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*Via Certified Mail - Return Receipt*

February 11, 2011

Rod Huls, General Manager  
Bodega Bay Public Utility District  
265 Doran Park Road  
P.O. Box 70  
Bodega Bay, CA 94923

John S. Locey, P.E., President  
and Registered Agent for Service  
Brelje & Race Consulting Civil Engineers  
475 Aviation Boulevard, Suite 120  
Santa Rosa, CA 95403

Gary Locke, Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

**Re: Notice of Violations and Intent to File Suit Under the Endangered Species Act (ESA §9 and §10 - Illegal "Take" of Listed Salmonids)**

Dear Mr. Huls, Mr. Locey and Secretary Locke:

## NOTICE

This letter serves to provide a 60-day notice pursuant to the federal Endangered Species Act, ("ESA") 16 U.S.C. §§ 1531-1544, as to the intentions of Northern California River Watch ("River Watch") to initiate legal proceedings under the federal ESA pursuant to its citizen suit provision as set forth in 16 U.S.C. § 1540(g). Following the expiration of the 60-day hold period, River Watch intends to file suit in federal court against Bodega Bay

Public Utility District and Brelje & Race Consulting Civil Engineers (hereafter, collectively “BBPUD”) to enjoin them from violating the federal ESA or regulations issued under the authority of the ESA. River Watch also gives Notice by way of this letter to the Secretary of Commerce that after the expiration of the 60 day hold period, River Watch intends to file suit in federal court to enforce the ESA unless the Secretary of Commerce has commenced an action to impose a penalty pursuant to 16 U.S.C. § 1540(a) or, if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress the violations of the ESA as alleged in this Notice.

## STATUTORY FRAMEWORK

Under ESA § 9, 16 U.S.C. § 1538(a)(1)(B), it is unlawful for any person to TAKE a threatened or endangered species,. Under ESA § 4(19), 16 U.S.C. 1532(19), the term “TAKE” includes to harass, harm, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. TAKE includes direct as well as indirect harm and need not be purposeful. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995). In fact, a TAKE may even be the result of an accident. See *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9<sup>th</sup> Cir.1994). Harm to the habitat is a violation of the ESA.

Attempting to cause almost any level of injury to a threatened or endangered species or their habitat is also prohibited by law. TAKE is defined in the broadest possible manner to include every conceivable way in which a person can TAKE or attempt to TAKE any fish or wildlife creature or impair their habitat. *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8<sup>th</sup> Cir. 1989).

ESA § 9 is a strict liability statute such that the illegal TAKE need not be intentional. Cumulative acts that result in a TAKE are also actionable. For example, if water diversion in a critical habitat is caused by several rather than one entity, all entities in violation of the ESA may be prosecuted even if the act of one was insufficient to cause a TAKE.

The ESA not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party which bring about the acts exacting a taking. For instance a governmental third party pursuant to whose authority an actor directly exacts a taking may be deemed to have violated the ESA. *Strahan v. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir.1997) See also *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294 (8<sup>th</sup> Cir.1989); *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11<sup>th</sup> Cir.1998); *Sierra Club v. Yeutter*, 926 F.2d 429 (5<sup>th</sup> Cir. 1991).

The ESA has a broad citizen suit provision allowing any entity to commence a civil suit on its own behalf to enjoin any entity alleged to be in violation of any provision of the ESA or regulation issued under the authority thereof. A plaintiff can seek to enjoin both present activities which constitute an ongoing TAKE, as well as future activities which are reasonably likely to result in TAKE. See *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9<sup>th</sup> Cir. 1996).

## FACTUAL BACKGROUND

BBPUD is a public utility district located in the community of Bodega Bay. Its operations include providing potable water to the Bodega Bay district as well as sewage operations.

River Watch alleges BBPUD, in the course of operations, is responsible for water diversion practices including de-watering and pollution to critical habitat of listed and endangered salmonid species such as coho salmon, chinook salmon and steelhead trout, resulting in harm and a TAKE of threatened or endangered salmonid since at least the passage of the ESA. The diversion of water from listed salmonid habitat occurs multiple times a year. Statistics show that diversion is more extreme in dry years when fish are at greater risk. There is clear documentation these diversions have and will continue to harm, harass or kill protected fish species. All of the water courses adjacent to lands which BBPUD owns and/or operates are designated as listed salmonid habitat under the ESA.

According to the National Marine Fisheries Service (NMFS”), rapid draw downs of water resources near potential or actual salmonid habitat have caused a TAKE of listed salmonid species such as coho salmon and steelhead trout. Continuing practices such as water diversion, land use, chemical use and conversion have caused a TAKE and are a continuing threat of a TAKE of endangered salmonids. Water diversion by means of pumping for potable and non-potable use, is widespread and the harmful impacts on salmonid survival and recovery well documented. Listed salmonid populations in critical habitat are at very high risk of extinction due to loss of habitat due to de-watering.

## Protected Status and Habitat Needs

Coho salmon, chinook salmon, and steelhead trout are federally listed fish species protected under the ESA. Coho and chinook Salmon are listed as endangered; the steelhead trout is listed as threatened.

Coho salmon (*Oncorhynchus kisutch*) spend approximately the first half of their life cycle rearing and feeding in streams and small freshwater tributaries. Spawning habitat is small streams with stable gravel substrates. The remainder of their lifecycle is spent foraging in estuarine and marine waters of the Pacific Ocean. Adults (usually around 3 years old) migrate back from a marine environment into the freshwater streams and rivers of their birth in order to mate. They spawn only once and then die. Females prepare several redds (nests) where the eggs will remain for 6 to 7 weeks until they hatch.

Chinook salmon (*Oncorhynchus tshawytscha*) were listed as endangered in 1994. Critical habitat has been designated for the nine ESA-listed chinook salmon evolutionarily significant units (ESUs), which are essentially equivalent to distinct population segments (DPS) for the purpose of the ESA.

Juvenile chinook salmon may spend from 3 months to 2 years in fresh water before migrating to estuarine areas as smolts and then into the ocean to feed and mature. Chinook 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”, which mature in freshwater or return after 2 or 3 months in salt water. Scientific studies shows that unless smolts reach a certain size before ocean migration, they have little chance of survival.

There are different seasonal (i.e., spring, summer, fall, or winter) “runs” in the migration of chinook from the ocean to freshwater, even within a single river system. These runs have been identified on the basis of when adult chinook enter freshwater to begin their spawning migration. However, distinct runs also differ in the degree of maturation at the time of river entry, the temperature and flow characteristics of their spawning site, and the actual time of spawning. Freshwater entry and spawn timing are believed to be related to local temperature and water flow regimes. Adequate year round flows are essential to support the protected species throughout their life cycles.

Adult female chinook will prepare a redd in a stream area with suitable gravel type composition, water depth and velocity. She may deposit eggs in 4 to 5 “nesting pockets” within a single redd. Spawning sites have larger gravel and more water flow up through the gravel than sites used by other Pacific salmon. After laying eggs in a redd, adult chinook will guard the redd from a few days to nearly a month before dying. chinook eggs will hatch, depending upon water temperatures, between 3 to 5 months after deposition. Eggs are deposited at a time to ensure that young fry emerge during the following spring when the river or estuary productivity is sufficient for juvenile survival and growth.

On January 5, 2006, NMFS listed nine DPS of steelhead trout (*Oncorhynchus mykiss*) as threatened and one as endangered. Some of them had been previously listed between 1996 and 1998, but, because of legal and other issues, all listings were reaffirmed and/or revised in 2006. Critical habitat for ten west coast steelhead DPS was designated on September 2, 2005.

These are a unique species. Individuals develop differently depending on their environment. While all steelhead hatch in gravel-bottomed, fast-flowing, well-oxygenated rivers and streams, some stay in fresh water all their lives, and are then known as rainbow trout. The steelhead that migrate to the ocean develop a much more pointed head, become more silvery in color, and typically grow much larger than the rainbow trout.

Adults migrate from a marine environment into the freshwater streams and rivers of their birth in order to mate. Unlike other Pacific salmonids, they can spawn more than once. Young animals feed primarily on zooplankton. Adults feed on aquatic and terrestrial insects, mollusks, crustaceans, fish eggs, minnows, and other small fishes.

Stream-maturing steelhead (summer-run steelhead in the Pacific Northwest and northern California) enter freshwater in a sexually immature condition between May and October and require several months to mature and spawn.

Ocean-maturing steelhead (winter-run steelhead in the Pacific Northwest and northern California) enter freshwater between November and April with well-developed gonads and spawn shortly thereafter. Coastal streams are dominated by winter-run steelhead, whereas inland steelhead of the Columbia River basin are almost exclusively summer-run steelhead.

Adult female steelhead will prepare a redd in a stream area with suitable gravel type composition, water depth, and velocity. She may deposit eggs in 4 to 5 nesting pockets within a single redd. The eggs hatch in 3 to 4 weeks.

Steelhead are capable of surviving in a wide range of temperature conditions. They do best where dissolved oxygen concentration is at least 7 parts per million. In streams, deep low-velocity pools are important wintering habitats. Spawning habitat consists of gravel substrates free of excessive silt.

Coho and chinook salmon as well as the steelhead trout require perennial aquatic habitat and adequate stream flows 24 hours a day/365 days a year in order to live.

## Habitat Protection

These species of fish spawn and mature in freshwater, migrate to the sea to finish growing and maturing, and then return to the creeks of their birth to spawn again. These anadromous fish, in order to survive long enough to migrate to the sea, require access to freshwater habitat with year-round flows, deep pools, adequate food, adequate shelter, clean cold waters and egress back to the ocean.

Upland and riparian habitats associated with aquatic habitat are essential to maintain the populations of these species as they provide food and essential shade to cool the ambient air and protect the streams from the heating effects of solar radiation through thin or no shade canopy available. Maintaining the integrity of aquatic sites by protecting them from disturbance and supporting the normal functions of the aquatic habitat is critical and known to be an important factor in reducing water temperature and sedimentation of creeks.

Loss and adverse modification of Class I, II, III, and IV streams, well development activities, water diversions, scrapping of the land, and lined reservoir development as well as forest conversions are major contributors to the TAKE of these protected species.

River Watch contends BBPUD must cease all operational, land use, and management activities harmful to these listed fish species and must develop a plan which will prevent such future harmful activities.

## Diversions

The effect of diversions of water on listed salmonids and their habitat includes the rapid drawn down of both flows and of vital pools natural to creeks and rivers, which has occurred due to the practices and operations of BBPUD. Listed fry utilize shallow gravels where they are safe and can grow to become proficient swimmers. Juvenile listed salmonids spend a summer in the creek in which they were born and are completely dependent upon adequate flows, cool water, and deep pools in order to avoid predation. As described herein, when the flows are reduced, such as they have been by the practices of BBPUD, water recedes from the gravels and young become stranded in place where they quickly die. Even when pools are not drained entirely, they become warm and shallow exposing smolts to overcrowding and predators.

The rapid draw downs which harmed and continue to harm listed salmonids are associated with both direct diversions from surface waters and with pumping of wells in proximity to creeks which has occurred in the past and continues to occur due to practices of BBPUD in violation of the ESA. BBPUD's actions and practices are alleged to have de-

watered several habitats within a couple of hours. The listed salmonids utilizing their native streams to grow and mature over the spring and summer have perished. They continue to die in the absence of water in shallow warm pools, are killed due to their sudden exposure to predators, and, in what little water is left, are subjected to unhealthy and often times lethal biological conditions such as nitrification and utrafication.

Stream flows of specific depth and volume are needed to sustain listed salmonids in their various life stages. Spawning listed salmonids need sufficient flows to migrate upstream. Flows are needed to cover redds and enliven (newly hatched fish). Stream flow is needed for rearing purposes, to support food life and access to food and allow movement to refuge to avoid predation. Flows also affect stream temperature that can cause thermal barriers, stress fish, induce disease and low growth rate, and induce predation. The practices of BBPUD such as over-utilization of water resources due to pumping and polluting critical habitat, are adversely affecting stream flows thus harming the listed salmonids as well as their habitat.

Stream flows have been shown to be diminished and interrupted by the diversion. In some cases there are diversion-induced dry sections of streams that have never been seen until recent times. These stressors, related to low flows, end up producing smaller smolts, which have a very high rate of mortality in the ocean.

### Land Use

BBPUD's practices have harmed and continue to harm listed salmonids by compromising the integrity of the riparian vegetation due to the intrusions of tractors, people, domesticated animals, and chemicals. Healthy riparian areas provide the food source for fish as well as provide shelter and shade. The removal and thinning of the canopy of the riparian zone has harmed and continues to harm listed salmonids.

The acts and practices of BBPUD as described in this Notice have resulted in a TAKE of protected species which includes harm to listed salmonid species and habitat. Water use and reclamation practices are required by law to be conducted in such a manner so as to avoid impacts to listed species. Thousands of acres of water consuming, recharge depleting, and illegal discharges have occurred within 300 feet of listed salmonid habitat, critical habitat, and potential habitat. Water development activities and the pursuit of individual projects by BBPUD proceed without regard for the impacts on listed salmonid habitat. These activities include the depletion of water from salmonid critical habitat and the pollution of critical habitat due to sewage related activities. River Watch alleges BBPUD is not protected from violations of the ESA as a result of approved or otherwise allowed diversion, pumping, storage and other water rights issues, nor due to lack of enforcement.

River Watch alleges BBPUD is in violation of ESA § 9, 16 U.S.C. 1538, by engaging in the activities described herein which TAKE protected species. The operations of BBPUD including diversions and pumping of water near critical habitat have repeatedly killed endangered salmonids by lowering water levels in the watercourses adjacent to and downstream of land owned and/or operated by BBPUD. Said operations have also impaired ingress and egress migration. River Watch contends BBPUD must take immediate action to conform to the federal mandate of the ESA and cease harmful activities within the known habitat of these protected species. In addition to other remedies BBPUD must stop activities which likely contribute to the loss of cold clean water available year round for the migration, reproduction, rearing, safety and food essential for the survival and recovery of the listed species.

River Watch alleges that BBPUD has not applied for an incidental TAKE permit under ESA § 10, 16 U.S.C. § 1539.

## CONCLUSION

The violations of BBPUD as set forth in this Notice affect the health and enjoyment of the members of River Watch who reside, work and recreate in the affected area and use this watershed for domestic water supply, agricultural water supply, recreation, sports, fishing, photography, nature walks and the like. The health, property rights, use and enjoyment of this area by members of River Watch are specifically impaired by BBPUD's violations of the ESA as alleged in this Notice.

River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

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River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under the ESA against BBPUD for the violations enumerated herein.



During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations identified in this Notice. However, if BBPUD wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

  
Jack Silver

JS:lh