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WESTERN ENVIRONMENTAL LAW CENTER

Via Certified Mail, Return Receipt Requested

April 10, 2020

Ryan D. McCarthy
Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310-0101

Todd T. Semonite
Commanding General and Chief of Engineers
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314-1000

Aaron R. Dorf
Commander and District Engineer
U.S. Army Corps of Engineers
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David L. Bernhardt
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240-0001

Aurelia Skipwith
Director
U.S. Fish and Wildlife Service
1849 C Street N.W., Room 3331
Washington, D.C. 20240-0001

Robyn Thorson
Regional Director
U.S. Fish and Wildlife Service
911 N.E. 11th Ave.
Portland, Oregon 97232-4181

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

Dear Sirs and Mesdames:

I write on behalf of Willamette Riverkeeper and The Conservation Angler (“Notifiers”) to respectfully request that you remedy ongoing violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. The U.S. Army Corps of Engineers (“Corps”) and the U.S. Fish and Wildlife Service (“Service”) and its officials and employees have violated and are violating the ESA by authorizing, approving, funding, facilitating or otherwise undertaking, among other actions, the production and release of hatchery summer steelhead trout into the upper Willamette River basin in Oregon, that jeopardize and/or impede the recovery of native winter steelhead trout, and destroy or adversely modify the species’ critical habitat.

1. Summary:

Winter steelhead are native to the upper Willamette River basin, and are listed as threatened with extinction under the ESA. Upstream of Willamette Falls, winter steelhead are found in, among other river basins, the Mollala, the North Santiam, the South Santiam, the Calapooia, and the McKenzie. The Willamette River and these tributaries are designated as critical habitat for winter steelhead. See 50 C.F.R. § 226.212.

The Corps and the Service have chosen to exercise their discretion and help produce and release summer steelhead into the upper Willamette River basin. For its part, the Corps has exercised its discretion under the Flood Control Acts of 1938 and 1950, and associated authorities, and funds the production and release of summer steelhead into river basins in the upper Willamette River basin. The Corps has also contracted with, and allows the use of facilities it owns or controls, for the production and release of summer steelhead into river basins in the upper Willamette River basin. For its part, the Service has exercised its discretion under the Sports Fish Restoration Act, 16 U.S.C. § 777-777k, to fund the production and release of summer steelhead into river basins in the upper Willamette River basin.

The summer steelhead released into the upper Willamette River basin are not native to the basin. Summer steelhead released into the basin compete with, displace, prey on and interbreed with winter steelhead. Further, fishing for summer steelhead results in harm or death to winter steelhead. These direct and indirect effects individually and collectively jeopardize the continued existence of winter steelhead, impede the species’ recovery, and destroy or adversely modify the species’ critical habitat.

2. Notifiers:

Willamette Riverkeeper was founded in 1996 and focuses on protecting and restoring the resources of the Willamette River basin in Oregon. Willamette

Riverkeeper works on programs and projects ranging from Clean Water Act compliance and river education, to Superfund cleanup and habitat restoration. Willamette Riverkeeper had a significant role in the 2008 Biological Opinion related to the effects of federal facilities and projects on native wild salmon and steelhead trout in the Willamette River basin, and is working to protect threatened salmon and steelhead from the harmful and harassing effects of artificial “wave” river surfing on the Willamette River.

The Conservation Angler is non-profit group that advocates for wild fish and fisheries, and to protect and conserve wild steelhead, salmon, trout and char throughout their Pacific range. The Conservation Angler is a watch-dog organization—holding public agencies, countries and nations accountable for protecting and conserving wild fish for present and future generations— using legal, administrative and political means necessary to prevent the extinction and to foster a long-term recovery of wild steelhead, salmon, trout, and char to fishable and ultimately, harvestable abundance.

3. Winter Steelhead in the Upper Willamette River Basin.

On March 25, 1999, the National Marine Fisheries Service (“NMFS”) listed the naturally-spawning anadromous steelhead (*Oncorhynchus mykiss*) in the Upper Willamette River evolutionarily significant unit (“ESU”) as threatened with extinction under the ESA. 64 Fed. Reg. 14517 (March 25, 1999). This ESU occupies the Willamette River and certain of its tributaries upstream from Willamette Falls. *Id.* at 14521. Steelhead from the upper Willamette River are “genetically distinct from those in the lower river,” likely because of Willamette Falls, which was a barrier to some anadromous fish migration before fish ladders were built in 1885. *Id.* Native steelhead in the upper Willamette River basin enter fresh water primarily in March and April, and are called “winter” steelhead. *Id.*

When it listed the Upper Willamette River ESU of winter steelhead, NMFS was “concerned about the universally declining trends in abundance in the relatively small-to-moderate sized runs of winter steelhead in this ESU.” *Id.* at 14524. NMFS noted that steelhead “native to the Upper Willamette River ESU are late-run winter steelhead, but introduced hatchery stocks of summer and early-run winter steelhead also occur in the upper Willamette River.” *Id.* NMFS was “concerned about the potential risks associated with interactions between non-native summer and wild winter steelhead, whose spawning areas are sympatric in some rivers (especially the Mollala and North and South Santiam Rivers).” *Id.*

Subsequently, in 2006, NMFS listed or re-listed ten distinct population segments (“DPSs”) of West Coast steelhead as threatened with extinction, or as endangered, under the ESA. 71 Fed. Reg. 834 (Jan. 5, 2006). The listing includes the upper Willamette River DPS. *Id.* at 860. NMFS found that the upper Willamette River DPS “continues to be spatially well distributed, occupying each of the four major subbasins (the Mollala, North Santiam, South Santiam, and Calapooia Rivers).” *Id.*

For the upper Willamette River DPS, in 2006, NMFS found that “[t]he recent 5-year mean abundance . . . remains low for an entire DPS (5,819 adults), and individual populations remain at low abundance. Long-term trends in abundance are negative for all populations in the DPS, reflecting a decade of consistently low returns during the 1990s.” *Id.* at 853.

Hatchery winter steelhead programs once existed in the upper Willamette River basin, but were terminated in the 1990s. By contrast, in the late 1960s, the Oregon Department of Fish and Wildlife (“ODFW”) introduced hatchery summer steelhead into the upper Willamette River basin. The stock for these non-native fish were taken from the Washougal River and Skamania Hatchery in Washington. These summer-run steelhead are not native to the Willamette River and are not of the same ESU as native winter steelhead. Since 1973, the broodstock for summer steelhead releases into the upper Willamette River basin have been collected from adult hatchery summer steelhead returning to the South Santiam.

4. Federal Agency Roles in the Hatchery Summer Steelhead Program.

The Corps owns, has ownership interests in, or otherwise controls the South Santiam hatchery and the South Santiam Fish Facility on the South Santiam River, which produce, release, or collect summer steelhead. The Corps owns, has ownership interests in, or otherwise controls the Marion Forks hatchery and the Minto Fish Facility on the North Santiam River, which produce, release, or collect summer steelhead. The Corps owns, has ownership interests in, or otherwise controls other facilities in the upper Willamette River basin that produce, transport, release, or collect summer steelhead. The Corps has exercised its discretion and contracted with or otherwise entered into agreements that allow ODFW to use its facilities to produce, transport, collect, and/or release summer steelhead into the upper Willamette River basin where winter steelhead occur. The Corps has exercised its discretion and funds the production, collection, transport, and/or release of summer steelhead into the upper Willamette River basin where winter steelhead occur. For its part, the Service has exercised its discretion and funds the production, collection, transport, and/or release of summert steelhead into the upper Willamette River basin where winter steelhead occur.

5. 2019 Biological Opinion.

In 2019, NMFS issued a Biological Opinion as to the effects of its decision to approve, among other things, a Hatchery and Genetic Management Plan (“HGMP”) for the summer steelhead program in the upper Willamette River basin. The Corps is among the agencies that proposed the summer steelhead HGMP to NMFS. The 2019 Biological Opinion documents varying degrees of harm to winter steelhead from summer steelhead, including but not limited to competition, displacement, predation, interbreeding (genetic introgression), and fishing impacts. NMFS ultimately concluded that the summer steelhead program does not jeopardize the

continued existence of winter steelhead, and does not destroy or adversely modify the species' critical habitat. NMFS's conclusion does not relieve the Corps or the Service from independently assessing and complying with their substantive duties under ESA Section 7 to ensure that any action they undertake will not jeopardize the continued existence of winter steelhead, or destroy or adversely modify its critical habitat. The Corps and the Service have failed to make such an independent assessment, or if they have, any conclusion that their actions will not jeopardize winter steelhead or destroy or adversely modify its critical habitat is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

6. Violations of ESA Section 7.

The Corps and the Service are required to insure that any actions they authorize, fund, facilitate, or otherwise control are not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). The actions of the Corps and the Service as detailed above jeopardize the continued existence of winter steelhead and destroy and adversely modify the species' critical habitat. This serves as Notifiers' notice of intent to sue the Corps, the Service, and their officials under the ESA for these violations. 16 U.S.C. § 1540(g)(2).

Notifiers anticipate that during the 60-day period when the Corps and the Service consider this notice, and before Notifiers file any lawsuit, the agencies may wish to meet and confer as to their positions as to these matters. Notifiers welcome such an engagement. Notifiers are represented by counsel in this matter:

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Thank you for your time and consideration.

Sincerely,

/s/ Peter M.K. Frost
Peter M.K. Frost
Of Attorneys for Notifiers