



February 22, 2023

***VIA EMAIL and
VIA CERTIFIED U.S. MAIL RETURN RECEIPT REQUESTED***

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Re: Sixty-Day Notice of Intent to Sue for Violations of Sections 7 and 9 of the Endangered Species Act

Dear Secretary Haaland, Secretary Raimondo, Administrator Regan, Administrator Sixkiller and Assistant Administrator Coit:

On behalf of the Swinomish Indian Tribal Community (“Swinomish”), we provide this notice of violation of Sections 7 and 9 of the Endangered Species Act (“ESA”).¹ As described more fully below, the U.S. Environmental Protection Agency (“EPA”) has violated the ESA by failing to reinitiate consultation on the State of Washington’s Total Maximum Daily Load (“TMDL”) (enclosed with this notice) intended to address violations of temperature water quality standards in the Lower Skagit River watershed in Skagit County, Washington. Changed circumstances and incorrect assumptions underlying the initial approval necessitate a re-evaluation of potential jeopardy to listed species.

The original 2008 Biological Opinion (“BiOp”) (enclosed) issued by the National Marine Fisheries Services (NMFS) relied upon representations and science-based assurances from the Washington Department of Ecology (“Ecology”) regarding the need, efficacy, size, and timeline

¹ 16 U.S.C. §§ 1536(a)(2), 1538(a)(1)(B).

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for establishing vegetated streamside habitat or “riparian buffers” as the required means to address ongoing violations of temperature water quality standards² that adversely affect and jeopardize various listed salmonids in the Lower Skagit watershed. Some of Ecology’s representations and assurances on how the take of, or jeopardy to, listed species would be reversed, mitigated, and avoided have proven false or inaccurate. Ecology has also completely failed to take action to address the temperature violations documented in the 2004 TMDL. Overall, these failures of action and ongoing threats to listed species constitute new information or changed circumstances from those upon which NMFS relied in developing the original BiOp.

As a result, EPA and NMFS must reinitiate consultation on the Lower Skagit temperature TMDL immediately, NMFS must enforce the Endangered Species Act (“ESA”) through measurable and timely terms and conditions, and EPA must withdraw its approval of the TMDL until a new biological opinion is issued in response to the reinitiation.

This letter describes the basis of liability under Section 7 of the ESA and serves as notice pursuant to 16 U.S.C. § 1540(g) of Swinomish’s intent to bring a citizen suit to enjoin the violations described herein. Given the conditions in the Lower Skagit, state and federal agencies may additionally be liable for unauthorized take under Section 9 of the ESA.

BACKGROUND

I. SWINOMISH INDIAN TRIBAL COMMUNITY

Swinomish is a federally recognized tribe that occupies the Swinomish Reservation in Washington State. As a signatory to the Treaty of Point Elliott, Swinomish retains treaty rights to fisheries in the Skagit River Basin and beyond, and to the habitat necessary to support them. Swinomish serves as a co-manager of fishery resources and plays a key role in ensuring habitat protection and restoration within the Skagit Basin. The Swinomish people have relied on such fishery resources for thousands of years to support their way of life. Swinomish has watched as its salmon harvest has declined by over 80% in the past decades, even as no other industry has suffered similar losses. Unaddressed climate change is compounding the situation and speeding up the clock to extirpation. EPA and NMFS, as federal agencies, serve as trustees to Swinomish through their actions related to such fishery resources and the habitats that support them. Swinomish has long been involved in efforts to protect salmon, their critical habitat, and the Tribe’s treaty rights, and the Tribe has repeatedly communicated with state and federal agencies about the serious mismanagement issues causing harm to these resources.³

² 173-201A WAC.

³ See generally Letter from Steve Edwards, Chairman, Swinomish Indian Tribal Cmty., to Allison Castellan, Off. for Coastal Mgmt., NOAA, & Michelle Wilcox, EPA Region 10, re: Proposed Federal Decision Regarding Washington’s Satisfaction of Conditions on its Coastal Nonpoint Program under CZARA, docket No. NOAA-NOS-2019-0135 (Sept. 14, 2020) (detailing history of mismanagement and resource harm).

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II. THE SKAGIT AND ITS SALMONIDS

The Skagit River system is the third largest river system in the western United States. More than 3,000 rivers and streams flow into the Skagit River system, accounting for at least one-quarter of the fresh-water input to Puget Sound. It is the only river system in the lower 48 states that is home to all five species of Pacific salmon and to steelhead.⁴ The Skagit River watershed also hosts the largest population of listed bull trout in Western Washington.⁵ It contains 26 local bull trout populations in the Puget Sound Management Unit, and it is unique in hosting populations that rely on all four observed life history strategies (resident, fluvial, adfluvial, and anadromous).⁶ The State of Washington has identified the Skagit River watershed as the most significant watershed in Puget Sound for salmonid production and recovery.⁷

Among the various ESA-listed species that depend upon the Skagit are culturally significant Chinook salmon. NMFS has previously concluded that “[i]ndividually and collectively, the Skagit [Puget Sound] Chinook salmon populations are essential to the survival and recovery of the [Evolutionarily Significant Unit] because they provide vital contributions to its abundance, productivity, diversity and spatial structure.”⁸ Skagit Chinook salmon have been seriously adversely affected by a variety of factors, including significant habitat alteration and

⁴ NOAA and WDFW, Southern Resident Killer Whale Priority Chinook Stocks Report (June 22, 2018), at p. 7; Northwest Indian Fisheries Comm’n, 2020 State of Our Watersheds, at p. 336, <https://nwifc.org/publications/state-of-our-watersheds/>.⁵ *Skagit Basin*, Skagit Climate Science Consortium (last accessed February 20, 2024), <https://www.skagitclimatescience.org/skagit-watershed/>; see also Matt J. Smith, Final Report to Seattle City Light: Population Structure and Genetic Assignment of Bull Trout (*Salvelinus confluentus*) in the Skagit River Basin (Dec. 2010), at p. 3,

<https://www.seattle.gov/light/skagit/relicensing/cs/groups/secure/@scl.skagit.team/documents/document/cm9k/ntcw/~edisp/prod570954.pdf>.

⁵ *Skagit Basin*, Skagit Climate Science Consortium (last accessed February 20, 2024), <https://www.skagitclimatescience.org/skagit-watershed/>; see also Matt J. Smith, Final Report to Seattle City Light: Population Structure and Genetic Assignment of Bull Trout (*Salvelinus confluentus*) in the Skagit River Basin (Dec. 2010), at p. 3, <https://www.seattle.gov/light/skagit/relicensing/cs/groups/secure/@scl.skagit.team/documents/document/cm9k/ntcw/~edisp/prod570954.pdf>.

⁶ Mara Zimmerman & Clayton Kinsel, Migration of Anadromous Juvenile Bull Trout in the Skagit River, 1990-2009, at p. 4, Wash. Dep’t of Fish & Wildlife (Dec. 2010), <https://wdfw.wa.gov/sites/default/files/publications/01173/wdfw01173.pdf>.

⁷ NOAA and WDFW, Southern Resident Killer Whale Priority Chinook Stocks Report (June 22, 2018), at p. 7; Northwest Indian Fisheries Comm’n, 2020 State of Our Watersheds, at p. 336 (needs date), <https://nwifc.org/publications/state-of-our-watersheds/>.

⁸ NMFS BiOp prepared for the Army Corps’ dry slough tidegate replacement project in the Skagit River (Sep. 15, 2006), at p. 10.

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destruction, throughout Puget Sound and in the Skagit River and estuary in particular.⁹ Declines in the Puget Sound Chinook salmon population have resulted in their listing as threatened under the ESA.¹⁰

In the Skagit River watershed, one of the principal harms to listed salmonids is high stream temperatures that violate water quality standards deemed necessary for salmonid survival. Those high temperatures occur every year and throughout the entire Lower Skagit watershed.¹¹ The lack of riparian vegetation is the primary cause of salmonid-harming high water temperatures; riparian vegetation provides effective shade, cooler microclimates, and reduced channel erosion (the latter preventing channel widening that results in more absorbed solar heat, as well as reduced sediment pollution).¹²

Tribes, Washington State, and the federal government have repeatedly recognized the vulnerability of cold water salmonids in the Pacific Northwest and species' needs for sufficiently protective temperature criteria and implementation methods.¹³ So, too, have these entities recognized the primary importance of restoring native riparian vegetation and establishing protective buffer zones.¹⁴

III. WATER QUALITY STANDARDS AND TMDL PROCESS RELEVANT TO THE COMPLAINT

Lower Skagit tributaries have been recognized as important salmonid spawning, rearing, and migration habitat with associated water quality standards. Yet repeat temperature exceedances resulted in a Clean Water Act section 303(d) listing in 1998, over 25 years ago. In its own documents, Ecology noted that summer maximum stream temperatures in the Lower Skagit are “a significant source of mortality” for listed juvenile salmonids,¹⁵ affect salmonid migration and foraging patterns, and are correlated with disease outbreaks.¹⁶ Ecology also

⁹ See Shared Strategy for Puget Sound, Puget Sound Chinook Salmon Recovery Plan, at pp. 79-80, 181-82 (Jan. 2007), <https://repository.library.noaa.gov/view/noaa/16005> (pointing to high stream temperatures and habitat degradation as limiting factors for Chinook recovery); see also Nat'l Marine Fisheries Serv. & Nat'l Oceanic & Atmospheric Admin., ESA Recovery Plan for the Puget Sound Steelhead Distinct Population Segment, at p. 76 (Dec. 2019), <https://www.fisheries.noaa.gov/resource/document/esa-recovery-plan-puget-sound-steelhead-distinct-population-segment-oncorhynchus> (same for steelhead recovery).

¹⁰ 64 Fed. Reg. 14,308 (Mar. 24, 1999).

¹¹ Department of Ecology, Lower Skagit TMDL (2004), at pp. 43, 49.

¹² *Id.* at p. 9.

¹³ U.S. EPA, EPA Region 10 Guidance For Pacific Northwest State and Tribal Temperature Water Quality Standards (hereinafter “EPA NPW Guidance”) (2003), at p. 5, <https://nepis.epa.gov/Exe/ZyPDF.cgi/P1004IUI.PDF?Dockey=P1004IUI.PDF>.

¹⁴ *Id.* at p. 44.

¹⁵ 2004 TMDL at p. 28.

¹⁶ *Id.* at p. 29.

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recognized that the Lower Skagit River tributaries commonly exceed temperatures in the mid to high 20°C range, which can cause death of ESA-listed cold water fish species if exposure lasts several hours to a day.¹⁷ Ecology has recognized that farming and ranching activities on agricultural lands have led to vegetation removal, warm water running off fields, and increases in water temperature, along with other water quality issues.¹⁸ These sources of water pollution generally constitute “nonpoint” sources.

The 303(d) listing required Washington to develop a TMDL, that is, a pollution budget designed to return the waters to meeting water quality standards.¹⁹ The TMDL identifies causes and solutions to pollution exceedances, and sets a timeline for bringing the water body into compliance.²⁰ In waters with nonpoint pollution sources such as the Lower Skagit, the TMDL must identify “load allocations” for the pollutant sources at issue, along with a margin of safety.²¹

In 2004, Ecology developed a TMDL intended to meet temperature water quality standards for specific creeks in the Lower Skagit.²² Based upon EPA guidance and science related to the relationship between shade and stream temperatures, the 2004 TMDL used “effective shade” as a surrogate indicator for heat flux load allocation, given that this specific water quality impairment could not be tied to a single traditional “pollutant” or a pollutant for which a numeric criterion could be identified.²³ The TMDL identified revegetation as an essential and scientifically-recognized measure to address heat pollution in the river, as vegetation would generate shade, ensure a cooler water and ground shoreside microclimate, and reduce erosion and channel width.²⁴ For the various creeks studied, the TMDL stated that effective shade along 78% and 95% of specified stream reaches was required to stem heat pollution.²⁵ The document also established buffer widths corresponding to 75% of average site potential tree height for 100 year old trees, which translated into widths of 91.8 to 131.2 feet.²⁶

¹⁷ *Id.* at pp. 31, 76.

¹⁸ *Id.* at p. 35.

¹⁹ 33 U.S.C. § 1313(d); *see also* 2004 TMDL at p. 2 (characterizing the role of the TMDL as “ensur[ing] the impaired water will attain water quality standards”).

²⁰ *See* BiOp at p. 52.

²¹ 2004 TMDL at p. 2.

²² Specifically, for the Carpenter, Turner, Otter Pond, Red, Fisher, Hansen, Lake, Nookachamps, and East Fork Nookachamps creeks. *Id.* at pp. 19, 43.

²³ *Id.* at p. 18.

²⁴ *Id.* at pp. 2, 9. The TMDL also recognized protecting instream flows as a heat-regulating mechanism, *see id.* at p. 33, but the primary protection mechanism identified was revegetation.

²⁵ *Id.* at pp. 89-92. At the time, some areas were only 15% vegetated. *E.g., id.* at p. 89 (reaches on Carpenter Creek).

²⁶ *Id.* at p. 87; *see also* Timothy Quinn, George F. Wilhere, & Kirk L. Krueger, eds., *Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications* (2020), Wash. Dep’t of Fish & Wildlife.

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The TMDL found the vegetated buffers would result in “substantial reductions in water temperature.”²⁷

Critically, the load allocations, actions, and timeline for meeting water quality standards established in the 2004 TMDL were based on two assumptions: (1) protection and reestablishment of riparian vegetation through management actions would occur, and (2) there would be no further degradation of water quality from other causes.²⁸

In 2006, Washington issued revised water quality standards as required by EPA,²⁹ which generally reduced the maximum allowable temperatures in order to ensure those standards are sufficiently protective of cold water species.³⁰ Prior to the revision, Washington categorized waters by class, designating the Lower Skagit tributaries as “Class A” waters with a corresponding temperature standard of 18°C daily maximum.³¹ In 2006, Washington revised its water quality standards to categorize waters by “use” and to change the unit of time for measuring temperature, resulting in the classification of portions of the Skagit as “salmonid spawning, rearing, and migration” habitat, “core summer salmonid habitat,” or spawning habitat specific to char, salmon, or trout, with respective temperature criteria of 17.5°C, 16°C, and 12-13°C averaged over seven days.³²

In 2008, Ecology issued a Water Quality Improvement Report (“Improvement Report,” enclosed) for the Lower Skagit Temperature TMDL providing more detail on the TMDL’s implementation. The Improvement Report did not change the TMDL’s goals despite the 2006 water quality standards revisions because, Ecology stated, the TMDL’s solutions, implementation, and timelines previously identified would allow water bodies to attain the more stringent temperature standards.³³ Ecology set a target that 100% of listed stream miles would have buffers planted by 2020, which according to its modeling would result in meeting temperature water quality standards by 2080.³⁴

In the Improvement Report, Ecology recommended three voluntary measures to increase riparian shading and achieve its goals by 2020: 1) incentive programs for buffer planting, 2) an

²⁷ *Id.* at p. 77.

²⁸ *Id.* at p. 87.

²⁹ See Letter from Michael F. Gearheard, Dir., EPA, to David C. Peeler, Program Manager, Dep’t of Ecology, re: EPA Approval of the 2003/2006 Revisions to the Washington Water Quality Standards Regulations (Feb. 11, 2008).

³⁰ U.S. EPA & NMFS, *Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Washington State Water Quality Standards* (Feb. 5, 2008) (hereinafter “BiOp”), at p. 9.

³¹ 2004 TMDL at p. 41 (citing WAC 173-201A-030); BiOp at p. 65 (explaining history of Washington water quality standards).

³² BiOp at pp. 65-70; see also WAC 173-201A-200(1)(c).

³³ Water Quality Improvement Report at p. 21.

³⁴ Improvement Report at pp. 10 (2080 standards achievement), 45 (100% goal stated).

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outreach and technical assistance program, and 3) a communication program.³⁵ Though adopting an approach based on voluntary measures, the report explicitly noted that Ecology *could* compel nonpoint sources of pollution to comply with TMDL requirements.³⁶

Because of the presence of ESA-listed salmon species in the Lower Skagit, EPA was required to review the water quality standards revisions, and the associated TMDLs, in consultation with the appropriate federal wildlife services. Given the presence of anadromous salmon species and steelhead, which are under NMFS jurisdiction, and of bull trout, which are under the US Fish and Wildlife Service's (FWS) jurisdiction, both Services should have been consulted to issue a biological opinion (BiOp). In 2008 NMFS issued a BiOp approving Washington's revised water quality standards necessary to meet the Clean Water Act, and the attendant TMDL. NMFS recognized FWS' interests in bull trout and sent the BiOp to that wildlife service, but FWS did not prepare or contribute to the BiOp or issue any assessment regarding potential impacts to bull trout.

NMFS' approval was based on its belief that the water quality standards were sufficiently protective and that the associated TMDLs would help the state achieve those standards if "rigorously implement[ed]."³⁷ NMFS recognized that the then-current environmental baseline

³⁵ *Id.* at p. 9.

³⁶ *Id.* at p. 14; *see also id.* at H-248 (reiterating Ecology's "duty and authority" to ensure landowners do not cause or permit water pollution, including heat pollution from nonpoint sources). Ecology has made clear in correspondence from the Director and its attorneys, and in court, that Ecology has full authority to regulate and enforce water quality requirements against nonpoint sources of pollutants. *See* Memorandum from Ronald L. Lavigne, Senior Counsel at the Office of the Att'y Gen., to Ben Rau, Watershed Plan. Unit Supervisor, Dep't of Ecology, re: Ecology's Authority to Prevent Non-Point Source Pollution and Require Implementation of Management Measures (July 12, 2019) (attached); Letter from Laura Watson, Dir., Dep't of Ecology, to Amy Trainer, Env't Pol'y Dir., Swinomish Indian Tribal Cmty., re: July 21, 2020 Swinomish Letter on the Department of Ecology's Authority to Regulate Temperature (Aug. 13, 2020) (attached); *see generally Lemire v. State, Dep't of Ecology, Pollution Control Hearings Bd.*, 178 Wash. 2d 227, 309 P.3d 395 (2013) (upholding Ecology's authority to issue administrative orders to farmer to address nonpoint source with substantial potential to pollute waters). Indeed, Ecology stated that while it "initially uses outreach and education to seek compliance[,]andowners whose management practices are determined to be deficient in protecting creek water quality would be required to develop and implement a farm plan through consultation with the local Conservation District, Natural Resource Conservation Service, or private consultant." *Id.* at p. 9. Ecology has not done so.

³⁷ BiOp at p. 60; Letter from Michael F. Gearheard, Dir., EPA, to Kelly Susewind, Interim Manager, Wash. Dep't of Ecology, re: EPA Approval of the Lower Skagit River Tributaries Temperature TMDLs (Aug. 11, 2008) (hereinafter "TMDL Approval Letter") (approving TMDL load allocations and finding "that these allocations have been established at a level that, when fully implemented, will lead to the attainment of the water quality criteria addressed by these TMDLs").

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showed that water quality issues throughout the state meant “there must be significant improvements in the environmental conditions” affecting the rivers “to meet the biological requirements for survival and recovery” of listed species.³⁸

The BiOp highlighted the primary role of nonpoint sources on stream temperature, particularly from agriculture, forestry, and urban development.³⁹ NMFS noted that forest management practices in Washington included riparian buffer regulatory requirements, but for other non-timber sectors the BiOp relied heavily on existing voluntary programs to meet relevant water quality standards;⁴⁰ for agricultural lands, these comprised voluntary grant/loan programs managed through Washington conservation districts.⁴¹ The Service stated that progress was “slow and costly,” but optimistically claimed that approving the revised water quality standards would “provide a regulatory mechanism and level of assurance that the [water quality standards] must be met.”⁴² In the BiOp, NMFS specifically noted that agriculture “has considerable impact” on temperature, and thus the new water quality standards (and by inference, the TMDL required to implement them) would “serve to guide” Washington’s agriculture programs aimed at temperature pollution.⁴³ The Service expressly noted that Ecology’s temperature TMDL centered on increased effective shade, such that riparian buffers would be the primary means for nonpoint sources to comply with the water quality temperature standards.⁴⁴ NMFS recommended a minimum of 100-foot riparian habitat buffers to ensure sufficient temperature protections.⁴⁵

Riparian revegetation proceeded at a glacial, almost nonexistent, pace for years with the result that the TMDL’s goal of 100% riparian buffer revegetation was not met by 2020. Only 8% of stream miles have been planted.⁴⁶ Confronted with this near-total failure and unchanged—or even worsening—water quality conditions, Ecology produced a nonbinding 2020 “strategy document” to revisit methods to promote revegetation with input from various stakeholders.⁴⁷ Despite admitting the State’s revegetation goals had failed after over 20 years of voluntary

³⁸ *Id.* at p. 59

³⁹ *Id.* at p. 104.

⁴⁰ *Id.* at p. 105.

⁴¹ *Id.* at p. 44.

⁴² *Id.* at p. 106.

⁴³ *Id.* at p. 47.

⁴⁴ *Id.* at p. 104.

⁴⁵ *Id.* at p. 105.

⁴⁶ This estimate is based on Swinomish’s communication with a Senior Restoration Botanist at the Skagit River System Cooperative, a tribal consortium of the Swinomish and Sauk Suiattle Tribes that provides technical support, scientific research, and environmental services for the Skagit and Samish River basins. See Email from Brenda Clifton, Skagit River Sys. Coop., to Amy Trainer, Env’t Pol’y Dir., Swinomish Indian Tribal Cmty., re: Skagit Temp TMDL (Sept. 14, 2023).

⁴⁷ Dep’t of Ecology, *Lower Skagit Tributaries Temperature Implementation Strategy* (Mar. 2020) (hereinafter “2020 Strategy Document”), at pp. ix-x.

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efforts,⁴⁸ Ecology inexplicably continued to rely solely on voluntary measures based upon unreasonable hopes that it might obtain increased funding for education, outreach, and technical assistance and that alone would solve the widespread problem.⁴⁹ Ecology, unbelievably, also stated that it believed “restoration targets should be established to help ... accomplish the restoration challenge,” ignoring that it had set restoration targets 20 years prior, which voluntary measures failed to achieve.⁵⁰

As Swinomish pointed out in a letter objecting to the 2020 strategy, Ecology’s approach has not and will not meet the revegetation goal and certainly will not ensure that water quality standards will be achieved in Lower Skagit tributaries.⁵¹ Even more concerningly, rather than strengthen its efforts in the face of prior failure, Ecology recently weakened its riparian habitat goals. Ecology recommended narrowing the buffer width requirement to 35 feet in its 2020 strategy document, and formalized this determination in its 2022 “Voluntary Clean Water Guidance for Agriculture – Riparian Areas.” Swinomish stated that this new buffer width goal was insufficiently protective, contrary to best science, and contrary to NMFS’s express recommendations to achieve recovery for listed species. To date, revegetation efforts have remained woefully inadequate, to the extent they occur at all and even with the grossly-reduced buffer widths. As a result, take of threatened salmonids continues unabated due to consistent, high summer water temperatures in violation of water quality standards.

CONDITIONS REQUIRING REINITIATION OF SECTION 7 CONSULTATION

I. ESA CONSULTATION REQUIREMENT

Because of the presence of ESA-listed salmon species in the Lower Skagit, Section 7 of the ESA requires that federal agencies consult with the appropriate fish and wildlife service to ensure their actions are “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.”⁵² EPA approval of Washington’s TMDLs (and water quality standards underlying TMDLs) constitutes such “action” requiring review.⁵³

Longstanding ESA regulations define “jeopardize the continued existence of” as:

⁴⁸ *Id.*

⁴⁹ 2020 Strategy document, p. 29.

⁵⁰ *Id.*

⁵¹ Letter from Amy Trainer, Env’t Pol’y Dir., Swinomish Indian Tribal Cmty., to Heather Bartlett, Water Quality Program Dir., Dep’t of Ecology (Dec. 17, 2019).

⁵² 16 U.S.C. § 1536(a)(2).

⁵³ 33 U.S.C. § 1313(c).

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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.⁵⁴

These regulations also define “destruction or adverse modification of critical habitat” as:

a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.⁵⁵

For those actions that require formal consultation, the wildlife service must review all information provided by the acting agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat.⁵⁶ This determination is set forth in a biological opinion.⁵⁷

If the wildlife service concludes that the proposed action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat, it must identify and describe any reasonable and prudent alternative to the proposed action that it believes would avoid jeopardy and adverse modification.⁵⁸ During formal consultation, the wildlife service may, as it has done in this case, prepare an incidental take statement, which specifies the impact of the take, reasonable and prudent measures needed to minimize the impact, and terms and conditions to implement the authorized incidental take.⁵⁹ An agency may take listed species only if it is in full compliance with the terms of an incidental take statement.⁶⁰

Federal regulations require reinitiation of formal consultation:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;

⁵⁴ 50 C.F.R. § 402.02; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008).

⁵⁵ 50 C.F.R. § 402.02.

⁵⁶ 50 C.F.R. § 402.14(h)(3).

⁵⁷ *Id.*; 16 U.S.C. § 1536(b)(3)(A).

⁵⁸ 16 U.S.C. § 1536(b)(3)(B).

⁵⁹ 50 C.F.R. § 402.14(i).

⁶⁰ *Id.* § 402.14(i)(5).

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- (b) 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;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.⁶¹

II. ERRONEOUS ASSUMPTIONS AND FAILED ACTIONS UNDER THE LOWER SKAGIT TMDL.

The 2008 BiOp issued by NMFS recommended approval of Washington’s revised water quality standards, based on the Service’s belief that the standards were sufficiently protective of designated uses for cold water species and that the associated TMDLs would help the state achieve those standards **if “rigorously implement[ed].”**⁶² (emphasis added). NMFS recognized that the then-current environmental baseline showed that water quality issues throughout the state meant “there must be significant improvements in the environmental conditions” affecting the rivers “to meet the biological requirements for survival and recovery” of listed species.⁶³ EPA indicated that it retained authority to reinitiate consultation where warranted, including on the basis of new information or modification of the action.

But, as detailed below, EPA’s approval was based on certain fundamental assumptions and assurances that were incorrect or have been proven false. These erroneous assumptions and failed actions require EPA to reinitiate consultation in order to prevent continued harm to ESA-protected species.

First, consulting federal agencies during the establishment of revised water quality standards incorrectly believed that Ecology lacked authority to require the establishment of buffers to address nonpoint source pollution.⁶⁴ Therefore, the BiOp noted, Ecology primarily relies on education, cost sharing, and voluntary programs to obtain compliance.⁶⁵ However, this belief was and is incorrect under Washington law. Ecology and the Washington State Attorney

⁶¹ *Id.* § 402.16.

⁶² BiOp at p. 60.

⁶³ *Id.* at p. 59

⁶⁴ BiOp at p. 46.

⁶⁵ BiOp at p. 47.

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General have explicitly confirmed that Ecology does have relevant enforcement authority to require the establishment of buffers,⁶⁶ and have espoused that position for over a decade.⁶⁷

Second, Washington failed to implement the plan and strategies promised in the TMDL, thereby not only completely failing to meet the TMDL's 2020 goals of 100% riparian revegetation, but actually failing to make *any* meaningful progress. Approval of the revised water quality standards and associated TMDL was based on the assumption that revegetation would occur by 2020⁶⁸ — a goal that the agency modeled would achieve alignment with water quality standards by 2080. In the 20 years since the 2004 TMDL was approved, only 8% of streamside revegetation has occurred.⁶⁹ Ecology's failure indicates that Washington is not likely to meet temperature standards *within this century*. Because EPA's approval of Washington's revised water quality standards was premised upon assurances provided in TMDL, and such assurances have not borne out, EPA is now confronted with new information that compels it to reinitiate consultation.

Third, when Washington recognized in 2020 that it had failed, after 15 years, to even meet ten percent of revegetation requirements, Ecology simply weakened those requirements. The 2004 TMDL modeled water temperatures and determined that buffer widths equal to 75% of average site potential one hundred year old tree height was needed to reduce heat loads to waterways. This calculation meant that buffers would range from 92 feet *at a minimum* to just over 131 feet in width. Yet, without explanation, Ecology in its 2020 Strategy Document informally narrowed buffer widths to 35 feet and formally curtailed widths in its 2022 Clean Water Guidance for Agriculture. These new widths are unsupported by Ecology's monitoring, are contrary to peer-reviewed best science, and will not achieve water quality temperature standards. This change constitutes either new information or a substantive modification that triggers reinitiation of consultation with federal wildlife services.

⁶⁶ See Memorandum from Ronald L. Lavigne, Senior Couns., Wash. Att'y Gen., to Ben Rau, Watershed Plan. Unit Supervisor, re: Ecology's Authority to Prevent Non-Point Source Pollution and Require Implementation of Management Measures (July 12, 2019) and Letter from Laura Watson, Dir., Dep't of Ecology, to Amy Trainer, Env't Pol. Dir., Swinomish Indian Tribal Community, re: July 21, 2020 Swinomish Letter on the Department of Ecology's Authority to Regulate Temperature (Aug. 13, 2020) (both affirming Ecology's "authority to require a non-point source polluter to implement specific management measures").

⁶⁷ See generally *Lemire v. State, Dep't of Ecology, Pollution Control Hearings Bd.*, 178 Wash. 2d 227, 309 P.3d 395 (2013) (upholding Ecology's position that it has authority to issue administrative orders to farmer to address nonpoint source with substantial potential to pollute waters).

⁶⁸ See, e.g., BiOp at pp. 105-06 ("[A]pproving the revised temperature standards will provide a regulatory mechanism and level of assurance that the [water quality standards] must be met, which may ultimately result in reduced stream temperatures (*through implementation of effective TMDLs*).") (emphasis added)); see also TMDL Approval Letter.

⁶⁹ Email from Brenda Clifton, Skagit River Sys. Coop., to Amy Trainer, Env't Pol'y Dir., Swinomish Indian Tribal Cmty., re: Skagit Temp TMDL (Sept. 14, 2023).

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Finally, climate change and increasing water use from development and agriculture magnify the urgency of addressing the incorrect assumptions and new information discussed previously. Impacts of climate change and increased development will result in increased water temperatures, rendering it even less likely that water quality standards can be met with existing voluntary strategies or within stated time frames. Changes in the Pacific Northwest's climate, as well as burgeoning development in the Skagit basin belie EPA's assumption that other underlying conditions would remain the same.⁷⁰ Thus, this essential assumption undergirding water quality standard revision approval with its associated TMDL has failed, and further supports the exigency of reinitiating consultation.

Each of these circumstances would alone dictate reinitiation of consultation under Section 7 of the ESA. Combined they demonstrate an immediate obligation of EPA to reinitiate consultation on the Lower Skagit TMDL with both wildlife services and revoke approval pending the results of that consultation. To continue to allow Ecology to pursue substantially changed and continuously failing implementation strategies, based upon erroneous assumptions, is a violation of federal laws and EPA's obligations under those laws. This Notice is to inform EPA that it is out of compliance with the Endangered Species Act absent reinitiation of consultation, and to notify the Agency of the Swinomish Indian Tribal Community's intent to commence suit to enforce the Endangered Species Act in 60 days from the date of this Notice.

Additionally, because of Washington's utter failure to implement its TMDL—the document containing the representations and assumptions upon which EPA's approval was based—take of salmonids due to high temperatures in the Lower Skagit continues unabated. This is a violation of the Endangered Species Act Section 9's take provisions.

Section 9 of the ESA prohibits take of endangered species.⁷¹ NMFS, through its Section 4(d) authority, has extended Section 9 protection to threatened Chinook and steelhead.⁷² The take prohibition makes it unlawful for any person to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a protected animal.⁷³ NMFS' regulations define “harm” prohibited by Section 9 to include “any act which actually kills or injures fish or wildlife,” including

⁷⁰ See 2004 TMDL at p. 87; see also Se-Yeun Lee & Alan F. Hamlet, *Skagit River Basin Climate Science Report* (2011), <https://www.skagitcounty.net/EnvisionSkagit/Documents/ClimateChange/Complete.pdf>, at p. 5 (temperature increase and precipitation reduction in summer), 10-11 (more severe low flow events).

⁷¹ 16 U.S.C. § 1538(a)(1)(B).

⁷² 65 Fed. Reg. 42,422 (July 10, 2000) (Chinook); 72 Fed. Reg. 26,722 (May 11, 2007) (steelhead).

⁷³ 16 U.S.C. § 1532(19).

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“significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.”⁷⁴ FWS has also extended protection to threatened bull trout.⁷⁵

In its incidental take statement in the BiOp, NMFS indicated that incidental take of salmon and steelhead due to the effects of temperature was reasonably likely to occur due to various factors, none of which was “because of business as usual.” Rather these circumstances included inadvertent miscalculations of temperature or mis-designations of water use, human use allowances *prior* to a TMDL being completed, mixing zone complexities, and so forth. NMFS authorized incidental take due to adverse effects from mis-designation, but otherwise determined that “substantial baseline improvements are expected by implementing the proposed action.”⁷⁶

The continued take of protected species in the Lower Skagit due to temperature violations, particularly because of an utter failure to address those violations, is not protected take. The trigger for reinitiation of consultation and the changed circumstances on which the BiOp incidental take statement was originally based have invalidated the incidental take statement in the current BiOp and require development of a new one in a new consultation process. EPA’s failure to reinitiate consultation despite the new information or modifications described above may render it liable for Section 9 violations for failing to address continued harm to endangered salmonids.

III. PARTY PROVIDING NOTICE AND COUNSEL

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⁷⁴ 50 C.F.R. § 222.102; *Babbitt v. Sweet Home Chapter of Cmty. For a Great Ore.*, 515 U.S. 687, 697–98 (1995) (upholding federal wildlife agencies’ interpretation of “harm”).

⁷⁵ 64 Fed. Reg. 58, 934 (Nov. 1, 1999). FWS’s take statement allows fishing administered under state permit regimes, but does not allow take due to egregious and unabated violations of water quality standards.

⁷⁶ BiOp at pp. 114-15.

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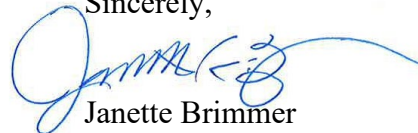
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CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA and regulations promulgated thereunder.⁷⁷ If you fail to remedy the ESA violations described herein, Swinomish plans to file a citizen suit to compel compliance with Section 7 of the ESA.

If affirmative actions are not forthcoming, and if the above violations of law are not remedied within 60 days of receipt of this letter, we intend to bring appropriate legal action in the United States District Court for the Western District of Washington. Please do not hesitate to contact the undersigned with any questions.

Sincerely,



Janette Brimmer

Earthjustice

*Attorneys for Swinomish Indian Tribal
Community*

cc: Amy Trainer, Environmental Policy Director, Swinomish Indian Tribal Community
Clyde Halstead, Swinomish Indian Tribal Community Tribal Counsel
Washington Department of Ecology
Governor's Office of Regulatory Assistance
NOAA Fisheries West Coast Regional Office

⁷⁷ 16 U.S.C. § 1540(g).