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Via Certified Mail - Return Receipt Requested

November 5, 2010

Grant Davis, Interim General Manager
Sonoma County Water Agency
404 Aviation Boulevard
Santa Rosa, CA 95403

Valerie Brown, Chair
Sonoma County Board of Supervisors
575 Administration Drive, Room 100A
Santa Rosa, CA 95403

Gary Locke -Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT UNDER THE ENDANGERED SPECIES ACT

Dear Mr. Davis, Supervisor Brown, and Secretary Locke:

NOTICE

The Endangered Species Act (“ESA”) § 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under the ESA, an entity must give notice of its intent to sue to the alleged violator and the Secretary of Interior or Commerce.

I am writing on behalf of Northern California River Watch and Coast Action Group (“Noticing Parties”) in their support of Russian River salmon, to notify the Sonoma County Water Agency and the Sonoma County Board of Supervisors as managing directors of the Sonoma County Water Agency (“VIOLATORS,”) of alleged violations of Sections 9 of the ESA, 16 U.S.C. § 1538 with respect to the activities hereafter identified alleged in this Notice.

Following the expiration of the 60-day notice period, Noticing Parties intend to file suit in federal court against VIOLATORS to enjoin VIOLATORS from violations of the ESA or regulations issued under the authority of the ESA. If prior to expiration of the 60-day notice period either the Sonoma County Water Agency or the Sonoma County Board of Supervisors corrects its actions or inactions and is legally enjoined from further violations of the ESA, that entity so doing will not be named in the lawsuit.

Noticing Parties also give notice to the Secretary of Commerce that after the expiration of the 60-day hold period, Noticing Parties will file suit in federal court to enforce the ESA, with respect to the violations as alleged in this Notice unless the Secretary has commenced an action to impose a penalty pursuant to 16 U.S.C. § 1540(a); or, if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress the violations of the ESA as alleged in this Notice.

STATUTORY FRAMEWORK

Under ESA § 9, 16 U.S.C. § 1538(a)(1)(B), it is unlawful for any person to TAKE an endangered species. Under ESA § 4(19), 16 U.S.C. 1532(19), the term “TAKE” includes to harass, harm, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. TAKE includes direct as well as indirect harm and need not be purposeful. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. § 687, 704 (1995). In fact, a TAKE may even be the result of an accident. See *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

ESA § 9 is a strict liability statute, such that the illegal TAKING need not be intentional. Cumulative acts resulting in a TAKE are also actionable. Attempting to cause almost any level of injury to an endangered species is also prohibited by law. TAKE is defined in the ESA in the broadest possible manner to include every conceivable way in which a person or entity can TAKE or attempt to TAKE any fish or wildlife. *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8th Cir. 1989). ESA § 9 prohibition on TAKE applies equally to threatened species.

The ESA not only prohibits the acts of those parties that directly exact the TAKING, but also bans acts by a third party which bring about the acts exacting a TAKE. For instance, a governmental third party entity pursuant to whose authority an actor directly exacts a TAKING may be deemed to have violated the ESA. *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir.1997) See also *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11th Cir.1998); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

The ESA has a broad citizen suit provision allowing any entity to commence a civil suit on its own behalf to enjoin any entity who is alleged to be in violation of any provision of the ESA or regulation issued under the authority thereof. A plaintiff can seek to enjoin

both present activities which constitute an ongoing TAKE, and future activities reasonably likely to result in a TAKE. See *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996).

FACTUAL BACKGROUND

On or about September 29, 2010, VIOLATORS mechanically breeched the sand bar which provided the structure for a biologically important lagoon and estuary at the mouth of the Russian River in Jenner, California. Prior to the breeching of the sand bar by VIOLATORS, the estuary provided vital rearing habitat for federally protected coho salmon, steelhead trout, and chinook salmon. Breeching of the sand bar resulted in a rapid increase in salinity of the estuary which adversely modified rearing conditions and reduced food supply for salmonids, and also increased currents in the estuary which swept immature salmonids out to sea.

In 2008, after extensive study, the National Marine Fisheries Service (“NMFS”) (or the National Oceanic and Atmospheric Administration Fisheries Service,) released a biological opinion on the current status and future needs of the federally protected anadromous fish which rely heavily on the Russian River to avoid extinction, concluding that the historic and recent practices of VIOLATORS are likely to jeopardize and adversely modify critical habitat of endangered coho salmon and threatened steelhead trout.

Notwithstanding the critical importance of maintaining a lagoon upon which thousands of juvenile salmonids depend, VIOLATORS mechanically and suddenly adversely compromised the lagoon and critical salmon habitat. The September 2010 breeching activity resulted in the TAKE at a minimum, of approximately 2,000 very young endangered coho, including many from the Russian River Coho Salmon Captive Broodstock Program and Russian River Water Resources Coho Partnership. Fry and parr were harmed, injured, harassed, and killed as a result of VIOLATORS’ activities.

PROTECTED STATUS AND HABITAT NEEDS

The evolutionarily significant units (“ESUs”) of coho salmon, chinook salmon, and steelhead trout which include the Russian River and Gualala River populations, are federally listed species of fish protected under the ESA. The Central California Coast ESU of coho salmon is listed as endangered. Critical habit was designated on May 5, 1999. The California Coastal ESU of chinook salmon are listed as threatened. Critical habitat has been designated for the 9 listed chinook salmon ESUs. The Northern and Central California Coast ESUs of steelhead trout are listed as threatened. Critical habitat for 10 west coast steelhead Designated Population Segments (“DPS”) was designated on September 2, 2005. On January

5, 2006, the NMFS listed 9 DPS of west coast steelhead as threatened and one as endangered. Some had been previously listed between 1996 and 1998, but because of legal and other issues, all listings were reaffirmed and/or revised in 2006.

Coho salmon (*Oncorhynchus kisutch*) spend approximately the first half of their life cycle rearing and feeding in streams and small freshwater tributaries. Spawning habitat is small streams with stable gravel substrates. The remainder of their lifecycle is spent foraging in estuarine and marine waters of the Pacific Ocean. Adult coho salmon migrate back from a marine environment into the freshwater streams and rivers of their birth in order to mate. They spawn only once and then die, usually at around three years old. Females prepare several redds (nests) where the eggs will remain for six to seven weeks until they hatch.

Chinook salmon (*Oncorhynchus tshawytscha*) were listed as endangered in 1994. Juvenile chinook may spend from 3 months to 2 years in fresh water before migrating to estuarine areas as smolts and then into the ocean to feed and mature. Chinook salmon remain at sea for 1 to 6 years (more commonly 2 to 4 years), with the exception of a small proportion of yearling males called “jack salmon” which mature in freshwater or return after 2 or 3 months in salt water. Scientific studies shows that unless smolts reach a certain size before ocean migration, they have little chance of survival.

There are different seasonal (i.e., spring, summer, fall, or winter) migrational “runs” of chinook salmon from the ocean to freshwater, even within a single river system. These runs have been identified on the basis of when adults enter freshwater to begin their spawning migration. However, distinct runs also differ in the degree of maturation at the time of river entry, the temperature and flow characteristics of spawning sites, and their actual time of spawning. Freshwater entry and spawning timing are believed to be related to local temperature and water flow regimes.

Adult females will prepare a redd in a stream area with suitable gravel type composition, water depth and velocity. They may deposit eggs in 4 to 5 “nesting pockets” within a single redd. Spawning sites have larger gravel and more water flow up through the gravel than sites used by other Pacific salmon. After laying eggs in a redd, adults will guard the redd from a few days to nearly a month before dying. The eggs will hatch, depending upon water temperatures, between 3 to 5 months after deposition. Eggs are deposited at a time to ensure that young fry emerge during the following spring when the river or estuary productivity is sufficient for juvenile survival and growth.

Steelhead trout (*Oncorhynchus mykiss*) are a unique species. Individuals develop differently depending on their environment. While all steelhead hatch in gravel-bottomed, fast-flowing, well-oxygenated rivers and streams, some stay in fresh water all their lives, and

are then known as rainbow trout. The steelhead which migrate to the ocean develop a much more pointed head, become more silvery in color, and typically grow much larger than the rainbow trout that remain in fresh water.

Adults migrate from a marine environment into the freshwater streams and rivers of their birth in order to mate. Adult females will prepare a redd in a stream area with suitable gravel type composition, water depth, and velocity, and may deposit eggs in 4 to 5 nesting pockets within a single redd. The eggs hatch in 3 to 4 weeks. Unlike other Pacific salmonids, they can spawn more than once. Young animals feed primarily on zooplankton. Adults feed on aquatic and terrestrial insects, mollusks, crustaceans, fish eggs, minnows, and other small fishes.

The stream-maturing type (summer-run steelhead in the Pacific Northwest and northern California) enter freshwater in a sexually immature condition between May and October and require several months to mature and spawn. The ocean-maturing type (winter-run steelhead in the Pacific Northwest and northern California) enter freshwater between November and April with well-developed gonads, and spawn shortly thereafter. Coastal streams are dominated by winter-run steelhead, whereas inland steelhead of the Columbia River basin are almost exclusively summer-run steelhead.

Steelhead are capable of surviving in a wide range of temperature conditions. They do best where dissolved oxygen concentration is at least 7 parts per million. In streams, deep low-velocity pools are important wintering habitats. Spawning habitat consists of gravel substrates free of excessive silt.

Both salmon and steelhead trout require perennial aquatic habitat and adequate stream flows 24 hours a day 365 days a year in order to live. In order to make the physiological changes that adapt these anadromous fish for success in a salt water environment, they not only require adequate time in freshwater, but also the adequate food supply which freshwater habitat provides.

VIOLATIONS

ESA § 9.

ESA § 9 prohibits the TAKE of protected species. The acts, operations, and failure to act properly on the part of VIOLATORS resulted in TAKE of protected species including harm to habitat.

The Sonoma County Water Agency, under the auspices of its flood control authority, is responsible for the September 2010 breaching of the sand bar exposing immature salmonids to rapid increases in salinity, reduced food supply, and unusually strong currents

resulting in adverse habitat modification, harm, harassment of the species, and interruption of rearing, foraging, and reproduction, all in violation of the ESA. Such breeching is ordinarily only permitted after October 15 in order to protect rare species of salmonids who depend upon the closed estuary to survive.

The County Board of Supervisors (“County”) is also the directing board of the Sonoma County Water Agency and is thus directly responsible for the Agency’s policies and procedures. In carrying out its duties, the County must comply with laws governing the protection of endangered and threatened species. Although required to do so, the County failed to “prevent the elimination of fish and wildlife species due to man’s activities, insure that fish and wildlife do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history”. (Calif. Prc. Code Sec 21001(c)). VIOLATORS are not protected from violating the ESA as a result of approved permits or plans in the absence of an incidental take permit.

It is alleged that the operations authorized by and/or carried out by VIOLATORS in September, 2010 in violation of ESA § 9, 16 U.S.C. §1538, included creating a trench on the sandbar which makes the Russian River estuary, with the use of either a backhoe or earth-moving equipment, thereby allowing salt water in and creating strong currents that both killed and threatened to harm listed species. Activities of VIOLATORS as described in this Notice modified critical habitat by reducing the amount of time the fish were able to spend in freshwater, resulting in harm and injury to the protected salmonids.

It is expected that such breeching activities will continue. Noticing Parties allege the County has a track record of choosing protection of manmade structures from high water (such as a small visitors’ center adjacent to the estuary), over protecting the lives of rare species of salmon.

VIOLATORS must take immediate action to conform to the federal mandate of the ESA and cease harmful activities within the known habitat of protected species. Flood control activities must be conducted in a manner which will not harm listed species. In addition, VIOLATORS must stop activities which likely contribute to the loss of estuarian habitat essential for the migration, reproduction, rearing, safety, food, survival and recovery of the listed species.

ESA § 10.

VIOLATORS have failed to obtain an incidental TAKE permit under ESA § 10, 16 U.S.C. § 1539 permitting the TAKE of listed salmonids. VIOLATORS do not fall within the category of those persons or entities permitted to incidentally TAKE endangered species

such as research scientists or restoration experts. Acts, operations, and failure to act properly on the part of VIOLATORS has resulted in the unpermitted TAKE of protected species including harm to habitat.

IDENTIFICATION OF ENTITIES BRINGING NOTICE

The entities bringing this Notice are Northern California River Watch and Coast Action Group.

Northern California River Watch is a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California, located at 500 North Main Street, Suite 110, Sebastopol, CA 95472, Telephone and Facsimile 707-824-4372, Email: US@ncriverwatch.org.

Coast Action Group is an organization dedicated to the protection of fishery and water quality resources on the north coast of California. Coast Action Group has a history of actions supporting the protection of fish, forest, and water quality resources dating back to 1990. Coast Action Group exists in order to protect fish and wildlife through state and federal water laws. It comments on issues of statewide concern in order to protect in-stream flows and water quality. It is currently participating in meetings and on a task force attempting to deal with important issues which affect listed species of coho salmon and steelhead trout. Coast Action Group is located at P.O. Box 215, Point Arena, CA 95468, Telephone 707-882-2484, Email: alevine@mcn.org.

CONTACT INFORMATION

Noticing Parties have retained legal counsel. All communications with respect to the issues raised in this Notice should be addressed to:

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CONCLUSION

The violations as set forth in this Notice affect the health and enjoyment of Noticing Parties and their members who reside, work and recreate in the affected area. Said members use this watershed for domestic water supply, agricultural water supply, recreation, sports,

fishing, swimming, hiking, photography, nature walks and the like. The health, property rights, use and enjoyment of these areas by said members are specifically impaired by the violations of the ESA as alleged herein.

Noticing Parties believe this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter Noticing Parties intend to file a citizens' suit under the ESA against VIOLATORS for the violations enumerated herein.

During the 60-day notice period Noticing Parties are willing to discuss effective remedies for the violations described in this Notice. However, if VIOLATORS wish to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated within the next 20 days so that they may be completed before the end of the 60-day notice period. Noticing Parties do not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

A handwritten signature in black ink that reads "Jack Silver". The signature is written in a cursive style with a large, prominent "J" and "S".

Jack Silver

JS:lhbm