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VIA CERTIFIED MAIL
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Dennis McLerran
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U.S. EPA Region 10
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Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act, the Clean Water Act and the Administrative Procedures Act

Dear Ms. McCarthy and Mr. McLerran:

This letter provides notice ("Notice of Intent") that Idaho Power Company ("IPC") intends to file a lawsuit against the U.S. Environmental Protection Agency ("EPA") pursuant to Section 11(g)(1)(A) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(1)(A), Section 505(a)(2) of the Clean Water Act ("CWA"), 33 U.S.C. §1365(a)(2) and Section 706 of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A), if the violations described herein are not corrected within 60 days. EPA has violated the ESA, the CWA, and the APA in numerous ways related to the decision by the State of Idaho to promulgate a site-specific temperature standard to protect the beneficial use of salmonid spawning in the Snake River below Hells Canyon Dam. By copies of this letter, IPC is providing notice to the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NOAA Fisheries") (collectively, the "Services") of IPC's notice of intent to sue EPA, and also serving the Attorney General with a copy of this notice pursuant to 40 C.F.R. § 135.2.

I. Summary of Violations

In 2010, in compliance with EPA's regulations, IPC petitioned the Idaho Department of Environmental Quality ("DEQ") to adopt revised site-specific temperature criteria for fall Chinook spawning in the Snake River below Hells Canyon Dam[1]. In response to that petition, DEQ initiated negotiated rulemaking, which IPC participated in. After carefully reviewing the evidence submitted in the negotiated rulemaking process, including peer reviews undertaken by eminent scientists in the field of salmon biology and migration and written comments by NOAA Fisheries stating that the proposed standard was fully protective of ESA listed Snake River fall Chinook,[2] DEQ presented the proposed rule for a site-specific temperature standard to protect fall Chinook spawning in the Snake River below Hells Canyon Dam to the Idaho Board of Environmental Quality on November 11, 2011. The proposed rule was adopted by the Board with no changes. The rule was finalized by the 2012 Idaho Legislature and became effective under Idaho law on March 29, 2012. The revised standard provides for a two week step-down period for transition in temperatures from October 23 through November 6. DEQ submitted its revised site-specific temperature criteria for fall Chinook spawning to EPA on June 8, 2012. This proposed site-specific temperature standard has been pending before EPA for over a year, and EPA is violating a nondiscretionary duty under the CWA on a daily basis by failing to take any action on the standard in the statutorily required timeframe of 60 to 90 days. 33 U.S.C. §1313 (c)(3)&(4).

The critical question in EPA's review of a revised standard under the CWA is whether the standard is protective of the designated beneficial use, in this case fall Chinook spawning below Hells Canyon Dam. ESA Section 7(a)(2) places the additional obligation upon EPA of consulting with NOAA Fisheries or FWS if EPA determines that a new or revised standard may affect an ESA listed species or its critical habitat. Snake River fall Chinook spawn below Hells Canyon Dam and were listed as a threatened species under the ESA in 1992.[3] There is clear evidence that Snake River fall Chinook salmon are spawning successfully and that current conditions are supporting the designated beneficial use for the Snake River below Hells Canyon Dam.[4] Based in part on this evidence, the State of Idaho determined that the revised standard is protective of fall Chinook spawning, and comments filed by NOAA Fisheries in the negotiated

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[1] "EPA recognizes that there are instances in which designated uses may be achieved and protected by criteria less stringent than generally applicable water quality criteria." *Idaho Mining Ass'n, Inc. v. Browner*, 90 F. Supp. 2d 1078, 1103 (D. Idaho 2000)(citing 47 Fed. Reg. at 49238: "There are water bodies that support the designated uses even though the Section 304(a) numerical criteria included in the state's standard are exceeded."). EPA thus "promulgated 40 C.F.R. § 131.11(b)(1)(ii) to allow states to modify water quality criteria where the state determines that water conditions are acceptable for the designated use even though the generally applicable criteria are exceeded." *Id.*

[2] Snake River fall Chinook are listed as a threatened species under the ESA, 57 Fed. Reg. 14653 (April 22, 1992).

[3] *Id.*

[4] Natural adult returns to the Snake River have increased from 78 in 1990 to almost 11,000 in 2012. Total adult returns (natural and hatchery) to the Snake River in 2013 thus far have exceeded 50,000 adults.

rulemaking indicate that it concurs. NOAA has jurisdiction over Snake River fall Chinook and is the consulting agency for ESA § 7(a)(2). EPA may conclude that ESA consultation is not required under the ESA if it determines that the revised standard has "no effect" upon fall Chinook below Hells Canyon Dam.[5] But such a determination will be tantamount to finding that the standard is protective of salmonid spawning, requiring that the revised standard be approved, as EPA has no authority to disapprove a standard that meets the requirements of the CWA. If, however, EPA has reached even a preliminary conclusion that approval of the site-specific criteria standard "may affect" fall Chinook, EPA has a non-discretionary duty to consult with NOAA Fisheries under Section 7 of the ESA before taking action on the standard. To date, EPA has neither made a "no effect" determination nor consulted with NOAA Fisheries.

Idaho's revised site-specific temperature standard is based on the best scientific evidence, evidence that has been peer reviewed and accepted by leading fisheries scientists. Moreover, NOAA Fisheries provided comments in the negotiated rulemaking record that the revised standard is fully protective of the beneficial use, salmonid spawning, and that a site-specific standard was appropriate for this stretch of the Snake River. *NOAA Fisheries Comments to IDEQ on Idaho's Site-Specific Criteria* (August 25, 2011) at 7.

In September 2011 comments to the negotiated rulemaking, EPA recommended that DEQ not proceed with the rulemaking and urged the finalization of the relicensing of Idaho Power's Hells Canyon Complex ("HCC") process by FERC with the current salmon spawning criterion in place. EPA's insistence on avoiding the legal requirement to timely act on the site-specific criteria standard goes beyond the regulatory role and obligation of EPA under 33 U.S.C. §1313 (c)(3)&(4) of the CWA and is unreasonably delaying the § 401 certification process under the CWA and completion of HCC relicensing process by FERC.

In reviewing a proposed water quality standard, EPA must approve those standards that meet the requirements of the CWA, including a determination of whether the states' decision is scientifically defensible and protective of designated uses. 33 U.S.C. § 1313(c)(3); *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1401 (4th Cir. 1993)(citing 40 C.F.R. §§ 131.5(a), 131.6(c), 131.11(a) & (b)). By conflating this obligation with "extra-scientific considerations" associated with the HCC relicensing, EPA is injecting "factors Congress did not intend it to consider" into the standard review process. *NW. Envtl. Advocates v. U.S. E.P.A.*, 855 F. Supp. 2d. 1199, 1230 (D. Or. 2012) (quoting *Lands Council v. McNair*, 629 F.3d 1070, 1074)(internal quotations omitted). An agency determination is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004)(citing *Motor Vehicle*

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[5] Should EPA determine that a new or revised standard has no effect, "...EPA may record the determination for its files and no consultation is required." EPA has agreed to share any biological evaluation, "no effect" determination, and supporting documentation used to make a "no effect" determination with NOAA Fisheries and FWS upon request. *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination under the Clean Water Act and Endangered Species Act*, January 10, 2001, 66 Fed. Reg. 11202, 11214 (February 22, 2001).

Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Accordingly, EPA's preference to avoid acting on the site-specific proposal is *ultra vires* of its authority and thus arbitrary and capricious. *NW. Envtl. Advocates v. U.S. E.P.A.*, 855 F. Supp. 2d at 1231. In any event, DEQ declined to follow EPA's recommendation and adopted the site-specific criteria change. EPA's political preference that DEQ stand down has no bearing on its duty to consult under the ESA or on its duty to act on the lawfully adopted Idaho site-specific criteria change under the CWA.

II. Legal Framework

Under ESA Section 7(a)(2), "[e]ach federal agency shall ... 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). Section 7(a)(2) imposes a procedural duty on the "action agency" (EPA) to consult with the "consultation agency" (i.e., either FWS or NOAA Fisheries) if the agency's action "may affect" a listed species. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1167(W.D. Wash. 2004) (citing 50 C.F.R. § 402.14(a); *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 974; *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994)).

EPA has admitted that approval of state water quality standards triggers a duty to consult under Section 7 of the ESA. *See Sierra Club v. U.S. E.P.A.*, 162 F. Supp. 2d 406, 422 (D. Md. 2001). Furthermore, EPA and the Services have agreed that consultation is required if "EPA determines that its approval of any of the standards may affect listed species or designated critical habitat." *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* ("ESA/CWA MOA") 66 Fed. Reg. 11202 (Feb. 22, 2001), at 11214.

Consultation is unnecessary only if the proposed action will have "no effect" on a listed species or critical habitat. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579, 185 L. Ed. 2d 575 (2013). Once an agency has determined that a proposed action "may affect" a listed species or critical habitat, the agency must consult with the appropriate expert wildlife agency. *Id.* If EPA and NOAA Fisheries jointly determine that the proposed action is not likely to adversely affect any listed species or critical habitat, no further action is necessary. 50 C.F.R. § 402.13(a) and § 402.14(b)(1).

If no such concurrence is reached between the action agency and the consultation agency, formal consultation must be undertaken. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1168 (W.D. Wash. 2004) (referencing 50 C.F.R. § 402.13(a); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8).

The ESA "requires federal agencies to consult with the Fish and Wildlife Service or NOAA Fisheries Service *before* taking 'any action authorized, funded, or carried out by such agency' that might harm a listed species." 16 U.S.C. § 1536(a)(2); *Karuk Tribe of California v. U.S.*

Forest Serv., 681 F.3d 1006, 1032 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579, 185 L. Ed. 2d 575 (2013) (emphasis added). Consultation is vital to compliance with the ESA. *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1072 (failure to obtain a comprehensive biological opinion "constitutes a substantial violation of the procedural requirements of the ESA").

The ESA requires completion of formal consultation within a 90-day period. 16 U.S.C. §1536(b)(1)(A); 50 C.F.R. 402.14(e); *see also Endangered Species Act Consultation Handbook: Procedures for Conducting* Section 7 Consultation and Conferences ("Consultation Handbook"), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998, at 4-7 ("The consultation timeframe cannot be 'suspended.' If the Services need more time to analyze the data or prepare the final opinion, or the action agency needs to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. Extensions should not be indefinite, and should specify a schedule for completing the consultation.")

Under the CWA, States have primary responsibility for establishing water quality standards. States must submit those standards to EPA for review and approval before they become effective. 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. § 131.6. EPA's regulations allow for site-specific criteria[6] and EPA must review and approve any site-specific criterion before it takes effect. 40 C.F.R. § 131.21; *Nw. Envtl. Advocates v. U.S. E.P.A.*, 268 F. Supp. 2d 1255, 1269 (D. Or. 2003). EPA "reviews and approves/disapproves the standards based on whether the standards meet the requirements of the CWA and the Water Quality Standards Regulation." *EPA Water Quality Handbook*, at 6.2. EPA has no authority to disapprove a standard that meets the requirements of the CWA. The courts have consistently held the "primary responsibility for establishing appropriate water quality standards is left to the states, meaning that the EPA sits in a reviewing capacity of the state-implemented standards, with approval and rejection powers only." *Barnum Timber Co. v. U.S. E.P.A.*, 835 F. Supp. 2d 773, 780-81 (N.D. Cal. 2011) (quoting *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993)(internal quotations omitted). EPA must notify the state within 60 days if it approves the new or revised standards as complying with the CWA. 33 U.S.C. §1313 (c)(3). If EPA disapproves the state standards, it must notify the state within 90 days of the date of the submission and "specify the changes to meet such requirements." *Id.* The state then has 90 days to make the suggested changes. *Id.* If the state does not make those changes, EPA is required to "promptly" revise the standards, within 90 days after publication of the revised standards. 33 U.S.C. §1313 (c)(4). "[T]he time restriction for the EPA's review of state ... water quality standards supports our conclusion that Congress intended the EPA to have a very limited role." *City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996).

Under the APA, a court "must set aside an agency's decision if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *NW. Coal. for Alternatives to Pesticides (NCAP) v. U.S. E.P.A.*, 544 F.3d 1043, 1047 (9th Cir. 2008); 5 U.S.C. § 706(2)(A). The court must determine whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oreg. Natural*

[6] 40 C.F.R. §§ 131.11(a), (b)(1)(ii).

Res. Council, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotation marks omitted). An agency determination is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004)(citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). When EPA interjected the HCC relicensing into its determination on the site-specific criteria water quality standard, it relied on a factor which Congress did not intend it to consider with respect to state water quality standards, and was therefore arbitrary and capricious. EPA's failure to carry out its duty to timely approve or disapprove Idaho's site-specific criteria as clearly mandated by the CWA is arbitrary, capricious, not in accordance with law, and thus a violation of the APA. *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 549 (W.D. Wash. 1997).

Similar allegations regarding EPA's failure to comply with the CWA and ESA with regard to Idaho water quality standards have been made in a case pending before the United States District Court for the District of Idaho, Case No. 1:13-cv-00263-EJL, *Northwest Environmental Advocates v. The National Marine Fisheries Service, et al.* As IPC's substantive rights could be affected by the outcome of that case, it is filing this Notice of Intent at this time so that its rights are not harmed or prejudiced by actions (including actions by EPA) in that separate proceeding.

III. Identity of Counsel

This Notice of Intent is served upon EPA by the Idaho Power Company, which is an investor-owned utility headquartered and incorporated in Idaho, represented in this matter by Senior Counsel James C. Tucker, whose address and contact information is:

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IV. Conclusion

EPA has violated the CWA, the ESA and the APA, by failing to act on Idaho's site-specific criteria standard, by failing to consult with NOAA Fisheries before taking action on Idaho's site-specific criteria standard within the time frames required by law, and by injecting extra-scientific considerations into a scientific determination.

If EPA does not cure the violations of law described above immediately, upon expiration of the 60 days IPC intends to file suit against EPA pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A), the CWA, 33 U.S.C. §1365(a)(2), and the APA, 5 U.S.C. § 706(2)(A).

The purpose of a NOI is to offer the agency a chance to remedy the violations of its duty before a lawsuit is filed. Accordingly, IPC invites EPA to discuss the significant violations described

herein and seek a mutually acceptable solution to them. Please contact James Tucker or the undersigned.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker
Sarah W. Higer

APB/se

cc (via certified mail):

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