DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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WASHINGTON DC 20310-0108

APR 24 2019

Mr. Henry Kerner
U.S. Office of Special Counsel
1730 M Street, N.W. Suite 300
Washington, D.C. 20310-0101

RE: Whistleblower Investigation, Violations by Army Employees in Portland District's Planning, Programs and Project Management Division, Environmental Planning Section of the National Environmental Policy Act, Endangered Species Act, Clean Water Act, National Historic Preservation Act, and Executive Order 13112 (Office of Special Counsel File Number DI-17-1993)

Dear Mr. Kerner:

In accordance with Title 5, United States Code, Sections 1213(c) and (d), the enclosed summary and report is submitted in response to your referral of information requesting an investigation of allegations and a report of findings in the above referenced case.

The Secretary of the Army (SA) has delegated to me his authority, as agency head, to review, sign, and submit to you the statutorily required report. [TAB 1].

The Department of the Army (DA) has enclosed two versions of its report. The first version of the report contains the names and duty titles of military service members and civilian employees of the DA. This first version is for your official use only, as specified in 5 U.S.C. §1213(e). We understand that, as required by law, you will provide a copy of this first version of the report to the Whistleblower, the President of the United States, and the Senate and House Armed Services Committees for their review. Other releases of the first version of the report may result in violations of the Privacy Act[1] and breaches of personal privacy interests.

The second version of the report has been constructed to eliminate references to privacy-protected information and is suitable for release to all others. We request that only the second version of the report be made available on your website, in your public library, or in any other forum in which it will be accessible to persons not expressly entitled by law to a copy of the report.

[1] The Privacy Act of 1974, Title 5, United States Code, Section 552a.

The Department of the Army takes very seriously its responsibility to address, in a timely and thorough fashion, matters referred by OSC. In this case, the Army conducted a comprehensive investigation in response to the OSC's referral of allegations submitted by the Whistleblower, a former employee of the U.S. Army Corps of Engineers (USACE) Portland District, Whistleblower An Investigating Officer (IO) was appointed to investigate the facts and circumstances surrounding the Whistleblower's allegations that employees in Portland District's Planning, Programs and Project Management Division, Environmental Resources Branch, violated the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Clean Water Act (CWA), National Historic Preservation Act (NHPA), and Executive Order (EO) 13112 in their handling of numerous ongoing Portland District projects. These projects include the Willamette Valley Project (WVP) operations, Rogue River Basin Project (RRBP) operations, John Day and The Dalles Dams Mitigation (JD/TD Mitigation) operations, and other operations on the Columbia River.

The purpose of this investigation was to determine the validity of the Whistleblower's allegations and to make findings concerning whether any violations had occurred, and if so, by whom, and whether adequate policies and procedures are in place to preclude any recurrences of the violations. Further, appropriate corrective actions were to be taken as required. These allegations demanded that the investigation be detailed, thorough, and conducted by senior personnel with experience dealing with the applicable laws, regulations and policies.

Although USACE's AR 15-6 investigation concluded that none of the Whistleblower's specific allegations were substantiated, the IO found that the Portland District's NEPA coverage could be improved, particularly for the projects that were developed in the distant past. However, the IO also found that the District's leadership had recognized this issue and had implemented a concerted effort over the last five years to improve compliance. These efforts include hiring additional staff to work on environmental compliance issues and efforts to engage and coordinate with interagency partners, such as the National Marine Fisheries Service, the Fish and Wildlife Service, and the States of Oregon and Washington.

Pursuant to the findings and recommendations approved by the USACE Deputy Commanding General (DCG), the U.S. Army Corps of Engineers has proactively initiated one recommendation to further address and resolve these issues. In addition to adding additional staff experienced in dealing with environmental compliance issues and closely working with interagency partners, the IO's recommendation to list all environmental reviews and compliance actions taken over the past 5-years on the agency's website, and to list forthcoming actions, will ensure that the public is well informed of Portland's efforts to comply with applicable environmental laws.

I agree with the IO's conclusions that the Portland District acted appropriately in carrying out its programmatic responsibilities to comply with applicable environmental laws, regulations and executive orders. Where the agency exercised discretion, I find that it did so in a reasonable manner. I concur that the material facts do not substantiate any of the Whistleblower's eleven allegations, nor constitute any violation. The facts demonstrate that while NEPA coverage was

in some instances dated, in most cases detailed environmental analysis had been completed on a project-by-project basis over time. For example, while the Whistleblower alleged a failure to study the environmental impacts of the Willamette Valley Project Operations, the IO found examples of recent environmental reviews for 10 of the 13 specific components of the Project. The IO's findings with respect to the Rogue River Basin Project, the John Day and The Dalles dams and the Columbia River projects were similar.

Furthermore, I agree with the IO's conclusion that the lack of "recent reviews" does not necessarily equal non-compliance. The Headquarters, U.S. Army Corps of Engineers accepted the IO's recommendation and initiated steps to ensure that the recommended action occur in a timely manner.

I am satisfied that the IO's conclusions and implementation of the associated recommendations constitute an appropriate outcome in this matter. Accordingly, the Army has made no referral of alleged criminal violation to the Attorney General pursuant to Title 5, United States Code,§ 1213(d)(5)(d).

This report, with enclosures, is submitted in satisfaction of my responsibilities under Title 5, USC, Sections 1213(c) and (d). Please direct any further questions you may have concerning this matter to [redacted] at 703-614-3500.

Sincerely,

[redacted]

Assistant Secretary of the Army
(Civil Works)

I. SUMMARY OF THE REPORT OF INVESTIGATION

A. INFORMATION INITIATING THE INVESTIGATION

By letter dated July 9, 2018, the Office of Special Counsel (OSC) forwarded to the Secretary of the Army allegations from a Whistleblower, a former employee of the Portland District, Whistleblower. The Whistleblower alleged that officials at the Department of Army, U.S. Army Corps of Engineers, (USACE[2]), Northwestern Division, Portland District (Portland District or NWP) located in Portland, Oregon, may have engaged in actions that violated laws, rules and/or regulations including the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act (CWA), the National Historic Preservation Act (NHPA) and Executive Order 13112 during the time the Whistleblower worked for the Agency from 2011 to 2017. [TAB A – OSC File No. File Number DI-17-1993, July 9, 2018]. The NWP Planning, Programs and Project Management Division, Environmental Planning Section is responsible for supporting the Corps of Engineers Civil Works water resources development mission. Members of the planning team are professionals in the U.S. Army Corps of Engineers with expertise in water resources planning, including plan formulation, environmental evaluation, cultural resources evaluation, civil works policy, and public involvement.

As reflected in the OSC's referral correspondence to the Secretary, OSC provided the following detailed information as asserted by Whistleblower:

> 'Whistleblower, in her capacity as Environmental Planning Section Chief (2011-2015) and Senior Environmental Resource Specialist (2015-2017), was responsible for ensuring regulatory compliance for all planned/proposed Portland District actions. In doing so, however, Whistleblower says that she discovered that numerous ongoing Portland District projects, including Willamette Valley Project (WVP) operations, Rogue River Basin Project (RRBP) operations, John Day and The Dalles Dams Mitigation (JD/TD Mitigation) operations, and other operations on the Columbia River may not comply with environmental regulations. She stated that she reported her concerns to Portland District management, including Environmental Planning Section Chief [redacted], Environmental Resources Branch Chief [redacted], and Deputy District Engineer for Project Management [redacted]. Whistleblower states that she was advised that the agency did not have sufficient funding, and did not wish to delay ongoing projects to seek regulatory compliance, and that she should focus on ensuring compliance for planned/proposed actions." [TAB A – OSC File No. File Number DI-17-1993, July 9, 2018].

[2] Hereinafter, the U.S. Army Corps of Engineers will be referred to as "USACE" or "Corps" in this Report.

Based on the above information, OSC forwarded the following specific allegations regarding the several sites referenced above to the Army for investigation:

Willamette Valley Project Operations

OSC Referred Allegation 1: USACE's failure to study the environmental impact of changes in WVP operations, including changes in WVP hatcheries and the listing/delisting of endangered and/or threatened species in the Willamette River Basin, and, if necessary, to supplement the Environmental Impact Statement (EIS) prepared for the WVP in 1980, violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).

OSC Referred Allegation 2: USACE's failure to study or account for the potential impact on historic properties prior to commencing its WVP operations violates the NHPA, 54 U.S.C. § 306102.

OSC Referred Allegation 3: USACE's failure to obtain a National Pollution Discharge Elimination System (NPDES) permit for its operation of hydroelectric dams and their discharge of oil into the Willamette River violates the CWA, 33 U.S.C. § 1342.

Rogue River Basin Project Operations

OSC Referred Allegation 4: USACE's failure to study the environmental impact of, and, if necessary, to supplement and/or prepare EISs for the following changes in RRBP operations violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c):

(a) 1973 construction of the Cole River Fish Hatchery; 1977 construction of the Lost Creek Lake Dam;

(b) 1997 listing/2005 reaffirmation of Southern Oregon/Northern California Coast (SONCC) Coho Salmon as a threatened and/or endangered species; and

(c) 2008 notching of the Elk Creek Dam.

OSC Referred Allegation 5: USACE's current RRBP operations jeopardize the continued existence of SONCC Coho Salmon in violation of the ESA, 16 U.S.C. § 1536.

OSC Referred Allegation 6: USACE's failure to obtain NPDES permits for its construction of the Lost Creek Dam and subsequent discharge of oil into the Rogue River, and its notching and disturbance of the Elk Creek Dam, which generated piles of debris exceeding five acres, violates the CWA, 33 U.S.C. § 1342.

John Day and The Dalles Dams Mitigation Operations

OSC Referred Allegation 7: USACE's failure to study the environmental impact of, and, if necessary, to prepare an EIS for its JD/TD Mitigation operations on the Columbia River violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).

OSC Referred Allegation 8: USACE's current JD/TD Mitigation operations jeopardize the continued existence of protected anadromous fish species and bull trout in violation of the ESA, 16 U.S.C. § 1536.

OSC Referred Allegation 9: USACE's failure to prevent, monitor, and control the spread of invasive New Zealand mud snails found at the Ringold Hatchery on the Columbia River violates EO 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999).

Real Estate Project on the Columbia River

OSC Referred Allegation 10: USACE's failure to study the environmental impact of Three Mile Canyon Farms, L.L.C.'s operations on USACE land violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).[3]

Columbia River Navigation Program

OSC Referred Allegation 11: USACE's failure to study or account for the potential impact on historic properties of its continued maintenance of navigation channels on the Columbia River violates the NHPA, 54 U.S.C. § 306102.

In addition to the OSC's description of the Whistleblower's allegations, the Whistleblower, [redacted], provided a detailed discussion of her allegations in her statement to the Investigating Officer as part of the Army's investigation into her allegations. [See TAB B - Statement of Whistleblower [redacted]].

B. CONDUCT OF THE INVESTIGATION

On July 20, 2018, the Army General Counsel, on behalf of the Secretary of the Army forwarded the OSC's correspondence to the Commanding General, U.S. Army Corps of Engineers, Headquarters, for appropriate action, including the initiation of an investigation into the allegations pursuant to Army Regulation (AR) 15-6, Procedures for Investigating Officers and Boards of Officers, and taking appropriate corrective actions. Based on the investigation, an Army report would be prepared for submission to OSC as required by 5 USC §1213 (c) and (d) for the above captioned OSC case. The memorandum forwarding this correspondence was formally signed by the Army General Counsel, [redacted] [TAB C – Memorandum

[3] Even though the title is Three Mile Canyon Farms, it is one business entity so it will be referred to as a single entity for grammatical purposes in this Report.

for Commanding General, Headquarters, U.S. Army Corps of Engineers, Re: OSC File No. File Number DI-17-1993].

Upon receiving the Acting Secretary's referral, on July 20, 2018, [redacted], Commanding General, U.S. Army Corps of Engineers, Headquarters, formally delegated his authority to appoint an Investigating Officer (IO) to conduct an investigation under AR 15-6, and to prepare a draft Army report setting forth all the information required by 5 U.S.C. §§1213 (c) and (d), to [redacted], Deputy Commanding General (DCG), U.S. Army Corps of Engineers on August 13, 2018. [TAB D — USACE Commanding General memorandum to USACE Deputy Commanding General].

On August 14, 2018, DCG duly appointed [redacted], Chief, Regulatory Program, U.S. Army Corps of Engineers, Alaska District, as the designated IO [TAB E — Deputy Commanding General memorandum to Chief, Regulatory Program]. He was appointed as the IO given his vast and varied experience within USACE. A subject matter expert of the Corps' Regulatory, Project Management and Planning functions, Chief, Regulatory Program background made him ideally suited to be the IO in the subject investigation given his extensive knowledge of USACE programs. This background includes a total of 28 years of Federal service, of that 27 years with the Corps of Engineers.

During his career, Chief, Regulatory Program has held a variety of positions in which he garnered expertise with NEPA. Chief, Regulatory Program has served as a Project Manager within the Corps of Engineers (processing federal permits which require compliance with NEPA) for over 8 years, and as a supervisor within this same field (overseeing individuals completing NEPA evaluations) for over 15 years. During these 15 years, he has served as the Chief of Regulatory, Mobile District Corps of Engineers, the Chief of Regulatory, Jacksonville District (the Corps largest regulatory program in the nation), the Chief of Regulatory, Alaska District, and as the Deputy District Engineer for Programs and Project Management, Jacksonville District. In these capacities, Chief, Regulatory Program has directly worked or overseen the work and completion of approximately 8 EIS's, to include several focusing on Everglades Restoration, which is the largest environmental restoration project in the world.

Due to his knowledge and accomplishments, in October of 2017, Chief, Regulatory Program was requested by the Executive Office of the President to serve as a Senior Advisor on Infrastructure Projects. Chief, Regulatory Program served in this position for 6 months working directly for the Council on Environmental Quality, with a focus on environmental reviews to include fulfillment of NEPA requirements in federal actions. As his background demonstrates, Chief, Regulatory Program has worked throughout USACE in both leadership positions and as a program subject-matter expert. USACE leadership believed that his background was uniquely suited to allow him to analyze the issues in the subject investigation, delve into the merits of the allegations, determine relevant facts, and formulate recommendations for corrective action to address any issues related to the instant facts or from a systemic perspective, as appropriate.

The IO began his investigation immediately after being appointed on August 14, 2018, by completing a review of the OSC referral memorandum, the Army referral memorandum and his appointment orders. The IO then arranged a phone call with assigned legal counsel, [redacted] Deputy District Counsel with the U.S. Army Corps of Engineers, Omaha District, in order to discuss the allegations, the relevant AR 15-6 procedures and initial thoughts on how to conduct the investigation. On August 26th and 27th of 2018, the IO and his legal advisor, conducted on-site visits to the Portland District where they interviewed over witnesses and gathered documentary evidence.

On April 15, 2019, the IO completed the final draft of his Report of Investigation (ROI), forwarded it to the report's Approving Authority, DCG [redacted], and DCG [redacted] approved it on April 26, 2019.

C. BACKGROUND

Pursuant to an AR 15-6 investigation, the IO was appointed to investigate the facts and circumstances surrounding the Whistleblower's allegations that employees in the NWP violated laws, rules and/or regulations including the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act (CWA), the National Historic Preservation Act (NHPA) and Executive Order 13112 by allowing a number of NWP projects to proceed and operate without completion of the proper environmental planning and compliance actions. The purpose of this investigation was to determine the validity of the Whistleblower's allegations and to make findings concerning whether any violations occurred and, if so, by whom, and whether adequate policies and procedures are in place to preclude any recurrence of any violations discovered during the inquiry.

The complexity of the numerous allegations and each of their respective multiple sub-elements added to the difficulty of ensuring that all of the allegations were specifically identified and investigated, that a thorough analysis of all of the gathered testimonial and documentary evidence had been conducted, that the appropriate findings and conclusions could be developed, all of which, in turn, would be captured in the Army's report to OSC. Government operations in the Willamette Valley, Rogue River Basin, John Day and The Dalles Dams, and on the Columbia River have been extensive and long-standing. Adequately investigating, analyzing and succinctly summarizing the findings required a structured approach, narrowly tailored to uncover the facts relevant to the Whistleblower's allegations.

During the course of the investigation, the IO interviewed the Whistleblower, [redacted]. Whistleblower and received information from her via email throughout the investigation. The IO reached out to Whistleblower via telephone on August 16, 2018 to request a face to face interview, and simultaneously requested any written documentation to support her allegations. The IO followed up with an email to Whistleblower on August 17, 2018. On August, 20, 2018 the IO received (via e-mail) written documentation from Whistleblower. After reviewing the Whistleblower's allegations and information, the IO began scheduling interviews with 8

employees from the Portland District in compliance with AR 15-6.[4] Additionally, two interagency experts were also contacted at the end of September 2018: a Regional Administrator with the National Marine Fisheries Service (NMFS), [redacted], Assistant Regional Director of the agency responsible for compliance with ESA; and, the State Archeologist for Oregon, [redacted][5] State Archaeologist has 40 years of experience working for the State of Oregon, 15 years in his current position.

With respect to the witnesses, the primary source of individuals identified for witness interviews were those named in the OSC referral, as well as the supervisors, both past and present, of the NWP functional areas involved in the complaint. Additionally, individuals who were specifically identified by other witnesses as possibly having relevant information were also interviewed. Several witnesses provided multiple emails and documents to support or rebut various elements of the allegations contained in the OSC referral, often as suggested by witnesses during interviews or as requested by the IO. After interviewing all of the witnesses and reviewing all documentary evidence obtained over the course of his investigation, the IO determined the significance of each of the pieces of documentary evidence he collected.

All relevant and material evidence that the IO considered in reaching his findings and conclusions on each of the Whistleblower's allegations, including but not limited to testimony from the first two groups, is summarized, to the extent it is needed, to reflect the full and complete reference to all of the gathered testimony, in the discussion section of this report.

To facilitate a better understanding of the facts and circumstances associated with the Whistleblower's allegations to the OSC, and to permit a more informed assessment of the testimonial and documentary evidence collected in this matter, it is important to understand the missions and functions of the relevant organizations as well as their roles and responsibilities. Additionally, a working knowledge of the laws, rules, regulations, and policies that govern the USACE Regulatory Program is also essential and will aid in analyzing the merits of the Whistleblower's allegations. Thus, a summary of those relevant authorities is provided.

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[4] [redacted], Deputy District Engineer for Programs and Project Management, [redacted], former Chief of the Environmental Resources Branch, [redacted], Senior Assistant District Counsel, [redacted], Acting Section Chief of Environmental Planning, [redacted], Lead Fisheries Biologist, [redacted], Chief, Cultural Resources Section, [redacted], Chief of the Environmental Resources Branch, [redacted], Chief, Real Estate Division.

[5] Please note that the Investigating Officer prepared an email Memorandum for Record (MFR), dated September 19, 2018, capturing the testimony of \\ State Archaeologist . Though his MFR referenced his discussion with \\ State Archaeologist \\ State Archaeologist ," the witness's name is "\\ State Archaeologist as captured in \\ State Archaeologist email's signature block.

D. ORGANIZATIONAL ROLES AND RESPONSIBILITIES

1. CORPS OF ENGINEERS.

The Corps of Engineers (Corps) is a Federal agency that provides civil and military engineering services in support of National interests. The Military Construction Program includes management of worldwide military construction projects assigned to USACE as a designated DoD construction agent with responsibility for delivery of facilities and infrastructure supporting the Army, Air Force, and Defense Agencies (e.g. design and construction work on military bases such as building a new runway or barracks building). The Civil Works programs include water resource development activities such as flood risk management, navigation, recreation, and infrastructure and environmental stewardship (e.g. construction and or maintenance of locks and dams, managing campgrounds environmental restoration projects etc.) Generally for our purposes, it is critically important to understand that most of the authority for administering the day to day activities of the Corps Civil Works program has been delegated to the agency's District engineers and Division engineers. As a preface to the more detailed regional organizational structure discussion that follows, however, the following records how Corps Districts, such as the Portland District, are situated within a greater command structure within the Department of the Army and the Department of Defense.

The Secretary of Army has designated the Corps as a Direct Reporting Unit (DRU) within the Department of Army, a military department within the Department of Defense. The Corps is led by its Commanding General, the Chief of Engineers, who reports on the agency's civil works engineering and regulatory functions to the Assistant Secretary of the Army (Civil Works), a civilian official. Three deputy commanding generals report to the Chief of Engineers, including the Deputy Commanding General for Civil and Emergency Operations, who along with the agency's Director of Civil Works (a civilian official), oversees the national management of the Corps' Civil Works Program at USACE Headquarters in Washington, D.C. Under the daily supervision of a dedicated program chief, Headquarters staff are principally responsible for identifying nationwide policy, and providing technical support to the Corps' 8 CONUS Divisions (also known as Major Subordinate Commands (MSCs) and its 38 CONUS District offices, the latter group of which includes the Portland District.

2. ORGANIZATIONAL STRUCTURE OF THE NWP PLANNING, PROGRAMS & PROJECT MANAGEMENT DIVISON

The Portland District, U.S. Army Corps of Engineers, maintains an Environmental Resources Branch that is currently managed by a GS-14 level Chief who reports through the District's Programs & Project Management Division directly to the Portland District Commander, who in turn reports upward through the Division Engineer of the Northwest Division MSC. Staff in the Environmental Resources Branch are divided into three Sections, all of which are physically located in Portland, Oregon (the Environmental Compliance Section, the Fish Passage Sections and the Cultural Resources Section). Each Section is headed by GS-13 level Section Chief. As of the date of this report, all of the chief positions are permanently filled.

Each one of these sections is staffed by a variety of professionals (Fishery Biologist, Anthropologist, Archeologist etc…) with a range in grades from GS-11's to GS-13's based on levels of responsibility [TAB F – Portland District Organizational Chart, dated January 15, 2019].

Finally, to provide additional context and clarity for the discussion below, it is also important to note that the Environmental Resources Branch receives legal services from the Portland District Office of Counsel under the management of the Portland District Counsel, who reports through the Northwest Division Counsel to the Associate Deputy Chief Counsel, U.S. Army Corps of Engineers, Headquarters. Typically, the Office of Counsel participates as a member of Project Delivery Teams. This ensures the Office of Counsel is aware of project status and ongoing issues (including those of a legal nature). Additionally, the Office of Counsel is open to all employees should there ever be a need for an employee to raise an issue. However, through this investigation, it was noted there is no formal process in place that describes when or how the Office of Counsel should or could be notified of concerns or issues or at which point the Office of Counsel should be brought into conversations related to legal matters.

E. RELEVANT LEGAL AUTHORITIES

Summaries of the pertinent provisions of National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Clean Water Act (CWA), National Historic Preservation Act (NHPA), and Executive Order (EO) 13112 follow.

1. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA).

NEPA was signed into law on January 1, 1970. 42 U.S.C. §§4321, et. seq. NEPA requires agencies to review the potential environmental impacts of their projects, recording their review in a publicly available document. There are three types of environmental documents, based on the type of review: a categorical exclusion (CE), an environmental assessment (EA) and an environmental impact statement (EIS). The act dictates procedure, not results.

NEPA also created the Council on Environmental Quality (CEQ), which promulgated regulations implementing the act. 40 C.F.R. §§ 1500 et seq. The NEPA regulations emphasize communicating with the public, reducing delays of federal projects, and making better decisions. 40 C.F.R. §§ 1500.1 - 1500.5. Agencies are to integrate NEPA reviews with other agency planning and review processes, and coordinate with other federal agencies and with similar state processes when appropriate. 40 C.F.R. § 1500.2(c).

Because NEPA does not provide a right of action, suit is brought under the Administrative Procedure Act (5 U.S.C. §§ 706 et seq.). Like other APA cases, the court reviews the administrative record to see if the agency acted arbitrarily or capriciously. NEPA "does not mandate particular results, but simply prescribes the necessary process." Robertson v.

Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Thus, NEPA merely prohibits uninformed — rather than unwise — agency action.

2. ENDANGERED SPECIES ACT (ESA).

The ESA declares that all federal departments and agencies must seek to conserve endangered and threatened species and to "utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c). The Act sets forth the procedure for determining whether a species is threatened or endangered, resulting in a published list of all species determined to be threatened or endangered, and designating critical habitat for listed species. 16 U.S.C. § 1533).

The authority for implementing and executing the ESA is delegated to the Department of the Interior and, within that agency, to the U.S. Fish and Wildlife Service (FWS). The National Marine Fisheries Service (NMFS), operating under the Department of Commerce, has similar powers for protecting and conserving marine life and anadromous fish. FWS and NMFS are responsible for determining which species are listed as threatened or endangered and delineating critical habitats necessary for their survival.

Federal agencies must ensure that any action authorized, funded, or carried out by the agency is (1) "not likely to jeopardize the continued existence" of any listed species, and (2) not likely to result in the destruction or adverse modification of the "designated critical habitat" of a listed species, unless the agency has been granted an exemption. 16 U.S.C. § 1536(a)(2). Federal agencies are required to consult with FWS or NMFS before implementing an action that may affect listed species or their critical habitat. 16 U.S.C. § 1536(a)(2). These requirements also apply with respect to species that are proposed for listing or adverse modification of critical habitat proposed to be designated for such species. 16 U.S. C. § 1536(a)(4).

3. CLEAN WATER ACT (CWA).

The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained. EPA's National Pollutant Discharge Elimination System (NPDES) permit program controls discharges. 33 U.S.C. §1342. Point sources are discrete conveyances such as pipes or man-made ditches. Industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters.

4. NATIONAL HISTORIC PRESERVATION ACT (NHPA).

Section 106 is the portion of the NHPA that is concerned with Federal undertakings. 16 U.S.C. §§ 470a et seq. A Federal undertaking is a project, activity, or program either funded, permitted, licensed, or approved by a Federal agency. Undertakings may take place either on or off federally controlled property and include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

Section 106 requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment. In addition, Federal agencies are required to consult on the Section 106 process with State Historic Preservation Offices (SHPO) and Indian Tribes.

5. EXECUTIVE ORDER 13112.

Executive Order 13112 of February 3, 1999 (Invasive Species), called upon executive departments and agencies to take steps to prevent the introduction and spread of invasive species, and to support efforts to eradicate and control invasive species that are established. Executive Order 13112 also created a coordinating body, the Invasive Species Council, also referred to as the National Invasive Species Council to oversee implementation of the order, encourage proactive planning and action, develop recommendations for international cooperation, and take other steps to improve the Federal response to invasive species.

II. SUMMARY OF KEY EVIDENCE AND THE INVESTIGATING OFFICER'S FINDINGS

After interviewing all of the witnesses and reviewing all documentary evidence obtained over the course of the investigation, the IO determined the significance of each of the pieces of testimonial and documentary evidence collected. The IO found three of the interviews he conducted particularly helpful in forming his ultimate conclusions, along with a Table of Portland District Project Environmental Reviews [TAB G - Table of Portland District Project Environmental Reviews] that was assembled to help answer questions surrounding the history of NWP project environmental compliance. A summary of the testimonial evidence gathered from those three interviews as well as the Table of Portland District Project Environmental Reviews follow in this section.

Ultimately, after completing his interviews, and after receiving and reviewing all applicable information, the IO determined that material facts do not substantiate *any* of [redacted] Whistleblower eleven allegations. Additionally, he did not find any violation of law, rule, regulation or executive order.

a. Chief, Environmental Resources Branch.

[redacted] formerly served in the Portland District as Chief of the Environmental Resources Branch. Chief, Environmental Resources Branch served as the Chief of the Environmental Resources Branch from 2009 to 2018, and also served as Whistleblower direct supervisor. In her OSC complaint, Whistleblower alleged that she reported concerns regarding environmental compliance, or lack thereof, to Chief, Environmental Resources Branch and was told that the agency did not have sufficient funding to purse compliance as recommended by the Whistleblower. The IO interviewed Chief, Env. Resources Branch by telephone on November 15, 2018.

Chief, Environmental Resources Branch stated that that Whistleblower had never informed her that USACE was in violation of environmental laws. Chief, Environmental Resources Branch stated that she had discussions with Whistleblower about NWP projects that are the subject of this investigation, but Whistleblower never stated a belief that USACE was in violation of any federal laws or rules. Chief, Environmental Resources Branch noted that NEPA coverage is dated for some of the NWP projects, but she does not believe that constitutes a NEPA violation.

The IO asked Chief, Environmental Resources Branch whether she had ever been notified by other agencies that USACE was in violation of federal environmental laws. Chief, Environmental Resources Branch stated that the State Historic Preservation Offices, FWS, and NMFS would sometimes complain about the pace at which USACE moved forward with coordination and consultation, but that she never heard these agencies express concerns about violations.

Finally, Chief, Environmental Resources Branch acknowledged that Portland District understood that the Environmental Resources Branch needed additional people to execute its environmental compliance program. Chief, Environmental Resources Branch arrived at the District in 2009 there were 20 employees in the Environmental Resources Branch. The District understood there were concerns with staffing levels and began the process of new staffing approvals and hiring around approximately 2012. When she retired in 2018, the Branch had 30 employees. Chief, Environmental Resources Branch stated the USACE worked hard to ensure appropriate funding and staff were available to execute the NWP mission.

b. Deputy District Engineer for Project Management.

Deputy District Engineer for Project Management serves as the NWP Deputy District Engineer for Programs and Project Management and is responsible for program execution of the District's civil works program. The senior leader interviewed, Deputy Dist Eng for Project Management, succinctly stated that the Portland District may not have "perfect" NEPA coverage for each of the projects that were developed in the past, but that he is not aware of any existing violations of law. He recognized that in some cases, past practices needed to be improved, and detailed the ways in which the Portland District is working to make those changes.

Deputy Dist Eng for Project Management had been made aware of concerns involving certain NWP projects with regards to environmental compliance issues. He stated that in 2002, USACE published the "Environmental Operating Principles" guidance which discussed the Corps' commitment to environmental sustainability. When Deputy Dist Eng for Project Management assumed the position of the Deputy District Engineer in 2007, the District was certainly doing environmental compliance and cultural resource work, but he and the District leadership took action to strengthen those two sections.

Starting in 2007, NWP hired more people to do environmental compliance and cultural resources work in an effort to improve and add more rigor to those programs. One of the employees hired was the Whistleblower, who was hired in 2011. Whistleblower was hired into the Environmental Compliance section to help the District in its compliance efforts. [redacted] Whistleblower [redacted] Deputy Dist Eng for Project Management [redacted] Whistleblower [redacted]

State Archaeologist was eventually hired to lead the Section in hopes of "righting the ship." [redacted] hired the right people, and worked to integrate the Section's efforts within the structure of the organization.

c. Senior Assistant District Counsel.

[redacted] serves as a Portland District Senior Assistant District Counsel and Environmental Team Lead in the Office of Counsel. She provides legal advice on a wide variety of environmental issues concerning Civil Works projects, Real Estate, and the Regulatory Program. Senior Assistant District Counsel was able to provide detailed information regarding her knowledge of the NWP projects at issue in this investigation. Senior Assistant District Counsel provided specific testimony regarding the following projects:

(1) Willamette Valley Project Operations.

Senior Assistant District Counsel stated that she is aware of questions regarding the sufficiency of NEPA documentation for the operations of the Willamette Valley project given the date of the EIS (1980), changes in operations since that time, and the ESA-listing of various species. In her professional opinion, the date of an EIS, in and of itself, does not mean that the Corps is violating NEPA since whether and when to prepare an EIS is not a black and white issue under NEPA, particularly when an agency is dealing with the continued operations of a project as opposed to the construction of a new project. Senior Assistant District Counsel stated that the 1980 EIS was very broad in scope. However, the District recognized a couple of years ago that it would be prudent and would minimize legal risk to update the EIS and requested funding to do so. The Corps is planning, pending funding, to prepare an updated EIS. A project charter for this effort was approved in May 2018. With the development of an updated EIS for the Willamette Valley Project, Section 106 compliance will also be addressed.

With respect to NPDES permitting, for many years, EPA (and the Corps) did not think dams required NPDES permits. There has been a lot of litigation and debate over the years regarding whether dams "add" pollutants for purposes of Section 402 of the Clean Water Act. In this region, EPA did not prioritize NPDES permitting of the operation of dams, in part because they did not find the discharges that might be regulated significant as compared to other facilities such as paper mills or waste water treatment plants. As a result of a settlement agreement from a 2014 lawsuit filed by a group called Columbia Riverkeeper, the District agreed to take actions intended to assure its dam operations are in compliance with the federal CWA. Those actions include seeking NPDES permits for the addition of pollutants (e.g., oil, heat from cooling water) from its operations of Bonneville, The Dalles, and John Day. The District is currently investigating whether permits are required for the facilities in the Willamette Valley.

(2) Rogue River Basin Project Operations.

Senior Assistant District Counsel recalled reviewing a draft EA for the notching of Elk Creek dam. She is not aware of any operations today at Elk Creek which would require an NPDES permit.

(3) John Day and The Dalles Dam Mitigation Operations.

Senior Assistant District Counsel was not aware of any concerns about the spread of invasive New Zealand mud snails at the Ringold Hatchery. She confirmed an existing Biological Opinion (BiOp) for the operation of the Federal Columbia River Power System (FCRPS), which addresses hatcheries. The Corps is currently engaged in ESA consultation for the next BiOp.

(4) Lower Columbia River Channel Maintenance.

Senior Assistant District Counsel stated that the existing 1999 EIS and 2003 SEIS for Lower Columbia River Channel Improvement and Maintenance appeared to address channel maintenance issues. The District is currently preparing a new 20-year dredged material management plan and EIS for the Lower Columbia River Channel Maintenance and will address Section 106. See http://www.nwp.usace.army.mil/lcrchannelmaintenance/.

(5) Three Mile Canyon Farms Lease.

Senior Assistant District Counsel advised the IO that two other attorneys in her office had provided advice on the environmental and/or real estate legal issues with respect to Three Mile Canyon Farms' lease. She noted the legal distinction between the Corps' obligation for environmental review of leases to third parties compared to the Corps' construction or operation of a civil works project.

In summary, Senior Assistant District Counsel is not aware of any violations of NEPA, ESA, or applicable regulations regarding Willamette Valley Project operations, Rogue River Basin Project operations, John Day and The Dalles Dams Mitigation operations, Columbia River Navigation Program, or the real estate instrument concerning Three Mile Canyon Farms, LLC.

d. Table of Portland District Project Environmental Reviews.

After completing his interviews, the IO requested additional information, including a list of list of environmental undertakings on the projects that are the subject of this investigation. A table showing the environmental compliance history for the subject projects was prepared by [redacted], NWP Chief of the Environmental Planning Section and Lead Fisheries Biologist. [TAB G - Table of Portland District Project Environmental Reviews]. As demonstrated by the Table, the NWP projects that are the subject of this investigation have a complex history of environmental compliance reviews that often date to the 1970's.

III. DISCUSSION OF THE SPECIFIC OSC REFERRED ALLEGATIONS

A. Willamette Valley Project Operations (WVP):

The Portland District operates 13 dams in the Willamette River basin. Each dam contributes to a water resource management system that provides flood risk management, power generation, water quality improvement, irrigation, fish and wildlife habitat and recreation for the Willamette River and many of its tributaries. Collectively these dams operated in concert and are considered a single project, the Willamette Valley Project.

Nine of the Willamette Valley dams generate hydroelectricity from the power of water passing through the dams. Eight of these facilities are owned and operated by the Corps of Engineers, and one is a private facility licensed by FERC. Three project locations, Green Peter/Foster, Detroit/Big Cliff and Lookout Point/Dexter, are two dam systems that work in concert to allow for power peaking operations. They are listed together since the two dams work as a single system. In total the Willamette Valley Project dams can provide enough power to service about 300,000 homes (500 mw).

OSC Referred Allegation 1: The Whistleblower alleged the USACE's failure to study the environmental impact of changes in WVP operations, including changes in WVP hatcheries and the listing/delisting of endangered and/or threatened species in the Willamette River Basin, and, if necessary, to supplement the Environmental Impact Statement (EIS) prepared for the WVP in 1980, violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).

Conclusion for OSC Referred Allegation 1: The IO found this allegation to be *unsubstantiated* based on the following evidence.

During the interviews with all Corps representatives the IO specifically asked if they were aware of any violations of law, regulation, executive order or policy with regard to the projects being discussed, to which they all replied in the negative. Although both Deputy District Engineer for Project Management Former Chief, Environmental Resources Branch Senior Assistant District Counsel all stated they believed their NEPA could be stronger and they were working to make that happen, none believed they had violated any laws.

The IO requested information on any recent valuations/studies/environmental assessments or such that had been conducted on the WVP. Once this list was provided, the IO then verified these actions had actually taken place. As is reflected in the evidence that follows,

there are a significant number of recent evaluations/studies/environmental assessments that have been conducted on the WVP.

(1) Below is a list of recent environmental and or NHPA reviews that have been completed in the recent past.

(a) The Willamette Valley Project is a system of 13 dams. Compliance is addressed below by dam or project-wide. Over the years, many different evaluations have been completed. Additionally, it is important to note that with respect to the dams or projects addressed below, the Corps of Engineers is not responsible for the listing or delisting of species contained in those waters as this is a responsibility of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (NMFS).

(b)July 25, 2017, Record of Environmental consideration for Willamette Hatchery and Dexter Ponds ODFW Hatchery Housing Lease (which included NHPA Sec. 106 consultation).

(c) December 15, 2017, Record of Environmental consideration for easement renewal for Olympic Pipeline Company. (This is technically at the Moorings but is on the Willamette River and includes Sec 106 analysis).

(d) June 14, 2018, environmental assessment (EA)/finding of no significant impact (FONSI) lower South Fork McKenzie floodplain enhancement project Lane County, Oregon.

(2) Lookout Point/Dexter Dam:

Location. On the Middle Fork, Willamette River at Meridian site, 21.3 miles from the mouth of the river. The Middle Fork, Willamette River, rises in Lane County on western slope of Cascade Range and flows northwesterly to its junction with Coast Fork, which is the head of the mainstream Willamette River. The Dam is about 22 miles southeast from Eugene, Oregon.

Existing project. A main dam at Meridian site and a re-regulating dam 3 miles downstream at Dexter site. Both dams are earth-and-gravel-filled with concrete spillways and have power generating facilities. The main dam is 258 feet high from lowest point of the general foundation to deck and is 3,381 feet long at crest forming a reservoir 14.2 miles long providing storage of 456,000 acre-feet at full-pool level. A reservoir controls runoff of tributary drainage area of 991 square miles. Spillway, 274 feet long, is a gate-controlled overflow type, forming right abutment. Outlet works consisting of slide-gate-controlled conduits pass through spillway section. The powerhouse has three main generating units with a capacity of 120,000 kilowatts. Dexter re-regulating dam has a maximum height of 107 feet above lowest point of the general foundation and is 2,765 feet long at crest, forming a full pool of 27,500 acre-feet extending upstream to main dam and providing pondage to regulate Lookout Point powerhouse water

releases to a uniform discharge. The spillway consists of a gate-controlled overflow section 509 feet long forming right abutment.

Flow regulation is accomplished by use of spillway gates and releases through the powerhouse, which contains one 15,000-kilowatt unit. Lookout Point and Dexter Lakes are operated as a single unit of a coordinated system of reservoirs to protect the Willamette River Valley against floods; to provide needed hydroelectric power, and to increase low water flows for navigation, irrigation, and other purposes. The existing project is authorized as a unit of a comprehensive plan for flood control and other purposes in the Willamette River Basin.

Construction of the project was initiated May 1947 and was completed in June 1961, except for construction of additional recreation facilities funded through the Code 710 Program (a budget code for construction of recreation facilities at completed civil works projects). Future recreation facilities will be provided in accordance with the cost-sharing contract with Lane County and will require a 50 percent contribution by Lane County and is subject to funding availability by the Government and the County. At Lookout Point powerhouse, generating units #1, #2 and #3 were placed in commercial operation in December 1954, February 1955, and April 1955, respectively. At Dexter powerhouse the single unit was placed on-line in May 1955. Dexter was placed in operation for re-regulation in December 1954. The Dexter main unit circuit breaker and protective relays were updated in 2006. Dexter is remotely operated from Lookout Point.

(a) October 14, 2015, record of environmental consideration for Lookout Point Dam powerhouse- brake replacement- Lane County, Oregon (includes Sec. 106 analysis)

(b) October 16, 2015, record of environmental consideration for dacw-57-3-95-0024 easement to Lane County school district for an easement to operate an irrigation pump at Dexter reservoir in Lane County, Oregon (includes Sec. 106 consultation).

(c) July 29, 2016, record of environmental consideration for Lookout Point dam and Cottage Grove dam cable upgrade, Lane County, Oregon.

(d) August 4, 2016, record of environmental consideration for Lowell state park shoreline revetment, Lane County, Oregon (includes NHPA Sec. 106 consultation).

(e) April 14, 2016, record of environmental consideration for Leburg.

(f) July 29, 2016, record of environmental consideration for Lookout Point Dam and Cottage Grove Dam cable upgrade, Lane County, Oregon July 31, 2018 record of environmental consideration: intake gantry crane replacement, Dexter Dam, Lane, Oregon (includes NHPA Sec. 106 consultation).

(3) Hills Creek Dam:

Location. On the Middle Fork, Willamette River, 47.8 miles from mouth and 26.5 miles upstream from Lookout Point Dam. The Middle Fork, Willamette River rises on west slope of Cascade Range and flows northwesterly to its junction with Coast Fork, Willamette River. The Dam is about 45 miles southeast from Eugene, Oregon.

Existing project. An earth-and-gravel-fill dam about 2,150 feet long at the crest and 338 feet above the lowest point of the general foundation. A gate-controlled concrete gravity chute-type spillway is in right abutment. A diversion tunnel, outlet tunnel and power tunnel are in same abutment. A powerhouse with two 15,000-kilowatt units is located next to spillway. Hills Creek Lake is about 8.5 miles long and provides storage capacity at full pool of 356,000 acre-feet. Project controls runoff of drainage area of 389 square miles and is an integral unit of comprehensive plan for development of water resources of Willamette River Basin. Hills Creek Lake and Lookout Point Lake are operated as a unit for control of floods and generation of power on Middle Fork Willamette River. These projects, in conjunction with Dexter re-regulating dam and Fall Creek Lake flood control system, effectively manage flooding risks on the Middle Fork and provide maximum efficient generation of hydroelectric power. The U.S. Forest Service provides recreation facilities. Hills Creek power units are remote controlled from Lookout Point. Construction of project, initiated in May 1956, was completed in June 1963. The project was placed in service for useful flood control in November 1961. On May 2, 1962, the two power units were placed on-line. The project is operated remotely from Lookout Point Dam in Lowell, Oregon.

(a) Sept 6, 2016, record of environmental consideration for hills creek dam issue evaluation study geotechnical investigations–Lane County, Oregon (includes Sec. 106 consultation).

(b) May 10, 2017, record of environmental consideration: Hills Creek Dam oil spill prevention system, Lane County, Oregon (includes Sec. 106 analysis)

(4) Foster/Green Peter Dam:

Location. At approximate mile 5.5 on Middle Santiam River which joins South Santiam River about 56.8 miles above its confluence with Willamette River. The dam is about 30 miles southeast of Albany in Linn County, Oregon.

Existing project. A main dam and a re-regulating dam, both with power-generating facilities. The Green Peter Dam is a concrete gravity structure, 1,400 feet long and 385 feet high above the lowest point of the general foundation with a gate-controlled spillway. Outlet works consist of two conduits through the spillway, discharging into a stilling basin. A power plant, on the right bank adjacent to a spillway stilling basin, consists of two units with an installed capacity of 80,000 kilowatts. A reservoir provides storage capacity at full pool of 430,000 acre-feet, extending 6.5 miles up Quartzville Creek and some 7.5 miles up Middle Santiam River

above creek junction, forming a Y-shaped pool. The reservoir controls runoff of tributary drainage area of 277 square miles. Foster Dam, 7 miles downstream from Green Peter Dam is located on South Santiam River about 38 miles above its confluence with Santiam River and 1.5 miles below its confluence with Middle Santiam River. Foster Dam consists of an earth, gravel, and rock-filled embankment, 146 feet high from lowest point of the general foundation and a concrete gravity gate controlled spillway and stilling basin for a total length of 4,800 feet. Hydropower installation consists of two units with capacity of 20,000 kilowatts. Foster Lake has a storage capacity, at full pool, of 61,000 acre-feet. The Project functions as a unit in a coordinated system of reservoirs for multiple-purpose development of water resources in Willamette River Basin. Green Peter is remotely operated from Foster.

All construction on Green Peter-Foster Lakes project, initiated in June 1961, is completed. Green Peter Lake was placed in operation for useful flood control in June 1967 as a unit of a coordinated reservoir system for protection of the Willamette River Basin. The first power-generation unit was placed on-line on June 9, 1967 and the second unit came on-line on June 28, 1967. Use of Foster Lake for re-regulating fluctuating flows from the Green Peter units was effective December 1967. The first power generation unit was placed on-line August 22, 1968 and the second, September 6, 1968.

During the summer of 2008, structural deformation was detected on all the Foster spillway gates. It was determined that original design weaknesses and past maintenance practices led to buckling of main structural gate members, requiring emergency repairs. The reservoir was lowered in the fall of 2008 impacting recreation and power generation. During the repair of the first gate, the project passed inflows and lacked capacity to safely store water. Repairs to the first gate were accomplished by mid-January, 2009, and project benefits and operating conditions were restored.

(a) June 27, 2017, record of environmental consideration for Pacific Power easement Foster Lake, Oregon (includes NHPA Sec. 106 analysis).

(b) October 13, 2015, record of environmental consideration for Menears Bend culvert removal at Foster Dam project (includes NHPA Sec. 106 consultation).

(c) December 12, 2017, record of environmental consideration: license renewal to Linn County parks and recreation for debris and log removal, Foster Lake, Linn County, Oregon (includes Sec.106 analysis).

(d) November 17, 2017, record of environmental consideration for lease combination and renewal for consumers power, including substation and powerline easement; Foster dam, Linn County, Oregon (includes NHPA Sec. 106 analysis).

(e) July 12, 2018, record of environmental consideration: Foster powerhouse electrical reliability upgrades – Linn County, Oregon (includes NHPA Sec. 106 consultation).

(f) October 1, 2015, record of environmental consideration for Green Peter powerhouse- replacement of main unit breakers and electrical reliability upgrades- Linn County, Oregon (includes NHPA Sec. 106 analysis).

(g) October 5, 2015, record of environmental consideration for Green Peter powerhouse bridge crane rehabilitation, Linn County, Oregon (includes NHPA Sec.106 consultation).

(h) December 22, 2015, record of environmental consideration for real estate outgrant for Quartzville road improvement project– Linn County, Oregon (includes NHPA Sec. 106 consultation).

(5) Fern Ridge Dam:

Location. On the Long Tom River, 23.6 miles from the mouth of the river. The Long Tom River raises in Lane County, Oregon, on eastern slope of Coast Range, flows north for 50 miles, and enters Willamette River 147 miles above its mouth.

Existing project. A main dam of 6,624 feet long at crest and 49 feet high from lowest point of the general foundation and two auxiliary dikes, 915 and 3,929 feet long, along the northeasterly boundary of lake. The main dam consists of an earth fill embankment dam 6,330 feet long, a concrete gravity spillway near left abutment with a non-overflow structure 46 feet long, containing outlet works, and an overflow structure, 248 feet long, controlled by six automatic gates. The Project includes rectification of channel of the Long Tom River downstream of the dam. The reservoir provides 110,000 acre-feet of usable flood control storage and controls runoff of a tributary drainage area of 275 square miles. The reservoir protects the Long Tom River Valley and is operated as a unit of a coordinated reservoir system to protect the Willamette River Valley generally, and to increase low water-flows for navigation and other purposes. The Dam was originally constructed in 1941 to height of 47 feet. Provision of additional storage for flood control was obtained in 1965 by raising embankments 2 feet to 49 feet above the lowest point of the general foundation. The project is operated remotely from Lookout Point Dam in Lowell, Oregon.

In December 2004, a panel of experts determined that the embankment dam was in an "active state of failure." The panel recommended severe restrictions on reservoir operations and immediate repairs to the dam. Subsequent analysis determined that the probability of a storm event that would cause severe flooding downstream, with these new restrictions in place, was very high. Authority for an emergency repair of the dam was supported at all Corps levels. The Portland District began design work in early February 2005, awarded a contract in May 2005 and completed a repair of the entire 1.1 mile-long embankment dam prior to the 2005/2006 flood control season. The repair involved removing approximately 1/3rd of the embankment dam, replacing the internal drain system and restoring the embankment. Over 60,000 cubic yards of material excavated from the dam repair were used to develop 3 new sub impoundments

comprising 394 acres of sub-impoundments managed for over wintering waterfowl or to control non-native vegetation.

Construction of the Project was initiated in April 1940 and was completed in August 1951, except for provision of additional storage for flood control, which was authorized in 1962 and completed in April 1965, and construction of additional recreation facilities funded through the Code 710 Program. Construction of three water flow impoundments was completed in 1994 under Section 1135 of the Water Resources Development Act, as amended. The dam and reservoir have been in continuous operation since December 1941. Development of future recreation facilities will be in accordance with the cost-sharing contract with Lane County, and requires a 50 percent contribution by the county.

Portions of Federal lands surrounding Fern Ridge Lake were designated critical habitat for Fender's Blue Butterfly, Kincaid's Lupine and the Willamette Daisy, all federally listed species. Approximately 250 acres of Fern Ridge are designated as one of the Corps' few Research Natural Areas, and provide some of the best examples of remnant Willamette Valley wet prairie. Routine O&M efforts include restoration of both upland and wet native prairie plant communities, in cooperation with many local and regional partners.

(a) November 6, 2015, record of environmental consideration for south marsh unit culvert replacement at Fern Ridge Reservoir-Lane County, Oregon

(b) April 13, 2017, record of environmental consideration for the removal of an underground storage tank by Eugene Yacht Club, Fern Ridge, Oregon (includes NHPA Sec. 106 consultation).

(6) Fall Creek Dam:

Location. On Fall Creek, a tributary of Middle Fork Willamette River, about 7 miles above confluence of the streams and about 19 miles southeasterly of Eugene, Oregon.

Existing project. An earth and gravel fill embankment about 5,100 feet long at its crest and 193 feet high from the lowest point of the general foundation. A gated concrete gravity spillway is in left abutment. The outlet is in right abutment. A reservoir provides 115,000 acre-feet of usable flood control storage and is operated as a unit of a coordinated reservoir system to protect Willamette River Valley and increase low water flows for navigation and other purposes. Construction of project began May 1962 and was essentially complete by November 1965. Reservoir storage for flood control was effective in October 1965. The project is operated remotely from Lookout Point Dam in Lowell, OR. Sky Camp Lodge was completed October 1978. Future recreation facilities will be provided in accordance with the cost-sharing contract with Bethel School District. Bethel School District has a sub-agreement with the Springfield Kiwanis Club for management of this facility. The Corps manages one park at the project.

(a) July 8, 2016, record of environmental consideration for fall creek gate

rehabilitation, fall creek dam, Lane County, Oregon (includes Sec. 106 consultation).

** ***(7) Dorena Dam:***

Location. On Row River, Oregon, 7 miles from the mouth of the river. Row River rises in Lane County on western slope of Cascade Range, flows northwest for 19 miles, and enters Coast Fork of Willamette River 19.5 miles above mouth.

Existing project. An earth fill embankment dam, 3,352 feet long at its crest and 145 feet high from the lowest point of the general foundation. A concrete gravity free-overflow spillway, 200 feet long, forms right abutment. An outlet works on five slide-gate-controlled conduits pass through spillway section. A reservoir provides 70,500 acre-feet of usable flood control storage and controls runoff of 265 square miles. The Project is operated as a unit of a coordinated reservoir system to protect the Willamette River Valley and increase low water flows for navigational and other purposes. Construction of the project was initiated in June 1941 and was completed in October 1952, except for construction of additional recreation facilities that were funded under the Code 710 Program. Future recreation facility construction will be accomplished in accordance with the cost-sharing contract with Lane County, Oregon. Dam and reservoir have been in continuous operation since November 1949. The project is operated remotely from Lookout Point Dam in Lowell, Oregon.

During the course of this investigation, the IO did not find any record of environmental reviews being conducted for this project (i.e. no documentation of categorical exclusion, environmental assessments, environmental impact statements, or supplemental reviews). However, since the project pre-dates NEPA, the project only triggers an evaluation process if changes are made to the project or its operations. As no such changes were discovered, the IO had no reason to believe that re-evaluation was required. This is so for the instant site as NEPA requirements were not retroactive for existing projects. Keeping in mind that NEPA is designed to ensure that environmental considerations are taken into account when decisions are made concerning projects that could have significant impacts on the quality of the human environment, existing projects were essentially grandfathered since the decisions concerning those projects had already been made.

(8) Detroit/Big Cliff Dam:

Location. On the North Santiam River with the dam 50 miles from the mouth of the river, 40 miles southeast of Salem, Oregon. The North Santiam River flows north and west for 85 miles, and unites with the South Santiam River to form the Santiam River, which 10 miles downstream, enters the Willamette River 108 miles above its mouth.

Existing project. A main dam and a re-regulating dam, both with power-generating facilities. Detroit Dam is a concrete gravity structure about 1,522 feet long and 454 feet high from the lowest point of the general foundation to the roadway deck. The spillway is a gate-controlled overflow section, and outlet works are gate-controlled conduits through the dam. A powerhouse with two units having a capacity of 50,000 kilowatts each is in right abutment

immediately below the dam. The reservoir has a storage capacity at full pool of 454,900 acre-fee and controls runoff from a tributary drainage area of 438 square miles. It is operated as a unit in a coordinated reservoir system to protect the Willamette Valley from floods, to increase low water flows in the interest of navigation and irrigation, to generate power, and for other purposes. A re-regulating dam 3 miles downstream at the Big Cliff site is a concrete gravity type dam, about 191 feet high from the lowest point of the general foundation to the roadway deck. Power installation consists of one unit with a capacity of 18,000 kilowatts. Reservoir has a storage capacity of 5,930 acre-feet at full pool. The Project is operated as a unit of a comprehensive system for flood control and other authorized purposes in the Willamette Basin. Big Cliff is remotely operated from Detroit Dam. Recreation facilities are provided by the U.S. Forest Service, Oregon State Park System and the town of Detroit.

Construction of the Project began in May 1947 was completed in December 1960. The two powerhouse generating units were placed in commercial operation in June and October 1953. At Big Cliff powerhouse, a single generating unit was placed on-line June 1954. Use of Big Cliff Dam for re-regulating fluctuating flow from the Detroit units was effective October 1953.

(a) October 24, 2017, Notice Of Intent to Prepare an Environmental Impact Statement for the Detroit Dam Downstream Passage Project

(b) September 22, 2015 Record of Environmental Consideration for Rehabilitation of The Detroit Dam Tainter Gates and Temperature Control Operation (includes NHPA Sec. 106 Consultation)

(c) July 24, 2017, Record of Environmental Consideration for Marion Forks Hatchery and ODFW Hatchery Housing Lease (includes NHPA Sec. 106 Consultation)

(d) September 5, 2017, Record of Environmental Consideration: Intake Gantry Crane Replacement, Big Cliff Dam, Linn and Marion Counties, Oregon (includes NHPA Sec. 106 Consultation

(9) Cougar Dam:

Location. At mile 4.4 on South Fork McKenzie River which joins McKenzie River about 56.5 miles above its confluence with Willamette River. Project is about 42 miles east of Eugene, Oregon.

Existing project. A rock fill dam with an impervious earth core, about 1,738 feet long at its crest and 445 feet high above the streambed. The reservoir is 6 miles long with storage capacity at full pool of 219,000 acre-feet and controls runoff of tributary drainage area of 210 square miles. The spillway is on right abutment and outlet and power tunnels in left abutment. An outlet tunnel is provided with a chute and stilling basin. The power plant consists of two 12,500-kilowatt units with minimum provisions for installing a third unit of 35,000 kilowatts for

future peaking capacity. The Project functions as a unit in a coordinated system of reservoirs for multiple-purpose development of water resources in the Willamette River Basin. Recreation facilities are provided by the U.S. Forest Service. Also authorized (but un-constructed) is a re-regulating dam, Strube Lake, below Cougar Lake, which would permit Cougar to operate as a peaking power plant. The Strube Dam would contain two units totaling 4,600 kilowatts. Estimated Federal cost of Strube Lake and Cougar Additional Units is $114,000,000.

Construction of the Project was initiated in June 1956 and is complete, excluding Strube Dam and Lake for which planning is essentially complete. Also, plans and specifications for the first construction contract (relocations) have been completed. Generating units 1 and 2 were placed in commercial operation March 23 and February 4, 1964, respectively. The physical in-service date for flood control was November 29, 1963. Turbines were replaced and generating units were re-wound and commissioned in 2005. The project is operated remotely from Lookout Point Dam in Lowell, Oregon.

(a) September 24, 2015, Record of Environmental Consideration for Cougar Dam Oil Spill Prevention System, Lane County, Oregon (includes Sec. 106 Analysis)

(b) January 22, 2016, Record of Environmental Consideration for Cougar Dam Roof Replacement, Cougar Dam Project, Lane County, Oregon (includes Sec. 106 Analysis)

(c) June 6, 2016, Record of Environmental Consideration for Cougar Dam Spillway Gate Rehabilitation, Lane County, Oregon (includes Sec. 106 Analysis)

(d) December 15, 2016, Record of Environmental Consideration for Cougar Dam Issue Evaluation Study Geotechnical Investigations–Lane County, Oregon (includes Sec. 106 Consultation)

(e) February 9, 2016, National Environmental Policy Act Documentation for Emergency Actions to Repair the Cougar Dam Water Temperature Control Tower Intake Trash Racks (includes NHPA Sec. 106 Consultation)

(10) Cottage Grove Dam:

Location. On the Coast Fork of Willamette River, 29 miles from the mouth of the river. The Coast Fork rises in Douglas County, Oregon, on western slope of Cascade Range and northern slope of Calapooia Range, flows north for 49 miles, and unites with Middle Fork to form main Willamette River.

Existing project. An earth fill dam, of 1,750 feet long at crest and 114 feet high from lowest point of the general foundation, a concrete gravity free- overflow spillway 264 feet long near the right abutment, and a concrete gravity non-overflow section 96 feet long forming the right abutment. The total length of the dam is 2,110 feet. Outlet works, consisting of three gate-controlled conduits, pass through a spillway section. The reservoir provides 30,060 acre-feet

of usable flood control storage and controls runoff of drainage area of 104 square miles. The Project is operated as a unit of a coordinated reservoir system to protect the Willamette River Valley and increase low water flow for navigation and for other purposes. Recreational development consists of day use and overnight facilities at five sites operated by the Corps. Construction of the Project was initiated in August 1940 was completed in April 1952. The dam and reservoir have been in continuous operation since September 1942. The project is operated remotely from Lookout Point Dam in Lowell, Oregon.

(a) March 20, 2018, Record of Environmental Consideration Drilling Program Plan (DPP), Cottage Grove Dam, Lane County, Oregon (includes Sec. 106 Consultation)

(11) Blue River Dam:

Location. On the Blue River, a major tributary of the McKenzie River, 1.8 miles above the confluence of the two rivers at the confluence of Quartz Creek and Blue River and about 42 miles easterly of Eugene, Oregon.

Existing project. A gravel fill embankment dam, 1,329 feet long at crest, including spillway, and 319 feet above the lowest point of the general foundation. A concrete gravity chute-type spillway with two gates is located on the left abutment. Outlet works are in left abutment. On the left shore of the reservoir is an earth-and-gravel fill embankment, about 1,535 feet long and 70 feet high, which closes a low saddle between the Blue River and the McKenzie River. The Project controls runoff from a drainage area of 88 square miles. The reservoir provides 85,000 acre-feet of usable flood control storage and is operated as a unit of a coordinated reservoir system to protect the Willamette River Valley and increase low water flows for navigation and other purposes. The U.S. Forest Service, under a Memorandum of Agreement, provides recreation facilities. The Project is complete. Construction of the dam and appurtenant works was initiated in May 1963 and operation for flood control was effective in October 1968. The project is operated remotely from Lookout Point Dam in Lowell, Oregon.

During the course of this investigation, the IO did not find any record of environmental reviews being conducted for this project (i.e. no documentation of categorical exclusion, environmental assessments, environmental impact statements, or supplemental reviews). However, since the project pre-dates NEPA, the project only triggers an evaluation process if changes are made to the project or its operations. This is so for the instant site as NEPA requirements were not retroactive for existing projects. As no such changes were discovered, the IO had no reason to believe that re-evaluation was required. Keeping in mind that NEPA is designed to ensure that environmental considerations are taken into account when decisions are made concerning projects that could have significant impacts on the quality of the human environment, existing projects were essentially grandfathered since the decisions concerning those projects had already been made.

OSC Referred Allegation 2 - The Whistleblower alleged the USACE's failure to study or account for the potential impact on historic properties prior to commencing its WVP operations violates the NHPA, 54 U.S.C. § 306102.

Conclusion for OSC Referred Allegation 2: The IO utilized a majority of the information referenced in the above consultations. Based on the evidence, the IO concluded that this allegation was *unsubstantiated.*

Additionally, the IO specifically asked [redacted], NWP Chief, Cultural Resources Section, whether he was aware of any NHPA or cultural resource issues in connection with WVP operations, to which he replied that he had done more work in the Willamete Valley than any other area and to his knowledge there were no specific concerns. This is consistent with the comments of [redacted] Archeologist, State of Oregon Historic Preservation Office

State Archaeologist has 40 years of experience working for the State of Oregon, 15 years in his current position. He stated the Portland District is in good standing with his office and he is unaware of any violations committed by the Portland District during his time with the State. He also shared that he believes the Portland District does follow the National Historic Preservation Act and coordinates with the State when necessary. [TAB H – Statement of State Archaeologist, in Memorandum for Record Format].

OSC Referred Allegation 3 - The Whistleblower alleged the USACE's failure to obtain a National Pollution Discharge Elimination System (NPDES) permit for its operation of hydroelectric dams and their discharge of oil into the Willamette River violates the CWA, 33 U.S.C. § 1342.

Conclusion for OSC Referred Allegation 3: Based on the evidence gathered for this investigation, the IO concluded that this allegation was *unsubstantiated.*

As outlined in the sworn statement provided by [redacted] (Senior District Counsel, Portland District) neither the Corps of Engineers nor the U.S. Environmental Protection Agency (the agency responsible for administering the NPDES permits) believed there was a requirement to obtain NPDES permits for the operation of dams, which means that even if the District determined there was a need and actually applied for the permit, the EPA would not have processed the application. However, as a result of a settlement in 2014, the Portland District is now seeking permits for the operations of the Bonneville, The Dalles and the John Day Dams. The District has been informed by the Corps of Engineers Headquarters that it must have approval from Corps Headquarters before it pursues NPDES permits for facilities in the Willamette Valley. Additionally, USACE has published regulations related to Clean Water Act Compliance at hydropower facilities. [See TAB I – Clean Water Act Compliance at USACE Hydropower Facilities (2016)].

B. Rogue River Basin Project Operations:

The Rogue River Project is a water resource management system that provides flood risk management, fish and wildlife management, irrigation, municipal and industrial water supply, hydropower, recreation, and water quality control on the Rogue and Applegate Rivers. All three Projects are in Jackson County, Oregon. Elk Creek and Lost Creek Lake are near Shady Cove, Oregon, and Applegate Dam is southwest of Medford and five miles from the California border.

The **Elk Creek** Project was initiated in 1971, the third dam authorized by Congress to be built in the Rogue River Basin Project. After several years of litigation, lawsuits to protect salmon and other migratory fish led to a court injunction that stopped the Project in 1988, leaving an incomplete dam. Plans were developed to restore Elk Creek to a free-flowing creek. The dam was notched in August 2008, and the Corps restored Elk Creek to its original channel in September 2008.

Lost Creek Lake reservoir and dam is part of the Rogue River Basin Project. Construction began in 1967 and the lake began filling in February 1977. The William L. Jess Dam at Lost Creek is a 327-foot-high rock-fill embankment structure with a gated spillway. The lake and surrounding area is popular for year-round recreation.

The Corps began building **Applegate Dam** in 1976 and finished this 242-foot rock fill embankment dam in 1980. Applegate Dam includes a regulating outlet conduit, a gate-controlled concrete chute spillway, and an intake tower with multi-level intakes capable of removing water from various levels of the reservoir for downstream temperature control.

OSC Allegation 4 - The Whistleblower alleged the USACE's failure to study the environmental impact of, and, if necessary, to supplement and/or prepare EISs for the following changes in Rogue River Basin Project operations violates 40 C.F.R. §§ 1502.9(c)(l) and 1506.1(c):

Conclusion for OSC Referred Allegation 4: This allegation involves concerns about the historic construction of the Cole River Fish Hatchery in 1973 and construction of the Lost Creek Lake Dam in 1977, along with more recent concerns surrounding the listing of the Southern Oregon/Northern California Coast (SONCC) Coho Salmon as a threatened and/or endangered species in 1997 and 2005.

The IO confirmed an environmental impact statement was completed on May 8, 1972 regarding the above projects. Since that date, a supplemental EIS has not been completed. However, the IO found no direct evidence that substantial changes or significant new circumstances exist to the extent that a supplemental would be required.

The IO also determined that since the NMFS is the agency with statutory responsibility for designating and monitoring this particular threatened or endangered species, the input of the

NMFS was critical to resolving the second and more recent part of this allegation. Per the statement of the NMFS Assistant Regional Administrator, the NMFS does not believe that the Corps is in violation of the ESA. As a result the IO found no cause for further investigation.

Thus, based on the evidence, the IO concluded that this allegation was *unsubstantiated*.

OSC Referred Allegation 5 - The Whistleblower alleged the USACE's current RRBP operations jeopardize the continued existence of SONCC Coho salmon in violation of the ESA, 16 U.S.C. § 1536.

Conclusion for OSC Referred Allegation 5: After review of the gathered evidence, the IO found this allegation to be *unsubstantiated*.

Although the IO determined that Portland District personnel believed they performed all necessary actions to be compliant, it was prudent to reach out to the agencies actually responsible for ESA compliance. On September 10, 2018 the IO reached out to Assistant Regional Administrator, Assistant Regional Director of the NMFS (the agency responsible for compliance with ESA). Assistant Regional Administrator stated the Corps (Portland District) is not in violation of the ESA on any of their ongoing projects or operations. He did state that there has been litigation over implementation of some Biological Opinions, but that these were implementation issues and not blatant or willful violations. Assistant Regional Administrator stated that he believes NMFS has a good working relationship with the Portland District and that the agencies are able to work through issues that arise. [See TAB J – Statement of Assistant Regional Administrator in Memorandum for Record Format].

OSC Referred Allegation 6 - The whistleblower alleged the USACE's failed to obtain NPDES permits for its construction of the Lost Creek Dam and subsequent discharge of oil into the Rogue River, and its notching and disturbance of the Elk Creek Dam, which generated piles of debris exceeding five acres, and violates the CWA, 33 U.S.C. § 1342.

Conclusion for OSC Allegation 6: Considering the evidence, the IO concluded that this allegation was *unsubstantiated*.

As outlined in the sworn statement provided by [redacted], Senior District Counsel, Portland District, neither the Corps of Engineers nor the U.S. Environmental Protection Agency (the agency responsible for administering the NPDES permits) believed there was a requirement to obtain NPDES permits for the operation of dams and as such, would not have processed NPDES applications had the Corps applied. In addition, Senior Assistant District Counsel provided a copy of a USACE Policy that discusses how these issues should be handled following the 2014 lawsuit. [See TAB I – Clean Water Act Compliance at USACE Hydropower Facilities (2016)]. Additionally, per the sworn statement of Chief, Environmental Planning Section, a NEPA document was completed for the notching and disturbance of Elk Creek Dam and a Finding of No Significant Impact (FONSI) was signed in 2007.

C. John Day and The Dalles Dams Mitigation (JDM) Operations:

The JDM project area is located in the mid-Columbia River basin and includes a number of hatchery facilities that are used to mitigate losses. The area includes the hatchery facilities that are currently funded by the Corps to produce and release smolts for JDM.

OSC Referred Allegation 7 - The Whistleblower alleged the USACE's failure to study the environmental impact of, and, if necessary, to prepare an EIS for, its JD/TD Mitigation operations on the Columbia River violates 40 C.F.R. §§ 1502.9(c)(I) and 1506.1(c).

Conclusion for OSC Allegation 7: The IO found the Corps was proposing to construct additional fish hatcheries at the John Day Mitigation Project, but once it was determined the mitigation goals were being met, the additional construction was never pursued. With that said, the District is currently performing a Limited Re-evaluation report to ensure all facets of the project are operating as designed so that a final determination can be made regarding the need for additional fish hatcheries. This is outlined in the statement from [redacted] Chief, Environmental Planning Section, in which he specifically stated that fisheries biologists determined that increased production from the hatchery program was unnecessary because the production goals were already being achieved. This is also alluded to in the statement from [redacted] Whistleblower. [TAB B – Statement of [redacted] Whistleblower [redacted]].

OSC Referred Allegation 8 - The Whistleblower alleged the USACE's current JD/TD Mitigation operations jeopardize the continued existence of protected anadromous fish species and bull trout in violation of the ESA, 16 U.S.C. § 1536.

Conclusion for OSC Referred Allegation 8: Upon review of the gathered evidence, the IO determined that this allegation was *unsubstantiated.*

As mentioned above, the IO determined the overall responsibility for implementation of ESA in this particular case is a responsibility of NMFS. This was confirmed in the IO's discussions on September 10, 2018 with [redacted], Assistant Regional Director of the NMFS. Again, he stated he was unaware of any violations from the Corps (Portland District) of the ESA on any of its ongoing projects or operations. [See TAB J – Statement of [redacted] Assistant Regional Director of the NMFS in Memorandum for Record Format].

OSC Referred Allegation 9 - The Whistleblower alleged the USACE's failure to prevent, monitor, and control the spread of invasive New Zealand mud snails found at the Ringold Hatchery on the Columbia River violates EO 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999).

Conclusion for OSC Referred Allegation 9: According to information from the U.S. Fish and Wildlife Service, the New Zealand Mud Snail is a tiny aquatic snail that inhabits lakes, rivers,

streams, reservoirs and estuaries. The New Zealand mudsnail was first introduced to the US through contaminated ship ballast water and/or the transport of live fish or eggs for the commercial aquaculture industry. Once introduced to a region, snails may be spread locally on the fur or feathers of terrestrial wildlife and pets, or consumed and dispersed in the excrement of local fish species. Thus, the introduction of the New Zealand mudsnail to the Columbia River was entirely outside of USACE control, and could not have been prevented by USACE.

The IO recognized, as stated in the EO 13112, that each agency does have a responsibility to prevent, monitor and control invasive species. However, these efforts are also contingent upon the availability of funding. As described in the statement of Chief, Environmental Resources Branch, NWP Chief of the Environmental Resources Branch, the Portland District has started a master plan for the Rogue River. The District is completing an EIS for the Portland District Dams, and the Bureau of Reclamation Dams on the Columbia River, and is working on a recently funded project for the Willamette Valley project. Chief, Environmental Resources Branch stated that with respect to the Ringold hatchery, it does have invasive New Zealand Mud snails and NWP is investigating the feasibility of increasing fish rearing capacity and at the same time dealing with the mud snails. Portland District is currently undergoing a Limited Re-evaluation Report (LRR) to determine if and how the USACE may better approach or solve this issue. The LRR is scheduled to be completed in 2020.

The Pertinent Provisions of EO 13112 are:

(a) Identify such actions;

(b) Subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and

(c) Not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

Thus, based on the evidence, the IO concluded that this allegation was *unsubstantiated*.

OSC Referred Allegation 10 - The whistleblower alleged that USACE failed to study the environmental impact of Three Mile Canyon Farms, L.L.C.'s operations on USACE land violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).

Conclusion for OSC Referred Allegation 10: As explained by Chief, Real Estate Division, NWP Chief, Real Estate Division, Three Mile Canyon Farms has an easement on Corps property and the Farms operates a pump station that feeds water up to the Farms. Over 50 years ago, the Farms was granted an easement, which was in the process of being renewed as of August 2018. The renewal action requires NEPA and NHPA analysis that had been underway as of the time of Chief, Real Estate Division interview in August 2018.

In terms of the timelines for the renewal process, Chief, Real Estate Division explained that she had meetings with Three Mile Canyon Farms and its consultants. She participated in a compliance inspection of the easement area in 2012, during which she identified that Three Mile Canyon Farms had expanded its operations outside of the lease area (for the placement of dredge material), which required authorization from the Portland District Regulatory Branch (which was required to perform a NEPA review prior to their issuance of the permit). The Farms was placed in a hold-over status. The Corps is still in the process of completing an updated lease agreement which will also require a complete NEPA review (which includes a NHPA review as well).

D. Columbia River Navigation Program:

The Columbia River begins in British Columbia, Canada, and winds its way through Washington and Oregon to the Pacific Ocean, draining an area about the size of France. The Corps' navigation mission on the Columbia River dates back to 1866.

Today, the authorized Columbia & Lower Willamette project includes deep-draft navigation channels, pile dike structures which stabilize the channel, stern buoys for ship traffic, and wildlife mitigation sites. The 600-ft wide, 43-ft deep navigation channel in the Columbia River generally follows the Oregon-Washington border and extends 106.5 miles from the Mouth of the Columbia River (separate project) at the Pacific Ocean to Vancouver, Wash. The project also includes a 40-ft deep navigation channel along the lower 11.6 miles of the Willamette River. Numerous side channels have been developed to capitalize on the economic benefits of navigation on the Columbia River.

The Columbia River Channel Improvements Project was completed in November 2010, which deepened the Columbia River navigation channel to 43 feet to accommodate the current fleet of international bulk cargo and container ships and improved the condition of the Columbia River estuary through the completion of environmental mitigation and restoration projects. There has already been $930 million in new commercial investment. The project was a collaborative effort between the Corps and the lower Columbia River Ports of Portland, Vancouver, Kalama, Longview and Woodland.

OSC Referred Allegation 11 - The whistleblower alleged that USACE failed to study or account for the potential impact on historic properties of its continued maintenance of navigation channels on the Columbia River violates the NHPA, 54 U.S.C. § 306102.

Conclusion for OSC Referred Allegation 11: The IO found that on September 8, 2015, the Corps completed an EA/FONSI for Howard Island Sump and Rice Island Placement which included not only a NHPA review but also included Government to Government consultation.

Additionally, the IO found that on February 19, 2016, the Corps completed a record of environmental consideration for the realignment of the Baker Bay Federal Navigation Channel in Pacific County Washington, which included NHPA consultation.

It should be noted that each maintenance activity for any particular segment of the river would require a NHPA review, and without new evidence, once a particular section had been evaluated it would not require additional evaluation even if new dredging occurred. And, as referenced in [redacted] (state archeologist) statement, he is unaware of any violations of NHPA as a result of District work. [TAB H - Statement of State Archaeologist].

IV. FINDINGS OF FACT

Upon completion of the interviews, and after receiving and reviewing additional applicable information, I have determined that material facts do not substantiate *any* of the Whistleblower's eleven allegations. Additionally, I did not find any violation of law, regulation or executive order. The facts demonstrate that while NEPA coverage was in some instances dated (e.g. the Cole River Fish Hatchery) and had not been updated since the 1970's, in most cases substantive environmental analysis had been completed on a project-by-project basis over time. While the Whistleblower alleged that USACE had failed to study the environmental impacts of the Willamette Valley Project Operations, the IO found examples of recent environmental reviews for 10 of the 13 specific components of the Project. The IO's findings with respect to the Rogue River Basin Project, the John Day and The Dalles Dams and the Columbia River program were similar. Additionally, the lack of "recent reviews" does not equal non-compliance. Reviews/updates are only required to be completed if there are changes to the projects or their operations that are significant in scope or would significantly change the scope of a project's impacts.

It is critical to understand the nature of NEPA, which prescribes consideration of environmental impacts but does not dictate outcomes. The fact that an environmental document, such as an EIS is dated, does not mean that the Corps of Engineers is in violation of NEPA. This is especially true for continued operations of existing projects versus construction of a new project. The Willamette Valley Project, as an example, was analyzed by a 1980 EIS that was very broad in its scope. Changes to ongoing operations may require additional analysis, but the line between changes that require additional analysis and those

that do not is not black and white. Furthermore, the Portland District has been planning, and pending funding, will prepare an updated EIS for Willamette Valley Project operations.

The IO's investigation revealed that NWP employees recognize that environmental compliance is critical from both a project completion perspective as well as from an environmental protection perspective. Perhaps for that reason, several of the employees interviewed stated that there has been a concerted effort over the last five years or so to improve compliance. State Archaeologist, for example, stated that the Environmental Planning Section is working to update the 38 year old Willamette Valley Project Operations EIS and is working with the SHPO to work on compliance efforts under NHPA Sections 101 and 106. He specifically stated "We have made large strides with getting compliance in place."

The senior leader interviewed, Deputy District Engineer for Project Management, succinctly stated that the Portland District may not have "perfect" NEPA coverage for each of the projects that were developed in the past, but that he is not aware of any existing violations of law. He recognized that in some cases, past practices needed to be improved, and detailed the ways in which the Portland District is working to make those changes.

Based on over 28 years of experience working in the environmental field in six different USACE Districts (i.e. Chief of Regulatory in Mobile District, Chief of Regulatory in Jacksonville District, Deputy District Engineer in Jacksonville District and now Chief of Regulatory in Alaska District), the IO found the actions of the Portland District to be very similar to and reflective of actions and processes within USACE.

Despite recognition that improvement is needed in certain areas of its program, the facts revealed a methodical and dedicated exercise of existing processes and procedures used throughout USACE. NWP coordinates frequently and repeatedly with its interagency partners, such as NFMS and the State of Oregon. The IO found appropriate efforts to ensure compliance with the law, while at the same time recognizing flexibility in methods to do so. The senior leadership with the Portland District is fully committed to planning and funding the necessary efforts to comply with NEPA, the ESA, the CWA, the NHPA and Executive Order 13112.

V. INVESTIGATING OFFICER'S RECOMMENDATIONS

Based on the IO's conclusion that NWP has not violated NEPA, the ESA, the CWA, the NHPA and Executive Order 13112, the only recommendation made by the IO to the Investigating Appointing/Approving Authority in his AR 15-6 Record of Investigation is that the Portland District establish a link in their existing website that can list all environmental reviews and compliance actions taken over the past 5-years on these projects and list the ones forthcoming for the next 2 years.

VI. APPOINTING/APPROVAL AUTHORITY'S ACTIONS

On April 26, 2019, the Investigation Appointing/Approving Authority concurred and approved the recommendation in the Investigating Officer's report in conjunction with his approval of the Report of Investigation.

Finally, a copy of the Investigating Officer's Report, and this Memorandum will be provided to the NWP Commander and senior District leadership at the NWP Commander's discretion, for prompt action in accordance with the foregoing recommendation.