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CERTIFIED MAIL—RETURN RECEIPT REQUESTED

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Re: Notice of Intent to Sue for Violations of the Endangered Species Act

On behalf of Willamette Riverkeeper and Northwest Environmental Defense Center (“NEDC”), I write to provide you notice pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. §1540(g)(2)(A)(i), that the Army Corps of Engineers (“Corps”) has violated and continues to violate the ESA by failing to insure through consultation with the National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service (“FWS”) that the Corps’ action of owning and operating dams in the Willamette River basin is not likely to jeopardize the continued existence of ESA-listed Upper Willamette River Chinook Salmon, Upper Willamette River Steelhead, Columbia River population of Bull Trout, and Oregon Chub, or result in destruction of adverse modification of these species’ critical habitat. The violations arise from the Corps’ failure to comply with the substantive and procedural requirements imposed by ESA § 7, 16 U.S.C. § 1536, as well as the prohibition on “take” of listed species in ESA § 9, 16 U.S.C. § 1538. Willamette Riverkeeper and NEDC are concerned about the harm caused to these

imperiled species due to the Corps' failure to analyze the effect of the dam operations and mitigation measures on the listed species and their critical habitat.

I. Factual background.

The Corps owns and operates thirteen major dams in the Willamette basin: Fall Creek dam on Fall Creek; Fern Ridge dam on the Long Tom River; Cottage Grove dam on the Coast Fork Willamette River; Dorena dam on the Row River; Big Cliff and Detroit dams on the North Fork Santiam River; Green Peter and Foster dams on the South Fork Santiam River; Blue River and Cougar dams on the McKenzie River; and Dexter, Hills Creek, and Lookout Point dams on the Middle Fork Willamette River. Construction of these dams occurred between 1941 and 1969 and the Corps has maintained operational control since completion. The primary uses of the dams include the storage of water for irrigation purposes and flood control, the creation of recreation areas in the form of reservoirs, and hydropower. The Corps' ownership and operation of each of these dams adversely affects ESA-listed species in the Willamette River basin.

Dams directly and indirectly cause a number of detrimental affects on fish populations, particularly salmonids, in the Willamette River basin.¹ For instance, the Corps' dams change water flow characteristics of rivers, potentially causing times of abnormally low or high flow that adversely affects fish habitat. Adverse effects on fish habitat may include, but are not limited to, erosion, water quality problems such as excess turbidity, food source disruption, nutrient depletion, and the destruction of river morphological features. Additionally, the Corps' dams increase water temperature in streams by releasing heated water from reservoirs where increased surface area results in solar heating. Many salmonid species are highly sensitive to changes in water temperature.² An EPA review of thermal effects on salmonids notes: “[T]here are significant impacts to survival due to temperature regime worth considering in all life stages [of salmonids].”³ Dams also block passage of fish to historical spawning grounds and potentially important feeding areas. The NMFS Biological Review Team (“BRT”) “considered the loss of access of historical spawning grounds because of dams to be a major risk factor.”⁴ Finally, passage through dams can directly cause salmonid mortality.

NMFS listed the Upper Willamette River Chinook Salmon Evolutionary Significant Unit (ESU) as threatened in 1999. 64 Fed. Reg. 41835, 41836 (August 2, 1999). In 2000 and again in 2005, NMFS designated critical habitat for the Upper Willamette River Chinook Salmon ESU. See 65 Fed. Reg. 7764, 7767 (Feb. 16, 2000); 70 Fed. Reg. 52630 (September 2, 2005). In a June 2005 Biological Status Review, the BRT selected this ESU for the “likely to become endangered” category. One issue addressed by the BRT was that although the population is relatively stable, most of the population comes from hatcheries. The BRT noted that the Oregon

¹ See generally Good, T.P., R.S. Waples, and P. Adams (editors). 2005. Updated status of federally listed ESUs of West Coast salmon and steelhead. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-66, 598.

² McCullough, D.A. 1999. A review and synthesis of effects of alterations to the water temperature regime on freshwater life stages of salmonids, with special reference to Chinook Salmon. U.S. Environmental Protection Agency, EPA 910-R-99-010, 279 at 1.

³ *Id.* at 191.

⁴ Good, T.P et al., NMFS-NWFSC-66, 237.

Department of Fish and Wildlife (“ODFW”) identified only one remaining naturally producing population in this ESU, the spring-run Chinook in the McKenzie River. The BRT partially attributed the declines in spring-run Chinook in the Upper Willamette basin to “the extensive habitat blockages caused by dam construction.”⁵ This is supported by the 2006 NMFS Technical Memo 73, which demonstrates that the Chinooks' historical habitat reached far past several dams that now block access.⁶ These dams include the Blue River, Cougar, Big Cliff, Detroit, Foster, Green Peter, and Dexter dams.

In 1999, NMFS also listed the Upper Willamette River Steelhead ESU as threatened under the ESA. 64 Fed. Reg. 41835, 41836 (August 2, 1999). NMFS designated critical habitat for the Upper Willamette River Steelhead ESU in 2000 and 2005. See 65 Fed. Reg. 7764, 7767 (Feb. 16, 2000); 70 Fed. Reg. 52630 (September 2, 2005). This critical habitat is adversely affected by the Corps' dam operations. According to the 1996 NMFS Technical Memo 27, historical data on the Upper Willamette River Steelhead ESU is thin, but “[n]ative winter steelhead within this ESU have been declining on average since 1971, and have exhibited large fluctuations in abundance.”⁷ In a June 2005 Biological Status Review, the BRT stated that they “considered the loss of access to historical spawning grounds because of dams to be a major risk factor.”⁸ Furthermore, Technical Memo 73 illustrates that a significant portion of the historical range of the Upper Willamette River Steelhead ESU is inaccessible due to Corps' dams. These dams include the Big Cliff, Detroit, Foster, and Green Peter dams.⁹

In 1998, FWS listed the Columbia River populations of bull trout as threatened under the ESA. 63 Fed. Reg. 31647 (June 10, 1998). In 2005, FWS designated critical habitat for the Willamette River basin bull trout population. 70 Fed. Reg. 56212 (September 26, 2005). The critical habitat includes habitat affected by the Corps' dam operations at the Dexter, Lookout Point, Hills Creek, and Blue River dams. According to the FWS draft Bull Trout Recovery Plan, Willamette River Recovery Unit, Chapter 5, “[a]t the time of listing in 1998, bull trout in the upper McKenzie River above Trail Bridge Reservoir and the South Fork McKenzie River above Cougar Reservoir were considered at high risk of extinction; bull trout in the mainstem McKenzie River were considered at moderate risk of extinction, and bull trout in the Middle Fork Willamette, Santiam and Clackamas rivers were considered extinct.”¹⁰ The draft Bull Trout Recovery Plan also stated that “[t]he construction of impassable dams and culverts is considered a major factor in the decline of bull trout.”¹¹

⁵ Good, T.P et al., NMFS- NWFSC-66 at 126; see also Id. at 166 (stating that “perhaps a third of the historical habitat used by fish in this ESU is currently inaccessible behind dams.”)

⁶ Myers, J., C. Busack, D. Rawding, A. Marshall, D. Teel, D.M. Van Doornik, and M.T. Maher. 2006. Historical population structure of Pacific salmonids in the Willamette River and lower Columbia River basins. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-73, 311, 231-38.

⁷ Busby, J.B., T.C. Wainwright, G.J. Bryant, L.J. Lierheimer, R.S. Waples, F.W. Waknitz, and I.V. Lagomarsino. 1996. Status review of West Coast Steelhead from Washington, Idaho, Oregon, and California. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-27, 275 p.

⁸ Good et al, NMFS-NWFSC-66, 237.

⁹ Myers et al., NMFS-NWFSC-73, 264-68.

¹⁰ Bull Trout Recovery Plan, p. 2, accessed March 6, 2007, available online at: <http://www.fws.gov/pacific/bulltrout/colkla/Factsheet/chapter%205.pdf>.

¹¹ Id. at 3.

On October 18, 1993, FWS listed the Oregon Chub as endangered under the ESA. 58 Fed. Reg. 53800 (October 18, 1993). The only remaining established populations of the Oregon Chub “are restricted to an 18.6 mile (30 kilometer) stretch of the Middle Fork Willamette River drainage, just 2 percent of its historic home range.” *Id.* According to the final rule listing the species as endangered, “[d]ecline of the Oregon Chub has been correlated with the construction of dams.” *Id.* at 53801. Specifically, the construction of flood control projects altered the historical flooding patterns and eliminated Oregon Chub habitat. *Id.* at 53800. To date, FWS has not designated critical habitat for the Oregon Chub.

To the best of our knowledge, the Corps completed a Biological Assessment and requested consultation with NMFS and FWS regarding the operation of the Willamette River basin dams in 2001. In 2006, the Corps notified NMFS and FWS of its intent to prepare a supplemental biological assessment with a revised proposed action. To date, the Corps has not complied with its substantive and procedural duties to insure, in consultation with NMFS and FWS, that the Corps' actions are not likely to cause jeopardy to the listed species or destroy or adversely modify critical habitat. NMFS and FWS have not produced a Biological Opinion.

II. Legal Violations of the Endangered Species Act.

Section 7(a)(1)

Federal agencies must “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1). As defined under ESA § 3, the term “conservation” means to use all necessary methods and procedures to bring an endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary. 16 U.S.C. § 1532(3).

The Corps' failure to carry out programs to conserve endangered species violates Section 7(a)(1). The Corps' failure to insure through consultation that the Corps' action of owning and operating dams in the Willamette River basin is not likely to jeopardize the continued existence of ESA-listed fish exemplifies its failure to use all necessary methods and procedures to bring the listed salmon to healthy level.

Section 7(a)(2)

The Corps is in violation of Section 7(a)(2) by failing to insure through consultation with NMFS and FWS that the Corps' action of owning and operating dams, including the Corps' mitigation measures, in the Willamette River basin is not likely to jeopardize the ESA-listed fish or result in destruction or adverse modification of critical habitat. The ESA requires that “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). Because the Corps owns and operates the Willamette River basin dams, the Corps has a mandatory duty to ensure its actions

do not jeopardize listed species. According to the Supreme Court, the duty to consult reflects “an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 185 (1978)

An agency must initiate consultation under Section 7(a)(2) whenever it undertakes an action that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). Conversely, an agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat. Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”).

Regulations implementing Section 7(a)(2) broadly define the scope of agency actions subject to consultation to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” 50 C.F.R. § 402.02 (definition of “action”). Therefore, once a species is listed as threatened or endangered under the ESA, the duty to consult under section 7 attaches to “any agency action authorized, funded, or carried out by such agency.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12. Under the ESA’s implementing regulations, “action” means:

all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, *but are not limited to*: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) *actions directly or indirectly causing modifications to the land, water, or air.*

50 C.F.R. § 402.02 (emphasis added).

Agencies must also consult on ongoing agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. 50 C.F.R. § 402.16 (reinitiation of consultation). Agencies must consult on such ongoing agency actions “if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or if a new species is listed . . . that may be affected by the identified action.” Id.

The Corps' ownership and operation of the Willamette River basin dams, and the Corps' mitigation measures related to the dams, constitute an action under Section 7(a)(2). Therefore, the Corps has a mandatory duty to consult. Moreover, under the ESA’s implementing regulations, a federal agency must review its actions at the "earliest possible time to determine whether the action may affect listed species or critical habitat." 50 C.F.R. § 402.14. The Corps's failure to insure that its actions do not cause jeopardy and failing to complete consultation in the last 8 years since the listing of salmonids and 14 years since listing the Chub in the Willamette River basin violates the requirement to review its actions at the earliest time possible.

To initiate consultation, an agency must assess the impacts of the action on listed species and their habitat and provide all relevant information about such impacts to FWS or NMFS. 50 C.F.R. § 402.14(c). If the action agency determines that an action “may affect,” but is “not likely to adversely affect” the listed species or its critical habitat and FWS or NMFS concur in writing, the agency does not have to undergo formal consultation. 50 C.F.R. § 402.13. However, if FWS or NMFS do not concur, or if the action agency has determined that the action is “likely to adversely affect” the listed species, the agencies must conduct a formal consultation. *Id.* at §§ 402.02, 402.14(a). In this matter, the Corps initiated consultation so it must have determined that its actions may affect and are likely to adversely affect listed species.

The end product of formal consultation is a biological opinion in which FWS or NMFS determine whether the action will jeopardize the survival and recovery of listed species or will adversely modify the species’ critical habitat. 16 U.S.C. § 1536(b). In order to make this determination, FWS or NMFS must review all relevant information and provide a detailed evaluation of the action’s effects, including the cumulative effects of federal and nonfederal activities in the area, on the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). FWS and NMFS have a statutory duty to use the best available scientific information in an ESA consultation. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). If FWS or NMFS determines that the action is likely to jeopardize the species, the biological opinion must specify reasonable and prudent alternatives that will avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3). FWS or NMFS must also formulate discretionary conservation recommendations to reduce or minimize the action’s impacts on listed species or critical habitat. 50 C.F.R. § 402.14(g)(6).

Overall, the Corps has violated and continues to violate the ESA by failing to insure through consultation with NMFS and FWS that the Corps’ action of owning, operating, and mitigating dams in the Willamette River basin is not likely to jeopardize the continued existence of ESA-listed fish, or result in destruction or adverse modification of these species’ critical habitat. The Corps’ ongoing operation of the Willamette River basin dams, which modifies the flow, water quality, and morphology of streams, falls squarely within the definition of federal “action” in 50 C.F.R. § 402.02(d). Thus, the Corps has a mandatory obligation to insure through consultation that the Willamette River basin dams do not jeopardize or adversely modify or destroy critical habitat of on the Upper Willamette River Chinook Salmon, the Upper Willamette River Steelhead, Oregon Chub and Bull Trout. The dams clearly impact the listed species through direct and indirect manipulations to both water and land. Under the ESA, the Corps has a mandatory duty to initiate consultation with NMFS and FWS to review its actions at the “earliest possible time.” 50 C.F.R. § 402.14.

Section 9

The Corps has violated and continues to violate Section 9 of the ESA because the operation of the dams and mitigation measures in the Willamette River basin “take” listed species. Section 9 of the ESA prohibits any person—including a governmental entity—from “taking” any endangered species of fish or wildlife listed under the ESA. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in

such conduct. *Id.* at § 1532(19). FWS and NMFS have defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102. The Corps' dam operation impairs essential behavioral processes by altering flow, temperature, dissolved oxygen, and other pollutants, and degrading or eliminating access to historic habitat.

As part of a consultation, FWS or NMFS determine whether to authorize the incidental take of listed species through the issuance of an incidental take statement. An incidental take statement may be issued only if the action can proceed without causing jeopardy. 16 U.S.C. § 1536(b)(4). An incidental take statement must: (1) specify the impact of the incidental take on the listed species; (2) specify reasonable and prudent measures FWS or NMFS considers necessary to minimize that impact; and (3) set forth mandatory terms and conditions. *Id.*

An incidental take statement insulates the federal agency from liability for a take of a threatened or endangered species, provided the agency complies with the statement’s terms and conditions. This insulation extends further to any entity receiving a federal permit, license, authorization, or funding subject to, and in compliance with, the statement. Thus, the Act provides that:

[A]ny taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

16 U.S.C. § 1536(o)(2).

The Corps' operation of the Willamette River basin dams and funding of projects purported to mitigate the impacts of the dams "takes" listed species, and the Corps is not shielded by an incidental take statement. Therefore, the Corps is prohibited from "taking" any listed fish. The Corps will continue to violate ESA Section 9 until it completes the consultation process and receives an incidental take statement pursuant to 16 U.S.C. § 1536(b)(4).

III. Conclusion.

The Corps has violated and continues to violate its mandatory duty under Section 7(a)(1) by failing to utilize its authority to conserve listed species. The Corps has violated and continues to violate its mandatory duties under Section 7(a)(2). The Corps operates 13 dams and funds mitigation in the Willamette River basin. However, to date, the Corps has failed to comply with its Section 7(a)(2) duty to consult and insure that the agency’s actions are not likely to jeopardize the continued existence of the endangered and threatened species or result in the destruction or adverse modification of designated critical habitat. Furthermore, the Corps has violated and continues to violate Section 9 by “taking” listed species.

Persons Giving Notice

The full name, address, and telephone number of the parties providing this notice are:

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Willamette Riverkeeper and NEDC anticipate filing suit against the Corps 60 days from the date of this notice in United States District Court District of Oregon, requesting declaratory and injunctive relief. I am available to discuss potential remedies prior to the expiration of this notice.

Sincerely,

/s/
Stephanie Parent