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Clean Water Act & Endangered Species Act: Lessons from the Pacific Northwest

NACWA – Developments in Clean Water Law

November 15, 2012

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Salmon & Bull Trout Listing in the PNW

- Salmonids:
 - First listing in 1991 for Snake River sockeye
 - Bulk of listings for other ESUs around 1999
- Bull Trout:
 - FWS consideration began in 1985
 - Listings in 1999



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Salmonid Critical Habitat

Land Area Affected by Endangered Species Act Listings of Salmon & Steelhead

* 28 distinct population segments:
5 endangered, 23 threatened

* 176,000 sq. miles in Washington,
Oregon, Idaho & California

* 61% of Washington's land area,
55% of Oregon's, 26% of Idaho's, &
32% of California's

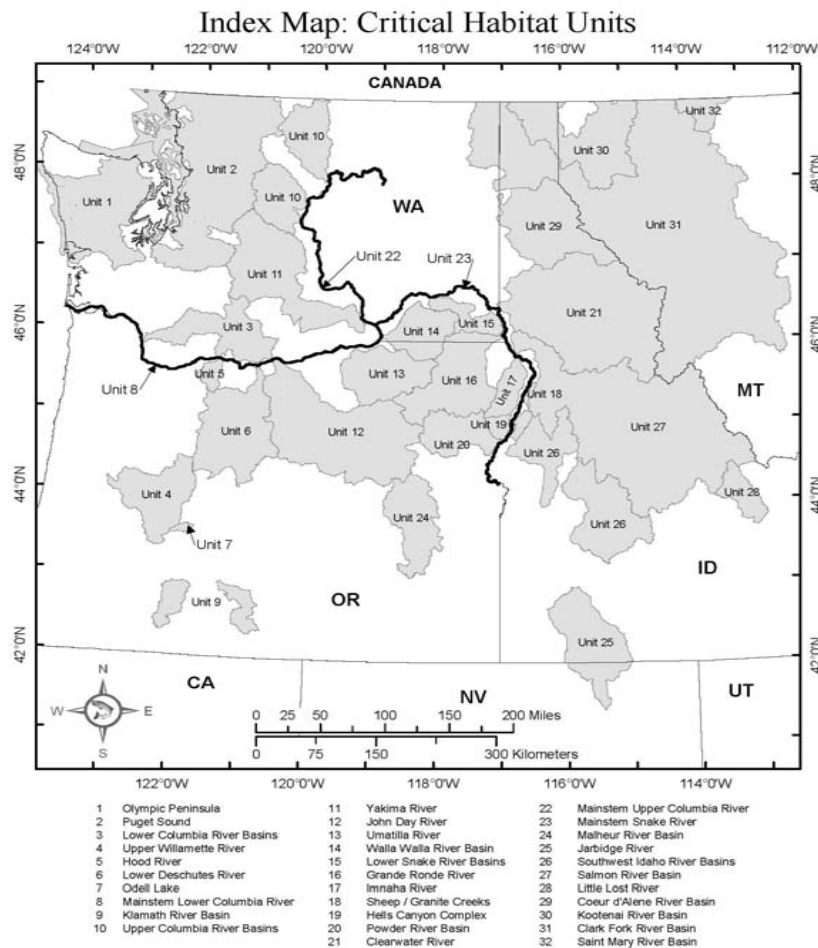


October 2010





Bull Trout Critical Habitat



Bull Trout critical habitat
USFWS, October 2010

Impacts of Salmonid and Bull Trout ESA Listings

- Water Quality Standards
 - Salmon & bull trout as beneficial use/protected species
 - Very low temperatures to support species
- In-water work windows for Section 404 work
- Dams



Development of Temperature Standard

- Oregon's temperature standard approved/disapproved by EPA in 1999
 - First *NEA v. EPA* case in 2001
- Regional temperature guidance in 2003
 - EPA, DEQ, Ecology, NGOs, Permit-holders
- Revised WQS in Oregon in 2004
- Recent litigation started in 2005

Oregon Temperature Case: *Northwest Environmental Advocates v. EPA et al.*

- Both Clean Water Act & Endangered Species Act challenges
- CWA Claims:
 - Nonpoint sources not considered by EPA
 - Natural conditions criteria illegal
 - Numeric biological criteria not low enough
 - Antidegradation plan not sufficient

Oregon Temperature Case: *Northwest Environmental Advocates v. EPA et al.*

- ESA claims:
 - NMFS and USFWS consultations not sufficient
 - Incidental Take Statements not supported by the record

Why do Clean Water Agencies Care?

- Rules like Natural Conditions Criteria at risk
 - Narrative criteria that “supersede” numeric criteria
 - Any rule applying background conditions affected?



Why do Clean Water Agencies Care?

- New 303(c) challenges in Oregon
 - Temperature TMDLs in Oregon
 - Every TMDL represents a new WQS
 - Lack of consultation with the Services



Conclusion

Water quality standards applicable to Clean Water Agencies are increasingly vulnerable to ESA-based challenges.



Thank you.

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