

HON. JAMES L. ROBERT

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

CENTER FOR BIOLOGICAL DIVERSITY)
)
Plaintiff,)
)
v.)
)
ENVIRONMENTAL PROTECTION)
AGENCY; GINA McCARTHY,)
ADMINISTRATOR; DENNIS McLERRAN,)
REGION 10 ADMINISTRATOR, UNITED)
STATES ENVIRONMENTAL)
PROTECTION AGENCY)
)
Defendants.)

Case No: 13-cv-1866 JLR

**UNITED STATES' CROSS-MOTION
FOR SUMMARY JUDGMENT AND
COMBINED MEMORANDUM IN
SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

**NOTE ON MOTION CALENDAR:
November 7, 2014**

ORAL ARGUMENT REQUESTED

Defendants, the United States Environmental Protection Agency, Gina McCarthy, Administrator, Dennis McLerran, Region 10 Administrator, United States Environmental Protection Agency (collectively, "EPA") oppose the motion for summary judgment filed by Plaintiff, Center for Biological Diversity ("Plaintiff" or "CBD") [ECF Doc. 33] and cross-move for summary judgment on all issues.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION1

STATUTORY AND REGULATORY BACKGROUND2

I. Water Quality Standards2

 A. Washington’s Water Quality Standards3

 B. Oregon’s Water Quality Standards4

II. CWA Section 303(d) Lists of Impaired Waters4

FACTUAL BACKGROUND6

I. Ocean Acidification6

II. EPA’s Decisions6

 A. EPA’s Approval of Washington’s 303(d) List6

 B. EPA’s Partial Approval/Partial Disapproval of Oregon’s 303(d) List and
EPA’s Additions to Oregon’s 303(d) List8

STANDARD OF REVIEW9

ARGUMENT10

I. EPA Reasonably Determined that the Data and Information Readily Available
at the Time of the Challenged Decisions Did Not Require that the Coastal and
Estuarine Waters in Washington and Oregon Be Listed as Impaired Due to
Pollutants Associated With or Conditions Attributable to Ocean Acidification10

 A. Washington Reasonably Decided Not to List Waters for Non-attainment
of the Numeric pH Water Quality Criteria Based Upon Evaluation of
Information Available at the Time it Submitted its List, and EPA
Reasonably Approved the List Upon Evaluation of Information
Available at the Time of Approval11

 1. Washington’s Decision12

 2. EPA Review15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. EPA Reasonably Determined that the Information Available at the Time of EPA’s Decisions Did Not Demonstrate that Either Washington’s or Oregon’s Coastal and Estuarine Waters Failed To Meet Applicable Narrative Water Quality Criteria for Protection of Aquatic Life.....17

1. EPA Reasonably Determined That Anecdotal Information Was Insufficient to Support Listing Decisions in Either State18

2. EPA Reasonably Determined that Laboratory-Based Studies Were Not Sufficient to Support Listing Decisions in Either State19

3. EPA Reasonably Determined That Shellfish Hatchery Information Was Not Sufficient to Support Listing Decisions in Oregon.....20

C. EPA Reasonably Determined that Listing Was Not Required Based on Aragonite Undersaturation.....22

D. The Court Should Afford Judicial Deference to EPA’s Decisions.....23

II. EPA Considered All Existing and Readily Available Information in Approving the Washington 303(d) List and in its Additions to the Oregon 303(d) List25

III. CBD is Not Entitled to the Remedy It Seeks28

CONCLUSION.....29

TABLE OF AUTHORITIES

CASES

Am. Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001) 2

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 2

Asarco, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980)..... 28

Ass'n of Data Processing Svc. Orgs. v. Bd. of Governors, 745 F.2d 677 (D.C. Cir. 1984)..... 10

Barnum Timber Co. v. EPA, 835 F. Supp. 2d 773 (N.D. Cal. 2011) 27

City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) 27

City of Arcadia v. EPA, 411 F.3d 1103 (9th Cir. 2005)..... 2, 27

Ctr. for Biological Diversity v. EPA, 749 F.3d 1079 (D.C. Cir. 2014)..... 6

Dickinson v. Zurko, 527 U.S. 150 (1999) 10

Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517 (9th Cir. 1995)..... 9

Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275 (1981)..... 9

Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952)..... 28

Fla Pub. Interest Research Grp. Citizen Lobby Inc. v. EPA, 386 F.3d 1070 (11th Cir. 2004) 24

Gebhart v. SEC, 595 F.3d 1034 (9th Cir. 2010) 10

George v. Bay Area Rapid Transit, 577 F.3d 1005 (9th Cir. 2009)..... 9

Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143 (9th Cir. 2010)..... 10

IRS v. Fed. Labor Relations Auth., 494 U.S. 922 (1990)..... 28

Kleppe v. Sierra Club, 427 U.S. 390 (1976)..... 28

League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122
(9th Cir. 2011) 9

Motor Vehicle Mfr. Ass'n v. State Farm Ins., 463 U.S. 29 (1983)..... 9

Mont. Wilderness Ass'n v. McAllister, 666 F.3d 549 (9th Cir. 2011) 24

Nat'l Tank Truck Carriers, Inc. v. EPA, 907 F.2d 177 (D.C. Cir. 1990)..... 28

1 *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395 (4th Cir. 1993)..... 27

2 *Natural Res. Def. Council v. EPA*, 863 F.2d 1420 (9th Cir. 1988)..... 6

3 *NLRB v. Food Store Emps. Union, Local 347*, 417 U.S. 1 (1974) 28

4 *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994) 2, 3

5 *Sierra Club v Leavitt*, 488 F.3d 904 (11th Cir. 2007)..... 26

6 *Sierra Club v. EPA*, 346 F.3d 955 (9th Cir. 2003)..... 23

7 *Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996) 25

8 *UOP v. United States*, 99 F.3d 344 (9th Cir. 1996) 28

9 *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949 (9th Cir. 2011)..... 10

10 *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006)..... 10

11 *Vigil v. Leavitt*, 381 F.3d 826 (9th Cir. 2004)..... 10

12 *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803 (9th Cir. 1980) 29

13

14 **STATUTES**

15

16 5 U.S.C. § 706(2) 28

17 5 U.S.C. § 706(2)(A)..... 9, 28

18 33 U.S.C. § 1251(a) 2

19 33 U.S.C. § 1251(a)(2)..... 2

20 33 U.S.C. § 1251(b) 2

21 33 U.S.C. § 1251(d) 2

22 33 U.S.C. § 1313(a) 3

23 33 U.S.C. § 1313(a)-(c)..... 2

24 33 U.S.C. § 1313(b) 3

25 33 U.S.C. § 1313(c)(2)(A) 3

26 33 U.S.C. § 1313(c)(3)-(4)..... 3

27 33 U.S.C. § 1313(d)(1) 4

28

1 33 U.S.C. § 1313(d)(2) 5, 6
 2 33 U.S.C. § 1362(7) 6
 3 33 U.S.C. § 1362(8) 6
 4
 5 **REGULATIONS**
 6 40 C.F.R. § 130.7 5, 27
 7 40 C.F.R. § 130.7(b)(4)..... 4
 8 40 C.F.R. § 130.7(b)(5)..... 5
 9 40 C.F.R. § 130.7(b)(6)..... 5, 26
 10 40 C.F.R. § 130.7(b)(6)(iv)..... 5
 11 40 C.F.R. § 130.7(d) 5
 12 40 C.F.R. § 130.7(d)(2)..... 6, 8, 27
 13 40 C.F.R. § 131.6..... 3
 14 40 C.F.R. § 131.10-12..... 3
 15 40 C.F.R. § 131.12 2
 16 40 C.F.R. § 131.12(a)(1)..... 3
 17 40 C.F.R. § 131.12(a)(2)..... 3
 18 40 C.F.R. § 131.12(a)(3)..... 3
 19 40 C.F.R. § 131.21 3
 20
 21
 22
 23
 24
 25
 26
 27
 28

INTRODUCTION

Ocean acidification (“OA”) refers to the decrease in pH of the Earth’s oceans. OA is primarily caused by increasing concentrations of carbon dioxide – a greenhouse gas – in the atmosphere. The carbon dioxide is absorbed by the oceans, resulting in lower pH levels. OA can also be caused or enhanced by other chemical additions or subtractions from the ocean. While the ultimate consequences of OA are still unknown, there is a risk of ecosystem changes that threaten coral reefs, fisheries, protected species, and other natural resources of value to society.¹

EPA recognizes that a growing body of research indicates the seriousness of global OA risks and the potential that conditions related to OA may have significant adverse impacts on aquatic life in the coastal waters of Washington and Oregon, and elsewhere. However, the science is complex - and experts agree that more research and analyses are needed to fully understand the sources, causes and impacts of OA in different aquatic environments. More information and data are available now than were available in 2010, the end of the reporting period for the water quality impairment listings submitted to EPA by Washington and Oregon, or in 2012 when EPA made the decisions challenged in this case. Research is continuing through a number of Federal, State, and private programs; thus, even more data are likely to be available when the States conduct and report on their next biennial reviews of impaired waters.

The issue before this Court, however, is the validity of EPA’s 2012 decisions on the States’ 2010 lists of impaired waters. Those decisions must be reviewed based on the information available at that time, as reflected in the administrative records presented to the Court. EPA evaluated all of the information submitted by CBD to the States and to EPA, and also considered additional information that was not reviewed by the States, and reasonably concluded that the information available was insufficient to support a finding that the coastal and estuarine waters in the States of Washington and Oregon failed to meet the States’ respective water quality standards. Because those decisions are fully supported by the administrative records and are entitled to

¹ For more information on OA, *see* Questions and Answers on OA and the CWA 303(d) Program [WA-001133], citing National Research Council of the National Academies, “*Ocean Acidification: A National Strategy to Meet the Challenges of a Changing Ocean*” (2010).

1 deference, the Court should deny Plaintiff's motion for summary judgment and grant judgment
2 for EPA.

3 **STATUTORY AND REGULATORY BACKGROUND**

4 The Clean Water Act ("CWA") establishes a comprehensive program "to restore and
5 maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain
6 "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."
7 33 U.S.C. § 1251(a), (a)(2). Although EPA generally administers the Act, *see* 33 U.S.C. §
8 1251(d), the States are principally responsible for implementing much of the statute. *Id.* §
9 1251(b). ("It is the policy of Congress to recognize, preserve, and protect the primary
10 responsibilities and rights of States to prevent, reduce, and eliminate pollution."). The CWA's
11 statutory scheme "anticipates a partnership between the States and the Federal Government,"
12 *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), in which "States remain at the front line in
13 combating pollution," *City of Arcadia v. EPA*, 411 F.3d 1103, 1106 (9th Cir. 2005). The CWA
14 establishes distinct roles for the Federal and State governments in that partnership. *PUD No. 1 of*
15 *Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704-05 (1994).

16 **I. Water Quality Standards**

17 CWA subsections 303(a) through (c) direct the States, with EPA approval and oversight,
18 to establish water quality standards ("WQS") for water bodies within their boundaries. *See* 33
19 U.S.C. § 1313(a)-(c). These standards consist principally of: (a) designated beneficial uses for
20 waters, such as water supply, fish propagation, or navigation; (b) water quality criteria, which
21 define the amounts of pollutants, in either numeric or narrative form, that the waters can contain
22 without impairment of their designated beneficial uses; and (c) an antidegradation policy.² 33
23 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.6, 131.10-12; *see also PUD No. 1 of Jefferson Cnty.*,

24
25
26 ² An antidegradation policy generally aims to protect against unauthorized degradation of water quality. Like all
27 State WQS, it is subject to EPA review and approval. 40 C.F.R. § 131.12. EPA's antidegradation regulation provides
28 for three "Tiers" of water quality protection. *See generally* 40 C.F.R. § 131.12; *Am. Wildlands v. Browner*, 260 F.3d
1192, 1194-95 (10th Cir. 2001). Tier 1 sets forth the baseline level of protection applicable to all waters in the State
and requires that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses
shall be maintained and protected." 40 C.F.R. §131.12(a)(1). Tier 2 protections apply to "high quality" waters and
Tier 3 waters are outstanding resource waters and receive the most stringent protection. *Id.* at §131.12(a)(2) & (3).

1 511 U.S. at 704-07 (describing the regime used to establish water quality standards). Upon
 2 review, if EPA determines that a State’s new or revised water quality standards are inconsistent
 3 with the Act, then EPA so notifies the State. 33 U.S.C. § 1313(b), (c)(3)-(4)); 40 C.F.R. § 131.21.
 4 If the State does not adopt timely changes, EPA does so. 33 U.S.C. § 1313(c)(3)-(4).

5 CWA section 304(a) authorizes EPA to publish recommendations for water quality
 6 criteria, which provide guidance for States to consider in developing water quality standards for
 7 waters within their jurisdiction. 33 U.S.C. § 1313(a). Pursuant to that authority, EPA published
 8 recommendations for pH criteria for the protection of marine aquatic life. *See* “Quality Criteria
 9 for Water,” PB-263 943, p. 337-354 (July 26, 1976):³

10 For open ocean waters where the depth is substantially greater than the euphotic
 11 zone, the pH should not be changed more than 0.2 units from the naturally
 12 occurring variation or in any case outside the range of 6.5 to 8.5. For shallow,
 13 highly productive coastal and estuarine waters where naturally occurring pH
 14 variations approach the lethal limits of some species, changes in pH should be
 15 avoided but in any case should not exceed the limits established from fresh
 16 water, i.e., 6.5-9.0. As with freshwater criteria, rapid pH fluctuations that are
 17 due to waste discharges should be avoided.

18 *Id.* at 337.

19 **A. Washington’s Water Quality Standards**

20 Washington’s water quality standards are codified in Chapter 173-201A of Washington’s
 21 Administrative Code (“WAC”). Washington has established numeric water quality criteria for
 22 marine aquatic life uses as well as protection of shellfish harvesting and wildlife habitat uses.
 23 WAC 173-201A-210 (1-4). The marine numeric criteria for pH establishes an acceptable range of
 24 pH for waters designated as “extraordinary quality” or “excellent quality” of 7.0 – 8.5, with a
 25 human-caused variation within that range of less than 0.2 (for extraordinary quality) or 0.5 (for
 26 excellent quality). WAC 173-201A-210(1) at Table 210(1)(f).

27 Washington has established an overarching narrative designated use provision that
 28 requires protection of all aquatic life uses, which includes “all indigenous fish and nonfish aquatic

³ This is known as the “Red Book.” It is available at:
http://water.epa.gov/scitech/swguidance/standards/criteria/current/upload/2009_01_13_criteria_redbook.pdf

1 species.” WAC 173-201A-210(1). Aquatic life uses for waters designated as “extraordinary
 2 quality” or “excellent quality” are “salmonid and other fish migration, rearing and spawning;
 3 clam, oyster and mussel rearing and spawning; crustaceans and other shellfish (crabs, shrimp,
 4 crayfish, scallops, etc.) rearing and spawning.” *Id.*

5 Washington has also established a narrative criterion to protect aquatic life designated
 6 uses that requires that “deleterious material concentrations must be below those which have the
 7 potential, either singularly or cumulatively, to adversely affect characteristic water uses, [or]
 8 cause acute or chronic conditions to the most sensitive biota dependent upon those waters.”
 9 WAC 173-201A-260(2)(a).

10 **B. Oregon’s Water Quality Standards**

11 Oregon’s water quality standards are codified in Chapter 340, Div. 41 of Oregon’s
 12 Administrative Regulations (“OAR”). Oregon has adopted numeric water quality criteria for pH
 13 that establishes an acceptable range for pH in marine waters of 7.0-8.5. OAR-340-041-0021. For
 14 estuarine and fresh waters there are basin-specific criteria that range from 6.5-9.5, depending on
 15 the location. OAR-340-041-0101 through 0350. Oregon also has adopted a narrative water
 16 quality criterion for protection of aquatic life designated uses. OAR-340-041-007(10). *See also*
 17 OAR 340-041-0011 “waters of the State must be of sufficient quality to support aquatic species
 18 without detrimental changes in the resident biological communities.”

19 **II. CWA Section 303(d) Lists of Impaired Waters**

20 CWA section 303(d) directs States to identify and list the waters within their boundaries
 21 for which the CWA’s technology-based pollutant control measures are insufficient to achieve
 22 applicable water quality standards; these are referred to as “impaired waters.” 33 U.S.C.
 23 § 1313(d)(1). The State need not identify the source of pollutants causing the impairment, but
 24 must identify the pollutant causing the impairment, if known. 40 C.F.R. § 130.7(b)(4). The list
 25 of impaired waters (“Section 303(d) List” or “List”) must be submitted to EPA for approval. 33
 26 U.S.C. § 1313(d)(2). To implement this requirement, EPA regulations direct each State to submit
 27 its Section 303(d) List to EPA biennially. 40 C.F.R. § 130.7 (d).

28

1 In developing the List, each State is required to “assemble and evaluate all existing and
2 readily available water quality-related data and information.” 40 C.F.R. § 130.7(b)(5). A State
3 submission to EPA must include supporting documentation, including, at a minimum: (i) “A
4 description of the methodology used to develop the list;”⁴ (ii) “[a] description of the data and
5 information used to identify waters;” (iii) “[a] rationale for any decision to not use any existing
6 and readily available data and information” for certain categories of waters; and (iv) “[a]ny other
7 reasonable information requested by the [EPA].” *See id.* at § 130.7(b)(6). Upon request by EPA,
8 a State also must demonstrate good cause for not including a water or waters on the 303(d) List.
9 *See id.* at § 130.7(b)(6)(iv).

10 EPA’s 2002 Integrated Water Quality Monitoring and Assessment Report Guidance
11 (November 19, 2001) (“2002 IR Guidance”) [WA-001310-335] recommends that States place
12 waters into categories. Under the Guidance, “Category 5” is for waters where the water quality
13 standard is not attained. *Id.* at 7 [WA-001316]. The Category 5 waters constitute the Section
14 303(d) List. Under the CWA and implementing regulations, EPA only approves or disapproves a
15 State’s Section 303(d) List, i.e., Category 5 listings. 40 C.F.R. § 130.7. EPA does not approve or
16 disapprove the States’ placement of waters in other categories except to the extent that EPA
17 determines such waters should be placed in Category 5. The 2002 IR Guidance provides that:

18 EPA’s review and approval of the 303(d) list will be based on a determination that
19 the state’s or territory’s assessment and listing methodology was used to prepare
20 the list, that the assessment and listing methodology is scientifically sound, that it
21 is consistent with the state’s or territory’s water quality standards, and that the
22 state or territory reasonably considered all existing and readily available data and
23 information, and listed all waters not attaining water quality standards.

24 2002 IR Guidance at 10-11 [WA-001319-20].

25 EPA is directed to approve or disapprove a State’s List within 30 days of its submission.
26 33 U.S.C. § 1313(d)(2). EPA must ensure that the State has satisfied the minimum requirements

27 ⁴ Washington and Oregon have developed listing methodologies for their 2010 Lists. Those methodologies address,
28 among other things, the quality of the data used for listing, as well as the predicates for listing waters as impaired for
non-attainment of narrative water quality criteria. Washington State “Water Quality Program Policy, WQP Policy
1-11, Chapter 1, 2012 [WA-001361] and Chapter 2, September, 2006. [WA-001641]; “Methodology for Oregon’s
2010 Water Quality Report and List of Water Quality Limited Waters,” (last updated 5/12/2011) [OR1-00080 and
OR1-000122].

1 set forth in CWA Section 303(d) and the implementing regulations at 40 C.F.R. § 130.7(d)(2),
 2 including whether the State has assessed the water against the applicable water quality standards.
 3 If EPA disapproves a State's List for failing to include certain waters, EPA is to identify such
 4 impaired waters for the State within 30 days of the disapproval. *Id.*

5 **FACTUAL BACKGROUND**

6 **I. Ocean Acidification**

7 Ocean acidification science is complex and still in early stages, especially in regard to
 8 coastal waters of the territorial seas and estuarine waters.⁵ Many of the published studies and
 9 reports addressing OA that EPA reviewed for the 2010 303(d) Lists recognized that the effects of
 10 ocean acidification on coastal and estuarine systems needed more study.⁶ *See Ctr. for Biological*
 11 *Diversity v. EPA*, 749 F.3d 1079, 1086 (D.C. Cir. 2014) (recognizing the scientific uncertainty
 12 and complexity of the issues related to pollutants believed to be the precursors of acid rain, which
 13 contributes to ocean acidification). Thus, while more is known today about the causes and effects
 14 of OA on coastal and estuarine waters than was understood only a few years ago -- when the
 15 States compiled their Section 303(d) Lists and when EPA undertook its review -- the associated
 16 underlying science continues to evolve.

17 **II. EPA's Decisions**

18 **A. EPA's Approval of Washington's 303(d) List**

19 The State of Washington, through its Department of Ecology ("Ecology") submitted its
 20 initial Integrated Report for 2010 to EPA Region 10 on December 28, 2011. [WA-000200]. By
 21

22 ⁵ Waters of a State include the "territorial seas," a belt of the seas measured from the coast and extending seaward
 23 three miles. 33 U.S.C. § 1362(7) & (8); *Natural Res. Def. Council v. EPA*, 863 F.2d 1420, 1436 (9th Cir. 1988). In
 24 this brief, the term "coastal waters" refers to marine waters of a State in the territorial seas, as opposed to marine
 waters of the oceans. Estuaries are areas where inland fresh waters (like rivers) meet saline ocean waters.

25 ⁶ *See, e.g.,* Wootton, *et al.* (2008) at 18851 (results point to "a need for more detailed investigation of the processes
 26 controlling ocean pH in higher latitudes and coastal habitats;" and "results highlight the urgent need for more
 27 spatially distributed and temporally intensive studies of ocean pH dynamics and their underlying causal mechanisms
 and consequences"); Feely, *et al.* (2010) at 20 ("Further study of ocean acidification in estuaries is thus warranted");
 28 Barton, *et al.* (2010) at 707 (noting that a significant shortcoming in understanding the effects of acidification on
 natural populations was the prediction of how carbonate conditions will vary in coastal and estuarine environments,
 and that before predictive models could be developed, high resolution monitoring of carbon dioxide chemistry was
 still needed). [WA-000731 (CD containing all of these documents)].

1 letter dated January 12, 2012, EPA informed Ecology that the submission was incomplete and
2 that further documentation would be required before EPA could take action. EPA specifically
3 requested Washington to include “any memos to the file, etc. documenting decisions surrounding
4 comments submitted by CBD” [WA-000198]. Washington submitted further documentation on
5 March 20, 2012, and again on June 8, 2012 [WA-000005]. Altogether, Ecology’s submissions
6 included the 2010 Section 303(d) List, a response to public comments on the List, the final list
7 methodology, a TMDL priority ranking, and an Integrated Report on the status of Washington’s
8 waters [WA-000001]. The List did not identify any coastal or estuarine waters as impaired due to
9 pollutants associated with OA or to conditions attributable to OA.⁷

10 After careful review and consideration of the information submitted by Washington, and
11 evaluation of additional information that was not available to Washington but was available to
12 EPA (including additional information provided to EPA by CBD), EPA approved Washington’s
13 2010 Section 303(d) List:

14 The EPA has also conducted a detailed review of Ecology’s justification for not
15 placing Puget Sound or other Washington waters, including Willapa Bay,
16 Gray’s Harbor, The Strait of Juan de Fuca, and the Pacific Coast, on the 2010
17 303(d) list for impairments associated with water quality standards that could be
18 related to ocean acidification, including marine pH, and narrative criteria under
19 aquatic life designated uses, or antidegradation. Based on this review, the EPA
20 has concluded that Ecology has adequately addressed all statutory and
21 regulatory requirements for excluding these waters from Category 5 of the
22 Integrated Report.

23 Letter dated Dec. 21, 2012 from Opalski to Susewind, approving Washington’s Section 303(d)
24 List (“Approval Letter”) [WA-000001-2]. *See also* EPA Review of Ecology’s Analysis of Ocean
25 Acidification Data and Information (“Approval Letter, Encl. 2”) [WA-000011] (same).

26 ⁷ Washington did, however, identify Puget Sound in “Category 2” (waters of concern) for potential impacts to fish
27 and shellfish habitat attributable to human activities, including conditions that may be related to ocean acidification.
28 June 8, 2012 letter from Ecology to EPA, Encl. 4 [WA-000153, 154]. Washington concluded that “some credible
data created concerns of possible impact to designated uses, but fall short of demonstrating that there is a persistent
problem.” *Id.* But, because the information did not demonstrate a failure of the Puget Sound to attain the State’s
water quality standards, a Category 5 listing was not appropriate. *Id.*

1 **B. EPA’s Partial Approval/ Partial Disapproval of Oregon’s 303(d) List**
 2 **and EPA’s Additions to Oregon’s 303(d) List**

3 Oregon submitted its Integrated Report (which included its Section 303(d) List) to EPA on
 4 May 23, 2011. The Oregon List did not identify any coastal, or estuarine waters as impaired for
 5 conditions related to OA. In its Response to Comments on Final Supplement to Oregon’s 2010
 6 Integrated Report [OR1-000168-179], Oregon addressed comments submitted by CBD regarding
 7 OA, and explained that available data did not demonstrate nonattainment of the numeric water
 8 quality standard for pH, and that there was insufficient evidence demonstrating nonattainment of
 9 the general beneficial use goal in any one of Oregon’s narrative criteria. *Id.* at 7 [OR1-000177].
 10 Oregon explained that the articles submitted by CBD did not contain any usable data that could be
 11 used for evaluating water quality. *Id.* at 8 [OR1-000178].

12 Following careful review and consideration, EPA issued a decision partially approving
 13 and partially disapproving Oregon’s 303(d) List. *See* Letter dated March 15, 2012 from Michael
 14 Bussell to Greg Aldrich [OR2-000337-38]. In the partial disapproval, EPA found that Oregon
 15 had not considered readily available data and water-quality related information for water bodies
 16 of the State and failed to list waters for a variety of pollutants for which EPA had approved
 17 numeric water quality criteria. *Id.* Because of the partial disapproval, CWA § 303(d) and EPA
 18 regulations, 40 C.F.R. § 130.7(d)(2), required that EPA identify waters not meeting the State’s
 19 water quality standards.

20 On December 14, 2012, EPA issued its decision adding 870 additional water quality
 21 limited segments to the Oregon 2010 List. *See* Letter dated December 14, 2012 from Daniel
 22 Opalski to Greg Aldrich (“Final Additions to Oregon’s 2010 303(d) List”) [OR2-000001-9]. EPA
 23 did not identify any water quality segments as impaired due to pollutants associated with or
 24 conditions attributable to OA. EPA explained that there was no evidence of impairment based on
 25 nonattainment of Oregon’s water quality standards applicable to ocean acidification. *See id.*,
 26 Attachment 3, Response to Comments on the EPA’s Additions to Oregon’s 2010 CWA 303(d)
 27 List at 18-19, 22 [OR2-000271-272, 275]. *See also* EPA Evaluation of Ocean Acidification
 28 Information [OR2-000286]: “EPA has determined that, at this time, there is not sufficient
 evidence demonstrating non-attainment of Oregon’s marine pH criteria and/or state-wide

1 narrative criteria related to aquatic life designated uses to warrant listing any coastal waters as
2 impaired or threatened related to these WQS.”

3 STANDARD OF REVIEW

4 This Court reviews EPA’s actions under the Administrative Procedure Act’s (“APA’s”)
5 arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); *Dioxin/Organochlorine Ctr. v. Clarke*,
6 57 F.3d 1517, 1521 (9th Cir. 1995); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (1981).
7 EPA’s approval of Washington’s 303(d) List and partial approval of Oregon’s 303(d) List must
8 be upheld unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
9 with law.” 5 U.S.C. § 706(2)(A). The Ninth Circuit only finds a decision arbitrary or capricious
10 if “the agency has relied on factors which Congress has not intended it to consider, entirely failed
11 to consider an important aspect of the problem, offered an explanation for its decision that runs
12 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
13 difference in view or the product of agency expertise.” *Dioxin/Organochlorine*, 57 F.3d at 1521
14 (quoting *Motor Vehicle Mfr. Ass’n v. State Farm Ins.*, 463 U.S. 29, 44 (1983)). Even if the
15 “[agency] made missteps . . . the burden is on [the plaintiff] to demonstrate that the [agency’s]
16 ultimate conclusions are unreasonable.” *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011
17 (9th Cir. 2009).

18 “This ‘arbitrary and capricious’ standard of review is a highly deferential one which
19 presumes the agency’s action to be valid.” *Envtl. Def. Fund*, 657 F.2d at 283. Under this
20 standard, a court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs.*
21 *Ass’n*. 463 U.S. at 43. Instead, the agency’s action must be affirmed if the agency has considered
22 the relevant factors and articulated a “rational connection between the facts found and the choice
23 made.” *Id.* (citation omitted).

24 The Court’s deference to the agency “is highest when reviewing an agency’s technical
25 analyses and judgments involving the evaluation of complex scientific data within the agency’s
26 technical expertise.” *League of Wilderness Defenders Blue Mountains Biodiversity Project v.*
27 *Allen*, 615 F.3d 1122, 1130 (9th Cir. 2011). “Agencies have discretion to rely on their own
28 experts’ reasonable opinions to resolve a conflict between or among specialists, even if [a

1 reviewing court] find[s] contrary views more persuasive. *Greater Yellowstone Coal. v. Lewis*, 628
 2 F.3d 1143, 1148 (9th Cir. 2010). “[W]here, as here, a court reviews an agency action
 3 involve[ing] primarily issues of fact, and where analysis of the relevant documents requires a high
 4 level of technical expertise, we must defer to the informed discretion of the responsible federal
 5 agencies.” *Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004). The Ninth Circuit has said “we
 6 must defer to the agency’s finding on these matters unless the record shows that the agency’s
 7 findings were not supported by substantial evidence—i.e., unless the evidence in the record
 8 ‘would *compel* a reasonable finder of fact to reach a contrary result.’ ” *Ursack Inc. v. Sierra*
 9 *Interagency Black Bear Grp.*, 639 F.3d 949, 958 (9th Cir. 2011) (quoting *Gebhart v. SEC*, 595
 10 F.3d 1034, 1043 (9th Cir. 2010)). The “substantial evidence” standard is the most stringent
 11 standard that can apply to questions of evidentiary sufficiency for factual determinations. *See*
 12 *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999); *see also Utah Shared Access Alliance v.*
 13 *Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006); *Ass’n of Data Processing Svc. Orgs. v. Bd. of*
 14 *Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984). That standard is more deferential even than
 15 the “clearly erroneous” standard for appellate review of trial court findings. *Zurko*, 527 U.S. at
 16 162, 164.

ARGUMENT

I. EPA Reasonably Determined that the Data and Information Readily Available at the Time of the Challenged Decisions Did Not Require that the Coastal and Estuarine Waters in Washington and Oregon Be Listed as Impaired Due to Pollutants Associated With or Conditions Attributable to Ocean Acidification.

21 CBD argues that ocean acidification has caused violation of the States’ narrative water
 22 quality standards for protection of aquatic life (CBD Br. at 13-19), the numeric criteria for pH
 23 (CBD Br. 19-21), and a non-existent criterion for “aragonite undersaturation” and corrosive
 24 seawater conditions (CBD Br. at 21-24). EPA recognizes that ocean acidification has the
 25 potential to adversely affect aquatic life in marine waters. But, at the time EPA made the
 26 challenged decisions regarding the Washington and Oregon Lists, EPA reasonably determined
 27 that existing and readily available information did not support a finding that the States’ coastal
 28 and estuarine waters failed to meet the States’ applicable water quality standards.

1 With respect to Washington, EPA concluded that the information submitted by CBD,
 2 both to Ecology and to EPA, did not provide sufficient ambient water quality data, nor could such
 3 data be reasonably extrapolated, to demonstrate that the State's water quality standards were not
 4 met for pollutants associated with OA or conditions attributable to OA. *See* Approval Letter,
 5 Encl. 2, EPA Review of Ecology's Analysis of Ocean Acidification Data and Information [WA-
 6 000011, 14]. With respect to Oregon, EPA similarly determined that the references provided by
 7 CBD did not identify sufficient evidence to demonstrate non-attainment of Oregon's water quality
 8 standards so as to warrant listing such waters as impaired due to pollutants associated with or
 9 conditions attributable to OA. *See* EPA Evaluation of Ocean Acidification Information [OR2-
 10 000286]. As demonstrated below, both of EPA's determinations are reasonable, explained in the
 11 decision documents, supported by the administrative records, and should be afforded judicial
 12 deference.

13 **A. Washington Reasonably Decided Not to List Waters for Non-attainment of the**
 14 **Numeric pH Water Quality Criteria Based Upon Evaluation of Information**
 15 **Available at the Time it Submitted its List, and EPA Reasonably Approved the**
 16 **List Upon Evaluation of Information Available at the Time of Approval.**⁸

17 Washington's water quality criteria for pH provide that pH levels should be within the
 18 range of 7.0-8.5, with an anthropogenic (human-caused) variation within that range of less than
 19 0.2 units (for extraordinary marine quality waters) or less than 0.5 units (for excellent marine
 20 quality waters). All of the pH data in the record are within the acceptable range, and CBD does
 21 not contend otherwise. CBD relies entirely on a single study that documented a decrease in pH
 22 levels of greater than 0.2 units, but still within the acceptable range in the pH water quality
 23 criteria. J. Timothy Wootton, *et al*, *Dynamic Patterns and Ecological Impacts of Declining*
 24 *Ocean pH in a High-Resolution Multi-Year Dataset* (2008) [WA-000731] ("Wootton Study").
 25 The Wootton Study evaluated samples collected from a single monitoring location over an eight-

26
 27
 28 ⁸ In its Motion for Summary Judgment, CBD does not challenge EPA's decision that the readily available data and information did not support a finding of nonattainment of Oregon's numeric water quality criteria for pH.

1 year period in waters that are not subject to Washington's water quality standards.⁹ On the basis
 2 of the Wootton Study, CBD argues that all of Washington's marine waters should be listed as
 3 impaired for pH. (CBD Br. at 19-21). Washington disagreed, and, as discussed below, EPA
 4 reasonably concurred with Washington.

5 **1. Washington's Decision**

6 CBD criticizes Washington's decision, asserting that "Washington declined to examine
 7 the pH data" (CBD Br. at 19). However, the record demonstrates otherwise. Washington
 8 reviewed all of the documents submitted by CBD, prepared a detailed response to CBD's specific
 9 assertions, and concluded that none of the referenced studies demonstrated non-attainment of the
 10 pH criteria:

11 We reviewed each of the documents referenced by CBD as support for their
 12 assertions to see if they included pH data not meeting our water quality
 13 standards. None of the documents included data that showed any data outside
 14 of the accepted range, and in particular, no data demonstrated a decline in pH
 15 at any Washington marine water body of greater than 0.2 or 0.5 pH units
 16 (depending on the waterbody use designation) due to a human-caused
 variation within the accepted range. Therefore, a Category 5 listing of
 threatened or impaired for coastal waters was not triggered based on the pH
 numeric criteria.

17 Letter dated June 12, 2012 from Ecology to CBD [WA-000066, 67]. *See also* Washington's
 18 Response to Comments from CBD [WA-000417] (same). Washington prepared a table listing all
 19 of the references submitted by CBD to Washington (a total of 128) [WA-000072-86], specifically
 20 referencing the Wootton Study [WA-000086], and explained that "Ecology reviewed all of the
 21 references to determine if the studies provided relevant documentation of declines in pH not
 22 within the acceptable limits or documenting violations of the narrative standards for protecting
 23 existing and designated aquatic life uses." [WA-000071]. Washington reviewed all of the
 24 available data and information, and concluded that "[m]ost of the studies submitted by CBD did
 25 not provide sufficient or appropriate information to assess whether or not Washington waters
 26

27 ⁹ The monitoring location was near Tatoosh Island, in the Strait of San Juan de Fuca, within the waters of the Makah
 28 Indian Tribe.

1 were attaining the water quality standards.” June 12, 2012 letter from Ecology to CBD at 4 [WA-
2 000069].¹⁰

3 Ecology’s Environmental Assessment Program staff, with expertise in marine science,
4 prepared a separate and more detailed assessment of the references that it found to be potentially
5 relevant, including the Wootton Study. *See* Ecology Assessment of Relevant CBD References
6 (“Ecology Assessment”) [WA-000087-94]. The team evaluated the Wootton Study and the
7 associated data set “to determine if the pH and biology data collected as part of the study could be
8 used as a basis for listing on Category 5 in the 2010 Marine Assessment.” *Id.* at 7 [WA-000093].
9 Ecology staff communicated directly with the principal author of the Wootton Study in
10 developing responses to the comments. *See* letter (undated) from Wootton to Ecology and EPA
11 [WA-000824-26]. The Ecology Assessment explained why the Wootton Study did not support a
12 finding that Washington’s marine waters did not attain the pH water quality criteria:

13 While the Wootton study may be valid for Tatoosh Island, a spatial
14 extrapolation of long-term trends from the study area to a larger regional
15 change would exhibit high uncertainty since the data are from only one
16 sampling location. Also, the study does not provide conclusive evidence
17 that the cause of the pH change is due to human sources. For instance, the
18 change could be caused by natural sources related to inputs from river
19 discharges, long-shore shelf transport and planktonic specifics composition
(i.e., the pH changes could be related to changes in physical conditions due
to the location and changes in the patterns of primary productivity and
species composition).

20 Ecology Assessment at 7 [WA-000093]. Ecology thus concluded that “[f]urther follow-up studies
21 would be needed before Ecology could support using the data for documenting human-caused
22 variations in pH or aquatic life impairment for Washington’s coastal water bodies leading to a
23 Category 5 listing. This study does not provide any pH data showing impairments of Washington
24 waters, nor does it provide conclusive evidence that Washington’s coastal aquatic life in the
25 natural environment are being impaired by ocean acidification.” *Id.*

26
27 ¹⁰ Washington evaluated the data submitted by CBD and concluded that much of the data did not meet credible data
28 requirements mandated by the Water Quality Data Act, RCW 90.48.570-90.48.590 and the Water Quality Program
Policy 1-11 [WA-001361]. Washington described its credible data requirements and explained why certain data
failed to meet the requirements in its June 12, 2012 letter to CBD at 4 [WA-000069].

1 Washington also concluded that the Wootton Study data could not be extrapolated to
 2 other waters in Washington, because all of the samples were collected at a single location, and
 3 that location was not representative of other marine waters. The sampling site was unique
 4 because it is where oceanic waters mix with estuarine water (including inland freshwater) from
 5 the Strait of Juan de Fuca. *Id.* Moreover, the waters at the monitoring site where the Wootton
 6 Study was conducted are not subject to Washington's water quality standards because it is located
 7 within the boundaries of the Makah Indian reservation and States do not have regulatory authority
 8 over Tribal lands, waters, or individual Tribal members. *Id.*¹¹

9 Washington also considered a study by Feely, *et al.*, *The Combined Effects of Ocean*
 10 *Acidification, Mixing, and Respiration On pH and Carbonate Saturation in an Urbanized*
 11 *Estuary* (2010) ("Feely Study") [WA-000731] that evaluated inorganic carbon measurements in
 12 Puget Sound. *See* Encl. 1 to 6/12/12 letter from Ecology to CBD at 6 [WA-000071, 76]. The
 13 Feely Study found that decreasing pH in the Puget Sound is largely the result of natural mixing,
 14 circulation, and biological processes, and that OA plays a smaller role. Feely concluded that
 15 since the Industrial Revolution "a reasonable estimate of the range of the present-day pH decrease
 16 in the Puget Sound region due to ocean acidification is between .05 and .15 pH units." Feely
 17 Study at 12 [WA-000731]. Thus, even if 100% of that decline in pH were due to anthropogenic
 18
 19

20 ¹¹ While CBD notes that Washington has, in the past, included waters on tribal lands on its 303(d) list (CBD Br. at
 21 21, n. 5), those listings have occurred in response to requests by the interested Tribe, and are listed with an express
 22 qualification that Washington State does not have jurisdiction over the waters. This is consistent with EPA
 23 Guidance. *See* Recommended Framework for EPA Approval Decisions on 2002 State Section 303(d) List
 24 Submissions at 10-11 [WA-001304-05]. CBD's assertion that the Makah Tribe wanted its waters listed (CBD Br. at
 25 21) is not supported by the record, and its quote from the Makah letter is not complete. The complete quote is: "We
 26 believe that our ability to consult [government to government] would be enhanced by being able to cite Ocean
 27 Acidification (OA) in our [Tribal Water Quality Standards] on the issue." [WA-WA-002138] (emphasis is the
 28 portion of the quote omitted by CBD). The Makah Tribe was proposing a consultation to consider establishing a
 water quality standard of its own, rather than proposing that the State include tribal waters on its List. Moreover, the
 record demonstrates that EPA responded to the Makah Tribe by offering to arrange such consultation, but the Tribe
 did not pursue consultation. [WA-000181 (Supp. AR)]. *See also* letter from the Makah declining listing of the
 Strait of Juan de Fuca on the State's 2010 List for reasons other than OA [WA-000208]. If the Tribe sought listing
 of the Strait of Juan de Fuca due to pollutants associated with or conditions attributable to OA, then the Tribe would
 have so indicated in that letter.

1 causes, the change would still be less than the 0.2 pH unit variation that would indicate non-
2 attainment of the criteria.

3 Based on its evaluation of this available pH data, including all of the information and data
4 referenced by CBD, Washington reasonably concluded that none of the studies demonstrated non-
5 attainment of the pH standard for any Washington marine waters: “None of the documents
6 included data that showed any data outside of the accepted range [7.0-8.5], and in particular, no
7 data demonstrated a decline in pH at any Washington marine water body of greater than 0.2 or 0.5
8 pH units (depending on the waterbody use designation) due to a human-caused variation within
9 the accepted range.” Letter dated June 12, 2010 from Ecology to CBD at 2 [WA-000067]. *See*
10 *also* Washington’s specific comments on Feely Study, Enclosure 2 to the June 12 letter [WA-
11 000087, 89-90].

12 **2. EPA Review**

13 EPA reviewed Washington’s submittal package, including all of the information submitted
14 by CBD to Washington, and reached the same conclusion: The data did not support a finding of
15 non-attainment of the numeric water quality criteria for pH:

16 The EPA has also conducted a detailed review of Ecology’s justification
17 for not placing Puget Sound or other Washington waters, including
18 Willapa Bay, Gray’s Harbor, The Strait of Juan de Fuca, and the Pacific
19 Coast, on the 2010 303(d) list for impairments associated with water
20 quality standards that could be related to ocean acidification, including
21 marine pH and narrative criteria under aquatic life designated uses, or
22 antidegradation. Based on this review, the EPA has concluded that
23 Ecology has adequately addressed all statutory and regulatory
24 requirements for excluding these waters from Category 5 of the
25 Integrated Report.

26 Approval Letter at 1 [WA-000001].¹² EPA’s further analysis confirmed that, “for a variety of
27 reasons, including the unique sampling location in the [Wootton] study, information from those
28

26 ¹² EPA conducted an independent review of Ecology’s Analysis of Ocean Acidification Data and Information [WA-
27 000011-20]. Appendix A addresses EPA’s Review of Ocean Acidification References [WA-000021-65], including
28 a table identifying all Ocean Acidification References Reviewed by the EPA (Table 1) [WA-000021-50], as well as
a separate table providing an assessment of CBD references that were flagged as having potentially usable data or
information to assess to Washington’s water quality standards (Table 2) [WA-000051-65].

1 documents was insufficient to determine the attainment status of Washington's marine pH
2 criteria." Approval Letter, Encl. 2 (EPA Review of Ecology's Analysis of Ocean Acidification
3 Data and Information) at 5 [WA-000015].

4 In addition to the review and evaluation conducted by Washington, EPA independently
5 evaluated the Wootton Study and associated data set. *See* Factors Influencing Trends in pH in the
6 Wootton, *et al.* (2008) Dataset, by Cheryl Brown of EPA's Pacific Coastal Ecology Branch,
7 Western Ecology Division, Office of Research and Development (2012) ("Brown") [WA-001338-
8 60]. Dr. Brown concluded that there are other drivers (particularly river flow) that influence pH
9 in the region that were not considered in the Wootton Study.¹³ Because it was not possible to
10 determine from the data whether the decline in pH observed in the Wootton Study was due to
11 natural or anthropogenic causes, EPA reasonably determined that the Wootton Study's conclusion
12 that the decline in pH was strictly related to anthropogenic atmospheric CO₂ was not supported.
13 Brown at 22 [WA-001359].¹⁴

14 Dr. Brown also agreed with Washington that the sampling location on Tatoosh Island was
15 unique.¹⁵ Dr. Brown compared the Tatoosh Island data with data collected at Yaquina Estuary in
16 Oregon. If the decline in pH observed in the Wootton dataset was representative of other marine
17 waters, one would expect similar results at other locations in the Pacific Northwest, such as the
18 Yaquina Estuary. Yet comparison of the data showed no such correlation. Brown at 15-16 [WA-
19 001352-52]. Because the sampling location was not representative of Washington marine waters,

21 ¹³ CBD incorrectly interpreted the Brown analysis as concluding that pH changes resulting from the river flow were
22 caused by climate change (i.e., human-caused increase in CO₂). CBD Br. at 20. In fact, the Brown analysis
23 concluded that it was not possible to discern from the data whether the alterations resulted from climate change.
Brown at 22 [WA-001338].

24 ¹⁴ Brown's conclusions are consistent with the Feely Study, finding that the decline in pH at Tatoosh Island may be
25 related to local conditions and "is probably explained by a combination of factors, including enhanced upwelling of
26 waters off the Washington coast resulting from changes in regional ocean circulation as well as smaller contribution
from ocean acidification. Feely Study at 18 [WA-000731].

27 ¹⁵ Brown explained that the sampling site is unique because "The oceanography in this region is influenced by
28 numerous physical factors including complex bathymetry upwelling (both wind driven and tidal) and the presence of
large-scale eddies and multiple river plumes. This region is subjected to strong tidal estuarine and wind-driven
flows." Brown at 2 [WA-001338].

1 EPA agreed with Ecology’s conclusion that it would be inappropriate to extrapolate the biology
 2 data collected near Tatoosh Island, from the Makah waters, to waters of the State.” *See also*
 3 Approval Letter, Encl. 2 (EPA’s Review of Ecology’s Analysis of Ocean Acidification Data and
 4 Information) at 6 [WA-000016]. *See also id.* at 5 [WA-000015] (describing a host of variables
 5 that make the extrapolation of data across large geographic range, for the purposes of determining
 6 non-attainment of water quality standards, difficult and inappropriate).¹⁶

7 In sum, the data in the record do not support a finding of non-attainment of the water
 8 quality criteria for pH in the marine waters of Washington. Washington’s conclusion was
 9 reasonable, and EPA’s review and concurrence with that decision was also reasonable.

10 **B. EPA Reasonably Determined that the Information Available at the Time of**
 11 **EPA’s Decisions Did Not Demonstrate that Either Washington’s or Oregon’s**
 12 **Coastal and Estuarine Waters Failed To Meet Applicable Narrative Water**
 13 **Quality Criteria for Protection of Aquatic Life.**

14 EPA reasonably concluded that the existing and readily available information did not
 15 support a finding that coastal and estuarine waters in Washington or Oregon were impaired based
 16 on the States’ respective narrative standards for protection of aquatic life due to conditions related
 17 to ocean acidification. *See* Approval Letter at 1 [WA-000001]; EPA Evaluation of Ocean
 18 Acidification Information [OR2-000290].

19 Washington concluded that the available data and information did not provide sufficient
 20 evidence that aquatic uses in the natural environment were being threatened or impaired by
 21 environmental alterations related to ocean acidification. June 12, 2012 letter at 3 [WA-000068].
 22 Washington provided a detailed summary of the information it considered, and an assessment of
 23 its conclusions. *See* Ecology Assessment of Relevant CBD References [WA-000087-94]. EPA
 24 agreed with Washington’s analysis, concluding that: “No data or information was presented

25 ¹⁶ CBD has selectively quoted a provision from the EPA 2010 OA Guidance indicating that EPA supports a
 26 “presumption that the pollutant source (particularly when from atmospheric deposition, such as mercury) is
 27 uniformly affecting segments in large geographic areas.” (CBD Br. at 21). However, the next sentence qualifies
 28 EPA’s the statement, indicating that “EPA supports the use of these methods for making attainment decisions related
 to OA *where appropriate*” (emphasis added). Because of the significant data and information gaps concerning OA
 in coastal waters, and because a variety of factors may influence pH levels in coastal and estuarine waters, EPA
 reasonably concluded that it would not be appropriate to extrapolate inconclusive data over large geographic areas.

1 demonstrating impaired health of wild, natural populations in Washington waters, therefore an
 2 impairment determination for the aquatic life designated uses cannot be made at this time.” EPA
 3 Review of Ecology’s Analysis of Ocean Acidification Data and Information at 7 [WA-000017];
 4 and EPA reached similar conclusions with respect to attainment of Oregon’s narrative criteria.
 5 See EPA Evaluation of Ocean Acidification Information [OR2-000289].¹⁷

6 EPA provided a detailed and rational explanation of why it determined that the available
 7 information was insufficient for the purpose of determining non-attainment of applicable water
 8 quality standards. There were no *in situ* field studies documenting adverse effects on the health of
 9 aquatic life populations in either State. Nor was there any other information documenting effects
 10 on indigenous populations of aquatic life in State waters indicating stressors attributable to ocean
 11 acidification. The only information available regarding aquatic life in ambient waters under
 12 natural conditions was inconclusive.¹⁸ CBD relies only upon anecdotal observations, laboratory
 13 experiments, and data collected at artificial habitats, specifically, on-shore oyster seed hatcheries.
 14 As demonstrated below, EPA’s determination that existing information was insufficient to
 15 support a decision to list the waters as impaired was reasonable.

16 **1. EPA Reasonably Determined That Anecdotal Information Was**
 17 **Insufficient to Support Listing Decisions in Either State.**

18 CBD relies on statements found in articles and conference reports, without reference to
 19 any data supporting the assertions. For example, CBD begins its hyperbolic argument with
 20 reference to an article in the *New Yorker* discussing the pteropod – which makes no mention of
 21

22 ¹⁷ CBD challenges EPA’s statement that “[n]o data or information was presented demonstrating impaired health of
 23 wild, natural populations in Oregon waters,” arguing that EPA’s qualification “wild, natural” is in error as a matter
 24 of law (CBD Br. at 17), but does not object to EPA’s similar conclusion with regard to Washington’s waters. The
 25 quoted statement was made in EPA’s Evaluation of Ocean Acidification Information [OR2-000289] and was in
 26 response to specific articles discussing laboratory studies. As explained below, EPA reasonably found that neither
 27 the laboratory data, nor the hatchery data, were sufficient to support a finding of impairment of aquatic life narrative
 28 standard absent any data indicating effects on the wild, natural populations in the State’s coastal and estuarine
 waters.

¹⁸ CBD’s statement that “EPA acknowledges that evidence shows ocean acidification has killed billions of oyster
 larvae in the Pacific Northwest” is a gross overstatement. EPA acknowledged that there was some information that
 acidified/low carbonate water was affecting oyster larvae in on-shore hatcheries (e.g., the Barton Study), but that
 information was insufficient to determine non-attainment of applicable water quality standards. There is no
 information in the record to support the claims for non-hatchery shellfish.

1 any pteropods in the coastal waters of Washington and Oregon, and the referenced study (Kolbert
2 (2006)) [OR2-003021] does not refer to the waters of the relevant States. (CBD Br. at 2).

3 While CBD asserts that the oyster population in Willapa Bay has “crashed,” (CBD Br. at
4 14), it did not present either State, EPA or the Court any actual oyster population or harvesting
5 data from Willapa Bay to support its assertion.¹⁹ CBD relies on the Southern California Coastal
6 Water Research Project (2010) (“SCCWRP”), but that report does not purport to explain the
7 degree of, or reasons for, the decline in wild oyster populations in Willapa Bay. On the contrary,
8 the SCCWRP report recognized that “[s]ets of wild oysters have been recorded in Willapa Bay
9 since 1942 and there have been other periods of 4 to 6 years where sets of wild oysters have been
10 poor. It is unknown if the present declines in wild set will end, as other periods have, or if the
11 declines will continue.” SCCWRP at B-5 [WA-000731]. EPA reasonably determined that such
12 inconclusive and anecdotal statements did not provide sufficient basis to list Willapa Bay as
13 impaired due to non-attainment of the narrative water quality criteria attributable to ocean
14 acidification conditions.²⁰

15 **2. EPA Reasonably Determined that Laboratory-Based Studies Were Not**
16 **Sufficient to Support Listing Decisions in Either State.**

17 CBD relies upon several laboratory studies that correlate ocean acidification conditions
18 with adverse impacts to shellfish. (CBD Br. at 15, citing Crim (2011) at 272 [WA-000731],
19 Hettinger (2012) at 30 [WA-000731], Gaylord (2011) at 2586 [WA-000731]). EPA determined
20 that it would not be appropriate to rely solely on the findings in such studies as a basis for
21 determining non-attainment of the narrative water quality criteria in natural waterbodies, because
22

23 ¹⁹ Moreover, CBD’s assertion that the oyster population in Willapa Bay has “crashed” is difficult to reconcile with
24 its assertion that the oysters [in a hatchery] are raised from broodstock “from sustaining native populations in
25 Willapa Bay, WA.” CBD Br. at 17.

26 ²⁰ CBD also argues that even if the cause for the decline in shellfish in Washington waters is not known (i.e., that the
27 decline cannot be attributed to OA), the water must still be listed based on actual impairment even though the
28 impairment cannot be attributed to a pollutant. CBD Br. at 15, citing EPA Guidance [WA-001231]. The cited EPA
Guidance is not applicable here, because there has been no finding or demonstration of impairment. The Guidance
relates to circumstances where there is a finding of impairment, but an unknown cause.

1 the data and information did not sufficiently account for the potential adaption and acclimation of
2 wild and/or indigenous populations. *See* EPA Review of Ecology’s Analysis of Ocean
3 Acidification Data and Information at 7 [WA-000017]; EPA Evaluation of Ocean Acidification
4 Information [OR2-000289]. EPA reviewed articles documenting that laboratory experiments
5 suffered from a reduced ecological complexity (Honisch, *et al.* 2012) [WA-000731]. Some of the
6 experiments used parameters that were tightly controlled and manipulated and thus did not reflect
7 the conditions in the natural environment. EPA explained that “these variables make the
8 extrapolation of data/information from the laboratory and hatchery studies submitted by CBD, for
9 the purposes of determining non-attainment of water quality standards, difficult and inappropriate
10 in these circumstances. More information is needed on the biological condition within the
11 waterbody (e.g., *in situ* field studies documenting the health of aquatic life populations) or
12 laboratory studies that are designed to account for natural variability and ecological complexity
13 within a particular system.” EPA Response to Comments on EPA’s Additions to Oregon’s 2010
14 303(d) List at 22 [OR2-000275]. Thus, EPA reasonably concluded that data and information
15 were not sufficient to make a determination of non-attainment of the States’ narrative criteria.

16 **3. EPA Reasonably Determined That Shellfish Hatchery Information Was Not**
17 **Sufficient to Support Listing Decisions in Oregon.**²¹

18 EPA determined that it would not be appropriate to make listing decisions based on
19 observations from on-shore oyster seed hatcheries because they are artificial habitats and are not
20 representative of natural conditions in ambient waters. EPA explained that the artificial nature of
21 the monoculture found in an on-shore shellfish hatchery did not accommodate the adaptation and
22 acclimatization that would be found in ambient waters. *See* EPA’s Decision Document, “Final
23 Additions to Oregon’s 2010 303(d) List, December 14, 2012, Encl. 3 (Response to Comments),
24 Attach. 3 (EPA Evaluation of Ocean Acidification Information) [OR2-000286, 000288]. In

25
26 ²¹ CBD raised this issue only with respect to EPA’s decision on listing waters in Oregon. CBD does not argue that
27 the hatchery data provide a basis for challenging EPA’s approval of the Washington List, even though EPA found
28 the hatchery data insufficient for listing of waters in Washington for the same reasons it found the data insufficient
for listing waters in Oregon.

1 particular, EPA cited the SCCWRP conference proceedings that concluded that there was a need
2 for improved linkages between biological and oceanographic data, and recognized that “hatchery
3 operators operate with tendencies that may obscure the relationship between water chemistry and
4 recruitment” and concluded that “[u]ltimately, analysis of ocean chemistry resulted in discovery
5 of a correlation between upwelling of lower pH water and larval mortalities in the hatcheries.
6 However, it is unclear what is actually driving these decreases both in the hatcheries as well as in
7 the wild.” *Id.*

8 EPA also addressed the Barton, *et al.* (2012) study of hatcheries [OR2-001521-533]
9 (“Barton Study”) upon which CBD relies, and explained why it did not find the information
10 sufficient to support a listing decision. *See* EPA’s Decision Document, “Final Additions to
11 Oregon’s 2010 303(d) List, December 14, 2012, Encl. 3 (Response to Comments), Attach. 3
12 (EPA Evaluation of Ocean Acidification Information) [OR2-000286, 000289]. The Barton Study
13 included no data regarding the health of wild aquatic organisms, and the only pH data presented
14 in the Barton Study indicated a pH in Netarts Bay between 7.6 and 8.2, both within the acceptable
15 range of 7.0-8.5 for marine waters and 6.5-8.5 for estuarine waters. *Id.* Measurements of pH
16 within the acceptable range confounded conclusions that ocean acidification would be the cause
17 for the observed hatchery losses. The Barton Study also found variability of shellfish larvae
18 responses within the hatchery (“within cohort variability”), and observed that some shellfish
19 larvae grew without incident, casting further doubt on the conclusion.

20 CBD argues that EPA should consider information about the observed effects and other
21 knowledge and data in areas with limited site-specific monitoring because EPA’s 2010
22 Memorandum on OA supports the use of such information and data to make impairment decisions
23 “when extrapolation of such information to a wider geographic area is appropriate.” EPA
24 Evaluation of Ocean Acidification Information, citing (EPA 2010) [OR2-000286, 000287].
25 (CBD Br. at 18). EPA’s evaluation of the articles submitted by CBD, however, revealed that the
26 papers’ authors made reference to “data gaps preventing definitive conclusions to be drawn about
27 the degree to which ocean acidification impacts can be extrapolated to other locations.” *Id.* For
28 example, the Barton Study identified gaps that rendered extrapolation difficult and inappropriate:

1 [T]wo significant shortcomings exist with regard to understanding acidification
2 effects on natural populations of organisms in variable coastal and estuarine
3 habitats: prediction of how carbonate conditions will vary in coastal and estuarine
4 environments with increasing atmospheric CO₂ and a better understanding of the
fundamental biology underlying the responses of multicellular organisms to
acidification.

5 EPA Evaluation of Ocean Acidification Information (quoting Barton Study) [OR2-000289]. The
6 Barton Study went on to explain that “limited experience suggests that the multitude of forcing
7 time scales still requires high-resolution monitoring of water CO₂ chemistry before we are fully
8 capable of developing predictive models.” *Id.*

9 Moreover, EPA explained that studies reveal that physical and seasonal variables make
10 the extrapolation of data across a large geographic range for purposes of determining non-
11 attainment of water quality standards in local water bodies difficult and inappropriate. *Id.* [OR2-
12 000286]. EPA relied on a variety of studies documenting these variables.²² Based on the record,
13 it was reasonable for EPA to determine that it was not appropriate to list marine and estuarine
14 waters in Oregon.

15 **C. EPA Reasonably Determined that Listing Was Not Required Based on**
16 **Aragonite Undersaturation.**

17 EPA agrees with CBD’s assertion that an increase of carbon dioxide in seawater reduces
18 aragonite saturation. Aragonite is used by aquatic life to build shells and skeletons, and reduced
19 saturation of aragonite can weaken or preclude formation of shells and skeletons. (CBD Br. at
20 22). However, neither Washington nor Oregon has adopted a numeric water quality criterion for
21 assessing aragonite saturation, nor has EPA published recommended water quality criteria for
22 aragonite saturation state. Therefore, failure to attain a numeric aragonite saturation criterion
23 based on alleged undersaturation of aragonite would not provide a basis for listing waters as

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26 ²² See, e.g., Juranek, *et al.* (2009) describing the distinct seasonal cycle offshore from in Newport, Oregon relating to
27 upwelling dynamics; Langston (May 26, 2011) describing natural processes and pollution may contribute to low pH
28 values in Hood Canal, Washington. EPA noted that Netarts Bay, Oregon is a lagoon-type estuary dominated by
ocean inputs, while water exchange between the ocean and the four basins of Puget Sound is limited by bottom
morphology at Admiralty Inlet, relying on Barton, *et al.* (2012) and Feely, *et al.* (2010). [OR2-001317-4494].

1 impaired.²³ CBD argues, however, that EPA failed to consider information concerning aragonite
 2 undersaturation to evaluate whether it caused non-attainment of either State's narrative water
 3 quality criteria for protection of aquatic life. (CBD Br. at 23).

4 EPA did consider all of the studies submitted by CBD and explained why it found the
 5 information insufficient to support a listing decision. *See* CBD Cited References on Ocean
 6 Acidification [WA-00071-86]; EPA's Review of References Submitted by CBD [OR2-000292-
 7 329]; Index of Ocean Acidification Articles Reviewed by EPA [OR2-001299-1316].²⁴ Moreover,
 8 CBD expressly referenced EPA's conclusions regarding those studies. (CBD Br. at 24). Thus,
 9 while CBD may disagree with EPA's conclusions, the record does not support its argument that
 10 EPA ignored the information. As explained above, EPA reasonably concluded that the readily
 11 available data and information considered by EPA was insufficient to support a listing of coastal
 12 and estuarine waters for nonattainment of the States' narrative water quality criteria; and, as
 13 discussed below, that decision is entitled to deference.

14 **D. The Court Should Afford Judicial Deference to EPA's Decisions.**

15 As discussed above (*see* Standard of Review, *supra* at 9-10), EPA's decisions based on
 16 scientific and technical information within its area of expertise are entitled to heightened
 17 deference. Notwithstanding that fundamental premise of administrative law, CBD encourages the
 18 Court to reject EPA's evaluation of the information before it, relying on a series of cases that
 19 provide no support.

20 CBD misleadingly relies on *Sierra Club v. EPA*, 346 F.3d 955, 963 (9th Cir. 2003), in
 21 which the Ninth Circuit vacated an EPA decision because the Agency's decision was based upon
 22 assumptions of fact that were shown to be invalid. In this case, EPA did not rely on any invalid
 23

24 ²³ The appropriate remedy would be to petition the State to establish a water quality criterion for aragonite. In fact,
 25 CBD has petitioned EPA to recommend water quality criteria under CWA section 304(a) to address aragonite
 26 saturation state and calcification rates.
http://www.biologicaldiversity.org/campaigns/ocean_acidification/pdfs/EPA_OA_petition_2013.pdf (April 17,
 2013).

27 ²⁴ EPA determined that some of the studies [OR2-002882, OR2-000310] contained no data suitable for analysis
 28 under Oregon water quality standards; and found that some studies [WA-00060, WA-000056-57, WA-000731]
 provided no evidence of non-attainment regarding Washington water quality standards in Puget Sound and along the
 State's west coast.

1 assumptions of fact; it determined that the information available to EPA was inconclusive or
2 insufficient to support listing the waters as impaired. Moreover, *Sierra Club* case did not involve
3 the Agency's evaluation of technical and scientific information within its expertise, and for which
4 it is entitled to the greatest deference.

5 The records of decision in this case also differ from the matter considered in *Mont.*
6 *Wilderness Ass'n v. McAllister*, 666 F.3d 549, 561 (9th Cir. 2011), in which the Forest Service
7 failed to consider an important element of the applicable statute (the "1977 Study Act") based on
8 its erroneous understanding of its legal obligations under the 1977 Study Act. Here, EPA did not
9 misapprehend its legal obligations, but clearly understood the applicable decisional threshold -
10 attainment of numeric and narrative water quality standards. EPA considered all existing and
11 readily available data and information before it and applied its technical expertise and concluded
12 that the readily available data and information was insufficient to support a finding of non-
13 attainment of the applicable standards.

14 CBD's reliance on *Fla Pub. Interest Research Grp. Citizen Lobby Inc. v. EPA*, 386 F.3d
15 1070 (11th Cir. 2004) is similarly inapposite. The challenge there was not to EPA's review of a
16 state's Section 303(d) List; rather, the plaintiff contended that Florida's adoption of a rule
17 establishing a methodology for listing waters as impaired amounted to a *de facto* amendment of
18 Florida's water quality standards. Here, there is no suggestion that the States' water quality
19 standards are invalid or inconsistent with the CWA; nor is there any allegation that either State or
20 EPA has amended the water quality standards through application of listing methodologies.

21 In sum, CBD is relying on inapplicable authorities. The Ninth Circuit case law is clear
22 that EPA's approval of Washington's 2010 303(d) List, and EPA's decision-making in its
23 additions to Oregon's 2010 303(d) List, are entitled to deference, and the Court should uphold
24 them.

1 **II. EPA Considered All Existing and Readily Available Information in Approving the**
 2 **Washington 303(d) List and in its Additions to the Oregon 303(d) List.**

3 CBD submitted six letters to Washington and 128 references; CBD submitted six letters to
 4 Oregon and over 125 references. EPA reviewed all of the information submitted to the States, as
 5 well as 14 letters and 175 references submitted by CBD to EPA, and information otherwise
 6 identified independently by EPA.²⁵ If there was any additional, readily available, information to
 7 support listing of waters in Washington or Oregon as impaired due to conditions related to OA,
 8 CBD would certainly have provided the information to EPA.

9 CBD argues that EPA erred in failing to add additional waters to Oregon's list because it
 10 did not consider all existing and readily available data and information. CBD identifies two
 11 sources of information by the National Oceanic and Atmospheric Administration ("NOAA") that
 12 CBD claims EPA should have considered, but did not: (1) NOAA's National Estuarine Research
 13 Reserve System and National Data Center and (2) NOAA's Pacific Marine Environmental
 14 Laboratory and Integrated Ocean Observing System.²⁶ CBD does not suggest, much less identify
 15 any relevant information, in either of the two referenced sources that would have led to a different
 16 decision. *See Sierra Club v. Hankinson*, 939 F. Supp. 865, 870 (N.D. Ga. 1996) (cited in CBD
 17 Br. at 25), rejecting an argument that the State failed to consider "all existing readily available
 18 water quality-related data and information" in preparing its 303(d) list because there was no
 19 evidence in the record indicating that the State's failure to use the identified information resulted
 20 in the exclusion of waters that should have been listed.

21 CBD also argues that Washington failed to consider all existing and readily available
 22 information in developing its 2010 303(d) List. CBD asserts that Washington should have
 23 consulted data available from EPA's Storage and Retrieval warehouse ("STORET"), United
 24 States Geological Survey ("USGS") water data repository and the Laboratory Analytical and

25 ²⁵ See WA-000710, -734, -739, -744, -751, -763, -771, -800, -831, -832, -840, -850, -888, -895, -916, -936, -956, -
 26 959, -969, -977, -980, -992, -001005, OR2-004495-OR2-004805.

27 ²⁶ While EPA recommends that States consider these sources in its 2010 OA Memorandum at 7 [WA-001122], the
 28 recommendations are not binding requirements, *id.* at 5 [WA-001118], and the States and EPA have discretion in
 determining the data and information upon which to rely.

1 Storage Retrieval (“LASAR”) databases, arguing that those sources were existing and readily
2 available because they were consulted by EPA for its additions to the Oregon List. The record
3 developed by Washington, however, demonstrates that the State did consult both the STORET
4 and USGS databases.²⁷ The Washington database contains records for which the source is
5 identified as STORET or USGS, and some of the records in the Washington submission to EPA
6 derive from those sources. [WA-000097]. It is thus apparent that Washington consulted both of
7 those sources for relevant information as part of its listing methodology. In fact, CBD recognizes
8 that Washington consulted the STORET and USGS databases for pH data and relied upon that
9 information for listing the Soleduck River. (CBD Br. at 27, n. 8).

10 CBD further asserts that Washington should have considered data collected in Puget
11 Sound by NOAA and should have pursued data cited by Dr. Feely of NOAA. (CBD Br. at 29).
12 Again, the record reflects that Washington did consider those data, but concluded that the data
13 were not appropriate to support listing decisions. Washington acted consistent with EPA
14 regulations: “While States are required to evaluate all existing and readily available water
15 quality-related data and information, a State may decide to rely or not rely on particular data or
16 information in determining whether to list particular waters.” [WA-000003]. *See also Sierra*
17 *Club v Leavitt*, 488 F.3d 904, 913 (11th Cir. 2007) (regulations require state to evaluate all data,
18 but state has right to decide not to use certain data). Washington explained its credible data
19 policy and asserted that all readily available data meeting the requirements of its policy were
20 analyzed. Washington also considered documents from Dr. Feely, which validated its decision
21 not to use some existing datasets collected from Puget Sound for attainment decision-making
22 because the pH probes used to collect the Puget Sound data were subject to a high rate of error.
23 *See* June 12, 2012 Letter from Washington to CBD [WA-000066, 69]. Therefore, the record

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27 ²⁷ CBD also suggests that Washington should have considered the LASAR database that was reviewed by EPA for
28 the Oregon list. LASAR is an Oregon Department of Environmental Quality database, so it only contains data
considered relevant to Oregon waters, thus there would be no reason for Washington to consider that database.

1 demonstrates that Washington appropriately considered and evaluated all existing readily
2 available data and information.²⁸

3 More importantly, the issue in this case is not the validity of Washington's decision, but
4 rather, EPA's decision approving Washington's 2010 Section 303(d) List. EPA necessarily has a
5 limited role when acting in its oversight capacity to review and approve or disapprove State
6 Section 303(d) Lists, as the law provides EPA 30 days to approve or disapprove a State's List. 40
7 C.F.R. § 130.7(d)(2). The nature of EPA review of a Section 303(d) List was addressed in
8 *Barnum Timber Co. v. EPA*, 835 F. Supp. 2d 773, 779 (N.D. Cal. 2011), explaining that Congress
9 assigned primary responsibility for identifying impaired waters to the States and provided EPA an
10 oversight role, and recognizing that the short period for EPA to review the States' Lists confirms
11 that its role is limited. The 10th Circuit reached the same result in *City of Albuquerque v.*
12 *Browner*, 97 F.3d 415, 425 (10th Cir. 1996) ("the time restriction for the EPA's review of state . .
13 . water quality standards supports our conclusion that Congress intended the EPA to have a very
14 limited role.") *See also Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir.
15 1993). Although the Ninth Circuit has not defined the scope of EPA's oversight role in reviewing
16 State Section 303(d) lists, it has recognized the primacy of the States in combating pollution in
17 State waters. *City of Arcadia*, 411 F.3d at 1106.

18 Notwithstanding EPA's limited role, EPA did conduct a detailed review of Washington's
19 justification for not listing waters as impaired based on water quality standards that could be
20 associated with OA. *See* EPA Decision Document [WA-000001] and EPA Review of Ecology's

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22
23 ²⁸ While States must consider all existing and readily available water quality-related data and information, there is
24 no requirement that a State forward to EPA all of the information it considered. The State needs only to include in its
25 submission (1) a description of the methodology used to develop the list; (2) a description of the data and information
26 used to identify waters; (3) any other reasonable information requested by the Region and (4) rationale for decision
27 not to use data. 40 C.F.R. § 130.7(b)(6). In this case, EPA emphasized the importance of the Washington's
28 consideration of all existing and readily available data and information for coastal and estuarine waters, including pH,
in developing the 2010 List per 40 C.F.R. § 130.7." *See* 6/8/12 letter from Bussell to Susewind [WA-000153]. In a
letter dated Jan 12, 2012 from Bussell to Susewind, EPA specifically asked Washington to include "[a]ny memos to
the file, etc. documenting decisions surrounding comments submitted by the Center for Biological Diversity" [WA-
000198]. Ecology provided a full response, identifying all resources it considered and relied upon. [WA-000153-
56]. *See also* letter dated 6/12/12 from Ecology to CBD, explaining why certain information provided to Washington
by CBD was not relied upon. [WA-000066-70].

1 Analysis of Ocean Acidification Data and Information [WA-000011-65]. EPA agreed with
2 Washington's conclusion that the information available did not support listing of Washington
3 waters as impaired for conditions related to OA.

4 **III. CBD is Not Entitled to the Remedy It Seeks.**

5 Should the Court determine that either of EPA's decisions was arbitrary and capricious,
6 the appropriate remedy authorized by the APA is to remand the decision to EPA to take
7 appropriate action. 5 U.S.C. § 706(2)(A). *See, e.g., UOP v. United States*, 99 F.3d 344, 350-51
8 (9th Cir. 1996); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("If the court
9 determines that the agency's course of inquiry was insufficient or inadequate, it should remand
10 the matter to the agency for further consideration and not compensate for the agency's dereliction
11 by undertaking its own inquiry into the merits." CBD acknowledges that vacatur of the decision
12 during the remand proceedings would not be appropriate (CBD Br. at 29-30). However, CBD
13 inappropriately – and unrealistically - requests that the court "direct EPA to disapprove Oregon
14 and Washington's impaired waters lists and identify waters impaired by ocean acidification with
15 30 days of the disapproval." (CBD Br. at 30).

16 The Supreme Court has long held that if a reviewing court disapproves of an agency's
17 action, it ought not to order the agency to take specific action on remand. *See NLRB v. Food*
18 *Store Emps. Union, Local 347*, 417 U.S. 1, 10 (1974) ("when a reviewing court concludes that an
19 agency invested with broad discretion . . . has apparently abused that discretion . . . remand to the
20 agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing
21 court's proper course"); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he
22 guiding principle [of APA review] is that the function of the reviewing court ends when an error
23 of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration").
24 On remand, it is therefore the agency's responsibility, not the Court's, to evaluate alternative
25 courses of action and ultimately make a choice. *Kleppe v Sierra Club*, 427 U.S. 390, 410 n. 21
26 (1976). *See also, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 933 (1990) (An agency's task
27 on remand remains "infused with judgment and discretion, requiring the 'accommodation of
28 conflicting policies that were committed to the agency's care.'" (citation omitted).

1 The preservation of agency discretion in the environmental sphere is particularly
 2 important given the complex scientific and technical knowledge required to implement
 3 environmental statutes. As the Ninth Circuit has stated, judicial “intervention into the process of
 4 environmental regulation, a process of great complexity, should be accomplished with as little
 5 intrusiveness as feasible.” *Western Oil & Gas Ass’n v. U.S. EPA*, 633 F.2d 803, 813 (9th Cir.
 6 1980).

7 In sum, if either decision is found to be arbitrary and capricious, the only appropriate
 8 remedy is remand to the agency. On remand, EPA would have the discretion to approve or
 9 disapprove the States’ 2010 Lists consistent with the CWA and EPA regulations and any Order of
 10 this Court. CBD is not entitled to an Order compelling disapproval of the Lists; and particularly
 11 is not entitled to an Order compelling EPA to identify any particular waters as impaired by ocean
 12 acidification.

13 CONCLUSION

14 EPA’s actions on Washington’s and Oregon’s 2010 Section 303(d) Lists of impaired
 15 waters were lawful, reasonable, and well supported by the administrative records. CBD’s motion
 16 for summary judgment should be denied; EPA’s cross-motion for summary judgment should be
 17 granted.

18 Dated: August 15, 2014

19 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2014, I filed the foregoing United States' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment with the Clerk of Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/

Cynthia J. Morris