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January 4, 2011

***Certified Mail - Return Receipt Requested***

Hon. Gary Locke  
U.S. Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W.  
Washington, D.C. 20230

Lieutenant General Robert L. Van Antwerp  
Commanding General & Chief of Engineers  
U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20314

Brigadier General John R. McMahon  
Commander and Division Engineer  
U.S. Army Corps of Engineers  
P.O. Box 2870  
Portland, OR 97208

Gentlemen:

On behalf of the Audubon Society of Portland, we are writing to inform you that unless the problems discussed below are remedied within 60 days, we intend to file suit in federal court against the U.S. Army Corps of Engineers ("Corps") for failing to comply with its affirmative duty under section 7(a)(2) of the Endangered Species Act (ESA) to insure against both jeopardy to the continued existence of listed salmonids and destruction or adverse modification of their critical habitat in connection with the agency's decision to proceed with navigation dredging of Post Office Bar in the Lower Willamette River.

We hope the Corps will reconsider its decision to proceed with this action and instead recommit itself to ensuring the survival and recovery of listed species as required by federal law.

Pursuant to 16 U.S.C. §1540(g), this letter constitutes notice as required by the ESA prior to initiating litigation.

### **SPECIES BACKGROUND**

The Columbia and Willamette River systems provide important habitat for several steelhead and salmon species listed as threatened under the ESA. The National Marine Fisheries Service (“NMFS”), pursuant to the requirements of the ESA, listed Lower Columbia River chinook salmon,<sup>1</sup> Upper Willamette River chinook salmon,<sup>2</sup> Columbia River chum salmon,<sup>3</sup> Lower Columbia River steelhead<sup>4</sup> and Upper Willamette River steelhead<sup>5</sup> in 1999. In 2005, NMFS listed Lower Columbia River coho salmon as threatened<sup>6</sup> and critical habitat for Lower Columbia River Chinook salmon, Lower Columbia River steelhead, Upper Willamette River Chinook salmon and Upper Willamette River steelhead.<sup>7</sup>

Steelhead and salmon are anadromous fish. They are born and rear in fresh water tributaries of the Columbia River, including the Willamette River, migrate downstream through the Columbia River system to the Pacific Ocean where they grow and live as adults, and return to their natal streams and lakes to spawn and die. Cold, oxygen-rich water with ample vegetation and woody debris is crucial to the health of salmon and steelhead populations.

Habitat conditions within the Willamette River Basin – and the lower Willamette in particular – are highly degraded. Many stream banks have been channelized, off-channel areas removed, tributaries put into pipes, and the river disconnected from its floodplain as the lower valley was urbanized. Silt loading to the Lower Willamette River has increased over historical levels due to logging, agriculture, road building, and urban and suburban development within the watershed. Limited opportunity exists for large wood recruitment to the lower Willamette River due to the paucity of mature trees along the shoreline, and the lack of relief along the shoreline to catch and hold the material. The lower Willamette River has been deepened and narrowed through channelization, diking and filling, and much of the shallow-water habitat has been converted to deep-water habitat: 79% of the shallow water through the lower river has been lost through historic channel deepening. *See* National Marine Fisheries Service (NMFS), Post Office Bar Biological Opinion (2010) at 12. The Willamette River system drains nearly 11,500 square miles and all juvenile salmonids raised in this system must pass through the Lower Willamette on their migrations to and from the ocean.

The Corps proposes to allow dredging in a portion of the Willamette River from river miles 2.1 to 2.4 in an effort to improve ease of navigation for large vessels. Such action will adversely affect salmonid species by causing physical, chemical, and biological changes to the

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<sup>1</sup> 64 Fed. Reg. 14,308 (Mar. 24, 1999).

<sup>2</sup> *Id.*

<sup>3</sup> 64 Fed. Reg. 14,508 (Mar. 25, 1999).

<sup>4</sup> 63 Fed. Reg. 13,347 (Mar. 19, 1998).

<sup>5</sup> 64 Fed. Reg. 14,517 (Mar. 25, 1999).

<sup>6</sup> 70 Fed. Reg. 37,160 (Jun. 28, 2005).

<sup>7</sup> 70 Fed. Reg. 52,630 (Sept. 2, 2005).

designated critical habitat of listed salmon and steelhead, as well as by directly affecting individual members of the listed Evolutionarily Significant Units (ESUs). These adverse effects include interaction direct mortality to fish migrating through or rearing within the action area during dredging, diminishing benthic and pelagic forage opportunities, and negative water quality effects (turbidity and increased exposure to contaminants). Dredging will also maintain the existing habitat as deep-water habitat despite it being in a depositional area that has the potential to develop into shallow-water habitat, a rare habitat-type in the Lower Willamette River. Post Office Bar BiOp at 14.

## **RELEVANT LAW AND ANALYSIS**

The ESA mandates federal agencies must “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.” 16 U.S.C. § 1536(a)(2). Even after it engages in section 7’s interagency consultation process, the Corps has an independent duty to insure that its actions avoid jeopardy to a species or destruction or adverse modification of its critical habitat. In deciding to authorize navigation dredging of Post Office Bar, the Corps has failed to insure that the adverse impacts of the proposed dredging action, when considered in light of the current status of the listed ESUs and their designated critical habitat and when added to the environmental baseline and cumulative effects, are not likely to jeopardize their continued existence and/or destroy or adversely modify the critical habitat of listed salmonid ESUs present in the action area.

### **NMFS Obligations under Section 7 of the ESA**

During formal consultation under section 7, NMFS has a responsibility to assess the effects of a proposed federal agency action on listed ESUs and designated critical habitat from the starting point of the “current status of the listed species or critical habitat.” 50 C.F.R. §402(g)(2). NMFS then assesses the effects of the action under consideration together with cumulative effects to determine whether the proposed agency action is likely to adversely affect listed species or destroy or adversely modify critical habitat. *See id.* at §402(g)(4); Section 7 Consultation Handbook at 4-20 to 4-22. Finally, NMFS assesses whether the effects of the action are likely to jeopardize the continued existence of listed ESUs or destroy or adversely modify critical habitat. In assessing jeopardy in particular, NMFS asks whether the effects of the proposed action are likely to reduce appreciably the survival and recovery of the entire species across its range. *See id.* at 4-35. This method of assessment makes it vital for NMFS and the action agency to have as clear an understanding as possible of the range-wide status of a listed species and critical habitat.

NMFS has made a number of determinations finding that listed Willamette ESUs (as well as other ESUs affected by the Post Office Bar dredging) and their critical habitat are facing severe threats to their very existence. The agency documented extensive threats to these ESUs and their habitat in its initial listing determinations. *See* notes 1-7, *supra*. In 2005, NMFS issued a biological opinion assessing Oregon water quality standards for waterbodies across the state in which it asserted:

“[T]here must be a significant improvements [sic] in the environmental conditions [listed ESUs in Oregon] experience, over those currently available under the environmental

baseline, to meet the biological requirements for survival and recovery of these species. Any further degradation of these conditions would significantly reduce the likelihood of survival and recovery of these species due to status of the environmental baseline. NMFS BiOp on the State of Oregon's water quality standards for temperature (February 23, 2004). Four years later, NMFS determined that the Corps' proposed operations of dams in the Willamette Basin, coupled with the poor condition of Willamette ESUs and their habitat, was likely to jeopardize the continued existence of Upper Willamette steelhead and Chinook; the biological opinion that reached this conclusion set forth a detailed reasonable and prudent alternative (RPA) for operations of the system that NMFS believes will not violate section 7. This RPA includes direction to develop a prioritized list of major habitat restoration activities, and implement two of these actions by 2010. Willamette Dams BiOp at 9-77 to 9-79.

Even after issuing a biological opinion finding jeopardy to Willamette ESUs, NMFS has issued at least 26 BiOps for projects on the Willamette – all no jeopardy, no adverse modification of critical habitat findings – for additional federal projects that have adverse impacts on Willamette ESUs and their critical habitat. These BiOps join scores of other biological opinions dating back over a decade which determine that actions adversely affecting the listed ESUs and their critical habitat are consistent with section 7 of the ESA. See Attachment A. Plaintiffs hereby incorporate for future reference the substance of all the biological opinions listed in Attachment A. In virtually every one of these biological opinions, NMFS fails to adequately assess the current status of the affected ESUs and their critical habitat; the agency has no discernable methodology to keep track of the additive adverse effects on the ESUs and their habitat stemming from the many separate federal agency actions, as well as non-federal actions, that have already taken place over time. Accordingly, NMFS' repeated boilerplate analyses of successive adverse impacts on listed ESUs and critical habitat present in the Willamette have no rational bearing on whether listed ESUs face jeopardy, or whether each successive action is likely to result in the destruction or adverse modification of designated critical habitat. This is because NMFS cannot accurately determine the status of these species and their critical habitat without incorporating an analysis that considers "all past human...activities," which include actions authorized in other BiOps. 50 CFR 402.14(g)(2). In other words, since jeopardy and adverse modification assessments are based on a species-wide analysis, and NMFS fails to do an adequate job of assessing the status of the species and critical habitat range-wide, the agency's repeated no jeopardy or adverse modification determinations – including one included within the biological opinion for the Post Office Bar project – are arbitrary and capricious. Accordingly, to the extent the Corps relied on NMFS' Post Office Bar BiOp to comply with its section 7 obligations in approving dredging at Post Office Bar, the Corps also acted arbitrarily.

### **US Army Corps Obligations Under Section 7 of the ESA**

The Corps has a duty independent from the section 7 consultation process to determine whether the agency is meeting its responsibilities under section 7 to avoid jeopardy and destruction or adverse modification of critical habitat. *See Resources Limited v. Robertson*, 35 F.3d 1300 (9th Cir. 1995). In approving the Post Office Bar project, the Corps failed to meet its independent obligation under section 7(a)(2). The agency failed to consider the current status of the listed ESUs and their critical habitat in light of impacts from past federal and non-federal actions adversely affecting these species, including those action in the biological opinions referenced in Attachment A. The Corps has thus ignored the additive effects on listed species of many adverse impacts over multiple years, and thus cannot rationally ensure that the proposed

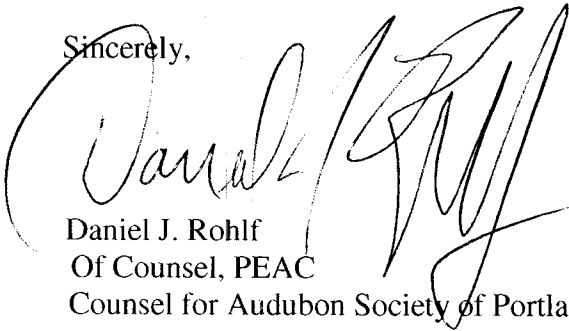
dredging activities at Post Office Bar will avoid jeopardizing listed ESUs or adversely modify their habitat.

Accordingly, the Corps has failed to ensure that its decision to authorized dredging at Post Office Bar is not likely to jeopardize the continued existence of listed ESUs or destroy or adversely modify the designated critical habitat. *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 proposed agency action adversely impacts these features of designated critical habitat and destroys and adversely modifies the ability of the critical habitat to contribute to the recovery of the species. *See Gifford Pinchot Task Force*, 378 F.3d 1059; *NWF v. NMFS*, 524 F.3d at 933-936. By implementing the proposed action under these circumstances, the action agency is violating section 7(a)(2).

**CONCLUSION**

We hope that the Corps will act expeditiously to remedy the violations of the law described in this letter. If you have any questions about these issues, please contact me using the letterhead contact information.

Sincerely,



Daniel J. Rohlf  
Of Counsel, PEAC  
Counsel for Audubon Society of Portland