



*Via Certified Mail with Return Receipt Requested*

September 3, 2014

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**Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Related to the Northwest Area Contingency Plan**

Dear Sir/Madam,

This letter serves as a sixty day notice on behalf of the Center for Biological Diversity ("Center") and Friends of the Columbia Gorge ("Friends") of intent to sue the U.S. Coast Guard ("USCG") and the Environmental Protection Agency ("EPA") and their officers, directors and administrators for ongoing and imminent violations of the Endangered Species Act ("ESA") (16 U.S.C. §§ 1531-1544), resulting from the development and implementation of the 2014 Northwest Area Contingency Plan for multi-agency prevention of and response to oil and hazardous waste spills in Coast Guard COTP Zones Puget Sound and Columbia River, the States of Washington, Oregon and Idaho, and the Environmental Protection Agency's Inland Region Ten excluding Alaska ("Plan," or "NWACP"). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

The Pacific Northwest is experiencing an unprecedented boom in the transport of oil through the region by rail, barge and pipelines. Newly shipped oil includes rapidly increasing amounts of particularly explosive oil produced by hydraulic fracturing (“fracking”) of the North Dakota Bakken shale, and may include heavy tar sands bitumen strip-mined in Alberta, Canada. This increased transport happens in the context of a very recent history of deadly rail accidents throughout North America, involving oil and petroleum products. Your agencies play a critical role in preventing and responding to inevitable future rail and barge accidents to minimize oil spill impacts. While federal and state agencies have begun recent steps to improve the safety of oil transport by rail and barge, legally required actions to protect the region’s most vulnerable wildlife from oil spills have not been completed.

The NWACP outlines numerous potential responses to oil or other hazardous materials spills, including but not limited to mechanical recovery, the use of dispersants, surfactants, biological additives and bioremediation, the deflection of spilled oil, in-situ burning, dredging, shoreline cleanup, field testing, and field training. As explained below, each of these response activities may have effects, including adverse effects, on species listed under the ESA, which are present in the planning area.

To fulfill the substantive purposes of the ESA, federal agencies are required to engage in Section 7 consultation with the National Marine Fisheries Service and/or the Fish and Wildlife Service (the “Services”), depending on the species at issue, to “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 habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. To date, the federal agencies involved in development and implementation of the NWACP have failed to undertake consultation with the U.S. Fish and Wildlife Service (“FWS”), and have failed to properly reinitiate consultation with the National Marine Fisheries Service (“NMFS”), as required under the ESA. 16 U.S.C. § 1536(a)(2); 50 CFR 402.16.

By this letter, the Center and Friends put the USCG and EPA (“Lead Agencies”) on official notice that their actions regarding the development and implementation of the NWACP without sufficient consultation with the Services are in violation of the ESA, as described further below. In addition to formal notice of these ESA violations, as interested persons, the Center hereby petitions, under the Administrative Procedures Act, the Lead Agencies to undertake immediately the revision of the 2014 NWACP in light of increased rail and barge transport of oil products and in light of the latest science on oil spill response impacts. *See* 5 U.S.C. § 553(e).

## **FACTUAL BACKGROUND**

### **Increased crude-by-rail transport and spills**

The amount of crude oil being transported by rail throughout North America and the NWACP planning area has increased dramatically in recent years. In 2008, only 9,500 rail cars of oil were transported on America’s Class I railways. In 2013 there were an estimated 400,000 rail cars of oil - a dramatic increase in only six years. During that same time, the Pacific Northwest went from having zero oil-by-rail facilities capable of receiving massive oil trains, to four functional terminals with a daily potential throughput of 183,600 barrels per day. About 19,000 tank cars of crude oil passed through Oregon last year, a 250 percent increase from the year before, with at

least three oil trains per week moving through the Plan area to the Clatskanie facility. The Columbia River Gorge has become the key route for oil moving in the Pacific Northwest, with as many as 19 oil trains per week now passing through Klickitat County on the Washington side of the Gorge. (<http://www.bellinghamherald.com/2014/06/24/3716444/crude-oil-rail-shipment-data-begins.html>).

At least six additional terminals have been proposed in Oregon and Washington. If all of the proposed oil-by-rail projects were built, they would be capable of moving more than 850,000 barrels per day—substantially more oil capacity than the proposed Keystone XL pipeline. On Puget Sound, three of the region’s five refineries already receive oil-by-rail shipments, and the other two are planning new facilities. Three proposals for Grays Harbor would move oil along the Washington coast. On the Columbia River, one port terminal is already receiving oil-by-rail shipments, the Tesoro and Savage companies propose a terminal in Vancouver that would be by far the region’s largest facility, and a nearby facility elsewhere in Vancouver proposes to transition to handling crude oil. *See* The Northwest's Pipeline on Rails: Crude oil shipments planned for Puget Sound, Gray's Harbor and the Columbia River (May, 2014) (2014). <http://www.sightline.org/research/the-northwests-pipeline-on-rails/>.

This increased transport happens in the context of a past history of catastrophic accidents in the area and a very recent history of deadly rail accidents throughout North America involving oil and petroleum products that have resulted in hundreds of thousands of gallons of crude oil being spilled into waterways. Fiery derailments have recently occurred in North Dakota, New Brunswick, Alabama and Quebec, the latter causing the death of 47 people, the evacuation of approximately 2,000 people from the surrounding area, and the incineration of a popular tourist town.

Most recently, on April 30, 2014, an eastbound CSX train consisting of 105 tank cars loaded with Bakken crude oil from North Dakota derailed in downtown Lynchburg, Virginia. Seventeen of the train’s cars derailed, and one of the tank cars was breached. A petroleum crude oil fire ensued, shooting flames and black smoke into the air. Emergency responders evacuated approximately 350 individuals from the immediate area. Three of the derailed tank cars containing petroleum crude oil came to rest in the adjacent James River, spilling up to 30,000 gallons of petroleum crude oil into the river, threatening the habitat of listed species such as the Atlantic sturgeon.

The likelihood of an oil spill has also increased recently due to improper handling of the increasing amount of oil being shipped by rail. In early 2014, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) sent violation notices to Hess Corp., Whiting Petroleum Corp. and Marathon Oil Co. for improperly loading rail-bound crude oil using the wrong safety packing categories. More than half of samples tested in unannounced inspections had been assigned incorrect categories. PHMSA said such mistakes “could result in material being shipped in containers that are not designed to safely store it, or could lead first responders to follow the wrong protocol when responding to a spill.”

On January 23, 2014, The National Transportation Safety Board (“NTSB”) acknowledged the unprecedented increase in oil rail shipments and the significant increase in likely oil spills and

spill impacts. *See* Safety Recommendation Letters R-14-001-003 and R-14-004-006. The new NTSB recommendations call for increased scrutiny of rail carriers that may not be taking risks seriously and increased planning for worst-case spill scenarios. The sheer volume of oil that can be moved in a single train was recognized as a particular threat that could result in major environmental consequences.

The situation regarding rail accidents involving petroleum products has become such a problem that the United States Department of Transportation issued an Emergency Order on May 7, 2014. *See* Docket No. DOT-OST-2014-0067 (available at <http://www.dot.gov/briefing-room/emergency-order>). The Emergency Order states that “[t]he number and type of petroleum crude oil railroad accidents... that have occurred during the last year is startling, and the quantity of petroleum crude oil spilled as a result of those accidents is voluminous in comparison to past precedents.” The Emergency Order was necessary “[d]ue to the volume of crude oil currently being shipped by railroads, the demonstrated recent propensity for rail accidents involving trains transporting crude oil to occur, and the subsequent releases of large quantities of crude oil into the environment and the imminent hazard those releases present....” The DOT went on to state that “[r]eleases of petroleum crude oil, subsequent fires, and environmental damage resulting from such releases represent an imminent hazard as defined by 49 U.S.C. 5102(5), presenting a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur.”

Further, the tanker cars being used to transport this oil are inadequate. Nearly 80 percent of the crude oil moved around North America railways is carried in a flawed and aging tanker car model known as the DOT-111. The National Transportation Safety Board has known for decades that the DOT-111’s thin metal skin and protruding valves mean they shouldn’t be used for flammable or hazardous materials; however, the growth of crude-by-rail shipments depends on using a hundred or more DOT-111 tanker cars hitched together - a huge concentration of risk.

On May 13, 2014, the Federal Railroad Administration and Pipeline and Hazardous Materials Safety Administration issued recommendations for tank cars used for the transportation of petroleum crude oil by rail. *See* Notice of Safety Advisory 79 Fed. Reg. 27370 (May 13, 2014). The Safety Advisory notes the “recent propensity for rail accidents involving trains transporting Bakken crude oil” due to the “rapid growth in the quantity of petroleum crude oil shipped by rail in recent years,” and that “older ‘legacy’ tank cars ... without more modern construction and design enhancements, continue to be used to transport hazardous materials, including Bakken crude oil.” It further confirms that “the number and type of railroad accidents involving Bakken crude oil that have occurred during the last year has increased, and the quantity of petroleum crude oil released as a result of those accidents is higher than past precedents.”

Not just the quantity, but the type of oil transported and inevitably spilled greatly affects the impacts of spills, including impacts to natural resources. The terminals in the NWACP planning area are designed to transport fuel from the Bakken oil formation in North Dakota, but the infrastructure could also be used to export Canadian tar sands oil. Lighter fuels, including light crude oils like that from the Bakken Region of North Dakota, are generally more explosive, more toxic, and can penetrate shorelines more quickly and deeply. *Preliminary Guidance from Operation Classification*, Pipeline and Hazardous Materials Safety Administration (“PHMSA”)

(Jan. 2, 2014). Heavy oils, including the heavy oils and diluted bitumen produced from strip-mined Alberta tar sands, persist longer and can smother shorelines and the biota that live there. This viscous type of oil, once spilled into aquatic environments, creates a nightmare clean up scenario with lasting and perhaps irreversible impacts to water quality and aquatic ecosystems. Tar sands oil is not only dangerous for its inherent corrosive and acidic properties and for its tendency to sink in water bodies, but since it is generally only transported when blended with toxic gas condensates, tar sands present a one-two punch to the environment in the event of a spill.

Given the unprecedented recent increase in rail transport of oil through the NWACP planning area, and new knowledge concerning the risks of transporting oil by rail, there is a far greater risk for impacts to listed species from an oil spill and related response actions than was the case just a few years ago. This new information serves to heighten the need for timely compliance with the ESA provisions designed to protect our most vulnerable wildlife.

### **The impacts of oil spills and spill response measures on wildlife**

The NWACP outlines numerous potential responses to oil or other spills, including but not limited to the use of dispersants, surfactants, biological additives and bioremediation; the deflection of spilled oil; in situ burning; dredging; field testing; and field training. Each of these response activities may have adverse effects on species listed under the ESA, which are present in the planning area. Formal consultation on oil spill response activities conducted under the NWACP was last undertaken in 2002, and NMFS issued a Biological Opinion on November 6, 2003 (the "2003 BO"). That consultation from more than a decade ago is now entirely out of date. New information on oil spills and impacts to wildlife from spill response actions requires reinitiation, as explained further below.

Catastrophic oil spills, and the years-long responses that follow them, have become an all too common occurrence across the U.S. landscape, with large spills such as from the Exxon Valdez and Deepwater Horizon resulting in irreparable regional destruction. At least seven spills greater than 250,000 gallons of oil or refined petroleum products have occurred within the planning area of the NWACP from vessels, pipelines and refineries. 2003 BO at Appendix A. More than two dozen spills occurred between 1971 and 1999. *Id.* Worst case scenarios envisioned in the Plan contemplate the possibility of a spill of as much as millions of gallons of oil. NWACP at 1000-36. The increasing shipments of crude-by-rail make this a very real possibility.

Spills in the NWACP planning area are therefore inevitable, and only through careful advance planning can agencies maximize their ability to mitigate impacts to wildlife and minimize further harm from their response efforts. However, it is apparent that spill response planning is not adequate. In Washington, Governor Inslee has stated his "very serious concerns with safety associated with oil trains," and recently directed state agencies to tackle mounting public safety concerns and identify data and information gaps that hinder improvements in public safety and spill prevention and response as oil train traffic continues to increase, particularly in Southwest Washington. (<http://www.columbian.com/news/2014/jun/12/inslee-issues-oil-train-directive/>). In Oregon, Governor Kitzhaber has called for a top-to-bottom review of oil train safety and oil spill responsiveness, citing the lack of information that emergency responders have about the oil being hauled through Oregon communities. ([http://www.oregonlive.com/environment/index.ssf/2014/02/gov\\_john\\_kitzhaber\\_orders\\_top-](http://www.oregonlive.com/environment/index.ssf/2014/02/gov_john_kitzhaber_orders_top-)

.html). That lack of information makes it difficult for oil spill responders to properly respond to an accident, because "you have to know what to train for," said Karmen Fore, Kitzhaber's transportation policy advisor. *Id.* ODOT hasn't added any railroad inspectors since the late 1990s, despite the increase in crude oil shipments. Therefore, not only is the potential for a spill rapidly increasing, but there is a very real threat that oil spill responders will not have the information they need to mount a proper response, resulting in harm to listed species.

The complex geography, hydrology, and ecology of the Columbia River make it an especially difficult environment in which to administer an emergency spill response that avoids causing further harm to sensitive species. It is vital to know how the complexities of the spill environment may interact with different spill response strategies, including specific mechanical, chemical, and biological applications, which could affect species in different ways.

For example, chemicals in water, including spilled crude oil as well as dispersants and dispersed oil, may behave differently depending on the degree of salinity. The degree of salinity in the lower Columbia River may not be predictable at any given time and at any given location. It is vital to know how different substances used in spill response will behave in water depending on the degree of salinity, and how this, in turn, may affect species.

The shifting current in the Columbia is also of concern with regard to direction of flow. Installation of booms to protect sensitive areas from spilled crude may be more or less effective, or even harmful, depending on location, timing, tidal cycle, and direction and volume of flow in the river. It is important to know whether the habitat of listed species could actually be harmed by deployment of booms, especially if deployment occurs without regard to the dynamic nature of the river and bay environment.

Heavy crude oil, such as that extracted from the Alberta tar sands region, if spilled in the NWACP area from a train derailment, could require both chemical and mechanical treatment to remove. Heavy crude tends to sink to the bottom when spilled in water. Removal efforts, in addition to the initial harm of the spill itself, could be devastating to species, such as green sturgeon, which are sensitive to poor water quality and require specific substrates in specific locations to meet life history stages. Mechanical removal of oil, including dredging of important benthic environments, could disturb or destroy feeding and spawning areas, eggs, larvae, juveniles, and foraging adults.

Beach cleanup operations, such as may follow a crude oil spill, can also destroy turtle and bird nests. Vehicle activity can crush nests and eggs, cause harassment of birds, and leave tire ruts that inhibit movement of species. Digging and removal of beach sand and salt marsh sediments, if contaminated with oil washed or sprayed up from the ocean, can also harm listed birds, butterflies and sea turtles, directly or indirectly.

Oil spills near the mouth of the Columbia River, Puget Sound or farther out from the coast may occur due to a tanker accident, or oil may be carried out to sea on river and tidal currents. Spill response, in addition to oil spills themselves, may prove harmful to listed species such as whales, if the marine mammals swim through waters contaminated with either harmful dispersants or dispersed oil.

Use of dispersants is an important example of an oil spill response measure that might do more harm than good. Dispersants are used to break oil into smaller droplets that can break down more readily than oil in slicks. The use of dispersants involves a complex calculation of impacts as oil, dispersants, and dispersed oil can all have toxic effects on aquatic species from plankton to fish to whales. Effects include direct mortality from ingestion, impacts on marine mammals from breathing dispersants, and impacts from the coating of birds' feathers with dispersants or dispersed oil.

Dispersants applied in a real-world oil spill setting have been shown to travel up to 180 miles and to persist for at least 64 days. Kujawinski, E. B., et al., Fate of Dispersants Associated with the Deepwater Horizon Oil Spill, *Environmental Science and Technology*, 45: 1298-1306, (2011). Further, dispersants are now known to behave very differently in fresh compared to salt water. Wrenn, B.A., et al., Dispersibility of crude oil in fresh water, *Environmental Pollution*, 157: 1807-1814, (2009). Dispersed oil has in the past generally been considered less dangerous to wildlife; however, several research teams have shown in just the last year that oil dispersed by a common dispersant, Corexit 9500A,<sup>1</sup> is more toxic than either spilled oil or dispersant alone. Zhang, Y.Q., et al., Chemical dispersant potentiates crude oil impacts on growth, reproduction, and gene expression in *Caenorhabditis elegans*, *Archives of Technology*, 87: 371-82, (2013); Rico-Martinez, R., Snell, T.W., Shearer, T. L., Synergistic toxicity of Macondo crude oil and dispersant Corexit 9500A (R) to the *Brachionus plicatilis* species complex (Rotifera), *Environmental Pollution*, 173: 5-10 (2013); Goodbody-Gringly, G., et al., Toxicity of Deepwater Horizon Source Oil and the Chemical Dispersant, Corexit (R) 9500, to Coral Larvae, *PLOS ONE*, 8: 1, (2013).

The toxicity of many chemical agents, such as dispersants, that may be used during a spill response have not yet been evaluated by the EPA or NMFS for their impacts on listed species. The NWACP contemplates the use of COREXIT 9500 and COREXIT 9527, which were used during the response to the Deepwater Horizon disaster.<sup>2</sup> While these dispersants remain on the Product Schedule for the National Contingency Plan, the EPA has never consulted on the impacts of these specific dispersants on listed species, and hence the presence of a dispersant on the Product Schedule does not in any way indicate that such dispersants have no adverse impacts on listed species.

Recent research into the comparative toxicities of the different dispersants on the Product Schedule provides new information about where and when to use dispersants; however, the NWACP fails to incorporate the lessons learned from these studies and from the impacts of dispersants used during the response to the Deepwater Horizon disaster. Scientists have documented effects of spilled oil and dispersants on genome expression and morphology on

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<sup>1</sup> This product is approved for use pursuant to the NWACP.

<sup>2</sup> In fact, the NWACP states that it does not cover "Dispersants using agents other than COREXIT 9500 and COREXIT 9527;" however, several other dispersants are on the NCP Product Schedule and therefore approved for use by responders. Furthermore, Section 9406 of the NWACP, which governs the use of dispersants, states in the FOSC Authorization Checklist that the FOSC must only look at whether "the dispersant to be used is listed on the current NCP Product Schedule and is considered appropriate for the oil type and conditions." Consultation on other dispersant products is thus warranted, since there is the potential that they will be used.

resident marsh fish. Larval and adult fish have shown aberrant protein expression in gill tissues. The effects persisted for over two months after exposure. Whitehead, A., B. Dubansky, C. Bodinier, T. Garcia, S. Miles, C. Pilley, V. Raghunathan, J. Roach, N. Walker, R. Walter, C. Rice, S. Galvez. 2011. *Genomic and physiological footprint of the Deepwater Horizon oil spill on resident marsh fishes.*<sup>3</sup> The NWACP, however, still allows for the use of COREXIT 9500 and 9527, the exact dispersants that were used during the Horizon response, and which proved to cause undue adverse impacts to wildlife by increasing toxic exposure, and no analysis of these potential impacts appears to have been included.

Similarly, in-situ burning may do more harm than good. In-situ burning involves the burning of oil, generally on water, at or where it was spilled, generally while contained by fire-resistant booms. Burning agents may also be employed for a higher degree of combustion. These activities remove oil from the water, but also have the potential to kill wildlife, including sea turtles. Reported incidents of sea turtles being injured or killed as a result of in-situ burning activities related to the Deepwater Horizon spill response clearly indicate that such activities can and do harm listed species. Consequently, neither the Lead Agencies nor the Services can reasonably conclude that in-situ burning is not likely to adversely affect listed species.

It is also important to note that there are limitations to the available response measures in the NWACP area, and these have important implications for listed species. The NWACP makes it very clear that "during certain times of the year, it is very difficult to mount an effective response action for spills in the outer coastal environment," and "meteorological conditions (such as fog, wind, and rain) may dramatically limit or terminate effective oil booming and on-water oil recovery efforts." NWACP at 1000-28. The Plan adds that "Diversion and containment booming and intertidal shoreline clean-up is very difficult in many of the Northwest's environmentally sensitive shallow marine estuaries such as the Columbia River, Padilla Bay and the Nisqually Delta. Once oil enters these intertidal areas, extensive environmental damage is likely and recovery technology has minimal effectiveness." *Id.*

Moreover, the NWACP notes that "Should a catastrophic oil spill occur, it is likely that there will not be adequate response resources in the Northwest Area to manage and clean up the spill." NWACP at 1000-28. The NWACP suggests that these factors require prompt response to oils spills; however, given these limitations on the responders ability to fully protect the species and habitat in the area, it is critical that the on scene coordinator ("OSC") has the necessary information to prevent harm to listed species and their habitat. In the absence of such information, oil could be pocketed directly into important listed species' habitat.

The use of chemical countermeasures in response to an oil spill event introduces substances into the environment that are potentially toxic to listed species or to species in their food chains. In-situ burning, dredging, field testing of spill response methods, and field training exercises all involve actions that might have adverse impacts on species, depending on the manner in which they are implemented. While federal, state, and local responses to oil spills often lessen the impacts of spills to wildlife, poorly planned or poorly implemented spill response activities can adversely affect wildlife and essential habitat. Only through careful advance planning can

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<sup>3</sup> doi/10.1073/pnas.1109545108 (2010),  
<http://www.pnas.org/content/early/2011/09/21/1109545108.full.pdf>.

agencies maximize their ability to mitigate impacts to wildlife and minimize further harm from their response efforts.

The new information described above, especially as it relates to the novel subsea application of dispersants and the impacts of in-situ burning in response to the *Deepwater Horizon* oil spill, requires that the Lead Agencies reinitiate and complete formal consultation to ensure that the oil spill response measures set forth in the NWACP are “not likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat” of listed endangered and threatened species. 16 U.S.C. § 1536(a)(2); 50 CFR 402.16.

### **Listed species possibly affected by spill response actions**

The following federally listed and proposed species could be affected by emergency response to a crude oil spill from a train derailment, pipeline, or barge/tanker accident in the NWACP area:

- Southern Oregon/northern California Coasts coho salmon (*Oncorhynchus kisutch*)
- Oregon Coast coho salmon (*O. kisutch*)
- Snake River Fall-run chinook salmon (*O. tshawytscha*)
- Snake River spring/summer-run chinook salmon (*O. tshawytscha*)
- Lower Columbia River chinook salmon (*O. tshawytscha*)
- Upper Willamette River chinook salmon (*O. tshawytscha*)
- Upper Columbia River spring-run chinook salmon (*O. tshawytscha*)
- Hood Canal summer-run chum salmon (*O. keta*)
- Columbia River chum salmon (*O. keta*)
- Snake River sockeye salmon (*O. nerka*)
- Upper Columbia River steelhead (*O. mykiss*)
- Snake River Basin steelhead (*O. mykiss*)
- Lower Columbia River steelhead (*O. mykiss*)
- Upper Willamette River steelhead (*O. mykiss*)
- Middle Columbia River steelhead (*O. mykiss*)
- Puget Sound chinook salmon (*O. tshawytscha*)
- Lake Ozette sockeye salmon (*O. nerka*)
- Eulachon (*Thaleichthys pacificus*)
- Southern DPS of green sturgeon (*Acipenser medirostris*)
- Blue whales (*Balaenoptera musculus*)
- Fin whales (*B. physalus*)
- Humpback whales (*Megaptera novaeangliae*)
- Northern right whales (*Eubalaena glacialis*)
- Sei whales (*B. borealis*)
- Sperm whales (*Physeter macrocephalus*)
- Steller sea lion (*Eumetopias jubatus*)
- Green turtles (*Chelonia mydas*)
- Leatherback turtles (*Dermochelys coriacea*)
- Loggerhead turtles (*Caretta caretta*)
- Olive Ridley turtles (*Lepidochelys olivacea*)

- Marbled Murrelet (*Brachyramphus marmoratus*)
- Western Snowy Plover (*Charadrius nivosus nivosus*)
- Oregon Silverspot Butterfly (*Speyeria zerene hippolyta*)

## **LEGAL BACKGROUND**

### **The Northwest Area Contingency Plan and ESA Consultation**

The National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") is the federal government's master plan for addressing oil and other hazardous substance spills in the U.S. Among its many functions, the NCP defines federal agency roles, creates Regional Response Teams, requires the development of area contingency plans ("ACPs"), and establishes general responsibilities of on-scene coordinators. *See* 40 CFR Part 300.

A 2001 Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act ("ESA MOA") outlines a process for assuring that oil spill response planning and implementation is in full compliance with the Endangered Species Act. The agreement makes it the responsibility of committees that develop and implement ACPs "to identify and incorporate plans and procedures to protect listed species and designated critical habitat during spill planning and response activities." ESA MOA at 1. The MOA acknowledges that implementation of an ACP may affect listed species. Therefore, "[b]y consulting on the anticipated effects prior to implementing response actions, decisions can be made rapidly during the spill, harm from response actions can be minimized, and implementation of response strategies specifically designed to protect listed species and critical habitat can be achieved." *Id.* at 5.

Specific steps outlining the consultation process are described in the MOA. While the MOA allows for emergency consultation in the event of a spill, it also requires consultation on the development of the ACP itself. An area committee chair (also serving as the pre-designated Federal on-scene coordinator) should first, in writing, describe the planning area in question and request that the Services provide a list of all endangered and threatened species that are present in that planning area. *Id.* at 5 and Appendix C. The area committee and Services will then work jointly to gather and analyze appropriate data for assessing whether spill response activities may adversely affect any listed species or designated critical habitat. *Id.* at 6. If "it cannot be determined that adverse effects will not occur during a response action," the agency and the Services must enter into formal, programmatic consultation (described below). *Id.* at 6-7. The MOA further recognizes that additional consultation may be needed if new species or habitat in the planning area are listed or if there are changes to planned response activities. *Id.* at 7.

The current NWACP was published in January of 2014. No consultation with the Services has been undertaken on this version of the NWACP. The USCG initiated formal consultation on a prior version of NWACP in 2002, with NMFS publishing a Biological Opinion in 2003; however, that consultation is now entirely out of date, and must be reinitiated due to new information that reveals effects of authorized response actions on listed species not previously considered, and new species and critical habitat have been designated in the plan area. ESA

MOA at 7; 50 CFR 402.16. Furthermore, no consultation has been undertaken with the U.S. Fish and Wildlife Service ("FWS") regarding potential impacts to terrestrial species, such as the threatened Marbled Murrelet, Western Snowy Plover and Oregon Silverspot Butterfly, which can be adversely impacted by vehicle and equipment recovery activity on shore. Until consultation is complete, there is no way to be certain that sensitive areas important for the region's most vulnerable wildlife have been identified and will be protected.

### **The Duty to Ensure No Jeopardy to Listed Species Under Section 7(a)(2) of the ESA**

Congress enacted the Endangered Species Act in 1973 to provide for the conservation of endangered and threatened fish, wildlife, plants and their natural habitats. 16 U.S.C. §§ 1531, 1532. The ESA imposes substantive and procedural obligations on all federal agencies and persons with regard to listed species and their critical habitats. *See id.* §§ 1536(a)(1), (a)(2) and 1538(a); 50 C.F.R. § 402.10.

Each federal agency has a duty to consult with the Services to ensure 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). The definition of agency “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part” including “the granting of licenses, contracts, leases, easements, rights-of-way, [or] permits” and any “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

Each federal agency must review its actions at “the earliest possible time” to determine whether any action “may affect” listed species or their critical habitat in the “action area.” 50 C.F.R. § 402.14(a). The “action area” encompasses all areas that would be “affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The term “may affect” is broadly construed to include “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,” and thus is easily triggered. *Interagency Cooperation – Endangered Species Act of 1973, As Amended*, 51 Fed. Reg. 19,926 (June 3, 1986). If a “may affect” determination is made, “consultation” is required.

Where an agency retains discretion to act on behalf of listed species and continues to act pursuant to that discretion on an ongoing basis, such ongoing agency action triggers consultation. Examples of agency actions with an ongoing duty to consult include: forest management plans, because an agency has discretion to amend such plans, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994); pesticide registrations, because an agency has discretion to alter or cancel such registrations, *Washington Toxics Coalition v. Env'tl Prot. Agency*, 413 F.3d 1024, 1032 (9th Cir. 2005); and fishing permits, because an agency has discretion to condition such permits to benefit species, *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003). Therefore, wherever an agency retains and exercises ongoing discretion under a plan or program to act on behalf of listed species, as is the case here, the duty to consult is also ongoing.

During consultation, agencies must “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). If the action agency concludes that the proposed action is “not likely to adversely affect” the species, then the Services must concur in writing with this determination in

order to avoid formal consultation. 50 C.F.R. §§ 402.13(a) and 402.14(b). If the Services concur in this determination, then consultation is complete. *Id.* § 402.13(a). If the Services' concurrence in a "not likely to adversely affect" finding is inconsistent with the best available science, however, any such concurrence must be set aside. *See* 5 U.S.C. § 706(2).

If an action agency concludes that the action is "likely to adversely affect" listed species or critical habitat, it must then enter into "formal consultation." 50 C.F.R. §§ 402.12(k), 402.14(a). The threshold for triggering the formal consultation requirement is "very low;" "any possible effect . . . triggers formal consultation requirements." 51 Fed. Reg. 19,926. "Formal consultation" commences with the action agency's written request for consultation and concludes with the Services' issuance of a "biological opinion." 50 C.F.R. § 402.02.

The biological opinion issued at the conclusion of formal consultation states the opinion of the Services as to whether the effects of the action are "likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id.* § 402.14(g)(4). To "jeopardize the continued existence of" means "to engage in an action that 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." *Id.* § 402.02.

The "effects of the action" include all direct and indirect effects of the proposed action, plus the effects of actions that are interrelated or interdependent, added to all existing environmental conditions - that is, added to the environmental baseline. "The environmental baseline includes the past and present impacts of all Federal, state, and private actions and other human activities in the action area . . . ." "Interrelated actions are those that are part of a larger action and depend on the larger action for their justification." "Interdependent actions are those that have no independent utility apart from the action under consideration." The effects of the action must be considered together with "cumulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.* § 402.02.

If jeopardy is likely to occur, the Services must prescribe in the biological opinion "reasonable and prudent alternatives" to avoid "take" of listed species. *Id.* § 402.14(g). If either Service concludes that a project is not likely to jeopardize listed species, it must provide an "incidental take" statement with the biological opinion, specifying the amount or extent of incidental take, "reasonable and prudent measures" necessary or appropriate to minimize such take, and the "terms and conditions" that must be complied with by the action agency to implement any reasonable and prudent measures. 16 U.S.C. § 1536(b)(4), 50 C.F.R. § 402.14(i).

After the issuance of a final biological opinion and "where discretionary Federal involvement or control over the action has been retained or is authorized by law," the agency must reinitiate formal consultation if, *inter alia*:

- the amount or extent of taking specified in the incidental take statement is exceeded;
- new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- the identified action is subsequently modified in a manner that causes an effect to the listed species ... that was not considered in the biological opinion; or

- a new species is listed or critical habitat designated that may be affected by the identified action.”

50 C.F.R. § 402.16.

## **VIOLATIONS**

### **The Lead Agencies Have Failed to Comply with ESA Section 7**

The USCG and the EPA each have a duty to ensure that their actions are not likely to jeopardize the continued existence of the many endangered and threatened species that exist in the NWACP planning area. The NWACP sets in motion a variety of actions that are likely to adversely affect listed species, including but not limited to the use of dispersants, surfactants, biological additives and bioremediation, the deflection of spilled oil, in situ burning, dredging, field testing, and field training. The development and implementation of the Plan is clearly an agency action subject to the ESA’s consultation requirement. To fulfill their legal obligations, the Lead Agencies were required, at the earliest possible time, to determine whether implementation of the NWACP is likely to adversely affect any listed species. If so, the agencies are required to enter formal consultation with the Services. Any prior consultation must be reinitiated where, as here, new information reveals effects of the action that may affect listed species in a way not previously considered, or new species are listed or new critical habitat designated in the plan area. 50 CFR 402.16. Having failed to do so is a glaring violation of section 7(a)(2) of the ESA.

#### **Reinitiation of consultation is required because of newly listed species and newly designated critical habitat in the NWACP planning area**

While the Lead Agencies engaged in formal consultation with the National Marine Fisheries Service in 2002, with NMFS publishing a Biological Opinion in 2003, that consultation is entirely outdated and reinitiation of consultation is required. Pursuant to 50 CFR 402.16, formal consultation must be reinitiated "if a new species is listed or critical habitat designated that may be affected by the identified action." Since the 2003 Biological Opinion was issued, several species have been listed in the NWACP planning area, and new critical habitat has been designated, including the following:

- On June 28, 2005, NMFS issued final listing determinations and revised the 4(d) protective regulations for 16 ESUs of Pacific salmon (70 FR 37160). On January 5, 2006 NMFS issued final listing determinations and revised the 4(d) protective regulations for 10 DPSs of steelhead (71 FR 834). *See* National Marine Fisheries Service 5-Year Review: Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, Lower Columbia River Coho Salmon, Lower Columbia River Steelhead (July 26, 2011).
- NMFS designated critical habitat for Lower Columbia River Chinook salmon, Lower Columbia River steelhead, and Columbia River chum salmon in 2005 (70 FR 52630, September 2, 2005). Critical habitat designation has also been proposed for Lower Columbia River Coho salmon (76 FR 1392, January 10, 2011). *Id.*
- Originally part of a larger Lower Columbia River (“LCR”)/Southwest Washington Evolutionarily Significant Unit (“ESU”), LCR Coho salmon were identified as a separate ESU and listed as threatened on June 28, 2005 (70 FR 37160).

- On April 7, 2006, NMFS determined that the Southern DPS of green sturgeon is likely to become endangered in the foreseeable future throughout all or a significant portion of its range and listed the species as threatened under the ESA (71 FR 17757). Critical habitat was designated for the green sturgeon on October 9, 2009 (74 FR 52345), which includes areas covered by the NWACP.
- On March 18, 2010, NMFS issued a Final Rule listing the Southern DPS of the Eulachon (commonly called smelt, candlefish, or hooligan) as threatened under the ESA (75 FR 13012). A Final Rule designating Critical Habitat, including areas covered by the NWACP, was issued in October of 2011 (76 FR 65323). According to the listing materials, the lower Columbia River and its tributaries support the largest known spawning run of Eulachon.
- On February 11, 2008, NMFS issued a final threatened listing determination, final protective regulations, and final designation of critical habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon (73 FR 7816), which was reaffirmed on May 26, 2010 (75 FR 29489).
- On June 19, 2012, FWS published a final rule for critical habitat designation along the coasts of California, Oregon, and Washington for the Western Snowy Plover (77 FR 36728).

The Lead Agencies' failure to reinitiate formal consultation following these additions of listed species and critical habitat in the NWACP planning area is in direct violation of the law, as well as the terms of the ESA MOA. 50 CFR 402.16; ESA MOA at 7.

Reinitiation of consultation is required because new information reveals how listed species in the NWACP planning area may be affected.

Pursuant to 50 CFR 402.16, reinitiation of consultation is required "if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." New information concerning the amount of oil moving through the NWACP planning area, as well as new information on the listed species in the region and the potential for harmful impacts from spill response activities, necessitates reinitiation of consultation on the NWACP.

The recent increase in oil-by-rail transport through the region and associated fiery derailments and spills, which necessitated the emergency DOT, NTSB and PHMSA orders and recommendations discussed above, represent new material information that must be evaluated through consultation to ensure that listed species are protected. This drastic increase in rail shipments means that more, and larger, crude oil spills are now likely to occur, with potentially devastating impacts on the environment. *See* DOT Emergency Order Docket No. DOT-OST-2014-0067 (Emergency Order necessary "due to the volume of crude oil currently being shipped by railroads, the demonstrated recent propensity for rail accidents involving trains transporting crude oil to occur, and the subsequent releases of large quantities of crude oil into the environment and the imminent hazard those releases present" and noting that "the quantity of petroleum crude oil spilled as a result of those accidents is voluminous in comparison to past precedents"); Notice of Safety Advisory 79 Fed. Reg. 27370 (May 13, 2014) ("the number and type of railroad accidents involving Bakken crude oil that have occurred during the last year has

increased, and the quantity of petroleum crude oil released as a result of those accidents is higher than past precedents.”).

While at least seven spills greater than 250,000 gallons of oil or refined petroleum products have occurred within the planning area of the NWACP from vessels, pipelines and refineries (2003 BO at Appendix A), and the NWACP itself contemplates a potential worst-case scenario of a spill of as much as millions of gallons of oil (NWACP at 1000-3), the 2003 Biological Opinion specifically states that it only covers “an oil spill of up to 250,000 gallons offshore, and up to 10,000 gallons inland of the coastal zone.” 2003 BO at 9. The 2003 Biological Opinion further states that “response actions triggered by a spill larger than these are not part of the Federal action and would require a separate section 7 consultation.” Given the unprecedented boom in the amount of oil being moved through the area by rail and new oil transfer facilities in the region, the risk of a spill larger than 250,000 gallons has increased dramatically. This constitutes changed circumstances requiring reinitiation of consultation, or separate section 7 consultation, to ensure that listed species are protected from larger spills. 50 CFR 402.16.

There have also been several updates to what we know about the genetic distinctions for salmon since the 2003 Biological Opinion was authored; this new information likewise requires reinitiation of consultation. Table 3 of the National Marine Fisheries Service 5-Year Review: Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, Lower Columbia River Coho Salmon, Lower Columbia River Steelhead (July 26, 2011) (“2011 5-Year Review”), which provides a summary of scientific assessments for the ESUs and DPS in the Lower Columbia River, shows at least 12 major studies have been authored since the 2003 consultation on these species.

Moreover, three evaluations of LCR Coho salmon status, all based on Willamette/Lower Columbia Technical Recovery Team criteria, have been conducted since the last status review, as part of the recovery planning process. 2011 5-Year Review at 26 (citing McElhany et al. 2007; ODFW 2010; LCFRB 2010). All three evaluations concluded that none of the LCR Coho ESU’s meet recovery criteria. Of the 24 historical populations in the ESU, 21 are considered at very high risk. The remaining three (Sandy, Clackamas, and Scappoose) are considered at high to moderate risk. *Id.* Given that these recent studies indicate that salmon are not meeting the recovery criteria, a reevaluation of the potentially catastrophic impacts of oil spill response measures on these listed species is needed to ensure that they are not further jeopardized by spill response actions.

Further, in January 2011, NMFS adopted the Columbia River Estuary ESA Recovery Plan Module for Salmon and Steelhead. These plans, which form the basis of the NMFS ESA recovery plan for the Lower Columbia, identify habitat degradation as a limiting factor for almost all Lower Columbia River populations of salmon and steelhead. *Id.* at 32. Any further loss of habitat through oil spill response efforts that dredge the benthic substrate or add toxic dispersants to the environment can impact listed species’ habitat. Consultation must be reinitiated to incorporate these recovery plans and the new information they provide into response planning.

Consultation must also be reinitiated to incorporate lessons learned from the Deepwater Horizon oil spill regarding the impacts that response actions may have on listed species - especially the

use of dispersants. The 2003 Biological Opinion specifically states that it does not cover “Dispersants using agents other than COREXIT 9500 and COREXIT 9527;” however several other dispersants have been approved for use since that time, and are now included on the NCP Product Schedule. Moreover, there has been no analysis in the 2003 BO or the NWACP of the potential impacts of the use of dispersants on listed species, which the Horizon oil spill showed to be deadly and toxic. The several studies recently completed on long-term impacts of dispersant use, discussed above, constitute new information that requires reinitiation of consultation pursuant to 50 CFR 402.16.

Similarly, the 2003 Biological Opinion does not cover sea turtles, since NMFS provided a concurrence with the USCG’s and EPA’s determination in their Biological Assessment that “the use of dispersants and in-situ burning may affect but are not likely to adversely affect sea turtles.” More recent information from the Horizon oil spill suggests that this is incorrect. In-situ burning and the use of dispersants have been shown to harm sea turtles, and a more thorough examination of these potential impacts is now warranted.

The NWACP does not contain sufficient information on the locations of listed species and sensitive habitat

Information on the locations of listed species and habitat areas is missing from the NWACP, and what is provided in the Plan is outdated. The NWACP itself does not contain any maps or detailed information regarding the location of listed species or critical habitat. There are also no maps or specific information on listed species in the Northwest Wildlife Response Plan, which is a sub-part of the NWACP. In order to ensure protection of listed species, the on-scene coordinator must have this information on hand when making spill response decisions. The current plans do not provide sufficient information.

The NWACP relies on Geographic Response Plans ("GRPs") and Environmental Sensitivity Index ("ESI") maps for more specific information on habitat; however, these maps are obsolete. The GRPs, which are more location-specific plans that are considered part of the NWACP but maintained separately, are supposed to provide information on the location of wildlife resources including “sensitive species nesting” and “wildlife conservation/concentration areas.” However, the current GRPs focus on flight restriction zones and do not adequately call out endangered or threatened species or critical habitat. Moreover, the Sensitive Resources chapter of the GRP for the lower Columbia River, which is maintained by the Washington Department of Ecology, has not been updated since 2000. The maps and information provided are now obsolete and must be updated to ensure that oil and dispersants are not boomed into sensitive areas, which would likely harm listed species and critical habitat.

Similarly, regarding Oil Responses in Shoreline Environments, the Biological Opinion references the Environmental Sensitivity Index (ESI) maps, which were supposedly incorporated into the GRPs. 2003 BO at 30. These maps, as the Biological Opinion itself notes, were compiled in 1989 for the Columbia River. This is incredibly old information, and does not provide the level of specificity needed to ensure protection for listed species and critical habitat. Consultation must be completed using more recent data, and the maps provided in the NWACP

and accompanying materials must be updated to ensure compliance with the Lead Agencies' Section 7 duties.

Furthermore, 40 CFR 300.210(c)(4) requires that the Fish and Wildlife and Sensitive Environments Plan must “be prepared in consultation with the USFWS and NOAA and other interested natural resource management agencies and parties,” yet neither the Northwest Wildlife Response Plan nor the Geographic Response Plans (“GRPs”) indicate that there was any consultation completed when those were prepared, and the 2003 Biological Opinion makes no mention of the Northwest Wildlife Response Plan.<sup>4</sup> It therefore remains unclear whether the Lead Agencies have in fact fully met the requirements of 40 CFR 300.210(c)(4). The Center and Friends hereby request confirmation that this consultation was completed. If not, the Center and Friends hereby petition the Lead Agencies, pursuant to 5 U.S.C. § 553(e), to begin immediately the process of consulting with the Services regarding the Fish and Wildlife and Sensitive Environments Plan. This consultation process must result in updated maps to ensure that listed species are protected during oil spill response actions.

Consultation with the Fish and Wildlife Service on impacts to terrestrial species is required

Although actions taken in response to oil spills may affect terrestrial species such as birds, plants and insects, the only consultation that has taken place for the NWACP is the 2002/2003 consultation with NMFS, which did not cover any terrestrial species that may be harmed through oil spill response activities. A guidance document issued by NMFS, entitled Endangered Species and the use of a Biological Opinion During Spill Response, discusses the 2002/2003 NMFS consultation, and states that for the NWACP “the USCG and EPA have not yet initiated an analogous programmatic consultation with the US Fish and Wildlife Service (USFWS), so incident-specific consultations are ongoing for ESA-listed species under their jurisdiction.” ([http://www.epa.gov/osweroe1/docs/oil/fss/fss06/bernard\\_1.pdf](http://www.epa.gov/osweroe1/docs/oil/fss/fss06/bernard_1.pdf)).

The ESA MOA acknowledges that implementation of an ACP may affect listed species. Therefore, “[b]y consulting on the anticipated effects prior to implementing response actions, decisions can be made rapidly during the spill, harm from response actions can be minimized, and implementation of response strategies specifically designed to protect listed species and critical habitat can be achieved.” ESA MOA at 5. The Lead Agencies are therefore required to assess whether listed species or critical habitat may be affected by spill response activities. If so, consultation with FWS is required. Shorebirds, such as Marbled Murrelet and Western Snowy Plover, and butterflies, such as the Oregon Silverspot, may be harmed by oil spill responders and vehicular use on shorelines in the NWACP planning area. Where, as here, “it cannot be determined that adverse effects will not occur during a response action,” the Lead Agencies must enter into formal consultation. ESA MOA at 6. The failure to enter into consultation with FWS is therefore in violation of the ESA and the terms of the ESA MOA.

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<sup>4</sup> The Northwest Wildlife Response Plan states that “The Plan has been developed to meet portions of the Northwest Area Contingency Plan’s (NWACP) Fish and Wildlife and Sensitive Environments Plan requirements set forth in the National Contingency Plan (NCP), 40 CFR 300.210(c)(4).”

## CONCLUSION

Rail and barge traffic of crude oil through the Pacific Northwest are increasing at a rapid rate, and crude oil products are being transported in increasing quantities. The risk of a spill, and consequently the need for spill response, has increased significantly since the 2002 NMFS consultation was completed. While imperiled species often stand to benefit from responses to spills of oil and hazardous substances, it is only through careful advanced planning that protection of species can be maximized and inadvertent harm to species minimized. The ESA MOA governing spill response measures specifies that consultation with the Services is required in connection with the adoption and implementation of the Plan. To date the required consultation and reinitiation of former consultation has not taken place, in clear violation of Section 7 of the ESA.

The Center, Friends, and their members themselves represent “interested persons” according to the meaning given that term by 5 U.S.C. § 553(e) of the Administrative Procedure Act (“APA”). As such, the Center and Friends hereby petition the Lead Agencies, under the APA, to begin immediately the process of updating the ACP. As consultation should be undertaken at the “earliest possible time,” 50 C.F.R. § 402.14(a), the consultation process should begin simultaneously. We respectfully request a written response to this petition at the Lead Agencies earliest convenience.

The USCG and EPA should take immediate steps to come into compliance with the ESA by entering into and completing consultation on the NWACP. To that end, we stand ready to assist in any way we can. Please do not hesitate to contact us if we can provide additional information on this topic or otherwise assist in this matter rather than having to resort to the judicial remedies provided by the ESA. We look forward to your prompt response.

Sincerely,

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