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December 19, 2019

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act Related to the Proposed Willamette Basin Reallocation

Dear Sirs:

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), I write on behalf of my clients, WaterWatch of Oregon, Northwest Environmental Defense Center (“NEDC”), and WildEarth Guardians, to provide this notice of intent to sue the Army Corps of Engineers (“Corps”) and the Assistant Secretary of the Army (Civil Works) (“ASA(CW)”) for violations of the ESA in connection with the Corps’ proposed reallocation plan for the water stored in the Willamette River Basin Flood Control Project (“Willamette Project”). This reallocation will affect threatened Upper Willamette River (“UWR”) Chinook salmon and steelhead by determining how much stored water will be allocated to various uses, including fish and wildlife.

As detailed below, the Corps is violating and will violate the ESA by proposing and implementing a reallocation plan for Willamette Basin storage water while it is in the middle of an ESA consultation with the National Marine Fisheries Service (“NMFS”) over the effects of the Willamette Project as a whole on UWR Chinook salmon and steelhead.

The Corps' decision to move forward with reallocation while it is in the middle of ESA consultation violates its duty under section 7(d) of the ESA not to make any "irreversible or irretrievable commitment of resources" that will foreclose the development of measures to avoid jeopardy during consultation. 16 U.S.C. § 1536(d). In order to halt that violation of the ESA and avoid any further violations, the Corps and the ASA(CW) must refrain from submitting to Congress a signed Chief of Engineers' Report ("Chief's Report") on reallocation until the Corps' consultation with NMFS over the Willamette Project is complete. If such a report is submitted to Congress after receipt of this notice, the Corps and the ASA(CW) can avoid further ESA violations by withdrawing the report and notifying Congress that any recommendation on reallocation must wait until the completion of consultation with NMFS on the Willamette Project.

FACTUAL BACKGROUND

I. Upper Willamette River Chinook Salmon and Steelhead

The Willamette River provides habitat for numerous runs of salmon and steelhead, but only two are native to the Upper Willamette River above Willamette Falls: UWR Chinook salmon and UWR steelhead. These species of salmon and steelhead are each listed as a threatened species under the ESA and have designated critical habitat. 70 Fed. Reg. 37,160 (June 28, 2005) (UWR Chinook salmon), 71 Fed. Reg. 834 (Jan. 5, 2006) (UWR steelhead), 70 Fed. Reg. 52,630 (Sept. 2, 2005) (UWR Chinook and steelhead critical habitat). Each species consists of multiple local populations that inhabit different portions of the Upper Willamette Basin.

There are seven populations of UWR Chinook, which occur in the Clackamas, Molalla, North Santiam, South Santiam, Calapooia, McKenzie, and Middle Fork Willamette Rivers. The Middle Fork population is considered a core population and critical to the long-term persistence of UWR Chinook. These seven river basins also contain designated critical habitat for UWR Chinook salmon. UWR Chinook are one of the most genetically distinct groups of Chinook salmon in the Columbia River Basin, and adapted an early migration timing compared to other salmon because they could get over Willamette Falls only during high flows in winter and spring. They begin appearing in the lower Willamette River in February, with most of the run ascending the falls in April and May. Spawning occurs in September and early October and incubation of eggs in the gravel lasts until the following spring. Historically, the Upper Willamette supported hundreds of thousands of Chinook salmon, but populations of UWR Chinook have declined dramatically. About 90% of UWR Chinook are hatchery fish, with less than 10,000 wild fish returning each year. Five of the seven populations are at very high risk of extinction. The McKenzie and Clackamas populations were considered stronghold populations because they were the only ones not at very high risk of extinction, but the McKenzie population has experienced a disturbing decline in recent years. The risk of extinction for UWR Chinook as a whole is high.

UWR steelhead consists of four populations: Molalla, Calapooia, North Santiam, and South Santiam. Designated critical habitat for UWR steelhead occurs in each of the

four river basins. These steelhead are winter run steelhead, entering the Willamette River in January and February but not migrating to their spawning areas until late March or April. They spawn between April and early June, and eggs incubate in gravels through the summer. There are no hatchery fish in the UWR winter steelhead run. Instead, out-of-basin summer steelhead are released into the Upper Willamette for recreational fishing. Extinction risk was considered moderate for each of the four populations as well as for UWR steelhead as a whole, but numbers have continued to decline over the last decade and fish counts in 2018 were extremely low.

II. Willamette River Basin Flood Control Project

The Willamette Project consists of thirteen dams, 42 miles of revetments along the banks of the Willamette and its tributaries, and five hatcheries that produce salmon and steelhead to mitigate for the impacts of the dams. The principal purpose of the dams is flood control, but they also are used for power, storage for irrigation, recreation, and fish and wildlife.

The dams that primarily impact UWR salmon and steelhead and their critical habitat occur in the Middle Fork Willamette sub-basin (Dexter, Lookout Point, Fall Creek, Hills Creek dams), McKenzie sub-basin (Cougar, Blue River dams), North Santiam sub-basin (Big Cliff, Detroit dams), and South Santiam sub-basin (Foster, Green Peter dams). In the Middle Fork Willamette, dams cut off more than 90% of the historic Chinook spawning habitat, while in the North and South Santiam sub-basins, dams cut off about 70% of the Chinook spawning habitat. More spawning habitat is available in the McKenzie sub-basin because dams block only about 16% of historic habitat, but that habitat was some of the highest quality for spawning in that sub-basin. For UWR steelhead, a greater amount of spawning habitat exists below the dams compared to Chinook, but the dams still block access to 1/3 of historic steelhead spawning habitat.

In addition to blocking access to habitat, the dams and reservoirs behind them impact salmon and steelhead in various ways. They alter the natural water flows of the river, storing it in reservoirs and releasing it in quantities that are sometimes lower and sometimes higher than natural flows. This creates conditions downstream of the dams that are not appropriate for high quality fish habitat and can adversely affect spawning or incubation. These flow alterations also cause downstream water quality problems, particularly water temperatures and dissolved gas levels that are outside the optimum range for salmon and steelhead. And by blocking peak flows, sediment, and large woody debris, the dams prevent attributes necessary for creating good fish habitat, thereby reducing the quality of downstream spawning and rearing habitat for Chinook and steelhead. Reservoirs behind the dams are large bodies of stagnant water that prove difficult for juvenile salmon and steelhead to navigate when they migrate downriver because there is no flow to direct them. The reservoirs also are habitat for warm water fisheries that can prey upon the juveniles and contain bacteria that cause disease and infections in juvenile fish. The fisheries and large bodies of calm water attract recreational boaters and fishermen to many of these reservoirs. Keeping reservoirs at high levels during the summer to appease

recreationists can cause low flows below dams that create poor water quality and poor fish habitat.

Because of the impacts of these dams on salmon and steelhead, the Corps funds five hatcheries run by Oregon Department of Fish and Wildlife (“ODFW”) that provide spring Chinook to the North Santiam, South Santiam, McKenzie, and Middle Fork Willamette rivers as well as summer steelhead to the North and South Santiam rivers. The use of hatchery fish is problematic for maintaining wild fish genes because hatchery fish can occupy limited spawning grounds and preclude wild fish from spawning, compete for resources with wild fish, interbreed with wild fish, and if wild fish are captured and incorporated into hatchery broodstock, they cannot spawn naturally. These effects are even more problematic for UWR steelhead because the hatchery fish are out-of-basin summer steelhead so are not at all related to the UWR winter steelhead. The Corps also funds several trap and haul facilities, where adult fish are collected below the dams and released above the dams to try and stimulate production of fish in historic spawning habitat.

III. The Willamette River Basin Review Feasibility Study

In 1988, the House Committee on Public Works and Transportation authorized the Corps to conduct a water resources study of the Willamette River Basin. H.R. Rep. No. 100-1121, at 90 (1988) (Conf. Rep.). In 1991, the Corps completed a reconnaissance study and recommended conducting a full feasibility study to determine whether changes in the storage and allocation of water in the basin’s reservoirs would better serve the water resources needs in the Willamette Valley. *Willamette Basin Reservoir Study 2001 Update*, at 2 (Dec. 4, 2001). The Corps, together with the Oregon Water Resources Department (“OWRD”), began conducting that feasibility study in 1996. *Id.* at 3.

The feasibility study was scheduled to be completed in 2001, but the Corps and OWRD put the study on hold in 2000 so that the Corps could consult with NMFS and the U.S. Fish and Wildlife Service (“FWS”) regarding the effects of the entire Willamette Project on threatened and endangered species. *Id.* at 3, 6. The Corps recognized that it could not complete a proper feasibility study without first knowing what recommendations and criteria would appear in the Biological Opinions then being prepared by NMFS and FWS:

Following the listing [of steelhead and spring Chinook salmon in March 1999], it became obvious that final decisions on operational criteria for fish would be only made as part of the [ESA] Section 7 consultation process. Since it would be impossible to determine how much of the water stored in the reservoirs would be available for other purposes until after the requirements for ESA-listed fish had been clearly specified, the Executive Committee agreed to extend completion of the study

The extension will allow information developed for the Biological Opinion on reservoir operations to be used in crafting the final alternatives for the study. Criteria developed by fisheries agencies to protect declining runs are likely to play a major role in shaping future reservoir operations. Following

release of the opinion, . . . [t]he first activity will be to determine changes in the study plan needed to respond to recommendations [in the BiOp].

Willamette Basin Reservoir Study Interim Report, at 3 (Jan. 2000).

NMFS did not complete its Willamette Project BiOp until 2008. In that BiOp (“2008 BiOp”), NMFS concluded that the Corps’ continued operation and maintenance of the Willamette Project was likely to jeopardize the existence of UWR Chinook salmon and UWR steelhead and destroy or adversely modify their designated critical habitat. The 2008 BiOp set forth a Reasonable and Prudent Alternative (“RPA”) action that would allow continued operation of the Willamette Project in a way that would avoid jeopardy to the species and adverse modification of their critical habitat. The 2008 BiOp stated that avoidance of jeopardy and adverse modification of critical habitat would depend on successful completion of the RPA measures.

In 2015, the Corps reinitiated the Willamette Basin feasibility study. *Final Draft Integrated Feasibility Report and Environmental Assessment*, at i (Sept. 2019). The feasibility study process results in a feasibility report and some form of environmental analysis under NEPA (usually an environmental impact statement (“EIS”)). 33 U.S.C. § 2215(d)(2), § 2282, § 2282a(c)(1). A feasibility report—and its associated NEPA document—is finalized when the Chief of Engineers (“Chief”) prepares a “Chief’s Report” recommending to Congress a particular plan for executing a water resources project. 33 U.S.C. § 2282a(f); 33 C.F.R. pt. 230, app. A. Congress approves the Corps’ recommended projects as a matter of course in the Water Resources Development Acts (“WRDAs”) passed every two years. Cong. Research Serv., *Army Corps of Engineers: Section 7001 Annual Report on Future Studies and Projects* (May 16, 2019). Typically, Congress will approve a project by explicitly referencing the Chief’s Report in a WRDA. *E.g.*, America’s Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 1401, 132 Stat. 3765, 3835–40.

In November 2017, the Corps released a draft integrated feasibility report and NEPA environmental assessment on Willamette Basin reallocation for public comment. *Draft Integrated Feasibility Report and Environmental Assessment* (Nov. 2017). The reallocation plan tentatively chosen by the Corps involved allocating 962,800 acre-feet of water for fish and wildlife uses, allocating 327,250 acre-feet of water for agricultural, municipal, and industrial uses, and leaving 299,950 acre-feet of water as “joint use” in order to “provide flexibility in making revised reservoir operations that may be required in the future.” *Id.* at 87.¹ Notably, the plan outlined in the draft feasibility report would not necessarily meet peak demand for agricultural, municipal, and industrial uses. The Corps indicated that it would submit a biological assessment (“BA”) to NMFS and FWS based on its tentatively selected reallocation plan. *Id.* at 132.

After receiving comments on the draft feasibility study, the Corps decided to change its proposed reallocation plan. Under the revised plan, no water would be left

¹ Right now, all 1,590,000 acre-feet of water in the system is allocated for joint use. *Final Draft Integrated Feasibility Report and Environmental Assessment*, at viii.

allocated for “joint use,” and the 1,590,000 acre-feet of water in the system would be allocated as follows: 1,102,600 acre-feet for fish and wildlife, 159,750 acre-feet for municipal and industrial uses, and 327,650 acre-feet for agricultural uses. *Final Draft Integrated Feasibility Report and Environmental Assessment*, at 93, 95. Unlike the plan tentatively chosen in the draft feasibility report, the revised plan would meet peak demand for agricultural, municipal, and industrial uses. When the Corps prepared its BAs, it performed the required analyses using this revised reallocation plan.

IV. Reinitiation of ESA Consultation over the Willamette Project and Initiation of Consultation Over the Proposed Reallocation Plan

A few months after the release of the draft integrated feasibility report and environmental assessment, several groups filed suit against the Corps in the U.S. District Court for the District of Oregon, alleging that the Corps was violating the ESA in its operation of the Willamette Project.² *Nw. Env'tl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, No. 3:18-cv-437-HZ, ECF No. 1 (D. Or. Mar. 13, 2018). Among the plaintiffs' claims in that case was a claim that the Corps needed to reinitiate consultation with NMFS over its operation of the entire Willamette Project. On April 8, 2018—less than a month after the suit was filed—the Corps reinitiated consultation with NMFS over the operation of the Willamette Project. It is anticipated that NMFS will issue a final BiOp for the Willamette Project as a whole sometime in 2023. *Willamette Valley System Environmental Impact Statement*, www.nwp.usace.army.mil/Locations/Willamette-Valley/System-Evaluation-EIS/ (last visited Nov. 15, 2019).

Soon after reinitiating consultation with NMFS over the operation of the Willamette Project, the Corps submitted its BAs on the water reallocation to NMFS and FWS. *Final Draft Integrated Feasibility Report and Environmental Assessment*, at 145. The BAs reflected the Corps' determination that the (revised) proposed reallocation would be unlikely to adversely affect UWR Chinook and steelhead. *Id.* at 145–46. FWS concurred with that determination as to the species over which it has jurisdiction; NMFS, however, did *not* concur with the Corps' determination, leading the Corps and NMFS to initiate formal ESA consultation over the effects of the proposed reallocation. That consultation resulted in a BiOp from NMFS in June 2019 (“2019 Reallocation BiOp”).

In the 2019 Reallocation BiOp, NMFS concluded that “the proposed [reallocation] is likely to jeopardize the continued existence of UWR Chinook salmon and UWR steelhead and destroy or adversely modify their designated critical habitats.” 2019 Reallocation BiOp, at 96. NMFS predicted that the Corps' proposal to reduce water allocations for each use category proportionally in years when the reservoirs do not fully refill—rather than prioritizing fish and wildlife uses in such years—will lead to reduced instream flows and higher water temperatures, thus harming fish. *Id.* at 71–85. According to NMFS, the proposed plan will result in a higher likelihood of missing the flow targets

² NEDC and WildEarth Guardians are plaintiffs in that lawsuit. WaterWatch of Oregon is not.

contained in the 2008 BiOp, not to mention more fish-protective flow targets that might be adopted in the next BiOp. *Id.* at 72.

NMFS set out five RPA measures in the 2019 Reallocation BiOp that “together” would allow the Corps to avoid jeopardy. *Id.* at 102. One of those measures—RPA Measure 1—would require the Corps to “include [in its report to Congress] a recommendation that the Corps will retain sufficient local authority to modify th[e] reallocation without further Congressional action, as necessary to complete all actions related to the storage and release of water from the [Willamette Project] that are already called for in [the 2008 BiOp], any biological opinion that will be issued as a result of [the 2018] reinitiation of . . . consultation, and any biological opinion that may be issued as the result of a future ESA consultation related to the storage and release of stored water from the WVS.” *Id.* at 97. Another RPA measure—RPA Measure 4—would require the Corps to take steps to prioritize water for fish during low-water years. *Id.* at 99.

NMFS noted that the proposed reallocation “would limit the Corps’ flexibility to comply with the 2008 BiOp and RPA provisions that are still incomplete, as well as ESA Section 7(d) requirements in relation to the separate reinitiation of the 2008 BiOp now underway.” *Id.* at 95. NMFS pointed to the adoption of RPA Measure 1 as being essential to “ensure that the Corps retains the capability to comply with ESA Section 7(d) requirements in relation to the separate consultation now underway for reinitiation of the 2008 BiOp and RPA, and for any future ESA consultations that will affect the management of water stored in the WVS.” *Id.* at 100.

V. The Chief’s Report

Following the issuance of the 2019 Reallocation BiOp, the Corps released a “final draft” of the integrated feasibility report and environmental assessment. That report recommended the same reallocation plan analyzed by NMFS in the 2019 Reallocation BiOp. The report also recommended that the Corps adopt RPA Measure 1 and concluded that, if the Corps did adopt RPA Measure 1, the resultant reallocation plan would not have a significant adverse impact on the environment. *Final Draft Integrated Feasibility Report and Environmental Assessment*, at 151. Consistent with that finding, the Corps released a draft “finding of no significant impact” (“FONSI”) in lieu of a full environmental impact statement (“EIS”). *Draft Finding of No Significant Impact* (July 2019).

In October 2019, the Corps released a proposed Chief’s Report containing the reallocation plan that the Corps intends to submit to Congress. In that report, the Chief of Engineers rejected the final draft feasibility report’s recommendation that the Corps incorporate RPA Measure 1 into its recommended reallocation plan. *Proposed Chief’s Report*, at 2 (Oct. 2019). The Chief gave the following reasons for not adopting the recommendation to incorporate RPA Measure 1 into the proposed reallocation plan:

[Incorporating RPA Measure 1 into the reallocation proposal] would add unacceptable risk for the reliability of the new storage levels once authorized by Congress. In addition, the prospect of future undefined

administrative modifications to the reallocation would be inconsistent with the Corps' historically limited discretion for water supply reallocation at its reservoirs and would undermine Congressional prerogatives to define the public benefits to be derived from a project. Congress authorized the project to serve specific purposes and an undefined, unlimited Congressional grant of authority to the Army to modify the reallocation in the future, as recommended, could create conflicts with those Congressionally-authorized project purposes if future Endangered Species Act consultations require changes that would seriously affect project purpose or otherwise involve major operational changes. Further, such a grant of authority could also undermine the ability of the Corps to continue implementing the current allocation should the environmental circumstances change. Congress, not the Army nor NMFS, should continue to determine how best the public good is served by this project, especially in those cases where the realization of Congressionally-authorized project purposes could be undermined by other resource requirements.

Id. The proposed Chief's Report also implicitly rejected RPA Measure 4, agreeing with the recommendation in the draft feasibility report to reduce water for all uses in low-water years rather than prioritizing water for fish and wildlife uses. *Id.*

Once signed, the Chief's Report will go to the ASA(CW) for review, and it will then be sent to the Office of Management and Budget ("OMB"). 33 C.F.R. pt. 230 app. A. "After OMB provides its views, [the] ASA(CW) will sign the record of decision . . . and transmit the report to Congress." *Id.*; see also 33 U.S.C. § 2282b (giving the ASA(CW) 120 days from the date of the Chief's Report to transmit the report to the relevant Congressional committees).

At the same time the Chief's Report is sent to the ASA(CW), it will be sent directly to the relevant Congressional committees. 33 U.S.C. § 2282a(f)(2)(B). "Since the mid-1990s, Congress has authorized many projects based on Chief's [R]eports prior to completion of the project review by the [ASA(CW)] and OMB." Cong. Research Serv., *Army Corps of Engineers: Water Resource Authorization and Project Delivery Processes*, at 11 (Apr. 19, 2019). For that reason, the transmittal of the Chief's Report to Congress is often the last action taken by the Executive Branch before Congress acts on a proposed water resources project, and it is always the last action taken by the Corps. As mentioned above, Congress routinely adopts the Chief's Reports by referencing them in WRDAs.

LEGAL BACKGROUND

Section 7 of the ESA imposes a substantive obligation on federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of" habitat that has been designated as critical for such species. 16 U.S.C. § 1536(a)(2); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). Jeopardy results where an action reasonably would be

expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.*

To fulfill the substantive mandates of section 7, federal agencies must consult with an expert agency—FWS or NMFS, depending on the species at issue. The ESA’s implementing regulations allow an agency to enter into informal consultation with the relevant expert agency to determine whether its actions “may affect” threatened or endangered species or their critical habitats. 50 C.F.R. § 402.13. Usually this is done by completing a biological assessment and submitting it for the expert agency’s concurrence. *Id.* § 402.12(j), (k). If, through the informal consultation process or otherwise, the agency determines that its action “is likely to adversely affect” listed species or their critical habitats, formal consultation is required that results in a biological opinion. *Id.* § 402.14(a).

When a federal agency is engaged in formal consultation under section 7(a)(2) of the ESA, section 7(d) of the ESA prohibits the agency from “mak[ing] 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 reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). This prohibition “continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09. “Section 7(d) was enacted to ensure that the status quo would be maintained during the consultation process” *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034–35 (9th Cir. 2005), *abrogated on other grounds as recognized by Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1092 (9th Cir. 2015). Compliance with section 7(d) guards “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.” *NRDC v. Houston*, 146 F.3d 1118, 1128–29 (9th Cir. 1998) (emphasis in original).

Private citizens may bring suit to enjoin federal agencies from violating their duties under the ESA, including their duties under section 7(d). 16 U.S.C. § 1540(g)(1); *Lane Cty. Audubon Soc’y v. Jamison*, 958 F.2d 290, 291–92 (9th Cir. 1992). The alleged violations must be ongoing or reasonably likely to occur in the future. *See Forest Cons. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786–88 (9th Cir. 1995) (rejecting the argument that an ESA citizen-suit cannot be brought for “claims of only future violations”).

VIOLATIONS OF LAW

Moving Forward With Reallocation During ESA Consultation Violates the Corps’ Duty Not To Make Any Irreversible or Irretrievable Commitment of Resources

The Corps’ decision to move forward with its reallocation plan at this time violates its section 7(d) duty to avoid making any “irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any

reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). As NMFS recognized in the 2019 Reallocation BiOp, any reallocation plan that fails to reserve for the Corps adequate flexibility on storage water allocation will impair its ability to formulate RPA measures during the ongoing consultation over the Willamette Project as a whole. 2019 Reallocation BiOp, at 100. The plan as outlined in the proposed Chief’s Report will tie the Corps’ hands and limit the scope of alternative measures that it will be able to consider during the consultation process. Indeed, because Congress acts as a rubber stamp for the Corps’ water resources project proposals, the reallocation plan is *already* affecting the Corps’ ability to develop RPA measures insofar as it is being treated as a *fait accompli*. What the Corps is doing is the furthest thing imaginable from the “status quo.” *Wash. Toxics Coal.*, 413 F.3d at 1034–35.

When the Corps confronted this same situation in 2000, it recognized that its duties under the ESA required it to hold off on completing the feasibility study and making a recommendation to Congress until the completion of consultation. *Final Draft Integrated Feasibility Report and Environmental Assessment*, at 2. The Corps also acknowledged at that time that it made no sense to finalize a reallocation plan until consultation was complete, because “[c]riteria developed by fisheries agencies to protect declining runs [would] likely . . . play a major role in shaping future project operations.” *Willamette Basin Reservoir Study Interim Report*, at 3. Here, in contrast, the Corps has chosen to charge ahead with its reallocation plan despite its section 7(d) duties.

If the Corps and the ASA(CW) want to stop violating section 7(d) and avoid any further violations, they must refrain from submitting to Congress the signed Chief’s Report on Willamette Basin reallocation. If such a report is submitted to Congress after receipt of this notice, the Corps and the ASA(CW) can avoid further ESA violations by withdrawing the report and notifying Congress that any recommendation on reallocation must wait until the completion of consultation with NMFS on the Willamette Project.

CONCLUSION

This letter provides the 60 days’ notice required under the ESA, 16 U.S.C. § 1540(g), of WaterWatch of Oregon, NEDC, and WildEarth Guardians’ intent to sue the Corps and the ASA(CW) for violations of the ESA unless they agree to correct the violations described herein within a reasonable timeframe.

Sincerely,

/s/ Lauren M. Rule

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