



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

July 9, 2018

The Honorable Dr. Mark T. Esper  
Secretary  
Department of the Army  
114 Army Pentagon  
Washington, D.C. 20310

Re: OSC File No. DI-17-1993  
Referral for Investigation – 5 U.S.C. § 1213(c)

Dear Mr. Secretary:

I am referring to you for investigation a whistleblower disclosure that employees at the U.S. Department of the Army (Army), U.S. Army Corps of Engineers (USACE), Portland, Oregon, have engaged in conduct that may constitute a violation of law, rule, or regulation. A report in response to these allegations and any related matters is due to the U.S. Office of Special Counsel (OSC) by September 7, 2018.

The whistleblower, Ms. Judith Marshall, who consented to the release of her name, disclosed that USACE has failed to take action in response to information that several Portland District projects may be in violation of environmental regulations, including the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Clean Water Act (CWA), the National Historic Preservation Act (NHPA), and Executive Order (EO) 13112.

Ms. Marshall explained that, in her capacity as Environmental Planning Section Chief (2011-2015) and Senior Environmental Resource Specialist (2015-2017),<sup>1</sup> she ensured regulatory compliance for all planned/proposed Portland District actions. In doing so, however, Ms. Marshall discovered that numerous ongoing Portland District projects, including Willamette Valley Project (WVP) operations, Rogue River Basin Project (RRBP) operations, John Day and The Dalles Dams Mitigation (JD/TD Mit) operations, and other operations on the Columbia River may not comply with environmental regulations. She stated that she reported her concerns to Portland District management, including Environmental Planning Section Chief David Griffith, Environmental Resources Branch Chief Joyce Casey, and Deputy District Engineer for Project Management Kevin Brice. Ms. Marshall was advised that the agency did not have sufficient funding, and did not wish to delay ongoing projects to seek regulatory compliance, and that she should focus on ensuring compliance for planned/proposed actions. The allegations to be investigated include:

<sup>1</sup> Ms. Marshall retired from federal service on September 30, 2017. She can be reached at (503) 481-8456 or [judy8111@comcast.net](mailto:judy8111@comcast.net) for questions related to this matter.

JABA

The Honorable Dr. Mark T. Esper  
July 9, 2018  
Page 2 of 3

Willamette Valley Project Operations

- USACE's failure to study the environmental impact of changes in WVP operations, including changes in WVP hatcheries and the listing/delisting of endangered and/or threatened species in the Willamette River Basin, and, if necessary, to supplement the Environmental Impact Statement (EIS) prepared for the WVP in 1980, violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).
- USACE's failure to study or account for the potential impact on historic properties prior to commencing its WVP operations violates the NHPA, 54 U.S.C. § 306102.
- USACE's failure to obtain a National Pollution Discharge Elimination System (NPDES) permit for its operation of hydroelectric dams and their discharge of oil into the Willamette River violates the CWA, 33 U.S.C. § 1342.<sup>2</sup>

Rogue River Basin Project Operations

- USACE's failure to study the environmental impact of, and, if necessary, to supplement and/or prepare EISs for the following changes in RRBP operations violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c):
  - 1973 construction of the Cole River Fish Hatchery;
  - 1977 construction of the Lost Creek Lake Dam;
  - 1997 listing/2005 reaffirmation of Southern Oregon/Northern California Coast (SONCC) coho salmon as a threatened and/or endangered species; and
  - 2008 notching of the Elk Creek Dam.
- USACE's current RRBP operations jeopardize the continued existence of SONCC coho salmon in violation of the ESA, 16 U.S.C. § 1536.
- USACE's failure to obtain NPDES permits for its construction of the Lost Creek Dam and subsequent discharge of oil into the Rogue River, and its notching and disturbance of the Elk Creek Dam, which generated piles of debris exceeding five acres, violates the CWA, 33 U.S.C. § 1342.

John Day and The Dalles Dams Mitigation Operations

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

---

<sup>2</sup> USACE has asserted that it is not required to apply to the U.S. Environmental Protection Agency (EPA) for NPDES permits for its pollutant-discharging dams. Ms. Marshall noted, however, that, in August 2014, USACE settled a lawsuit with a conservation group by agreeing to apply to the EPA for NPDES permits for eight hydroelectric dams on the Columbia and Snake Rivers. Ms. Marshall alleged that this makes it more difficult for USACE to claim that its pollutant-discharging dams do not require NPDES permits.

The Special Counsel

The Honorable Dr. Mark T. Esper

July 9, 2018

Page 3 of 3

- USACE's current JD/TD Mit operations jeopardize the continued existence of protected anadromous fish species and bull trout in violation of the ESA, 16 U.S.C. § 1536.
- USACE's failure to prevent, monitor, and control the spread of invasive New Zealand mud snails found at the Ringold Hatchery on the Columbia River violates EO 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999).

Real Estate Project on the Columbia River

- USACE's failure to study the environmental impact of Three Mile Canyon Farm, L.L.C.'s operations on USACE land violates 40 C.F.R. §§ 1502.9(c)(1) and 1506.1(c).

Columbia River Navigation Program

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

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation into these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 for assistance. I am also available for any questions you may have.

Sincerely,



Henry J. Kerner  
Special Counsel

Enclosure

cc: Lt. Gen. Leslie Smith, Inspector General