UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit corporation,

Plaintiff,

v.

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

Defendant,

and

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

Intervenors-Defendants.

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

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

In this action, plaintiff Northwest Environmental Advocates, a non-profit environmental organization ("NWEA"), challenges decisions made by the United States Environmental Protection Agency ("EPA") regarding Oregon's water quality standards. Presently before the court is the EPA's motion for voluntary remand, joined in by intervenor-defendant the State of Oregon, through its Department of Environmental Quality ("Oregon"). (EPA's Mot. for Voluntary Remand, ECF No. 89 ("Motion") Based on the record before it, the court should grant the EPA's motion to remand, without vacatur, but impose a three-year remand timeline with which the EPA and Oregon must comply.

Background

NWEA brings suit under the right-to-review provision of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2016) ("APA"), and citizen-suit provisions of the Federal Water Pollution Control Act (commonly known as the Clean Water Act), 33 U.S.C. §§ 1251-1387 (2016) ("CWA"), and Endangered Species Act, 35 U.S.C. §§ 1531-1544 (2016) ("ESA"). (Second Am. Compl., ECF No. 11 ("Compl.") ¶ 2.) NWEA challenges the EPA's review and approval, or lack of approval, of certain temperature and mercury Total Maximum Daily Loads ("TMDLs") submitted by Oregon. (Compl. ¶¶ 3-10.) Specifically, NWEA's claims target numerous Oregon temperature TMDLs approved by the EPA between 2004 and 2010; the Klamath Basin temperature TMDL ("Klamath Temperature TMDL"), submitted by Oregon but never approved by EPA; and the Willamette Basin mercury TMDL ("Willamette Mercury TMDL"), approved by EPA in September 2006. (Second Am.

Compl. ¶¶ 3-10.) The EPA now moves to voluntarily remand the latter two TMDLs.

Legal Standards

Under the APA, the court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995) (citing *Rybachek v. EPA*, 904 F.2d 1276, 1284 (9th Cir.1990)). An agency decision is arbitrary and capricious if: "the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Sw. Center for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir.1996) (internal citations omitted). Review under this standard is narrow, and the court may not substitute its judgment for that of the agency. *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010). The court must be "at its most deferential" when reviewing an agency's scientific determinations. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

Overview of the Relevant Acts

I. Clean Water Act

The CWA was adopted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To do so, the CWA requires each state to develop water quality standards for all water bodies, or water "segments," within its jurisdiction. 33 U.S.C. § 1313(a). These standards designate specific uses for the waters involved and establish

numerical and narrative water quality criteria to protect those uses. 33 U.S.C. § 1313(c)(2). Each state must review and appropriately modify its water quality standards at least once every three years and submit revised standards to the EPA. 33 U.S.C. § 1313(c)(1). The EPA then reviews the state standards and approves those standards that sufficiently meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3). If the EPA determines a water quality standard is unapprovable, the EPA identifies changes needed and, if the state fails to adopt the necessary changes, promulgates acceptable standards for the state. 33 U.S.C. § 1313(c)(3).

Water quality standards define water quality goals for a water body by "designating the use or uses to be made of the water and by setting criteria that protect the designated uses." 40 C.F.R. § 131.2 (2016). The standards protect "public health or welfare" and "provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water . . ." *Id.* To do so, states develop narrative or numerical criteria to support and protect the designated uses. 40 C.F.R. § 131.3(b) (2016).

While these narrative and numerical standards establish water quality goals for water bodies, they also provide a regulatory basis for setting effluent limits for point sources discharging pollutants into those water bodies. 33 U.S.C. §§ 1311, 1316. A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Point sources are regulated through the National Pollutant Discharge Elimination System ("NPDES"), under which permits are issued for discharge into navigable waters. 33 U.S.C. § 1342. Alternatively, nonpoint source pollution, though undefined in the CWA, arises "from many dispersed activities over large areas, and is not traceable to any single discrete source." *Nw. Envtl. Def. Ctr.*

v. Brown, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds, Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326 (2013).

The CWA also mandates each state identify any waters within its borders that fail to meet "any water quality standard applicable to such waters"and establish TMDLs for those impaired waters. 33 U.S.C. § 1313(d)(1)(A)-(D). A TMDL defines the maximum amount of a pollutant that can be discharged to a water body from all combined sources without violating "the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). The CWA requires that a TMDL set "limits on a pollutant sufficient to reduce contamination to levels necessary to satisfy the narrative and numeric water quality criteria and protect all designated uses applicable to the water body." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 224 (D.D.C. 2011) ("TMDLs must implement all water quality standards made applicable to a water body under state law."). Thus, though a water body must be listed as "impaired" if it violates any one water quality standard, the attendant TMDL must be developed to attain *all* applicable water quality standards. *Id.*

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

33 U.S.C. § 1313(d)(1)(D). These limits inform each water segment's "loading capacity," which describes the "greatest amount of loading that a water can receive without violating water quality

standards." 40 C.F.R. § 130.2(f) (2016). In rare circumstances, a TMDL may be expressed by a measure of mass per time period other than "daily," if such an alternative measure best serves the purpose of effective regulation of levels of a particular pollutant in water bodies; however, the period of time governing the measurement of each pollutant's mass in a water body within a TMDL is subject to judicial review. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001) ("In the case of each pollutant, effective regulation requires agencies to determine how the pollutant enters, interacts with, and, at a certain level or under certain conditions, adversely impacts an affected waterbody."); *see e.g., San Joaquin River Exch. Contractors Water Auth. v. State Water Res. Control Bd.*, 183 Cal. App. 4th 1110, 1124 (2010), as modified (May 5, 2010) (approving a total maximum *monthly* load comprising a "30-day running average" rather than a "daily" load for salt/boron, based on data and modeling constraints.); *contra Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 142 (D.D.C. Cir. 2006) (holding, with respect to TMDLs, "[d]aily means daily, nothing else.").

A TMDL includes three distinct but interrelated components: wasteload allocations, load allocations, and a requisite margin of safety. 33 U.S.C. § 1313(d)(1)(D); 40 C.F.R. § 130.2(g)-(i) (2016). Relevant to NWEA's claim, wasteload allocation refers to the "portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h). A load allocation is the portion of a receiving water body's loading capacity attributable either to one of its existing or future nonpoint sources or to natural background sources." 40 C.F.R. § 130.2(g). Therefore, by implementing both load and wasteload allocations, a TMDL addresses the amount of pollution entering a water body from both nonpoint and point sources. The

CWA does not require that a TMDL include individual waste load allocations, that is specific allocations to individual point sources; rather the allocation scheme functions sufficiently where the TMDL is based upon an aggregate of all 'individual [wasteload allocations] for point sources.'" *Anacostia Riverkeeper*, 798 F. Supp. 2d at 249 (quoting 40 C.F.R. § 130.2(i)); *see also Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 984 F. Supp. 2d 289, 316 (M.D. Pa. 2013), *aff'd*, 792 F.3d 281 (3d Cir. 2015) (affirming a sector-specific wasteload allocation scheme within a TMDL).

TMDLs are not self-enforcing, but serve as informational tools or goals for the establishment of further pollution controls. *Pronsolino v. Nastri*, 291 F.3d 1123, 1128-29 (9th Cir. 2002). Once a state submits a TMDL for EPA approval, the EPA must approve or disapprove the provisions within thirty days. 33 U.S.C. 1313(d)(2).

II. Endangered Species Act

Under the ESA, the United States Fish and Wildlife Service is required to maintain lists of endangered and threatened species. 16 U.S.C. § 1533(c)(1). The ESA requires federal agencies to "insure [sic] that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of such species' critical habitat. 16 U.S.C.§ 1536(a)(2). Whenever a federal agency, for example the EPA, determines a proposed action "may affect listed species or critical habitat," that agency must prepare a biological assessment on the effects of the action and consult with the Services to determine whether the agency action is likely to result in jeopardy to that species or its critical habitat. 50 C.F.R. § 402.14(a) (2016); 16 U.S.C. § 1536(a).

Allegations

With respect to the Klamath Temperature TMDL, NWEA, in its complaint, asserts the EPA missed its thirty-day deadline in which to approve or disapprove the Klamath Temperature TMDL under 33 U.S.C. § 1313(d), a nondiscretionary duty. The Willamette Mercury TMDL, according to NWEA, suffers numerous deficiencies. First, NWEA asserts the Willamette Mercury TMDL incorrectly targeted only human fish consumption as opposed to "all water quality standards," as required by 33 U.S.C. § 1313(d)(1)(C). Second, NWEA challenges the Willamette Mercury TMDL's *annual* loading capacity, which it argues should instead be calculated on a "daily" basis. Third, NWEA claims the EPA failed to determine whether the margin of safety in the Willamette Mercury TMDL is sufficient to protect *all* humans who consume fish (not just the average consumer), in addition to fish and wildlife. Fourth, NWEA argues the Willamette Mercury TMDL sets load and wasteload allocations for only "general source categories," not individual point and nonpoint sources of pollution. Fifth, according to NWEA, the Willamette Mercury TMDL is required to contain, but lacks, seasonal variations. Lastly, NWEA challenges the EPA's approval of the Willamette Mercury TMDL under the ESA, arguing the EPA failed to determine whether the new water quality goals contained in the TMDL would have an effect on listed species.

Factual and Regulatory Background

Oregon's water quality standards are codified in Chapter 340, Division 41 of the Oregon Administrative Rules. OR. ADMIN. R. 340-041-0001 to 340-041-0350 (2015). These standards include both narrative and numerical criteria. *See e.g.*, OR. ADMIN. R. 340-041-0028(4) ("Biologically Based Numeric Criteria"); OR. ADMIN. R. 340-041-0007 ("Statewide Narrative Criteria"). Further, Oregon has established designated basin-specific beneficial uses for its waters, including, for the Willamette Basin, "fishing" and "fish & aquatic life." (OR. ADMIN. R.

340-041-0340; AR 145.) Also applicable to the Willamette Basin is a section which provides:

> Toxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife or other designated beneficial uses.

OR. ADMIN. R. 340-041-0033(1).

I. Klamath Temperature TMDL

In 2004, Oregon adopted and the EPA approved the Natural Conditions Criterion ("NCC"), which provided that if a water body's "natural thermal potential," or naturally occurring temperature, would have been higher than the state's existing numeric temperature criteria, the natural thermal potential temperature "supercede[s]" the former criteria and would be deemed the applicable temperature criteria for that waterbody." *See* OR. ADMIN. R. 340-041-0028(8). Thus, the NCC, through this supercession mechanism, created a loophole by which Oregon's approved numeric temperature criteria could be altered, preempted by the natural thermal temperature potential, without the EPA's approval of the change. In 2005, NWEA filed suit against the EPA on those grounds, challenging the validity of the NCC. *See Nw. Envtl. Advocates v. U.S. E.P.A.*, 855 F. Supp. 2d 1199 (D. Or. Feb. 28, 2012).

From 2004 to December 17, 2010, Oregon submitted numerous temperature TMDLs, pursuant to the NCC. (Bell Decl. Ex. R.) Despite the ongoing litigation over the NCC, the EPA approved all of these TMDLs. (Bell Decl. Ex. R.) On December 21, 2010, Oregon submitted the Klamath Temperature TMDL, also based on the NCC. (AR 413.) That TMDL, like many of those developed under the NCC, set new temperature criteria higher than those previously approved by the EPA. (AR 398 at 19533; Compl. ¶¶ 68 (*e.g.*, Jenny Creek temperature raised to 23°C compared to

the previous numeric criterion of 20°C)). In response to the Klamath Temperature TMDL, Oregon received petitions for reconsideration. (Croxton Decl. Ex. A; AR 411.)

In February 2012, this court struck down the NCC, explaining that, among other deficiencies, the provision "violate[d] the CWA's § 303(c) water quality standards review." *Nw. Envtl.,* 855 F. Supp. 2d at 1218. In May 2012, the EPA issued an approval memorandum in which it declined to act on the Klamath Temperature TMDL, "in consideration of the uncertainties regarding the application of the [NCC] for temperature raised by [the] recent ruling in [*Nw. Envtl.*]." (AR 413.) The EPA noted it would "make a determination on the temperature TMDLs after the Court has issued a final order in that case." (AR 413; AR 414.) By postponing action on the Klamath Temperature TMDL, the EPA aimed to "provide time for [Oregon] to review the petitions for reconsideration . . . and to determine if any changes to the TMDL would be made." (AR 411.)

The EPA never approved the Klamath Temperature TMDL, and on February 11, 2015, Oregon withdrew its submission of the Klamath Temperature TMDL. (Croxton Decl. Ex. A.) According to a letter from Oregon informing the EPA of the withdrawal, Oregon intends to "issue a final decision on reconsideration, hold a public hearing on the proposed changes to the TMDLs and then issue a final decision on reconsideration." (Croxton Decl. Ex. A.) Oregon anticipates that upon reconsideration, the Klamath Temperature TMDL "will [be] remove[d]" and "other modifications will likely be made to the remaining TMDLs in response to the petitions for reconsideration." (Croxton Decl. Ex. A.) The changes will then be submitted to the EPA for review and approval. (Croxton Decl. Ex. A.)

II. Willamette Mercury TMDL

On September 21, 2006, Oregon submitted its most recent TMDL for the Willamette Basin,

which addressed bacteria, temperature, and, as relevant here, mercury,[1] to EPA for review and approval under 33 U.S.C. § 1313(d) of the CWA. (AR 101.) Mercury pollution, toxic even at low concentrations, poses a serious environmental risk as it bioaccumulates in fish and other organisms, which are then eaten by piscivorous birds and mammals, including humans. (AR 107 at 4850; Compl. ¶ 72; Croxton Decl., at 2.) The Willamette Mercury TMDL "focuse[d] on the restoration of the beneficial use of fish consumption in the Willamette Basin." (AR 107 at 4852.) Thus, the Willamette Mercury TMDL was established to reduce average mercury concentration, not of the water column but in fish tissue, "so that the fish are safe for human consumption." (AR 107 at 4856.)

To do so, Oregon, with its Willamette Mercury TMDL, aimed to establish numerical "interim guidance value[s]" that "when attained, should eventually reduce the concentrations of mercury in fish tissue to levels that no longer pose an unacceptable health risk to consumers of the fish." (AR 107 at 4850, 4861.) The Willamette Mercury TMDL sets the water column guidance value for total mercury at 0.92 ng/l. (AR 107 at 4864, 4881.) At the time the Willamette Mercury TMDL was developed, Oregon's fish tissue mercury criterion was 0.3 mg/kg. (AR107 at 4853, 4857.) The Willamette Mercury TMDL's water column guidance value was established under the construct that if the guidance value "were reached fifty percent of the time in the Willamette mainstream system, then [Oregon's] analysis predict[ed] that average fish tissue concentrations of mercury in [the most mercury-sensitive of the fish species in the Willamette basin,] the northern pikeminnow[,] will eventually fall below the threshold of 0.3 mg/kg." (AR 107 at 4881.)

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[1] Although the Willamette Basin TMDL addresses bacteria, temperature, and mercury, the EPA has requested to remand only the mercury provisions of the TMDL. Therefore, for the purposes of this order, the court refers only to the portions of the TMDL that set mercury limits.

The Willamette Mercury TMDL also sets an associated annual loading capacity of 94.6 kg/yr. (AR0 07 at 4852.) Due to acknowledged informational limitations, the Willamette Mercury TMDL did not set numerical water quality-based effluent limits for individual point sources; rather it established "sector-specific allocations" that would be "used to define the extent of the problem and to identify the level of effort needed to address the bioaccumulation of mercury in fish." (AR 107 at 4850.) In its overview of the Willamette Mercury TMDL, Oregon states it "intends to require specified domestic and industrial point sources in the Willamette Basin to monitor their effluent for mercury and to submit their data to [the Oregon Department of Environmental Quality]." (AR 107 at 4850.)

The Willamette Mercury TMDL also explains "[m]ercury minimization plans will also be required from select sources and sectors." (AR 107 at 4850.) These mercury minimization plans were intended to "serve as the primary vehicle for implementing mercury reduction activities within the point source sector." (AR 107 at 4850.) Under the program, all major domestic and primary industrial facilities and all minor domestic and non-primary industrial facilities where mercury is known to be present in source water or effluent are required to provide effluent characterization data for total mercury in conjunction with their NPDES permit. (Bell Decl., Ex. M at 4.) If any of these facilities discharge into a water body that is subject to an approved mercury TMDL (such as the Willamette Basin), the permit writer evaluates whether "the provisions (including the Waste Load Allocations) in the TMDL adequately address the methylmercury criterion." (Bell Decl., Ex. M at 2.)

The Willamette Basin TMDL also includes a Water Quality Management Plan, designed to "describe the overall framework for implementing the []TMDL," (the "Willamette WQMP.") (AR

118 at 5898.) In addition to basin-specific TMDL implementation requirements related to storm water management, the Willamette WQMP outlines activities, programs, legal authorities, management strategies, schedules and timelines, monitoring and evaluation methods, costs and funding resources, and other implementation measures. (AR 118 at 5898.) The Willamette WQMP calls for mercury minimization plans from twenty-three major point source dischargers and requires urban areas to manage storm water and establish erosion control practices to reduce mercury runoff in streams. (Wu Decl. at 3.) The Willamette WQMP also contains implementation plans for bacteria and temperature management in the Willamette Basin, the other two areas of concern addressed in the Willamette Basin TMDL. (AR 118 at 5916, 5927.)

On September 25, 2006, the EPA issued a "no effects" determination under the ESA for the Willamette Mercury TMDL, thereby relieving the need for a biological assessment. (AR 151.) The EPA then approved the Willamette Mercury TMDL on September 29, 2006. (AR 98.) In its approval letter, the EPA affirmed the TMDL's "allocations ha[d] been established at a level that, when fully implemented, will lead to the attainment of the criteria addressed by the TMDLs in all perennial streams in the Willamette Basin." (AR 98.) In October 2011, the EPA approved Oregon's revisions to its methylmercury fish tissue concentration criteria for the protection of human health, which changed the acceptable level from 0.3 mg/kg (upon which the mercury TMDL was based) to a significantly more protective 0.040 mg/kg. (AR 107 at 4860); OR. ADMIN. R. 340-041-0033, Table 40.

Unlike the Klamath Temperature TMDL, Oregon's Willamette Mercury TMDL has not been withdrawn and remains in effect. However, according to Eugene P. Foster, manager of Oregon's Department of Environmental Quality Water Management Section and one tasked with helping to

develop TMDLs ("Foster"), Oregon "plans to revise the Willamette Mercury TMDL." (Foster Decl. ¶ 3.) This revision will occur "under stricter and more demanding scientific standards that will require analysis of factors affecting mercury pollution, including potential multiple sources, bioaccumulation patterns, and changes in the types of mercury being released and transformed in the entire complex river system." (Foster Decl. ¶ 4.) According to the EPA, planned revisions to the Willamette Mercury TMDL include the use of Oregon's "new toxics criteria for human health" based on higher fish consumption rates, which will in turn lead to lower acceptable concentrations of mercury in fish tissue than were in effect in 2006. (Croxton Decl. ¶ 6.) Additionally, the "EPA expects that the allocations will be expressed as daily loads in a revised TMDL." (Wu Decl. ¶ 6.) Though the revised TMDL will utilize "some of the work done for the initial TMDL," its "model must be revised and incorporate all the new data related to mercury that has been gathered since the first TMDL as well as attain the new human health toxics criteria and other uses that are found to be impaired." (Croxton Decl. ¶ 6.)

Discussion

I. Voluntary Remand

It is within a court's equitable power to remand an agency decision without judicial consideration of the merits. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939); *All. for the Wild Rockies, Inc. v. Allen*, No. CIV. 04-1813-JO, 2009 WL 2015407, at *2 (D. Or. July 1, 2009); *see also Cent. Power & Light Co. v. United States*, 634 F.2d 137, 145 (5th Cir. 1980), *opinion supplemented on reh'g,* 639 F.2d 1104 (5th Cir. 1981) (distinguishing between agency-requested "voluntary remand" *without*, or *before,* consideration of the merits and "court-generated remand," which occurs *after* consideration of the merits). A federal agency may request remand in order to reconsider its

initial action. *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C.Cir.1993) (where, after the discovery of new evidence, the court granted voluntary remand, stating "[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.").

Courts are particularly likely to grant an agency's request to voluntarily remand where there has been an intervening change in the law or newly discovered evidence, however, such developments are not necessarily required. *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004); *see also SKF USA Inc.*, 254 F.3d at 1028-29 (stating remand based on intervening events is generally required where the intervening event "may affect the validity of the agency action."). Nor do agencies requesting voluntary remand need to concede error to do so. *SKF USA, Inc.*, 254 F.3d at 1029. Even absent any intervening event, an agency:

> may request a remand (without confessing error) in order to reconsider its previous position. It might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies.

Id. If courts were to deny voluntary remand in such situations, judicial review would be "turned into a game in which an agency is 'punished' for procedural omissions by being forced to defend them well after the agency has decided to reconsider." *Id.*

As such, courts typically refuse voluntarily requested remand only if the agency's request is frivolous or made in bad faith. *California Communities,* 688 F.3d at 992 (citing *SKF USA Inc.*, 254 F.3d at 1029 (Fed. Cir. 2001)). An agency does not act frivolously or in bad faith where it

"recognize[s] the merits of the petitioners' challenges and [is] forthcoming in the[] proceedings." *Id.*

Examples of such bad faith are sparse, but one can be found in *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344 (D.C. Cir. 1998), where the court denied the Federal Communication Commission's ("FCC's") motion for voluntary remand on grounds the agency merely "wished to avoid judicial review." *Id.* at 349. There, a church appealed an FCC decision that found the church had violated equal opportunity regulations with the church-owned radio station's hiring practices. *Id.* at 346. Nearly two months after the court heard argument on the appeal, the FCC moved for voluntary remand, citing a recently released "policy statement" that modified its previous position. *Id.* at 349. Denying this "novel, last-second motion," the court rejected the agency's non-binding "post-argument 'policy statement'" as a sufficient justification for the remand. Moreover, the court noted that even if the statement would have changed the FCC's standing policy, it was unclear whether that change would have affected the agency's decision related to the church. *Id.*

Here, like in *California Communities*, the EPA requests voluntary remand to reconsider its initial action, having recognized the merits of NWEA's challenges and been forthcoming in the proceedings. Moreover, per *Pellissippi Parkway*, intervening changes in the law and newly discovered evidence make voluntary remand particularly appropriate here.

A. Klamath Temperature TMDL

With the Klamath Temperature TMDL, the EPA finds itself in a difficult administrative conundrum. The EPA cannot review and approve a TMDL that has been withdrawn by its proponent, Oregon. The EPA argues this retraction renders NWEA's claim against the Klamath Temperature TMDL moot and, therefore, voluntary remand should be granted. (Def.'s Mot. for

Voluntary Remand, ECF No. 89 ("Def.'s Mot."), at 1.) In NWEA's view, requesting remand absent an EPA decision on the TMDL is "simply perplexing" and hence should be denied. (Pl.'s Resp. to EPA's Mot. for Voluntary Remand, ECF No. 100 ("Pl.'s Resp."), at 4.)

Regardless of how one characterizes the situation at hand, it makes little sense and wastes judicial resources to rule on the merits of an EPA action that neither has occurred nor can occur. Based on information from Oregon contained in the record, multiple "modifications" and "changes" will be made to the withdrawn TMDL before it is resubmitted to the EPA for approval. Moreover, as NWEA itself points out, many of the underlying errors or uncertainties implicated in the Klamath Temperature TMDL, including whether TMDLs must address *all* applicable water standards, may be addressed in the summary judgment motions currently pending before this court; thus, upon remand, the EPA will have the court's guidance on this point. Thus, the EPA's request to voluntarily remand the Klamath Temperature TMDL should be granted.

B. Willamette Mercury TMDL

Conversely, the Willamette Mercury TMDL already has been approved by the EPA. (AR 98.) Even so, the EPA "acknowledges that NWEA's arguments raise legitimate concerns about the correctness of its approval of the Willamette Mercury TMDL" and is "committed to consider those concerns on remand." (Def.'s Reply Brief in Supp. of Mot. for Voluntary Remand, ECF No. 105 (Def.'s Reply"), at 4.) Specifically, the EPA highlights three issues implicated in the challenged TMDL (all of which were raised by NWEA) it intends to evaluate further: (1) whether TMDLs must address *all* water quality standards or only the standard previously failed; (2) whether individual wasteload allocations are required; and (3) whether loading capacity must be calculated on a "daily" basis. (Def.'s Reply at 5.) Foster testified that Oregon "intends to develop [] Waste Load

Allocations [] for individual point sources," the lack of which in the current standard constitutes one of NWEA main arguments. (Foster Decl. ¶ 5.) David Croxton, EPA's unit manager in charge of TMDL approval ("Croxton"), has testified that upon revision, the mercury TMDL will be based upon the new, lower fish tissue concentration. (Croxton Decl. ¶ 6.) According to Jennifer Wu, Oregon TMDL coordinator for the EPA ("Wu"), upon revision, the TMDL will also likely include daily loading. (Wu Decl. at 2, 7.)

The EPA also acknowledges new case law, *Anacostia Riverkeeper, Am. Farm Bureau Fed'n*, and the circuit split created by *Nat. Res. Def. Council, Inc. v. Muszynski* and *Friends of the Earth,* which emerged after the TMDL was approved. (Def.'s Mot. at 9.) In addition to the legal developments discussed above, the EPA notes the existence of new scientific information and new water quality standards that have been adopted in the ten years since the TMDL's approval in 2006. Simple fairness, if not also judicial deference to agencies on scientific determinations, dictates that the EPA should be permitted the opportunity to cure its own mistakes, mistakes brought to light only after the TMDL was approved.

Further, the record discloses no frivolity or bad faith here. The EPA's request for remand, in contrast to the request in *Lutheran Church*, was filed long before arguments were heard on the issue. The current motion was in response not to a self-serving, non-binding policy statement like that in *Lutheran Church*, but to independent, intervening case law and advances in scientific understanding which, consistent with *SKF USA Inc.*, affect the validity of the TMDL at issue.

Both parties argue disposition in its favor would promote judicial economy and the conservation of party resources. The EPA explains that the changes it intends to make on remand may obviate the need for further litigation and, indeed, obviate the need for a ruling on the merits

at all. NWEA argues a ruling on the merits is needed at this juncture to provide guidance on how the TMDLs should be established, so the EPA does not repeat past errors. Both positions have merit, but given the posture of this case, the testimony from Oregon and the EPA on the inevitability of significant change to the TMDL, the incompleteness of the decade-old administrative record before the court, the legal guidance provided by this Findings and Recommendation, and the availability of new technical and scientific information that the EPA, rather than the court, should interpret, judicial and party resources are better preserved through voluntary remand. Further, even if, following remand, NWEA remains unsatisfied with the resulting TMDL and files suit again, future litigation would likely center on fewer and narrower issues than those implicated here. Thus, consistent with the guiding case law and in the interest of judicial economy, voluntary remand of both the Klamath Temperature TMDL and the Willamette Mercury TMDL should be granted.

II. Vacatur

Whether remand occurs before or after a ruling on the merits, courts use the same equitable analysis to determine if challenged administrative actions should be vacated during the remand period. *Nat. Res. Def. Council, Inc. v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002). Ordinarily, when a regulation is not promulgated in compliance with the APA, the regulation is invalid and should be vacated. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d at 1405 (citing *Western Oil and Gas v. EPA*, 633 F.2d 803, 813 (9th Cir.1980)). Typically, the effect of vacating an agency action is to reinstate the action or rule previously in effect. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

However, even a "flawed rule" need not be vacated. *California Communities*, 688 F.3d at 992. In fact, "it is well-settled that when equity demands the court may enforce a rule promulgated

contrary to the APA while the rule is remanded to an agency for further proceedings." *Nat. Res. Def. Council*, 275 F. Supp. 2d at 1143. District courts "have 'broad latitude in fashioning equitable relief when necessary to remedy an established wrong,'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008)) (internal quotation omitted).

Whether a challenged agency action should be vacated upon remand requires a fact-specific, equitable balancing of "how serious the agency's errors are" with "the disruptive consequences of an interim change that may itself be changed." *California Communities*, 688 F.3d at 992, 993 (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir.1993) (internal quotations omitted)). To evaluate the seriousness of an agency's errors, courts consider whether the rule's deficiencies are substantive or merely procedural in nature. *Nat. Res. Def. Council*, 275 F. Supp. 2d at 1144-45; *see also Idaho Farm Bureau*, 58 F.3d at 1401–03 (discussing notice and comment deficiencies); *Western Oil*, 633 F.2d at 813 (also discussing notice and comment deficiencies)). Though there is no *per se* rule of vacatur, even in the face of substantive error, substantive deficiencies weigh heavily in favor of vacatur, given the increased likelihood that the agency will revise the flawed rule during reconsideration. *Nat. Res. Def. Council,* 275 F. Supp. 2d at1145. Generally, courts are "more reluctant to enforce" rules "more likely to fall during remand[.]" *Id.*

The disruptive consequences caused by vacatur involve both interruption or interference with existing regulation and the risk of potential environmental harm if protective rules are vacated. *Id.* at 1145-46; *see also Idaho Farm Bureau Fed'n*, 58 F.3d at 1405 (discussing "concern[] regarding the potential extinction of an animal species" in considering whether to vacate); *Nat'l Wildlife Fed'n*,

839 F. Supp. 2d at 1129 (where the court's refusal to "remove beneficial measures" informed its decision regarding vacatur). Of particular concern to the Ninth Circuit are the potential "irreversible consequences of environmental damage." *Nat'l Wildlife Fed'n,* 839 F. Supp. 2d at 1144 (construing *W. Oil & Gas Ass'n v. U.S. E.P.A.*, 633 F.2d 803, 813 (9th Cir. 1980). For example, even an invalid biological opinion may be left "in place during any remand if it provides protection for listed species within the meaning of the ESA." *Nat'l Wildlife Fed'n*, 839 F. Supp. 2d at1129.

Alternatively, when faced with the question of whether to vacate an invalid agency rule during the remand period, several courts have exercised another option: staying vacatur until the agency is able to establish suitable interim standards. *See e.g.*, *Friends of Earth, Inc.*, 446 F.3d at 148 (remanding the case to district court, but noting that upon remand, "the parties may move to stay the district court's order [] to give [] the District of Columbia a reasonable opportunity to establish daily load limits."); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C.Cir.2001) ("Because this decision leaves EPA without standards regulating [hazardous waste conductor] emissions, EPA . . . may file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards."); *Anacostia Riverkeeper, Inc.*, 713 F. Supp. 2d at 52 ("[T]he Court will vacate the challenged TMDLs, but will stay vacatur."); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur*, 80 N.Y.U. L.Rev. 278, 307 n.141 (2005) (recommending as a remedial option "vacating the agency rules upon remand, but delaying issuance of the mandate for a limited period of time").

Because there is no EPA-approved Klamath Temperature TMDL to vacate, the court need address only whether the Willamette Mercury TMDL should be vacated upon remand. The EPA opposes vacatur, asserting first that at the time the Willamette Mercury TMDL was developed, it was

based on approved narrative water quality standards more stringent than existing numerical criteria for human health and aquatic life uses. Next, the EPA contends the Willamette Mercury TMDL serves a basis for point sources to reduce their mercury discharges through both the development of mercury minimization plans and water quality-based limits in NPDES permits. Finally, the EPA claims the Willamette Mercury TMDL "provides a framework for conducting additional monitoring and data gathering, such as more refined information on mercury sources." (Def.'s Mot. at 16.) NWEA supports vacatur, arguing that the Willamette Mercury TMDL's alleged errors are "quite significant," that there would be no regulatory disruption were the Willamette Mercury TMDL vacated, and that the new fish tissue concentration criteria (0.04 mg/kg) is more stringent than that upon which the Willamette Mercury TMDL was based in 2006 (0.3 mg/kg.)

On one side of the vacatur scale are the Willamette Mercury TMDL's alleged errors. The majority, if not all, of the Willamette Mercury TMDL's alleged errors are substantive in nature, and therefore more significant than mere procedural deficiencies. Based on information in the record, some of the Willamette Mercury TMDL's areas of contention, notably the individual wasteload allocation issue, daily loading, and the now lower fish tissue criteria, will be addressed and likely modified upon remand. The multiple substantive defects alleged and likelihood that at least some portions of the Willamette Mercury TMDL will fall during remand certainly weigh in favor of vacatur.

However, even more important to the court's balancing here are the potential detrimental effects of vacatur, on both existing regulatory framework and the very waters the Willamette Mercury TMDL aims to protect. First, although the Willamette Mercury TMDL does not directly govern or necessarily affect NPDES permitting or the development of mercury minimization plans,

its framework provides bases for numerous other mercury reduction measures. Further, the Willamette Basin WQMP, which sets forth a multitude of binding mercury control measures, would be undermined or possibly invalidated if the Willamette Mercury TMDL itself were vacated. Despite that the Willamette Mercury TMDL was intended to provide only "interim" guidance, it represents a starting point from which almost a decade of regulatory advancement was premised and has progressed.

Second, and of particular concern here, is the question of how vacatur would affect the current environmental and human health protections afforded by the Willamette Mercury TMDL. Notwithstanding their disagreements here, all parties embrace a common goal: to avoid potentially irreversible consequences of environmental damage, particularly in light of mercury's unique bioaccumulative properties and persistence in the environment. The Willamette Mercury TMDL should not be vacated if doing so will remove beneficial measures. However, both NWEA and the EPA argue that their respective vacatur position offers the more stringent environmental and human health protection. Thus, the question becomes which standard is more protective: the current Willamette Mercury TMDL, which was based upon a higher fish tissue criteria of 0.3 mg/kg but supports an array of other mercury reduction controls, or the 2011-approved lower numeric fish tissue criterion of 0.04 mg/kg?

Here, staying vacatur of the Willamette Mercury TMDL until Oregon and the EPA can develop a sufficient interim TMDL would serve little purpose and likely add to the administrative burden the agencies already face. Such an approach would be functionally equivalent to denying vacatur, with the added step of hurriedly requiring Oregon and the EPA to put forth an interim mercury TMDL for the Willamette Basin. The existing Willamette Mercury TMDL itself was

intended to be only an interim TMDL. Requiring the development of an interim TMDL to replace an existing interim TMDL would only complicate and confuse the current mercury control framework and divert valuable and limited agency resources put to far better use establishing a revised *final* Willamette Mercury TMDL.

Simple logic dictates the lower fish tissue criterion is more protective, at least numerically. However, the criterion alone serves no function absent the rules and regulations that implement the standard. Importantly, were the Willamette Mercury TMDL vacated, the nearly ten years of regulatory development would be placed in jeopardy. Despite the intended interim, non-binding nature of the Willamette Mercury TMDL, its provisions have supported and informed myriad other more binding measures, such as mercury minimization plans and NPDES permits. Even if NPDES permits are not directly affected or invalidated by the vacatur of the Willamette Mercury TMDL, the uncertainty likely to accompany vacatur could lead to confusion on the part of point source dischargers. Given the high toxicity of mercury, every source counts in the effort to regulate mercury pollution. Vacatur of the Willamette Mercury TMDL would likely also bring with it vacatur of the extensive mercury control strategies set forth in the Willamette WQMP, the driving force of implementation.

Finally, the court is at its most deferential to an agency "making predictions, within its area of special expertise, at the frontiers of science." *Balt. Gas & Elec. Co.*, 462 U.S. at 103. In this scientific sphere, both Oregon and the EPA, acting in accordance with their duties under the CWA, believe on the whole that beneficial measures would be lost were the TMDL vacated. Considering not only the stringency of the numeric mercury limits but also the importance of its surrounding regulatory framework, the risk of regulatory disruption is too great to justify vacatur of the

Willamette Mercury TMDL, notwithstanding any flaws. Thus, the Willamette Mercury TMDL should be left in place during the remand period so Oregon can leverage the environmental protections the Willamette Mercury TMDL and its attendant regulatory framework afford.

III. Timing Upon Remand

An agency's "inherent authority to reconsider its decision" is conditioned upon the requirement that the reconsideration occur "within a reasonable time after the first decision." *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir.1993). Courts have discretion to impose a deadline for remand proceedings. *See Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1381 (Fed.Cir.2001) (imposing a deadline of 120 days). Courts dictate to an administrative agency "the methods, procedures, and time dimension" of the remand, only where a "substantial justification" exists. *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

Two competing interests inform the resulting inquiry: "the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." *Pellissippi Parkway*, 375 F.3d at 418 (citing *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321(1961). Thus, the remand timelines imposed vary greatly, depending on the circumstances at hand and the task an agency must undertake. *See, e.g.*, *Nat'l Wildlife Fed'n*, 839 F. Supp. 2d at 1129 (imposing a remand period of almost 28 months to produce a new biological opinion under the ESA); *All. for the Wild Rockies, Inc.,* 2009 WL 2015407 at *2 (imposing a remand period of only five months to produce a proposed revised critical habitat designation and fifteen months to submit a final decision on the designation under the ESA.); *United Steelworkers of Am., AFL-CIO-CLC v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (noting a fourteen-month time period for

the production of a revised benzene exposure standard was not "facially unreasonable" but refusing to impose a mandatory standard.)

The EPA proposes a four-year timeline to complete its revision of the Willamette Mercury TMDL. This period is warranted, the EPA explains, because upon reconsideration the EPA not only must address the issues asserted by NWEA in this litigation, but also must incorporate the new water quality standards that have been passed in the years since 2006. Declarations from EPA experts Croxton and Wu, and Oregon expert Foster outline the "complicated, time-consuming and resource-intensive effort involving many disciplines" the TMDL revision will entail. (Croxton Decl. ¶ 3.) Mercury poses several unique challenges in monitoring and analysis, due in part to its instability and variety of forms in the environment. (Croxton Decl. ¶¶ 4, 5; Wu Decl. at 6.). Additionally, the Willamette Basin is particularly complex, given the basin's large size and relative diversity and the dynamics of the river system itself. (Croxton Decl. ¶ 7; Foster Decl. ¶ 3.) Any revision to the Willamette Mercury TMDL will also have to include consultation with the many stakeholders in the Willamette Basin, including tribal representatives, an area of specific concern for NWEA.

NWEA opposes the four-year timeline for the Willamette Mercury TMDL but does not proffer its own. Rather, NWEA repeatedly points to the "far shorter" thirty-day timeline set forth by the CWA imposed upon the EPA when it disapproves a TMDL. (Pl.'s Resp. at 24-25.) This comparison, however, is inapposite and unrealistic. The EPA and Oregon have sufficiently demonstrated both the technological and administrative complexity of revising the TMDL, which, if completed within thirty days, would no doubt verge on arbitrary and capricious.

Still, the harmful effects of highly toxic mercury in the environment and on the human body do appear to substantially justify the court's imposition of a remand deadline. As NWEA correctly

points out, the 2006 TMDL was intended to provide only "interim" guidance until a revised TMDL was to be established in 2011. (AR 107 at 4886.) The 2011 revision never occurred. To avoid the same delay in the future and to provide accountability and impetus to Oregon and the EPA, the court should impose a deadline of two years in which to complete the revision of the Willamette Mercury TMDL. This schedule strikes the correct balance between the need for regulatory finality and the public's interest in achieving a mercury TMDL that accurately and comprehensibly addresses the standards prescribed by the CWA.

NWEA also argues Oregon and the EPA should be placed on a similarly strict timeline to complete the submission and approval of a Klamath temperature TMDL. The reconsideration of the Klamath Temperature TMDL will involve evaluation of many of the issues currently implicated in this litigation with respect to the other temperature TMDLs challenged in this case. Thus, the disposition of NWEA's other claims will likely provide insight for both agencies in revising and re-approving or disapproving a temperature TMDL for the Klamath Basin, assisting in a timely submission of a revised TMDL. Furthermore, the EPA's refusal to approve the Klamath Temperature TMDL in May 2012 put Oregon on notice more than four years ago of a need to issue a reviewed temperature TMDL. Oregon acknowledged this need by withdrawing the Klamath Temperature TMDL in February 2015. The court finds a two-year deadline for the submission of a revised temperature TMDL for the Klamath Basin to be reasonable as well.

Conclusion

Based on the conclusions stated above, Defendants' motion (ECF No. 89) for voluntary remand should be granted. During the remand period, the Willamette Mercury TMDL should be left in place. Lastly, the EPA and Oregon should submit a revised Willamette mercury TMDL and

Klamath temperature TMDL within two years of the adoption of this Findings and Recommendation (if any) by the Article III Judge.

Scheduling Order

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

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

DATED this 12th day of October, 2016.

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