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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

**NORTHWEST ENVIRONMENTAL
DEFENSE CENTER,**

Plaintiff,

v.

**UNITED STATES ARMY CORPS OF
ENGINEERS; NATIONAL MARINE
FISHERIES SERVICE,**

Defendants.

Case No.:

**PLAINTIFF'S COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

(Pursuant to Federal Advisory Committee
Act, 5 U.S.C. App. II and Endangered
Species Act, § 1531, *et seq.*)

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief challenging the unlawful actions of the United States Army Corps of Engineers (“Corps”) and the National Marine Fisheries Service (“NMFS” or “Service”) with regard to commercial in-stream gravel mining in Oregon. First, Defendant Corps is in violation of the Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. II, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, with respect to two advisory committees the Corps has convened and used to obtain advice and recommendations on its regulatory authority to permit commercial in-stream gravel mining activities on rivers throughout Oregon, including a proposed regional general permit (“RGP”) potentially authorizing significant gravel extraction activities on the Chetco River. Second, Defendant NMFS is in violation of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, *et seq.*, and the APA, by issuing a fundamentally flawed Biological Opinion, dated September 3, 2010, that fails to properly analyze the significant negative effects the in-stream gravel mining contemplated under the Corps’ proposed Chetco River RGP would have on the critically imperiled coho salmon and its habitat.

2. Plaintiff Northwest Environmental Defense Center requests that the Court declare that the Corps is in violation of FACA; order the Corps to correct the ongoing violations of FACA; and enjoin the Corps from continuing to engage in and from taking future actions in violation of FACA. In addition, Plaintiff requests that the Court declare the Biological Opinion and its application to the proposed RGP violate the ESA and APA; hold unlawful and set aside the Biological Opinion; order NMFS to rescind the Biological Opinion and require NMFS to issue a valid Biological Opinion for the proposed RGP in compliance with the ESA. Plaintiff also seeks an award of attorney fees and expenses.

JURISDICTION

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 5 U.S.C. §§ 701 *et seq.* (Administrative Procedure Act) and 28 U.S.C. §§2201 and 2202 (Declaratory Judgment Act).

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Defendant Corps has its headquarters for the Portland District and the Northwest Region in Portland, Oregon. Defendant NMFS has its Oregon State Habitat Office, which is the division responsible for consultation actions pursuant to the ESA in Portland, Oregon. Plaintiff Northwest Environmental Defense Center has members who reside within this District and who have been injured by the Defendants' actions and activities complained of herein.

5. Pursuant to Local Rule 3-2(b), Divisional Venue is proper in this Court because a substantial part of the events and omissions giving rise to the Plaintiff's claims occurred in Multnomah County.

PARTIES

6. Plaintiff Northwest Environmental Defense Center ("NEDC") is a non-profit, public interest organization with over 300 members. NEDC is dedicated to preserving, protecting, and improving the natural environment of the Pacific Northwest. NEDC brings this action on its own behalf, and on behalf of its members.

7. NEDC has been working since 1969 to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and engaging in litigation independently or in conjunction with other environmental groups. NEDC and its members also participate in education, public outreach, and commenting upon proposed agency actions. The members of

NEDC derive educational, scientific, aesthetic, recreational, spiritual, and other benefits from the protection of our nation's biodiversity.

8. In particular, NEDC's members regularly use and enjoy many of Oregon's waterways and surrounding areas for recreational, scientific and aesthetic purposes, including boating, canoeing, kayaking, fishing, sightseeing, bird watching, and wildlife viewing. NEDC's members conduct these activities, and others, in areas that are or will be directly affected by Defendants' failure to comply with the law, as alleged herein.

9. As a result of these interests, NEDC, on behalf of its members, has engaged, to the extent possible, in the public process revolving around the Corps' actions related to authorizing gravel mining in Oregon, including the development of the proposed RGP for gravel mining on the Chetco River. For example, NEDC has submitted comments to the Corps concerning the proposed Chetco River RGP and has used its newsletters, website, and other publications to inform its members about this RGP and the Corps other actions related to gravel mining in Oregon.

10. NEDC members reside near and regularly visit, use, and enjoy the portions of the Chetco River in Southern Oregon that would be affected by the Corps' proposed RGP, as well as watersheds in Oregon likely to be subject to future consideration by the Corps for in-stream gravel mining, such as the Umpqua River, Rogue River, Tillamook River, and Coquille River.

11. Defendant Corps' violations of FACA injure NEDC and its members. By failing to provide notice of meetings, conduct meetings open to the public, make advisory committee materials publicly available, and disclose documents in the manner required by FACA, Defendant is violating NEDC's statutory right to obtain information concerning these committees and their recommendations, and to disseminate that information to its members and

the public, as well as to present information to the Corps' advisory committees and to the Corps itself. Moreover, by failing to ensure the membership of advisory committees was fairly balanced and that the committees are structured such that the committees are not inappropriately influenced by any special interest, as required under FACA, the Corps' actions are harming NEDC's members by establishing a decision-making process that may allow mining in Oregon's rivers in a manner that will affect NEDC's members' interests in those areas.

12. In addition, because the Corps' advisory committees and their recommendations are playing and will continue to play an important role in the Corps' decision-making on whether and how to authorize commercial gravel mining in the Chetco, and subsequently in other Oregon watersheds, NEDC members' interests in protecting Oregon's natural resources are threatened by the Corps' unlawful use of these committees.

13. For example, the Corps' proposed RGP authorizing commercial gravel mining in the Chetco, that is the result of the actions of the Corps' advisory committees, will harm NEDC's members' recreational, scientific and aesthetic interests, including boating, canoeing, kayaking, fishing, sightseeing, birdwatching, and wildlife viewing in the Chetco River and the surrounding region by significantly impairing the water quality and habitat quality of the Chetco River. The Corps' use of unlawful advisory committees and their recommendations therefore threatens the interests of NEDC members who reside near and regularly visit, use, and enjoy the Chetco River.

14. These FACA violations also injure NEDC and its members because the issuance of an RGP, directly influenced by these illegal advisory committees, largely undermines NEDC's long standing effort to secure protections for threatened and endangered species and the habitat upon which such species depend. Absent the process currently employed, relying on its advisory committees to consider RGPs, the Corps would be less likely to authorize commercial gravel

mining that will negatively affect the threatened and endangered species that rely on rivers currently under considering through this process.

15. These FACA violations also injure NEDC and its members because the Corps' action authorizing in-stream gravel mining in Oregon—which the Corps' illegal advisory committees directly influence—could result in increased commercial gravel extraction in Oregon, well beyond the Chetco River. Specifically, the Corps' stated goal of using the advisory committees to aid in the development and issuance of RGPs, which are meant to streamline the permitting of recurring activities that are similar in nature, increases the likelihood that the Corps will permit more mining operations throughout the state, pursuant to a process that fails to adequately address the significant impacts these operations will have on Oregon's waters. Thus, the Corps' use of illegal advisory committees and their recommendations threatens NEDC members who reside near and regularly visit, use, and enjoy Oregon watersheds.

16. On information and belief, because the Corps relied on information provided by and the recommendations of two illegal advisory committees in developing and proposing the Chetco River RGP, a permanent injunction preventing the Corps from using these recommendations obtained in violation of FACA and ordering the Corps to provide to NEDC a full and complete copy of all information concerning these committees and their recommendations will bring the Corps into compliance with FACA, with regard to this proposal.

17. Furthermore, on information and belief, because the Corps charged the illegal advisory committees with evaluating whether the mining of gravel from Oregon rivers can be supported on a watershed basis, enjoining the Corps from continuing to use the advisory committees, unless and until, the Corps establishes or utilizes FACA-complying advisory committees, will ensure NEDC has access to, and the opportunity to participate in, the Corps'

decision-making process regarding the permitting of in-stream gravel mining to the full extent permitted by FACA. NEDC will then be able to obtain information concerning these committees and their recommendations, and to disseminate that information to its members and the public, as well as to present information to the Corps advisory committees and to the Corps prior to the Corps developing and issuing gravel mining permits on other Oregon rivers.

18. In addition, the aesthetic, recreational, scientific, and spiritual interests of NEDC's members in the Chetco River, and critically imperiled species, including the federally-protected coho salmon that are found in the river, have been adversely affected and will be irreparably injured if NMFS continues to act and fails to act as alleged herein. Threats to listed anadromous fish species, such as the coho, are a detriment to achieving NEDC's goals of protection and restoration, and this group's members and staff continue to be injured by NMFS's actions. NMFS's failure to comply with the ESA and the APA cause actual, concrete injuries. The relief sought would redress these injuries.

19. Defendant United States Army Corps of Engineers ("Corps") is an agency of the United States Department of the Army. The Corps is responsible for the lawful administration of the Clean Water Act, 33 U.S.C. § 1344, and is the federal agency that established the advisory committees at issue in this action.

20. Defendant National Marine Fisheries Service ("NMFS") is an agency of the U.S. Department of Commerce. NMFS is responsible for the lawful administration of the ESA with respect to anadromous fish, such as those at issue in this case. NMFS issued the Biological Opinion challenged in this action.

STATUTORY FRAMEWORK

A. The Federal Advisory Committee Act

21. Congress passed FACA to ensure that new advisory committees will be established sparingly and only when essential, to ensure that such committees are terminated before they outgrow their usefulness, to impose uniform procedures on those committees that are indispensable, and to ensure that Congress and the public are informed on the number, purpose, membership, activities, and cost of any such committees. 5 U.S.C. App. II § 2(b).

22. FACA defines an “advisory committee” as including “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof” “established or utilized by one or more agencies, in the interest of obtaining advice or recommendations.” 5 U.S.C. App. II § 3(2).

23. When an agency establishes such an advisory committee it must ensure creating the committee is “in the public interest,” 5 U.S.C. App. II § 9(2), the committee is “fairly balanced in terms of points of view represented and the function to be performed,” *id.* § 5(b)(2), and is not structured such that the committee may be “inappropriately influenced by the appointing authority or by any special interest.” *Id.* § 5(b)(3).

24. If these criteria are satisfied, and a committee is formed, the agency must file a charter for the committee with the head of the agency to which it reports and with the House and Senate committees having legislative jurisdiction over the agency. *Id.* § 9(c).

25. Once in operation, the advisory committee must give advance notice in the Federal Register of any meetings, hold all meetings open to the public, keep detailed minutes of each meeting and copies of all reports received, issued, or approved by the advisory committee, and make its records available for public inspection and copying at a single location. *Id.* § 10(b).

B. The Endangered Species Act

26. Recognizing that certain species of plants and animals “have been so depleted in numbers that they are in danger of or threatened with extinction,” 16 U.S.C. § 1531(a)(2), Congress enacted the ESA with the express purpose of providing both “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 . . .” Id. § 1531(b). The duties the ESA imposes on the Secretary of Commerce have been delegated to the Director of the National Marine Fisheries Service (“NMFS” or “the Service”). 50 C.F.R. § 402.01(b).

27. The ESA requires NMFS to list species either as threatened or endangered based on the present or threatened destruction, modification or curtailment of a species’ habitat or range, as well as other factors. 16 U.S.C. § 1533(a)(1). An endangered species is one “in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6). A threatened species is one that is “likely to become an endangered species within the foreseeable future.” Id. § 1532(20).

28. Concurrently with listing a species, NMFS also must designate the species’ “critical habitat.” 16 U.S.C. § 1533(a)(3). Critical habitat is the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations. Id. § 1532(5)(A). Critical habitat is the habitat essential for the recovery of the species, and when designing such habitat, the Service must identify the “principal biological or physical constituent elements . . . that are essential to the conservation of the species,” commonly referred to as Primary Constituent Elements (“PCEs”). 50 C.F.R. § 424.12(b)

29. Under section 7 of the ESA, all federal agencies must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). This duty must be met “in consultation with and with the Assistance of the [Service] . . .” Id.

30. Under the regulations implementing this “consultation” process, each federal agency is required to prepare a Biological Assessment to determine whether its activities “may affect” a listed species. 50 C.F.R. § 402.14(a). If it is determined that an action “may affect” a listed species, the action agency must engage in “formal consultation” with the Service. Id.

31. In this formal consultation, the action agency provides the Service with “the best scientific and commercial data available . . . for an adequate review of the effects” the action may have on listed species. 50 C.F.R. § 402.14(d). The Service must, in turn, review the information received and all other relevant information, evaluate the status of the listed species, and issue a “biological opinion” detailing “how the agency action affects the species,” 16 U.S.C. § 1536(b)(3)(A), and determining whether the agency action is likely to jeopardize the species or adversely modify the species’ critical habitat. If the action’s impact to a species or to a species’ habitat threatens *either* the recovery or survival of the species, the biological opinion must conclude that the action jeopardizes the species, adversely modifies critical habitat, or both. 50 C.F.R. §§ 402.14(g), (h).

32. In assessing the impact of an agencies’ actions on a species, the Service is required to “[e]valuate the effects of the action and cumulative effects on the listed species . . .” 50 C.F.R. § 402.14(g)(3). The effects to be considered include both the effects of the action itself, and of all other activities that “are interrelated or interdependent with that action, that will

be added to the environmental baseline.” Id. § 402.02. The environmental baseline, in turn, “includes the past and present impacts of all Federal, State or private actions and other human activities in the action area, [and] the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal . . . consultation.” Id.

33. If, after the conclusion of the consultation process, the Service concludes that the action is likely to jeopardize a listed species or result in the adverse modification or destruction of designated critical habitat, and therefore will violate Section 7, the Service “shall suggest those reasonable and prudent alternatives which,” if implemented, would prevent such a violation. 16 U.S.C. § 1536(b)(3)(A).

34. In any event, if the action will result in a “take” of listed species, the action may not go forward unless the Service provides an “incidental take” statement (“ITS”), which allows the agency to “take” a limited number of the species, if the action agency undertakes certain other conservation measures on behalf of the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14.

35. The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. Id. § 402.14(i)(1)(i), (ii), (iv). If during the course of the action the amount or extent of incidental taking specified in the ITS is exceeded, the action agency must immediately reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

36. A biological opinion also contains measures meant to further reduce the adverse impacts of the action on protected species. 50 C.F.R. § 402.13.

37. The ESA prohibits an agency from proceeding with an action which may affect

listed species before the consultation process is completed—i.e., it cannot “insure” that its actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the species’ designated critical habitat until formal consultation is completed and the NMFS has rendered its expert opinion on the matter. 16 U.S.C. § 1536(d).

38. Regardless of the outcome of the consultation process, it remains each agency’s continuing obligation to “determine whether and in what manner to proceed with the action in light of its section 7 obligations” 50 C.F.R. § 402.15(a).

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS

A. The Executive Team and the Technical Team

39. On or before April 25, 2007, the Corps began to engage various federal agencies, state agencies, and mining interests in a process to determine the future of in-stream gravel mining in Oregon.

40. The relationship among these entities was formalized on or around July 10, 2008, when various federal and state agencies and the mining industry agreed to work collaboratively to develop a permitting plan for in-stream aggregate mining on Oregon’s gravel-producing rivers.

41. Under this agreement, the Corps expressly created the Gravel Executive Team and the Gravel Technical Team. The Corps and the Oregon Department of State Lands (“DSL”) act as co-chairs of both committees. In addition to the federal and state agencies,¹ the Teams include representatives from the Oregon Concrete and Aggregate Producers Association

¹ The Teams include agency representatives from the Corps, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Environmental Protection Agency, Oregon Department of Environmental Quality, Oregon Department of State Lands, Oregon Department of Fish and

(“OCAPA”), participating county planning Departments, and commercial mining operators.

42. The Teams were established “to strategically evaluate, on a watershed basis, whether the mining of gravel from Oregon rivers can be supported” with the “overall goal” of “developing [permits] for commercial gravel mining activities in various watershed throughout Oregon.”

43. To these ends, pursuant to the agreement among the members of the committees, the Technical Team’s task is to “scope, collect, review and analyze data and other information to present recommendations in a coordinated fashion to the Executive Team for the particular watershed being evaluated.” Thus, the Technical Team is to “provide scientific and technical input to the Executive Team and the Corps/DSL to develop the anticipated” permits allowing gravel mining on the selected rivers. This information was intended to “inform the agency decision-making on these permits.”

44. The Executive Team, in turn, is charged with “ensur[ing] progress continues, and to provide support and direction to the Technical Team.” The Executive Team also “will approve or revise recommendations made by the Technical Team, and will develop strategies to distribute informational materials to potential operators and to fund necessary studies and data collection in support of the development of the watershed specific [permits].”

45. In carrying out the respective duties in providing information and recommendations to the Corps on the potential mining of the Chetco River and other rivers in Oregon, the Executive and Technical Teams have met regularly over the past several years.

46. For example, the Technical Team met on at least six occasions, including meeting on October 1, 2008, August 19, 2008, April 24, 2008, February 25, 2008, February 1, 2008, and

Wildlife, and Oregon Department of Land Conservation and Development.

November 20, 2007. The Executive Team, in turn, has met or was scheduled to meet on at least five occasions, including August 11, 2009, April 9, 2009, February 27, 2008, January 23, 2008, and December 19, 2007. The Teams also held a Chetco Gravel Mining Workshop on September 24 and 25, 2009; the public was excluded from this workshop. In addition, the agency members of the Executive Team met on May 23, 2008.

47. Although the Executive Team and the Technical Team are clearly subject to FACA's requirements, the Corps has not complied with FACA in any fashion with respect to the operations of these committees and their review of potential gravel mining in the Chetco River—the Corps never filed a charter for the committees, the timing and locations of the Teams' meetings were not disclosed to the public, the meetings were not open to the public, and the required committee materials were not made publicly available.

48. For example, as discussed below, the Technical Team provided a list of recommended measures for inclusion in any RGP for the Chetco River. The Corps did not publicly release this document. Plaintiff, for instance, only became aware of the Technical Team's recommendations when the document summarizing the recommendations was included as an attachment to NMFS's comments, dated April 5, 2010, on the initial public notice on the proposed RGP.

49. The Corps also never made the required findings that the Teams were "in the public interest," "fairly balanced," and free of members with inappropriate special interests.

50. In addition to Corps staff, and staff of other federal and state agencies, the Executive Team and the Technical Team included other persons predisposed to support continuation of extensive in-stream gravel mining not only on the Chetco River, but throughout Oregon—namely representatives from the mining industry and the mining operators on the

Chetco River.

51. For example, several members of the Executive Committee are employed by or are representatives of the mining companies seeking to operate on the rivers under consideration or are employed by or are representatives of industry groups that advocate on behalf of mining interests, including Rich Angstrom, representing Oregon Concrete Aggregate Producers Association, Ted Freeman and Bill Yocum, representing Freeman Rock, Inc. and Joy Smith, representing Umpqua Sand and Gravel, among others. None of these members could be expected to assess the potential aggregate removal, and the associated impacts on the river, objectively and without bias.

52. Similarly, several members of the Technical Team, including Chris Lidstone, a consultant contracted by OCAPA, and Robert Elayer and Bill Yocum, representing the mining interests, could not be expected to assess the potential aggregate removal, and the associated impacts on the river, objectively and without bias.

53. On information and belief, the Corps is still obtaining, and intends to continue to obtain, advice and recommendations from these advisory committees concerning gravel mining on several other Oregon rivers.

54. Indeed, the review conducted by the Teams of gravel mining on the Chetco River was then meant to “serve as a model for evaluating other river systems.” Thus, “[t]he Technical Team, in coordination with the gravel industry, will recommend the priority of future river systems to be studied.”

55. According to the Corps, as of July 2008, the Umpqua River, Rogue River, Tillamook River, and Coquille River systems had been identified as the next systems to be “studied.”

B. Gravel Mining on the Chetco River

56. The result of the work of the Technical Team and the Executive Team was a proposed RGP to permit in-stream aggregate mining in the lower Chetco River. However, the Corps' proposed RGP differs significantly from the recommendations of the Technical Team.

57. On or around February 5, 2010, the Technical Team provided the Executive Team with a summary of recommended measures to be included in any proposed RGP for gravel mining on the Chetco River that the Technical Team "believes would result in maintenance and recovery of habitat of the Chetco River while providing aggregate to the industry."

58. These measures include, but are not limited to:

- a. an "annual bar maintenance reserve recruitment volume," or minimum reserve volume, that must be recruited into the lower Chetco River in order to maintain the existing condition of the river. The Technical Team determined this volume to be 26,000 cubic yards. Thus, according to the Technical Team, mining must not be authorized during years when less than 26,000 cubic yards of material enters the lower Chetco River. If the reserve volume is not met in a given year, the deficit will be carried forward until the cumulative influx exceeds 26,000 cubic yards per year. Therefore, the year after the minimum reserve is not met, a total of 52,000 cubic yards of material will have had to enter the system over the two years for mining to occur. If the 52,000 cubic yards cumulative reserve volume is not met in two years, the deficit will be carried over to the third year, etc.;
- b. a recommendation that the permit include a "multi-year cyclical approach in which extraction would occur at most every three years, allowing recruited

material to accumulate during the rest years.” This recommendation was necessary according to the Technical Team because “[t]he literature is clear that frequent disturbance increases adverse effects on the environment.” In addition, however, extraction may be allowed in any year when a large influx event—such as a “5-year influx event,” or approximately 120,000 cubic yards of material entering the system—would “reset” all gravel bars in the lower Chetco River, and “mask” the disturbance caused by the extraction; and

- c. a limit on the amount of gravel that may be extracted. The Technical Team notes that “[b]ecause the current state of the Chetco River gravel bars is incised, maintaining them at this level has negative physical and biological consequences.” Therefore, a percentage of the material that enters the system, above the minimum reserve volume, must be “left to function in the river and recover habitats.” As a result, the Technical Team recommended that sixty percent of the recruited material above the minimum reserve volume could be made available for extraction under a permitting scheme that included mandatory rest years. If a regime allowing annual mining is considered, the Technical Team recommended that fifty percent of the material entering the system above the minimum reserve volume must be left in the river.

59. On March 5, 2010, the Corps published a Public Notice for a proposed RGP for the Chetco River, which would allow extraction activities to occur from 2010 to 2015. The proposed RGP would allow the removal of gravel for commercial purposes from three locations within the lower Chetco River. The proposed RGP includes the following specific parameters and limitations: a minimum reserve volume; bar form retention requirements; general

construction details (during gravel removal); an adaptive management strategy; a monitoring plan, and enhancement actions.

60. The proposed RGP, however, failed to follow many of the Technical Team's specific recommendations. For example, as NMFS notes in its comments, dated April 5, 2010, the proposed RGP failed to (1) "provide for recovery of physical and biological features which are currently degraded in the Chetco River" by allowing eighty percent of the "influx volume exceeding the maintenance volume to be extracted when the three-year cycle is triggered;" (2) prohibit extraction within the estuary; (3) establish individual bar extraction limits by allocating a percentage of the volume of the extractable material per bar in order to "prevent [the] concentration of extraction at individual bars;" (4) "[g]uarantee that high quality data collection and analysis will occur by designating an approved service provider and clarifying how they will be compensated;" (5) "[m]aintain review team effectiveness by ensuring state and Federal agency technical representation throughout the permit duration; (6) "[c]orrectly identify a five-year influx event as 120,000 cubic yards."

61. On June 7, 2010, the Corps released a second notice. In this iteration of the proposed RGP the Corps dropped the estuary from consideration and applied individual bar extraction allocations, as recommended by the Technical Team and others. The Corps, however, abandoned other Technical Team recommendations. Most notably, the Corps removed the requirement of "rest years" during the permit cycle, instead allowing extraction activities to occur in any year that minimum reserve volume was met, yet maintained the allowance that up to eighty percent of material recruited into the system above the minimum reserve volume would be available for extraction.

62. On July 27, 2010, the Corps released a final notice, again modifying the proposed

permit, this time to allow the extraction of significantly more material in 2010 than was previously considered under the proposed RGP. This change was the result of the Corps' announcement that it intended to include the gravel recruited into the lower Chetco River during 2009 for the extraction in 2010, thus allowing 23,040 cubic yards of material to be removed from the river in 2010, if the proposed RGP is issued.

C. The ESA Consultation

63. The Chetco River provides vital habitat for several federally protected species including the Southern Oregon/Northern California Coasts (SONCC) coho salmon (*Oncorhynchus kisutch*), a threatened species protected under the ESA, 70 Fed. Reg. 37,160 (June 28, 2005), the threatened southern eulachon (*Thaleichthys pacificus*), 75 Fed. Reg. 13,012 (Mar. 18, 2010) and the threatened North American green sturgeon (*Acipenser medirostris*), 71 Fed. Reg. 17,757 (Apr. 7, 2006). The Chetco River is designated as critical habitat for SONCC coho, 70 Fed. Reg. 52,630 (Sept. 2, 2005), and for sturgeon, 74 Fed. Reg. 52,300 (Nov. 9, 2009).

64. On July 26, 2010, the Corps sent a BA to NMFS, along with a letter requesting formal consultation on the potential effects of authorizing the proposed RGP to mine gravel at three sites in the Chetco River.

65. In that BA, the Corps concluded that the action, to issue a five-year RGP under its authority found in section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act to remove gravel from three sites in the Chetco River near Brookings, Oregon, is likely to adversely affect the SONCC coho, its critical habitat, and designated EFH.

66. The Corps also concluded that the proposed action is not likely to adversely affect the southern distinct population segment ("DPS") of the southern eulachon, the southern DPS of North American green sturgeon, or critical habitat designated for southern green sturgeon.

67. NMFS undertook the required review of the project, pursuant to section 7 of the ESA and its implementing regulations, and issued its Biological Opinion on September 3, 2010.

68. In the course of this review, NMFS notes that the Chetco River population of SONCC coho salmon is functionally independent from other coho populations and the size and location of the Chetco River makes it a very important link between the Rogue River SONCC coho salmon populations and the Northern California SONCC coho salmon populations.

69. In contrast to reports that the Chetco River formerly supported an abundant coho population, the estimated current coho salmon abundance in the Chetco River of 50 to 100 individuals is likely 0.1% of the historical population. At this level, the population is likely at or even under the depensation threshold, a population level at which “per capita growth rates decrease due to density dependent factors such as failure to find mates.” NMFS states that “[d]epensation results in a negative feedback loop that accelerates a population towards extinction.”

70. The primary factors now limiting the success of SONCC coho salmon in the Chetco River watershed include, but are not limited to, low gradient spawning habitat and over-wintering habitat, water temperature, fine sediment transport and storage, number of roads, and estuary habitat.

71. Addressing the probable impacts of the proposed action, NMFS identifies a “direct relationship exists between the amount of substrate removed from a stream and its geomorphic conditions,” stating that aggregate extraction “disturbs the equilibrium within a stream channel by intercepting material load moving within a dynamic system and triggers an initial morphological response to regain the balance between supply and transport.” These affects, in turn, will likely result in: “(1) Increased width/depth ratio; (2) bank erosion; (3) altered

sediment transport; (4) decreased sinuosity; and (5) altered sediment sorting processes.”

72. Given these impacts, based on the proposed RGP, NMFS concluded that the geomorphic conditions will degrade in 2010, but will “improve” during the rest of the permit cycle. However, the proposed mining “will delay the improvement of geomorphic conditions from what would occur undisturbed by extraction.”

73. The Biological Opinion notes “a direct relationship exists between the status and trend of geomorphic conditions within the lower Chetco River, carrying capacity of the action area, and survival of juvenile SONCC coho salmon to smolt stage.” Thus, the initial degradation of habitat conditions and the subsequent slowing of the recovery rate of the highly degraded Chetco River will necessarily delay the recovery of the species. Yet, the Biological Opinion fails to address what impact this delay in improvement of the species may have on the potential recovery of the species, despite the fact that impeding a species’ progress toward recovery exposes it to additional risk, and thus reduces its likelihood of survival.

74. Further, after reviewing the affects of the proposed mining on the species’ habitat, NMFS states, “the project will adversely affect the cover/shelter, food, water quality, safe passage, and water temperature PCEs.” PCEs again, are the physical and biological features identified as essential to the conservation of the listed species. Moreover, NMFS declares that the “project will delay the rate of improvement of the geomorphic conditions that affect five PCEs in 2010 and slow the rate thereafter.” Despite this—and without specifically analyzing what impact these affect will have on the habitat’s capacity to contribute to the species’ likelihood of survival or recovery—NMFS concludes that the proposed action “will still allow improvement over baseline conditions at the watershed scale,” and thus, because the “critical habitat will remain functional . . . to serve the intended conservation role for the species,” the

action is not likely to result in the destruction or adverse modification of SONCC coho salmon critical habitat.

75. Absent from the Biological Opinion is any discussion of, reference to, or comparison of the proposed RGP to the recommendations of the Technical Team. This omission is notable given NMFS's role as a member of the Technical Team, and its endorsement of the Technical Team's review of the best available science and its recommendations based on that review—noting on April 5, 2010 that “[n]o information has come available since the completion of [the Technical Team's recommendation to the Executive Committee] that would change the recommendation, thus NMFS maintains support of it and recommends the Corps does likewise.”

PLAINTIFF'S CLAIMS FOR RELIEF

Claim One: Violation of Federal Advisory Committee Act

United States Army Corps of Engineers: Executive Team and Technical Team

76. Plaintiff hereby incorporates by reference all preceding paragraphs.

77. Pursuant to FACA an “advisory committee” is “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof” “established or utilized by one or more agencies, in the interest of obtaining advice or recommendations.” 5 U.S.C. App. II § 3(2).

78. An advisory committee established by a federal agency that meets this definition, must be “in the public interest,” 5 U.S.C. App. II § 9(2), “fairly balanced in terms of points of view represented and the function to be performed,” *id.* § 5(b)(2), and structured such that the committee may be “inappropriately influenced by the appointing authority or by any special interest.” *Id.* § 5(b)(3).

79. Once in existence, any such advisory committee must give advance notice in the

Federal Register of any meetings, hold all meetings open to the public, keep detailed minutes of each meeting and copies of all reports received, issued, or approved by the advisory committee, and make its records available to the public for inspection and copying at a single location. Id. § 10(b).

80. By establishing and utilizing the Executive Team and the Technical Team, permitting the Teams to meet and deliberate without complying with FACA, and then obtaining and using the information and recommendations provided by the Teams, the Corps is in violation of FACA, and is acting in a manner which is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

**Claim Two:
Violation of Federal Advisory Committee Act**

United States Army Corps of Engineers: Executive Team and Technical Team

81. Plaintiff hereby incorporates by reference all preceding paragraphs.

82. By engaging in a pattern and practice of violating FACA, 5 U.S.C. App. II, by continuing to convene meetings of the Executive Team and Technical Team and continuing to obtain advice and recommendations from these advisory committees on gravel mining in Oregon's rivers, the Corps has acted, and is acting, in a manner which is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

**Claim Three:
Violation of the Endangered Species Act**

National Marine Fisheries Service: Jeopardy Determination

83. Plaintiff hereby incorporates by reference all preceding paragraphs.

84. The ESA requires NMFS to insure that federal actions are not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a). An action

is deemed to jeopardize the continued existence of a species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery” the species. 40 C.F.R. § 402.02.

85. The Biological Opinion’s jeopardy conclusion does not adequately consider or describe whether or how the action will reduce appreciably the likelihood of both survival and recovery of SONCC coho.

86. NMFS also fails to address adequately the short-term impact on the population that will result from the proposed action, particularly the mining that will be allowed to occur in 2010.

87. The Biological Opinion fails to adequately evaluate the effects and cumulative effects of the action and add those effects to the existing environmental baseline to determine whether the action will jeopardize the continued existence of the species.

88. The Biological Opinion’s jeopardy conclusion is based on assumptions that the Corps will enforce and the applicant will comply with future management, monitoring, and mitigation measures that are not reasonably certain to occur or to offset the anticipated affects.

89. The conclusions in the Biological Opinion that the actions are not likely to jeopardize the continued existence of SONCC coho are not based on the best available science, as required by the ESA.

90. For each of the above reasons, and others, NMFS’s Biological Opinion and its jeopardy conclusion is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706.

**Claim Four:
Violation of the Endangered Species Act**

**National Marine Fisheries Service: Destruction or Adverse Modification of
Designated Critical Habitat Determination**

91. Plaintiff hereby incorporates by reference all preceding paragraphs.

92. ESA § 7(a)(2) requires NMFS to insure that projects are not likely to “result in the destruction or adverse modification of [designated critical] habitat” of a listed species. 16 U.S.C. 1536(a)(2). If the action’s impact on a species’ habitat threatens *either* the recovery or survival of the species, the Biological Opinion must conclude that the action adversely modifies critical habitat. Further, an action exceeds this threshold if the affects “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.

93. NMFS failed to perform the required analysis of how the proposed in-stream gravel mining on which consultation was undertaken would affect the SONCC coho designated critical habitat’s value for recovery of the species.

94. The Biological Opinion fails to adequately evaluate the effects and cumulative effects of the action and add those effects to the existing environmental baseline to determine whether the action will adversely modify critical habitat.

95. The Biological Opinion further fails to evaluate whether short-term habitat degradation caused each year under the proposed gravel mining, particularly the mining proposed for the 2010 mining season, will reduce the coho’s ability to survive or recover.

96. The Biological Opinion’s conclusion regarding the impact to the species’ designated critical habitat inappropriately relies on assumptions that the Corps will enforce and the applicant will comply with future management, monitoring, and mitigation measures that are

not reasonably certain to occur or to offset the anticipated affects.

97. The conclusion in the Biological Opinion that the proposed mining is not likely to destroy or adversely modify designated SONCC coho critical habitat is not based on the best available science, as required by the ESA.

98. For each of the above reasons, and others, NMFS's Biological Opinion and its adverse modification conclusion is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706.

**Claim Five:
Violation of the Endangered Species Act**

National Marine Fisheries Service: Incidental Take Statement

99. Plaintiff re-allege each preceding paragraph as though stated in full herein.

100. Section 9 of the ESA prohibits any person from “taking” a threatened or endangered species. 16 U.S.C. § 1538(a)(1); see also 50 C.F.R. § 17.31. “Take” is defined broadly to include harassing, harming, wounding, killing, trapping, capturing or collecting a listed species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

101. An exception to this otherwise strict prohibition is made available to federal agencies at the conclusion of the formal consultation process when the Service issues an ITS. 16 U.S.C. § 1536(b)(4). Only if the terms and conditions of the ITS are followed, however, is the agency exempted from the take prohibition. Id. § 1536(o)(2).

102. A Biological Opinion should include an ITS if take of a listed species may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms and Conditions that must be complied with to

implement the Reasonable and Prudent Measures. Id. § 402.14(i)(1)(i), (ii), (iv).

103. The ITS also acts as an important check on the proposed action because, if during the course of the action an agency exceeds the amount or extent of incidental taking specified in the ITS, the action agency must immediately reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

104. Here, NMFS found in its Biological Opinion that the incidental take of listed salmon is likely to result from the proposed Chetco River RGP. Instead of assessing likely actual take of salmon, however, NMFS simply used the proposed mining's parameters as the surrogate measure of, as well as the limit of, incidental take of listed salmon.

105. It is thus not possible for NMFS to insure that the permitted level of incidental take does not result in jeopardy to the listed salmon affected by the proposed action. NMFS has therefore acted arbitrarily, capriciously, and otherwise not in compliance with the ESA, 16 U.S.C. § 1536(a)(2) and §1536(b)(4), in violation of the APA, 5 U.S.C. § 706.

106. Furthermore, NMFS's ITS for the proposed RGP fails to provide a necessary clear indication of when incidental take levels will be exceeded and consultation must be reinitiated. NMFS has thus acted arbitrarily, capriciously, and otherwise not in compliance with the ESA, 16 U.S.C. §§ 1536(a)(2); 1536(b)(4); 50 C.F.R. § 402.14(i), in violation of the APA, 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully request that this Court:

1. declare that the Corps has violated FACA with respect to the Executive Team and the Technical Team;
2. declare that the Corps is engaged in a pattern and practice of violating FACA;

3. order the Corps to publicly release all materials related to the Executive Team and the Technical Team which are covered by Section 10 of FACA, 5 U.S.C. App. II, § 10;
 4. enjoin the Corps from using, or relying upon, any information produced by or recommendations received from the Executive Team, the Technical Team, or both;
 5. enjoin the Corps from continuing to engage in a pattern and practice of violating FACA;
 6. declare that NMFS has violated, and continues to violate, the Endangered Species Act and the Administrative Procedure Act;
 7. declare that NMFS's Biological Opinion and associated incidental take statement violates the ESA and the APA;
 8. hold unlawful and set aside NMFS's Biological Opinion and its associated incidental take statement;
 9. grant plaintiff such preliminary and permanent injunctive relief as it might from time to time request and as may be necessary to protect the Plaintiff, the environment and ESA-listed species from suffering irreparable harm until the Court decides the merits of this case or the agencies comply with the law;
 10. award plaintiff its costs, attorneys' fees, and other disbursements for this action;
- and
11. grant plaintiff such other and further relief as this Court may deem just and proper.

DATED this 19 day of September, 2010

Respectfully submitted,



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