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April 19, 2006

Via Certified Mail – Return Receipt Requested

Administrator Steve Johnson
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Via Certified Mail – Return Receipt Requested

Administrator Michael Bogert
United States Environmental Protection Agency, Region 10
1200 Sixth Ave.
Seattle, WA 98101

Re: NOTICE OF INTENT TO SUE FOR VIOLATION OF ENDANGERED
SPECIES ACT – FAILURE TO CONSULT ON EFFECTS OF NPDES
DELEGATION AND OVERSIGHT ON THREATENED PUGET SOUND
CHINOOK SALMON

Dear Mr. Johnson and Mr. Bogert:

This letter concerns the failure of the United States Environmental Protection Agency to fulfill its duties under the Endangered Species Act to address the harmful effects of point source water pollution on the threatened Puget Sound Chinook. You and the Environmental Protection Agency (collectively “EPA”) are hereby provided with notice that National Wildlife Federation, 11100 Wildlife Center Dr., Reston, VA 20190, 1-800-822-9919, Public Employees for Environmental Responsibility, P.O. Box 2618, Olympia, WA 98507, (360) 528-2110, Puget Soundkeeper Alliance, 5309 Shilshole Ave. NW Suite 215, Seattle, WA 98107, (206) 297-7002, People For Puget Sound, 911 Western Ave. Suite 580, Seattle, WA 98104, (206) 382-7007, and Washington Trout, P.O. Box 402, Duvall, WA 98019, (425) 788-1167, intend to file suit for violations of Section 7 of the Endangered Species Act (“ESA”) and its implementing regulations after the expiration of sixty days from the date of this notice. These notifiers are represented by Richard A. Smith, Smith & Lowney, PLLC, at the letterhead address, and John Kostyack, National Wildlife Federation, 1400 Sixteenth St., N.W., Suite 501, Washington, DC 20036, (202) 797-6879. Any response to this letter should be directed to counsel. The suit will be filed under section 11(g) of the ESA, 16 U.S.C. § 1540(g), and will seek to enjoin EPA from violating the ESA, as well as other available relief. EPA has failed to fulfill Section 7 consultation duties with respect to the delegation of the National Pollutant Discharge Elimination System permit program to the State of

Washington, and continuing oversight and funding of that program with respect to the effects of that program on threatened Puget Sound Chinook and its designated critical habitat.¹

I. LEGAL BACKGROUND

A. The Endangered Species Act

The U.S. Supreme Court has declared the ESA “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. The ESA is designed to provide “a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b).

For actions of federal agencies, the heart of the ESA is Section 7(a)(2), which requires every federal agency to make certain that its actions are not likely to “jeopardize” a listed species or “result in the destruction or adverse modification” of its critical habitat. 16 U.S.C. § 1536(a)(2). “Jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number, or distribution of that species.” *Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); 50 C.F.R. § 402.02. By federal regulation, “[d]estruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” 50 C.F.R. § 402.02.

To execute the ESA’s strict substantive mandate, agencies must consult with the appropriate expert wildlife agency on the possible impacts of federal actions to listed species or critical habitats. The National Marine Fisheries Service has jurisdiction over marine and anadromous species, including Puget Sound Chinook. The United States Fish and Wildlife Service has jurisdiction over all other species. The formal consultation process begins when a federal agency determines that a proposed federal action “may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). Consultation is complete

¹ Although the claims described in this notice of intent to sue concern only EPA’s ESA Section 7 obligations with respect to threatened Puget Sound Chinook and Puget Sound Chinook designated critical habitat, notifiers believe that EPA has the same obligations with respect to all other ESA-listed fish and marine mammal species present in Washington waters, and their designated critical habitats, to the extent such species or habitats may be directly affected by EPA’s NPDES delegation, funding, and program oversight. EPA should consult with the appropriate expert agencies on the effects of its actions on all of these species.

when NMFS issues a “biological opinion” on whether the action is likely to jeopardize a species or destroy or adversely modify critical habitat. If NMFS determines jeopardy or habitat destruction or adverse modification is likely, the opinion may specify alternatives that will avoid these effects while still allowing the agency to proceed with the action. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5)-(6); (h)(3); (i)(1)-(2). NMFS may also suggest modifications to the action to limit negative impacts even when it concludes that jeopardy or habitat destruction or adverse modification is unlikely. *Id.*; 50 C.F.R. § 402.13. Under this framework, federal actions that may affect a listed species or critical habitat may not proceed until the federal agency insures, through completion of the consultation process, that the action is not likely to cause jeopardy or habitat destruction or adverse modification. *See* 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13.

The Ninth Circuit has emphasized repeatedly that strict compliance with the ESA’s procedures is critical, because only through the consultation process can the effects of an agency action be fully and objectively evaluated. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). In *Thomas*, the court reasoned that “the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.” *Id.* at 764.

Section 7(a)(2) of the ESA applies to:

All activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal Agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02 (defining “action”). The ESA does not refer to “federal actions,” but rather to any action that is “authorized, funded, or carried out” – in whole or part – by a federal agency. 16 U.S.C. § 1536(a)(2). The Ninth Circuit, following U.S. Supreme Court precedent, has defined “agency action” quite broadly. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Tennessee Valley*, 437 U.S. at 173 (The ESA’s command that agencies avoid jeopardizing listed species “admits of no exception.”) The Ninth Circuit has recently held that EPA’s decision to delegate authority to a state for administration of a National Pollutant Discharge Elimination System permit program under the Clean Water Act is an action that requires compliance with Section 7. *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946 (9th Cir. 2005).

Ongoing agency actions are subject to the requirements of Section 7. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). Past actions over which the federal agency retains some control and can act to the benefit of the listed species are also subject to the requirements of Section 7. *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005) (“Because EPA has continuing authority over pesticide

regulation, it has a continuing obligation to follow the requirements of the ESA.”) When agency action “comes within the agency’s decision-making authority and remains so, it falls within Section 7(a)(2)’s scope.” *Defenders of Wildlife v. U.S. EPA*, 420 F.3d at 970. Furthermore, Section 7 imposes an obligation to “insure” that an agency’s actions are not likely to jeopardize listed species above and beyond the obligations created by the statute governing the agency’s underlying action. *Id.*, 420 F.3d at 967.

The ESA Section 7 consultation process is triggered whenever a federal action “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). The threshold for such a determination is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement . . .”); *Consultation Handbook*, at xvi (defining “may affect” as “the appropriate conclusion when a proposed action may pose **any** effects on listed species . . .”) (emphasis in original). Even indirect effects (such as the private development that might be expected to occur independently after a new federal highway is built) must be evaluated through the ESA consultation process. *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976); *Consultation Handbook* at 4-18, 4-26; 50 C.F.R. § 402.14(d), § 402.02.

The action agency may request from the expert agency a list of listed species that occur in the project area. 50 C.F.R. § 402.12. “Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” *Id.* § 402.14. A determination by the action agency that the action may affect such species triggers the formal consultation process. *Id.* The duty to consult formally is excused only where the expert agency concurs in writing that the action is “not likely to adversely affect” the listed species or critical habitat. *Id.* § 402.14(b).

B. Threatened Puget Sound Chinook Salmon and its Critical Habitat

The Puget Sound evolutionarily significant unit of Chinook salmon was listed as a threatened species under the ESA by NMFS in 1999. 64 Fed. Reg. 14,308 (March 24, 1999). This ESU includes “all naturally spawned populations of Chinook from rivers and streams flowing into Puget Sound including the Straits of Juan de Fuca from the Elwha River, eastward, including rivers and streams flowing into Hood Canal, North Sound, South Sound, and the Strait of Georgia in Washington,” as well as twenty-six specified artificial propagation programs. 50 C.F.R. § 223.102(a)(7).

Chinook salmon (*O. tshawytscha*) are easily distinguished from other *Oncorhynchus* species by their large size. 63 Fed. Reg. 11,482, 11,483 (March 9, 1998). Chinook salmon are anadromous and semelparous. *Id.* This means that 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). *Id.* Adult female Chinook will prepare a spawning bed, called a redd, in a stream area with suitable gravel composition, water depth and velocity. *Id.* Redds will vary widely in size and in location within the stream or river. *Id.* The adult female Chinook may deposit eggs in 4 to 5 “nesting

pockets” within a single redd. *Id.* After laying eggs in a redd, adult Chinook will guard the redd from 4 to 25 days before dying. *Id.* Chinook salmon eggs will hatch, depending upon water temperatures, between 90 and 150 days after deposition. *Id.* Stream flow, gravel quality, and silt load all significantly influence the survival of developing Chinook salmon eggs. *Id.* Juvenile Chinook may spend from 3 months to 2 years in freshwater after emergence and before migrating to estuarine areas as smolts, and then into the ocean to feed and mature. *Id.*

Puget Sound Chinook are “ocean-type” Chinook. 63 Fed. Reg. at 11,488. Ocean-type Chinook typically migrate to sea within the first three months of emergence, but they may spend up to a year in freshwater before emigration. 63 Fed. Reg. at 11,484. They spend their ocean life in coastal waters, and return to their natal streams or rivers as spring, winter, fall, summer, and late-fall runs, but summer and fall runs predominate. *Id.* Ocean-type Chinook tend to use estuaries and coastal areas relatively extensively for juvenile rearing. *Id.*

Coastwide, Chinook salmon remain at sea for 1 to 6 years (more commonly 2 to 4 years), with the exception of a small proportion of yearling males (called jack salmon) that mature in freshwater or return after 2 or 3 months in salt water. *Id.* Ocean-type Chinook tend to migrate along the coast. *Id.*

Overall abundance of Puget Sound Chinook salmon has declined substantially from historical levels, and both long- and short-term trends in abundance are predominantly downward. 63 Fed. Reg. at 11,494.

Widespread degradation of habitat due to point source pollution was identified as a negative effect on the status of the Puget Sound Chinook in NMFS’ listing notice. 64 Fed. Reg. 14,308, 14,319. Stress on juvenile salmon caused by pollution as suggested by recent studies was cited as well. *Id.* Washington’s “Statewide Strategy to Recover Salmon” also identifies wastewater and stormwater discharge as “activities likely to affect salmon and their ecosystems.” Statewide Strategy to Recover Salmon, *Extinction is Not an Option*, State of Washington Joint Natural Resources Cabinet, Sept. 21, 1999 (Attachment 1) at Table 3, pp. II.29 – 30. Washington’s 2005 – 2007 *Puget Sound Conservation & Recovery Plan*, prepared by the Puget Sound Action Team at the direction of Governor Christine Gregoire, identifies improved control of stormwater pollution and municipal and industrial wastewater discharges as priorities for the recovery of Puget Sound Chinook and the Puget Sound ecosystem as a whole. Attachment 2 at 11-19 and 27-28. The Plan dedicates more than fifty-one million dollars, twenty-nine percent of the total 2005-2007 budget, to stormwater runoff harm reduction alone.² *Id.* at 34. According to the Draft Puget Sound Salmon Recovery Plan, prepared by the Shared Strategy for Puget Sound in December 2005 for NMFS, among the “threats to the function of the Puget Sound nearshore and marine environments for salmon” are

² Most of this money is for Washington Department of Transportation stormwater treatment construction and retrofit. Att. 2 at 35. \$2.1 million is for Ecology’s stormwater program. *Id.*

972 municipal and industrial wastewater discharges into the Puget Sound Basin []permitted by the Washington Department of Ecology. 180 permit holders had specific permission to discharge metals, including mercury and copper. Over 1 million pounds of chemicals were discharged to Puget Sound in 2000 by the 20 industrial facilities that reported their releases to the Environmental Protection Agency.

Attachment 3 at 76.

On September 2, 2005, NMFS designated critical habitat for threatened Puget Sound Chinook, effective January 2, 2006. 70 Fed. Reg. 52,630 (Sept. 2, 2005). This critical habitat is designated in all of the Puget Sound basin counties. 50 C.F.R. § 226.212(a). In the numerous stream reaches designated at 50 C.F.R. § 226.212(i), critical habitat extends to and includes a lateral extent as defined by the ordinary high-water line. 50 C.F.R. § 226.212(b). It includes designated lake areas as defined by the perimeter of the lakes' water bodies as displayed on standard 1:24,000 scale topographic maps or the elevation of ordinary high water, whichever is greater. *Id.* In estuarine and nearshore marine areas, critical habitat includes areas contiguous with the shoreline from the line of extreme high water out to a depth of no greater than 30 meters relative to mean lower low water. *Id.* Except for areas adjacent to specified lands owned by the Department of Defense, the critical habitat includes all so-described nearshore marine areas, including areas adjacent to islands, of the Strait of Georgia, Puget Sound, Hood Canal, and the Strait of Juan de Fuca.³ 50 C.F.R. § 226.212(i)(16).

NMFS identifies the primary constituent elements essential for conservation of threatened Puget Sound Chinook in this critical habitat to include water quality conditions sufficient to support the various Chinook life stages as they take place in the respective critical habitat areas. 50 C.F.R. § 226.212(c).

These areas of designated critical habitat include numerous areas that either directly receive pollutant discharges authorized via State of Washington-issued NPDES permits, or indirectly receive such discharges via tributaries or contiguous waters. *See*, Attachments 46 - 48. For the reasons described below, notifiers believe that these discharges may adversely modify critical habitat.

C. The Clean Water Act

The objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Among the Act’s goals are the elimination of the discharge of pollutants into waters of the United States and attainment of “an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . .” *Id.* It establishes a “national policy that the discharge of toxic pollutants in toxic amounts be prohibited.” *Id.*

³ Critical habitat also does not include habitat areas on Indian lands. 50 C.F.R. § 226.212(d).

Under the CWA, the discharge of any pollutant is prohibited unless it is in compliance with the Act's standards. 33 U.S.C. § 1311(a). The law establishes the National Pollutant Discharge Elimination System ("NPDES") to provide permits for discharges of pollutants into surface waters. 33 U.S.C. § 1342. The NPDES program initially focuses on the use of technology-based limits on the discharge of pollutants. 33 U.S.C. § 1311(b)(1)(A). However, where technology-based limitations are inadequate to achieve designated water quality standards, the CWA requires additional limits as necessary to ensure compliance with water quality standards. 33 U.S.C. § 1311(b)(1)(C).

With respect to stormwater regulation, NPDES permits for industrial stormwater discharges must require strict compliance with water quality standards, like NPDES permits generally. However, permits for discharges of municipal stormwater need only "require controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 – 66 (9th Cir. 1999). Even so, while municipal stormwater permits need not include conditions strong enough to ensure compliance with water quality standards to meet any explicit CWA standard, EPA has the "discretion to determine what pollution controls are appropriate," and hence may require compliance with water quality standards for municipal stormwater discharges as it sees fit. *Defenders of Wildlife v. Browner*, 191 F.3d at 1166.

Section 303 of the CWA requires states to develop water quality standards designed to protect the public health or welfare, enhance the quality of water and serve the purposes of the CWA. 33 U.S.C. § 1313. Water quality standards comprise 1) designated uses of waterways (e.g., protection and propagation of fish, shellfish, and wildlife), and 2) criteria that will ensure the protection of designated uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i); *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 714 (1994). Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act. 40 C.F.R. § 131.3(i). "*Criteria* are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use."⁴ 40 C.F.R. § 131.3(b) (*italics in original*). Washington's water quality standards include criteria for various chemical and physical characteristics of different types of waterbodies.⁵ WAC 173-201A-030 through -040. In

⁴ NMFS, however, does not consider Washington's water quality criteria to be necessarily sufficiently protective of Puget Sound Chinook and their prey base. Biological Opinion for SR524 Widening (Attachment 4) at 36.

⁵ The State of Washington is in the process of adopting new water quality standards. Under the new standards, salmonid and other fish migration, rearing, and spawning continue to be considered beneficial uses protected from adverse impacts. WAC 173-201A-200, -210, -310. The adoption of the new water quality standards will have no significant impact on the inclusion of these beneficial uses or the analysis underlying this notice of intent to sue. But for this footnote, citations in this letter are to the old water

addition, Washington's water quality standards identify "wildlife habitat," and "salmonid migration, rearing, [and] spawning" as beneficial uses for all but "Class C" waters. WAC 173-201A-030. For "Class C" waters, water quality must meet or exceed requirements for salmonid and other fish migration. WAC 173-201A-030(4).

Under Section 402 of the CWA, EPA delegates authority to states for operation of state NPDES permit programs, provided that applicant states meet the requirements of Section 402(b) and applicable federal regulations. 33 U.S.C. § 1342(b). The federal regulatory requirements are at 40 C.F.R. § 123.25. To receive delegation, a state must demonstrate to EPA that it will operate the permit program in a manner at all times consistent with the federal CWA requirements, and that it has the resources and legal authority to do so. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.25.

Once the NPDES permit program is delegated to the state, EPA retains an important and active oversight role, the boundaries of which are well specified. 40 C.F.R. § 123.41 - .46; *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) ("Congress preserved for the Administrator broad authority to oversee state permit programs.") (emphasis added); *U.S. Department of Energy v. Ohio*, 503 U.S. 607, 634 (1992) (White, J., dissenting) ("Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement.") For example, the CWA envisions that EPA will review permit applications submitted to and draft NPDES permits issued by delegated state programs. 33 U.S.C. § 1342(d) and (e). If a state draft permit is outside CWA "guidelines and requirements," EPA has the authority to object to the permit and stop its issuance. 33 U.S.C. § 1342(d)(2). If EPA objects to a state draft permit and EPA's concerns are not addressed by the state, authority to issue the permit passes back to EPA. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h).⁶ As identified by regulation, EPA's objections to a state permit "must" be based upon one or more enumerated grounds, including the following:

- a. the permit fails to apply, or to ensure compliance with, any applicable requirement of 40 C.F.R. § 123 (State Program Requirements);
- b. the procedures followed in connection with formulation of the proposed permit failed in a material respect with procedures required by the CWA, by regulations thereunder or the memorandum of agreement between EPA and the state concerning the permit program delegation;
- c. any finding made by the state in connection with the proposed permit misinterprets the CWA or any guidelines or regulations under the CWA, or misapplies them to the facts;

quality standards, which Ecology must continue to use for NPDES permitting purposes until EPA approves the new standards. 40 C.F.R. § 131.21(c) and (d).

⁶ To exercise this authority, EPA must make an objection within ninety days of receipt of the draft permit. 40 C.F.R. § 123.44.

- d. any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions, including effluent standards and limitations or standards for sewage sludge use and disposal required by the CWA, by the guidelines and regulations issued under the CWA, or the proposed permit;
- e. issuance of the proposed permit would in any respect be outside the requirements of the CWA, or regulations issued under the CWA; and
- f. the effluent limitations of a permit fail to satisfy the requirements of 40 C.F.R. § 122.44(d) (permits must include conditions sufficient to ensure compliance with water quality standards).

40 C.F.R. § 123.44(c); *State of Washington v. U.S. EPA*, 573 F.2d 583, 590 (9th Cir. 1978) (invalidating EPA veto of state permit where veto was not clearly linked to CWA violation).

The number of state permits to be reviewed and other provisions to ensure state compliance with CWA requirements is established in a memorandum of agreement (“MOA”) between the state and EPA. 40 C.F.R. § 122.24. EPA may “waive” its opportunity to review and object to any permit. 33 U.S.C. § 1342(d)(3). Under the regulations, EPA cannot waive the opportunity to review and object to certain classes or categories of state permits. 40 C.F.R. § 123.24(d). Additionally, the MOA must contain a statement that the EPA retains the right to terminate the waiver agreements at any time. 40 C.F.R. § 123.24(e).

Finally, EPA “may” withdraw or revise its approval for a state to operate an NPDES program when EPA finds that the state is not administering the program in accordance with the requirements of the CWA. 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.62 - .64 (describing circumstances under which withdrawal of delegation is appropriate). Possible grounds for revoking a delegation include failure to exercise control over regulated activities, including failure to issue permits, repeated issuance of permits that do not conform to regulations, and failure “to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.” 40 C.F.R. § 123.63(a).

D. Washington State’s NPDES Permit Program

EPA delegated authority to administer an NPDES program to the State of Washington in 1973. The current MOA governing this delegation was executed on January 9, 1990. Attachment 5. The MOA imposes duties on Ecology that, for the most part, mirror the program requirements identified in the CWA and EPA regulations. The agreement states that “EPA will oversee the administration of NPDES on a continuous

basis for consistency with the CWA, this Agreement, the annual program plan, and all applicable federal regulations and policies.” *Id.* at 4 (emphasis added).

Under the MOA, EPA “will review” certain categories of NPDES permits: review of the rest is waived. *Id.* at 6. However, EPA explicitly reserves the right to terminate any waivers of permit review rights at any time. *Id.* at 7. While EPA has a right to object to any draft permit that it reviews, those objections “must be based on one or more of the criteria identified in 40 C.F.R. § 123.44.” *Id.* at 5. If EPA’s concerns are not addressed, “exclusive authority to issue the NPDES permit vests in EPA.” *Id.* EPA has 30 days to comment upon, object to, or make recommendations with respect to any draft permit, which can be extended to 90 days upon request of the EPA. *Id.*

EPA’s commitment to oversight includes review of information submitted by Ecology, meeting periodically with state officials, examination of Ecology’s files on selected permittees to evaluate Ecology’s program, and conduct of public hearings on Ecology’s program “when appropriate.” *Id.* at 16. The MOA expressly provides that none of its provisions shall be construed to limit EPA’s authority under the CWA. *Id.* at 17. The MOA also gives EPA a role in approving or denying some categories of variances. *Id.* at 8. Ecology has extensive reporting obligations to EPA on its implementation of the program. *Id.* at 14 – 15. EPA is also obligated to provide Ecology with specific materials. *Id.* at 15 – 16.

In the Washington NPDES program, there are currently a total of approximately 4,254 effective NPDES permits. Jan. 25, 2006, E-mail communication from Ecology (Attachment 6). These include the following permits authorizing discharges into the Puget Sound basin: 16 major individual industrial permits; 56 other individual industrial permits; 86 individual sewage treatment plant permits; 98 general industrial permits; and 1593 general stormwater permits. Effect on Puget Sound Chinook Salmon of NPDES Authorized Toxic Discharges as Permitted by Washington Department of Ecology (Attachment 7) at 14 and Appendix B. According to EPA staff, since mid-2002, EPA has reviewed 21 draft NPDES permits issued by Ecology and submitted comments on 13 of these. *Pers. comm.. L. Olson, EPA Region 10, Jan. 26, 2006.* To the best of our knowledge, EPA has not objected to and “federalized” any Washington NPDES permit on any grounds for more than ten years, if ever.

The Washington-EPA MOA states that “EPA commits to funding Ecology to the maximum extent possible to support its NPDES activities.” Att. 5 at 3. Every year, EPA gives Ecology substantial sums of money under CWA Section 106, 33 U.S.C. § 1256, that are used to implement water quality programs. This amount is more than ten million dollars for the state fiscal years 2006-2007, and is to be expended on various activities, including some directly related to Washington’s administration of the NPDES permit program, such as reduction of the NPDES permitting backlog. Environmental Performance Partnership Agreement, July 2005 (Attachment 8) at 6, 46, and 48-52. For this time period, EPA funds no less than 5 FTEs specifically for the Washington Department of Ecology NPDES permit program. *Id.* at 53. EPA’s funding of Ecology’s

program is established in the Environmental Performance Partnership Agreement, which is negotiated between these agencies on a biennial basis.

II. EFFECTS ON THREATENED PUGET SOUND CHINOOK AND CRITICAL HABITAT

EPA's delegation of the NPDES permit program to the Washington Department of Ecology and its continuing oversight and funding of that program may affect threatened Puget Sound Chinook and may destroy or adversely modify its designated critical habitat. As cool, clean water is an essential feature of Chinook habitat, and since Chinook use waters throughout the Puget Sound basin that receive discharges of pollutants from NPDES permittees, this fact seems self-evident. However, description of particular issues and ways that NPDES permitted discharges are likely to adversely affect threatened Puget Sound Chinook and critical habitat is helpful to illustrate and exemplify the scope and extent of this problem and the reasons for this notice of intent to sue.

A. Ecology's NPDES Regulation of Municipal Stormwater Discharges

The Municipal Stormwater Problem

As described in the attached report by our experts, discharges from municipal separate storm sewer systems have significant hydrologic effects on streams and contribute substantial conventional and toxic pollutants to receiving waters that are likely to adversely affect threatened Puget Sound Chinook and destroy or adversely modify the primary constituent elements of designated critical habitat. Stormwater Management and Recovery of Puget Sound Chinook Salmon, Feb. 2, 2006 (Attachment 9) at 1 – 12. Ecology's NPDES regulation of municipal stormwater discharges, which results from EPA's NPDES delegation and is subject to EPA oversight, has been manifestly inadequate to prevent adverse effects to this ESA-protected species and its critical habitat.

According to Ecology, “[s]tormwater is the leading contributor to water quality pollution in our urban waterways. As urban areas grow, it is also the state’s fastest growing water quality problem.” Municipal Stormwater NPDES Permit Program, Report to the Legislature, Jan. 2004 (Attachment 10) at i. Ecology estimates that of all the impaired water bodies identified for cleanup plans under the CWA, approximately one-third are polluted by stormwater runoff.⁷ Att. 2 (Puget Sound Conservation and Recovery Plan) at 14. Other government actors in general agreement with this assessment include the Puget Sound Action Team (see “Why is Stormwater a Problem?” (Attachment 11), and the Washington State Joint Natural Resources Cabinet (see Att. 1 (Statewide Strategy to Recover Salmon – Extinction is Not an Option) at IV 113

⁷ Notifiers believe that the one-third estimate is likely an understatement of the magnitude of stormwater discharges' contribution to water pollution problems. There is a lack of quality data available to evaluate this contribution relative to most other potential contributing sources.

(identifying urban stormwater as significant part of habitat degradation factor for salmon decline)).

Stormwater is the water that runs off roads, pavement and roofs during rainstorms or snow melt. Stormwater can also come from hard grassy surfaces like lawns, play fields, and from graveled roads and parking lots.

Stormwater flows over land through intentional and unintentional conveyances to surface water bodies such as lakes, streams or wetlands, or, in some instances, to areas where it infiltrates into ground water. In the course of flowing over the urban landscape, stormwater picks up pollutants from the myriad of human activities in residential, commercial and industrial areas. In addition, the large impervious surfaces in urban areas reduce the amount of water that goes into the ground and, as a result, increases the quantity and peak flows of runoff during the wet season.

Att. 10 at 2.

Stormwater is often so polluted that it is toxic to salmon and other fish and wildlife, and presents a potential human health hazard. *Id.* at 2. In the fact sheet for the recently released draft Phase I municipal stormwater permit, Ecology explains:

Stormwater is the leading contributor to water quality pollution in our urban waterways. As urban areas grow, stormwater is also Washington's fastest growing water quality problem. Pollutants in or resulting from stormwater can cause a wide range of impacts. Some pollutants such as metals, oil and grease, and organic toxins are toxic to aquatic organisms if concentrations are high enough. Sediments cause tissue abrasion and gill clogging in fish, they reduce light and impair algal growth, they smother fish spawning habitat and are transporters of other pollutants. Nutrients accelerate eutrophication of lakes and ponds resulting in nuisance algal blooms, reduced clarity, odors and reduced drinking water quality. Temperature sensitive fish and invertebrates cannot survive in overly warm water bodies.

...

Impacts from stormwater are highly site-specific and vary geographically due to differences in local land use conditions, hydrologic conditions, and the type of receiving water. The following is a list of typical impacts caused by stormwater discharges:

...

Salmon Habitat: In western Washington urban stormwater impairs streams that provide salmon habitat. Paved surfaces cause higher winter stormwater flows that erode stream channels, destroying spawning beds. Also, because more water flows away during the wet season, streams can lose summertime base flows, drying out habitat needed for salmon rearing. Over the past few years surveys of spawning adult Coho salmon in Seattle

and Bellevue found that very high percentages of adult females (up to 90 percent) are dying before they spawn. Coho rely on runoff from the first significant rainfall events in the fall to move upstream. Although the precise causes of these acute die-offs are not yet known, stormwater pollution is likely to be involved. The problem is under active scientific investigation, and it appears to be widespread throughout urban streams in Puget Sound.

Draft Fact Sheet for Draft Phase I Permit (Attachment 12) at 7 – 8 (bold in original, citations omitted); *See also* Att. 12 at 49 – 50..

Degradation of aquatic resources due to hydrologic system changes – particularly lowered base flows and greatly elevated peak flows – presents a serious concern. Att. 9 at 2 - 4. According to EPA:

Storm water runoff from lands modified by human activities can harm surface water resources and, in turn, cause or contribute to an exceedance of water quality standards by changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitat, and elevating pollutant concentrations and loadings. Such runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorous and nitrogen), heavy metals and other toxic pollutants, pathogens, toxins, oxygen-demanding substances (organic material), and floatables. ... Individually and combined, these pollutants impair water quality, threatening designated beneficial uses and causing habitat alteration or destruction.

National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule, 64 Fed. Reg. 68721, 68724 (12/8/99). *See also*, Att. 10 at 2-4.

Ecology's NPDES Regulation of Municipal Stormwater

Although they expired in 2000, the first Phase I NPDES permits that Ecology issued in 1995 for discharges from the six large or medium municipal separate storm sewer systems within the Puget Sound basin (Cities of Seattle and Tacoma, Pierce, King, and Snohomish Counties, and the Washington Department of Transportation) remain in effect today. Cedar/Green Water Quality Management Area NPDES Permit (Attachment 13).⁸ These permits do not even purport to require compliance with water quality standards. The centerpiece of these permits is the requirement for permittees to develop and implement stormwater management programs based on Ecology's stormwater management guidance manual. *Id.* at 7 - 13.

⁸ The other two general permits for Phase I municipal stormwater issued by Ecology in 1995, those for the Island/Snohomish and the South Puget Sound Water Quality Management Areas, are essentially identical to the permit for the Cedar/Green Water Quality Management Area.

The manual in effect at the time of permit issuance was the 1992 *Stormwater Management Manual for the Puget Sound Basin*. This manual was considered inadequate within a few years of its issuance:

Current technology-based and water quality based guidance developed by Ecology for new development and redevelopment in the Puget Sound Basin (as identified in The Stormwater Management Manual for the Puget Sound Basin, The Technical Manual) are insufficient to prevent significant degradation of the resource. Revisions of most aspects of the manual – treatment requirements, Best Management Practice (BMP) selection, erosion control, source control, and most notably, flow control – are sorely needed.

Att. 1 (1999 Statewide Strategy to Recover Salmon) at IV.113-114 (underline omitted).

The 1992 Puget Sound manual was replaced in 2001 by Ecology’s *Stormwater Management Manual for Western Washington*. Although the Phase I permits purport to require permittees to use the Puget Sound manual “as amended by its replacement,” Ecology has declined to require Phase I permittees to use any guidance but the outdated 1992 Puget Sound manual under the conditions of the 1995 permits. Att. 13 at 11; Transcript of the Deposition of Bill Moore (Attachment 14) at 14 – 18, 22 – 23, 39, 60 – 61.

Ecology amended the *Stormwater Management Manual for Western Washington*, the key guidance implemented through NPDES regulation for municipal stormwater management, in 2005. NMFS submitted extensive and very critical comments to Ecology on the 2005 amendments. Letter from K. Berg, U.S. Fish and Wildlife Service, and S. Landino, National Marine Fisheries Service, to E. O’Brien, Dept. of Ecology, Dec. 23, 2004, and attached comments (Attachment 15). NMFS based its concerns on the probable adverse affects to ESA-listed fish from the changes to the manual and placed them in the context of the overlapping CWA role of the manual and NMFS’ ESA duties. *Id.* Ecology declined to modify its proposed *Stormwater Management Manual for Western Washington* amendments in response to NMFS’ concerns and comments. Letter from S. Landino, National Marine Fisheries Service, to J. Manning, Dept. of Ecology, June 3, 2005 (Attachment 16) at 1. NMFS has therefore been engaged in the development of an “enhanced standard” or “ESA supplement” to Ecology’s manual, to be used for stormwater design and management when underlying projects are subject to ESA consultation because of federal involvement or funding. *Id.* at 2; E-mail message from D.Poon, EPA, Mar. 18, 2005 (Attachment 17). An outline of this ESA supplement prepared by NMFS and forwarded to EPA and Ecology identifies the issues to be addressed (water quality treatment for road runoff, flow control for discharge to large water bodies, flow control for discharge in urban environments, flow durations, stream base flows, and habitat function) and identifies stringent performance standards to be required of projects with stormwater effects. E-mail message from D. Kirkpatrick, NMFS, Oct. 6, 2005, and attached outline (Attachment 18). However, Ecology will not

incorporate this “enhanced supplement” into its NPDES permit requirements, leaving the permits inadequate to protect ESA-listed fish according to NMFS considered opinion.

Ecology has struggled and, so far, failed to update and reissue the 1995 Phase I municipal stormwater permits despite the CWA’s direction that NPDES permits are to be issued for terms limited to five years. 33 U.S.C. § 1342(b)(1)(B). Ecology has also failed to issue the Phase II permit for discharges from the approximately 100 small municipal separate storm sewer systems in Washington State despite the passing of the December 8, 2002, date for permit issuance contemplated by EPA. 64 Fed. Reg. 68,721, 68,738 (Dec. 8, 1999); Ecology’s tentative list of Phase II-regulated entities (Attachment 19). Thus, contaminated stormwater from thousands of individual Phase II municipal stormwater outfalls operated by scores of jurisdictions subject to the Phase II regulations continue to discharge into waters that are critical habitat for the threatened Puget Sound Chinook without any NPDES regulation. Att. 19.

On February 16, 2006, Ecology finally released drafts of new Phase I and Phase II municipal stormwater NPDES permits. Attachments 20 and 21. Ecology had received extensive comments on the preliminary drafts of these permits from NMFS and others. Comments from U.S. Fish and Wildlife Service and NMFS on Ecology’s Preliminary Draft Phase I and Phase II Permits (Attachment 22). In its comments, NMFS concludes that the permits “will have more than minor detrimental effect” on threatened Puget Sound Chinook and other ESA-listed species in Washington waters. *Id.* at 21 (internal quotation marks omitted). The letter describes the basis for this conclusion and the pollution and hydrological effects of municipal stormwater discharges, as well as its concerns about Ecology’s preliminary draft permits, in substantial detail. *Id.* at 5 - 22. Ecology has largely failed to adequately address NMFS’ concerns in the February 16 draft permits. Att. 20 and 21. Ecology’s acknowledgment that “it may take decades or longer to address the water quality impacts of existing municipal stormwater discharges,” seems more a self-fulfilling prophesy than an expression of appropriately urgent regulatory intent. Att. 12 at 26.

B. Ecology’s NPDES Regulation of Stormwater Discharges Associated with Industrial Activities

Ecology has issued several general NPDES permits that authorize discharges associated with various types of industrial activities. These include the Industrial Stormwater General Permit, the Construction Stormwater General Permit, and the Boatyard General Permit. Stormwater discharges regulated under each of these general NPDES permits is likely to adversely affect threatened Puget Sound Chinook and adversely modify designated critical habitat.

1. The Construction Stormwater General Permit

Construction activity, including clearing, grading, excavation, and other land disturbing activities, that results in the disturbance of one or more acres, as well as disturbance of less than one acre that is part of a larger common plan of development that

will ultimately disturb one acre or more, generally requires NPDES permit authorization to discharge stormwater. 40 C.F.R. § 122.26. By federal regulation, the threshold for the permit requirement decreased from five acres to one acre on March 10, 2003. 40 C.F.R. § 122.26(e)(8). Ecology, however, from March 10, 2003, until the reissuance of its Construction Stormwater General Permit on November 16, 2005, continued to inform construction operators that no permit coverage was necessary for discharges from construction sites of less than five acres. E.g., Attachments 23 and 24.

Ecology's Construction Stormwater General Permit authorizes discharges of contaminated stormwater from hundreds of construction sites in the Puget Sound basin. According to information provided by Ecology, in 2005 alone, construction activity affecting approximately 1,090 acres in the Puget Sound basin was covered by the Construction Stormwater General Permit. This figure will increase dramatically in 2006 and future years since Ecology will be applying the legally correct threshold of one acre rather than five acres.

Discharges of stormwater from construction sites present serious threats to water quality. As EPA described the environmental impacts of these discharges:

Storm water discharges generated during construction activities can cause an array of physical, chemical, and biological water quality impacts. Specifically, the biological, chemical, and physical integrity of the waters may become severely compromised. Water quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems. Estimates indicate that 80 percent of the phosphorus and 73 percent of the Kjeldahl nitrogen in streams is associated with eroded sediment.

In watersheds experiencing intensive construction activity, the localized impacts of water quality may be severe because of high pollutant loads, primarily sediments. Siltation is the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes. ... Introduction of coarse sediment (coarse sand or larger) or a large amount of fine sediment is also a concern because of the potential of filling lakes and reservoirs (along with the associated remediation costs for dredging), as well as clogging stream channels. Large inputs of coarse sediment into stream channels initially will reduce stream depth and minimize habitat complexity by filling in pools. In addition, studies have shown that stream reaches affected by construction activities often extend well downstream of the construction site. For example, between 4.8 and 5.6 kilometers of stream below construction sites in the Patuxent River watershed were observed to be impacted by sediment inputs.

A primary concern at most construction sites is the erosion and transport process related to fine sediment because rain splash, rills (i.e., a channel small enough to be removed by normal agricultural practices and typically less than 1-foot deep), and sheetwash encourage the detachment and transport of this material to waterbodies. Construction sites also can generate other pollutants associated with onsite wastes, such as sanitary wastes or concrete truck washout.

Although streams and rivers naturally carry sediment loads, erosion from construction sites and runoff from developed areas can elevate these loads to levels well above those in undisturbed watersheds. It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use. Results from both field studies and erosion models indicate that erosion rates from construction sites are typically an order of magnitude larger than row crops and several orders of magnitude greater than rates from well-vegetated areas, such as forests or pastures.

...

Storm water discharges from construction sites that occur when the land area is disturbed (and prior to surface stabilization) can significantly impact designated uses. Examples of designated uses include public water supply, recreation, and propagation of fish and wildlife. The siltation process described previously can threaten all three designated uses by (1) depositing high concentrations of pollutants in public water supplies; (2) decreasing the depth of a waterbody, which can reduce the volume of a reservoir or result in limited use of a water body by boaters, swimmers, and other recreational enthusiasts; and (3) directly impairing the habitat of fish and other aquatic species, which can limit their ability to reproduce.

Excess sediment can cause a number of other problems for waterbodies. It is associated with increased turbidity and reduced light penetration in the water column, as well as more long-term effects associated with habitat destruction and increased difficulty in filtering drinking water. Numerous studies have examined the effect that excess sediment has on aquatic ecosystems. For example, sediment from road construction activity in Northern Virginia reduced aquatic insect and fish communities by up to 85 percent and 40 percent respectively. Other studies have shown that fine sediment (fine sand or smaller) adversely affects aquatic ecosystems by reducing light penetration, impeding sight-feeding, smothering benthic organisms, abrading gills and other sensitive structures, reducing habitat by clogging interstitial spaces within a streambed, and reducing the intergravel dissolved oxygen by reducing the permeability of the bed material. For example, 4.8 and 5.6 kilometers of stream below construction sites in the Patuxent River watershed in Maryland were found to have fine sediment amounts 15 times greater than normal. Benthic

organisms in the streambed can be smothered by sediment deposits, causing changes in aquatic flora and fauna, such as fish species composition. ...

National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule, 64 Fed. Reg. 68,721 at 68,728-730 (Dec. 9, 1999) (citations omitted).

The expert report commissioned by notifiers on the effects of stormwater discharges on Puget Sound Chinook concludes, with respect to construction stormwater and Ecology's permit, that these discharges "are likely to harm threatened Puget Sound Chinook by contributing fine sediments that bury spawning gravels and suffocate incubating eggs, alkaline sediments that alter the pH of receiving waters, phosphorus that degrades water quality, metals and toxics with both lethal and sub-lethal effects on salmon, and warm water that violates both existing and proposed water quality standards for temperature." Att. 9 at 13. These impacts also result in an adverse modification of critical habitat. This report further concludes that Ecology's Construction Stormwater General Permit, in significant part because of its heavy reliance on Ecology's 2005 *Stormwater Management Manual for Western Washington*, imposes requirements that are insufficient to protect these salmon. *Id.* at 12-13.

As discussed above, NMFS also has substantial reservations about the adequacy of the 2005 *Stormwater Management Manual for Western Washington*. In a Biological Opinion recently issued for a major road construction project otherwise subject by Ecology to controls equivalent to those in the Manual, NMFS effectively forced the project to include "a performance commitment of no net increase of [total suspended solids], and total and dissolved copper, lead, and zinc discharge" to the receiving waters. Att. 4 at 6 - 46. Neither the Stormwater Management Manual for Western Washington nor any Ecology-issued NPDES permit imposes such a protective standard.

In its discussion of the effects of construction stormwater on Chinook, NMFS summarized:

Direct effects on PS Chinook can occur during construction near surface waters. Earth-disturbing activities, including excavation, stockpiling, vegetation manipulation, and construction, can result in increased delivery of sediment to streams, and increased turbidity in the water column. The severity of the effect depends on numerous factors including the proximity of the action to the water, amount of ground-disturbing activity, slope, amount of vegetation removed, and weather. Sediment introduced into streams can degrade spawning and incubation habitat, and negatively affect primary and secondary productivity. This may disrupt feeding and territorial behavior through short-term exposure to turbid water.

Id. at 40.

Notifier Puget Soundkeeper Alliance has appealed the Construction Stormwater General Permit to the Washington State Pollution Control Hearings Board because, in part, the permit fails to meaningfully ensure compliance with water quality standards. The Associated General Contractors of Washington, the Building Industry Association of Washington, and Snohomish County have also appealed the permit (PCHB Nos. 05-157, 05-158, and 05-159), and all appeals have been consolidated. The Association of Washington Business has intervened in the proceedings. The industry groups and Snohomish County assert that the law should be applied in a manner that would make it impossible for this permit to effectively ensure compliance with water quality standards, including protection of beneficial use by threatened Puget Sound Chinook. The outcome of this appeal may present EPA with a renewed opportunity to review a draft of this permit.

2. The Boatyard General Permit

The Boatyard Problem and the General Permit

As defined by Ecology, a boatyard is “a service business primarily engaged in new construction and repair of small vessels 65 feet or less in length.” Boatyard General Permit Fact Sheet (Attachment 25) at 4. Ecology issued the current NPDES Boatyard General Permit on November 2, 2005. Boatyard General Permit (Attachment 26). It covers discharges of process wastewater and stormwater from approximately 95 boatyards in Western Washington, predominantly in the Puget Sound basin. Att. 26 at 112-14. This is the third iteration of the Boatyard General Permit. The first two were issued in 1992 and 1997. The current Boatyard General Permit is inadequate to ensure that stormwater discharges do not significantly adversely affect threatened Puget Sound Chinook or adversely modify critical habitat, particularly considering the grossly elevated levels of copper documented in boatyard stormwater discharges. Ecology failed to comply with procedural and substantive CWA requirements in the development of this permit.

Copper is highly toxic to salmonids at low levels. Att. 7 at 65 - 67; Att. 4 at 58 – 60; Attachment 27. Many of the regulated boatyard discharges are located in or near waters likely to be used by threatened Puget Sound Chinook. *See* Attachments 47 and 48; Att. 25 at 112-14; Attachment 28. According to Ecology, boatyard stormwater discharge monitoring required under the 1997 permit indicates that the average copper concentration in such discharges varies by season – 32,000 ug/L in the fall and 65,000 ug/L in the spring. Att. 25 at 7 – 8. The data evaluated by Ecology indicates that copper concentrations in boatyard stormwater discharges far exceed the state water quality criterion for acute toxic effects from copper in marine water (4.8 ug/L dissolved) and the fresh water acute criterion (4.61 ug/L dissolved at a receiving water hardness of 25 mg/L), even accounting for the non-normal distribution of the monitoring data and the ratio of total to dissolved copper. *Id.* at 7; Attachment 29. These observed concentrations even further exceed copper levels deemed likely to adversely affect Puget Sound Chinook. Att. 4 at 58 - 60; Att. 7 at 65 - 67.

Ecology's Failure to Follow Required Procedures to Protect Water Quality in Developing the Boatyard General Permit

Federal regulations require a permitting authority to determine the “reasonable potential” for a discharge to cause or contribute to violations of water quality standards, in this case including water quality criteria for copper, and to establish effluent limitations sufficient to “achieve water quality standards” if such reasonable potential is established. 40 C.F.R. § 122.44(d)(1)(i) – (iii). Such water quality-based effluent limitations must ensure that the level of water quality to be achieved by the limitations “complies with all applicable water quality standards.” 40 C.F.R. § 122.44(d)(1)(vii)(A).

In addition, the permitting authority is to determine whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion of the state water quality standards, such as the beneficial use of state waters by salmonids. 40 C.F.R. § 122.44(d)(1)(v). When such excursion or reasonable potential is found, “the permit must contain effluent limits for whole effluent toxicity.” *Id.*

These regulatory requirements partially implement the mandate of the CWA that industrial stormwater discharges comply strictly with water quality standards. *Defenders of Wildlife v. Browner*, 191 F.3d at 1164 – 66. The CWA further requires that such compliance be achieved within three years of permit issuance. 33 U.S.C. § 1342(p)(4)(A).

For the Boatyard General Permit, Ecology declined to conduct any formal reasonable potential analysis. Att. 25 at 79. Without citation, support, or explanation, Ecology asserts in the permit Fact Sheet that it and EPA “have determined that it is generally not possible to conduct a reasonable potential analysis for each facility covered under a general permit in the same manner as for an individual facility and still retain the benefits of a general permit.” *Id.* at 17. However, Ecology personnel acknowledged that “it takes no effort to demonstrate a reasonable potential to exceed [water quality standards] for copper by boatyard discharges,” and that the high copper concentrations in stormwater “can harm aquatic life, particularly our declining runs of salmon.” Att. 29; Attachment 31.

Instead of imposing numeric effluent limitations and whole effluent toxicity limits, Ecology's boatyard permit relies on a suite of demonstrably insufficient regulatory devices in its fig leaf assertion that the permit ensures compliance with water quality standards and is thus adequate to prevent or minimize potential harm to threatened Puget Sound Chinook.

The Boatyard General Permit's Ineffective Limitations

The Boatyard General Permit includes a narrative effluent limitation prohibiting discharges that cause or contribute to a violation of water quality standards in the receiving waters. Att. 26 at 19. However, this narrative limitation cannot ensure

compliance with water quality standards because, as Ecology admits, the stormwater discharge monitoring required by the permit is inadequate to determine whether discharges comply with the narrative limitation. Att. 25 at 74. This narrative effluent limitation is thus unenforceable as a practical matter and ensures nothing. Of note, CWA Section 308(a) mandates that a permitting authority require permittees to perform monitoring whenever necessary to determine whether the permittee is in violation of effluent limitations. 33 U.S.C. § 1318(a). In issuing this permit, Ecology has failed to meet this standard. Furthermore, EPA regulations require pollutant-specific effluent limits when reasonable potential can be demonstrated. 40 C.F.R. § 122.44(d)(1)(iii).

The Boatyard General Permit requires the implementation of best management practices. Att. 26 at 16-19 and 23-30. This does not, however, ensure anything about the quality of discharges and is strictly a technology-based requirement. The 1992 and 1997 permits required implementation of best management practices in a manner very similar to that required by the current permit and elevated copper stormwater discharge levels persist.

The Boatyard General Permit does impose numeric effluent limitations for copper discharges on new sources or new discharges to waters listed as impaired for copper on the current list of impaired waterbodies prepared under CWA Section 303(d). Att. 26 at 15. While this numeric effluent limitation both may be (or may not be) adequate to protect threatened Puget Sound Chinook from adverse effects from boatyard stormwater pollution and demonstrates that it is possible to establish numeric effluent limitations in general permits, it does nothing to protect water quality at any of the existing boatyards, whether they discharge to 303(d)-listed waters or not. Indeed, the permit neglects to impose either numeric effluent limitations or special benchmarks for existing discharges to 303(d)-listed waters. *Id.*

The Boatyard General Permit's Ineffective Benchmark/Compliance Schedule

Finally, the Boatyard General Permit includes a set of indicator benchmark levels for copper discharges, varying according to the category of receiving waters Att. 26 at 16 and 22-23. "Benchmark values are not water quality standards and are not permit limits. They are indicator values. Ecology considers values at or below benchmark as unlikely to cause a water quality violation." Att. 25 at 17. Ecology's Fact Sheet concludes that "[t]he water quality-based limitation" for stormwater discharges "is a requirement to inspect the facility and improve the BMP practices [sic] when the benchmarks are not achieved." *Id.* at 19. This is a reference to Special Condition S4., which directs permittees to take specified actions when monitoring indicates that benchmarks are exceeded. *Id.* at 22-23. There are at least two major problems with this scheme that render it ineffective at ensuring compliance with water quality criteria for copper and at ensuring that the beneficial use of Puget Sound Chinook in the receiving waters is protected.

First, the benchmark levels for copper are too high to adequately protect water quality, and Ecology's "consideration" that discharges below benchmarks are unlikely to cause a water quality violation is ill-founded. At 77 ug/L for discharges to lakes, 384 ug/L to rivers, and 229 ug/L to marine waters, these copper benchmarks are far above the acute criteria of 4.61 ug/L for lakes and rivers (estimated) and 4.8 ug/L for marine waters. Att. 25 at 18; Att. 26 at 16. Ecology relied on inappropriate and indefensible assumptions of "water effects ratios" and "dilution factors" to derive these benchmarks. As a result, the benchmarks, which may be considered the trigger portion of an effluent limit, do not satisfy the regulatory requirement that water quality-based effluent limits comply with all applicable water quality standards. 40 C.F.R. § 122.44(d)(1)(vii).

"A water-effect ratio is a means to account for a difference between the toxicity of the metal in laboratory dilution water and its toxicity in the water at the site." EPA Water Quality Standards Handbook, Appendix L (Attachment 32) at 2. While it may be appropriate to consider water effect ratios in the context of determining allowable copper levels in boatyard discharges, a water effect ratio is necessarily a site-specific determination that requires certain procedural requirements to have been met before it can be considered. *Id.*; Dept. of Ecology Permit Writer's Handbook (Attachment 33) at APP6-78-80. Here, instead of satisfying these requirements and considering site specific conditions at any relevant place, Ecology arbitrarily applied to its calculation of appropriate benchmarks the average of water effect ratios derived elsewhere that it deemed conservative. Att. 25 at 18 – 19.

Similarly, to calculate the copper benchmarks in the permit, Ecology applied dilution factors associated with mixing zones.⁹ It is contrary to Ecology's EPA-approved mixing zone regulation for Ecology to consider mixing zones and dilution without following the regulation's procedural requirements. WAC 173-201A-100; *Puget Soundkeeper Alliance v. Dept. of Ecology*, PCHB No. 02-162, Order Granting Partial Summary Judgment (June 6, 2003) at Secs. XXIII - XXXIII.

Ecology developed these very high benchmarks for copper discharge concentrations through these impermissible means. Notably, all of these copper benchmarks are more lenient than the 63.6 ug/L copper benchmark rejected by the Washington State Pollution Control Hearings Board in its review of a related industrial stormwater general permit in 2003. *Puget Soundkeeper Alliance v. Dept. of Ecology*, PCHB No. 02-162, Findings of Fact, Conclusions of Law and Order (Aug. 4, 2003) at F.F. Sec. XV and C.L. Sec. X. There, the Board found that the 63.6 ug/L copper benchmark was "excessively high in relation to both the acute and chronic standards for copper," and specifically cited concerns about the impacts of copper discharges on salmon recovery as a basis for its decision. *Id.* Furthermore, these benchmarks are all much higher than the 14 ug/L copper benchmark that NMFS recently criticized in comments on a general stormwater discharge permit proposed by EPA as inadequate to protect salmon. Feb. 15, 2006 NMFS comments EPA draft industrial stormwater permit (Attachment 34) at 11.

⁹ Mixing zones and dilution factors are discussed in detail at pp. 26 - 28 of this notice of intent to sue.

A second major problem with the Boatyard General Permit's benchmark and response scheme is that the responses do not necessarily lead to compliance with water quality standards, either on an acceptable timeline or at all. Responses are on three levels, successively triggered by a permittee's accumulation of sample results that exceed benchmark levels. Att. 26 at 22-23. Level One requires inspection, implementation of additional "source/operational control methods," and documentation and reporting. *Id.* at 22. Level Two requires an investigation and preparation and submission of a report on possible treatment practices or structures. *Id.* at 23. Level Three requires submission of an engineering report for treatment practices or structures. *Id.* This is a would-be compliance schedule that never requires compliance with benchmarks or water quality standards. It does not require implementation of treatment measures or structural improvements where indicated by consistent benchmark exceedences. With respect to treatment and structural improvements, it requires only submission of reports and plans, ensuring nothing.

Ecology already knows, and for some time has known, that a substantial number of the permitted boatyards will need to implement treatment or structural improvements to meet water quality standards. Attachments 29, 31, and 35. Nonetheless, the Boatyard General Permit even postpones entry into this de facto non-compliance schedule by linking it to a monitoring schedule that requires stormwater sampling once a month during only five months of the year: September, October, January, April, and May. Att. 26 at 21. Level Two and Level Three responses are triggered by 4 and 6 samples above benchmarks respectively. Att. 25 at 23. Thus, it will take more than a year for even the worst-performing permittees, as indicated by monitoring data collected under the previous permit, to get to Level Three. *Id.* This delay may well be lengthened if, as is typical, there is insufficient rain to generate discharges for sampling during fall months in Western Washington.

Conclusion on Boatyards and Implications for Other Stormwater General Permits

Ecology's Boatyard General Permit is thus inadequate to ensure compliance with water quality standards, particularly including water quality criteria for copper and the beneficial use by threatened Puget Sound Chinook and other salmonids, either on the three-year schedule required by the CWA or at all. 33 U.S.C. § 1342(p)(4)(A). This is especially troubling because Ecology knows more about the quality of boatyard stormwater discharges than it does about other types of stormwater discharges. In justification of its refusal to include meaningful water quality-based effluent limitations in stormwater general permits, Ecology consistently maintains that the establishment of monitoring requirements in permits is a necessary precursor step to the inclusion of such effluent limitations. With the boatyards, Ecology took this same position at the time of issuance of the 1997 permit, collected considerable data showing that boatyard stormwater discharges are highly contaminated with copper and probably harmful to salmon, and then continued to refuse to include meaningful water quality-based effluent

limitations in the current Boatyard General Permit. Attachment 37; Attachment 38 at 8 – 10 and 963 – 964.

Notifier Puget Soundkeeper Alliance and the Northwest Marine Trade Association, an industry group representing permittee interests, have appeals of the Boatyard General Permit pending and consolidated before the Washington State Pollution Control Hearings Board. PCHB Nos. 05-150 and 05-151. While Puget Soundkeeper Alliance asserts that the permit should be remanded to Ecology on the basis of the facts and reasoning presented here, among other reasons, NMTA asserts in its appeal that the permit requires too much of boatyard permittees and that the benchmarks and limitations are too stringent. Notably, NMTA asserts that Washington State legislation enacted in 2004, ESSB 6415, codified at RCW 90.48.555, applies to this permit in a manner that may make inclusion of meaningful water quality-based effluent limitations impossible. The outcome of this appeal may present EPA with a renewed opportunity to review a draft of this permit, as the Board is likely to direct Ecology to modify it, and to act to ensure that the permit includes provisions adequate to protect threatened Puget Sound Chinook.

3. The Industrial Stormwater General Permit

Ecology's Industrial Stormwater General Permit authorizes stormwater discharges from over 1,000 industrial facilities throughout Washington, including approximately 788 in the Puget Sound basin. Att. 7 at 14; Att. 47. It covers discharges from a wide variety of industrial activities with a correspondingly wide range of potential stormwater pollution sources. Industrial Stormwater General Permit Fact Sheet (Attachment 39) at 5 – 20. The current permit, issued in 2002 and modified in 2004, is the permit's fourth iteration, the original permit having been issued in 1992. *Id.* at 2.

Based on information available at the time of permit issuance in August 2001, Ecology estimated that "at least 10% to 15% of the permitted facilities have a stormwater discharge that is likely to be causing a measurable environmental problem." *Id.* at 21 – 22. In general, zinc is the only metal for which the permit requires routine stormwater discharge sampling and analysis. Industrial Stormwater General Permit (Attachment 40) at 28. The zinc monitoring is intended to be an indicator for the presence of other metals in the stormwater discharges. Att. 39 at 34 and 87. A recently produced Ecology study found that permittees are collecting or reporting zinc monitoring data in a manner that introduces a significant bias or error towards underreporting discharge zinc concentrations. A Survey of Zinc Concentrations in Industrial Stormwater Runoff (Attachment 41). Despite such error or bias, the levels of zinc concentrations reported by permittees are extremely high, either in comparison to the 117 ug/L benchmark or 372 ug/L "action levels" included in the permit, or to the zinc criteria (acute criteria for freshwater at hardness of 25 is 35.4 ug/L and for marine water is 90.0 ug/L). Att. 40 at 25 and 28; Att. 41 at 1; Assessment of Industrial Stormwater General Permit Data (Attachment 42). Stormwater discharges authorized by the Industrial Stormwater General Permit are likely to adversely affect threatened Puget Sound Chinook and their designated critical habitat. Att. 7 at 64 - 81; Att. 9 at 13 – 14.

NMFS' recent comments on EPA's proposed industrial stormwater general permit, known as the Multi-Sector General Permit or MSGP, confirm this conclusion. Att. 34. EPA's proposed MSGP authorizes stormwater discharges associated with the same industrial activities as are covered by Ecology's Industrial Stormwater General Permit. In its review, which specifically considered effects of the stormwater discharges from these activities on Chinook, NMFS concluded that the discharges "will have more than a minor detrimental effect on aquatic resources of national importance and threatened and endangered species" and that they "are likely to produce water quality conditions that have behavioral and physiological consequences for aquatic resources of national importance that are likely to reduce the viability of populations exposed to those conditions." *Id.* at 2 (cover letter) and 1 (comments). NMFS highlighted the probable impacts of metals discharged in industrial stormwater, as well as the effects of mixtures of toxicants. *Id.* at 11 – 15. Specifically considering Puget Sound salmon that spawn in small streams, such as the threatened Puget Sound Chinook, NMFS expresses concern that the proposed MSGP's 14 ug/L copper benchmark is inadequate since copper affects salmon at extremely low levels. *Id.* at 11 – 12. In contrast, Ecology's Industrial Stormwater General Permit uses 63.6 ug/L and 149 ug/L as the copper benchmark and "action level," respectively. Att. 40 at 25 and 29.

NMFS is also concerned about the effects of permitting industrial stormwater discharges on streamflows:

Existing stormwater discharges and new industrial stormwater discharges that will be added in the 5-year permit term will likely contribute to altered hydrological and geomorphological changes in areas covered under the MSGP. New stormwater discharges usually accompany new development, and result in the concomitant conversion of upland forest and meadow, wetlands, and floodplain habitat. Such conversions and the addition of new impervious surfaces lead to increases in surface runoff and reduced subsurface flows and groundwater recharge altering the hydrologic regime of aquatic species. Such changes may have more than a minor effect on aquatic ecosystems that support salmon and other aquatic species of national importance.

Id. at 19.

Ecology did not conduct an analysis of the reasonable potential for discharges authorized by the Industrial Stormwater General Permit to cause or contribute to violations of water quality standards as required by federal regulations (see discussion in Boatyard General Permit section). Att. 39 at 29. Instead of establishing numeric water quality-based effluent limitations, except where required for certain industrial categories by federal regulation, the permit relies on prescribed responses to exceedences of benchmark and action level values in a manner similar to that in the Boatyard General Permit. The deficiencies in this approach for the Industrial Stormwater General Permit are similar to those described for the Boatyard General Permit.

C. Ecology's NPDES Regulation of Toxic Pollutant Discharges

Many discharges authorized by NPDES permit issued by Ecology include toxic pollutants that are likely to adversely affect threatened Puget Sound Chinook and destroy or adversely modify designated critical habitat. *See* Attachment 46. Mechanisms and instances of this are evaluated and discussed in an attached report by experts commissioned by notifiers. *Effects on Puget Sound Chinook Salmon of NPDES Authorized Toxic Discharges as Permitted by Washington Department of Ecology* (Att. 7). The inadequacies of Ecology's NPDES permit process leading to discharges of toxic pollutants likely to adversely affect Chinook and critical habitat include: 1) unperformed or inadequate determinations of the reasonable potential for discharges to cause or contribute to violations of water quality standards; 2) overestimation of natural instream dilution by neglect of tidal return of previously discharged effluent; 3) overestimation of receiving water available for effluent dilution; 4) overestimation of outfall mixing energy by inflation of outfall port velocities; 5) allowing whole effluent toxicity ("WET") testing on animals less sensitive than Chinook; 6) permit WET testing using inflated dilutions from these inaccurate analyses; and 7) failing to account for additive and synergistic toxic effects of chemicals. *Id.* at 4 and 33 – 41. The sublethal effects on threatened Puget Sound Chinook of toxic chemical discharges authorized by Ecology-issued NPDES permits are numerous and severe. *Id.* at 4 and 82.

One specific regulatory problem worthy of additional discussion here is Ecology's policy and practice of using "mixing zones" to allow and justify elevated levels of toxic pollution and, often, to avoid imposing numeric effluent limitations to control levels of toxic pollutants in permitted discharges. Out of its concern for impacts on ESA-listed fish and designated critical habitat resulting from this policy and practice, NMFS has called for the development of "a regional mixing zone policy" "to minimize take from NPDES permitting on listed fish throughout the region" Attachment 43 at 2 – 3. EPA has the authority to address Ecology's use of mixing zones in NPDES permitting through its program oversight role.

As discussed above, the CWA requires effluent limitations in NPDES permits to ensure compliance with water quality standards, including water quality criteria and beneficial uses. When a discharge has the reasonable potential to cause, or contributes to, a violation of water quality standards, the permitting authority must include an effluent limitation for the pollutant at issue in an NPDES permit to ensure compliance with water quality standards. 40 C.F.R. § 122.44(d)(1). To determine whether such effluent limitation is necessary, an analysis of the "reasonable potential" for the discharge to cause or contribute to violation of water quality standards is required as part of the permitting process. 40 C.F.R. § 122.44(d)(1)(ii). Ecology, like many states, uses the concept of dilution available in a "mixing zone" as a means to make "reasonable potential" analyses easier for discharges to pass without finding that water quality-based effluent limitations are necessary under these regulations, and to make water quality-based effluent limitations less stringent when they are. Although widely used, "mixing zones" are nowhere mentioned or contemplated in the text of the CWA.

A “mixing zone” is a defined area and location around an outfall within which it is deemed acceptable to violate water quality criteria. Only at the edge of and outside the mixing zone is it required that the pollutant discharge not cause or contribute to violation of water quality standards. Once a mixing zone is established and sized, information on discharge and receiving water characteristics are fed into a computerized model to determine a “dilution factor.” The assumptions underlying the computerized models used by Ecology are suspect. Att. 7 at 37 - 38 and 41. The “dilution factor” is in turn used in mathematical formulae to determine whether there is reasonable potential for violation of or contribution to violation of water quality standards at the edge of the mixing zone and beyond. If such reasonable potential is found despite the mixing zone and dilution factor, then an effluent limitation, a numeric one whenever possible, is set. However, since the dilution factor is considered in the establishment of the effluent limitations in such instance, the resulting effluent limitations are typically far less stringent than they would be if no mixing zone was provided. As a result, the permittee is allowed to discharge both greater quantities or volumes of pollutants, and higher concentrations of pollutants.

The use of mixing zones is inappropriate with respect to toxic pollutants in general and to persistent bioaccumulative toxic pollutants in particular. There are likely no levels of persistent bioaccumulative toxic pollutants that can be discharged without lasting environmental harm, and certainly none that can be discharged to Puget Sound Chinook habitat that would be unlikely to result in harm to these fish. Att. 7 at 82. Furthermore, the use of mixing zones in the regulation of toxic pollutant discharges appears to contradict the “national policy that the discharge of toxic pollutants in toxic amounts be prohibited.” 33 U.S.C. § 1251(a)(3). In any event, the attached report by our qualified experts discusses and illustrates the harm likely to result to threatened Puget Sound Chinook from Ecology’s use of mixing zones in determining NPDES permit conditions. Att. 7.

Ecology regulations define the allowable sizes of mixing zones. WAC 173-201A-100. Although these regulations state that the size of a mixing zone is to be minimized, we are unaware of any instance in which Ecology has granted a mixing zone of any size less than the maximum allowed by this rule. WAC 173-201A-100(6). Although these regulations state that no mixing zone is allowed unless it is clear that the mixing zone would not have reasonable potential to cause a loss of important habitat, substantially interfere with existing or characteristic beneficial uses, or result in damage to the ecosystem, Ecology routinely grants mixing zones without meaningful analysis to evaluate the application of this prohibition. WAC 173-201A-100(4). For example, in one circumstance evaluated and rejected by the Washington State Pollution Control Hearings Board, Ecology attempted to establish a “standard mixing zone” for all dischargers regulated under an industrial stormwater general permit without even the pretense of making the evaluations and determinations of mixing zone applicability and sizing required by these regulations. *Puget Soundkeeper Alliance v. Dept. of Ecology*, PCHB No. 02-162, Order Granting Partial Summary Judgment (June 6, 2003) at Secs. XXIII - XXXIII.

Ecology also routinely recognizes expanded mixing zones and/or greater dilution factors in response to engineered changes to outfalls. For example, by replacing an outfall pipe with one with more or differently designed diffuser ports, a permittee can have Ecology recognize greater dilution to make NPDES effluent limitations less stringent. Att. 7 at 37 - 38. This dynamic tends to allow greater levels of pollutant loading with engineering improvements, rather than pushing for less pollution, and is contrary to the goals and objectives of the CWA. 33 U.S.C. § 1251(a).

In at least one instance, in 2001, NMFS evaluated and commented upon a proposed NPDES permit, for a facility named Cascade Pole, that incorporated a mixing zone for pentachlorophenol (PCP) discharges to “a highly sensitive estuary near the mouth of the Puyallup River used by ESA-listed salmon during most times of the year.” Att. 43 at 2. NMFS expressed its concerns about the application of mixing zones in a manner that supports the notifiers’ broad concerns:

On their face, mixing zones, which allow exceedances of established water quality standards have the potential to adversely affect listed species and critical habitat. It is not apparent that the analysis for establishment of the mixing zone evaluated the spatial distribution of Puget Sound Chinook in the particular reach of the river, how bioaccumulative compounds will affect fish, nor how the mixing zone, over time will be diminished and discontinued. How will the mixing zone be minimized over time?

Attachment 44 at 2-3.¹⁰ In its follow-up letter, NMFS noted that even after Ecology made some modifications to the draft permit in response to NMFS’ concerns about impacts to threatened Puget Sound Chinook, its worries about “proposed mixing zone effluent limits and potential for direct impacts on foraging juveniles and migrating adults” remained. Att. 43 at 2. At this point, NMFS urged that ways be found to expedite work on the “high priority” of a “regional mixing zone policy as it pertains to listed fish and critical habitat.” *Id.* Notifiers are unaware of any efforts by these agencies to develop such a policy, and believe that this “high priority” continues to be ignored.

¹⁰ The United States Fish and Wildlife Service, in its capacity as the agency responsible for protection of threatened bull trout, also voiced concerns about the mixing zone in the proposed permit that support concerns about Ecology’s procedures in general: “Monitoring of the proposed mixing zone in the Puyallup River is not addressed in the draft permit. This would be necessary to determine if it would comply with the mixing zone requirements stated in the water quality standards for surface waters In addition, the draft permit does not provide information on the actual length or width of the mixing zone. If a mixing zone were permitted, it should not cause a loss of sensitive or important habitats for bull trout. It’s not clear if the proposed mixing zone would create a barrier for migrating bull trout as a result of habitat loss.” Attachment 45 at 1.

D. Other Issues Concerning Ecology's NPDES Regulation and Effects on Puget Sound Chinook

The issues discussed in detail above illustrate specific regulatory problems in Ecology's NPDES permit program with respect to effects on Puget Sound Chinook, but are not an exhaustive description of the ways in which the program affects these threatened fish and their critical habitat. Other such issues include provision of lengthy "compliance schedules" for attainment of water quality-based effluent limitations, the failure to adequately regulate pollutants that may be harmful to salmonids but for which there are no established water quality criteria, the failure to timely reissue permits at the expiration of their five-year terms to incorporate improved knowledge and technology, the failure to include monitoring requirements sufficient to determine whether authorized discharges cause or contribute to violations of water quality standards, failure to adequately regulate discharges from concentrated animal feeding operations, the failure to substantively and temporally limit grants of short-term water quality modifications in aquatic pesticide application permits as required by the state water quality standards regulation, and the refusal to extend NPDES regulation to some categories of discharges, including discharges from sites regulated under the Model Toxics Control Act and discharges via direct hydrologic connection.

III. NOTICE OF INTENT TO SUE

Notice is hereby provided that upon the expiration of the sixty day notice period commenced with the service of this letter, National Wildlife Federation, Public Employees for Environmental Responsibility, Puget Soundkeeper Alliance, People For Puget Sound, and Washington Trout will file a lawsuit against you and EPA alleging violation of ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), as authorized by ESA Section 11(g), 16 U.S.C. § 1540(g), unless the violations described herein are remedied by that time or a settlement of this matter is reached. The lawsuit will seek injunctive and declaratory relief, as well as the recovery of litigation expenses.

Specifically, the lawsuit will allege that you and EPA have failed to initiate or complete formal consultation with NMFS regarding the effects of EPA's delegation of NPDES permit program authority to the State of Washington Department of Ecology and EPA's ongoing oversight, involvement, and funding of that program as required by the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. In the alternative, the lawsuit will allege that you and EPA have failed to reinitiate consultation on the program delegation as required by 50 C.F.R. § 402.16. Under the terms of the NPDES program delegation as described in the MOA (Att. 5) and section 402 of the CWA, EPA retains ongoing program oversight and discretion that could accrue to the benefit of the threatened Puget Sound Chinook and its critical habitat. EPA has the authority to review, object to, and stop issuance of NPDES permits authorizing discharges of pollutants that would harm the threatened Puget Sound Chinook and its critical habitat, since protection of beneficial uses for wildlife habitat and salmonid and other fish spawning, rearing, and migrating are incorporated into Washington's water quality standards. In addition, EPA has the authority to review and withdraw the program delegation if it determines that Ecology is

not conducting the program in such a way that water quality standards, including these beneficial uses, are protected. EPA also provides substantial funding to Ecology for administration of this program and EPA retains substantial discretion over this funding and its uses.

Very truly yours,

SMITH & LOWNEY, P.L.L.C.

By: _____
Richard A. Smith

cc: Jay Manning, Director, Washington Department of Ecology
Carlos Gutierrez, Secretary of Commerce
William T. Hogarth, Director NOAA Fisheries
Bob Lohn, Regional Administrator, National Marine Fisheries Service
Alberto Gonzales, United States Attorney General