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September 22, 2016

Via Certified Mail - Return Receipt Requested

Ms. Regina McCarthy, Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Mr. Dennis McLerran, Regional Administrator
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Ms. Penny Pritzker, Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230

Dr. Kathryn Sullivan, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue NW
Washington, D.C. 20230

Dr. Russell Callender, Assistant Administrator
National Ocean Service
N/MB6, SSMC4, Room 9149
1305 East-West Highway
Silver Spring, MD 20910

Re: Sixty-Day Notice of Intent to Sue NOAA and EPA for Violating ESA Section 7 Regarding the Agencies' Approvals of Washington's Non-Point Source Pollution Control Programs and Related Funding Decisions.

Dear Ms. McCarthy, Mr. McLerran, Ms. Pritzker, Dr. Sullivan, and Dr. Callender:

This letter provides you with sixty days' notice that Northwest Environmental Advocates ("Advocates") intends to sue you, the U.S. Environmental Protection Agency ("EPA"), the U.S. Department of Commerce, the National Oceanic and Atmospheric Administration ("NOAA"), and the individuals that administer those agencies (collectively the "Agencies") for failing to initiate and complete consultation under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, on the Agencies' decisions to conditionally approve Washington's coastal non-point source pollution control program, including the Agencies' related funding decisions under the Clean Water Act and Coastal Zone Management Act. Additionally, this letter provides you with sixty days' notice that Advocates' intends to sue EPA and the individuals that administer that agency for failing to initiate and complete Section 7 consultation on its decisions to approve the state of Washington's nonpoint source management plan,

which Washington developed pursuant to Section 319 of the Clean Water Act, 33 U.S.C. § 1329, its related findings that Washington has made "satisfactory progress" in implementing that program, and its related funding decisions under Section 319 of the Clean Water Act, 33 U.S.C. § 1329. By failing to initiate and complete Section 7 consultation, the Agencies' have failed to ensure the Agencies' actions are not likely to jeopardize ESA-listed species in Washington or result in the destruction or adverse modification of designated critical habitat, as required by the Endangered Species Act.

Advocates provides this notice of intent to sue pursuant to 16 U.S.C. § 1540(g). Kampmeier & Knutsen PLLC and Earthrise Law Center represent Advocates in this matter and any response to this notice of intent to sue should be directed to us at the addresses listed below.

I. LEGAL BACKGROUND.

A. The Clean Water Act.

In 1972, Congress adopted amendments to the Clean Water Act ("CWA") in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA establishes an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]" 33 U.S.C. § 1251(a)(2). To accomplish that goal, the CWA requires states to develop water quality standards that establish the desired conditions of each waterway within the state's regulatory jurisdiction. 33 U.S.C. § 1313(a); 40 C.F.R. § 131.2. Water quality standards must be sufficient to "protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA]." 33 U.S.C. § 1313(c)(2)(A). Upon review and approval by EPA, a state's water quality standards become a component of a state's regulatory scheme.

The CWA requires states to review the quality of surface waters on a regular basis. If a state finds that waters do not meet applicable water quality standards, CWA Section 303(d) requires the state to add the waters to its list of impaired waters. The CWA then requires states to develop total maximum daily loads ("TMDLs") for all waters on its CWA Section 303(d) list. A TMDL sets the allowable total daily loading of a pollutant for a particular waterbody that, when achieved, will ensure the water attains and maintains the applicable water quality standard. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.2(g)-(i), 130.7(c). Water quality standards and TMDLs are among the cornerstones of the CWA's pollution control measures.

The CWA regulates "point sources" of pollution differently than it regulates "nonpoint sources" of pollution. To limit and control pollution from "point sources," which the CWA defines as a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), the CWA established the National Pollutant Discharge Elimination System ("NPDES") permit program. In general, NPDES permits implement water quality standards, and pollutant wasteload allocations set by TMDLs, by incorporating them into effluent limitations and other permit conditions that limit the amount of pollution discharged.

The CWA does not require NPDES permits for nonpoint sources of pollution; instead, Section 319 of the CWA requires states to assess the quality of its waters and sources of water quality impairment before developing nonpoint source management plans ("Section 319 Plans"), which are

supposed to assist with meeting water quality standards and the goals of the CWA. 33 U.S.C. § 1329(a), (b), (c)(2), (d). Section 319 Plans must: (1) identify the best management practices the state will use to reduce pollution from nonpoint sources; (2) identify the programs the state will use to implement those best management practices; (3) include an implementation schedule; (4) certify that state law authorizes the management programs; and (5) describe the funding available for the program. 33 U.S.C. § 1329(b)(2).

Section 319(d)(1) of the CWA requires EPA to approve or disapprove all or a portion of a state's Section 319 Plan within 180 days of submission. 33 U.S.C. § 1329(d)(1). If EPA finds a proposed plan is insufficient, EPA must notify the state of the revisions that are necessary to obtain approval and EPA and the state can then work toward final approval for the program. 33 U.S.C. § 1329(d)(2). After EPA approves its Section 319 Plan, a state may apply for federal grants to assist with implementation. 33 U.S.C. § 1329(h)(1). State grant applications must include a description of the best management practices the state proposes to assist, encourage, or require for nonpoint sources for the year covered by the grant. Id. at (h)(2).

The CWA prohibits EPA from making grants to a state that has an approved Section 319 program, and that received a Section 319 grant in the preceding fiscal year, unless EPA finds that the state made "satisfactory progress" toward meeting the implementation schedule in its Section 319 Plan. 33 U.S.C. § 1329(h)(8). The "satisfactory progress" finding—specifically, EPA's ability to withhold Section 319 grant funds from states that are not making satisfactory progress—is important because it is a means by which EPA can encourage states to implement their Section 319 Plans, including TMDLs, to protect water quality.

B. The Coastal Zone Reauthorization Amendments of 1990 and the Agencies' "Conditional Approval" Policy.

The Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. § 1544b ("CZARA"), require certain states to develop and implement a coastal nonpoint source pollution control program ("CNPCP") that meet statutory criteria and federal guidance. Nonpoint source pollution is caused by precipitation runoff that moves over the ground, carrying away pollutants and depositing them into lakes, rivers, wetlands, and other waters. Because eliminating nonpoint source pollution is practically and politically difficult, Congress created incentives to encourage states to tackle the problem: in CZARA, Congress required EPA and NOAA to withhold a percentage of CWA and Coastal Zone Management Act ("CZMA") grant funds from states that fail to submit coastal nonpoint programs that meet applicable criteria and protect water quality.

If a state fails "to submit an approvable program," NOAA "shall withhold for each fiscal year until such a program is submitted a portion of grants otherwise available to the State" under CZMA Section 306, and the EPA "shall withhold" grants available to states under CWA Section 319. 16 U.S.C. § 1455b(c)(3) and (4). For states that fail to submit an approvable program, CZARA required EPA to begin withholding CWA grant funds, and required NOAA to begin withholding CZMA grant funds, beginning in 1996. Id. at § 1455b(c)(3)(D) and (4)(D). For fiscal years 1999 and thereafter, CZARA required EPA to withhold 30 percent of CWA grant funds, and required NOAA to withhold 30 percent of CZMA grant funds, from states that failed to submit an approvable program. Id.

To avoid implementing the statutory penalty provisions, EPA and NOAA developed a "conditional approval policy." In general, where a state submits a CNPCP that does not meet the applicable criteria, EPA and NOAA note deficiencies in the CNPCP—they determine the state has not submitted an approvable program—and identify conditions that need to be satisfied before the state can obtain full program approval. The Agencies then "conditionally approve" the deficient program and continue full CWA and CZMA funding pending completion of the conditions and final program approval.

In their *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*, issued in January 1993, EPA and NOAA indicated that "conditional approvals" would be utilized to give states two additional years to obtain the enforceable policies and mechanisms required by 16 U.S.C. § 1455(d)(16). After completing threshold reviews of the states' CNPCPs, NOAA and EPA agreed to make several changes to provide additional time and flexibility to states subject to CZARA. On March 16, 1995, NOAA and EPA then issued a document entitled *Flexibility for State Coastal Nonpoint Programs*, which was intended to clarify the January 1993 *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*.

The *Flexibility for State Coastal Nonpoint Programs* document confirms that states could be granted "conditional approval" for programs that are not yet fully approvable, thereby affording states yet more time to fully develop their programs. Indeed, in the *Flexibility for State Coastal Nonpoint Programs* document, NOAA and EPA expanded the availability of "conditional approvals" by making them available not just to states that needed more time to develop the enforceable policies and mechanisms required by 16 U.S.C. § 1455(d)(16), but to any state that needed more time to complete any element of its CNPCP. NOAA and EPA also increased the duration of "conditional approvals" from two years to up to five years and also established "one schedule for all coastal nonpoint programs," which scheduled for 2001 the withholding of grant funds from states without final program approval.

On October 16, 1998, NOAA and EPA issued *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990*. There, the agencies reiterated that the timeframes for conditional approval would remain the same as those specified in the March 16, 1995, *Flexibility for State Coastal Nonpoint Programs*, e.g., up to five years after conditional approval to meet conditions, with an evaluation of progress after three years.

C. The Endangered Species Act.

The Endangered Species Act ("ESA") seeks to bring about the recovery of species facing extinction by affording these species the "highest of priorities." Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978). One of the primary purposes of the ESA is to preserve the habitat upon which endangered and threatened species rely. 16 U.S.C. § 1531(b). Section 7(a)(2) of the ESA sets out two substantive mandates. First, it prohibits any federal action that "jeopardizes the continued existence of" species listed as threatened or endangered under the ESA. 16 U.S.C. § 1536(a)(2). Second, it bans federal actions that destroy or adversely modify any listed species' designated critical habitat. 16 U.S.C. § 1536(a)(2). The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to the 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).

In Section 7 of the ESA, Congress established a consultation process "to ensure compliance with the [ESA's] substantive provisions." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). Under that section of the Act, federal agencies must consult with NOAA Fisheries or the U.S. Fish and Wildlife Service ("the Services") prior to taking actions that may affect threatened or endangered species or destroy or adversely modify any listed species' designated critical habitat. 16 U.S.C. § 1536(a)(2). These requirements are designed to ensure that federal agency actions are properly informed by an analysis of their impacts on listed species and to promote compliance with the substantive protections of the Act. Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128-29 (9th Cir. 1998) (The consultation process "offers valuable protections against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.").

The Act's implementing regulations allow an agency to forego formal consultation in favor of informal consultation if the federal agency determines, with the written concurrence of the Services, that the proposed action is "not likely to adversely affect any listed species." 50 C.F.R. § 402.14(b)(1). If an action may affect a listed species, however, the Services must complete formal consultation and then issue a biological opinion detailing "how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A).

The biological opinion must state whether a proposed action will jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); Idaho Dept. of Fish & Game v. National Marine Fisheries Serv., 56 F.3d 1071 (9th Cir. 1995). "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); see also Conner v. Burford, 848 F.2d 1441, 1458 (9th Cir. 1988) (The ESA's "strict substantive provisions . . . justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions."). Biological opinions also recommend conservation measures designed to mitigate or remove all adverse effects on an endangered or threatened species. Romero-Barcelo v. Brown, 643 F.2d 835, 857 (1st Cir. 1981), rev'd on other grounds sub. nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

If the Services find in a biological opinion that a planned agency action is likely to jeopardize the continued existence of a listed species, the Services may "suggest those reasonable and prudent alternatives" which the Services believe would avert that likelihood. 50 C.F.R. § 402.02. The Services may further include an "incidental take statement" with a biological opinion if an agency action will result in incidental take of a protected species but will not jeopardize that species' continued existence. 16 U.S.C. § 1536(b)(3)(B)(4). As part of any incidental take statement, the Services must specify the impact of the taking on protected species, reasonable and prudent measures to minimize that impact, and terms and conditions to implement those measures. Id. Incidental take described in an incidental take statement is exempt from the Act's general prohibition on take of protected species. 16 U.S.C. § 1536(o)(2).

An action agency's consultation obligations do not end with the issuance of a biological opinion. An agency must reinitiate consultation where discretionary federal involvement or control of the action is retained, or is authorized by law, and when one of the following conditions is met: (1) the amount of take specified in the incidental take statement is exceeded; (2) new information reveals that the action may have effects not previously considered; (3) the action is modified in a way not previously considered; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16. After consultation is initiated or reinitiated, ESA Section 7(d) prohibits any "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any [RPAs]." 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The Section 7(d) prohibition remains "in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. § 402.09.

II. EPA'S AND NOAA'S VIOLATIONS OF THE ENDANGERED SPECIES ACT.

The Agencies have violated Section 7 of the ESA, 16 U.S.C. § 1536, by failing to initiate and complete consultation on the Agencies' decisions to conditionally approve Washington's CNPCP and on their related decisions not to withhold CWA and CZMA funds from Washington as required by CZARA. Additionally, EPA has violated Section 7 of the ESA, 16 U.S.C. § 1536, by failing to initiate and complete consultation on its recent decisions to approve the state of Washington's Section 319 Plan and its related findings that Washington has made "satisfactory progress" in implementing that Plan. By failing to initiate and complete Section 7 consultation, the Agencies' have failed to ensure the Agencies' actions are not likely to jeopardize ESA-listed species in Washington or result in the destruction or adverse modification of designated critical habitat, as required by the ESA.

Coastal and other waters of Washington State support dozens of species listed as threatened or endangered under the ESA and in many cases have been designated as critical habitat for species listed under the Act. Such species include bull trout, Puget Sound Chinook, Lower Columbia River Coho, Hood Canal summer chum salmon, Columbia River chum, Snake River and Lake Ozette sockeye, Puget Sound steelhead, Pacific eulachon (*Thaleichthys pacificus*), the Puget Sound/Georgia Basin DPS of yelloweye rockfish, canary rockfish, bocaccio, and Southern Resident killer whales. See, e.g., 64 Fed. Reg. 58,910, 58,933 (Nov. 1, 1999) (Bull Trout Listing); 75 Fed. Reg. 53,898 (Oct. 18, 2010) (Bull Trout Critical Habitat Designation); 64 Fed. Reg. 14,307 (March 24, 1999) (Upper Columbia River Spring Chinook Listing); 70 Fed. Reg. 37,160 (June 28, 2005) (Puget Sound Chinook, Lower Columbia River Coho, Hood Canal Summer Chum Salmon, Columbia River Chum, Snake River and Lake Ozette Sockeye, and Puget Sound Steelhead); 70 Fed. Reg. 52630 (September 2, 2005) (Designation of Critical Habitat for Puget Sound Chinook, Upper Columbia Chinook, Hood Canal Summer Chum Salmon, Snake River and Lake Ozette Sockeye, and Upper Columbia Steelhead); 74 Fed. Reg. 42605 (August 24, 2009) (Upper Columbia River Steelhead Listing); 75 Fed. Reg. 13012 (Mar. 18, 2010) (Pacific Eulachon Listing); 76 Fed. Reg. 65324 (October 20, 2011) (Critical Habitat Designation for Pacific Eulachon); 75 Fed. Reg. 22276 (April 28, 2010) (Puget Sound/Georgia Basin DPS of Yelloweye Rockfish, Canary Rockfish, and Bocaccio Listing); 70 Fed. Reg. 69903 (November 18, 2005) (Southern Resident Killer Whale DPS Listing); 71 Fed. Reg. 69054 (November 29, 2006) (Critical Habitat Designation of Southern Resident Killer Whale DPS).

Nonpoint source pollution in Washington adversely affects coastal and other waters in Washington, as well as the species that are trying to live there. Water quality that supports all aquatic

life cycle stages is necessary for the survival and recovery of the ESA-listed species that depend on Washington's fresh, marine, and brackish waters. Water pollution has a wide range of harmful effects on these species. Nonpoint pollution can impact coastal ecosystems through excess concentrations of nutrients from runoff, which can result in eutrophication, a leading cause of algal blooms, some of them toxic. When the nutrients run out, the algae die and sink to the bottom where they decompose, making anoxic zones uninhabitable for many fishes and invertebrates and lowering overall dissolved oxygen levels that are needed to support aquatic life.

Additionally, alteration of natural temperature regimes is caused by a range of nonpoint sources, also with the effect of depressing dissolved oxygen levels as well as raising temperatures beyond tolerances of cold water species, such as threatened and endangered salmonids. In addition to lack of streamside shading, temperatures are increased by sedimentation of streams that makes them shallower. Sediment pollution from nonpoint sources also affects aquatic life by carrying toxic pollutants into the environment.

Urban runoff often contains metal contaminants, which threaten aquatic life and persist in the sediments of coastal habitats. Metal contaminants can become available to marine organisms through uptake by wetland vegetation, adsorption by adjacent sediments, directly through the water column, or ingestion of sediment and bioaccumulation in coastal ecosystems.

Pesticides, from nonpoint sources such as logging, farming, and urban development, can adversely affect coastal and estuarine ecosystems through indirect impairment of the productivity of aquatic ecosystems and the loss or degradation of habitat that provides physical shelter for fish and invertebrates. Runoff from all land-disturbing activities also carries the deposits from air pollution sources into water, from nitrogen produced by industrial and vehicle emissions to toxic chemicals, such as mercury. The process of biomagnification increases the contamination levels of species at the highest levels in the food chain. These are just some of the ways nonpoint source pollution adversely impacts coastal and other waters in Washington, ESA-listed species living there, and designated critical habitats for those species.

Notwithstanding the fact that nonpoint source pollution in coastal and other waters in Washington is adversely impacting ESA-listed species and their designated critical habitats, the Agencies have never evaluated whether the Agencies' conditional approval of Washington's CNPCP, or the Agencies' decisions not to withhold CWA and CZMA funds from Washington under CZARA, jeopardizes threatened or endangered species or adversely modifies their critical habitats. Advocates does not agree the Agencies have discretion to conditionally approve Washington's CNPCP or to decide not to withhold CWA and CZMA funds from Washington under CZARA; however, if the Agencies have that discretion, as they have asserted, then they should have consulted under Section 7 of the ESA to determine whether the exercise of that discretion would jeopardize listed species or destroy or adversely modify listed species' designated critical habitat.

The Agencies' failure to consult on those decisions violates Section 7 of the ESA, 16 U.S.C. § 1536. The ESA requires consultation on "any action authorized, funded, or carried out" by the agency. 16 U.S.C. §1536(a)(2). Here, EPA and NOAA authorized Washington's CNPCP by conditionally approving that program. EPA and NOAA also funded Washington and its nonpoint source programs by providing grant funds through Section 306 of the CZMA and Section 319 of the CWA every year since

1998, including in 2011, 2012, 2013, 2014, 2015, and 2016. There can be no dispute that activities that generate nonpoint source pollution in Washington's coastal areas adversely affect fish and other species listed under the ESA. Because the Agencies have conditionally approved Washington's CNPCP and also decided not to withhold CWA and CZMA grant funds from Washington under CZARA, the Agencies should have consulted under ESA section 7 to determine whether the Agencies' actions jeopardize listed species or adversely modify or destroy any designated critical habitat. The Agencies' failures to consult on these actions and funding decisions, and the consequent failures to ensure against jeopardy or adverse modification of critical habitat, violate Section 7 of the ESA.

Additionally, EPA has violated Section 7 of the ESA, 16 U.S.C. § 1536, by failing to initiate and complete consultation on its decisions to approve the state of Washington's Section 319 Plan, its related findings that Washington has made "satisfactory progress" in implementing that plan, and its related funding decisions under Section 319 of the CWA, 33 U.S.C. § 1329. EPA approved Washington's final Section 319 Plan on August 21, 2015. And on September 15, 2015, EPA found pursuant to 33 U.S.C. § 1329(h)(8) that Washington had made satisfactory progress in implementing Washington's Section 319 Plan. EPA then awarded CWA Section 319 funds to Washington and its nonpoint source programs in 2016. Because EPA approved Washington's Section 319 Plan and also decided not to withhold CWA Section 319 grant funds from Washington, EPA should have consulted under ESA section 7 to determine whether EPA's actions jeopardize listed species or adversely modify or destroy any designated critical habitat. EPA's failure to consult on these actions and funding decisions, and the consequent failure to ensure against jeopardy or adverse modification of critical habitat, violates Section 7 of the ESA.

Finally, if the Agencies have consulted on the any of the decisions or actions discussed herein, those consultations are deficient and the Agencies are in violation of ESA section 7 because they have failed to reinitiate consultation as required by law.

III. PARTY GIVING NOTICE.

The full name and address of the party giving notice is:

Northwest Environmental Advocates
P.O. Box 12187
Portland, Oregon 97212-0187
Telephone: (503) 295-0490

IV. ATTORNEYS REPRESENTING NORTHWEST ENVIRONMENTAL ADVOCATES.

The attorneys representing Northwest Environmental Advocates in this matter are:

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V. CONCLUSION

At the conclusion of the 60-day notice period initiated by this letter, Northwest Environmental Advocates intends to file a lawsuit against EPA, NOAA, the U.S. Department of Commerce, and the individuals that administer those agencies, under the citizen suit provisions of the Endangered Species Act, 16 U.S.C. § 1540. Advocates will seek declaratory and injunctive relief to prevent further ESA violations and such other relief as is permitted by law, including recovery of Advocates' costs, attorneys' fees, and expert witness fees.

Very truly yours,

Kampmeier & Knutsen, PLLC

By: _____
Paul A. Kampmeier

Earthrise Law Center

By: _____
Allison LaPlante

cc: Mr. Barry Thom, Regional Administrator, NOAA Fisheries, West Coast Region, 1201 Northeast Lloyd Boulevard, Suite 1100, Portland, Oregon 97232

Director Eric Rickerson, Washington Fish and Wildlife Office, U.S. Fish and Wildlife Service, 510 Desmond Drive SE, Suite 102, Lacey, Washington 98503