



Cascadia Wildlands
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November 1, 2023

By Certified Mail, Return Receipt Requested

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RE: Notice of Intent to Sue to Remedy Violations of the Endangered Species Act Regarding the National Marine Fisheries Service's and Bureau of Land Management's Failure to Reinitiate Consultation Regarding Effects on Upper Willamette River Spring Chinook Salmon (*Oncorhynchus tshawytscha*) and Critical Habitat Following the 2020 Holiday Farm Fire

Dear Secretary Raimondo, Regional Administrator Quan, and District Manager Teitzel:

On behalf of Willamette Riverkeeper, Cascadia Wildlands, and Oregon Wild, we are writing to provide notice that the National Marine Fisheries Service ("NMFS") and Bureau of Land Management ("BLM") are in violation of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, for failure to reinitiate consultation regarding the effects of logging on Upper Willamette River spring Chinook salmon and critical habitat following the 2020 Holiday Farm Fire. Further, we provide notice that BLM is also in violation of the ESA, 16 U.S.C. § 1536, by continuing to rely on NMFS's 2018 biological opinion ("BiOp") regarding the effects of forest management on Upper Willamette River spring Chinook salmon and critical habitat.¹

The Holiday Farm Fire began on September 7, 2020, during a strong east wind event, and burned a large amount of private lands, as well as extensive portions of surrounding BLM lands

¹ Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for BLM's Forest Management Program for Western Oregon (WCR-2017-7574) (March 9, 2018).

and the Willamette National Forest. Pushed westward by strong winds, the fire moved through the communities of Blue River, Finn Rock, Nimrod, Vida, and Leaburg, damaging and destroying homes, businesses, and facilities in its path. The fire encompassed 173,439 acres primarily in a mixed conifer forest. The fire burned a mosaic pattern through most of the area, and the majority burned with low and moderate severity. It was 96 percent contained by October 12, 2020.

Impacted lands include the Calapooia River watershed and the Jackson Creek-Wiley Creek, Bigs Creek-Calapooia, and Hands Creek-Calapooia subwatersheds. The environmental baseline on which NMFS premised its 2018 BiOp has changed dramatically. The fires not only burned existing green forests, which changed watershed conditions, but the fires were accompanied by an extensive amount of post-fire logging, road work, and road construction. The 2018 document is now based on stale data and does not reflect on-the-ground conditions, and its conclusions are no longer valid for continued authorization of logging and associated activities.

Consultation must be reinitiated when “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.”² The changed environmental baseline following the 2020 Holiday Farm Fire and subsequent actions constitute such new information and indicate that logging and associated activities on this changed landscape may affect Upper Willamette River spring Chinook salmon and critical habitat to a greater degree than before the fire. Because reinitiation of consultation is required, no logging or associated activities may be lawfully authorized until such consultation is complete. Further, BLM need not and must not authorize logging that will cause unacceptable impacts. If reinitiated consultation reveals unacceptable impacts to spring Chinook and/or critical habitat, BLM must not authorize such logging.

Pursuant to section 11(g) of the ESA, 16 U.S.C. § 1536(g), this letter provides notice that, unless within 60 days of receipt of this letter NMFS and BLM reinitiate consultation pursuant to section 7 of the ESA, halt and refrain from authorizing logging and associated activities until such consultation is complete, and so inform the parties to this letter, the parties intend to challenge the agencies’ unlawful conduct and failures in federal district court.

I. THE PARTIES TO THIS LETTER

Willamette Riverkeeper is a non-profit organization founded in 1996 and headquartered in Oregon City with a satellite office in Eugene, Oregon. Willamette Riverkeeper has thousands of members in Oregon and the Pacific Northwest. Willamette Riverkeeper focuses on protecting and restoring the resources of the Willamette River Basin in Oregon and works on programs and projects ranging from Clean Water Act compliance and river education to Superfund cleanup and restoring habitat.

Cascadia Wildlands is a non-profit corporation headquartered in Eugene, Oregon, with approximately 12,000 members and supporters throughout the United States. Cascadia Wildlands educates, agitates, and inspires a movement to protect and restore wild ecosystems in the Cascadia Bioregion, extending from Northern California into Alaska. Cascadia Wildlands

² 50 C.F.R. § 402.16(a)(2).

envisions vast old-growth forests, rivers full of salmon, wolves howling in the backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia Bioregion.

Oregon Wild is a non-profit conservation organization founded in 1974 with the mission of protecting and restoring Oregon's wildlands, wildlife, and waters as an enduring legacy for future generations. Oregon Wild advocates for Oregon's unique environments through a combination of education, public communications, direct lobbying, grassroots activism, litigation, and partnering with and elevating allied groups and voices. Oregon Wild has over 20,000 members and supporters, and offices in Portland, Eugene, Bend, and Enterprise, Oregon.

II. LEGAL FRAMEWORK

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”³ Enacted in 1973, the law is meant to provide a means to conserve the ecosystems upon which endangered and threatened species depend and to provide a program to conserve listed species.⁴ To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior or Secretary of Commerce as “endangered” or “threatened” pursuant to ESA section 4.⁵

Section 7 of the ESA requires each federal agency, in consultation with a federal wildlife agency (NMFS for spring Chinook salmon), to ensure that any proposed action is not likely to jeopardize the continued existence of a threatened or endangered species, or result in the destruction or adverse modification of its critical habitat.⁶ The agencies must “use the best scientific and commercial data available” to fulfill their obligations under section 7 of the ESA.⁷ Formal consultation is required if an action agency determines a proposed action is likely to adversely affect a listed species or designated critical habitat.⁸

In order to determine whether an action is likely to adversely affect a listed species or critical habitat, an action agency must prepare a biological assessment.⁹ A biological assessment must “evaluate the potential effects of the action” on listed species and critical habitat,¹⁰ and may include consideration of cumulative effects.¹¹ “Effects of the action” include the “direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.”¹² “The environmental baseline,” meanwhile, “includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already

³ *Tenn. Valley Auth. v. Hill*, 473 U.S. 153, 180 (1978).

⁴ 16 U.S.C. § 1536(b).

⁵ *See* 16 U.S.C. § 1533.

⁶ *Id.* § 1536(a)(2).

⁷ *Id.*

⁸ 50 C.F.R. § 402.14(a) & (b)(1).

⁹ 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(a).

¹⁰ 50 C.F.R. § 402.12(a).

¹¹ *Id.* § 402.12(f)(4).

¹² *Id.* § 402.02.

undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.”¹³

If NMFS concurs in writing with an action agency’s determination that a proposed action is not likely to adversely affect a listed species or critical habitat, formal consultation is not required.¹⁴ When formal consultation is required, NMFS must consider all “relevant information,” evaluate the listed species’ or critical habitat’s “current status and environmental baseline,” and evaluate the effects of the proposed action—including cumulative effects—on the listed species or critical habitat.¹⁵ “Cumulative effects” for ESA consultation purposes “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.”¹⁶

At the conclusion of formal consultation, NMFS must issue a “biological opinion” explaining whether the proposed action is likely to result in jeopardy to the listed species or destruction of adverse modification of critical habitat.¹⁷ If NMFS reaches a “no jeopardy” determination, it may exempt from liability the incidental take of a listed species through an incidental take statement, but must “specif[y] the impact of such incidental taking on the species.”¹⁸

After consultation has concluded, but when “discretionary Federal involvement or control over the action has been retained or is authorized by law,” both NMFS and the action agency must reinitiate consultation under certain circumstances.¹⁹ The agencies must reinitiate consultation when “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,” or when “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 written concurrence.”²⁰ The duty to reinitiate consultation lies with both the action agency and the consulting agency.²¹

“Consulting with [NMFS] alone does not satisfy an agency’s duty under the [ESA]”²² because an agency “cannot ‘abrogate its responsibility to ensure that its actions will not jeopardize a listed species[].’”²³ Thus, when a party points to “‘new’ information—*i.e.*, information the [NMFS] did not take into account—which challenges the opinion’s

¹³ 50 C.F.R. § 402.02.

¹⁴ *Id.* § 402.14(b)(1).

¹⁵ *Id.* § 402.14(g)(1)–(3) & (h).

¹⁶ *Id.* § 402.02.

¹⁷ *Id.* § 402.14(g)(5) & (h); 16 U.S.C. § 1536(b)(3)(A).

¹⁸ 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(i)(1)(i).

¹⁹ 50 C.F.R. § 402.16(a).

²⁰ *Id.* § 402.16(a)(2) & (3).

²¹ *Id.* § 402.16(a); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

²² *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (citation omitted).

²³ *Id.*

conclusions,”²⁴ an action agency may not rely on that faulty biological opinion to satisfy its ESA obligations.²⁵

III. FACTUAL BACKGROUND

A. Affected Species and Critical Habitat

The Upper Willamette River spring Chinook salmon is an anadromous salmonid native to the Willamette River above Willamette Falls.²⁶ As an anadromous fish, these Chinook salmon are born in freshwater streams in the Upper Willamette River basin and migrate down the Willamette River and Columbia River to the ocean, where they live for several years before returning to their natal streams to spawn and complete their life cycle.

Upper Willamette River spring Chinook salmon are considered one of the most genetically distinct groups of Chinook salmon in the Columbia River Basin.²⁷ They adapted to the natural flows in the Willamette River by returning from the ocean and entering the river in late winter and getting past Willamette Falls, which historically acted as an intermittent physical barrier to upstream migration into the upper Willamette basin.²⁸ Adult spring Chinook salmon could only ascend the falls in the spring when flows were high enough to support their passage over the falls. Historically, the peak migration of adult salmon over Willamette Falls occurred in late May.²⁹ Low flows during summer and autumn months prevented fall-run Chinook salmon and Coho from reaching the Upper Willamette River basin.³⁰

Upper Willamette River spring Chinook salmon begin appearing in the lower Willamette River in January and February, and most of the run ascends Willamette Falls from April through July.³¹ After ascending the falls, adult Chinook migrate quickly to upper subbasins and “hold” in deep pools with cool water temperatures through the summer.³² The historic spawning period for spring Chinook likely extended from July through October, but now spawning generally begins in late August and continues into early October, with peak spawning in September.³³

²⁴ *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (citation omitted).

²⁵ *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) citation omitted).

²⁶ 70 Fed. Reg. 37,175 (June 28, 2005).

²⁷ ODFW and NMFS, Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead, (August 5, 2011), at 2-3, available at <https://www.fisheries.noaa.gov/resource/document/upper-willamette-river-conservation-and-recovery-plan-chinook-salmon-and> (last visited Oct. 31, 2023)

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 2-4.

³² *Id.*

³³ *Id.*

Adult Chinook salmon must deposit their eggs at a time that will ensure that fry emerge the following spring to support survival and growth.³⁴ Exact timing varies with water temperature. Fish in colder areas, such as the headwaters, spawn earlier than fish lower in the subbasin.³⁵ The success of spawning is greatest in areas with relatively stable substrates so that gravel and cobbles shifting during high water events do not damage the eggs, and in areas with high dissolved oxygen and low water temperatures.³⁶ Chinook fry emerge from gravels from February through March, and sometimes as late as June.³⁷ Juveniles rear in areas with a variety of cover types that provide protection.³⁸ Most young spring Chinook emigrate from freshwater as yearlings.³⁹

Historically, the Upper Willamette River supported hundreds of thousands of spring Chinook salmon,⁴⁰ but populations have declined dramatically. In 1999, NMFS listed the Upper Willamette River spring Chinook salmon as threatened under the ESA,⁴¹ and designated critical habitat in the Upper Willamette River basin in 2005.⁴²

There are seven geographically distinct populations of Upper Willamette River Chinook salmon: Clackamas, Molalla, North Santiam, South Santiam, Calapooia, McKenzie, and Middle Fork Willamette.⁴³ These seven river basins also contain critical habitat for Upper Willamette River spring Chinook.⁴⁴ Within the Upper Willamette River, the “primary constituent elements” for spring Chinook salmon—the physical and biological features essential to their conservation—include *water quality and quantity, spawning gravels and substrate, forage, natural cover including side channels and large wood, unobstructed migration corridors, and floodplain connectivity*.⁴⁵

³⁴ Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead at 2-4 to 2-5.

³⁵ *Id.* at 2-5.

³⁶ Luke D. Whitman, R. Kirk Schroeder, and Thomas A. Friesen, *Evaluating Migration Timing and Habitat for Juvenile Chinook Salmon and Winter Steelhead in the Mainstem Willamette River and Major Spawning Tributaries* (May 19, 2017), p. 2, available at https://odfw-wsrme.forestry.oregonstate.edu/sites/default/files/evaluating_habitat_for_chs_and_sts_final.pdf (last visited Oct. 31, 2023).

³⁷ Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead at 2-5.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 70 Fed. Reg. 37,160, 37,182 (June 28, 2005). In the 1920s approximately 300,000 adult spring Chinook salmon were observed passing Willamette Falls. *Id.*

⁴¹ 64 Fed. Reg. 14,308 (March 24, 1999).

⁴² 70 Fed. Reg. 37,160 (June 28, 2005).

⁴³ Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead at 2-2.

⁴⁴ See 70 Fed. Reg. 52,630 (Sept. 2, 2005).

⁴⁵ *Id.* at 52,664–65.

In 1999, when NMFS listed Upper Willamette River spring Chinook salmon alongside winter steelhead, the agency cited all of the five ESA listing factors⁴⁶ as contributing to the decline of these species.⁴⁷ The major concerns NMFS identified and described were related to: loss of historic spawning and rearing habitat due to dam blockages, adverse thermal effects downstream from operation of dams, *riparian and stream habitat loss and degradation* (particularly in the lowland valley areas), excessive fishery harvest, and adverse effects from hatchery programs.⁴⁸

In 2005, NMFS considered Upper Willamette River Chinook salmon to be “likely to become endangered in the foreseeable future.”⁴⁹ In 2011, NMFS updated this opinion and found that five of the seven distinct Upper Willamette River spring Chinook salmon populations were at “very high risk” of extinction, including the Calapooia population.⁵⁰ NMFS concurrently published the Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead, outlining and identifying salmonid populations in the basin, habitat features and biological needs, threats, and a management strategy on a watershed-by-watershed basis, including several specific to actions and recovery within the Calapooia Watershed.⁵¹

In the Recovery Plan, NMFS repeatedly identified land use practices, riparian area degradation, lack of large wood recruitment, and loss of floodplain connectivity and access to off-channel habitat as threats to Upper Willamette River spring Chinook salmon generally, and specifically in the Calapooia Watershed.⁵² For recovery of salmonids within the Calapooia Watershed, the agency identified the following measures and strategies:

- Increase habitat complexity to provide juvenile fish refugia during high flows;
- Identify reaches in the upper Calapooia River where deep pools can be maintained or created;
- Decrease harassment near spring Chinook holding pools;
- Identify priority reaches where habitat restoration projects can be implemented and monitored;

⁴⁶ See 16 U.S.C. § 1533(a)(1). NMFS’s evaluation of threats considers five factors: (1) the present or threatened destruction, modification, or curtailment of the species’ habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or human-made factors affecting the species’ continued existence. *Id.*

⁴⁷ Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead at 3-6.

⁴⁸ *Id.*

⁴⁹ NOAA Technical Memorandum NMFS-NWFSC-66, Updated Status of Federally Listed ESUs of West Coast Salmon and Steelhead (June 2005), p. 166, available at <https://www.noaa.gov/sites/default/files/legacy/document/2020/Oct/07354626691.pdf> (last visited Oct. 31, 2023).

⁵⁰ Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead at 4-3.

⁵¹ *Id.*

⁵² *Id.* at 5-27 and 5-30.

- Expand cool water zones and fish bearing habitat;
- Use fencing, weed control, and planting of native conifers at appropriate sites; and
- Create sufficient riparian buffers to improve summer water quality in headwater areas.⁵³

Despite listing and recovery efforts, counts of wild Upper Willamette River spring Chinook salmon have averaged less than 10,000 fish at Willamette Falls since 2010.⁵⁴

B. Previous BLM Consultation with NMFS Regarding Logging and Associated Activities

On March 9, 2018, NMFS sent BLM a programmatic BiOp for BLM’s forest management program for Western Oregon.⁵⁵ This 2018 BiOp included numerous ESA-listed species, including Chinook salmon and critical habitat in the Upper Willamette River.⁵⁶ The 2018 BiOp recognized that BLM’s “existing transportation system contributes to a poor environmental baseline condition in several ways,” including degraded streambank conditions, degraded floodplain connectivity, and discharge of stormwater runoff into streams.⁵⁷

The 2018 BiOp also said that a suite of restoration actions and activities that would affect listed species and critical habitat were previously consulted on in programmatic BiOps completed in 2011 and 2013.⁵⁸ Notably, though, the 2018 BiOp’s “environmental baseline” discussion did not mention fire or the natural fire regime for the Willamette-Lower Columbia Recovery Domain inhabited by the Upper Willamette River spring Chinook salmon,⁵⁹ despite referencing the fire regime for the Oregon Coast Recovery Domain.⁶⁰

In the 2018 BiOp, NMFS recognized that BLM’s forest management program, particularly road work associated with logging, would affect designated critical habitat by raising stream temperatures⁶¹ and introducing sediment into streams.⁶² The forest management program would also reduce large wood recruitment into streams,⁶³ kill and injure fish through equipment

⁵³ Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead at 7-30 and 7-31.

⁵⁴ See ODFW, Willamette Falls Fish Counts, https://www.dfw.state.or.us/fish/fish_counts/willamette%20falls.asp (last visited Oct. 31, 2023); <https://myodfw.com/willamette-falls-fish-counts> (last visited Oct. 31, 2023).

⁵⁵ Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for BLM’s Forest Management Program for Western Oregon (WCR-2017-7574) (March 9, 2018) (2018 BiOp).

⁵⁶ 2018 BiOp, p. 63.

⁵⁷ *Id.*, p. 96.

⁵⁸ *Id.*, pp. 99–99.

⁵⁹ *Id.*, pp. 100–03.

⁶⁰ *Id.*, p. 103.

⁶¹ *Id.*, pp. 114–15.

⁶² *Id.*, pp. 120–21.

⁶³ *Id.*, pp. 123–29.

and where they are captured and/or handled,⁶⁴ and alter peak and base flows of streams.⁶⁵ These effects would be adverse to Upper Willamette River Chinook salmon and its critical habitat.⁶⁶ Nonetheless, NMFS ultimately concluded that the program would not jeopardize the existence of the species or adversely modify or destroy the species' critical habitat.⁶⁷

C. 2020 Holiday Farm Fire and Subsequent Events

The Holiday Farm Fire began on September 7, 2020, approximately three miles west of McKenzie Bridge, Oregon.⁶⁸ Strong east winds pushed the fire westward, ultimately impacting 173,439 acres,⁶⁹ including 17,800 acres of land administered by BLM, 30,000 acres managed by the U.S. Forest Service (Willamette National Forest), and over 100,000 acres of private land.⁷⁰ Most of the fire burned at a low or moderate severity, a significant portion experienced high or moderate soil burn severity.⁷¹ Fire-damaged soils have high rates of root mortality and increase rates of water runoff and erosion.⁷²

According to the Forest Service, the Holiday Farm Fire was likely to increase debris-laden peak flows into tributaries of the Upper Willamette River, accompanied by increased channel scouring and hillslope erosion.⁷³ In addition, the fire was likely to increase the amount of fine sediment delivered into such streams, leading to direct mortality of fish eggs and fry, and a decrease in pools and other habitat elements.⁷⁴ The availability of large woody debris for recruitment into streams, meanwhile, may have increased due to the fire.⁷⁵ Because of risks to fisheries from post-fire stream flows and debris, as well as increased sediment delivery, a Burned Area Emergency Response (“BAER”) team “identified emergency treatments to protect infrastructure, water quality, and federally listed fish designated critical habitat values at risk.”⁷⁶

⁶⁴ 2018 BiOp, p. 131.

⁶⁵ *Id.*, pp. 132–35.

⁶⁶ *Id.*, pp. 142 & 201.

⁶⁷ *Id.*, p. 206.

⁶⁸ Willamette National Forest, Burned Area Emergency Response Summary, Holiday Farm Fire (Oct. 30, 2020), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd839860.pdf (last visited Oct. 31, 2023).

⁶⁹ Willamette National Forest, Burned Area Emergency Response Summary, Holiday Farm Fire.

⁷⁰ Oregon Forest Resource Institute, Holiday Farm Fire 2020 Fact Sheet, available at <https://oregonforests.org/sites/default/files/2021-11/HolidayFarm-Summary-Sheet.pdf> (last visited Oct. 9, 2023).

⁷¹ Willamette National Forest, Burned Area Emergency Response Summary, Holiday Farm Fire.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

D. Ongoing BLM Authorization of Logging and Associated Activities in Affected Upper Willamette River Spring Chinook Salmon Habitat

On July 19, 2023, BLM issued a Final Environmental Assessment (“EA”) for the Big League Project in the Upper Willamette Field Office of BLM’s Northwest Oregon District. On July 24, 2023, District Ranger Teitzel signed a Finding of No Significant Impact (“FONSI”) for the Big League Project in the Upper Willamette Field Office area of BLM’s Northwest Oregon District.⁷⁷ The preliminary EA that BLM released for the Big League Project in September of 2022 did not include any discussion of the 2020 Holiday Farm Fire. Only in response to public comments did BLM update the final EA to include a discussion of the Holiday Farm Fire.⁷⁸

In the final EA for the Big League Project, BLM acknowledged that 13,724 acres of the 2020 Holiday Farm Fire burned within the Calapooia Watershed, including the Jackson Creek-Wiley Creek, Bigs Creek-Calapooia, and Hands Creek-Calapooia subwatersheds that contain designated critical habitat for Upper Willamette River Chinook salmon.⁷⁹ According to BLM, “the closest burned area is approximately 2.6 miles from the harvest units within the Calapooia River in the Bigs Creek-Calapooia watersheds.”⁸⁰ BLM downplayed the combined effects of the fire and forest management on Upper Willamette River spring Chinook salmon because “any Big League harvest-related activities would occur 4–6 years after the fire—with revegetation of the burned area taking place in the meantime”⁸¹

However, BLM also conceded that fire affects fish habitat by increasing sediment production and turbidity and the number of snags and coarse and large woody debris.⁸² BLM contends that most of these effects occur within the first few years following a fire, and thus have already happened, such that timber harvest would “not occur simultaneously with fire-related increased sediment production.”⁸³

BLM did acknowledge that “gravel roads and road activities in proximity to CH have the potential to affect Upper Willamette Spring Chinook salmon from sediment transport.”⁸⁴ 384 acres of the Big League Project area in proximity of the Calapooia River, and log hauling will occur next to the Calapooia River.⁸⁵ Yet BLM did not address root mortality associated with fire-damaged soils. If root systems were damaged or destroyed by the Holiday Farm Fire, the ground could be unstable for years, increasing the likelihood that elevated levels of sediment will be delivered to surrounding streams when disturbed, such as by logging and road equipment. Furthermore, BLM’s analysis of impacts to listed fish failed to acknowledge that fire hazard in the project area will *increase* following authorized regeneration harvests, while fire resistance

⁷⁷ See Big League Project Final EA and FONSI, available at <https://eplanning.blm.gov/eplanning-ui/project/2016536/570> (last visited Oct. 31, 2023).

⁷⁸ Big League Project Final EA, p. 123.

⁷⁹ *Id.*, p. 91.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*, p. 92.

⁸⁵ *Id.*

will *decrease*, meaning any adverse impacts to Upper Willamette River spring Chinook salmon and critical habitat may be compounded by any future fire.⁸⁶

The same day it released the Big League Project final EA, BLM issued three associated Determinations of NEPA Adequacy (“DNAs”) for timber sales within the Big League Project area: Linebacker, Backcourt, and Farm Team. For the Linebacker and Backcourt DNAs, BLM asserted that the timber sale units are more than 0.5 mile from Upper Willamette River spring Chinook salmon critical habitat in the Calapooia River, thus logging and associated activities from those timber sales will have “no effect” on the species or critical habitat, and consultation with NMFS is not needed.⁸⁷

In the Farm Team DNA, however, BLM stated that “[t]he Calapooia River provides Critical Habitat for Upper Willamette River spring Chinook salmon and is approximately 200 feet from the harvest units” within the Farm Team timber sale.⁸⁸ Further, “[t]he haul route for timber includes Upper Calapooia Drive, which is adjacent to the Calapooia River.” BLM then expressly cited NMFS’s 2018 BiOp as evidence of completed consultation regarding effects to Chinook salmon and critical habitat, and indicated it would “follow the review and verification process for timber sale activities, per the Biological Opinion, including submitting project notifications to NMFS.”⁸⁹

A cursory review of the Big League Project maps in the final EA reveal that much of the riparian road construction and riparian yarding corridors are adjacent to or directly cross over known Chinook-inhabited streams and Essential Salmonid Habitat (“ESH”) for the Chinook salmon pursuant to Oregon Department of Fish and Wildlife surveys and designations. Further, field checking of the Big League timber sale units has revealed extensive post-fire clearcutting of adjacent and surrounding lands. This logging has been accompanied by new road construction as well. The widespread impacts of the 2020 Holiday Farm Fire and subsequent events to the watersheds overlapped by the Big League Project are obvious and severe.

IV. VIOLATIONS OF THE ESA

A. BLM and NMFS Violated the ESA by Failing to Reinitiate Section 7 Consultation Despite Changed Conditions and New Information.

BLM and NMFS are in violation of the ESA and its implementing regulations for failing to reinitiate consultation on the effects of BLM’s forest management program (and the Big League Project and Farm Team timber sale) on Upper Willamette River spring Chinook and critical habitat. New information has arisen since 2018 that the agencies did not previously consider in consultation, such as the following:

⁸⁶ Big League Project Fuels Specialist Report, p. 13 (BLM Sept. 13, 2022).

⁸⁷ See Backcourt and Linebacker DNAs, p. 3 in each, available at <https://eplanning.blm.gov/eplanning-ui/project/2016536/570> (last visited Oct. 31, 2023).

⁸⁸ See Farm Team DNA, p. 3, available at <https://eplanning.blm.gov/eplanning-ui/project/2016536/570> (last visited Oct. 31, 2023).

⁸⁹ Farm Team DNA, p. 3.

- (1) the extensive impacts of the 2020 Holiday Farm Fire (including but not limited to vegetation loss, soil burn severity, root mortality and root system damage, reduced streambank stability, sediment delivery, erosion, debris flows, increased water temperatures, and increased invasive plants in disturbed areas and associated fire risks);
- (2) the impacts of fire suppression activities, including on private, BLM, and national forest lands;
- (3) the impacts of any BAER treatments;
- (4) the impacts of any salvage logging, hazard tree removal, or other post-fire logging operations following the Holiday Farm Fire on private, BLM, and national forest lands.

In combination with these recent impacts, logging and associated activities may now affect Upper Willamette River spring Chinook salmon and critical habitat in a manner or to an extent not previously considered in the 2018 BiOp, requiring reinitiation.⁹⁰ Consultation regarding Upper Willamette River spring Chinook salmon critical habitat must be reinitiated regardless of its status as occupied or unoccupied. Neither the ESA nor implementing regulations differentiate between occupied and unoccupied habitat for consultation purposes.⁹¹ NMFS has had full knowledge of the Holiday Farm Fire’s potential impacts to Upper Willamette River spring Chinook salmon and critical habitat, but like BLM, similarly failed to reinitiate consultation.

The Oregon District Court recently held that a consulting agency and an action agency must reinitiate consultation following a wildfire that impacted an action area evaluated in a previous consultation.⁹² The court said the agencies should have considered the wildfire in and around the action area as new information that had not yet been evaluated because the agencies generally recognized wildfire as a threat to the listed species at issue.⁹³ According to the court, “[t]he standard for reinitiating consultation is not that the overall effects determination [] remains unchanged,” but “whether discretionary federal involvement or control over the action has been retained or is authorized by law, and new information reveals effects of the action that may affect listed species in a manner or to an extent not previously considered.”⁹⁴ The Oregon District Court has also specifically enjoined ongoing logging authorized by the Forest Service on the grounds that the 2020 wildfires changed the conditions upon which relied-upon environmental analyses were based.⁹⁵

The same is true here: The Holiday Farm Fire burned in and around the Calapooia Watershed where logging and roads will affect spring Chinook salmon and critical habitat. BLM retains discretionary control over ongoing logging and associated authorizations on BLM-managed lands within the watershed. BLM even concedes that “regeneration harvest” authorized as part of the Big League Project across thousands of acres will *increase* fire hazard and *decrease* fire resistance.⁹⁶ BLM recognizes that wildfire can harm listed fish and habitat by

⁹⁰ See 50 C.F.R. 402.16(a)(2).

⁹¹ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16.

⁹² *Klamath-Siskiyou Wildlands Ctr. v. U.S. Fish & Wildlife Serv.*, No. 1:20-cv-952-AA, 2022 WL 4599259, at *20 (D. Or. Sept. 30, 2022).

⁹³ *Id.*

⁹⁴ *Id.* (citing 50 C.F.R. § 402.16(a)(2)).

⁹⁵ *Cascadia Wildlands v. U.S. Forest Serv.*, No. 6:21-cv-01225-AA, 2021 WL 6112546, at *5–7 (D. Or. December 27, 2021).

⁹⁶ Big League Project Fuels Specialist Report, p. 13 (BLM Sept. 13, 2022).

increasing sediment and turbidity. Against an environmental baseline changed by the 2020 Holiday Farm Fire, the agencies must reinitiate consultation, because logging in the Big League Project area, and the Calapooia Watershed specifically, may now affect spring Chinook salmon and critical habitat “in a manner and to an extent not previously considered” in the 2018 BiOp.⁹⁷ Both agencies have a duty to reinitiate consultation in these circumstances, yet neither have done so, in violation of the ESA.

B. BLM Violated the ESA by Authorizing Logging and Associated Activities in Reliance on the Now-Invalid 2018 Biological Opinion, Despite Dramatically Changed Conditions and New Information.

BLM’s duty to comply with section 7(a)(2) of the ESA continues even after the completion of consultation that results in a biological opinion. Where earlier consultation documents no longer reflect actual conditions on the ground, and those documents failed to consider highly relevant information, BLM may not rely on their conclusions to satisfy its own ESA obligations. The environmental baseline on which NMFS premised its 2018 BiOp has changed dramatically following the 2020 Holiday Farm Fire and subsequent actions, rendering the document’s conclusions invalid and inappropriate for ongoing use regarding logging and associated activity authorizations. BLM must cease and refrain from logging and associated activities that impact spring Chinook and critical habitat until reinitiated consultation with NMFS is complete. If reinitiated consultation reveals unacceptable impacts to spring Chinook or critical habitat, BLM must not authorize such logging.

V. CONCLUSION

As set forth above, the parties to this letter intend to pursue litigation in federal court after sixty days and will seek injunctive, declaratory, and other relief, including an award of fees and expenses incurred in investigating and prosecuting this action. To avoid litigation, NMFS and BLM should immediately reinitiate ESA section 7 consultation regarding the effects of BLM’s forest management program on spring Chinook and critical habitat in light of new information not considered in previous consultation (including but not limited to the Holiday Farm Fire, fire suppression activities, BAER treatments, and salvage logging). Alternatively, BLM needs to consult with NMFS regarding the specific effects of the Big League Project. Until consultation issues are resolved, BLM should halt and refrain from authorizing logging within impacted watersheds, and the agencies should so inform the parties to the letter. If consultation reveals that logging will unacceptably impact spring Chinook or critical habitat, BLM must not authorize such logging.

If you have any questions or wish to discuss this matter further, please contact us.

⁹⁷ 50 C.F.R. § 402.16(a)(2).

Sincerely,

A handwritten signature in black ink that reads "John S. Persell". The signature is written in a cursive, flowing style.

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