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Re: Notice of Violations of the Endangered Species Act

Mr. Robert Naito
NBW Hood River, LLC
150 SW Harrison St
Portland, OR 97201

Mayor Arthur Babitz
City of Hood River
211 Second St.
Hood River, OR 97031

July 9, 2012

Dear Mayor Babitz and Mr. Naito:

We are writing on behalf of Friends of the Hood River Waterfront and Center for Biological Diversity (collectively "Friends") to provide notice, pursuant to the federal Endangered Species Act, ("ESA") 16 U.S.C. § 1540(g), that Friends intends to file suit against NBW Hood River LLC ("NBW") and the City of Hood River ("City") for violations of the ESA and its implementing regulations that would occur as a result of the approved commercial building, hotel development, parking lot and all associated development (collectively "the development") that has been proposed by NBW Hood River and permitted by the City of Hood River. Friends is required to provide you with this notice 60 days prior to the filing of this suit in the U.S. District Court for the District of Oregon.

While Friends has repeatedly asked the City and NBW to take its obligations under the ESA seriously, the failure of either party to do so has left Friends with few options other than the instant action for ensuring protection of the salmon that utilize the waters of the Columbia River affected by the proposed development.

This development project would cause the "take" of multiple runs of salmonids listed under the ESA as threatened or endangered and would therefore violate Section 9 of the ESA and its implementing regulations. 16 U.S.C. § 1538(a)(1); *id.* § 1538(a)(1)(G); 50 C.F.R. § 223.203(a); 50 C.F.R. § 223.102(c). The ESA defines "take" broadly and includes to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" or cause another to do so. 16 U.S.C. § 1532(19).

A. The Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . .” 16 U.S.C. § 1531(b).

To achieve these objectives, the ESA directs federal agencies to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list. 16 U.S.C. § 1533. An “endangered” species is one “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become endangered in the near future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20). Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but also its ultimate recovery. “Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities.” *Hill*, 437 U.S. at 155.

Section 9 of the ESA prohibits any “person” from “taking” or causing take of any member of an endangered species including the three endangered salmon runs present in the project area. 16 U.S.C. § 1538(a). This take prohibition also applies to threatened species including the eight runs of threatened Columbia River salmon that utilize the project area. *Id.* § 1533(d), 1538(a)(1)(G); 50 C.F.R. § 223.203(a); 50 C.F.R. § 223.102(c).¹ The term “take” is defined broadly, and includes to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or cause another to do so. 16 U.S.C. § 1532(19); *See also* 50 C.F.R. § 222.102.

The ESA’s legislative history supports “the broadest possible” reading of the prohibition against take. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; *see also National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

The take prohibition applies to any “person,” 16 U.S.C. § 1538(a)(1), including City governments acting in their official capacity, as well as, private developers. 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person, including city governments, to

¹ *See* the critical habitat protective rules with take prohibitions at 70 FR 37160, 6/28/2005 (Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, Lower Columbia River Coho Salmon, Mid- Columbia River Steelhead, Snake River spring/summer-run Chinook, Snake River Fall-run Chinook); 70 FR 37160 6/28/2005; 71 FR 834 1/5/2006 (Lower Columbia River Steelhead); 71 FR 5178 2/1/2006 (Upper Columbia River Steelhead). *See also* 50 C.F.R. § 223.102(c).

“cause to be committed” the take of a species. 16 U.S.C. § 1538(g).

Governmental entities, including cities, have repeatedly been held liable under Section 9 of the ESA where those entities authorize a third party’s conduct that results in, or is likely to result in, take of a listed species. *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981); *Strahan v. Coxe*, 127 F.3d 4 155 (1st Cir. 1997); *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989); *Pac. Rivers Council v. Brown*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, 2002 WL 32356431 (D. Or. Dec. 23, 2002); *United States v. Town of Plymouth*, 6 F Supp2d 81 (D Mass 1998); *Seattle Audubon Soc’y. v. Sutherland*, No. 06-1608MJP, 2007 WL 1300964 (W.D. Wash. May 1, 2007); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008); *National Wildlife Federation v. Hodel*, 15 Env’tl L Rep 20891 (ED Cal 1985).

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] . . .” 16 U.S.C. § 1540(g). Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take. *National Wildlife Fed’n v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9th Cir. 1994). The ESA’s citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness’ fees. 16 U.S.C. § 1540(g)(4).

Under Section 10 of the ESA, the City of Hood River and NBW can avoid potential liability for taking a threatened species by obtaining an incidental take permit (“ITP”). 16 U.S.C. § 1539(a)(1)(B). In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that “conserv[es]” – i.e., facilitates the recovery of – the species. *Id.* §§ 1539(a)(1)(B), (a)(2)(A); see also *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species” (emphasis added)).

B. Salmon listed under the ESA

The Columbia River, including the area commonly known as the Nichols Boat Basin (“boat basin”), is designated critical habitat for at least 11 runs² of salmonids protected under the ESA including: Chinook salmon, *Oncorhynchus tshawytscha* (Lower Columbia River Spring-run, Lower Columbia River Fall-run, Upper Columbia River Spring-run (Endangered), Snake River spring/summer-run, Snake River Fall-run); Steelhead salmon *Oncorhynchus mykiss* (Lower Columbia River, Middle Columbia River, Upper Columbia River (Endangered), Snake River), Snake River Sockeye (Endangered) *Oncorhynchus nerka*; Columbia River Chum salmon, *Oncorhynchus keta*, and Lower Columbia River Coho salmon, *Oncorhynchus kisutch*. Snake River Sockeye, Upper Columbia River Steelhead and Upper Columbia River Spring-run Chinook are listed under the ESA as “endangered” and the remaining runs are listed as

² Evolutionarily significant units/distinct populations segments listed in footnote 1.

“threatened.”

NOAA has designated the section of the Columbia River that flows into the boat basin as critical habitat for these species of salmonids under the ESA. These same salmonids utilize the section of the Columbia River that includes the boat basin and utilize the boat basin itself for a number of important life functions

C. Take of ESA-listed salmon

The illegal “take” of the salmon listed above would result from both the discrete impacts that the development would have on salmonids as well as the cumulative impacts from different aspects of the approved development.

1. Commercial building: The development would include construction of a commercial building below the ordinary high water (OHW) mark of the Columbia River in the boat basin. We refer to the area below the OHW as being in “the River.” The development would involve excavation and the related installation of numerous pilings in and adjacent to the River that would support the building above the water. These actions would take listed salmonids using the area due to direct impacts from excavation and construction work. It would also take salmonids using sections of the River adjacent to the approved development as a result of construction and related activities, including but not limited to water pollution caused by the release of sediment, high turbidity waters, concrete and/or related construction materials, construction and excavation related disturbance, and toxics that are known to be present at the development site as a result of past industrial practices there.

Once constructed the building would also result in the take of salmonids due to habitat degradation and disturbance caused by the presence and operation of the commercial building in and immediately adjacent to the River.

2. Construction grading and stormwater discharge: The use of heavy machinery to conduct grading, excavation, and dredging both below and above the OHW would also cause the direct take of listed salmonids. These activities would cause significant water pollution impacts as a result of increased turbidity and sediment and the release of toxic contaminants present on the site into the adjacent waters. This grading and construction would also directly remove and impact wetlands immediately adjacent to the river eliminating the values that this wetland buffer plays in protecting water quality and salmonids.

3. Stormwater pollution impacts: The approved development would produce significant amounts of stormwater pollution as a result of a more than 230-space parking lot and all other structures and hardscape associated with the approved development. This stormwater runoff would introduce toxics associated with parking lots, including but not limited to oil, grease, and other hydrocarbons, heavy metals, and a wide spectrum of other contaminants commonly associated with parking lot stormwater runoff into the boat basin. During late Spring, Summer and early Fall, stormwater runoff would also introduce high-temperature waters into the boat basin that exceed temperatures known to be toxic to the listed salmon at issue. The fact that during some times of the year temperatures already exceed state and federal water quality

standards highlights the potential impacts of additional discharges of high-temperature stormwater. This stormwater runoff would also produce significant peak flows in the volume of stormwater runoff.

The City-approved site plans show at least two stormwater outfalls directing stormwater runoff into the waters of the boat basin. The stormwater discharges described above would result in the take of listed salmon.

4. Increased disturbance: The proposed development would significantly increase disturbance in the near shore waters of the boat basin in areas that are known to have substantial concentrations of toxics from past industrial use of the site. While a superficial cleanup of the top 18" of soil has been conducted on portions of the development site, continued contamination of surface sediments and subsurface sediments has been documented to exist by the Oregon Department of Environmental Quality below the waterline which have not been removed by the limited cleanup that occurred on the site.

The proposed development would significantly increase human use and disturbance in portions of the boat basin that are contaminated and cause the re-mobilization of such toxics into the water column. The increased human disturbance as well as the related release of toxics it causes would result in the take of listed salmonids as a result of the approved development.

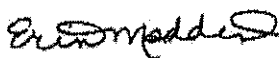
The commercial building is intended in part to service a high-intensity wake boarding cable park that is subject to the State of Oregon's amusement park regulations. While we believe the wake boarding cable park, which would occupy approximately 10 acres of the boat basin, would also constitute a take of the listed species at issue, the cable park has not yet been permitted by the City and so the instant notice is at this point limited to the development that the City has approved.

D. Request for corrective action and conclusion

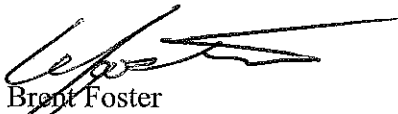
As a result of the take that would occur from the approved project, we hereby request that NBW and the City withdraw approval of the development at issue and either modify the proposed project to avoid any take of ESA-listed species or obtain a permit under Section 10 of the ESA that would authorize such take. 16 U.S.C § 1539.

Unless the City and NBW remedy the legal violations discussed in this letter within 60 days, we intend to bring legal action and seek an injunction against any and all activities responsible for the take identified above. As a part of that litigation, we will also seek an award for any costs and fees associated with the litigation, including reasonable attorney and expert fees. If you have any questions about this notice, please do not hesitate to contact me.

Sincerely,



Erin Madden
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On behalf of:

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