10, at 167; *see also* CWA ASSURANCES REVIEW, *supra* note 19, at 3; FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 13.

160. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3.

161. 33 U.S.C. § 1313; FORESTS AND FISH REPORT, *supra* note 10, at 170 (declaring that TMDLs need not be prepared for waters impaired by forest practices); CWA ASSURANCES REVIEW, *supra* note 19, at 3 (extending the CWA Assurances).

wildlife,”¹⁶² Washington WQSs are the basis for protecting and regulating surface waters in the state.¹⁶³ State WQSs are a combination of the designated uses of a given waterbody—the uses for which a waterway is to be protected¹⁶⁴—and the specific water quality criteria necessary to meet such uses.¹⁶⁵

Ecology has established designated uses for a multitude of waters within each Water Resource Inventory Area (WRIA) in Washington.¹⁶⁶ One designated use is aquatic life use.¹⁶⁷ Every listed freshwater waterway is designated for aquatic life uses.¹⁶⁸ All surface waters not specifically enumerated are to be protected for a host of default designated uses, which include salmonid spawning, rearing, and migration.¹⁶⁹ In general, “all indigenous fish and nonfish aquatic species [must] be protected in the waters of the state.”¹⁷⁰ This means that the protection of aquatic species is a primary standard, and activities that disrupt “the propagation and protection of fish”¹⁷¹ violate water quality standards.

States are responsible for identifying those waters that have failed to meet water quality standards, even with point source permits and other pollution control mechanisms.¹⁷² Indeed, point source limitations sometimes may not be stringent enough to meet water quality

162. WASH. ADMIN. CODE § 173-201A-010 (2012). Washington WQSs are promulgated in accordance with the Washington State Water Pollution Control Act (WPCA), WASH. REV. CODE §§ 90.48.010–.906. WASH. ADMIN. CODE § 173-201A-010. The purpose of the WPCA is to “maintain the highest possible standards to insure the purity of all waters of the state . . .” WASH. REV. CODE § 90.48.010.

163. *Surface Water Quality Standards: Overview*, WASH. STATE DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wq/swqs/overview.html> (last visited Nov. 5, 2012).

164. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). In Washington, for example, one designated use is aquatic life use. WASH. ADMIN. CODE § 173-201A-200(1).

165. 33 U.S.C. § 1313(c)(2)(A); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 215 (D.D.C. 2011) (“Water quality criteria, on the other hand, are measures of the conditions of a water body and ‘come in two varieties: specific numerical limitations on the concentration of a specific pollutant in the water . . . or more general narrative statements applicable to a wide set of pollutants.’”) (quoting *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 348–49 (D.C. Cir. 1993)).

166. WASH. ADMIN. CODE § 173-201A-602.

167. *Id.* § 173-201A-200(1). The protected aquatic life uses are: (1) char spawning and rearing; (2) core summer salmonid habitat; (3) salmonid spawning, rearing, and migration; (4) salmonid rearing and migration; (5) non-anadromous interior redband trout; and (6) indigenous warm water species. *Id.*

168. *Id.* § 173-201A-602.

169. *Id.* § 173-201A-600.

170. *Id.* § 173-201A-200(1).

171. *Id.* § 173-201A-010(1).

172. 33 U.S.C. § 1313(d)(1)(A) (2006).

standards.¹⁷³ The Total Maximum Daily Load (TMDL) program is the water-quality-based approach to regulating waters that fail to meet water quality standards despite the use of effluent limitations and other pollution control requirements.¹⁷⁴ To this end, states are required to prepare a list of waters that do not meet water quality standards.¹⁷⁵ A state prepares its “303(d) list”¹⁷⁶ biennially and submits it to the EPA.¹⁷⁷

Each state must first prioritize “impaired waters,” or those waterbodies unable to meet water quality standards, based on the severity of pollution and the type and use of the waterway.¹⁷⁸ These are the 303(d) lists, a compilation of a state’s impaired waterbodies. The 303(d) lists dictate the next step in the process: states must prepare a TMDL for each pollutant affecting an impaired waterway.¹⁷⁹ TMDLs are “informational tools” that assist the states and the EPA in coordinating “necessary responses to excessive pollution in order to meet applicable water quality standards.”¹⁸⁰ They work by allocating the total amount of each pollutant that can be introduced into a waterbody from both point and nonpoint sources without violating water quality standards.¹⁸¹

In concert with Section 303(d), Ecology performs an assessment of the quality of all surface waters in the state.¹⁸² Ecology places each assessed waterbody in a category (1–5) that describes the quality of the water.¹⁸³ Category 5 waters are those polluted waters that require a

173. See 40 C.F.R. § 130.7 (2012).

174. THE CLEAN WATER ACT HANDBOOK, *supra* note 157, at 207.

175. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(d)(1); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001) (“[Each] state is required to identify all of the waters within its borders not meeting water quality standards and establish [TMDLs] for those waters.”).

176. 33 U.S.C. § 1313(d)(3); see also *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 215 (D.D.C. 2011).

177. 40 C.F.R. § 130.8.

178. 33 U.S.C. § 1313(d)(1)(A); THE CLEAN WATER ACT HANDBOOK, *supra* note 157, at 209. Technically, each body of water on the 303(d) list is known as a “water quality limited segment,” 40 C.F.R. § 130.2(j), but for brevity, this Comment refers to such waters as “impaired waters.”

179. 33 U.S.C. § 1313(d)(1)(C); see also *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216 (noting each state’s statutory obligation to develop TMDLs).

180. *Anacostia Riverkeeper*, 798 F. Supp. 2d at 216 (citing *Pronsolino v. Nastro*, 291 F.3d 1123, 1129 (9th Cir. 2002)).

181. See *id.* at 216.

182. *Washington State’s Water Quality Assessment and 303(d) List: Introduction*, WASH. STATE DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wq/303d/introduction.html> (last visited Mar. 1, 2013).

183. *Water Quality Assessment Categories*, WASH. STATE DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wq/303d/WQAssessmentCats.html> (last visited Mar. 5, 2013).

TMDL.¹⁸⁴ Category 4b waterbodies are impaired by pollutants, and would normally require a TMDL but for a local, state, or federally approved pollution control project; a 303(d) listing is not required when it is determined that the pollution control project will sufficiently improve water quality comparable to a TMDL.¹⁸⁵ Ecology organizes water cleanup efforts and develops TMDLs for impaired waters to analyze the nature and quantity of the pollution impairing the water, and to provide targets and strategies for pollution control.¹⁸⁶

Antidegradation policy complements the state's water quality standards, prohibiting the degradation of waterbodies in order to protect designated uses.¹⁸⁷ Though not statutorily defined,¹⁸⁸ antidegradation has long been a hallmark of water pollution control.¹⁸⁹ A state's antidegradation policy must ensure protection of existing water quality standards;¹⁹⁰ if a proposed activity threatens to degrade existing uses, the planned activity must be avoided or adequate mitigation or preventative measures taken to "ensure that the existing uses and the water quality to

184. *Id.*

185. WASH. DEP'T OF ECOLOGY, WATER QUALITY PROGRAM POLICY 15–17 (2012) [hereinafter WATER QUALITY PROGRAM POLICY], available at <http://www.ecy.wa.gov/programs/wq/303d/WQpolicy1-11ch1.pdf>. Category 1 waterbodies meet water quality standards; Category 2 waterbodies raise some water quality concerns; Category 3 waterbodies are those that lack sufficient data to make an assessment; and Category 4a waterbodies have EPA-approved TMDLs. *Id.* at 13–15.

186. *Water Quality Improvement Projects Listed by WRIA and County*, WASH. STATE DEP'T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wq/tmdl/TMDLsbyWria/TMDLbyWria.html> (last visited Apr. 4, 2012).

With more than 2,400 waters on a 303(d) list, Washington is second only to Pennsylvania. *National Summary of Impaired Waters and TMDL Summary*, U.S. ENVTL. PROTECTION AGENCY, http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T (last updated Apr. 26, 2013).

187. WASH. ADMIN. CODE § 173-201A-300(2)(c) (2012). According to Ecology's WQSs, *id.* § 173-201A-300(1), the WPCA, WASH. REV. CODE § 90.54.020(3)(b) (2012) ("Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof . . ."), and EPA's antidegradation policy, 40 C.F.R. § 130.12(a) (2012), guide Washington's antidegradation policy. Washington's antidegradation policy has been upheld when faced with a challenge of unconstitutional vagueness. *Pac. Topsoils, Inc. v. Wash. State Dep't of Ecology*, 157 Wash. App. 629, 648, 238 P.3d 1201, 1211 (Wash. Ct. App. 2010).

188. *See Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n*, 545 F.3d 1207, 1217 (9th Cir. 2008); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 718 (1994).

189. EPA, WATER QUALITY STANDARDS HANDBOOK 4-1 (2d ed. Aug. 1994 & Supp. 2007) [hereinafter EPA HANDBOOK] (noting that the first antidegradation statement was released in 1968 and has since been "an integral component of a comprehensive approach to protecting and enhancing water quality"); *see also Jefferson Cnty.*, 511 U.S. at 718 ("When the [CWA] was enacted in 1972, the water quality standards of all 50 states had antidegradation provisions.").

190. THE CLEAN WATER ACT HANDBOOK, *supra* note 157, at 43.

protect them will be maintained.”¹⁹¹ States must develop antidegradation policies consistent with EPA guidelines.¹⁹²

In terms of the relationship between antidegradation and aquatic life uses, the EPA has expressed that no activity is allowable under a state’s antidegradation policy that would partially or completely eliminate aquatic life uses.¹⁹³ This is meant to be a strict requirement: “Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed.”¹⁹⁴

2. *The Washington Forest Practices Rules Provide a Mechanism for Circumventing Water Quality Laws*

The stewards of the CWA and Washington water quality laws and regulations—the EPA and Ecology, respectively—anticipated that “the forest practices rules [would] achieve steady progress in improving water quality in the short term and help to meet water quality standards in the longer term.”¹⁹⁵ Thus as part of the forest practices regulatory regime, the EPA and Ecology—despite the strict prescriptions of the CWA and Washington water laws—offered assurances that compliance with the Forest Practices Rules was a means of meeting the requirements of the CWA and Washington water quality laws.¹⁹⁶ Recognizing the Forest Practices Rules as the best management practices for addressing water quality issues arising from forest practices,¹⁹⁷ the CWA Assurances were originally granted as part of the FFR¹⁹⁸ and were re-

191. EPA HANDBOOK, *supra* note 189 at 4-4.

192. 40 C.F.R. § 131.12. The guidelines specify three tiers of protection: (1) existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected; (2) for high quality waters, water quality must be maintained and protected, unless there is a finding that allowing lower water quality is necessary to accommodate important economic or social development—such a finding is dependent on the State assuring water quality adequate to fully protect existing uses, however; and (3) for high quality waters constituting an outstanding national resource, water quality must be maintained and protected. *Id.*

193. EPA HANDBOOK, *supra* note 189, at 4-4.2.

194. *Id.*

195. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 13.

196. FORESTS AND FISH REPORT, *supra* note 10, at 1, 167; *see also* CWA ASSURANCES REVIEW, *supra* note 19, at 1, 3.

197. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 13.

198. FORESTS AND FISH REPORT, *supra* note 10, at 1, 167. The full text of the assurances is as follows:

EPA and Ecology have confidence that the Report, when signed and implemented, provides the quickest and most efficient means for achieving environmental goals and State of Washington water quality standards. Accordingly, TMDLs for waters impaired [sic] by sediment, habitat

granted in 2009.¹⁹⁹

The CWA Assurances are grounded in the deferral of the TMDL process: due to the belief that the forest practices program offers the best management strategy for meeting water quality goals for forest waterbodies,²⁰⁰ impaired forest waterbodies are a low priority for TMDL implementation.²⁰¹ In other words, TMDLs will not be created for forest waterbodies for the foreseeable future. The CWA Assurances are addressed in the Washington Administrative Code,²⁰² and the Forest Practices HCP reiterates that compliance with the forest practices regulatory framework ensures compliance with the CWA on Washington's 9.3 million acres of forestlands covered by forest practices.²⁰³ The Adaptive Management program is seen as the tool for bringing forested waters into compliance with water quality standards.²⁰⁴

Recent reports have found the provisions of the Forest Practices HCP aimed at achieving compliance with state water quality standards to be inadequate, however.²⁰⁵ This finding has prompted Ecology to agree only to conditional CWA Assurances moving forward—that is, assurances will be revoked if benchmarks for measuring and meeting certain water quality standards are not met.²⁰⁶ Even so, the TMDL process is the designated tool for bringing impaired waterbodies into compliance with water quality standards, and the absence of this regulatory mechanism raises doubts about the efficacy of future reforms

degradation, flow, turbidity or temperatures caused by forest practices covered in the Report and recommendations (private and state lands subject to Board regulation) affecting a current or future 303(d) listed water body, become a lower priority for EPA and Ecology. Therefore, these TMDLs need not be prepared prior to July 1, 2009 Ecology will submit its year 2000 Section 303(d) list and priorities consistent with this provision. EPA will review and approve the priorities as expressed here subject to notice and comment. EPA and Ecology will not add new TMDL CWA requirements to current or future 303(d) listed water bodies subject to the FPB regulations prior to 2009, except through the agreed upon adaptive management program set out in the Report, or made necessary by changes to the CWA or CWA implementing regulations.

Id.

199. CWA ASSURANCES REVIEW, *supra* note 19, at 3.

200. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 13.

201. *Id.* at 70.

202. WASH. ADMIN. CODE § 222-12-010 (2012) (“Promulgation of all forest practices rules shall be accomplished so that compliance with such forest practices rules will achieve compliance with the water quality laws.”).

203. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3, 16 (“[A]ssurances under the . . . CWA are intended to recognize that the Forest Practices program and rules effectively meet Federal . . . CWA requirements.”).

204. CWA ASSURANCES REVIEW, *supra* note 19, at 3.

205. *See, e.g., id.* at 4–5.

206. *Id.* at 5.

to secure compliance with water quality laws.²⁰⁷ Indeed, as Ecology itself has noted, “After ten years [with the CWA Assurances in place], *no* studies have been completed or data collected that provide an indication of whether or not the forest practices rules are improving water quality or maintaining forested waters in compliance with water quality standards.”²⁰⁸

In passing the ESA, Congress directed the Services to work in concert with other federal and state agencies to conserve endangered species, specifically in the context of resolving water resource issues.²⁰⁹ The Washington State Legislature also pointed to the “substantial link between the provisions of the federal endangered species act and the federal clean water act.”²¹⁰ But, as the next Part demonstrates, Washington’s ITP creates a collision between the ESA and the CWA. The ITP permits the taking of aquatic species; although timber activities adversely impact species, the minimization and mitigation measures of the Forest Practices HCP were deemed sufficient for the purposes of the ESA.²¹¹ The CWA and Washington water quality standards are governed by a different standard, however: no degradation of a waterbody’s designated uses—including the protection and propagation of aquatic species²¹²—is permitted.²¹³ As long as Washington forestland is covered by the ITP, continuing CWA violations will be permissible; thus the premise behind the CWA Assurances—compliance with forest practices entails compliance with the CWA—is a legal fiction.

III. THE EPA AND ECOLOGY SHOULD REVOKE THE CWA ASSURANCES BECAUSE THEY VIOLATE THE CWA AND WASHINGTON WQSS

The uncertain condition of many of Washington’s forest waterbodies calls into question the efficacy of Forest Practices Rules in terms of their ability to achieve water quality benchmarks set for fish habitat

207. *See* *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 217 (D.D.C. 2011) (“[A] TMDL provides crucial information for federal, state and local actors in furtherance of the cooperative efforts to improve water quality envisioned in the CWA.”).

208. CWA ASSURANCES REVIEW, *supra* note 19, at 3 (emphasis added).

209. 16 U.S.C. §§ 1531(c)(1)–(2) (2006).

210. WASH. REV. CODE § 77.85.005 (2012).

211. *See* notes 143–146 and accompanying text.

212. *See* WASH. ADMIN. CODE § 173-201A-200 (2012).

213. *Id.* § 173-201A-310; 40 C.F.R. § 131.12(a)(1) (2012). The EPA has indicated that “No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use” *See supra* text accompanying note 189.

protection. The CWA Assurances are a threat to any water quality improvements as they subvert the TMDL data-gathering, monitoring, and remediation procedures prescribed by the CWA. But this only highlights the core issue: the CWA Assurances are in direct contravention of the CWA and Washington WQSs.

First, with the ITP as the foundation, Washington Forest Practices Rules are predicated on a violation of water quality standards, namely, by permitting degradation of the aquatic life designated use. Second, there is no statutory authority for granting assurances under the CWA. Finally, the CWA Assurances violate Washington's duty to develop TMDLs for impaired waters, based on a priority ranking. For these reasons, the EPA and Ecology should revoke the CWA Assurances, placing Washington forest waterbodies back on the TMDL schedule.

A. *Authorization of the ITP Ipso Facto Violates the CWA and Washington Water Quality Standards*

In the context of the Forest Practices Rules, a statutory conflict exists between the ESA and the CWA. Section 10 of the ESA grants the Services authority to exempt landowners from certain sections of the ESA; under a valid ITP, parties may lawfully take listed species.²¹⁴ The ITP²¹⁵ is the core of the Washington forest practices—no liability will attach if species are taken due to timber activities conducted in accordance with Forest Practices Rules.²¹⁶

There is no analogous provision under the CWA. Under the CWA, water quality standards define the water quality goals of a waterbody by designating uses and by setting criteria necessary to protect those uses.²¹⁷ In Washington, for waterways designated for aquatic life uses, all indigenous fish and nonfish aquatic species must be protected.²¹⁸ Antidegradation policy requires the maintenance and protection of existing designated uses.²¹⁹ The ITP is thus an ipso facto violation of the CWA and state water quality laws: by permitting the take of two

214. 16 U.S.C. § 1539(a)(2)(A).

215. For Washington forest practices, there are two ITPs, one from NOAA Fisheries for anadromous fish, NOAA FISHERIES ITP, *supra* note 22, and one from USFWS for non-anadromous fish and aquatic species, USFWS ITP, *supra* note 22. This Comment refers to the two ITPs simply as the "ITP."

216. NOAA FISHERIES ITP, *supra* note 22 at 1; USFWS ITP, *supra* note 22, at 1.

217. *See* 33 U.S.C. § 1313.

218. WASH. ADMIN. CODE § 173-201A-200(1).

219. *Id.* § 173-201A-310(1).

endangered, fifteen threatened, and sixty-one unlisted species,²²⁰ the ITP authorizes the degradation of water quality.

1. *NOAA Fisheries and USFWS Issued Their Respective ITPs with the Recognition that Fish and Aquatic Species Would Be Taken by Forest Practices*

The Services could not forecast the number of listed species that would be taken as a result of the ITP.²²¹ The Services predicted the probable take in the form of habitat modification, with timber activities impairing “normal behavior patterns of listed salmonids to an extent that actually injures or kills them.”²²² NOAA Fisheries recognized that forest practices will “clearly affect fish habitat.”²²³ USFWS anticipated the take of bull trout through the impairment of foraging, rearing, and spawning behaviors, and through the effects of sediment, increases in stream temperature, and the loss of LWD.²²⁴

In its biological opinion, NOAA Fisheries catalogued the degradation of aquatic species’ habitat caused by historical forest practices.²²⁵ It further acknowledged that timber activities adversely affect the biological requirements of salmonids in at least six areas.²²⁶ Nonetheless, NOAA Fisheries extended its ITP on the ground that the Forest Practices HCP would sufficiently minimize and mitigate—to the maximum extent practicable—the impacts of the take of anadromous fish.²²⁷ USFWS

220. NOAA FISHERIES ITP, *supra* note 22, at 7–8 (granting take authorization for two endangered, fourteen threatened, and fifteen unlisted aquatic species—should they become listed—under the jurisdiction of the Department of Commerce); USFWS ITP, *supra* note 22, at 1 (granting take authorization for one threatened and forty-six unlisted aquatic species—should they become listed—under the jurisdiction of the Department of the Interior).

221. *See, e.g.*, NOAA FISHERIES ITP, *supra* note 22, at 2; USFWS BIOP, *supra* note 43, at 857–58.

222. NOAA FISHERIES BIOP, *supra* note 8, at 273.

223. *Id.* at 289; *see also id.* at 269 (“Some [forest practices affecting watershed processes] can modify habitat to an extent that injures or kills fish by impairing their normal behavioral patterns.”).

224. USFWS BIOP, *supra* note 43, at 857–59; *see also* USFWS ITP, *supra* note 22, at 4 (predicting that forest practices activities “would result in biological effects to Covered Species that rise to the level of take”).

225. NOAA FISHERIES BIOP, *supra* note 8, at 261–62.

226. *See id.* at 182–83 (hydrology); *see also id.* at 186 (LWD supply); *id.* at 195 (chronic sedimentation and turbidity); *id.* at 217 (sediment from mass wasting processes); *id.* at 220 (stream temperature); *id.* at 226 (nutrient inputs).

227. NOAA FISHERIES ITP, *supra* note 22, at 2. The minimization and mitigation measures include: (1) incorporation of the State Forest Practices Regulatory Program and Rules; (2) the Adaptive Management program; and (3) adequate funding. *See* NOAA FISHERIES BIOP, *supra* note 8, at 289.

similarly found sufficient minimization and mitigation measures.²²⁸ The Services' confidence derived from the Forest Practices HCP's protective measures for combating the degrading effects of forest practices.²²⁹ Accordingly, the Services concluded that forest practices would not "appreciably reduce the likelihood of survival . . . of covered species"²³⁰

In legal terms, this conclusion amounted to a "No Jeopardy" finding—the Services' determination that agency action was not likely to jeopardize the continued existence of any endangered or threatened species.²³¹ The justification for the finding of "No Jeopardy" was rooted in the fact that the Forest Practices HCP established rules that would improve conditions affecting habitat quality over the environmental baseline, that is, historical forest practices.²³² Thus, NOAA Fisheries' conclusions about overall effects took the form of a syllogism: when timber activities occur on Forest Practices HCP lands, processes affecting species' survival recovery will have already attained a level of function beyond the environmental baseline; and because such timber activities will occur based on the Forest Practices HCP's protective measures—designed to meet the ecological needs of covered species—"it follows that conditions will improve cumulatively across the affected landscape."²³³ By relying on this assumption—that because the Forest Practices HCP's protective measures were designed to benefit ecological conditions, ecological conditions would in fact improve—NOAA Fisheries found that the Forest Practices HCP would meet the biological

228. USFWS ITP, *supra* note 22, at 53.

229. *See, e.g.*, NOAA FISHERIES BIOP, *supra* note 8, at 253–54.

230. *Id.* at 254. The Services found that "implementation of the Forest Practices Rules will reduce overall sediment inputs (although they may remain above natural levels) and increase functional LWD and canopy cover. Nutrient inputs should be unchanged, or even improved, and temperature conditions will improve from baseline conditions." *Id.* at 267. The USFWS made similar findings in terms of the one listed species in its jurisdiction: bull trout. *See* USFWS BIOP, *supra* note 43, at 783–84, 857. Because of the parallel conclusions, and due to the relative number of species under each of the Service's respective jurisdictions, this Comment focuses on the findings and conclusions of NOAA Fisheries.

231. 16 U.S.C. § 1536(a)(2) (2006). This section is often referred to as the "consultation requirement," which includes the "No Jeopardy" clause. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 653, 662 (2007).

232. NOAA FISHERIES BIOP, *supra* note 8, at 269. NOAA Fisheries contended that the comparison between historical forest practices and forest practices under the Forest Practices HCP was not the basis for the "No Jeopardy" finding. *Id.* at 253–54, 268–69. Some may find this contention interesting in light of the fact that the term "improve," or some derivation thereof, was used more than 150 times in the biological opinion.

233. *Id.* at 235.

requirements of listed species.²³⁴

Even if forest practices under the Forest Practices HCP would improve conditions over the environmental baseline, however, NOAA Fisheries conceded that the habitat degrading effects of forest practices would continue under the Forest Practices HCP.²³⁵ It acknowledged that “[s]ome [effects of forest practices] can modify habitat to an extent that injures or kills fish by impairing their normal behavioral patterns.”²³⁶ Specifically, it acknowledged that habitat modifications that may cause take *would* occur from timber harvest and related activities under the Forest Practices HCP.²³⁷

Therein lies the conflict between the ESA and the CWA. While NOAA Fisheries found that “habitat modification will be greatly reduced, or minimized in a manner that enables continuation of the natural functional processes that restore and maintain habitat”²³⁸—sufficient for a “No Jeopardy” determination—the CWA forbids any activities that will degrade water quality below existing levels.²³⁹

2. *The ITP Allows Degradation of Washington Water Quality*

It is the declared public policy of Washington to “maintain the *highest* possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life”²⁴⁰

234. *Id.* at 267. Another flaw in this analysis is the reliance on only one possible alternative: the continuation of forest practices under the policies devised in the Forests and Fish Report. Comparison to an alternative of no further timber harvesting, or timber harvesting under more stringent forest practices would have been instructive here, because even with the added protections of the Forest Practices HCP, forest practices will disturb fish species. *Id.* at 244. Furthermore, although NOAA Fisheries was optimistic about progress made since the adoption of the FFR, its assessment of positive changes was speculative. *Id.* at 262 (“Seven years of improved practices under the 1999 emergency rules and subsequent permanent rules changes have *probably* begun to address these forest-practices related habitat issues.”) (emphasis added). Its assumptions about progress that would be achieved under the Forest Practices HCP were similarly speculative, *id.* at 262 (“Looking at how these conditions will change as previously harvested stands approach next harvest under the FPHCP, places with decreased rearing habitat and degraded spawning conditions *should* begin to present increased function and improved processes merely through the natural maturation of those stands as they reach mid-seral conditions typical of commercially harvested forest land.”) (emphasis added), and additionally begged the question whether habitat conditions would again be degraded upon the next harvest.

235. *Id.* at 244.

236. *Id.* at 269.

237. *Id.* at 274.

238. *Id.* at 269.

239. *See supra* note 213 and accompanying text.

240. WASH. REV. CODE § 90.48.010 (2012) (emphasis added).

To this end, and based on the CWA, Ecology designates certain uses for protection in Washington waters.²⁴¹ In order to protect designated uses, Ecology assigns numeric and narrative criteria to each waterway.²⁴² Overlaying these protective measures is Washington's antidegradation policy, which provides that, at a minimum, "[n]o degradation may be allowed that would interfere with, or become injurious to, existing or designated uses"²⁴³ Because the ITP permits timber activities with negative effects on aquatic species, it impairs the aquatic life designated use.²⁴⁴ The ITP thus runs afoul of the state's antidegradation policy, which at a minimum must preserve water quality that results in no mortality and no significant growth or reproductive impairment of resident aquatic species.²⁴⁵

The U.S. Supreme Court has held that *any* activities with the potential to partially or completely eliminate any existing use are not allowable.²⁴⁶ On this basis, the Court upheld Washington's finding that an activity that reduced stream flows would violate the state's antidegradation policy on grounds that such an activity would interfere with or become injurious to existing beneficial uses.²⁴⁷ The Court noted that the CWA does not provide a basis for interpreting the term "water quality" narrowly; instead, Congress evinced a concern with the physical and biological integrity of water generally, and recognized that water pollution may result from "changes in the movement, flow, or circulation of any navigable waters."²⁴⁸

A state's antidegradation policy may permit de minimis threats or impairment to existing uses.²⁴⁹ This is a low standard, however, because the policy may not allow activities that could even partially eliminate a designated use.²⁵⁰ The aquatic life designated use, which protects, among other things, salmonid spawning, rearing, and migration,²⁵¹ applies broadly throughout the state.²⁵² And with its Tier I standard—the

241. *See supra* Part II.B.0.

242. *See, e.g.*, WASH. ADMIN. CODE § 173-201A-200 (2012).

243. *Id.* § 173-201A-310.

244. *Id.* § 173-201A-200.

245. EPA HANDBOOK, *supra* note 189, at 4–4.2.

246. PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 718 (1994).

247. *Id.* at 719.

248. *Id.* at 719–20 (quoting 33 U.S.C. § 1314(f) (2006)).

249. Nw. Env'tl. Advocates v. EPA, 855 F. Supp. 2d 1199, 1220–21 (D. Or. 2012).

250. *Id.* (citing *Jefferson Cnty.*, 511 U.S. at 718–19).

251. WASH. ADMIN. CODE § 173-201A-600 (2012).

252. *Id.* § 173-201A-600 (describing designated uses that apply to all non-enumerated

absolute floor of water quality protection²⁵³—Washington’s antidegradation policy clearly forbids degradation that interferes with or becomes injurious to this designated use.²⁵⁴ Timber activities threaten salmonid species at each life cycle stage.²⁵⁵ The ITP, however, permits timber activities even to the extent that they actually kill or injure aquatic species.²⁵⁶ It is difficult to imagine a more direct violation of the state’s antidegradation policy.

B. There Is No Statutory Basis for Granting Compliance Assurances under the CWA

Washington Forest Practices Rules were intended to satisfy CWA requirements;²⁵⁷ the legislature decided that the “[a]doption [of forest practices rules] shall be accomplished so that compliance with such forest practice[s] rules will achieve compliance with water pollution control laws.”²⁵⁸ To this end, the EPA and Ecology provided assurances that compliance with Washington forest practices was “the quickest and most efficient means for achieving environmental goals and State of Washington water quality standards.”²⁵⁹ The idea was that forest practices would effectively satisfy the requirements of the CWA such that no party would be “subject to additional regulations or restrictions for aquatic resources except as provided in the forests and fish report.”²⁶⁰

Neither Ecology nor the EPA had authority to grant CWA exemptions, however, as granting a CWA exemption is the province of Congress.²⁶¹ The practical implication of this fact is that an agency is not entitled to judicial deference when the agency has no authority to act.²⁶²

waterbodies).

253. *Nw. Envtl. Advocates*, 855 F. Supp. 2d at 1220.

254. WASH. ADMIN. CODE § 173-201A-310.

255. *See generally* MURPHY, *supra* note 9.

256. *See* NOAA FISHERIES ITP, *supra* note 22, at 2.

257. *See* WASH. REV. CODE § 77.85.180(2) (2012); *see also id.* § 76.09.010(2)(g); FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3.

258. WASH. REV. CODE § 90.48.420(1) (2012).

259. FORESTS AND FISH REPORT, *supra* note 10, at 170.

260. WASH. REV. CODE § 77.85.190(1).

261. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) (“Only Congress may amend the CWA to create exemptions from regulation.”); *see also* *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (holding that “the EPA Administrator does not have the authority to exempt categories of point sources from [permitting requirements]”).

262. *N. Plains*, 325 F.3d at 1157–58; *see also* *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron*

Furthermore, states cannot create exemptions to the CWA, regardless of whether the EPA has delegated permitting authority to the state.²⁶³ At the state level, it is important to note that the CWA is intended as a floor, not a ceiling; states may not adopt standards less stringent than federal standards.²⁶⁴ Whether forest practices rules are equivalent to CWA regulations is a factual question—a state’s *intention* matters little.

Nonetheless, the CWA Assurances were extended to parties compliant with forest practices, on grounds that forest practices would satisfy the requirements of the CWA with respect to nonpoint sources of pollution.²⁶⁵ The effect of the CWA Assurances was that impaired forest waterways were given a “lower priority” ranking for TMDL development.²⁶⁶ In order to defend this low priority ranking, however, certain statutory criteria must be met; the simple assertion that timber activities conducted in concert with forest practices rules meet the requirements of the CWA is not sufficient justification.

C. *The CWA Assurances Violate the State’s Statutory Duty to Develop TMDLs for Impaired Waters, in Accordance with a Priority Ranking*

As previously discussed, the CWA mandates that states address impaired waters through the adoption of 303(d) lists, which identify state waterbodies not meeting water quality standards.²⁶⁷ According to section 303(d), States are required to prioritize such waterbodies for the establishment of TMDLs,²⁶⁸ a provision that was presumably the basis for Ecology and the EPA deciding to rank impaired forest waterways as low priority. There are specific statutory and regulatory criteria that must be met, however, when developing the priority list.²⁶⁹ Ecology has not

deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

263. *N. Plains*, 325 F.3d at 1157–58.

264. 33 U.S.C. § 1370 (2006).

265. WASH. REV. CODE § 77.85.180(2) (2012).

266. FORESTS AND FISH REPORT, *supra* note 10, at 170.

267. 33 U.S.C. § 1313(d); *see also* *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 213 (D.D.C. 2011) (“A determination that a particular water body is not meeting applicable standards triggers a State’s obligation to develop and submit for EPA approval total maximum daily loads (“TMDLs”) for the pollutants in that water body.”); *id.* at 216 (“The inclusion of a water body on a State’s 303(d) list triggers a statutory obligation to develop [TMDLs] . . .”).

268. 33 U.S.C. §§ 1313(d)(1)(A), (C).

269. *Id.* § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(4) (2012).

addressed these criteria for the forest waterbodies covered by the Forest Practices HCP, and thus the EPA has a duty to reject Washington's 303(d) list.

1. A State Must Establish Its Priority Rankings in Accordance with Statutory Requirements

Once a waterway has been identified on a 303(d) list, the state has a statutory obligation to develop TMDLs.²⁷⁰ Ecology and the EPA believed that rules outlined by the FFR would provide a means for quickly and efficiently achieving water quality goals,²⁷¹ deadlines for establishing TMDLs for waterbodies affected by forest practices were accordingly given a “lower priority” ranking.²⁷² That is not what the CWA—nor Washington water quality regulations—allows.

In establishing the priority ranking of impaired waters for TMDL development,²⁷³ a state must take into account certain factors concerning the state of the waterway. The language of the statute is clear: “The State shall establish a priority ranking for [impaired] waters, taking into account the severity of the pollution and the uses to be made of such waters.”²⁷⁴ The implementing regulations confirm this duty by using the same language.²⁷⁵ Ecology has provided further guidance as to factors that must be considered in the TMDL prioritization process.²⁷⁶ Importantly, one such factor is the “[r]isk to threatened and endangered species.”²⁷⁷

Prioritization determines the schedule for the waters that will first receive TMDL calculations.²⁷⁸ In approving a state's 303(d) list and associated priority rankings,²⁷⁹ the EPA must consider whether the

270. 33 U.S.C. § 1313(d)(1)(C); *Anacostia Riverkeeper*, 798 F. Supp. 2d at 225 (instructing that the need to generate a TMDL for an impaired water stems from its placement on a state's 303(d) list).

271. FORESTS AND FISH REPORT, *supra* note 10, at 170.

272. *Id.* (“Therefore, these TMDLs need not be prepared prior to July 1, 2009 EPA and Ecology will not add new TMDL CWA requirements to current or future 303(d) listed water bodies . . . prior to 2009”); CWA ASSURANCES REVIEW, *supra* note 19, at 3 (conditionally re-extending CWA assurances in 2009).

273. *See supra* Part II.C.

274. 33 U.S.C. § 1313(d)(1)(A).

275. 40 C.F.R. § 130.7(b)(4) (2012).

276. *See* WATER QUALITY PROGRAM POLICY, *supra* note 185, at 54.

277. *Id.*

278. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1319 (D. Colo. 2007).

279. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d).

statutory factors were considered.²⁸⁰ Blanket “low priority” rankings have been found invalid,²⁸¹ and courts must make a factual determination as to whether the statutory factors of “severity of pollution” and “uses to be made” were in fact adequately considered.²⁸²

There is no evidence that Ecology considered the severity of pollution of impaired forest waterbodies and the uses to be made of such waters in its low priority ranking of all waterbodies covered by the Forest Practices HCP. Nor is there evidence that Ecology considered any of its self-imposed factors. Instead, the low priority ranking—vis-à-vis the CWA Assurances—was grounded in the belief that the Forest Practices Rules, based on the FFR, were an important step forward in environmental protection, and would provide the best means for achieving compliance with water quality standards.²⁸³ The CWA Assurances were extended to provide landowners and agencies with a predictable and consistent regulatory system,²⁸⁴ and the low priority ranking for TMDL development meant that forest landowners did not have to comply with an additional regulatory mechanism on top of forest practices.

This justification for the low priority ranking runs afoul of the statutory and regulatory standards for prioritization. Admittedly, most impaired forest rivers and streams generally do not see the type of human use that would make TMDL development the *highest* priority.²⁸⁵ However, due to the importance of many of these waterways for the protection and propagation of fish habitat,²⁸⁶ it is difficult to justify the low ranking.²⁸⁷ And ultimately, whether Ecology and the EPA were

280. See *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 918 (11th Cir. 2007).

281. *Id.*

282. See *id.* at 917 (remanding case involving a challenge to EPA decision to uphold Florida’s 2002 303(d) list and priority rankings to district court for resolution of whether the evidence in the administrative record established that EPA considered the statutory factors).

283. CWA ASSURANCES REVIEW, *supra* note 19, at 3–4.

284. *Id.*

285. See *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 232–33 (D.D.C. 2011) (“Congress envisioned that a State would develop a priority list of waters identified in its 303(d) list by comparing the relative states of those waters; for example, a heavy-traffic river with significant human contact impaired by fecal matter would be a higher-priority candidate for an immediate TMDL than a low-volume waterway with minimal plant or animal life that is designated only for navigation and is impaired by non-toxic TSS.”).

286. See MURPHY, *supra* note 9, at xvi (noting that small forest streams are the “backbone” of salmonid habitat).

287. *Anacostia Riverkeeper*, 798 F. Supp. 2d at 232–33; see also *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1194 (D. Mont. 1999) (upholding EPA approval of Montana’s priority ranking that gave high priority to cold water fisheries on grounds that it took into account

justified in the low priority ranking is a factual dispute—one in which a court must consider whether the agencies adequately considered the relevant statutory and regulatory criteria.²⁸⁸ Because Ecology did not consider the severity of pollution affecting, or the uses to be made of, impaired forest waterways, the EPA did not have the authority to adopt Washington's 303(d) list.

2. *Category 4b Designation Is Not Available for Forest Waterways Covered by the Forest Practices HCP*

Washington does have a mechanism for getting around the severity of pollution and uses to be made evidentiary requirements: moving impaired waters from the Category 5 list to Category 4b.²⁸⁹ Category 4b waters are those with pollution problems, but which have a program in place expected to solve the problems.²⁹⁰ Category 4b placement effectively moves a waterway off of a state's 303(d) list.²⁹¹ Several criteria must be met before an impaired waterway is eligible for a Category 4b listing, including requirements to: be problem-specific and waterbody-specific; have enforceable pollution controls or actions stringent enough to attain water quality standards; and be feasible, with enforceable legal or financial guarantees that implementation will occur.²⁹² However, “[t]he mere existence of pollution controls, such as permit requirements or water quality regulations, is not sufficient to qualify a waterbody segment for [Category 4b].”²⁹³

Impaired waters covered by the Forest Practices HCP are not eligible for Category 4b designation because they do not meet all of the relevant

the statutory factors by considering the health of native fisheries); *see also* WATER QUALITY PROGRAM POLICY, *supra* note 185, at 54 (establishing the risk to threatened and endangered species as a factor that must be considered).

288. *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 918 (11th Cir. 2007).

289. *See Water Quality Assessment Categories*, *supra* note 183.

290. *Id.*

291. *See* 40 C.F.R. § 130.7(b)(1) (2012); *see also* ERIC MONSCHER & LAURIE MANN, CATEGORY 4B—A REGULATORY ALTERNATIVE TO TMDLS 1–2 (2007), *available at* http://www.epa.gov/owow/tmdl/results/pdf/36monschein_wef07_paper7.pdf.

292. WATER QUALITY PROGRAM POLICY, *supra* note 185, at 15–16. The other requirements are: to have reasonable time limits established for correcting the specific problem, including local reduction or interim targets when appropriate; to have a monitoring component to evaluate effectiveness; to have adaptive management built into the plan to allow for course corrections if necessary; and to be actively and successfully implemented and show progress on water quality improvements in accordance with the plan. *Id.*

293. *Id.* at 15.

criteria.²⁹⁴ A review of the types of projects that have generated Category 4b listing reveals that only single-waterway or single-basin projects are eligible for Category 4b listing.²⁹⁵ The point of Category 4b listings is that local management may sometimes provide the fastest and most efficient means of cleaning up a particular waterway.²⁹⁶ One of the driving forces behind the CWA Assurances was the 303(d) listing of 660 stream segments.²⁹⁷ Furthermore, the Forest Practices HCP and associated forest practices is a comprehensive scheme for addressing 9.3 million acres of land.²⁹⁸ This is not the type of “waterbody-specific” plan addressing local management that would qualify for Category 4b listing.²⁹⁹ Because there is no justification for moving impaired forest waterways covered by the Forest Practices HCP from Category 5, TMDLs must be prepared for such waterways, according to a priority ranking.

It has been recognized that “TMDLs are central to the Clean Water Act’s water-quality scheme because . . . they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.”³⁰⁰ By failing to prioritize forest waterbodies according to the actual severity of their water quality problems, the State has violated its statutory duty to create TMDLs for impaired waterways.³⁰¹

CONCLUSION

The decline of fish populations has been linked to habitat degradation in their spawning and rearing streams.³⁰² Timber activities are one source of such degradation. Even with the minimization and mitigation measures contained in Washington Forest Practices Rules, timber

294. *Id.* (“To be placed in the *Has a Pollution Control Project* category, the pollution control project must meet all of the [criteria].”).

295. See *Water Quality Assessment Category 4b*, WASH. STATE DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/programs/wq/303d/wqassescat4b.html> (last visited Mar. 5, 2013); MONSCHEIN & MANN, *supra* note 291, at 4.

296. See *Water Quality Assessment Category 4b*, *supra* note 295.

297. FORESTS AND FISH REPORT, *supra* note 10, at 3.

298. FOREST PRACTICES HABITAT CONSERVATION PLAN, *supra* note 3, at 3, 16.

299. WATER QUALITY PROGRAM POLICY, *supra* note 185, at 15.

300. *Sierra Club v. Meiburg*, 296 F.3d, 1021, 1025 (11th Cir. 2002) (internal quotation marks omitted).

301. 33 U.S.C. §§ 1313(d)(1)(A), (C) (2006); 40 C.F.R. § 130.7(b) (2012).

302. NOAA FISHERIES BIOP, *supra* note 8, at 172.

activities will continue to detrimentally impact aquatic habitat.³⁰³ At the same time, few would argue against the benefits of a robust timber industry that contributes to local economies and prevents the conversion of forestland to other uses. Finding the delicate balance point between restoring and maintaining healthy fish populations and supporting an economically viable timber industry is no easy task. But shortcuts that circumvent the law are no substitute for good policy based on science. Washington's Clean Water Act Assurances, as part of the larger forest practices framework, are a shortcut for "meeting" water quality goals. They act as a legal conclusion, assuring parties that compliance with Forest Practices Rules meets the requirements of the CWA and Washington water quality standards.

The CWA does not permit such a shortcut. When a waterbody falls short of water quality standards, a state's duty to prepare TMDLs is triggered. States must prioritize such TMDLs based on the designated uses of a waterbody and the severity of the pollution.³⁰⁴ There is no provision authorizing the blanket de-prioritization of hundreds of waterbodies. The issue here is exacerbated by the fact that federal agencies have permitted the take of aquatic species, when caused by the habitat-degrading effects of timber harvest. While the ESA allows for such a take, the CWA does not. In fact, the CWA prohibits actions that degrade water quality—measured in terms of factors such as the protection and promulgation of aquatic species. The ITP, by permitting the take of aquatic species, thus violates the antidegradation provisions in the state and federal water quality laws.

In order to remedy this regulatory discrepancy, the EPA and Ecology must revoke the CWA Assurances. While the grant of assurances is only conditional moving forward,³⁰⁵ nothing short of the full TMDL process is a substitute for compliance with the CWA. The recent settlement between stakeholders³⁰⁶ reflects the admirable goal of attempting to reach consensus-based regulations for timber activities, derived from negotiation instead of litigation. The settlement does not, however, bear on the ultimate legality of the CWA Assurances. Water quality issues

303. *Id.* at 274 ("Take in the form of harm *will* result from reduced function of watershed processes that create and maintain habitat meeting the ecological needs of the covered species.") (emphasis added).

304. 33 U.S.C. § 1313(d)(1)(A).

305. CWA ASSURANCES REVIEW, *supra* note 19, at 3.

306. Settlement Agreement: Conservation Caucus, State of Wash., and Wash. Forest Protection Ass'n ¶ 2.1 (May 24, 2012) (on file with author) (documenting the conservation group's covenant not to sue under the CWA for a period of three-and-a-half-years over Forest Practices Rules).

and the attendant effects on salmonids and other aquatic species must remain at the forefront of policy discussions. Should benefits not be realized over the course of the settlement agreement, the CWA Assurances will be ripe for litigation.