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***Via Certified Mail -
Return Receipt Requested***

January 9, 2011

Thomas Howard, Executive Director
State Water Resources Control Board
1001 I Street
P.O. Box 100
Sacramento, CA 95812-0100

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

NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT UNDER THE ENDANGERED SPECIES ACT

Dear Mr. Howard and Secretary Locke:

The Endangered Species Act (“ESA”) Section 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under the ESA, an entity must give notice of its intent to sue to the alleged violator and the Secretary of Interior or Commerce.

I am writing on behalf of Northern California River Watch, Coast Action Group, Pacific Coast Federation of Fishermen’s Associations and the Institute for Fisheries Resources (“Noticing Parties,”) to notify you of violations of Section 9 of the ESA, 16 U.S.C. §1538 with respect to the harm and unauthorized take of threatened, endangered and federally protected salmonids in coastal watersheds of Northern California.

Following the expiration of the 60-day notice period, Noticing Parties intend to file suit in federal court against the Executive Director (“DIRECTOR”) of the California State Water Resources Control Board (“SWRCB”) to enjoin the DIRECTOR and other employees, agents, and assigns of the SWRCB from violations of the ESA and/or non-compliance with

regulations issued under the authority of the ESA. If prior to expiration of the 60-day notice period the DIRECTOR corrects these violations and is legally enjoined from further violations of the ESA, Noticing Parties will not proceed to suit.

Noticing Parties also give notice to the Secretary of Commerce (“Secretary”) that after the expiration of the 60-day hold period, they will file suit against the DIRECTOR in federal court to enforce the ESA, unless the Secretary 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 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 an endangered species. Under ESA § 4(19), 16 U.S.C. § 1532(19), the term “TAKE” includes to harass, harm, wound, kill, trap, capture, 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 (9th Cir. 1994).

ESA § 9 is a strict liability statute, such that the illegal TAKE need not be intentional. Cumulative acts resulting in a TAKE are also actionable. Therefore, if water diversion in a habitat is caused by several entities rather than one, all entities may be prosecuted even if the act of one was insufficient to cause a TAKE. Attempting to cause almost any level of injury to an endangered species is also prohibited by law. TAKE is defined in the ESA in the broadest possible manner to include every conceivable way in which a person or entity can TAKE or attempt to TAKE any fish or wildlife. *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8th Cir. 1989). The ESA § 9 prohibition on TAKE applies equally to threatened species.

The ESA not only prohibits the acts of those parties that directly exact the TAKING, but also bans acts by a third party which bring about the acts exacting a TAKE. For instance, a governmental third party entity such as the DIRECTOR pursuant to whose authority an actor directly exacts a TAKING may be deemed to have violated the ESA. *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir.1997) See also *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11th Cir.1998); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

The ESA has a broad citizen suit provision allowing any entity to commence a civil suit on its own behalf against any person or 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 and future activities reasonably

likely to result in a TAKE. See *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996).

FACTUAL BACKGROUND

De-watering of rivers and streams is occurring in Northern California watersheds, and has been linked to diversions and pumping by agricultural interests authorized by the DIRECTOR in charge of water allocation, use, or diversion. In 1997 the SWRCB staff released a report identifying vineyard practices which adversely impact listed species of fish struggling to survive in the Russian River Basin and its tributaries. The report found that frost protection activities harmed listed species of fish including coho salmon, chinook salmon, and steelhead trout. In 2000, SWRCB staff referred to its 1997 report emphasizing that under certain conditions, adequate water is available for appropriation in the winter, but no water is available in the spring, summer or autumn without the risk of harming fishery resources. (Staff Report SWRCB 7/2000). Although the courts found that frost protection activities in the Napa River Basin were harmful to listed fish species in 1972, such frost protection activities in other counties continue to be authorized by the DIRECTOR and have increased in frequency over the years.

The Gualala River watershed is experiencing large conversions of forests to vineyards and associated diversions, authorized by the DIRECTOR through the issuing of permits or licenses for water use resulting in de-watering of that important fish habitat. Hundreds if not thousands of acres of vineyards have recently been planted by a relatively few large landholders above the Gualala River. The Wheatfield Fork of the Gualala River now has documented dry stretches in streams which have historically supported steelhead trout, rearing pools, and flows sufficient to keep baby salmon and steelhead, also known as fry, secure until such time as they are proficient swimmers. Green Valley Creek, Mark West Creek and the Klamath River are just a few stream systems which suffer anthropogenic impacts associated with water diversion.

TAKE of listed species occurs as a result of actions by the DIRECTOR who allows water diversions by way of issuing licenses, granting permits, or condoning unauthorized diversions, appropriations or storage of water harmful to listed species. Permits and licenses are issued or granted in waterways already over allocated.

In the main stem Russian River at Hopland and Felta Creek in Healdsburg, TAKE occurred when diversions caused rapid draw downs of water resources near listed species' habitat according to the National Marine Fisheries Service ("NMFS"). In the spring of 2008, fry of listed species were stranded in near shore gravels in Felta Creek, a relatively small but very important critical habitat tributary for spawning coho and steelhead. Despite knowledge and warnings, water withdrawals, some unpermitted and some authorized by the DIRECTOR, created a hostile environment wherein fish could not survive the low water

levels, increased temperatures and non-sustainable conditions for fish propagation and survival. A TAKE in these same areas also took place in the Spring of 2009 (NMFS February 19, 2009, NOAA - June 27, 2008).

Recent studies correlate rapid and dramatic draw downs of flows in creeks with agricultural activities. (Kondolf, Deitch, and Merenlender 2006 & 2008; D. Hines NMFS - April 29, 2009). According to a presentation by NMFS to the Regional Water Quality Control Board on April 7, 2009 entitled *Scope Of Potential Frost Impacts On Salmonids*:

“Habitat conditions in 22 of 35 habitats are limiting production, including instantaneous flow reductions in spring. Population viability is low for all 3 salmonids in the Russian River....Coho Salmon are at very high risk of extinction.”

Continuing water diversions permitted by the DIRECTOR through the issuing of water right licenses in waterways known to be over allocated have caused TAKE and are a continuing threat of TAKE of threatened and endangered listed species. The region’s significant fisheries are near extinction. Water diversions permitted by the DIRECTOR pose significant threats to salmonid survival and recovery. There are at least 1,778 miles of potential listed species habitat in the Russian River watershed. All of it is needed for the recovery of coho, chinook, and steelhead as described in recovery plans. There are at least 60,640 acres of vineyards in the Russian River, 70 percent of which is within 300 feet of species habitat.

Young fish, or fry, emerge from their eggs/redds in the springtime and have poor swimming ability. They are susceptible to stranding and take refuge in cobble substrates. In the Russian River basin, fry have been observed dead from sudden agricultural water drawn down and stranding, as have older fish known as “smolts”. Salmon raised by the Russian River Coho Salmon Captive Broodstock Program are equally susceptible to low flow conditions. Listed species’ populations in critical habitat are at a very high risk of extinction due to frost protection irrigation as well as other farming practices.

On stream and off stream reservoirs are major contributors to salmonid fatalities. Diversions, pumps, and water storage facilities authorized by the DIRECTOR through the issuing of water right licenses or otherwise operated with the knowledge of the DIRECTOR pull water from habitat of listed fish species.

This Notice alleges the DIRECTOR is responsible for TAKE of listed species by authorization of diversions and storage in the over-allocated Russian River and Gualala River watersheds, by the issuing of water right licenses in waterways known by the DIRECTOR to be over allocated. The diversion of water from listed species’ habitat occurs multiple times a year. Not all occurrences are due to frost. Statistics show that diversion is more extreme

in dry years when fish are at greater risk. Diversion events do not always correlate with frost risk and over response to the threat of frost appears to be increasing. There is clear documentation that these agricultural practices have and will continue to harm, harass or kill protected listed species.

PROTECTED STATUS AND HABITAT NEEDS

The federally protected evolutionarily significant units (“ESUs”) of coho, chinook and steelhead utilize the coastal watersheds of California and Southern Oregon to reproduce and develop, including the Klamath, Scott, Shasta, Garcia, Gualala, Navarro, Eel, Russian, and Napa Rivers. These represent just some of the coastal watercourses which are habitat for the listed species referenced in this Notice and adversely affected by the DIRECTOR’s failure to properly carry out its duties.

Examples of the anadromous salmonids harmed by the DIRECTOR’s actions are the Central California Coast ESU of coho, listed as endangered, the California Coastal ESU of chinook, listed as threatened and the Northern and Central California Coast ESUs of steelhead also listed as threatened. Other protected salmon and trout deemed harmed are the Northern California Coast Winter steelhead, Northern California Coast summer steelhead, Central Coast steelhead, South/Central Coast steelhead, Southern Oregon/Northern California Coastal chinook, Southern Oregon/Northern California coho, and Central California coast coho (Peter Moyle, et al. 2008 “Salmon, Steelhead, and Trout in California: Status of an Emblematic Fauna”).

Southern Oregon/Northern California Coast Coho, includes all naturally spawned populations of coho salmon in coastal streams from the Elk River, Oregon, through the Mattole River, California, as well as three artificial propagation programs.

The habitat needs of anadromous fish species are similar. Coho (*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.

The California Coast population of chinook (*Oncorhynchus tshawytscha*) was listed as threatened in 1999. That status was reaffirmed in 2005. Protective regulations were issued for this ESU on June 28, 2005. Critical habitat was designated on September 2, 2005 and has been designated for the 9 listed chinook distinct population segments (DPS). Juvenile chinook 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.

The Northern California ESU of steelhead (*Oncorhynchus mykiss*) was listed as threatened in 2000, and the listing status was reaffirmed in 2006. The Central California Coast ESU of steelhead was listed as threatened in 1997, and the listing status was reaffirmed in 2006. Critical habitat for both ESUs was designated on September 2, 2005 and protective regulations were issued on June 28, 2005.

On January 5, 2006, the National Marine Fisheries Service listed 9 DPS of west coast steelhead as threatened and one as endangered. Some were 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 10 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. Both the salmonids and steelhead require perennial aquatic habitat and adequate stream flows 24 hours a day/365 days a year in order to live.

ACTIONS ALLEGED TO TAKE PROTECTED SPECIES

Habitat Modification

The DIRECTOR has permitted near stream well development activities, water diversions, reservoirs and impoundments resulting in adverse modification of critical habitat leading to TAKE of listed species including harm, harassment, and trapping. Class I, II, and III streams considered to be critical habitat are being de-watered. Reduced flows are leading to harm, injury, and mortality of protected salmonids. The modification of sufficient freshwater habitat with year round flows, deep pools, adequate food, adequate shelter, and clean cold waters has lead and will continue to lead to the death of protected salmonids.

Diversions of water occur for several reasons. The effect on listed species and their habitat includes the draw down of water levels and de-watering of vital pools natural to creeks and rivers. Due to the DIRECTOR's actions such impacts have occurred and over-allocation of water resources has caused and lead to the take of protected species by water use that goes beyond the capacity of the subject rivers and streams to support listed salmonids.

In February 2009, in response to observed smolt mortality associated with frost protection in the Russian River, the National Marine Fisheries Service stated its concern that “water diversions, that may otherwise be legal under California water law, will be causing significant salmonid mortality” and urged the SWRCB to take immediate action to protect public trust salmonid resources from further harm. To date, the Director has continued to authorize and administer diversions through the issuing of licenses in the over allocated north coast watersheds.

Stream flows of specific depth and volume are needed to sustain listed species in their various life stages. Spawning listed species need sufficient flows to migrate upstream to spawn. Flows are needed to cover redds and newly hatched fish. Stream flow is needed for rearing purposes, to support food sources and access to food sources, and to allow movement and refuge from predation. Flows also affect stream temperature which can cause thermal barriers, stress fish, induce disease and low growth rate, and induce predation. As a result of the alleged diversions permitted or otherwise approved by the Director, stream flows have been shown to be diminished and interrupted. In some cases, there are diversion-induced dry sections of streams which until recent times, have never been seen before. These stressors, related to low flows, end up producing smaller smolts. Small smolts have a very high rate of mortality in the ocean.

Habitat modification due to decreased flows often times happens dramatically in a short period of time – as short as several hours, and leaves fish stranded and dead or seriously stressed. The de-watering of habitat occurs in the spring when grape growers use creek water, reservoirs filled by withdrawals from creeks and rivers, and nearby stream wells to wet the vines and buds in order to protect them from fluctuations in temperatures. De-watering also occurs in the summertime when temperature fluctuations place the grape crop in a tenuous situation due to its susceptibility to heat.

LIABILITY

The ESA prohibits any person, agency, or entity from killing or harming species listed as endangered or threatened. The actions of the Director therefore must comply with the ESA. The Director is empowered to regulate the use and conservation of water for beneficial uses. (Calif. Water Code §174). Beneficial uses of the north coast watersheds include spawning, reproduction, rearing, migration, and critical habitat for salmon and steelhead.

Water in many streams was long ago fully appropriated during the dry seasons of the year and portion of the spring time. The Director has approved licenses and permits in over-appropriated water bodies and has thereby harmed protected species.

VIOLATIONS OF ESA § 9

ESA § 9 prohibits the TAKE of protected species. The acts and operations on the part of the Director described herein have resulted in TAKE of protected species which includes harm to habitat, and threaten reasonably foreseeable future TAKE. Two examples of take include TAKE of protected species in Felta Creek an important tributary in the Russian River basin and in the mainstream of the Russian River.

In April of 2008, law enforcement of the National Marine Fisheries Service was notified of two episodes of fish stranding mortality: Steelhead fry perished along the mainstream Russian River near Hopland, and Coho fry and Steelhead fry died in Felta Creek, near Healdsburg. Similar impacts were documented on Maacama Creek, a tributary of the Russian River. Although a repeat of this biological disaster was predicted and regulatory agencies and the growing community were warned to take immediate steps to prevent such harm, the fish kills occurred again in the same places in the spring of 2009. The DIRECTOR's over allocation of water rights in these waterways resulted in these episodes of TAKE of protected species.

The DIRECTOR is in violation of ESA Section 9, 16 U.S.C. § 1538, if it has authorized or otherwise caused the activities described herein that TAKE protected species, and must take immediate action to conform to the federal mandate of the ESA and cease harmful activities within the known habitat of protected and listed species.

IDENTIFICATION OF ENTITIES BRINGING NOTICE

The entities bringing this Notice are Northern California River Watch, Coast Action Group, Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources, referred to in this Notice as "Noticing Parties".

Northern California River Watch is a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California. Northern California River Watch is located at 500 North Main Street, Suite 110, Sebastopol, CA 95472, Telephone 707-824-4372, Email: US@ncriverwatch.org.

Coast Action Group is an organization dedicated to the protection of fishery and water quality resources on the north coast of California. Coast Action Group has a history of actions supporting the protection of fish, forest, and water quality resources dating back to 1990. Coast Action Group exists in order to protect fish and wildlife through state and federal water laws. It comments on issues of statewide concern in order to protect in-stream flows and water quality. It is currently participating in meetings and on a task force attempting to deal with important issues which affect listed species of coho and steelhead.

Coast Action Group is located at P.O. Box 215, Point Arena, CA 95468, Telephone 707-882-2484, Email: alevine@mcn.org.

Pacific Coast Federation of Fishermen's Associations is a California nonprofit organization and the largest trade association for west coast commercial fishing families, many of whom make all or part of their living from the ocean harvest of salmon from California streams. For more than 30 years, Pacific Coast Federation of Fishermen's Associations has been at the forefront of efforts to protect in-stream salmonid spawning and rearing habitat in California in order to assure the long-term survival of these fish species and the economic benefits they produce.

The Institute for Fisheries Resources, although a separate, California nonprofit organization, serves as the fisheries conservation and habitat protection arm of Pacific Coast Federation of Fishermen's Associations, and both funds and manages Pacific Coast Federation of Fishermen's Associations' many salmon and watershed conservation programs. Its mission is to protect and restore fish populations (including anadromous salmon) as well as to protect the economies and communities of people who depend upon those fisheries for their livelihoods.

CONTACT INFORMATION

Noticing Parties have retained legal counsel to represent them in this matter. All communications with respect to the issues raised in this Notice should be addressed to the following counsel:

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CONCLUSION

The violations as set forth in this Notice affect the health and enjoyment of the members and staff of Noticing Parties who reside, work and recreate in the affected watershed areas identified in this Notice. Noticing Parties and their respective members use these watersheds for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, hiking, photography, nature walks, restoration activities, and the like. The health, property rights, use, and enjoyment of these areas by the members of Noticing

Parties are specifically impaired by the DIRECTOR's violations of the ESA as alleged herein.

Noticing Parties believe this Notice sufficiently states the grounds for filing suit. At the close of the 60-day notice period or shortly thereafter Noticing Parties intend to file suit in federal court against the DIRECTOR for the violations enumerated herein. During the 60-day notice period, Noticing Parties are willing to discuss effective remedies for the violations described in this Notice. However, if the DIRECTOR wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated within the next 20 days so that they may be completed before the end of the 60-day notice period.

Very truly yours,


Jack Silver

JS:lhbm

cc: Cecilia L. Dennis, Asst. Atty. General
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