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Via Certified Mail

September 13, 2018

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Re: Notice of Intent to Sue Under the Endangered Species Act

Dear Sirs/Madams:

We, the Sierra Club, Center for Environmental Law and Policy, and Columbiana (hereinafter the "Conservation Groups") hereby respectfully provide notice that we intend to sue you for violations of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* arising from your actions related to maintaining and operating Enloe Dam on the Similkameen River in Washington, as well as proposing, providing opinions about, or approving the construction of hydroelectric facilities at the dam.

Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. The ESA mandates “institutionalized caution.” *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2010). The ESA aims “to preserve the ability of natural populations to survive in the wild” and “to promote populations that are self-sustaining without human interference.” *Trout Unlimited v. Lohn*, 559 F.3d 946, 957 (9th Cir. 2009). Through the ESA, “Congress clearly intended that [agencies] give the highest of priorities and the benefit of the doubt to preserving endangered species.” *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1074 (9th Cir. 2005).

To achieve these goals, the ESA “provides both substantive and procedural provisions designed to protect endangered species and their habitats.” *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1121 (9th Cir. 1997). First, when a species has been listed or critical habitat designated under the ESA, Section 7 mandates that all federal agencies “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). Through consultation under Section 7, federal agencies work with the Services to determine whether their actions will jeopardize ESA-listed species’ survival or adversely modify designated critical habitat, and if so, to identify ways to modify the action to avoid that result. 50 C.F.R. § 402.14.

The consultation process begins when the action agency asks the Services whether any listed or proposed species may be present in the area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The threshold for a “may affect” determination and the required Section 7 consultation is low so as to ensure that listed species are not jeopardized. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc).

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which the Services may concur in writing with the agency’s determination. 50 C.F.R. § 402.14(a)-(b). If the agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if the Services do not concur with the agency’s “not likely to adversely affect” determination, the agency must engage in “formal consultation.” 50 C.F.R. §§ 402.02, 402.14(a). 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”).

To complete formal consultation, the Services must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Where the Services conclude that the proposed action

“will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A).¹

In addition, if the Services conclude the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, either as proposed or through the implementation of the reasonable and alternatives described in the biological opinion, the Services must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” the Services consider necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the action agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Taking of listed species without the coverage of an incidental take statement violates Section 9 of the ESA. 16 U.S.C. § 1538.

Finally, after consultation is complete, federal agencies have a continuing duty to reinstitute consultation on agency actions over which they retain, or are authorized to exercise, discretionary involvement or control if:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) 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;
- (c) 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
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

Apart from Section 7, a “core protection of the ESA” is the prohibition on “take” under Section 9 of the ESA. *S. Yuba River Citizens League v. NMFS*, 629 F. Supp. 2d 1123, 1125 (E.D. Cal. 2009). Section 9 specifies that no “person,” including any “officer, employee, agent

¹ An action is deemed to jeopardize the continued existence of a species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery” of the species. 50 C.F.R. § 402.02. Thus, an agency is prohibited from acting in a way that will reduce appreciably the likelihood of the species’ survival *or* recovery. *Nat’l Wildlife Fedn v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008); *see NMFS, The Habitat Approach, Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids*, 3 (1999) (“[I]n order for an action to not ‘appreciably reduce’ the likelihood of survival, it must not prevent or appreciably delay recovery.”).

department, or instrumentality of . . . any State,” may cause the “take” of members of an endangered species. 16 U.S.C. § 1538(a)(1)(B); *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1033 (9th Cir. 2007) (Section 9 “establishes a blanket prohibition” on taking). “Take” is broadly defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Each of these components of prohibited “take” has independent meaning. *Babbitt v. Sweet Home Chapter, Communities for Greater Or.*, 515 U.S. 687, 697-98 & 702 (1995). The “take” prohibited by Section 9 need not be the result of purposeful action. *Nat’l Wildlife Fed. v. Burlington Northern R.R.*, 23 F.3d 1508, 1509 (9th Cir. 1994) (trains accidentally hitting and killing grizzly bears constitutes take).

Fish in the Similkameen River

Steelhead trout are found throughout the upper Columbia River (“UCR”) basin in Washington. In 1997, the National Marine Fisheries Service (“NMFS”) listed as endangered under the ESA all naturally-spawned anadromous steelhead populations below natural and manmade impassable barriers in streams in the Columbia River basin upstream from the Yakima River to the U.S.-Canada border, including in the Similkameen River. 62 Fed. Reg. 43,937 *et seq.* (Aug. 18, 1997). (The Similkameen River flows into the Okanogan River.) Subsequently, in 2006, NMFS reclassified UCR steelhead to threatened with extinction in the UCR basin. 71 Fed. Reg. 834 (Jan. 5, 2006).² There are five independent populations of steelhead in the UCR basin: the Wenatchee, Entiat, Methow, Okanogan and Crab Creek populations. 72 Fed. Reg. 57,303, 57,304 (Oct. 9, 2007). In 2007, NMFS adopted a Recovery Plan for the UCR steelhead Distinct Population Segment, and found that “the Okanogan steelhead population is not viable and has a greater than 25% chance of extinction in 100 years.” NMFS Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, at vi (August 2007).

In 1999, the U.S. Fish and Wildlife Service (“FWS”) listed bull trout in the contiguous United States as threatened with extinction under the ESA. 64 Fed. Reg. 58,910 *et seq.* (Nov. 1, 1999). Bull trout have been documented in the Okanogan River downstream of Enloe Dam.

Enloe Dam

Completed in 1923, Enloe Dam is a 54-foot high, 290-foot crest length concrete dam built on the Similkameen River northwest of Oroville, Washington. Okanogan Public Utility District (“PUD”) acquired Enloe Dam in 1945. From 1956 to 1958, Okanogan PUD operated a power generating station at Enloe Dam. In 1981, Okanogan PUD applied for a new license to restart the power facility. In 1983, the Federal Energy Regulatory Commission (“FERC”) issued a 50-year license for hydroelectric facilities at Enloe Dam that required Okanogan PUD to account for fish passage at the dam. In 1986, FERC rescinded the license due to regional disagreement over fish passage at the Project. According to NMFS, “FERC stated that anadromous fishery issues had to be resolved before a licensing decision could be made.” 2012 BiOp at 9.

² After NMFS reclassified UCR steelhead as threatened with extinction, in 2006 it extended to UCR steelhead protective regulations under Section 4(d), including the prohibition on “take.” 71 Fed. Reg. 5178 *et seq.* (Feb. 1, 2006).

In 1991, Okanogan PUD applied for another FERC license. In 1996, FERC issued a license. However, after NMFS listed UCR steelhead under the ESA in 1997, FERC stayed effectiveness of the 1996 license and requested formal consultation on the effects of the license on UCR steelhead. In 1998, NMFS issued a biological opinion related to licensing Enloe Dam to generate electricity. 1998 BiOp. NMFS found that it was necessary to require fish passage as a term and condition of a FERC license, so as to not foreclose any opportunity to promote recovery of steelhead. 1998 BiOp at 9. However, “there was substantial opposition to passage from Canadian Tribes and the Provincial government of British Columbia, pointing to the paucity of evidence that anadromous fish historically passed Similkameen Falls just downstream of the Project.” *Id.* Citing the continued disagreement over anadromous fish passage at the Project, FERC again rescinded the license. *Id.*

In 2005, the scientists that formed NMFS’ critical habitat analytical review team noted that for steelhead in the Similkameen River, “[h]istorically occupied areas in this subbasin are now blocked by Enloe Dam.” CHART at 107. Given the relatively limited occupied steelhead habitat in the Similkameen River basin, “[t]he CHART also concluded that historically occupied areas upstream of Enloe Dam may be essential for the conservation of the ESU.” *Id.* The CHART “observed that Enloe Dam blocks access to more than 95 percent of the potential anadromous fish habitat in the Similkameen River.”³ *Id.* The CHART concluded UCR steelhead in the Similkameen “would likely benefit if the extant population had access to spawning/rearing habitat upstream and that these areas may warrant consideration as critical habitat.” *Id.*

In June, 2011, Okanogan PUD provided FWS with a draft biological assessment of the effects on bull trout of a license for Enloe Dam. Okanogan PUD determined the issuance of a license for the project “may affect” but was “not likely to adversely affect” bull trout. In May, 2011, FERC determined the issuance of the license would have “no effect” on bull trout. Accordingly, FERC did not consult with FWS to obtain its concurrence with FERC’s determination, nor FWS’s opinion as to effects on bull trout of Enloe Dam.

On August 31, 2011, FERC issued an Environmental Assessment (“EA”) to assess environmental effects of approving the most recent license application from Okanogan PUD. FERC, Environmental Assessment for Hydropower License Enloe Hydroelectric Project—FERC Project No. 12569. FERC stated that “[d]am removal would have no effect on anadromous fish passage in the Similkameen River. There are no anadromous fish found directly downstream of the dam due to the presence of the falls, which acts as a natural barrier to anadromous fish passage.” EA at 30. The EA served as FERC’s biological assessment under the ESA. FERC forwarded the EA to NMFS.

In September, 2012, NMFS issued a Biological Opinion on effects on UCR steelhead of the proposed license to construct hydroelectric facilities at Enloe Dam. NMFS, Endangered

³ The Recovery Plan notes that one study identified the “upper Similkameen” as steelhead habitat, but states “that is questioned based on uncertainty of fish being able to ascend Enloe Falls before construction of Enloe Dam at that site.” Recovery Plan at 33.

Species Act Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation Original Major License for the Enloe Hydroelectric Project Public Utility District No. 1 of Okanogan County FERC Project No. 12569-001, NMFS Consultation Number: 2011/02038 (September 27, 2012) (“2012 BiOp”). The 2012 BiOp is devoid of analysis of the potential effects of Enloe Dam itself, specifically the blockage of upstream, on steelhead survival or recovery. Instead, NMFS identified the “[p]otential direct and indirect effects to UCR steelhead and critical habitat from Project operations” to include only:

- (1) injury or mortality from contact with turbine runners;
- (2) temporary reduction in downstream flow due to emergency powerhouse shutdown;
- (3) decreased dissolved oxygen levels in the lower river;
- (4) elevated total dissolved gas in the lower river from spill; and
- (5) leaks and spills of chemical contaminants or hazardous materials.

2012 BiOp at 28-29. Accordingly, NMFS concluded that issuing the license to operate the dam would not jeopardize listed steelhead.

In July, 2013, FERC issued a license to authorize the Okanogan PUD to commence construction of hydroelectric facilities at Enloe Dam. FERC No. 12569.

Confirmation of Fish Affected by Enloe Dam

In August, 2017, NMFS wrote to FERC stating: “Chinook salmon have been observed jumping at the base of [Enloe] dam,” which indicates “salmon can navigate the falls roughly 300 feet downstream of the dam.” Letter from D. Bambrick, Chief Columbia Basin Branch, NMFS West Coast Region to K. Bose, Secretary, FERC (Aug. 3, 2017). Noting that UCR steelhead “are normally better leapers than Chinook salmon, if Chinook salmon can navigate the falls then it is very likely that steelhead are doing so.” *Id.* NMFS concluded that “[i]n light of this new information” FERC was required to reinitiate ESA section 7 consultation for UCR steelhead. *Id.*

Similarly, on May 9, 2018, FWS wrote to FERC, stating that “there is new video evidence of what appear to be Chinook salmon jumping at the base of Enloe Dam, demonstrating that salmon can ascend the falls located approximately 300 feet downstream of the dam. The Service assumes that if Chinook salmon can ascend to the base of Enloe Dam, other anadromous fish such as ESA-listed steelhead, as well as bull trout, are also likely to do so.”

Violations of the ESA

NMFS’s 2012 BiOp is unlawful because it is not based upon the best available scientific data related to the presence of UCR steelhead near Enloe Dam, and therefore of the effects on steelhead of licensing hydroelectric facilities at the dam. 50 C.F.R. § 402.14(g)(8).

Since NMFS issued the 2012 BiOp and FERC issued the license, FERC and NMFS have unlawfully failed to reinitiate consultation under the ESA to consider and address new

information that reveals effects of the action that may affect UCR steelhead or critical habitat in a manner or to an extent not previously considered. 16 U.S.C. § 1536(a); 50 C.F.R. § 402.16.

FERC's determination in 2011 that issuance of a license for hydroelectric facilities at Enloe Dam would have "no effect" on bull trout is arbitrary and capricious. Further, FERC has unlawfully failed to initiate consultation with FWS to consider and address the impacts of its actions on bull trout or its critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. § 402.14.

Enloe Dam unlawfully causes "take" of UCR steelhead and bull trout under Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). Okanogan PUD is liable for take. In addition, FERC is liable for any take caused by future dam operation. *Id.* § 1538(g).

Conclusion

The Conservation Groups intend to sue FERC, NMFS, and Okanogan PUD for their respective violations of the ESA. This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). If you do not take action within 60 days to remedy these violations of the ESA, the Conservation Groups will be forced to file suit.

The Conservation Groups, however, would prefer to resolve these issues without litigation and are prepared to engage in productive discussions. We welcome the opportunity to meet with you to ensure that UCR steelhead and bull trout are protected from the effects of relicensing operations at Enloe Dam.

Sincerely,

Andrew Hawley
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