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13 UNITED STATES DISTRICT COURT  
14 WESTERN DISTRICT OF WASHINGTON  
15 AT SEATTLE

16 TOKUL CREEK CHINOOK; )  
17 WASHINGTON TROUT; and PUBLIC ) No.  
18 EMPLOYEES FOR ENVIRONMENTAL )  
19 RESPONSIBILITY, ) COMPLAINT  
20 )  
21 Plaintiffs, )  
22 )  
23 v. )  
24 )  
25 JEFFREY P. KOENINGS; and )  
26 WASHINGTON DEPARTMENT OF FISH )  
27 AND WILDLIFE )  
28 )  
29 Defendants. )

INTRODUCTION

1. Defendants Washington Department of Fish and Wildlife and its director, Jeffrey P. Koenings, operate a hatchery on Tokul Creek, a tributary to the Snoqualmie River in King County, Washington, that blocks fish passage, includes an inadequately screened water intake, and otherwise

COMPLAINT - 1

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1 substantially contributes to the degradation of important habitat for the threatened Puget Sound chinook  
2 salmon. Plaintiffs Tokul Creek Chinook, Washington Trout and Public Employees for Environmental  
3 Responsibility seek declarative and injunctive relief and an award of litigation expenses, including  
4 reasonable attorney and expert witness fees, through the Endangered Species Act ("ESA") citizen suit  
5 provision, 16 U.S.C. § 1540(g), for Defendants' take of threatened Puget Sound chinook salmon at  
6 their Tokul Creek hatchery in violation of the ESA, 16 U.S.C. § 1533(d), and the 4(d) rule. In  
7  
8 addition, Defendants' operation of the hatchery constitutes a public nuisance and Plaintiffs seek  
9  
10 declaratory and injunctive relief to abate this nuisance.

#### 11 JURISDICTION AND VENUE

12  
13 2. The Court has subject matter jurisdiction over Plaintiffs' ESA claim under the ESA  
14 citizen suit provision, 16 U.S.C. § 1540(g). The Court has supplemental jurisdiction over Plaintiffs'  
15 public nuisance (state law) claim under 28 U.S.C. § 1367.  
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17 3. Under 16 U.S.C. § 1540(g), Plaintiffs served Defendants with their notice of intent to  
18 sue by letter dated and postmarked February 26, 2002. This letter also notified Defendants to  
19 "construct a fishway or remove a dam or obstruction" under RCW 77.55.060. A true and correct copy  
20 of this letter is attached as Exhibit A. Copies of this letter were simultaneously mailed to the Secretary  
21 of Commerce, the Administrator of the National Marine Fisheries Service, Northwest Regional Office,  
22 and to the United States Attorney General.  
23

24  
25 4. More than sixty days has passed since service of this letter and the ESA violations  
26 complained of are ongoing or reasonably likely to continue to occur. In addition, no fishway has been  
27 constructed and the dam or obstruction has not been removed.

1 5. Venue is appropriate in the Western District of Washington under 16 U.S.C. §  
2 1540(g)(3)(A) because the violations are occurring in King County, Washington.

3 PARTIES  
4

5 6. Plaintiff Tokul Creek Chinook is the population of threatened Puget Sound chinook  
6 salmon the individuals of which are born, reared, and return to spawn in Tokul Creek. Tokul Creek  
7 Chinook is the population that suffers the most harm from defendants' actions and that may be  
8 extirpated as a result of these actions. Therefore, the Tokul Creek Chinook is listed as a named Plaintiff  
9 for the symbolic and actual importance of having the population be defended and protected by the laws  
10 that are supposed to protect it and the Puget Sound chinook ESU to which it belongs.  
11

12 7. Plaintiff Washington Trout is a non-profit corporation under the laws of Washington  
13 dedicated to protection of the environment, especially fish and water. Washington Trout has engaged in  
14 scientific research, educational, and advocacy activities to further the science and policy supporting  
15 conservation of biologically diverse fish resources. Washington Trout has members across Washington  
16 and its principal office is in Duvall, Washington.  
17

18 8. Plaintiff Public Employees for Environmental Responsibility ("PEER") is a non-profit  
19 corporation organized under the laws of the District of Columbia. PEER is a national alliance of local,  
20 state and federal resource professionals and concerned citizens who support them. Among PEER's  
21 purposes are to monitor the environmental activities of governmental agencies, to hold them accountable  
22 for their activities, and to conserve natural resources. PEER's environmental work is solely directed by  
23 the needs of its members. PEER was founded to monitor natural resource management agencies and to  
24 organize a broad base of support among employees within local, state, and federal resource  
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1 management agencies. In addition to its principal office in Washington, DC, PEER maintains offices in  
2 numerous states, including one in Olympia, Washington. PEER has approximately 140 members who  
3 live near or recreate in the Snoqualmie River basin.  
4

5 9. Plaintiffs have one or more members who use and enjoy the waters of the Snoqualmie  
6 River basin and the Puget Sound for recreational, scientific, aesthetic, and commercial purposes.  
7 Plaintiffs' member(s) derive recreational, scientific, aesthetic, and commercial benefits from the existence  
8 of healthy aquatic and marine systems and wild salmon through water recreation, wildlife observation  
9 and study, photography, fishing, and other ways. Plaintiffs' member's (or members') enjoyment of these  
10 benefits is being and will continue to be harmed by Defendants' take of Puget Sound chinook salmon at  
11 the Tokul Creek hatchery. The Court can remedy this injury by declaring that Defendants are violating  
12 the ESA and Washington State law and by ordering Defendants to remedy such violations.  
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15 10. Plaintiffs are also specially injured by Defendants' actions in manners other than those  
16 suffered by the general public.  
17

18 11. Defendant Jeffrey P. Koenings is the Director of Defendant Washington Department of  
19 Fish and Wildlife.  
20

21 12. Defendant Washington Department of Fish and Wildlife ("WDFW") is an agency of the  
22 State of Washington. The mission of WDFW is "to provide sound stewardship of fish and wildlife."  
23 WDFW owns and operates the hatchery on Tokul Creek that is the subject of this action.  
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## BACKGROUND

### LEGAL FRAMEWORK – ENDANGERED SPECIES ACT

13. Under the ESA, the Secretaries of Interior and Commerce are charged with listing species as endangered or threatened. An endangered species is one that is "in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6), and a threatened species is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. §§ 1532(15), 1533. The Secretary of the Interior, acting through the U.S. Fish and Wildlife Service, is responsible for terrestrial and fresh water species, and the Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS"), is responsible for marine species, including anadromous fish. Id. §§ 1532(15), 1533.

14. Under ESA section 9, id. § 1538(a)(1)(B), it is illegal for any person, whether a private entity or a federal, state, or local government, to take any endangered species of fish or wildlife listed under the ESA. "Take" is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. Id. § 1532(19).

15. By regulation, NMFS has defined "harm" to specifically encompass activities that modify a protected species' habitat:

*Harm* in the definition of "take" in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

1 50 C.F.R. § 222.102. "Harassment," as used in the ESA, includes unintentional acts that make it more  
2 difficult for a protected species to breed, feed, shelter, reproduce or raise its offspring. H.R. Rep. No.  
3 412, 93d Cong., 1<sup>st</sup> Sess. at 11 (1973); 50 C.F.R. § 17.3.

4  
5 16. The statutory take prohibition applies only to species listed as endangered, unless the  
6 pertinent Service has issued protective regulations under section 4(d) extending the take prohibition to  
7 threatened species. Such regulations are known as 4(d) rules. Under section 4(d), 16 U.S.C. §  
8 1533(d):  
9

10 Whenever any species is listed as a threatened species pursuant to  
11 subsection (c) of this section, the Secretary shall issue such regulations  
12 as he deems necessary and advisable to provide for the conservation of  
13 such species. The Secretary may by regulation prohibit with respect to  
14 any threatened species any act prohibited under section 1538(a)(1) of  
15 this title, in the case of fish or wildlife ....

16 16 U.S.C. § 1538(a)(1), ESA section 9(a)(1), includes the take prohibition.

17 17. The Fish and Wildlife Service has adopted a blanket regulation automatically applying  
18 the take prohibition to all threatened species upon listing. 50 C.F.R. § 17.31(a). NMFS has no  
19 comparable blanket 4(d) regulation. Instead, NMFS promulgates 4(d) regulations on a species-by-  
20 species basis once a species is listed as threatened. The 4(d) rule adopted by NMFS for the threatened  
21 Puget Sound chinook salmon imposes the ESA section 9 prohibition on take, except in certain  
22 circumstances not now relevant here. 50 C.F.R. § 223.203.  
23

24 18. The ESA citizen suit provision authorizes any person to bring an action "to enjoin any  
25 person, including the United States and any other governmental instrumentality or agency ... who is  
26 alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof  
27

1 ..." 16 U.S.C. § 1540(g)(1)(A). In such action, the Court has the jurisdiction to enforce such  
2 provision or regulation and to award costs of litigation, including reasonable attorney and expert witness  
3 fees. 16 U.S.C. § 1540(g)(1) and (4). Under section 9(a)(1)(G) of the ESA, it is unlawful to take  
4 threatened Puget Sound chinook in violation of NMFS' 4(d) rule. 16 U.S.C. § 1538(a)(1)(G).  
5

6 LEGAL FRAMEWORK – PUBLIC NUISANCE

7 19. Washington law requires that "[a] dam or other obstruction across or in a stream shall  
8 be provided with a durable and efficient fishway ..." RCW 77.55.060. A dam or obstruction  
9 maintained without a durable and efficient fishway, after thirty days notice of the violation, constitutes a  
10 public nuisance. Id.  
11

12 20. Washington law requires that a "diversion device used for conducting water from any  
13 lake, river, or stream for any purpose" be equipped with a "fish guard" approved by WDFW "to  
14 prevent the passage of fish into the diversion device." RCW 77.55.040.  
15

16 21. "Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act  
17 or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends  
18 decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage,  
19 any lake or navigable river, bay, stream, canal or basin ..." RCW 7.48.120. "A public nuisance is one  
20 which affects equally the rights of an entire community ... although the extent of the damage may be  
21 unequal." RCW 7.48.130. It is a public nuisance to "obstruct or impede, without legal authority, the  
22 passage of any river, harbor, or collection of water." RCW 7.48.140(3).  
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FACTUAL BACKGROUND

A. Puget Sound chinook salmon life history and general status

22. Chinook salmon (*O. tshawytscha*) are the largest of the *Onchorhynchus* (Pacific salmon) species. Chinook are anadromous and semelparous – as adults, they migrate from a marine environment into the fresh water streams and rivers of their birth (anadromous) where they spawn and die (semelparous). Adult female chinook will prepare a spawning bed, called a redd, in a stream area with suitable gravel composition, water depth and velocity. Redds will vary widely in size and in location within the stream or river. The adult female chinook may deposit eggs in 4 to 5 "nesting pockets" within a single redd. After laying eggs in a redd, adult chinook will guard the redd from 4 to 25 days before dying. Chinook salmon eggs will hatch, depending on water temperatures, between 90 and 150 days after deposition. Stream flow, gravel quality, and silt load all significantly influence the survival of developing chinook salmon eggs.

23. As defined by NMFS, the Puget Sound Evolutionarily Significant Unit ("ESU") of chinook salmon encompasses all naturally spawned spring, summer, and fall runs of the species in the Puget Sound region from the North Fork Nooksack River to the Elwha River on the Olympic Peninsula, inclusive. Many chinook in this area exhibit an ocean-type life history. That is, they typically migrate to estuarine and then near-shore marine habitats within the first three months of their emergence from stream or river substrate. However, some, up to one-third, exhibit a stream-type life history and spend up to a year or more in freshwater before emigration. They spend their ocean life in coastal waters. Puget Sound chinook typically remain at sea for 3 to 4 years, with the exception of a small



1 proportion of sub-adult males that mature in freshwater (called "precocials") or return after spending one  
2 winter in salt water (called "jacks").

3           24. Chinook return to their natal streams or rivers as spring, winter, fall, summer, and late-  
4 fall runs, but summer and fall runs predominate. Genetics significantly influences the freshwater  
5 component of the returning adult migratory process. A number of studies show that chinook salmon  
6 return to their natal streams with a high degree of fidelity.  
7

8           25. Overall abundance of Puget Sound chinook has declined substantially from historical  
9 levels, and many populations are small enough that genetic and demographic risks are likely to be  
10 relatively high. Both long- and short-term trends in abundance are predominantly downward, and  
11 several populations are exhibiting severe short-term declines.  
12

13           26. Stream and river habitat throughout the Puget Sound basin has been blocked or  
14 degraded. In general, upper tributaries have been impacted by forest practices and lower tributaries  
15 and mainstem rivers have been impacted by agriculture and/or urbanization. Diking for flood control,  
16 draining and filling of freshwater and estuarine wetlands, and sedimentation due to forest practices,  
17 urban development and other causes are cited as problems throughout the region. Blockages by dams,  
18 water diversions, and shifts in flow regime due to hydroelectric development and flood control projects  
19 are major habitat problems in several sub-basins. Other important habitat issues include changes in flow  
20 regimes, sedimentation, high temperatures, streambed instability, estuarine loss, loss of large woody  
21 debris, and loss of pool habitat.  
22

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25           B. Listing of the Puget Sound chinook ESU

1 27. NMFS proposed listing the Puget Sound chinook ESU as threatened on March 9,  
2 1998. 63 Fed. Reg. 11482. The listing was made final on March 24, 1999. 64 Fed. Reg. 14308; 50  
3 C.F.R. § 223.102(a)(16). In its proposal for this listing, NMFS identified changes in flow regime,  
4 sedimentation, streambed instability, loss of pool habitat, and "blockage or passage problems associated  
5 with dams or other structures" among the causes of decline in the Snohomish River system. 63 Fed.  
6 Reg. 11494. NMFS also identified blocking or altering stream channels as activities that could  
7 potentially harm chinook and result in take. 63 Fed. Reg. 11508.  
8

9  
10 C. The 4(d) rule and the take prohibition

11 28. NMFS proposed a generally applicable 4(d) rule for threatened Puget Sound chinook,  
12 along with several other threatened salmonid species, on January 3, 2000. 65 Fed. Reg. 170. On June  
13 19, 2000, NMFS promulgated the final generally applicable 4(d) rule, with an effective date for  
14 protection of Puget Sound chinook of January 8, 2001. 65 Fed. Reg. 42422; 50 C.F.R. § 223.203.  
15

16 29. In proposing and finalizing this 4(d) rule, NMFS concluded that threatened chinook are  
17 at risk of extinction primarily because their populations have been reduced by human take. Id. NMFS  
18 determined that "[i]t is, therefore, necessary and advisable to put into place ESA section 9(a)(1)  
19 prohibitions to aid in their conservation." Id. at 42472. This 4(d) rule makes the take prohibition  
20 applicable to Puget Sound chinook, effective January 8, 2001. Id. at 42475; 50 C.F.R. § 223.203(a).  
21

22 30. In conjunction with this 4(d) rule, NMFS issued take guidance identifying the types of  
23 activities "most likely to cause harm and thus violate this rule." Id. at 42472. "*Constructing or*  
24 *maintaining barriers that eliminate or impede a listed species' access to habitat or ability to*  
25 *migrate*" is identified here as enforcement priority "A". Id. (emphasis added). Also highlighted as  
26  
27

1 enforcement priorities by NMFS here are: "[c]onstructing or operating dams or water diversion  
2 structures with inadequate fish screens or fish passage facilities in a listed species' habitat" and  
3 "[s]horeline and riparian disturbances ... [that] may retard or prevent the development of  
4 certain habitat characteristics upon which the fish depend ...." Id. at 42472-73 (emphasis added);  
5 see also NMFS' Definition of "Harm," Final Rule, 64 Fed. Reg. 60727, 60730 (11/8/99) (identifying  
6 these same activities as examples that may constitute "take").  
7

8  
9 31. The general 4(d) rule strictly prohibits take of Puget Sound chinook salmon by any  
10 means unless the activity resulting in take is encompassed by one of thirteen "limits," or exceptions,  
11 identified in the rule. Id. at 42475-78; 50 C.F.R. § 223.203.  
12

13 D. Tokul Creek

14 32. Tokul Creek, in northeastern King County, is the highest elevation tributary to the  
15 Snoqualmie River (part of the Snohomish River system) in the anadromous zone. According to  
16 available data from the past twenty-five years, Tokul Creek has *the highest density of peak chinook*  
17 *redds per mile of any stream in the Skagit, Stilliguamish, and Snohomish River systems.* Average  
18 peak number of chinook redds per mile in Tokul Creek has been estimated at almost fifty. While most  
19 of the tributaries that have chinook in the Skagit, Stilliguamish, and Snohomish River systems have  
20 decreased in chinook redd density during the past few decades, Tokul Creek has been consistently  
21 productive.  
22

23 E. The Washington Department of Fish and Wildlife Tokul Creek hatchery

24  
25 33. The Tokul Creek hatchery, located approximately 0.3 miles upstream from the creek's  
26 confluence with the Snoqualmie River, is owned and operated by Defendant WDFW. The hatchery  
27

1 produces and releases salmonids, including steehead. No chinook are produced or released as part of  
2 regular hatchery operations.

3 34. The Tokul Creek hatchery has been in operation since approximately 1901 after its  
4 construction by King County. In or about 1933, King County transferred the hatchery to the  
5 Washington State Department of Game, a predecessor of defendant WDFW.  
6

7 35. Sometime after 1950, WDFW constructed a dam, spanning the entire width of Tokul  
8 Creek, with an intake structure on the right bank on the upstream side of the dam. The purpose of the  
9 dam and intake structure was and is to provide fresh water to the hatchery.  
10

11 36. Although the dam was originally constructed with a fish ladder to allows chinook and  
12 other naturally occurring salmonids the opportunity to spawn upstream of the hatchery, the fish ladder  
13 was destroyed by a flood event in or about 1990.  
14

15 37. The dam currently presents an impassable barrier to migrating adult threatened Puget  
16 Sound chinook under most flow conditions, preventing access to one-half mile or more of excellent  
17 spawning and rearing habitat in Tokul Creek. Only during rare high flow conditions can returning adult  
18 chinook pass upstream of the dam without assistance. The dam is approximately six to eight feet high  
19 and has three sections over which the creek flows, two of which are approximately ten to twelve feet  
20 wide and the middle section is approximately six feet wide. Flows have mined the creek substrate just  
21 downstream of the dam apron, while the dam itself has impeded sediment transport from upstream,  
22 creating a two to three foot step just downstream of the dam.  
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1           38.     Watershed analyses conducted in 1994 for the Griffin and Tokul Creek watersheds  
2 identified numerous barriers to fish passage. The Tokul Creek hatchery diversion dam was identified as  
3 the most significant fish passage problem in the entire Snoqualmie River basin.  
4

5           39.     The intake structure on the right bank on the upstream side of the dam does not have a  
6 screen sufficient to prevent fish from being swept into it with the flow of intake water. This intake  
7 structure can provide as much as 5,000 gallons per minute of flow to the hatchery. There is no  
8 provision for detection, rescue or removal of fish that are caught in the intake structure. Fish caught or  
9 entrained in the intake structure are likely to be killed or injured as the flow passes through the hatchery.  
10

11           40.     In or about the 1950's, WDFW constructed a riprap revetment on the right bank of  
12 Tokul Creek, downstream of the intake dam, to protect the hatchery rearing pond. This riprap  
13 revetment, or bulkhead, is approximately 1,000 feet long. The riprap forces the creek to excavate the  
14 base of the slide area on the left bank, exacerbating natural erosion processes. The construction of this  
15 revetment also included filling a substantial portion of the Tokul Creek floodplain, resulting in the virtual  
16 elimination of flood storage in the lower reach of the creek. The revetment or bulkhead has been and  
17 continues to be maintained by WDFW for the purpose of protecting the hatchery rearing ponds and  
18 other features of the hatchery.  
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22           41.     WDFW's construction, improvement and maintenance of the revetment has resulted in  
23 degradation of chinook habitat in the section of Tokul Creek below the dam, including a decrease in  
24 active channel width, an increase in local channel slope, an increase in stream power, channel  
25 downcutting, and an acceleration of mass wasting events related to toe cutting from the stream channel.  
26

27 Mass wasting and large-scale erosion continue to occur along this reach of Tokul Creek as a result of  
28 COMPLAINT - 13

1 WDFW's maintenance of the revetment, including continued exacerbation of a major slide from the  
2 steep left bank across from and caused by the revetment that started in or about January 1999. The  
3 entire right bank is hardened and maintained, while only portions of the left bank are hardened. As a  
4 result, erosion is occurring in those areas where the bank is not protected, especially in the fine-grained  
5 glacial deposits that occur towards the mouth of Tokul Creek along the left bank.  
6

7 42. The increased levels of fine-grained material (e.g., sand and silt) from mass wasting  
8 reduces threatened Puget Sound chinook egg to fry survival rates by decreasing dissolved oxygen levels  
9 during incubation, by burying incubating eggs, and by entombing emerging fry.  
10

11 43. WDFW's filling and hardening has significantly degraded this habitat by changing the  
12 characteristics of the channel. Typically, alluvial fan reaches, like this one, are either pool-riffle or forced  
13 pool-riffle channel types, not plane-bed channel types. Forced pool-riffle channel types have more  
14 pools and greater adult fish use associated with them than do plane-bed channel types, such as what  
15 lower Tokul Creek has become as a result of WDFW's maintenance of the revetment. Alluvial fans  
16 also generally have more off-channel habitat such as side channels, which provide important rearing  
17 habitat for chinook. The revetment will continue to degrade habitat quality until the revetment and fill are  
18 removed.  
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22 44. Maintenance of the diversion dam and intake structure and the revetment is part of  
23 WDFW's operation of the Tokul Creek hatchery.  
24

25 F. Emergency Tokul Creek Chinook Passage Project

26 45. In a cooperative "emergency" response to the 1999/2000 slide, Washington Trout and  
27 WDFW, with the assistance and support of Washington Trout member volunteers and other  
28

1 governmental and private actors, conducted projects to capture adult chinook using a temporary weir  
2 just above the mouth of Tokul Creek and transport them around the revetment area and the intake dam  
3 passage barrier to the excellent spawning and rearing habitat above the hatchery. This activity was  
4 conducted in the fall seasons of 2000 and 2001. In 2000, approximately 97 adult chinook were  
5 captured below and released above the hatchery. In 2001, this number was approximately 146 adult  
6 chinook.  
7

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9 46. Some of the offspring of the adult chinook transported upstream of the dam are likely to  
10 be still present in Tokul Creek upstream of the hatchery and in danger of being entrained by the Tokul  
11 Creek hatchery water diversion intake.  
12

13 G. NMFS' "draft" letter to WDFW

14 47. On or about September 6, 2001, NMFS sent a letter, dated September 7, 2001, and  
15 marked "draft," to WDFW urging WDFW to address the "take liability from the anadromous barrier  
16 and unscreened water intake" at the Tokul Creek hatchery. This letter also urges WDFW to address  
17 the habitat degradation caused by the revetment and fill. NMFS wrote, "[a]lthough mass-wasting  
18 events can be a part of the natural disturbance regime of Puget Sound watersheds, it is likely that [the  
19 winter 1999/2000 mass wasting] event has been exacerbated, in part, because the hatchery facility  
20 occupies a portion of the natural channel migration zone of the creek. Further, the creek is unable to  
21 naturally adjust to the mass-wasting event, and also due to the anadromous barrier, returning adult  
22 chinook are obligated to utilize areas with elevated sediment loads and water velocities for spawning."  
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CAUSES OF ACTION

FIRST CAUSE OF ACTION – TAKE OF THREATENED PUGET SOUND CHINOOK IN VIOLATION OF THE ENDANGERED SPECIES ACT

48. ESA section 4(d) authorizes NMFS to issue regulations for the protection of threatened species, including imposition of a prohibition on take. 16 U.S.C. § 1533(d). NMFS has done so to protect the threatened Puget Sound chinook. 50 C.F.R. § 223.203. Under section 9(a)(1)(G) of the ESA, it is unlawful to take threatened chinook in violation of NMFS' 4(d) rule. 16 U.S.C. § 1538(a)(1)(G).

49. The ESA take prohibition applies to all "persons." 16 U.S.C. § 1538(a)(1). The ESA defines a "person" to include any "officer, employee, agent, department, or instrumentality of the Federal Government, of any State," or of local governments. 16 U.S.C. § 1532(13). The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person, including any governmental instrumentality or agency to the extent permitted by the Eleventh Amendment. 16 U.S.C. § 1540(g)(1).

50. Defendants are persons subject to the ESA take prohibition and subject to suit under the ESA citizen suit provision.

51. Defendants' operation of the Tokul Creek hatchery, including their operation and maintenance of the intake diversion dam and intake structure and the floodplain fill and revetment, "harm," "harass," or otherwise take threatened chinook by blocking passage, entraining and injuring them in the hatchery's water system or discharge, and by otherwise degrading habitat to the extent that chinook are actually injured as a result of Defendants' actions in violation of the 4(d) rule and the ESA.



1 50 C.F.R. § 223.203; 16 U.S.C. § 1538(a)(1)(G). Plaintiffs and/or their members are injured as a  
2 result of Defendants' violations.

3 52. Unless enjoined, Defendants will continue to operate the Tokul Creek hatchery in a  
4 manner that results in "take" of threatened Puget Sound chinook in violation of 50 C.F.R. § 223.203  
5 and 16 U.S.C. § 1538(a)(1)(G).  
6

7 SECOND CAUSE OF ACTION – PUBLIC NUISANCE  
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9 53. Defendants' operation of the Tokul Creek hatchery includes the operation and  
10 maintenance of a diversion dam that has no "durable and efficient fishway" or other provision for fish  
11 migration in violation of Washington law. RCW 77.55.060. Defendants' operation of the Tokul Creek  
12 hatchery includes the operation of a diversion intake that does not have a "fish guard" sufficient to  
13 "prevent the passage of fish into the diversion device" in violation of Washington law. RCW 77.55.040.  
14 Defendants' violation of these requirements constitutes a public nuisance, as a result of which Plaintiffs  
15 and/or their members have suffered injury distinct from that suffered by the public at large, and a  
16 nuisance per se. RCW 77.55.060.  
17  
18

19 54. Unless enjoined, Defendants will continue to operate the Tokul Creek hatchery in a  
20 manner that violates state law and constitutes a public nuisance per se.  
21

22 REQUEST FOR RELIEF

23 WHEREFORE, Plaintiffs pray that this Court:  
24

25 (a) Issue a declaratory judgment declaring that Defendants are in violation of the  
26 ESA with respect to their operation of the Tokul Creek hatchery;  
27

1 (b) Issue a declaratory judgment declaring that Defendants' diversion dam and  
2 intake constitute a public nuisance;

3 (c) Issue a mandatory injunction requiring Defendants to modify the Tokul Creek  
4 hatchery so that no further take of threatened Puget Sound chinook is likely to occur or otherwise  
5 requiring Defendants to comply with the requirements of the ESA;

7 (d) Issue a mandatory injunction requiring Defendants to abate the public nuisance;

8  
9 (e) Allow the plaintiffs to recover the costs of this action, including reasonable  
10 attorneys and expert witness fees; and

11 (f) Grant such other and further relief as the Court deems just and proper.

12 RESPECTFULLY SUBMITTED this \_\_\_\_ day of \_\_\_\_\_, 2002.

14 DANIEL P. MEYER  
15 Public Employees for Environmental Responsibility

16 Smith & Lowney, p.l.l.c.

17  
18  
19 By: \_\_\_\_\_  
20 Richard A. Smith, WSBA #21788  
21 Attorneys for Plaintiffs