

Supplemental Filing
OSC FILE No. DI-17-1993
By Judith (Jody) Marshall or Whistleblower (WB)
August 17, 2020

I. UPDATE

I am providing an update on Office of Special Counsel (OSC) review of OSC File No. DI-17-1993. **I provided my complete allegations to OSC in May 2017. On July 9, 2018**, the OSC found a "*substantial likelihood of validity*" that my disclosure of systemic non-compliance with key environmental and cultural resource protections by the US Army Corps of Engineers (Corps), Portland District (NWP) and the Northwest Division (NWD), over their entire civil works program in Oregon and in parts of Washington along the Columbia River evidenced "*violation of law, rule, or regulation*". The OSC instructed the US Department of Army (DOA) to investigate my disclosure. In turn, Secretary Esper instructed the Corps to prepare an investigative officer's (IO) report on the matter.

In a document dated **April 24, 2019**, the Corps forwarded the report from its designated Investigation Officer (IO) back to OSC. Two months later, OSC forwarded that response to me. On **July 19, 2019**, pursuant to 5 U.S.C. § 1213(e)(1), I provided comments to the OSC regarding the IO report.

On September 19, 2019, I along with my legal representatives from Public Employees for Environmental Responsibility (PEER), had a conference call with OSC. In that call, the OSC requested from me what type of documents one would expect from the Corps if there is compliance with the laws cited in my disclosure.

On October 11, 2019, PEER provided OSC with a description of documents and answers to questions that the Corps would need to provide in order to demonstrate compliance with the laws cited in my disclosure. Based on the phone call with OSC, PEER, and the Whistleblower on **July 17, 2020**, it is apparent that the OSC did not ask the Corps to provide those answers or that documentation. Instead, the OSC only requested certain updates on activities, specifically,

- *"regarding an updated Environmental Impact Statement for the Willamette Valley Project,*
- *the Portland District's investigation and any determinations made on the need for National Pollutant Discharge Elimination System permits in Willamette Valley,*
- *and whether the agency had implemented the recommendation made by the Investigating Officer."*

I contend that those updates cannot possibly demonstrate compliance with the laws, rules, and regulations that are the subject of my disclosure.

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On **August 10, 2020**, OSC provided me the DOA's redacted IO report (2020 IO report) at my request. I found new information in the 2020 IO report, and I also found PII that was not redacted in Tab B.

Today, I am providing supplementary comments evidencing ongoing violations by the Corps.

II. ONGOING VIOLATIONS

The substance of my disclosure was that the Corps has systematically been substantially 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 programs and major operational decisions for multiple dams, reservoirs, navigation channels, and hatcheries in the Willamette, Columbia and Rogue watersheds. These watersheds are central to the environmental health of the Pacific northwest.

Apart from violations of laws, regulations 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 populations¹;
- Increased hazardous algae bloom (HAB) outbreaks that are harmful to humans as well as listed fish;
- Unchecked damage and looting of historic properties and archaeological resources;
- Introduction and spread of invasive species;
- Water contaminated with elements such as arsenic and mercury from residual stockpiles left after the dams were constructed;
- Effects of climate change;
- The public is uninformed and confused about what is happening to our water in these major drainages; and
- Continued waste of our federal taxes and state taxes in Oregon.

Significantly, the US District Court in Portland, Oregon, confirmed that new NEPA analyses must be done when changes have occurred similar to those here. This was done for the Federal Columbia River Power System (FCRPS), a system of Corps and US Department of Interior,

¹ <https://repository.library.noaa.gov/view/noaa/17028>

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Bureau of Reclamation (BOR) on the Columbia and Snake Rivers. The Corps was directed in 2016, through court order, to conduct long-overdue NEPA for the FCRPS.² In that case, US District Court Judge Simon held that the Corps could not rely on stale data from the 1990s when many changes had occurred since then, including a 2014 biological opinion (BiOp) and its reasonable and prudent alternative (RPA) to avoid jeopardy to federally listed fish protected under the ESA. Judge Simon further found that when the Corps accepted the BiOp and its RPA, the Corps was required to do NEPA for the actions and effects not considered in its prior NEPA document that predated the 2014 BiOp.

The May 2016 decision was the fifth consecutive Corps plan in this region deemed illegal by three different judges across two decades.

WILLAMETTE VALLEY SYSTEM OR PROJECT (WVS OR WVP)

A. Violation of 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; 5 hatcheries; and adjoining land management for the WVS.

As in the case of the FCRPS, the Corps did not conduct a NEPA analysis or conduct public involvement when it claimed to implement the 2008 BiOp from US Department of Commerce, National Oceanic Atmospheric Administration (NOAA) Fisheries³ (sometimes referred to National Marine Fisheries Service or NMFS). Up to 2008, the Corps was operating the WVS such that NOAA Fisheries claimed their actions would jeopardize the continued existence of upper Willamette River (UWR) steelhead and Chinook salmon under the Endangered Species Act (ESA) without implementing the RPA stated in NOAA's 2008 biological opinion.

The NOAA Fisheries defines the RPA in the 2008 BiOp/RPA as the following:

"The measures in this RPA are additive to the Action Agencies' Proposed Action (USACE 2007a). That is, the two sets of measures combined create the complete RPA that NMFS will analyze. For the sake of brevity, the RPA measures provided below only include

² NATIONAL WILDLIFE FEDERATION, et al., v. NATIONAL MARINE FISHERIES SERVICE, et al., for the U.S. District Court, District Court of Oregon (Case No. 3:01-cv-00640-SI, filed 05/04/2016)

³ <https://www.fisheries.noaa.gov/resource/document/consultation-willamette-river-basin-flood-control-project>

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measures that are not in the PA⁴, and PA measures that are changed in some way. In the event there are inconsistencies between the PA and RPA, this RPA will take precedence.” (page 9-7).

The NOAA Fisheries BiOp and RPA include a variety of comprehensive measures related to the following to avoid jeopardizing listed fish: coordination; flow management; water contract program; fish passage; water quality; hatcheries; habitat; ESA compliance and coordination; research, monitoring and evaluation (RM&E); and maintenance.

As part of the ESA consultation, the RPA also states,

“Decision-making for all of the final actions and implementation of measures included in the RPA must comply with all applicable statutes and regulations. Among those the Action Agencies must consider are NEPA, the Clean Water Act and the Northwest Power Planning Act. In so doing, the criteria the Action Agencies will apply are whether the action is: (1) biologically feasible and beneficial; (2) technically feasible; and (3) cost effective.” (page 9-6).

The RPA is significant in impacts and costs. Further 40 Code of Federal Regulations (CFR) § 1501.(b) states,

“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.” (underlining for emphasis)

The truly significant issues of today are the adverse effects to salmonids and steelhead and concern for their survival in the years to come. The 1980 EIS for the WVS did not have this focus.

Some of the RPA measures involve operational changes, new facilities, and operation of those new facilities. The RPA commits the federal government to construct **hundreds of millions of dollars** of new facilities, which is funded by taxpayers.

⁴ PA is the proposed action.

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The Corps IO report stated that the 1980 environmental impact statement (EIS) was very broad in scope, but it did not claim that it was broad enough to address the situations we have today:⁵

"The Willamette Valley Project...was analyzed by a 1980 EIS that was very broad in scope. Changes to ongoing operations may require additional analysis, but the line between changes that require additional analysis and those that is not black and white." (p. 35)

Here, the IO is careful not to take a position on whether the changes to ongoing operations require additional analysis. The 1980 EIS is obviously not sufficient according to the US District Court's opinion and order from Judge Simon in 2016 and NEPA regulations found in 40 CFR § 1500 - 1508.

As specified in original response to the IO report, legal deficiencies following my disclosure led to their decision to prepare a new EIS for the WVS, including:

- **March 13, 2018**, Plaintiffs filed a lawsuit against the Corps alleging ESA violations of the 2008 WVP BiOp;⁶
- **April 9, 2018**, the Corps and the NOAA Fisheries agree to reinstate consultation;⁷
- **November 30, 2018**, Native Fish Society seeks a preliminary injunction to implement immediate measures for protection of listed fish;⁸ 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.⁹

So, while the Corps has been out of compliance under NEPA, the IO report states:

⁵ Page 15

⁶ <https://nativefishsociety.org/news-media/nfs-and-conservation-partners-file-lawsuit-to-save-willamette-river-chinook-salmon-and-steelhead/>

⁷ <https://nativefishsociety.org/campaigns/rewild-the-willamette/>

⁸ 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/>

⁹ <https://www.federalregister.gov/documents/2019/04/01/2019-06258/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-willamette-valley-system>

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“...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.” (page 15)

What really happened is the Corps is very behind their commitments in the 2008 biological opinion and is not meeting the scheduled RPA dates when the Corps needed to complete actions stated in the RPA measures. Page 9-6 of the RPA states,

“In order to assure timely progress toward implementing critical on-the-ground actions, NMFS’ RPA establishes deadlines for completing studies, structural and operational improvements at the dams and hatcheries, and for implementing habitat restoration programs. Specific projects are identified that must be completed in the short term, while other, larger projects must be completed during later years of the term of the Opinion. In the RPA, certain specific fish passage and temperature control measures will be completed by 2023, the end of the Opinion term...”

The Corps was being sued to come into compliance. It therefore began preparing an EIS for the WVS along with reinitiating consultation with NOAA Fisheries.

As an example of the Corps’ failures to comply with the BiOp’s RPA timeframes, the Corps initiated the Willamette Basin Review (WBR or Willamette River Basin Review (WRBR)). The Corps is directed by RPA measure 2.9 to,

*“Protecting Stored Water Released for Fish: In coordination with the OWRD¹⁰ and ODFW,¹¹ the Action Agencies will facilitate conversion of stored water to an instream flow water right. After being converted to water rights under Oregon law, OWRD can protect the minimum perennial stream flows from illegal diversion...In particular, USACE and Reclamation will coordinate with OWRD...to accomplish this measure... This effort will begin immediately. **By the end of 2009**, the Action Agencies will have coordinated with all appropriate agencies and determined the path forward in order to accomplish this action.” (pages 9-24 - 9-25)*

The stored water is the water that is impounded behind the dam, and the BOR is assigned the job of allocating it to agricultural/irrigation (AI) users. The Corps started this effort in **2015** as noted in the draft final feasibility study/environmental assessment (FS/EA), Willamette Basin Review Feasibility Study, Final Draft, Integrated Feasibility Report and Environmental Assessment

¹⁰ OWRD is the Oregon Water Resources Department

¹¹ ODFW is the Oregon Department of Fish and Wildlife

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(2019 FS/EA) (Corps, September 2019), so they are 6 years behind schedule on this RPA measure already.¹²

But the Corps' outrageous delay on the RPA measures is just one problem that exists with the Corps' operation of the WVS. The other is that Corps should not be pursuing interim projects, such as the WBR according to 40 CFR § 1506.1(c). This NEPA regulation states,

"(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

"(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives."

In April 2019, the Corps issued a notice of intent (NOI) to prepare an environmental impact statement (EIS) for the operation and maintenance of the WVS.¹³ Therefore this **WVS program EIS is in progress.**

The WBR proposal is NOT covered by an existing program NEPA statement because the Corps failed to do a NEPA analyses with their change in operations with the implementation of the 2008 biological opinion and RPA from NOAA Fisheries.

Further, the WBR proposal relies on the 2008 biological opinion in the FS/EA and in the WBR 2019 biological opinion from NOAA Fisheries (which is found in Appendix M).¹⁴

Therefore, the WBR proposal is NOT justified independently of the operation and maintenance of the WVS because allocation of the space in the WVS relies on the operation and maintenance of the WVS and the 2008 biological opinion & RPA.

¹² <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/13273>. The Corp has not yet issued a decision.

¹³ <https://www.govinfo.gov/content/pkg/FR-2019-04-01/pdf/2019-06258.pdf>

¹⁴ <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/12488>

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Making a decision on this WBR proposal now will prejudice the ultimate decision on the WVS EIS as it will determine subsequent development, and it will limit WVS's available alternatives. Even the scoping brochure for the EIS on the WVS admits this is the case should the WBR be approved and legislated prior to reaching a record of decision on the EIS for the WVS as a whole.

See Exhibit A, where I lay out the deficiencies of the WBR and ask my Oregon elected officials to not support the WBR going into the next Water Resources Development Act.

The point being this: While the Corps is being investigated for violations of NEPA, it continues to violate NEPA by pursuing *interim* actions such as the WBR, the downstream passage and temperature control at Detroit and Big Cliff Dams¹⁵ and the Cougar Dam and Reservoir downstream fish passage project¹⁶ in violation of 40 CFR §1506.1(c) and other regulations. The Corps also is preparing NEPA documents for these dams and reservoirs to meet different RPA measures from the 2008 NOAA Fisheries BiOp. Notably, all three of these projects are not listed in the IO report or Tab G.

Overall, because the Corps is preparing a programmatic EIS now, which is due in 2023, does not invalidate and only supports my contention that the agency is, and has been, in violation of NEPA in (a) pursuing many projects and taking many actions that are not covered by NEPA and (b) pursuing interim actions under NEPA before they have done a program statement, or EIS, for the operation of the WVS based on the 2008 BiOp from NOAA Fisheries.

In addition, the Corps is practicing segmentation, in violation of NEPA regulations, because the Corps has broken all the RPA measures into separate NEPA actions although the RPA applies to the entire WVS. This is confirmed by the Assistant Secretary of the Army in his letter to the Special Counsel.

Unlawful segmentation occurs when an agency artificially divides a major federal action into smaller components to avoid application of NEPA to some of its segments or to the project as a whole. Example: building two outer parts of a highway to avoid analyzing impacts to a Park that would lie in the middle part was unlawful segmentation. Even in Judge Simon's 2016 opinion and order, he states the following on the FCRPS:

"The RPA actions are part of a single plan, the 2014 BiOp, designed to work synergistically to improve survival and recovery prospects and avoid jeopardy. (p. 129)

¹⁵ <https://www.nwp.usace.army.mil/Willamette/Detroit/fish-passage/>

¹⁶ <https://www.nwp.usace.army.mil/Locations/Willamette-Valley/Cougar/Cougar-Dam-Reservoir-Downstream-Fish-Passage/>

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"Accordingly, a single EIS is required because the 2014 BiOp RPA constitutes one plan or proposal." (p. 130)

Finally after receiving a revised list of projects in Tab G in the 2020 IO report, I found the 1979 draft environmental impact statement (DEIS), Environmental Impact Statement on Operations and Maintenance of the Willamette Reservoir System (Corps, 1979) (1979 DEIS), which appeared to reflect much of what I read from the hard copy of the 1980 Final EIS (FEIS) in the Corps office where I previously worked.

Page 1 of the DEIS states,

"This Environmental Impact Statement ... was prepared under authority of Public Law 91-190 (National Environmental Policy Act of 1969), and the Corps of Engineers' regulation ER 1105-2-507. The purpose of this E.I.S. is:

- 1. to describe current operation and maintenance (O&M) procedures at Corps of Engineers dams in the Willamette Basin and to propose that these procedures continue;*
- 2. to describe the effects of current O&M¹⁷ at Corps projects on the human and natural environment; and,*
- 3. to describe alternatives to current O&M procedures and the effects of those alternatives." (page 1-1).¹⁸*

In Chapter 2, the DEIS describes the effects of the no-action alternative, the current operations and maintenance (O&M) practices at the time of its release.

Chapter 3 looks NOT at **reasonable** alternatives as required by NEPA regulations in 40 CFR §§ 1502.1 and 1502.14, but looks at **extreme** alternatives.

"This section will examine the trade-offs involved in alternative plans of operation. In order to more clearly illustrate the trade-offs, several alternatives will be considered:

- 1. No action; No change from present operation;*
- 2. Discontinuance of system operation; and*
- 3. Various alternatives, each designed to enhance one particular value or purpose. Discontinuance of the entire system is probably not a viable alternative; likewise, single-purpose alternatives tend to be unrealistic. Nevertheless, we have decided to describe these extreme alternatives in order to make more clearly visible the specific trade-offs involved in selecting a balanced alternative." (page 3-1)*

¹⁷ O&M = operations and maintenance

¹⁸<https://hdl.handle.net/2027/ien.35556031019250?urlappend=%3Bseq=13>

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I also looked at the Appendices.¹⁹

"No fish in the Willamette Basin is listed as endangered, rare, or threatened. Bond (1974) lists the Oregon chub... as a unique fish of Oregon and lists as status undetermined the leopard dace... and sand roller...; these fish are found in the Willamette Basin drainage." (page G-3).

This 1980 EIS fails to sufficiently analyze the current operations and commitments to new facilities for ESA-listed fish. The fact that there are no **reasonable** alternatives, just **extreme** ones suggests that the Corps had no intention of altering their course, and it should be considered a piece of trash on that alone - not for the date.

The RPA is large and expensive and is additive to the proposed action (PA) and has its own effects to other authorized uses and other resources. Further, the EIS is not even legally sufficient as it examines **extreme** alternatives when NEPA regulations require that only **reasonable** alternatives be examined (40 CFR §§ 1502.1 and 1502.14).

Where is the corresponding record of decision (ROD) where the decision maker makes their signed decision? Which of alternatives studied is the selected alternative described in the corresponding ROD that represents the actions the Corps conducts today (assuming this dated EIS is sufficient)?

In order for the Corps to demonstrate that they are compliant with NEPA, they should submit to OSC, their 1980 EIS and corresponding record of decision (ROD) and point out how that document (that pre-dates the ESA-listing of salmonids and issues of climate change) reflects these significant issues today:

- Effects to listed threatened and endangered (T&E) fish species and their designated critical habitat protected under the ESA;
- The Corps' 2008 consultation with NOAA Fisheries²⁰ and US Department of Interior Fish and Wildlife Service (USFWS) under the ESA that resulted in a 'no jeopardy' determination and biological opinions under the Endangered Species Act (ESA);²¹

¹⁹ <https://hdl.handle.net/2027/ien.35556031019268?urlappend=%3Bseq=3>

²⁰ NOAA Fisheries is also known as National Marine Fisheries Service (NMFS).

²¹ NOAA Fisheries reached a *no jeopardy* biological opinion with the stipulation that the Corps implement a reasonable and prudent alternative (RPA). An RPA is required when an agency's proposed action would jeopardize the continued existence of a T&E species or adversely affect its critical habitat, which is considered by most agencies to be a significant effect.

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- Major changes in WVP operations as part of the RPA to avoid causing T&E species to become extinct. The WVP is a system of dams to achieve common authorized purposes, and like Judge Simon noted in his 2016 opinion on the FCRPS, the EIS should describe how, “...RPA actions...work collectively...” to “... achieve their required benefits to avoid jeopardy.”(page 128).²² Also, the 1980 EIS should programmatically address the construction actions required in the RPA such as cooling towers and downstream passages for fish at some of the dams;
- Water Quality Effects-
 - Effects of hazardous algae blooms in the reservoirs and their releases downstream;²³
 - Effects of hazardous waste (arsenic and other toxins) in WVS reservoirs (such as Detroit and Dorena Lakes) and their releases downstream²⁴. (In the footnoted article, it shows the Corps has known about this problem since 2009, but the public only found out about it 10 years later.);
- Effects of climate change; and
- Effects to properties protected under the NHPA for the operation and maintenance of all its facilities and any mitigation that might be required. The EIS should discuss the results of Section 106 consultation under NHPA with affected Tribes and the Oregon State Historic Preservation Officer (Oregon SHPO).²⁵

None of these issues are presented in materials that the Corps has submitted to OSC.

²² *Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861 (D. Or. 2016)

²³ <https://kval.com/news/local/state-toxic-algae-detected-in-dorena-lake-none-found-in-cottage-grove-drinking-water>; <https://www.opb.org/news/article/cottage-grove-algae-bloom-dorena-reservoir/>; and <https://www.opb.org/news/article/toxic-algae-salem-oregon-water-contamination-facts/>

²⁴ <https://www.statesmanjournal.com/story/news/2019/06/28/big-cliff-reservoir-detroit-oregon-closed-arsenic-contamination-army-corp-engineers/1597324001/> and https://www.researchgate.net/publication/225344829_Tracing_the_source_of_mercury_contamination_in_the_Dorena_Lake_watershed_Western_Oregon

²⁵ Per 40 Code of Federal Regulations (CFR) §§ 1502.14(f), 1502.16(h), 1505.2(c), 1505.3, 1505.3(a), 1505.3 (b) and 1508.20 found at <https://www.ecfr.gov/cgi-bin/text-idx?gp=&SID=d3be7f446ef2bec857db7e333c29d750&mc=true&tpl=/ecfrbrowse/Title40/40chapterV.tpl>

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As a taxpayer and member of the general public in Oregon, I had much rather have an opportunity to voice my concerns on the cost and implementation of the RPA as a whole than to respond just to individual projects and actions required of the RPA

B. Violation of the 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 Corps' IO relies on a statement from Mr. Dennis Griffin, from the Oregon State Historic Preservation Office (SHPO), that he is unaware of any violations. Also, the IO relies on Mr. Chris Page's claim that they do more work in the WVS than anywhere else on the District.

In my July 2019 response, I pointed out what the Corps stated in their Finding of No Significant Impact (FONSI) for the Fall Creek drawdown (an action for another RPA measure segmented under NEPA) that shows the Corps is not in compliance with Section 106 of the NHPA for the WVS. Also, Exhibit B is another example of this broken promise. Exhibit B is a record of environmental consideration or categorical exclusion from 2015 that looks at e-flows as directed by RPA measure 2.7 for the WVS, and is another example of NEPA segmentation.

The Corps makes the following statement regarding NHPA compliance in this 2015 categorical exclusion:

"While reservoir operations and maintenance currently have, and will continue to have, adverse effects to known and unknown cultural resources, Section 106 compliance for these standard operations are being managed through the development of a Programmatic Agreement (PA) with the SHPO. Implementation of e-flows in the Willamette River basin will not differentiate between current conditions and those being analyzed for inclusion within the proposed PA. The determination of "no potential to affect" is ultimately dependent upon the future and timely completion of the PA which takes into account the necessity for future development of Areas of Potential Effect, completion of historic property identification efforts, determinations of effect, and resolution of adverse effects at all 13 Corps managed Willamette Basin Projects." (pages 14-15).

Yet, there is no completed Programmatic Agreement.

After getting the revised Tab G, I looked up information in the 1979 DEIS and corresponding Appendices on compliance with the NHPA.

Section 2.1.7 of the DEIS states,

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"A review of the latest published version (and addenda) of the National Register of Historic Places shows that the project areas do not contain any registered properties, or properties determined to be eligible for nomination to the National Register. However, few of the reservoirs in the Willamette Valley have been examined completely for prehistoric and historic archeological sites. One of the first studies, the Smithsonian Institute's report, "Appraisal of the Archeological Resources of Twelve Reservoirs in the Willamette Valley, Oregon" (dated October 1949), revealed no archeological sites within these areas. However, more recent surveys have located a number of sites revealing prehistoric aboriginal occupation. It can be assumed from these more recent surveys that many sites were lost when reservoirs were built and flooded. If all the reservoirs were reexamined, additional sites might be found. For example, Corps archeologists have mapped 14 sites at Foster and Green Peter. The significance of these sites is unknown because funds do not currently exist to properly examine them. Currently pool fluctuations necessary for flood control have the greatest impact on potential archeological sites. For instance, of the 14 sites at Green Peter and Foster, 12 are in the drawdown zone; one is almost completely eroded from pool fluctuation. The extent of the damage caused by pool fluctuations will not be known unless extensive inventories occur at each reservoir. If project inventories are implemented, archeologic and historic sites will be evaluated in relation to the criteria established for nomination to the National Register." (bolded text added for emphasis) (page 2-23).

So in the 1979 DEIS, the Corps documents it essentially decided to violate the NHPA because funds did not exist to do the proper and legal review of this project, but it appears they still had funds to operate the WVS. This is a violation of 36 CFR 800.1(c)²⁶.

Page iii of the DEIS does not indicate any correspondence with Oregon SHPO, part of the Oregon Parks and Recreation Department. Further the Appendices noted in footnote 4 contained no other information that might indicate the Corps consulted with the Oregon SHPO or any federally-recognized Tribes.

If the Corps is in compliance with NHPA for the WVP, as it claims in the IO report, then the Corps should be able to provide the following documents:

²⁶36 CFR 800.(c) states,

"Timing. The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking"

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- Corps' determination of effect to properties on or eligible to the National Register of Historic Places (NR) for the entire WVS. This is often made in a letter to the state historic preservation officer (SHPO);
- Oregon SHPO's and affected Tribes' concurrence on Corps' determination of effect and / or memorandum of understanding/agreement or programmatic agreement for adverse effects for the operation on properties on or eligible to the NR for the entire WVS; and
- The promised PA on the adverse effects

This Corps also is not meeting the requirements of regulations governing the NHPA. As the regulation in 36 CFR § 800.1(c) states:

"Timing. The agency official must complete the section 106 process 'prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license..."

The regulation in 36 CFR § 800.2(d) further states:

"The public.

- (1) Nature of involvement. The views of the public are essential to informed Federal decision making in the section 106 process. The agency official shall seek and consider the views of the public...*
- (2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decision making."*

The Corps has not complied with any of these requirements. Notably, the required public notice and involvement is completely absent from the e-flow action as categorical exclusions are not subject to public involvement. Also, the Corps failed to identify this e-flow action and the Fall Creek drawdown, both actions responding to RPA measures, in the IO report or Tab G.

C. National Pollution Discharge Elimination System (NPDES Permit) 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).

From 2014 until the Corps receives it permits from the Oregon DEQ, the Corps is technically not in compliance with the NPDES of the Clean Water Act, Section 402. I am relieved that they finally submitted applications for permits to the DEQ in 2019 for the spills from the

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hydroelectric dams. However, I will point out again that my complaint was issued in 2017 after working with the Corps since 2011, and this action was still not initiated for remedy until 2019.

The Corps could prove they are in compliance with the NPDES program if they had NPDES permits for discharges released at the eight hydroelectric dams on the WVS. These permits would be either from the Environmental Protection Agency (EPA) or Oregon Department of Environmental Quality (ODEQ). The eight hydroelectric dams on the WVS are:

- Big Cliff
- Detroit
- Foster
- Green Peter
- Cougar
- Dexter
- Lookout Point
- Hills Creek

I trust that the Corps' application for NPDES permits in 2019 confirms the validity of my 2017 disclosure that the absence of these permits was and is a violation of the Clean Water Act.

ROGUE RIVER BASIN PROJECT (RRBP)

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 report findings on this subject are completely incorrect and incomplete. First the IO report only acknowledges the dams in the RRBP and not the Cole River Hatchery as one of the features in what it deems a, "water resource management system" (page 29).

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 in the IO report, 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

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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 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."²⁷

This is absolutely incorrect.

The listing of southern Oregon and northern California coast (SONCC) Coho salmon, 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.

²⁷ Page 29.

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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.²⁸ In the article in footnote 22, the Corps is quoted as saying –

“The Corps owns the facility to raise and release hatchery fish to make up for the loss of wild salmon and steelhead spawning habitat blocked by Lost Creek and Applegate dams, the Corps’ two Rogue Basin facilities. The federal agency contracts with the Oregon Department of Fish and Wildlife to operate the facility.”

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 Rivers²⁹.”

However, the Corps fails to provide a list of NEPA documents that would describe how these dams and reservoirs work in concert since they are a “resource management system.” Failure to look at the entire system is segmentation, a practice outlawed under NEPA if the operation of all three dams is indeed “connected.”³⁰

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 environmental assessment (EA) for the notching

²⁸ <https://mailtribune.com/news/top-stories/corps-to-assess-ailing-rogue-river-hatchery> and <https://mailtribune.com/news/top-stories/hatchery-dead-zone>

²⁹ Page 29

³⁰ See 40 CFR § 1508.25 (a) (1) which states,

“Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.”

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of Elk Creek Dam. A Google search yields only a draft EA,³¹ but a final EA and FONSI are not listed in the Corps submittal. This strongly suggests that NEPA compliance on this project remains incomplete. Also, as a note, the Corps decided to breach, and not finish, the Elk Creek dam, due to concerns around SONCC Coho.

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

There is SONCC Coho in the RRBP. In the article footnoted here for Cole River Hatchery³² from the Mail Tribune the Corps states:

"The Corps owns the facility to raise and release hatchery fish to make up for the loss of wild salmon and steelhead spawning habitat blocked by Lost Creek and Applegate dams, the Corps' two Rogue Basin facilities."

If the Corps is indeed in compliance with ESA for the RRBP, they could easily provide or list the following documents as evidence that is truly the case:

- The Corps biological assessment(s) (BA) for the operation of the RRBP. If the Corps does not have a BA for the operation of the RRBP, perhaps they have a memo documenting a Section 7 ESA determination of *no effect*. If so they should explain why that determination is sufficient given NOAA Fisheries 2014 Recovery Plan for SONCC.³³
- NOAA Fisheries' and USFWS' BiOps for the operation and maintenance of the RRBP, where the NOAA Fisheries BiOp addresses SONCC for the entire RRBP.

There is, however, no evidence of these documents in the record.

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

³² <https://mailtribune.com/news/top-stories/corps-to-assess-ailing-rogue-river-hatchery>

³³ This recovery plan states,

"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."

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- 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 maintains 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 US Environmental Protection Agency (EPA) policy.

As for Elk Creek Dam, there are large piles of stored rock and gravel over a large area below the dam, well exceeding one acre.³⁴ 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." (pages 1-2)³⁵

The Environmental Protection Agency'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."*³⁶

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.

³⁴ <https://www.google.com/maps/place/Elk+Creek+Dam,+Trail,+OR+97541/@42.6826184,-122.7436374,989m/data=!3m1!1e3!4m5!3m4!1s0x54e5efb351d3bb41:0xb962c76e0a43faf1!8m2!3d42.681792!4d-122.7386534>

³⁵ <http://s3-us-west-2.amazonaws.com/uclidc-nuxeo-ref-media/2b43cbfd-80b6-4f58-b129-9a04475f05df>

³⁶ See <https://www.epa.gov/npdes/stormwater-discharges-construction-activities> and <https://www.oregon.gov/deq/wq/wqpermits/Pages/Stormwater-Construction.aspx>

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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 2015³⁷. There is no evidence that the Corps received such a 2015 permit.

In the absence of an NPDES permit for stormwater 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.

However, the Corps could demonstrate compliance with the NPDES of the CWA by providing the following:

- **Lost Creek Dam.** If Lost Creek dam (they only hydroelectric dam on the RRB) discharges oil into the Rogue River would be covered in an NPDES permit from OR DEQ or the US Environmental Protection Agency (EPA). Otherwise, the Corps can explain why one is not needed.
- **Elk Creek Dam.** The Corps responded that it completed an environmental assessment for the notching and disturbance of Elk Creek Dam. However, the Corps does not claim to have sought or received an NPDES permit. Perhaps the Corps could confirm that there is still debris around in the Elk Creek area exceeding 1 acre from the notching of Elk Creek dam. If not, when was debris removed and to where?
 - (1) If debris still exists around Elk Creek dam, request the Corps' stormwater pollution prevention plan or SWPPP for the area with debris surrounding Elk Creek dam.
 - (2) Request the NPDES permit from Oregon Department of Environmental Quality (ODEQ) if there is more than 1 acre of residual material remaining around Elk Creek. If the Corps does not have a NPDES for residual material exceeding 1 acre

³⁷ <https://www.oregon.gov/deq/wq/wqpermits/Pages/Stormwater-Construction.aspx>

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

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or more, please ask how the Corps how they are in compliance with the NPDES,
considering the discharges that are occurring around Elk Creek.

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 along the Columbia River:

- Priest Rapids (Washington)
- Ringold Springs State Hatcheries (Washington)
- Prosser Tribal Hatchery (Washington)
- Umatilla State Fish Hatcheries (Oregon)
- Little White Salmon (Oregon)
- Spring Creek National Fish Hatcheries (Washington)
- Bonneville (Oregon)

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.

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).

The Corps has offered no NEPA documents for this action and the only discussion concerns plans to prepare a limited re-evaluation report (LRR). These actions by the Corps have been occurring without NEPA compliance for 40 years. I would also add if the Corps claims to have NEPA coverage for its on-going actions, it should list the document like it *tried* to do for the three dam systems they manage in Oregon.

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.

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This cessation due to a funding shortfall reinforces, not undermines, the validity 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. Further, according to 40 CFR § 1507.2,

“Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements...”

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 (see Council on Environmental Quality answer #12b to forty most asked questions)³⁹.

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.”⁴⁰

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.⁴¹

The Corps apparently is claiming ignorance as a defense, according to the IO report, quoting the Former Environmental Resources Branch (ERB) Chief as saying,

³⁹ <https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>

⁴⁰ Citing *Jewell*, 747 F.3d at 641-42. “ (Page 119.)

⁴¹ 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.

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"...that [the Whistleblower] had never informed her that USACE was in violation of environmental laws."⁴²

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;⁴³
- ✓ 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 Ms. Tina Teed to document that the Corps began the deep drawdown of Fall Creek before Ms. Teed completed the EA and before the Colonel signed the FONSI.⁴⁴

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 TAP⁴⁵ 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.⁴⁶"*
- *"The O&M⁴⁷ representative on the JDM PDT⁴⁸ acknowledged that there was no NEPA analysis/decision for the interim increased production (no request was made for*

⁴² Page 14.

⁴³ Exhibit 2 from July 2019 whistleblower response.

⁴⁴ Exhibit 1 from July 2019 whistleblower response. In this case, the former ERB Chief instructed Ms. Teed and I that it was that it is permissible to start a project before NEPA was 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 at the Corps when the former ERB Chief issued these instructions as this was obviously improper.

⁴⁵ TAP = total adult production of hatchery fish

⁴⁶ TSP = tentatively selected plan or preferred alternative under NEPA

⁴⁷ O&M = operations and maintenance

⁴⁸ PDT = project delivery team

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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.”⁴⁹

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 implementing 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.

If the Corps is in compliance with NEPA for the John Day and The Dalles Dams mitigation, they should list the Corps’ environmental impact statement/record of decision (EIS/ROD) or environmental assessment/finding of no significant impact (EA/FONSI) that pre-dates 2017. This NEPA document should describe operations conducted prior to the LRR that describe the ESA consultations with NOAA Fisheries for salmonids and USFWS for bull trout.

Notably, it appears the Corps plans to address their lack of NEPA compliance with a LRR/EA but the fact of those plans highlight the agency’s past noncompliance.

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.”⁵⁰

The IO is flat out mistaken. Also, this statement contradicts earlier information in the IO report on page 12:

“The authority for implementing and executing the ESA is delegated to the Department of Interior, and within that...the U.S. Fish and Wildlife Service...The National Marine

⁴⁹ Exhibit 2 from July 2019 whistleblower response

⁵⁰ At page 31.

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Fisheries Service...operating under the Department of Commerce, has similar powers for protecting and conserving marine life and anadromous fish."

As the NOAA Fisheries website (Pacific Island Region) states:

"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."⁵¹

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. Regardless of whether USFWS or NOAA Fisheries has jurisdiction over the species involved, 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.

The Corps confirms this in their draft LLR, Draft Integrated Limited Reevaluation Report and Environmental Assessment, The Dalles and John Day Mitigation (Corps, 2019)⁵²

"The Corps has determined that the proposed action may affect and is likely to adversely affect listed salmon, steelhead, bull trout, and their designated critical habitat. Based on the outcome of the Section 7 consultation, NMFS and USFWS will likely issue a Biological Opinion (BiOp) that will set forth terms and conditions to minimize impacts of the proposed action and will issue incidental take statements. (page 7-2)

"A 'no effect' determination has been documented for terrestrial species under the jurisdiction of USFWS: gray wolf, pygmy rabbit, grizzly bear, Washington ground squirrel, marbled murrelet, northern spotted owl, yellow-billed cuckoo, showy stickseed, Umtanum desert buckwheat, and White Bluffs bladderpod. (pages 7-2 to 7-3)

⁵¹ <https://www.fisheries.noaa.gov/pacific-islands/endangered-species-conservation/esa-consultations-pacific-islands>

⁵² <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/12210>

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"The Corps anticipates that the preferred alternative would not cause jeopardy to the existence of ESA-listed species. The Corps would follow the conditions set forth in the issued BiOps. Any deviations to the proposed plan would require a written variance from the Services⁵³." (page 7-3)

With respect to the hatcheries, I agree with the Senior Assistant District Counsel that the FCRPS 2014 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 BMPs⁵⁴ 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.⁵⁵

Thus, except for Umatilla Hatchery, the Corps remains in violation of the ESA for all ESA listed fish 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.⁵⁶ 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.

Mr. Kratz's NOAA Fisheries statement in the IO report that he is unaware of any ESA violations is not complete or correct. If the Corps is in compliance with the ESA for this on-going program, then they should list or provide their biological opinions from both NOAA Fisheries and USFWS that pre-dates May 2017 of their compliance under the ESA. This would include –

- The Corps' BA(s) for the John Day/The Dalles Dam Mitigation Operations' effects to salmonids for consultations with NOAA Fisheries;

⁵³ Services = this is the term used to include both NOAA Fisheries and USFWS.

⁵⁴ BMPs = best management practices

⁵⁵ <https://www.westcoast.fisheries.noaa.gov/publications/hydropower/ferps/rpatableappendix.pdf>

⁵⁶ Exhibit 6.

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- The Corps' BA(s) for the John Day/The Dalles Dam Mitigation Operations' effects to bull trout for consultation(s) with USFWS;
- NOAA Fisheries' BiOp(s) for the John Day/The Dalles Dam Mitigation Operations' effects to salmonids; and
- USFWS's BiOp(s) for the John Day/The Dalles Dam Mitigation Operations' effects to bull trout

The Corps has produced none of these documents; nor can they be found on any public record.

- 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)).*

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, and this water source was found to be contaminated with NZMS. 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."⁵⁷

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.⁵⁸ If one goes to Ringold Springs Fish Hatchery, there are requirements for washing one's boots and other

⁵⁷ At page 16.

⁵⁸ <https://wdfw.wa.gov/news/wdfw-takes-steps-help-prevent-spread-of-new-zealand-mudsnails-ringold-hatchery>

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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.”⁵⁹

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 limited re-evaluation report (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.⁶⁰

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.

The IO report also declares:

“That with respect to Ringold hatchery, it does have New Zealand mud snails and NWP⁶¹ is investigating the feasibility of increasing fish rearing capacity and at the same time dealing with the mud snails.”⁶²

Apart from the questionable decision to increase fish production at Ringold despite the presence of a persistent invasive species, the Corps proposal to increase fish capacity at Ringold indicates the agency is currently and has been using it.

Obviously, the Corps’ current actions do not comply with EO 13112 since the NZMS were first discovered in 2014, and the Corps has yet to complete any assessment of this situation.

⁵⁹ <https://www.fws.gov/columbiariver/publications/2014%20NZMS%20progress%20report.pdf>

⁶⁰ See Exhibit 7 from whistleblower’s July 2019 response.

⁶¹ NWP = Portland District of the US Army Corps of Engineers

⁶² At page 32.

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If it was compliant with EO 13122, the Corps should have on hand:

- Documentation of proposed actions to address NZMS for the agency's current hatchery actions on the Columbia River; and
- The analyses of effects in the Corps' NEPA document and description of actions to address the problem, if it exists in an EIS/ROD or EA/FONSI. This should include mitigation, if applicable.

The Corps has yet to produce this material.

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)."*⁶³

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."*⁶⁴

Further, the final EA for the Willow Creek easement renewal, Final Environmental Assessment, Willow Creek Arm Easement Renewal (Corps, July 2019)⁶⁵, underlines this lapse by admitting

⁶³ At page 33

⁶⁴ Ibid

⁶⁵ <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/12126>

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that the applicant has been allowed to continue to operate although NEPA was not complete by describing the no action alternative as the following:

"Pursuant to the conditions of the existing easement regarding termination or expiration of the easement, TMCF⁶⁶ 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 WCA⁶⁷, 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."⁶⁸ (page 9)

This means the applicant was 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, the Corps allowed its applicant to use lands prior to NEPA evaluation, so the Corps was in violation of NEPA, 40 CFR § 1506.1 (b) for 7 years and did not conduct their analyses before the applicant was allowed to operate. This failure acted to deprive 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 of a civil works project."*⁶⁹ However, the IO has not stated what that legal distinction is nor does the IO explain how it justifies not having any NEPA by allowing the applicant to continue operating.

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).

⁶⁶ TMCF = Three Mile Canyon Farms

⁶⁷ WCA = Willow Creek Arm

⁶⁸ 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/utis/getfile/collection/p16021coll7/id/9991>

⁶⁹ At page16

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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/FONSIs for Howard Island Sump and Rice Island Placements from 2015.⁷⁰ These EA/FONSIs 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 Mr. Dennis Griffin, 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. The Washington Department of Archaeology and Historic Preservation (DAHP) also 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.

Based on the extra list of projects provided in Tab G with the 2020 IO report, I did a google search with the names of the projects. While I could not find the 1999 version of the Federal Navigation Channel Integrated Feasibility Report for Channel Improvements and Environmental Impact Statement: Columbia and Lower Willamette River Federal Navigation Channel, I found the draft environmental impact statement from 1998 at the same Northwestern University website (Draft Integrated Feasibility Report for Channel Improvements and Environmental Impact Statement, Columbia & Lower Willamette River Federal Navigation Channel (Corps, 1998))⁷¹. The section 7.4.14, Cultural Resources Acts, states,

"Cultural resources investigations and literature search have been conducted with a preliminary determination that no resources would be affected or can be avoided. The results of the investigation are documented in the report and will be coordinated with the State Historic Preservation Office. The proposed actions will meet the requirements of the pertinent cultural resources acts." (page 7-8).

⁷⁰ At page 34.

⁷¹ <https://babel.bathitrust.org/cgi/imgsrv/download/pdf?id=ien.35556031003494;orient=0;size=100;seq=9;num=6-70;attachment=0>

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This indicates the Corps made a determination of no historic properties affected per 36 CFR 800.4(d)(1), and that should have been provided to both WA DAHP and OR SHPO. The file should indicate that DAHP and SHPO concurred in writing or that 30 days after the Corps provided them their determination of effect, and they did not comment.

The most recent NEPA document for the 100-plus-mile federal navigation channel (FNC) for the Columbia River is the Columbia River Channel Improvement Project, Final Supplemental Integrated Feasibility Report and Environmental Impact Statement (Corps, 2003) (FSEIS)⁷², which supplements the 1999 EIS.

Section 5.4.5 of the FSEIS states there are no updates to cultural resources in the SFEIS (which is incorrect looking at Section 7.4.14). Section 7, discusses the status of compliance for each of the applicable laws. *Section 7.4.14, Cultural Resources Acts*, states,

"In 1999, cultural resource evaluations, studies, and comments on potential impacts for the channel improvement project were submitted to the Washington and Oregon State Historic Preservation Offices per Section 106 of the National Historic Preservation Act, for review and comment. The Corps acknowledged in our transmittal letter that additional construction sites, wildlife mitigation areas, and general project contingencies would occur that may affect cultural resources. To deal with subsequent project developments following State Historic Preservation Office review, the Corps recommended development of a Memorandum of Agreement per 36 CFR 800 implementing regulations for the National Historic Preservation Act. Both the Washington and Oregon State Historic Preservation Offices concurred with the project as described in 1999 and agreed in their concurrence letter with an use of a Memorandum of Agreement. This memorandum is under preparation." (pages 7-4 - 7-5).

This is easy peasy lemon squeezy. The Corps can provide this signed memorandum of agreement (MOA) or list it (with the dates signed by WA DAHP, OR SHPO and possibly the ACHP) to demonstrate its compliance with the NHPA and implementing regulations. Per the NHPA regulations, MOAs are developed to resolve adverse effects per 36 CFR 800.6. Then we don't have to rely on OR SHPO (Mr. Griffin's memory alone) from the past 17 years.

Because the Corps has been in violation of the NHPA for the Columbia River FNC for 54 years since NHPA and implementing regulations were enacted (1966), the agency has no idea what properties may exist in the FNC operations that are eligible to the National Register of Historic Places (NR). This lapse allows these NR-properties to be left to damage instead of protection from the operation and maintenance of the Columbia River FNC.

⁷² <https://babel.hathitrust.org/cgi/pt?id=ien.35556034539718&view=1up&seq=1>

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The Senior Assistant District Counsel indicated to the IO that preparation of an EIS had begun for the lower Columbia River FNC plan.⁷³ 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.

CONCLUSION

When most dams in the Pacific northwest were authorized and built, no consideration given to environmental resource protection laws that would later follow: the needs to protect and recover wild stock of fish, historic properties and clean water act mandates. Also, most dams have a design life of 50 years, and most, if not all of the dams in the Corps' Portland District are 50 years or older. When they were built, there was little thought given to what comes after their economic design life.

By way of mitigation, the IO recommends that Portland District of the f

"...establish a link in their existing website that can list all environmental reviews and compliance actions taken over the last 5-years on this projects and list ones forthcoming for the next 2 years." (page 35),

This is a great practice, which is now done for the Regulatory program in the Corps for their short discrete projects. But this would do little to aid public understanding of on-going actions in the civil works program where the Corps owns and operates the assets such as dams and navigation channels covering large areas and affecting large populations, by the Corps' own admission, are dated, and by the WB's experience, are difficult to find on the world wide web .

The IO's recommendation would have limited value in a very large area such as the WVS. The public cannot monitor the Corps status on the 2008 biological opinion if there was no public document describing its implementation, and the 1980 EIS cannot be found anywhere on the internet. If one wanted to find out what is going on with the The Dalles and John Day Mitigation, it is not at all clear where they would go to find a document. I think the Corps should post all the documents that currently describe current operations on their website until they are no longer valid.

Merely posting these documents is not enough, however. The basic problem is that, as the extensive non-compliance described above illustrates, the Corps has no grasp of the spirit and intent of these laws.

⁷³ See <https://www.nwp.usace.army.mil/jcr/channel/maintenance/>

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At one point in Oregon's history, the biggest industry was salmon (fishing, canning and sales). Now we are seeing salmon's rapid decline in a blink of an eye in terms of human existence. These dams are going to cost a lot to keep in place and to mitigate for ESA-listed fish, which to date, are not providing the level of protection needed.

In essence, the Corps is holding the waters and wild fish of the Pacific northwest hostage. We are not getting our money's worth from our investment in the Corps. Instead, we see degradation of our environment due to avoidance of laws Congress passed, and that is not fair to Oregonians. We have not had an opportunity to voice our concerns when some programs are resulting in the actions that jeopardize the continued existence of our wild fish.

Although, 40 CFR § 1507.2 (f) states,

"Agencies shall not commit resources prejudicing selection of alternatives before making a final decision"

The Corps has been allocated and spending millions of taxpayer dollars by building and operating their facilities outside of required public review and environmental analyses. I hope they don't use it as a reason to keep the dams or facilities funded and built in perpetuity.

For the foregoing reasons, I would urge the Office of Special Counsel to conclude that the Department of Army's response to my disclosures is unpersuasive and unreasonable.

In my 33 years of federal service, I consider the people with whom I worked with in the Corps to be some of the brightest and most intelligent people I've ever encountered in my career. However, they just lack the right type of leadership to meet and channel that talent towards the challenges of managing water in today's world and environment, which is sad.

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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

August 17, 2020
Date