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RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Sirs & Madam:

This letter provides notice of intent to sue the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), (together, "the action agencies") for violations of § 7 of the

Endangered Species Act (ESA), 16 U.S.C. § 1536.¹ These violations arise from the action agencies' failure to comply with the substantive and procedural requirements imposed by ESA § 7, 16 U.S.C. § 1536, in the planned construction of the Columbia River Crossing project (CRC). This notice also includes the U.S. Army Corps ("Corps") because, although it has not yet taken final agency action regarding the CRC project, the underlying consultation and Biological Opinion for the CRC clearly include actions that will require permits issued by the Corps. However, the Corps has not initiated or completed § 7 consultation with the National Marine Fisheries Service (NMFS) regarding the impacts of permits that the agency will have to issue for the CRC to move forward, and the Corps would violate the ESA if it issues such permits based on the existing Biological Opinion issued by NMFS regarding the CRC. This notice is provided pursuant to § 11(g) of the ESA, 16 U.S.C. § 1540(g). The National Marine Fisheries Service ("NMFS") also has violated ESA Section 7, but its illegal actions are reviewable under the Administrative Procedure Act, and NMFS is receiving this notice as a courtesy.

Attached to and included with this notice letter are multiple supporting documents. An attached list of those supporting documents is provided in hard copy. Actual copies of all listed and supporting documents are included in digital form on the attached and incorporated CD. Most of those listed and incorporated documents also are specifically addressed or discussed, and again incorporated by reference, below.²

The CRC Project is among the largest, new, in-water projects to be proposed for the Columbia Basin since multiple salmonids were listed under the ESA during the 1990s. That fact, however, and many others, are not acknowledged or discussed in NMFS' relatively short and cursory January 19, 2011 Biological Opinion ("BiOp"). Although that BiOp acknowledges the seriously degraded nature of salmonid habitat throughout the Columbia Basin, and in the specific area of the CRC project, NMFS and the action agencies have no problem approving one more very large obstacle for the listed salmon and steelhead to overcome, both when they migrate downstream as juveniles and upstream as adults. This obstacle will cause "temporary impacts" during at least six years of construction activity, and thus will directly affect several generations of salmon, and the CRC project also would become another permanent source of water pollution, increased predation, and in-water hindrance to the survival and recovery of these species. Perhaps most significantly, the BiOp makes no attempt to quantify or analyze how much harm to salmonids or their critical habitat this project will cause in addition to the harms NMFS has already authorized in hundreds of BiOps for other projects. Thus neither NMFS nor the action agencies have any basis in fact for their conclusions that the addition of this project's impacts will not jeopardize the continued existence of any listed salmonid population or adversely modify their critical habitat. Accordingly, the action agencies have failed to comply with their responsibilities under the ESA to ensure that construction and operation of the CRC does not jeopardize the continued existence of listed salmon and steelhead evolutionarily significant units (ESUs) in the Columbia River Basin.

¹ This letter is sent by the undersigned on behalf of the Northwest Environmental Defense Center (NEDC), the Coalition for a Livable Future (CLF), and the Northeast Coalition of Neighborhoods (NECN). A list of these organizations' business addresses is appended hereto.

² All documents included with or cited in this letter are hereby incorporated by this reference.

I. BACKGROUND

A. Listed Columbia River Basin Salmon and Steelhead Populations

The dramatic decline of Columbia River Basin salmon and steelhead populations is reflected in the listings of eight salmon Evolutionarily Significant Units (ESUs) and five steelhead Distinct Populations Segments (DPSs) in the Columbia River Basin under the ESA. Many other ESUs & DPSs are already extinct.

In 1991, the National Marine Fisheries Service (NMFS) listed the Snake River sockeye ESU as endangered under the ESA. 56 Fed. Reg. 58,619 (Nov. 20, 1991). Six months later, NMFS listed the Snake River spring/summer chinook ESU and the Snake River fall chinook ESU as threatened under the ESA. 57 Fed. Reg. 14,653 (Apr. 22, 1992). In 1997, NMFS further listed the Snake River steelhead DPS as threatened and the Upper Columbia River steelhead DPS as endangered. 63 Fed. Reg. 43,937 (Aug. 18, 1997). Subsequently, the agency listed the Lower Columbia River steelhead DPS as threatened, the Upper Columbia River spring-run chinook ESU as endangered, and the Lower Columbia River chinook ESU as threatened. 63 Fed. Reg. 13,347 (March 19, 1998); 64 Fed. Reg. 43,308 (March 24, 1999). In 1999, NMFS listed as threatened the Middle Columbia River steelhead DPS, the Upper Willamette River steelhead DPS, the Upper Willamette River chinook ESU, and the Columbia River chum ESU. 64 Fed. Reg. 14,517 (March 25, 1999); 64 Fed. Reg. 14,517 (March 25, 1999); 64 Fed. Reg. 43,308 (March 24, 1999); 64 Fed. Reg. 14,517 (March 25, 1999). Finally, while originally part of a larger Lower Columbia River/Southwest Washington ESU, in 2005 NMFS listed the Lower Columbia River coho ESU as threatened. In 2006, NMFS reclassified the Upper Columbia River steelhead DPS from endangered to threatened. 71 Fed. Reg. 834 (Jan. 5, 2006).

Recent status reviews of all ESUs & DPSs confirm that each of them remains at significant risk, and no ESU or DPS has been proposed for delisting.

B. The Columbia River Crossing Project & NMFS' ESA Determinations

FHWA and FTA are the lead federal action agencies responsible for ensuring that the proposed CRC complies with the ESA. Accordingly, on June 25, 2010, FHWA and FTA initiated formal ESA consultation with NMFS regarding the effects of the CRC on ESA-listed salmonids. Ultimately NMFS issued a Biological Opinion January 19, 2011, making a determination of no jeopardy to listed salmonid species and no adverse modification to their critical habitat.

II. LEGAL FRAMEWORK OF THE ESA

Under ESA § 7(a)(2), “[e]ach federal agency *shall ... 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) (emphasis added). The obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. See Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by § 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); Conner v. Burford, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

The ESA's substantive protections are implemented in part through the consultation process, which Congress designed explicitly "to ensure compliance with the [ESA's] substantive provisions." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). As the Ninth Circuit stated, "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." Id. (citing TVA v. Hill, 437 U.S. 153). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency (NMFS, in the case of anadromous fish) and, if appropriate, obtain a Biological Opinion evaluating the effects of any federal agency action on listed species and their critical habitat. Id. If NMFS concludes that a proposed action is likely to jeopardize a listed salmon species or result in adverse modification of its critical habitat, NMFS must propose reasonable and prudent alternatives, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); Idaho Dept. of Fish and Game v. National Marine Fisheries Service, 56 F.3d 1071 (9th Cir. 1995).

Compliance with the procedural requirements of the ESA – making the determination of the effects of the action through the consultation process – is integral to compliance with the substantive requirements of the Act. Under this statutory framework, federal actions that "may affect" a listed species or critical habitat may not proceed unless and until the federal agency ensures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; Pacific Coast Fed'n of Fishermen's Assoc. v. U.S. Bureau of Reclamation, 138 F. Supp.2d 1228 (N.D. Cal. 2001) (enjoining delivery of Klamath project water to irrigators until a valid consultation was complete); Greenpeace v. National Marine Fisheries Service, 106 F. Supp.2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); Conner v. Burford, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) ("the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development.").

Even after the procedural requirements of a consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agencies. An action agency's reliance on an inadequate, incomplete, or flawed Biological Opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. See, e.g., Stop H-3 Ass'n. v. Dole, 740 F.2d 1442, 1460 (9th Cir. 1984). Thus, the substantive duty not to jeopardize listed species (or adversely modify critical habitat) remains in effect regardless of the status of the consultation. While this substantive duty is most readily fulfilled by implementing a federal action that properly has been determined not to cause jeopardy, or by implementing a valid RPA that results from a properly completed consultation, an action agency is "technically free" to choose another alternative course of action if it can independently ensure that the alternative will avoid jeopardy. See Bennett v. Spear, 520 U.S. 154, 170 (1997).

In addition, ESA's Section 7(a)(1) requires federal agencies to "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) (emphasis added). Like the duty to avoid jeopardy, this conservation duty is discharged, in part, in consultation with NMFS. Id. A program of "conservation" is one that brings the species to the point of recovery and delisting. Id. § 1532(3).

Section 9 of the ESA prohibits all activities that cause a "take" of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C); 50 C.F.R. § 17.11(h). Congress intended the term "take" to be defined in

the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. See S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995. “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NMFS has further defined “harm” as “an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2412-14 (1995) (upholding similar definition used by Fish and Wildlife Service).

Section 9’s take prohibition applies on its face to two of the 13 listed ESUs/DPSs affected by the CRC because they are listed as “endangered.” Additionally, NMFS has enacted rules pursuant to ESA § 4(d) that extend the take prohibition to the eleven salmon and steelhead ESUs/DPSs in the Columbia River Basin that are listed as “threatened.” 16 U.S.C. § 1533(d); 65 Fed. Reg. 42,422 (July 10, 2000). While the rules contain some exemptions to the take prohibition for threatened species, none are applicable here.

Federal actions that have completed a legally valid § 7(a)(2) consultation and have a Biological Opinion generally obtain an “incidental take statement (ITS). 50 C.F.R. § 402.14(i). The ITS authorizes the agency, if in compliance with the terms and conditions of the ITS, to “take” listed species without facing § 9 liability. Id. § (i)(5). However, if a Biological Opinion is legally flawed, the ITS cannot shield the action agency or any other person or entity from liability under § 9.

Finally, NMFS’ regulations implementing the ESA state that re-initiation of consultation is required whenever “a new species is listed or critical habitat designated that may be affected by the identified action” 50 C.F.R. § 402.16(d). Failure to take this mandatory action is a clear violation of the ESA.

III. NMFS’ and THE FEDERAL ACTION AGENCIES’ VIOLATIONS OF THE ESA

A. NMFS and the Action Agencies Have Failed to Ensure That Their Actions Are Not Likely to Jeopardize the Continued Existence of Listed Species or Destroy or Adversely Modify Their Critical Habitat.

On January 19, 2011, NMFS issued the CRC Biological Opinion (“the BiOp”). As stated above, NMFS concluded in the BiOp that the proposed CRC project would not jeopardize the continued existence of the thirteen listed ESUs/DPSs of salmonids in the Columbia River Basin. The Action Agencies’ December 7, 2011, Record of Decision for the CRC specifically, on page 32 of that ROD, adopts and incorporates the BiOp. The BiOp is arbitrary, capricious and contrary to law for reasons that include, but are not limited to, those described below:

- The jeopardy analysis in the BiOp fails to actually evaluate whether the effects of the proposed action, when combined with the effects of the environmental baseline and cumulative effects, is likely to jeopardize the survival and recovery of the species. 50 C.F.R. § 402.14(g).
- The action area is defined improperly insofar as it is restricted to include only a very limited portion of the true geographic scope of the impacts from the CRC. The action area, as defined, does not include “all areas” that will be “directly or indirectly” affected by the project, including upland areas. Further, by unlawfully constricting the action area, the BiOp excludes many of the adverse impacts on salmon that must be considered as part of the status of the species and the environmental baseline. Specifically, the BiOp fails to appropriately address

significant impacts from the urbanization of the Columbia River watershed, and specifically the area from the Bonneville Dam to the mouth of the Columbia River.

- The jeopardy analysis in the BiOp never identifies the threshold conditions that would constitute jeopardy to the species and hence never actually assesses whether the proposed action will avoid jeopardy. See Consultation Handbook at 4.2, attached hereto and by this reference incorporated herein (explaining how consultation should identify “where future jeopardy thresholds may be reached”).
- The jeopardy analysis in the BiOp fails to include an accurate and complete description of the additive impacts from previously authorized incidental take statements that should be considered together with the incidental take authorized by the proposed action in determining whether the proposed action will cause jeopardy. Similarly, the BiOp fails to account for past additive impacts to designated critical habitat in assessing whether additional adverse impacts to critical habitat for listed ESUs destroy or adversely modify this critical habitat.
- The BiOp and its underlying analysis fail to utilize the best scientific and commercial data available. For example, one of several omissions is the fact that the BiOp ignores the additive impacts of past authorized incidental take and does not consider or cite the results of NMFS’ December 10, 2010, Pacific Northwest salmonid ESU/DPS status review. Ford MJ (ed.), Cooney T, McElhany P, Sands N, Weitkamp L, Hard J, McClure M, Kope R, Myers J, Albaugh A, Barnas K, Teel D, Moran P, Cowen J. 2010. Status review update for Pacific salmon and steelhead listed under the Endangered Species Act: Northwest. Draft U.S. Department of Commerce, NOAA Technical Memorandum NOAA-TM-NWFSC-XXX, attached hereto and by this reference incorporated herein.
- The ITS for the proposed action that accompanies BiOp is invalid because it relies on the inadequate jeopardy analysis in the BiOp, fails to address all of the take caused by the CRC, and fails to identify adequate independent triggers for reinitiation of consultation apart from implementation of the action as proposed. See, e.g., Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1039 (9th Cir. 2007) (“The Incidental Take Statement and BiOp are rendered tautological, they both define and limit the level of take using the parameters of the project.”); National Wildlife Federation v. NMFS, 235 F. Supp.2d 1143, 1160 (W.D. Wash. 2002).
- The normal in-water work window (IWWW) for work in the Columbia River is November 1 through February 28. ODFW Guidelines at 2, attached and incorporated. However, the CRC Project proposal includes in-water work from at least September 15 to April 15, and possibly even year round. The in-water work window guidelines are based on ODFW district fish biologists’ recommendations, with primary consideration given to important fish species including anadromous and other game fish and threatened, endangered, or sensitive species. *Id.* at 1. While ODFW has not issued a variance to the normal in-water work window, NMFS, in its Biological Opinion, expresses its approval of an expanded in-water work window for the CRC Project. CRC Biological Opinion, at 80. NMFS routinely denies such variances for projects with much smaller potential impacts on salmon. See Lake Oswego Denial, attached and incorporated. The Biological Opinion does not address the state variance process for in-water work, and it does not specifically or adequately address the increased impacts to wildlife from work during this time of special sensitivity to salmonids. This is a very significant and material omission from the BiOp.
- The BiOp discusses the fact that the CRC project will degrade habitat by significantly increasing the shaded areas over the Columbia River and North Harbor (BiOp at 60) and thus increasing predation on juvenile salmonids, both during construction and permanently. However the BiOp does not consider such adverse impacts when reaching its conclusions

regarding jeopardy or adverse modification of critical habitat, and the BiOp's incidental take statement completely ignores this source of take (and fails to authorize such take). Thus the action agencies lack incidental take authorization for the acknowledged increase in predation on salmonids that this project will cause.

- The BiOp's analysis of and conclusions regarding the impacts from the CRC's storm water discharges are incomplete and not supported. For example, although the CRC project will greatly increase the amount of impervious surface area and resulting storm water run-off, although the BiOp acknowledges that such run-off could have significant adverse impacts on salmonid populations or their critical habitat, although the CRC project has no plan for treating such discharges that is even close to complete or comprehensive, and although the BiOp contains no specific information regarding existing water quality in the project area or likely discharges of pollution into specific water bodies even after partial treatment of storm water run-off, the BiOp nevertheless somehow concludes that the CRC project will result in a net reduction in storm water pollution discharges and a net improvement in water quality for listed salmonids.
- The BiOp concludes without adequate support or explanation that the CRC project will result in a net reduction of in-water structures that adversely impact salmonids and their critical habitat.
- The BiOp repeatedly refers to impacts during construction as "temporary" without acknowledging or adequately considering that such impacts would in fact continue for multiple years and outside the standard in-water work window for the project area and such "temporary" effects thus would directly and adversely impact multiple generations of at least some salmonid populations.
- The BiOp acknowledges that four salmonid populations in Oregon are at very high risk for extinction and that three of those high-risk populations will have the highest adverse impacts from just one aspect of the CRC project, impact pile driving, over multiple years. But the BiOp somehow concludes with little or no analysis or explanation, that the CRC project is not "expected" to "exceed a reasonable level of mortality when added to other biological opinions." BiOp at 72.
- Although the BiOp acknowledges that "phased" construction may occur (BiOp at 3), it makes no attempt to analyze or consider the increased or longer temporal impacts from such "phased" construction.

Jeopardy is defined by regulation to mean an action that "reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. For reasons including those described above, the BiOp does not satisfy ESA § 7(a)(2) and its implementing regulations. The action agencies, however, have an independent duty to ensure that their actions avoid jeopardy. The proposed action, when added to the environmental baseline and cumulative effects, has both short-term and long-term adverse impacts on listed species that could push vulnerable species into jeopardy. Accordingly, by relying on NMFS' flawed BiOp for their conclusions that implementing the proposed action is not likely to jeopardize listed ESUs, the action agencies have violated section 7(a)(2). See, e.g., Stop H-3 Ass'n. v. Dole, 740 F.2d 1460; Resources, Ltd. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993).

The action agencies also have failed to ensure that their actions are not likely to destroy or adversely modify the designated critical habitat of listed species. See 50 C.F.R. § 402.02 (adverse modification defined as "direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species."). The ESA defines critical habitat as those areas with the "physical or biological features essential to the conservation of the species...." 16 U.S.C. §1532(5)(A)(i). The final rules designating critical habitat for listed salmon and steelhead

describe many features of critical habitat essential for their recovery, including, among other things, adequate water quality and quantity, water temperature, water velocity, and safe passage conditions. See, e.g., 58 Fed. Reg. at 68544 (1993). The proposed agency action adversely impacts these features of designated critical habitat and is likely to substantially decrease the ability of the critical habitat to contribute to the recovery of the species. See Gifford Pinchot Task Force, 378 F.3d 1059. NMFS' BiOp does not adequately assess the current status of designated critical habitat as a basis for determining whether yet more adverse impacts to critical habitat will destroy or adversely modify this habitat. By implementing the proposed action under these circumstances and relying on NMFS' flawed BiOp, the action agencies have failed to ensure that their actions are not likely to destroy or adversely modify critical habitat and thus are violating section 7(a)(2).

Furthermore, while simply listing previously authorized incidental take of listed salmonids without any actual analysis or quantitative data is a violation of the action agencies' obligation to ensure survival and recovery of listed species, the BiOp barely even attempts to list such activities. In order to satisfy the ESA, an analysis of additive impacts to Columbia River Basin ESA-listed salmonids should take into account those Federally-authorized actions resulting in or allowing take of the ESUs/DPSs considered in the BiOp. The BiOp also should consider the additive adverse impacts of all actions that have affected the status of affected ESUs, as well as consider all cumulative effects across the range of these ESUs.

For the CRC Project Biological Opinion, NMFS and the action agencies should have taken into account the "best available science" relating to all listed ESUs. They did not do so. For example, for the LCR chinook ESU, although ODFW issued the final *Lower Columbia River Conservation and Recovery Plan for Oregon Populations of Salmon and Steelhead* on August 6, 2010 (attached hereto and by this reference incorporated herein), although NMFS issued the *Ford* report on December 10, 2010, and although the Lower Columbia Fish Recovery Board (LCFRB) issued the *Lower Columbia Salmon Recovery & Fish & Wildlife Subbasin Plan* on June 6, 2010 (available at http://lcfrib.gen.wa.us/Recovery_Plans/RP_Frontpage.htm and by this reference incorporated herein), the BiOp does not consider these reports in its analysis of the status of the Lower Columbia River Chinook ESU. Rather, the BiOp relies exclusively on the 2007 *McElhany* report and a 2006 NMFS report to Congress in its status evaluation of the listed species. This alone renders the BiOp inadequate.

However, even if the three 2010 reports referenced above *had* been considered in the BiOp's discussion of the species' statuses, the BiOp still needed to consider the additive impacts to the listed species from federally-authorized take that was not taken into account by the 2010 reports. On this point it is helpful to consider the limits of the data evaluated in these 2010 reports. To illustrate, even the most recent report (NMFS' status update from December 10, 2010) only considers species data including and prior to 2009. Ford *et al* 2010, at 244 ("For the current evaluation [of the LCR chinook ESU], we have compiled data through 2008 or 2009 for most populations, though data are available for two populations (Clatskanie fall and Sandy late fall) only through 2006.") Similarly, ODFW's August 6, 2010, report relies only on data up to 2007 in determining the overall current status risk classification for Oregon populations of LCR Chinook. *See id* at 69-75. Finally, the LCRRB's June 6, 2010, report relies only on data from and before 2004 in its population status assessment³ and on data from and before 2007 in its modeled population status forecasting.⁴ Accordingly, it is obvious that

³ WA Lower Columbia Salmon Recovery and Fish & Wildlife Subbasin Plan, 2010, Appendix E – Population Ranking, at E-2.

⁴ *See* WA Lower Columbia Salmon Recovery and Fish & Wildlife Subbasin Plan, 2010, Appendix E, Chapter 12.

NMFS could not have relied upon these three reports for up-to-date information regarding the LCR chinook ESU.

In fact, the most up-to-date scientific information available to NMFS when it issued the January 19, 2011 CRC Project Biological Opinion was available in the form of NMFS' prior-issued biological opinions affecting the LCR chinook ESU. For example, between January 1, 2005⁵ and the issuance of the CRC Project Biological Opinion, NMFS issued 228 biological opinions relevant to the LCR chinook ESU, the vast majority of which included discussion of adverse impacts on this ESU and its critical habitat, as well as incidental take statements for these fish. In the CRC Biological Opinion, NMFS should have considered the sum of these impacts and authorized incidental take in determining the current status of this ESU and its critical habitat, which then should serve as the basis for the CRC BiOp's assessment of whether yet more adverse impacts to this ESU and its critical habitat as a result of the CRC are likely to jeopardize the continued existence of LCR chinook or destroy or adversely modify its critical habitat. FHWA and FTA should have done the same, especially considering NMFS' failure to do so and the action agencies' independent obligation to ensure that their actions do not result in violation of the ESA. In fact, this analysis should have been completed for all 13 ESUs/DPSs considered in the BiOp.

The sum total of all adverse impacts to the species and its critical habitat, including unconsidered incidental take statements, often represents a significant degree of additive adverse impacts to ESUs/DPSs. Unfortunately, no agency is keeping track of these additive impacts. Considering the precarious status of listed Columbia River Basin salmonids, this failure could easily lead to the addition of the proverbial "straw that broke the camel's back," and the ESUs/DPSs would cease to exist. Accordingly, NMFS and action agencies must develop a system for tracking the additive impacts of authorized take and past and foreseeable future harm to listed ESUs/DPSs and their critical habitat.

NMFS itself has recognized the need to track these additive impacts in considering proposed actions that adversely affect habitat of listed salmon and steelhead. For example, when it listed Lower Columbia River steelhead as threatened in 1998, NMFS identified the Corps' inability to keep track of the additive effects of in-water activities it controls as one of the inadequate regulatory mechanisms that led to the need to protect these fish under the ESA. Discussing the Corps' regulation of dredging, fill, and in-water construction, NMFS noted that "the [Corps] guidelines do not specify a methodology for assessing cumulative effects or how much weight to assign them in decision making. Furthermore, the [Corps] does not have in place any process to address the additive effects of the continued development of waterfront, riverine, coastal, and wetland properties." 63 Fed. Reg. at 13359 (March 19, 1998); see also 63. Fed. Reg. at 11500 (nearly identical language in proposal to list upper Willamette steelhead as threatened). Two years later, when NMFS adopted rules governing take of ESUs affected by the CRC Project, NMFS received several comments suggesting ways to assess cumulative effects to salmon and their habitat. *See* 65 Fed. Reg. at 42440 (2000). NMFS responded that the suggestions had "great merit," but cautioned that "assessing cumulative impacts is a difficult process. In most cases, there are no adequate standards for habitat productivity, and developing them is a complex and long-term task. NMFS intends to work with co-managers to develop the necessary standards and assessment techniques." *Id.* NMFS also recognized take of listed salmon and steelhead

⁵ 2005 is a necessarily arbitrary starting date for counting biological opinions. The exact number of prior-issued biological opinions and accompanying ITSs NMFS, FHWA, and FTA should analyze for any given biological opinion depends on the latest accurate and complete status review for the relevant ESUs and ESU sub-populations. Existing status reviews are not comprehensive assessments of the ESUs and their critical habitat.

as a type of cumulative effect it needed to track, assuring commenters that “NMFS is moving toward implementing a method for assessing total take across broad sectors.” *Id.*⁶

More than a decade later, however, NMFS and its co-managers (including FHWA, FTA, and the Corps), have yet to develop a means to track and assess the additive impacts of the continuing litany of projects that adversely affect (and occasionally benefit) salmon habitat. Nor has NMFS implemented a means of tracking the total incidental take of listed ESUs and DPSs that the agency authorizes in virtually all of its biological opinions.

Attached hereto, and incorporated herein by this reference, are 28 exhibits illustrating the beginnings of one potential approach to taking account of past authorized habitat degradation and incidental take. These 28 exhibits are broken down as 14 tables and 14 Gantt charts, all representing the incidental take authorized by NMFS of the 13 salmonid ESUs/DPSs considered in the BiOp, spanning from June 24, 2009, to January 19, 2011 (the day the CRC BiOp was issued). While not nearly sufficient for purposes of developing a systematic approach to evaluating additive impacts, NMFS could use such an approach as a starting point for a full evaluation of additive impacts.

Also attached hereto, and incorporated herein by this reference (and previously provided to FHWA and FTA in PEAC’s comments on the CRC FEIS⁷), are all 678 Biological Opinions issued by NMFS between January 1, 2005, and January 19, 2011, in relation to the 13 listed Columbia River Basin salmonid ESUs/DPSs. The vast majority of these Biological Opinions include discussions of adverse impacts to affected ESUs and their critical habitat, as well as ITSs for ESA-listed salmonids; all of these impacts should have been considered and accounted for in the CRC BiOp in assessing the status of the ESUs and their critical habitat, as well as in determining whether the affected ESUs and critical habitat could withstand the significant additional adverse impacts and incidental take without running afoul of section 7(a)(2). This was not even attempted, and therefore the BiOp violates the § 7(a)(2) consultation requirement.

1. The CRC BiOp does not accurately describe the statuses of the listed species or their degraded critical habitat.

The CRC BiOp inaccurately describes the statuses of the listed ESUs and DPSs affected by the CRC Project, including the degraded state of their critical habitat. While the BiOp describes some of the factors limited recovery of these species (namely, lost/degraded floodplain connectivity and lowland stream habitat, degraded water quality, high water temperature, reduced stream flow, and reduced access to spawning/rearing habitat), it falls short of providing a clear, complete, and accurate picture of the species’ and critical habitat conditions.

On February 23, 2004, NMFS issued a Biological Opinion that illustrates what is closer to an accurate portrayal of the statuses of these fish and their critical habitat. Biological Opinion on EPA’s Proposed Approval of Revised Oregon Water Quality Standards, attached hereto and by this reference incorporated herein. In that BiOp, NMFS examined “all basins in Oregon with anadromous fish use...or designated critical habitat.” *Id.* at 6. In that Biological Opinion, NMFS determined the

⁶ In these passages, both the commenters and NMFS itself were referring to “cumulative impacts” in a broad sense of this term rather than using the regulatory definition of this term set forth in NMFS’ section 7 regulations. In other words, these references to cumulative impacts meant the sum total of all past and present impacts to listed ESUs, not only the non-federal actions that were reasonably certain to occur in the future.

⁷ PEAC’s FEIS comments also included preliminary tables and a Gantt chart illustrating how the BiOp information could be utilized.

degraded status of listed salmon and steelhead habitat throughout the state “is such that there must be a significant improvements [sic] in the environmental conditions [these fish] experience,” and declared that “[a]ny further degradation of these conditions would significantly reduce the likelihood of survival and recovery of these species.” *Id.* at 24. NMFS regulations define “jeopardize the continued existence of” as engaging in an action that “reduce[s] appreciably the likelihood of both the survival and recovery of the species in the wild....” 50 C.F.R. § 402.02. Regulations define “destruction or adverse modification” of critical habitat in a similar manner. *See id.* Accordingly, in its 2004 Water Quality Standards BiOp, NMFS acknowledged that further habitat degradation would jeopardize listed salmon and steelhead species and their critical habitat. In authorizing further habitat degradation for the CRC, however, NMFS completely ignored its prior conclusion in describing the status of the listed species and their critical habitat. This is a clear violation of the ESA.

2. The CRC BiOp does not take into account NMFS’ jeopardy and adverse modification finding for the 2008 Willamette Project Biological Opinion.

On July 11, 2008, NMFS issued the Biological Opinion for the continued operation of the Willamette Project in the Willamette River basin, finding jeopardy to listed salmon and steelhead and adverse modification of their critical habitat. *See* Willamette Project Biological Opinion and Supplement Biological Assessment, attached hereto and by this reference incorporated herein. The CRC BiOp does not consider whether the 2008 Willamette Project Biological Opinion Reasonable and Prudent Alternative (RPA) is being implemented effectively so as to avoid jeopardy and adverse modification to Willamette River Basin salmonids and their habitat and to ensure recovery.

Some of the RPA’s measures designed to benefit ESA-listed salmonids include measures to improve upstream and downstream fish passage, improve downstream conditions by improving flows and water quality, updating hatchery operations and facilities, improving irrigation diversions and water contracts, upgrading fish collection facilities and outplanting procedures, and conducting habitat improvement projects. *See* Willamette Project BiOp RPA. Accordingly, while it is a failure simply to not track implementation of the RPA, the failure is compounded by the fact that the agencies do not seem aware that the RPA is not and has not been fully implemented according to its terms. For example, and as shown by the attached Willamette River Flow Data records from the U.S. Geological Survey (USGS) (attached hereto and by this reference incorporated herein), flow requirements under the RPA have not been met on many occasions. Specifically, RPA 2.3 states, in part, as follows:

Minimum Mainstem Flow Objectives: The USACE will operate the system in a manner to meet or exceed minimum mainstem flow objectives listed in Table 9.2-1 as measured at Salem and Albany, Oregon, following the framework described in Appendix D and in collaboration with the Services and other entities as provided in RPA measures 1 and 2.1. Based on RM&E results (RPA measure 9 in section 9.9 below) and operational experience, and with the approval of the Services and review by the FM Committee, the USACE will amend mainstem flow objectives (Table 9.2-1) in its Annual Willamette Conservation Plan....

According to the attached USGS survey data, however, mainstem Willamette instantaneous minimum flow objectives set in RPA Table 9.2-1 have *not* been met on August 8, 2008, August 20-25, 27-28, and September 5-7, 2010. 14191000 Willamette River at Salem, OR, Discharge, Cubic Feet Per Second, Water Year October 2007 to September 2008. 14191000 Willamette River at Salem, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values; 14174000 Willamette River at Albany, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values.

Similarly, RPA 2.4 states, in part, as follows:

Tributary Flow Objectives –Project Release Minimums: The USACE will operate Willamette project dams as described in this subsection to meet or exceed minimum tributary flow objectives listed in Table 9.2-2 to ensure adult fish access to existing spawning habitat below USACE dams, protect eggs deposited during spawning, and provide juvenile rearing and adult holding habitat for listed salmonids and other fishes within system constraints described in Appendix D.

According to the USGS data, however:

- Middle Fork Willamette River tributary flow objectives for below **Dexter Reservoir**, set in Table 9.2-2, have *not* been met on September 1-10 and 12-13, 2009, nor on March 3-11, 2010. 14150000 Middle Fork Willamette River Near Dexter, OR, Discharge, Cubic Feet Per Second, Water Year October 2008 to September 2009, Daily Mean Values. 14150000 Middle Fork Willamette River Near Dexter, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values;
- Middle Fork Willamette River tributary flow objectives for below **Hills Creek Reservoir**, set in Table 9.2-2, have *not* been met on February 5-9, 11-22, and 24-26, nor on March 3, and 6-8, 2009, nor on April 8 and 21, 2010. 14145500 Middle Fork Willamette River Above Salt Creek, Near Oakridge, OR, Discharge, Cubic Feet Per Second, Water Year October 2008 to September 2009, Daily Mean Values. 14145500 Middle Fork Willamette River Above Salt Creek, Near Oakridge, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values;
- Fall Creek tributary flow objectives for below **Fall Creek Reservoir**, set in Table 9.2-2, have *not* been met on September 1, 5, and 6-30, 2008, nor February 2-22 and 28, March 1-7 and 9-11, and September 15-30, 2009, nor April 6-7 and September 1-16, 2010. 14151000 Fall Creek Below Winberry Creek, Near Fall Creek, OR, Discharge, Cubic Feet Per Second, Water Year October 2007 to September 2008, Daily Mean Values. 14151000 Fall Creek Below Winberry Creek, Near Fall Creek, OR, Discharge, Cubic Feet Per Second, Water Year October 2008 to September 2009, Daily Mean Values. 14151000 Fall Creek Below Winberry Creek, Near Fall Creek, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values;
- North Santiam tributary flow objectives for below **Big Cliff Reservoir**, set in Table 9.2-2, have *not* been met on July 25-26 and 28, August 1-20 and 27-31, and September 1-7, 2008, nor July 3-4, 8-12, 15, and 25-31, August 1-31, and September 1-24, 2009, nor July 10-15 and 24-30, August 2-17 and 19-30, and September 1-18 and 26-29, 2010. 14184100 North Santiam River at Greens Bridge, Near Jefferson, OR, Discharge, Cubic Feet Per Second, Water Year October 2007 to September 2008, Daily Mean Values. 14184100 North Santiam River at Greens Bridge, Near Jefferson, OR, Discharge, Cubic Feet Per Second, Water Year October 2008 to September 2009, Daily Mean Values. 14184100 North Santiam River at Greens Bridge, Near Jefferson, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values;
- South Santiam tributary flow objectives for below **Foster Reservoir**, set in Table 9.2-2, have *not* been met on September 1 and 20-22, 2008, nor August 21-24 and 26-28, September 1-30, and October 1-15 and 17-19, 2009, nor March 16-25 and 27-31, April 1-11, 14-16, 18, and 20-30, May 1-12 and 14, August 6-9, 12-15, and 19, and September 1-14, 2010. 14187500 South Santiam River at Waterloo, OR, Discharge, Cubic Feet Per Second, Water Year October 2007 to September 2008, Daily Mean Values. 14187500 South Santiam River at Waterloo, OR, Discharge, Cubic Feet Per Second, Water Year October 2008 to September 2009, Daily Mean

Values. 14187500 South Santiam River at Waterloo, OR, Discharge, Cubic Feet Per Second, Water Year October 2009 to September 2010, Daily Mean Values;

- McKenzie River tributary flow objectives for below **Cougar Reservoir**, set in Table 9.2-2, have *not* been met on September 1-30, 2008, nor June 27-30 and September 2-7, 2009.

14159500 South Fork McKenzie River Near Rainbow, OR, Discharge, Cubic Feet Per Second, Water Year October 2007 to September 2008, Daily Mean Values. 14159500 South Fork McKenzie River Near Rainbow, OR, Discharge, Cubic Feet Per Second, Water Year October 2008 to September 2009, Daily Mean Values.

The above flow requirement failures demonstrate lack of compliance with the Willamette Project RPA and exacerbate the precarious situation of Willamette River ESA-listed salmon and steelhead.

As a further example of failure to implement the RPA, the Willamette Project Action Agencies have failed to complete the required Willamette Fish Operation Plan (WFOP) in the required time period. RPA 4.3 states, in part, as follows:

Willamette Fish Operations Plan: The Action Agencies will complete a Willamette Fish Operations Plan (WFOP) by October 1, 2008. The Action Agencies will coordinate with the Services when preparing the WFOP. This Plan and its annual revisions will be consistent with this Opinion and incidental take statement, and will take into account and be coordinated with related biological opinions issued by the USFWS to the fullest extent practicable. The Action Agencies will carry out measures identified in the WFOP and in annual revisions to the WFOP.

Despite the deadline of October 1, 2008, the WFOP is still in draft form. See Draft Willamette Fish Operations Plan, attached hereto and by this reference incorporated herein. Considering that the *Rationale/Effect of RPA 4.3* explains that “The WFOP is a critical link between measures required by the Proposed Action and this RPA and on-the-ground implementation activities,” this is a significant instance of noncompliance with the RPA. Furthermore, the lack of a final WFOP over three years after it was supposed to be completed demonstrates the lack of coordination and cooperation between the Willamette Project action agencies and NMFS.

Perhaps the most significant instance of lack of tracking and implementation of the Willamette Project RPA is the failure to meet scheduled deadlines for the construction of Cougar Dam downstream fish passage. RPA 4.12.1 states, in full, as follows:

Cougar Dam Downstream Passage: The Action Agencies will investigate the feasibility of improving downstream fish passage at Cougar Dam through structural modifications as well as with operational alternatives, and if found feasible they will construct and operate the downstream fish passage facility.

- The Action Agencies will take necessary initial steps beginning no later than 2010, which may include a site/concept study, design report, plans and specifications, if appropriate.
- The Action Agencies will establish a Major Milestone (MM2) (described in measure 4.13 below) near the end of 2010, in conjunction with completion of the Cougar Site/Concept Study and DDR. The Action Agencies will make “go/no go” decisions on the feasibility of Cougar downstream passage facilities. In the case of the decision to move forward on implementation, the decision will potentially be focused on alternative locations and designs for downstream passage facilities and operations. (NMFS assumes that fish passage improvements at Cougar Dam will not require further authorization because passage was specifically authorized and constructed as part of the original Cougar Dam plans; NMFS also assumes that the proposed Cougar trap will be used for upstream fish passage.)
- The Action Agencies will complete construction of any structural fish passage facilities by Dec. 2014; and by 2015, begin operating downstream fish passage facilities at Cougar Dam. Any necessary NEPA compliance required for implementation of the proposed facilities will occur in conjunction with development of the DDR.

Although required by RPA 4.12.1, no Major Milestone was established "near the end of 2010." In fact, there is no indication that the Willamette Project Action Agencies are anywhere near establishing a Major Milestone.

Because the *Rationale/Effect* of RPA 4.12 is that "lack of passage is the most significant limiting factor to the viability of the affected populations of UWR Chinook and UWR steelhead," the lack of a Major Milestone (or any indication of a pending "go/no-go" decision) suggests that the Action Agencies are either (1) not on schedule to complete construction of downstream passage at Cougar Dam by December 2014, as required by RPA 4.12.1 in the event that construction is undertaken at all, or (2) the Action Agencies plan to decide that downstream passage at Cougar Dam is not feasible, and are delaying official decision on the matter because such a decision would trigger re-initiation of consultation under the ESA.

Considering NMFS' general lack of tracking the implementation of the Willamette Project RPA, the CRC BiOp cannot legally authorize incidental take.

B. The Action Agencies are Taking Actions that are an Irretrievable Commitment of Resources and that "May Affect" Listed Species And Their Designated Critical Habitat Without a Valid Biological Opinion.

The substantive goal of consultation under ESA § 7(a)(2) is to ensure that federal actions do not jeopardize the continued existence of listed species or adversely modify its critical habitat. Federal agencies may not take action that could harm a listed species until they have completed the ESA § 7(a)(2) consultation process and have received a valid biological opinion. The BiOp is not valid and the action agencies may not rely on it to conclude that their actions will avoid jeopardy or adverse modification of critical habitat, or to satisfy their procedural duties under the ESA. Under these circumstances, the ESA requires that the action agencies avoid any irreversible or irretrievable commitment of resources or any action that causes harm to listed species or designated critical habitat pending compliance with the procedural requirements of § 7(a)(2). See 16 U.S.C. § 1536(d); Pacific Coast Fed'n of Fishermen's Assoc., et al. v. BOR, 138 F. Supp.2d 1228 (N.D. Cal. 2001)(requiring that BOR suspend water deliveries in the Klamath Basin, unless flows were fully adequate for fish, pending completion of biological opinion); Greenpeace v. National Marine Fisheries Service, 80 F. Supp.2d 1137 (W.D. Wash. 2000) (enjoining implementation of fishing management plans in specific areas pending completion of BiOp).

C. The Action Agencies Have Failed to Comply With § 7(a)(1).

As discussed above, ESA § 7(a)(1) is an additional, mandatory obligation that agencies develop programs for the recovery of listed species, in consultation with NMFS. See Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998). As the BiOp acknowledges, the biological requirements of salmon and steelhead in the mainstem of the Columbia and Snake River are not being met, and consequently, the species continue to slide towards extinction. In neither the BiOp nor any other document, however, have the action agencies identified, or consulted with NMFS regarding, those steps they will take to recover these species to the point where they can be removed from ESA protection. For example, these action agencies are responsible for creating and maintaining highways and bridges that cause significant water pollution and in-water adverse impacts to listed salmonid populations and their critical habitat throughout the Columbia Basin. See BiOp at 48. But these same agencies have not undertaken a comprehensive, basin-wide conservation program to use their authorities to conserve

listed ESUs; such a program could contain measures such as reducing the pollution from those highways and bridges or reducing the number of in water structures required for their bridges or the adverse impacts from such structures. For the CRC project these action agencies specifically refused to consider and advance for detailed analysis bridge designs that would have required far fewer in-water structures than the design approved by the ROD and considered by the BiOp.

D. The Action Agencies have Failed to Reinitiate Consultation with NMFS after the Designation of Eulachon Critical Habitat and Violated Section 7(d) by issuing their ROD before Reinitiating and Completing such Consultation.

Action agencies are required to re-initiate ESA consultation whenever “a new species is listed or critical habitat designated that may be affected by the identified action” 50 C.F.R. § 402.16(d). Accordingly, after the designation of critical habitat for ESA-listed Columbia River Basin eulachon in October 2011, FHWA and FTA became subject to a non-discretionary duty to re-initiate consultation under the ESA. To date, based on NMFS’ responses to PEAC’s FOIA requests, FHWA and FTA have failed to re-initiate consultation with NMFS regarding the effects of the CRC to Columbia River Basin eulachon critical habitat, which is a clear violation of the ESA. Moreover, in violation of Section 7(d), 16 U.S.C. § 1536(d) the action agencies issued their ROD for the CRC project even though they had acknowledged that they would need to reinitiate consultation with NMFS regarding eulachon critical habitat. As NMFS explained in the context of another large project approved by a different federal agency before completing the required Section 7 consultation, the issuance of a final agency decision is itself a violation of Section 7(d), and NMFS should refuse to reinitiate consultation with these action agencies until they withdraw the CRC Project’s premature ROD. See NMFS October 7, 2008 Request for Rehearing to FERC (hard copy attached).

IV. CONCLUSION

If FHWA and FTA do not cure the violations of law described above immediately, upon expiration of the 60 days after the date of this notice the parties to this notice intend to file suit against FHWA and FTA pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). If you would like to discuss the significant ESA violations described herein and seek a mutually acceptable solution to them, please feel free to contact the undersigned.

Sincerely,



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