

RESPONSE TO INVESTIGATION
OSC FILE No. DI-17-1993
By Judith (Jody) Marshall
July 15, 2019

The U.S. Office of Special Counsel (OSC) asked me to comment on the report, Army Report Documents, U.S. Army Corps of Engineers, Portland District, Portland, Oregon, Office of Special Counsel File Number DI-17-1993, Unredacted (April 24, 2019). That report largely consisted of a *Report of Investigation* by a designated Investigating Officer (IO). That IO report was adopted in its entirety by the Assistant Secretary of the Army for Civil Works as the Department of Army's official response to my disclosures.

Before commenting upon and rebutting specific findings made by the IO, I would like to first highlight the real-world significance of these issues and, second, to point out basic shortcomings in the approach pursued by the IO.

Note on Significance

The U.S. Army Corps of Engineers (Corps) has systematically and substantially been derelict in its legal responsibilities under key environmental statutes such as: the National Environmental Policy Act (NEPA); Endangered Species Act (ESA); Clean Water Act (CWA); and the National Historic Preservation Act (NHPA) for projects and major operational decisions for multiple dams, reservoirs and hatcheries in the Willamette, Columbia and Rogue watersheds. These watersheds are central to the eco-health of the Pacific Northwest.

Apart from violations of law and policies, this abdication means that Corps activities across this wide area have largely gone unexamined for several years and, in some cases, decades. As a result, the Corps is NOT actively making "informed decisions" as required by NEPA about the operation of these major facilities. These violations also denote an absence of meaningful federal oversight concerning a broad array of agency actions.

This is not a merely academic or procedural concern. As detailed below, these lapses have very serious real-world consequences, including –

- Adverse impacts on federally protected fish populations;
- Growing dead zones in waterbodies;
- Increased fungal outbreaks;
- Unchecked damage and looting of historic properties and archaeological resources;
- Introduction and spread of invasive species; and
- Tolerance of long-term oil discharges and other pollution discharges.

With these considerations in mind, the ingrained avoidance of legal compliance by the Portland District of the Corps is far more understandable and can viewed with the proper perspective.

Shortcomings in the IO Report

Before reviewing the specific IO findings, several points should be made:

I. The IO Report Is a Classic “Non-Denial Denial”

The IO report is replete with official promises that the agency is beginning to take steps to achieve compliance. Nonetheless, quoted Deputy Director Engineer for Project Management, as saying that the hiring of my replacement for Section Chief, would hopefully lead to the “righting of the ship”, the report concluded that the Corps committed no violations.¹ But why would the agency need to correct course on environmental compliance if it were already compliant?

The Corps’ posture in this matter can be fairly summarized as “nothing is broken, but we will fix it immediately.”

II. Recent Actions Conform the Substance of the Disclosure

My disclosure was filed in May 2017. Since that time, the Corps has announced that it will engage in environmental reviews spanning NEPA, CWA, and ESA for the Willamette Valley Project (WVP), John Day and The Dallas (JD/TD) mitigation and several other facilities. These belated reviews are both long overdue and have been irresponsibly delayed.

The WVP Operations is an excellent example of the Corps’ pattern of delays. Since my disclosure was filed, the following has occurred:

- **March 13, 2018**, Plaintiffs filed a lawsuit against the Corps alleging ESA violations of the 2008 WVP biological opinion (BiOp);²
- **April 9, 2018**, the Corps and the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries, also referred to as the National Marine Fisheries Service or NMFS) agree to reinstate consultation;³
- **June 25, 2018**, City of Salem files a lawsuit to intervene in the above lawsuit on behalf of Corps because they want the Corps to study the Detroit Water Temp Control System under an Environmental Impact Statement (EIS) due to likely draining of the reservoir;⁴
- **November 30, 2018**, Native Fish Society seeks a preliminary injunction to implement immediate measures for protection of listed fish;⁵ and
- **April 1, 2019**, the Corps issues a notice of intent (NOI) in the Federal Register to do an EIS for the Willamette Valley Project.⁶

¹ Similarly, on page 14 of the IO report, the former ERB Chief acknowledged that the Portland District ERB needed more people to properly execute its mission.

² <https://nativefishsociety.org/news-media/nfs-and-conservation-partners-file-lawsuit-to-save-willamette-river-chinook-salmon-and-steelhead>

³ <https://nativefishsociety.org/campaigns/rewild-the-willamette>

⁴ <https://www.cityofsalem.net/CityDocuments/case-3-18-cv00437-pk-document-7-2018-06-25.pdf>

⁵ See <https://nativefishsociety.org/news-media/nfs-conservation-partners-request-preliminary-injunction-seeking-immediate-changes-at-willamette-dams> and <https://advocateswest.org/case/willamette-river-salmon-and-steelhead/>

⁶ <https://www.federalregister.gov/documents/2019/04/01/2019-06258/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-willamette-valley-system>

These subsequent developments highlight the gist of my disclosure and represent a flock of legal chickens belatedly coming home to roost.

III. The IO Recommendation Underlines the Thrust of My Disclosures

In its conclusion, the IO report makes a single recommendation:

“...the only recommendation made by the IO...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.”

Setting aside the issue that many of the cited Corps environmental reviews did not constitute compliance with the applicable statutes, these reviews require that notice and an opportunity to comment be provided to the public and stakeholders and impose a duty on the Corps to consider and respond to those public comments.⁷ To the extent that the Corps environmental reviews are currently unavailable to the public that, by itself, signifies an important dimension of noncompliance.

As detailed below, the Corps's failure to engage the affected publics is not a case of the agency hiding its light under the proverbial bushel. Instead, the Corps' isolation from local communities evidences that the Corps does not appear to grasp the nature of its legal responsibilities in conducting these reviews.

IV. The IO Interviews Were Not an Investigation

The approach that the IO took was to interview eight current and former Corps employees other than myself, to ask if these were aware of compliance violations. The IO took the lack of incriminating admissions⁸ by these responsible Corps officials as its principal evidence that the agency was indeed in compliance. The IO's decision is tantamount to saying that the agency could not be found culpable without a guilty plea.

Outside the Corps interviews, the IO sent emails to two outside officials, one from NOAA Fisheries and the other being the Oregon State Historic Preservation Officer (SHPO) to ask if they were “aware” of compliance issues. The IO's entire investigation into federal and state control agencies consisted of these inconclusive cryptic email exchanges.

By contrast, the IO declined to interview or talk to the people whose names I offered having information that would corroborate my disclosures. Both individuals are in the Corps. One is from office of counsel who could verify the situation regarding the John Day/The Dallas mitigation. The other was a resource specialist who worked for me and prepared a memo documenting that Fall Creek drawdown was occurring before NEPA was complete and before a decision was made.

⁷ For example, 40 CFR §1500.1(b) declares that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”

⁸ All responded that they “...are not aware of any violations...”

V. The IO Conclusions Are Not Based on the Written Record

My disclosures focus on reviews and consultations that were not conducted. Compliance with these requirements would have produced a written record evidencing that the review was done. For example, under the ESA the evidence that there is ESA authorization might be a letter of concurrence of effect, or it may be a biological opinion (BiOp). NEPA compliance is a paper exercise, requiring environmental assessments (EAs) perhaps leading to an environmental impact statement (EIS) or a finding of no significant impact (FONSI). Under the NHPA, there should be a letter of concurrence on effects from the Oregon SHPO and/or from the federally recognized Tribes.

The IO report is bereft of documentary evidence supporting its conclusion of Corps compliance.

The closest that the IO comes to producing documentary evidence of the Corps' compliance is the list submitted under Tab G. This one-page, largely incomplete list predominantly reflects that the last NEPA compliance activities for the Willamette and Rogue watersheds occurred back in the 1970s. This evidence of noncompliance is essentially my point.

VI. IO Conclusions Are Based Upon Misunderstanding of the Law

Key conclusions in the IO Report are based upon the IO's misunderstandings of the basic legal requirements of the relevant statutes. For example, with respect to NEPA compliance for the Dorena and Blue River Dams, the IO states:

"...since the project pre-dates NEPA, the project only triggers an evaluation process if changes are made to the project or its operations...existing projects were essentially grandfathered since the decisions concerning those projects had already been made."

This is simply not true. The White House Council on Environmental Quality (CEQ) guidance on NEPA regulations⁹ clearly states the opposite:

"12b. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered? A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and [46 FR 18030] subject to the Council's former Guidelines."

The Corps acknowledges this situation in their notice of intent (NOI) to prepare an EIS for the Willamette Valley System (WVS).¹⁰ In the NOI, the Corps states:

⁹ Executive Office of the President Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (<https://www.energy.gov/sites/prod/files/2018/06/f53/G-CEQ-40Questions.pdf>)

¹⁰ <https://www.federalregister.gov/documents/2019/04/01/2019-06258/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-willamette-valley-system>

“The most recent NEPA evaluation for the overall WVS operations and maintenance was an EIS completed in 1980. Since 1980, operations have been modified and structural improvements for fish passage and temperature control have been implemented to address effects of the WVS on ESA-listed fish. NEPA evaluations since the 1980 EIS have been project-specific.”

Similarly, the IO concludes that the Corps complied with the National Pollution Discharge Elimination System (NPDES) requirements of the CWA because there was no point source for oil discharges from dams. Yet, the official Corps guidance cited (and included as Tab I)¹¹ states that the absence of a pipeline or point source is the beginning, not the end of the inquiry:

“The USACE determination of whether an NPDES permit is necessary, requires a careful multi-disciplinary evaluation.”

The IO offered no evidence that such a careful evaluation was ever performed at the facilities discharging oil and other pollutants into the navigable waters of the region.

Responses to Agency Findings

The OSC referred five disclosures containing eleven specifications to the Corps for a response. As explained below, the Corps’ response, as embodied by the IO report, is incomplete, misleading, and, by asserting that not one of my disclosures could be substantiated in whole or part, an attempt to deflect blame in its conclusions.

For the reasons articulated above and specified below, the Corps’ response is unreasonable. Taking each disclosure in turn:

I. Willamette Valley Project

I disclosed that the Corps committed violations of NEPA, NHPA, and CWA with respect to the WVP:

A. NEPA

I charged that the Corps failed 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 to supplement the Environmental Impact Statement (EIS) prepared for the WVP in 1980, in violation of 40 C.F.R. §§ 1502.9 (c) (1) and 1506.1(c).

In essence, the Corps does not have NEPA coverage for its on-going operations and maintenance of the 13 dams and 11 reservoirs in the WVP.

The IO report quotes the Senior Assistant District Counsel’s opinion that “...the date of an EIS, in and of itself, does not mean that the Corps is violating NEPA...”¹² While I do not disagree with that opinion, my disclosure was not based solely on the existing NEPA document’s date, which was 1980.

¹¹ MEMORANDUM FOR ALL DIVISION, DISTRICT, CENTER, LABORATORY, AND FIELD OPERATING ACTIVITY COMMANDERS, Clean Water Act Compliance at USACE Hydropower Facilities, January 27, 2018.

¹² At page 15.

Since 1980, several major developments occurred which should have triggered NEPA review but did not:

- Fish populations were listed under ESA (first in 1999 and then re-listed in 2005/2006); and
- The 2008 BiOp contained several significant changes to the way the Corps operates the spill and holding patterns on the dams in addition to required structural modifications to the WVP, and these were part of the reasonable and prudent alternative (RPA) – a suite of actions to avoid jeopardizing the continued existence of the salmonids. One of the most prominent operational changes is RPA measure 2.3 for meeting the minimum flow objective in the mainstem of the Willamette River;¹³

Clearly, these developments are both “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” and a situation where the Corps made “substantial changes in the proposed action that are relevant to environmental concerns” as described in 40 CFR § 1502.9 (c) (i) and (ii) that required the Corps to prepare a supplemental EIS.

The Corps acknowledged this need for a NEPA review in their NOI to prepare an EIS for the WVS¹⁴ by conceding:

“The most recent NEPA evaluation for the overall WVS operations and maintenance was an EIS completed in 1980. Since 1980, operations have been modified and structural improvements for fish passage and temperature control have been implemented to address effects of the WVS on ESA-listed fish. NEPA evaluations since the 1980 EIS have been project-specific.”

Significantly, U.S. District Court Judge Simon’s 2016 ruling¹⁵ stated:

“...implementation of a biological opinion by an action agency triggers the action agency’s obligation to comply with NEPA.” [citations omitted]

I hope the Corps is applying this opinion to similar authorized projects as they were a defendant in this case.

In short, the Corps currently is in violation of NEPA for the WVP since they adopted NOAA Fisheries 2008 BiOp for the WVP. The Corps currently has insufficient NEPA coverage for the spill and holding patterns it conducts today for the WVP per the 2008 biological opinion. Furthermore, there have been changes to project operations with the implementation of the 2008

¹³ [file:///Users/judithmarshall/Downloads/F25734_200002117_WillametteFinalPart3%20\(8\).pdf](file:///Users/judithmarshall/Downloads/F25734_200002117_WillametteFinalPart3%20(8).pdf)

¹⁴ <https://www.federalregister.gov/documents/2019/04/01/2019-06258/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-willamette-valley-system>

¹⁵ <https://law.lclark.edu/live/files/21776-salmon-biop-opinion-may-2016>

BiOp, and climate change is affecting the available water supply – none of which has been subjected to NEPA review.

Furthermore, the IO report omits discussion of actions on specific facilities within the WVP that should have also triggered NEPA. Notwithstanding the IO Report discussion of “Willamette Valley Projects by Dam” (pages 18 – 27), I did not allege that the Corps was lacking in NEPA for individual actions and categorical exclusion activities on Corps land associated with the WVP—for minor repairs of Corps facilities or for small real estate actions. I was pointing to the absence of review for how the WVP works as whole in concert with the RPA stipulated in the 2008 BiOp. In short, the IO report’s list of WVP actions is too discrete and does not address the overall hold and spill patterns of the 13 dams and 11 reservoirs with hatchery operations.

Consider the following omissions by the IO:

➤ Foster/Green Peter Dam

The IO report states:

“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 the 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.”¹⁶

However, the IO’s list of activities and NEPA documents does not reference a memo or letter documenting the emergency and assessing the environmental impacts as is required by 33 CFR § 230.8.¹⁷

➤ Fall Creek Dam

The IO report states that the “Sky Camp Lodge was completed October 1978”¹⁸ yet this project is not among those listed by the IO in Tab G, and there is no indication of any NEPA documentation.

¹⁶ At page 21.

¹⁷ “In responding to emergency situations to prevent or reduce imminent risk of life, health, property, or severe economic losses, district commanders may proceed without the specific documentation and procedural requirements of other sections of this regulation. District commanders shall consider the probable environmental consequences in determining appropriate emergency actions and when requesting approval to proceed on emergency actions, will describe proposed NEPA documentation or reasons for exclusion from documentation. NEPA documentation should be accomplished prior to initiation of emergency work if time constraints render this practicable. Such documentation may also be accomplished after the completion of emergency work, if appropriate. Emergency actions include Flood Control and Coastal Emergencies Activities pursuant to Pub. L. 84-99, as amended, and projects constructed under sections 3 of the River and Harbor Act of 1945 or 14 of the Flood Control Act of 1946 of the Continuing Authorities Program. When possible, emergency actions considered major in scope with potentially significant environmental impacts shall be referred through the division commanders to HQUSACE (CECW-RE) for consultation with CEQ about NEPA arrangements.”

¹⁸ At page 23.

➤ Foster Fish Collection Facility

This project was constructed in 2014 but is not listed in Tab G. Nor is the NEPA document for it publicly available, if it exists.

➤ Cougar Dam & Reservoir Downstream Fish Passage Project

That EA is still in development¹⁹ but not listed in Tab G.

➤ Willamette River Basin Review Feasibility Study.

This is an ongoing study that looks at how the space in the reservoirs can be allocated for assigned water. The Corps will assign the space and operate for allocation should this decision proceed.²⁰ The Corps is in violation of 40 C.F.R. 1506.1(a)(2) for pursuing actions that would limit the choice of reasonable alternatives for the operation and maintenance of the WVS, such as re-allocation of reservoir space and water.²¹ The Corps's dereliction of its NEPA responsibilities robs the public and many federal and state agencies of the opportunity to comment on how these operations affect their daily business and lives.

The IO report finds my disclosure with respect to WVP NEPA compliance unsubstantiated largely because the officials the IO interviewed claimed not to know of any violated laws or regulations. Their failure to admit does not refute the substance of my disclosure. Nor does the IO reference that I submitted copies of reports of these very violations to these same officials.²²

The good news is that the Corps is taking some steps to remedy this situation as they issued a notice of intent (NOI) in the Federal Register (F.R.) this spring to prepare an EIS for the WVP operations and maintenance.²³ The bad news is that the Corps is allowed to manage and impound water in the state of Oregon without a complete understanding of the effects of its activities and without any transparency to the affected publics. The Corps's freedom to act in the shadows has allowed unacceptable damage to occur while the public has no idea what is happening.

B. NHPA

I charged that the Corps failed to study or account for the potential impact on historic properties prior to commencing its WVP in violation of the NHPA (54 U.S.C. § 306102).

The IO claimed that it could find no evidence supporting my contention. Yet in the 2014 FONSI for Fall Creek Drawdown on the WVP, the Corps states:

“National Register of Historic Places and other historical and culturally significant places: The proposed project has potential to impact known and unknown cultural resources within the Fall Creek reservoir drawdown zone. The Corps has completed both

¹⁹ <https://www.nwp.usace.army.mil/Locations/Willamette-Valley/Cougar/Cougar-Dam-Reservoir-Downstream-Fish-Passage/>

²⁰ See <https://www.nwp.usace.army.mil/willamette/basin-review/>

²¹ <https://www.oregon.gov/OWRD/programs/Planning/FederalBasinStudies/Willamette/Pages/default.aspx> and <https://www.nwp.usace.army.mil/willamette/basin-review>

²² See Exhibit 4.

²³ See (<https://www.federalregister.gov/documents/2019/04/01/2019-06258/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-willamette-valley-system>).

determinations of eligibility and of effect for five archeological resources within the reservoir and determined that three of the sites are eligible for the NRHP. The Corps has also determined that reservoir operations have an adverse effect upon these resources and, as noted under point three above, is pursuing a PA for the WVP as a whole to address adverse effects to NRHP eligible or listed properties. The Corps has initiated consultation with the SHPO and local Native American tribes for the Fall Creek drawdown. The Corps anticipates the PA will satisfactorily resolve the adverse effects to any eligible properties.”²⁴

As the Corps admits, there is no NHPA compliance for the spill and holding patterns on the WVP, including Fall Creek dam.

Yet five years later, this programmatic agreement (PA) has not yet materialized. This means that there are both known as well as unknown National Register or NR eligible sites that are being adversely affected by WVP operations. This is another example of the Corps apparently not understanding the effects of its actions and letting properties that were meant for protection to be left at risk of destruction, damage or looting.

The good news is that the Corps apparently plans to remedy this lack of NHPA compliance with its intentions to prepare an EIS for the WVP and “...to initiate consultation under Section 106 of the National Historic Preservation Act.”²⁵

This declaration in a Draft EIS both admits the violation and in the meantime, because it is merely a statement of intent, allows sites to be plundered by “pot-hunters” when the water in the reservoirs is low and the artifacts are exposed.²⁶ In short, these sites are still not being protected per Congress’s intent when it enacted the NHPA.

The IO also failed to notice the absence of NHPA compliance documentation for the Fern Ridge Dam, where an “emergency” repair of the entire 1.1. mile-long embankment dam took place prior to the 2005/2006 flood control season. The IO was unable to find the documentation that the Corps complied with the requirements of the regulations governing the NHPA as noted in 36 CFR § 800.12 (Emergency Situations).

Notably, when I went on temporary assignment in 2014, the former Environmental Resources Branch Chief authorized the next acting Section Chief to hire much needed archaeologists. I provided her with a workload analysis that identified needs for more people within the Environmental Planning Section.²⁷ Although I am not certain, I highly doubt that my suggestions for remedying NHPA noncompliance were ever implemented.

²⁴ <https://www.nwp.usace.army.mil/Media/Public-Notices/Article/554875/final-ca-fonsi-fall-creek-dam-fish-enhancement/>.

²⁵ <https://www.nwp.usace.army.mil/Locations/Willamette-Valley/System-Evaluation-EIS/>

²⁶ https://www.oregonlive.com/history/2016/01/oregon_ghost_town_rises_from_d.html.

²⁷ See Exhibit 3.

C. NPDES

I charged the Corps with 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 in violation of the CWA (33 U.S.C. § 1342).

Although the IO for the Corps disagrees with my contention, the U.S. Environmental Protection Agency (which administers the NPDES requirements of the CWA) agrees with me. Tellingly, the Portland District of the Corps is now in the process of acquiring NPDES for the dams on the Columbia River per the 2014 settlement agreement with EPA.

II. Rogue River Basin Project

For this watershed, my disclosure documented Corps violations of NEPA, ESA, and CWA. Taking each in turn:

A. NEPA

I charged the Corps with failure to study the environmental impact of, and, to supplement and/or prepare EISs for the following changes in the Rogue River Basin Project (RRBP) in violation of 40 C.F.R. §§ 1502.9 (c) (1) and 1506.1 (c).

The IO finding on this subject are completely incorrect. The IO report states that:

“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.”

Looking at Tab G, one sees that three EISs were completed, one for each dam, as well as supplemental EISs. No NEPA was done for Cole River hatchery and the production of hatchery fish. The Corps recently prepared a draft EA and FONSI for the management of the lands in the RRBP. Notably, Tab G does not show the completed NEPA document for the notching of Elk Creek dam. It is not clear whether such a document exists.

The table below summarizes the status of NEPA compliance for the RRBP:

Dams/Features	Original EIS	Supplemental EIS	Supplemental EIS
Applegate Dam/Lake	1971	1976	1977 & 1978
William Jess ²⁸ Dam/Lake	1972		
Elk River Dam	1980	1991	
Cole River Fish Hatchery	No NEPA at all		
Lands adjoining the dams/features	Draft Master Plan with an EA/FONSI, 2018		

In defending the Corps, the IO “found no direct evidence that substantial changes or significant new circumstances exist to the extent that a supplemental would be required.”²⁹ This is absolutely incorrect.

The listing of southern Oregon northern California (SONCC) Coho, climate change and the changing operations anticipated with ESA consultation are significant new circumstances. Further, if the Corps and NOAA Fisheries would engage in the required ESA consultations (see below), there would undoubtedly be additional changes to project operations. The Corps is also in violation of NEPA for the operation and maintenance of its facilities/lands on the RRBP because it has not yet analyzed the effects of its operations in light of the listing of SONCC Coho in 2005 and climate change.

Finally, there has never been a NEPA document for Cole River Hatchery. This absence is particularly disconcerting considering the problems the hatchery has been having recently.³⁰

Looking at the Rogue River Basin as a whole, the IO report states:

“The Rogue River Project is a water resource management system that provides flood risk management, fish and wildlife management, municipal and industrial water supply, hydropower, recreation, and water quality control on the Rogue and Applegate Rivers.”

Under Tab G, however, there is no list of NEPA documents that would describe how these dams and reservoirs work in concert since they are “resource management system.” Failure to look at

²⁸ Originally named Lost Creek Dam and Lake.

²⁹ Page 29.

³⁰ <https://mailtribune.com/news/top-stories/corps-to-assess-ailing-rogue-river-hatchery> and <https://mailtribune.com/news/top-stories/hatchery-dead-zone>

the entire system is segmentation, a practice outlawed under NEPA if the operation of all three dams is indeed “connected.”

In addition, the IO’s list of projects is not complete. For example, the IO’s report states that Senior Assistant District Counsel reviewed the draft EA for the notching of Elk Creek Dam. A Google search yields only a draft EA,³¹ but a final EA and FONSI are not listed in Tab G. This strongly suggests that NEPA compliance on this project remains incomplete.

B. ESA

I charged that the Corps’ current RRB operations jeopardize the continued existence of SONCC Coho salmon in violation of the ESA (16, U.S.C. § 1536).

The IO concluded that my contention was unsubstantiated based solely on a short email exchange with NOAA Fisheries Assistant Regional Director. Yet, the information from the NOAA Fisheries website provides ample evidence supporting my contention.

In its 2014 recovery plan, NOAA Fisheries documents the following operations that adversely affect SONCC Coho:

“Thousands of coho salmon once returned to spawn in the rivers and streams of northern California and southern Oregon. Not long ago, these watersheds provided conditions that supported robust and resilient populations of coho salmon that could persist under dynamic environmental conditions. The combined effects of fish harvest, hatcheries, hydropower operations, and habitat alterations caused by land management led to declines in these populations. The National Marine Fisheries evaluation of declining coho salmon abundance and productivity, as well as range reductions and diminished life-history diversity, supported the decision to list the southern Oregon/northern California Coast (SONCC) Evolutionarily Significant Unit (ESU) of coho salmon as a threatened species under the Endangered Species Act (ESA) in 1997, a decision that was reaffirmed in 2005.”³²

Significantly, the range for SONCC Coho coincides with the locations of the RRB and Applegate and William Jess dams.³³

The Corps completed ESA consultation in 2001 for SONCC Coho for Phase 1 of Elk Creek dam.³⁴ However, there is no ESA consultation for SONCC Coho for operations and maintenance at William Jess and Applegate dams.

³¹ <http://s3-us-west-2.amazonaws.com/uclde-nuxeo-ref-media/2b43cbfd-80b6-4f58-b129-9a04475f05df>

³² https://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/recovery_planning_and_implementation/southern_oregon_northern_california_coast/SONCC_recovery_plan.html (P. 24 or Es-1 in the PDF)

³³ https://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/esa/chinook/web_pdfs_soncc_chinook.pdf

³⁴ See draft EA for Elk Creek project: <http://s3-us-west-2.amazonaws.com/uclde-nuxeo-ref-media/2b43cbfd-80b6-4f58-b129-9a04475f05df>

In short, the Corps is in violation of ESA for the RRBP because it has not yet analyzed and consulted on its effects to SONCC Coho for two of the three dams in the RRBP (William Jess and Applegate dams as well as Cole River Hatchery).

C. NPDES

I charged that the Corps failed to obtain NPDES permits for its construction of the Lost Creek Dam and subsequent discharge of oils into the Rogue River, and its notching and disturbance of Elk Creek Dam, which generated piles of debris exceeding five acres, in violation of the CWA (33 U.S.C. §1342).

In support of this contention, I submitted evidence that Lost Creek dam is discharging oil into the Rogue River as part of its operations. The Corps does not dispute the discharge but maintain that it has no responsibility to even monitor let alone abate this water pollution. As explained above, the Corps' position that because there is no pipe outlet, there is no legal obligation is contrary to both Corps and U.S. Environmental Protection Agency (EPA) policy.

As for Elk Creek Dam, below the dam there are large piles of stored rock and gravel over a large area, well exceeding one acre.³⁵ Its draft EA states:

"The plan was to evaluate and implement measures in a two-phase process. The first phase would provide long-term fish passage measures by removing a section of the spillway and left abutment. The second phase would evaluate and implement measures required to resolve land management issues, potential equipment and gravel disposition, cultural resource requirements as well as other issues. Temporary fish passage around the project would continue to be provided using Corps funds until a long-term solution is implemented. This EA is for Phase 1 actions."³⁶

EPA's website on stormwater discharges states the following:

"When it rains, stormwater washes over the loose soil on a construction site, along with various materials and products being stored outside. As stormwater flows over the site, it can pick up pollutants like sediment, debris, and chemicals from that loose soil and transport them to nearby storm sewer systems or directly into rivers, lakes, or coastal waters."³⁷

Because the Corps still has these large piles of rock and debris that exceed one acre around Elk Creek and the dam, it needs a NPDES permit (with a storm water pollution protection plan or SWPPP). Otherwise, the water quality in Elk Creek becomes degraded.

³⁵ <https://www.google.com/maps/place/Elk+Creek+Dam,+Trail,+OR+97541/@42.6826184,-122.7436374,989m/data=!3m1!1e3!4m5!3m4!1s0x54c5efb351d3bb41:0xb962c76c0a43faf1!8m2!3d42.681792!4d-122.7386534>

³⁶ <http://s3-us-west-2.amazonaws.com/uclidc-nuxeo-ref-media/2b43cbfd-80b6-4f58-b129-9a04475f05df>

³⁷ See <https://www.epa.gov/npdes/stormwater-discharges-construction-activities> and <https://www.oregon.gov/deq/wq/wqpermits/Pages/Stormwater-Construction.aspx>

If the Corps indeed had a NPDES in 2008, as the Senior Assistant District Counsel suggested in her interview with the IO, that permit has long since expired. The Oregon Department of Environmental Quality reissued the NPDES permit for general construction stormwater discharges in 2015. There is no evidence that the Corps received such a 2015 permit.

In the absence of an NPDES permit for storm weather discharges, the Corps is in violation of Section 402 of the CWA. For the piles of debris around Elk Creek dam site alone, the Corps is in violation. By not addressing this pollution with a NPDES permit and SWPPP, the adjoining and downstream waters become degraded.

Parenthetically, per the Corps' own admission, there is only a NEPA document for notching the Elk Creek Dam. Furthermore, the Senior Assistant District Counsel only identified Elk Creek dam of the three dams and two reservoirs on the RRB. She makes no mention of the other two dams or how all three operate together on the RRB.³⁸ Nor does she mention ESA or NEPA compliance for the William Jess (Lost Creek Lake) and Applegate dams on the RRB.

Note on NHPA

While not a listed in the disclosures I made to OSC, the Corps admits the following in its draft EA:

"The proposed project is not expected to have adverse effect on any cultural, historic, or archaeological resource. Further coordination with the Oregon SHPO is underway."³⁹

However, the Corps website contains no document concerning this consultation, suggesting that Section 106 compliance was also not completed.

III. John Day and The Dalles Dam Mitigation Operations

Currently, the Corps conducts this mitigation by a combination of adult egg take, incubation and juvenile rearing using a combination of the following hatcheries; Priest Rapids and Ringold Springs State Hatcheries (Washington); Little White Salmon and Spring Creek National Fish Hatcheries, Bonneville and Umatilla State Fish Hatcheries (Oregon); and the Prosser Tribal Hatchery (Washington). About half of the fall Chinook mitigation fish are upriver bright fall Chinook salmon that are released at various locations from just below Bonneville Dam to above McNary Dam. The remaining production is composed of tule fall Chinook that are released below Bonneville Dam or the pool above Bonneville Dam.⁴⁰

This disclosure concerns Corps violations of NEPA, the ESA, and Executive Order 13112. Taking each in turn:

A. NEPA

I charged the Corps with failure to study the environmental impact of its JD/TD Mitigation operations on the Columbia River violates 40 C.F.R. §§ 1502 (c) (1) and 1506.1 (c).

³⁸ See <https://www.nwp.usace.army.mil/rogue/> for the entire configuration and operation of the RRB.

³⁹ <http://s3-us-west-2.amazonaws.com/uclde-nuxeo-ref-media/2b43cbfd-80b6-4f58-b129-9a04475f05df> (Page 9)

⁴⁰ Exhibit 6.

It is correct that once the Corps determined (after 12-plus years of pursuing this action) that its mitigation goals were met, the Corps stopped pursuing NEPA compliance. But it was stopped not because it had completed its NEPA obligations, but because there was no more funding to do a study associated with a post authorization change report (PACR), which contains environmental analyses and public review to meet NEPA requirements.

This cessation due to a funding shortfall reinforces, not undermines, the veracity of my disclosure. The Corps is obligated to do NEPA because this is an on-going action that needs to be studied and which adversely affects ESA-listed wild fish. Yet it has never been studied.

As discussed above, the fact that the JD/TD Mitigation operation was authorized before NEPA came into law does not absolve the Corps of NEPA responsibilities for these projects.

The Corps completed one ESA consultation, which resulted in a biological opinion, in coordination with Bonneville Power Administration (BPA) and NOAA Fisheries for Umatilla Hatchery, since all three agencies use the hatchery. This opinion was urgently needed because NOAA Fisheries was being sued for shirking its ESA obligations. Per Judge Simon's 2016 holding "...implementation of a biological opinion by an action agency triggers the action agency's obligation to comply with NEPA."⁴¹ Because the Corps completed ESA consultation for Umatilla Hatchery under NEPA, it must notify the public and analyze the effects of its action. There is, however, no record of NEPA ever being done for this on-going action.

The Corps website for planning/NEPA documents contains a definition of a limited re-evaluation report (LRR), which needs to adhere to the requirements of Engineering Regulation (ER) 1105-2-100, which in turn requires a study under NEPA and applicable environmental laws.⁴²

The Corps apparently is claiming ignorance as a defense, according to the IO report, quoting the Former Environmental Resources Branch (ERB) Chief as saying "...that [the Whistleblower] had never informed her that USACE was in violation of environmental laws."⁴³

That was not the case, however, as I kept her regularly updated on non-compliances and sent memos to my chain-of-command, including the ERB Chief detailing –

- ✓ John Day/The Dallas mitigation lack of ESA and NEPA;⁴⁴
- ✓ Lack of NHPA compliance for Fall Creek and the Fall Creek drawdown, and the former ERB Chief's name is in the list of recipients; and
- ✓ That the former ERB Chief directed a Environmental Resource Specialist (ERS) on my staff to document that the Corps began the deep drawdown of Fall Creek before the ERS completed the EA and before the Colonel signed the FONSI.⁴⁵

⁴¹ Citing Jewell, 747 F.3d at 641-42. " (Page 119.)

⁴² See <https://www.iwr.usace.army.mil/Missions/Flood-Risk-Management/Flood-Risk-Management-Program/Frequently-Asked-Questions/FAQ-Definitions/> and https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf.

⁴³ Page 14.

⁴⁴ Exhibit 2.

In addition, I prepared a briefing paper for my supervisors informing them of several things including the following:

- “Beginning in 2013, NWP has made incremental increases at Little White Salmon and Spring Creek hatcheries (both Corps-funded) on the Columbia to move closer to a TAP⁴⁶ of 88,843. The Corps did this in response to a request from the United States v. Oregon Committee to start increasing production to allow for a successful transition to 107,000 TAP with the implementation of the TSP.”
- “The O&M representative on the JDM PDT acknowledged that there was no NEPA analysis/decision for the interim increased production (no request was made for compliance efforts). Review of past historical NEPA indicates that this interim changed production was not analyzed. Further there is no indication of compliance with other laws such as ESA and NHPA for change in production.”⁴⁷

Significantly, these developments demonstrate how this JD/TD program has been changing over time and has been managed in a way that ignored its obligation under NEPA. Thus, the Corps violated NEPA because it never studied the JD/TD program under NEPA since NEPA was enacted despite making changes to the program in 2013 and later implemented a biological opinion altering its activities at Umatilla Hatchery. Consequently, the Corps did not examine the extent to which native wild fish are being adversely affected or the adverse water quality impacts with hatchery operations.

The good news is that it appears the Corps plans to address their lack of NEPA compliance with a limited re-evaluation report (LRR).

B. ESA

I charged that the 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).

On this topic, the IO concluded that my disclosure was unsubstantiated not by refuting it but by shifting the responsibility to NOAA Fisheries:

“...the IO determined the overall responsibility for implementation of ESA in this particular case is a responsibility of NOAA Fisheries.”⁴⁸

The IO is flat out mistaken. As the NOAA Fisheries website (Pacific Island Region) states:

⁴⁵ Exhibit 1. In this case, the former ERB Chief instructed my staff ERS and me that it is permissible to start a project before NEPA is complete (a signed decision) as long as the FONSI is signed before the actual action described in the EA/FONSI is completed. I told the IO I went to talk privately with Office of Counsel when the former ERB Chief issued these instructions, as this was obviously improper.

⁴⁶ TAP = total adult production

⁴⁷ Exhibit 2.

⁴⁸ At page 31.

“Section 7 of the Endangered Species Act (ESA) requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any listed species. Thus, section 7 requires consultation by the federal “action agency” (the agency authorizing, funding, or carrying out the action) with the appropriate regulatory agency, either NOAA Fisheries for marine species, or the U.S. Fish & Wildlife Service (USFWS) for terrestrial and freshwater species.”⁴⁹

Therefore, with respect to ESA Section 7 consultation, NOAA Fisheries does not have overall responsibility for implementation of ESA for this particular action. Although, NOAA Fisheries manages the most species found in this part of the Columbia River, USFWS has responsibility for ESA consultation for bull trout and its critical habitat. The Corps has responsibility to prepare a biological assessment when it determines the effects of its action may affect or is likely to adversely affect the listed species or its listed critical habitat.

With respect to the hatcheries, I agree with the Senior Assistant District Counsel that the Federal Columbia River Power System (FCRPS) BiOp addresses hatcheries. However, the FCRPS BiOp does not provide ESA coverage for the actual hatchery operations. Reasonable and Prudent Alternative (RPA) measure 39 of the FCRPS BiOp requires that consultation occur by each hatchery:

“The Hatchery Effects Report, the ... NOAA Fisheries paper to the PWG and the NOAA Fisheries 2007 Guidance Paper should be considered in developing these criteria in addition to the BMPs in the Action Agency’s BA. Site specific application of BMPs will be defined in ESA Section 7...consultations with NOAA Fisheries to be initiated and conducted by hatchery operators with the Action Agencies as cooperating agencies.”⁵⁰

Thus, except for Umatilla Hatchery, the Corps remains in violation of the ESA for the salmonids under the purview of NOAA Fisheries. The Corps needs to complete consultation with NOAA Fisheries for the other five hatcheries it uses. The Corps also needs to consult with USFWS for bull trout and its critical habitat.

Except for Umatilla Hatchery, the Corps has no ESA authorization for any incidental take of listed fish under the jurisdiction of NOAA Fisheries. Nor does the Corps have ESA authorization for its adverse effects on, and take of, bull trout and its critical habitat, which is managed under the jurisdiction of USFWS.⁵¹ If the Corps had conducted these consultations, the agency would be able to produce the resultant biological opinions – but these records of consultations do not exist.

C. Executive Order 13112

I charged that the Corps failed to prevent, monitor, and control the spread of invasive New Zealand mud snails found at the Ringold Hatchery on the Columbia River in violation of EO 13112 (64 Fed. Reg. 6183 (Feb. 3, 1999)).

⁴⁹ <https://www.fisheries.noaa.gov/pacific-islands/endangered-species-conservation/esa-consultations-pacific-islands>

⁵⁰ <https://www.westcoast.fisheries.noaa.gov/publications/hydropower/fcrps/rpatableappendix.pdf>

⁵¹ Exhibit 6.

New Zealand mud snails (NZMS) are an introduced aquatic species that has invaded estuaries, rivers, lakes and streams in Washington, Oregon, California and many other states. Its tiny size coupled with its ability to spread through many means, including in the digestive tracts of fish and birds, make it very difficult to control.

This invasive species should be of concern to the Corps because the Corps currently funds a program to produce 3.5 million juvenile salmonids on the water source at Ringold Springs. The Corps was also planning to increase the production at Ringold with the proposed expansion of the JD-TD Mitigation. As a federal agency, the Corps needs to assure its actions are also consistent with Executive Order 13112, which calls on all executive branch agencies to take steps to prevent the introduction of invasive species, control their spread, and facilitate their eradication.

Incredibly, the IO report found merit in a statement by the Senior Assistant District Counsel that she "...was not aware of any concerns about the spread of invasive New Zealand mud snails at the Ringold Hatchery."⁵²

It is somewhat disturbing that this official claims to be unaware of NZMS or any concern related to their spread especially given expressions of concerns by sister agencies.⁵³ If one goes to Ringold Springs Fish Hatchery, there are requirements for washing one's boots and other measures to prevent the spread of this invasive species. Also, the report listed by the USFWS states:

"When NZMS were first observed at Ringold State Hatchery (Ringold, WA), population densities were so prolific many speculate the snails were present in the facility 3-4 years prior to their discovery."⁵⁴

Therefore, the presence and concern of the spread of NZMS is clearly ongoing for hatchery actions at Ringold Springs.

The IO report concludes that my disclosure was unsubstantiated by just listing the pertinent provisions of EO 13112 and stating that Corps will be doing a LRR to be complete in 2020. It is not clear that the NZMS problem will be addressed by the promised future action, however, I do know that the IO ignored a draft statement of work for a task order that I prepared in 2015 to (a) develop a design that avoids contact with the NZMS at Ringold Springs Hatchery and (b) to prepare a BiOp for the Portland District's hatchery program on the Columbia River.⁵⁵

The Corps' violation of EO 13112 is underlined by the utter absence of any documentation that the agency planned to address the growing problem of NZMS, as the EO directed it to do. The fact that responsible Corps officials maintain that they are not aware of a NZMS problem both further confirms this noncompliance and should be cause for public concern.

⁵² At page 16.

⁵³ <https://wdfw.wa.gov/news/wdfw-takes-steps-help-prevent-spread-of-new-zealand-mudsnails-ringold-hatchery>

⁵⁴ <https://www.fws.gov/columbiariver/publications/2014%20NZMS%20progress%20report.pdf>

⁵⁵ See Exhibit 7.

IV. Columbia River Real Estate

I charged that the Corps failed to study the environmental impact of the Three Mile Canyon Farms, L.L.C.'s operations on USACE land and violates the National Environmental Policy Act. (1506.1 (c). 1506.1(b)).

The IO report appears to substantiate this contention when it concluded the following:

“[The Real Estate Division (RED) Chief] participated in a compliance inspection of the easement area in 2012, during which she identified that Three Mile Canyon Farms had expanded operations outside of the lease area (for the placement of dredge material), which required authorization from the Portland District Regulatory Branch (for their in-water work). The Farms was placed in holdover status. The Corps is still in the process of completing an updated lease agreement which will also require a complete NEPA review (which requires NHPA review as well).”⁵⁶

The RED Chief further admitted to the IO that:

“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.”⁵⁷

Further, the draft EA for the Willow Creek easement renewal underlines this lapse by admitting that the applicant has been allowed to continue to operate although NEPA is not complete:

“Pursuant to the conditions of the existing easement regarding termination or expiration of the easement, TMCF would be required to remove all their equipment and facilities from USACE land and restore USACE land to USACE satisfaction. The pumps and pump station would be removed from the edge of WCA, TMCF would no longer pump water from that location (pumping would occur at a different location), dredging would not occur, and the settling basin would be restored to pre-project conditions. Sedimentation within the WCA would continue.”⁵⁸

This means the applicant has been allowed to continue to operate although the effects under NEPA had not been analyzed. By not studying the effects of its applicant's operation prior to the operation, they allowed their applicant to use lands prior to NEPA evaluation, and the Corps is in violation of NEPA, 40 C.F.R. 1506.1 (b). This failure deprived the public, Tribes and other agencies of their rightful opportunity to comment and possibly monitor the actions and activities.

In the IO report, there is a reference to “the legal distinction between the Corps' obligation for environmental review of leases to third parties compared to the Corps' construction or operation

⁵⁶ At page 33

⁵⁷ Ibid

⁵⁸ website, <https://www.nwp.usace.army.mil/Media/Public-Notices/Article/1774948/draft-environmental-assessment-for-willow-creek-arm-easement-renewal/> See <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/9991>

of a civil works project.”⁵⁹ However, the IO has not stated what that legal distinction is, nor does the IO explain how it justifies not having any NEPA but allowing the applicant to continue operating.

V. Columbia River Navigation

I charged that the Corps failed to study or account for the potential impact on historic properties of its continued maintenance of navigation channels on the Columbia River in violation of NHPA (54 U.S.C. § 306102).

This disclosure refers only to the federal navigation channel (FNC) on the Columbia River. The FNC runs from the mouth of Columbia River (Columbia River Mile (CRM) 3) to Vancouver, Washington at CRM 105.5. The Columbia River FNC runs through both the states of Oregon and Washington.

The IO report references EA/FONSI for Howard Island Sump and Rice Island Placements from 2015.⁶⁰ These EA/FONSI are for disposal and disposal handling from the dredging to maintain the Columbia River FNC. These are disposal islands/sites used to dispose of and handle material generated from excavating and maintaining the FNC on the Columbia River.

While it is commendable that the Corps is becoming NHPA compliant on these actions, these actions do not account for or pertain to the maintenance and operation of the over 100-mile channel on the main-stem of the Columbia River.

Similarly, the Corps NHPA compliance for the Baker Bay FNC pertains to a separate authorized navigation project off the Columbia River FNC, and the two FNC projects do not coincide.

The statement from Oregon State Historic Preservation Office (SHPO) is helpful. But this is only one of two SHPO officials who would provide NHPA compliance on the Columbia River FNC. Washington Department of Archaeology and Historic Preservation (DAHP) would need to do a NHPA consultation and review for the portions of the Columbia River FNC in the state of Washington. The IO presented no evidence that this was the case.

Because the Corps has been in violation of the NHPA for the Columbia River FNC since NHPA and implementing regulations were enacted, the agency has no idea what properties may exist in the FNC operations that are eligible to the National Register. This lapse allows these NR-properties left to damage instead of protection from the operation and maintenance of the Columbia River FNC.

The Senior Assistant District Counsel indicated to the IO that preparation of an EIS had begun for the lower Columbia River FNC plan.⁶¹ It is possible that the Corps will finally get their NHPA compliance done with that action, but the final record of decision will take several years from this date. That means there will be more years of degradation to unknown and known NR and NR-eligible properties.

⁵⁹ At page 16

⁶⁰ At page 34.

⁶¹ See <https://www.nwp.usace.army.mil/lcrchannel/maintenance/>

Conclusion

For the foregoing reasons, I would urge the Special Counsel to conclude that the Department of Army's response to my disclosures is unpersuasive and unreasonable. I stand ready to assist the Corps in finally "righting its ship" by helping to steer this wayward program back into channels of legal compliance and responsible resource protection.

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I declare that the statements made in the above affidavit are true and correct to the best of my knowledge, information and belief.

 

Judith E. Marshall Date

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