June 5, 2025

VIA CERTIFIED MAIL

Doug Burgum, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Paul Souza, Acting Director
U.S. Fish and Wildlife Service
1849 C St NW
Washington DC 20240

Lee Zeldin, Administrator
Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: 60 Day Notice of Intent to Sue Under the Endangered Species Act

You are hereby notified that the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) and Citizens for a Better Flathead (CBF) intend to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), for violations of the ESA, 16 U.S.C. § 1531 et seq. CSKT and CBF will file suit after the 60 day period has run unless the violations described in this notice are remedied.

The name, address, and phone number of the entities giving notice of intent to sue are as follows:

Confederated Salish & Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855
406-675-2700

Citizens for a Better Flathead
137 South Main St.
Kalispell, MT 59901
406-755-4521

The name, address, and phone number of counsel for the notifiers are as follows:

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STATEMENT OF FACTS

Bull Trout

The Bull trout is a sub-population of the salmonid family that is currently listed under the ESA. *See* 64 Fed. Reg. 58910 (November 1, 1999). (USFWS rule stating that "we determine threated status for all populations of bull trout [.] within the coterminus United States[.]") The Bull trout listing includes five population segments: the Coastal-Puget Sound, St. Mary-Belly River, Klamath River, Columbia River, and Jarbidge River. Today, Bull trout are distributed from coastal Alaska and western Canada, south to the Pacific Northwest, and east to portions of the middle and northern Rocky Mountains. Bull trout are threatened by "the combined effects of habitat degradation, fragmentation and alterations associated with dewatering, road construction and maintenance, mining, and grazing; the blockage of migratory corridors by dams or other diversion structures; poor water quality; incidental angler harvest; entrainment [.] into diversion channels; and introduced non-native species." *Id.* at 58910.

Bull trout have both resident and migratory life history strategies. The size and age of bull trout at maturity depends upon habitat capacity and subsequent life history strategy. Of native salmonids in the Pacific Northwest of the United States, bull trout have the most specific habitat requirements, which are often referred to as "the four Cs": cold, clean, complex, and connected habitat. Habitat components that influence bull trout distribution and abundance include water temperature, in-stream and stream-bank cover, channel form and stability, valley form, spawning and rearing substrate, and unobstructed migratory corridors. Juveniles remain in the substrate after hatching; the time from egg deposition to emergence of fry can exceed 200 days. During the relatively long incubation period in the gravel, bull trout eggs are especially vulnerable to fine sediments, streambed scour, and water quality degradation. *See* Five-Year Status Review: Summary and Evaluation, Bull Trout, USFWS, September 2024, p.6.

Bull trout need the following core area habitat factors in sufficient condition to successfully complete all stages of their life cycle. (1) Water Quality: enough clean and cold water to support breeding and feeding, and provide shelter for each life stage to survive. (2) FMO Habitat Access: connectivity for subadults and adults between spawning and rearing habitats and feeding, migrating and overwintering habitats that provide diverse resources. (3) Fish Community Quality: habitat for all life stages with limited interaction with deleterious nonnative species. (4) Instream Quality: in-water habitat with complex substrates, stream morphology, and structure to meet the needs of each life stage. (5) Riparian Quality: intact habitat for all bull trout life stages within the riparian corridor, which provides shad, channel complexities, insect communities, and allochthonous inputs leading to higher quality instream habitat and water quality. (6) Spawning and Rearing Habitat Quality: sufficient amount and quality of habitat to allow for individual adults to spawn and juveniles to rear. *See* Five-Year Status Review, p.7.

The Columbia Falls Aluminum Company Site & EPA's CERCLA Decision-Making

The Columbia Falls Aluminum Company, LLC, (CFAC) owns the former aluminum reduction facility located near Columbia Falls, Flathead County, Montana. It lies north and adjacent to the Flathead River. The Anaconda Copper Mining Company constructed the aluminum reduction plant and began operating as the Anaconda Aluminum Company in 1955.

ARCO purchased the Anaconda entities in 1977 and continued operating the plant until 1985. CFAC purchased the operational area in 1985 and operated the plant until 1999, when Glencore AG purchased CFAC. Glencore operated the plant intermittently at various levels of production until 2009. The plant remained idle until 2015, when Glencore permanently closed the plant. Decommissioning and removal of the industrial building and related structures lasted until late 2019. The operational area of the CFAC Site occupied approximately 953 acres. Exhibit A to this Notice features a map depicting the location of different Site operational areas, including adjacency to the Flathead River.

CFAC produced aluminum at the Site using the Hall-Héroult process and vertical stud Soderberg aluminum cell technology. In this process, aluminum was produced in an aluminum production "pot," a steel vessel which was lined with carbon paste, or "potline." Each pot was charged with a mixture of powdered alumina (aluminum oxide) and cryolite (sodium fluoride), to which a high electric current was applied through an anode (made of petroleum coke and pitch) at the top of the mixture. The current passed from the anode through alumina/cryolite bath to the potline, which acted as a cathode and completed a circuit. The application of current also created high heat in each pot (1760°F). As a result, aluminum ions in alumina were reduced to aluminum metal, forming molten aluminum at the bottom of the pot. The molten aluminum was periodically tapped from the pot and transported to the site's cast house, where it was cast into ingots for offsite shipment. Over the years, as part of the casting process, various alloys and ingots were produced at the facility.

Anaconda/ARCO (hereinafter ARCO) produced an estimated 7,104,464,396 lbs. of aluminum between 1955 and September 1985, when it sold the site to CFAC. CFAC/Glencore produced an estimated 6,319,833,296 lbs. of aluminum between 1985 and 2009, when it stopped producing aluminum.

ARCO disposed of an estimated 129,000 to 135,000 tons of spent potlines (SPL), a principal waste generated by aluminum reduction which contained cyanide and fluoride, in two unlined landfills at the CFAC site: the West Landfill and the Center Landfill. ARCO also disposed of another waste from its aluminum production operations – sludge from wet scrubbers that was comprised of 80 percent calcium fluoride – in the Wet Scrubber Sludge Pond (WSSP) from the beginning of ARCO's operations at the site through approximately 1979. These onsite SPL and fluoride disposals by ARCO are primarily, if not exclusively, responsible for the elevated concentrations of cyanide and fluoride documented in groundwater and hydrologically connected surface water downgradient from these disposal areas. The SPL and fluoride disposals, and the elevated groundwater concentrations, led the U.S. Environmental Protection Agency (EPA) to list the Site on the CERCLA National Priorities List on September 9, 2016. The cyanide and fluoride leaching from the SPL disposed of by ARCO, and calcium fluoride sludge disposed of by ARCO, are the principal drivers for the need to select and implement a CERCLA cleanup remedy at the Site.

After listing on the NPL, a number of CERCLA planning activities occurred on the site. From 2015 to 2020 a first Remedial Investigation (RI) was conducted and submitted to EPA (Roux 2020a). From 2020 to 2021 a South Percolation Ponds Removal Action occurred, including removal of impacted sediments from the South Percolation Ponds and allowing the

Flathead River to migrate naturally into its northern side channel (Roux 2021b). In 2021 CFAC completed the Feasibility Report required by CERCLA and EPA (Roux 2021a). EPA issued the Proposed Plan for clean-up on June 1, 2023 (EPA 2023).

On January 10, 2025, the EPA issued a final Record of Decision (CFAC ROD) detailing the clean-up remedy for the CFAC Site under CERCLA. The CFAC ROD identified wastes requiring clean-up as including the SPL noted above. In addition, the CFAC ROD identified additional wastes at the site for remediation:

- **Air Emissions.** Air emissions included particulate fluoride, hydrogen fluoride, and polycyclic aromatic hydrocarbons (PAHs) from the paste plant and aluminum reduction facility. Wet scrubbers, an air pollution control device that uses a liquid to remove contaminants from air emissions, removed pollution from smelting until 1976. They were replaced with dry scrubbers in 1980.
- **Sludge.** Wastewater from the paste plant wet scrubbers was discharged to the North Percolation Ponds. The aluminum reduction facility wet scrubbers operated until 1976. Sludge analysis showed the makeup of the wet scrubber sludge was approximately 80 percent calcium fluoride and also contained calcium oxide, magnesium oxide, sodium oxide, and iron oxide. The sludge was landfilled on-site at the Wet Scrubber Sludge Pond.
- **Liquid Waste.** Liquid waste from the aluminum reduction process and stormwater was discharged to several percolation ponds. Wastewater was discharged indirectly to groundwater through infiltration through the percolation ponds under a state-issued discharge permit.

During the CERCLA remedial investigation, a number of groundwater wells were drilled to characterize the underlying groundwater aquifer, pollutant fate, transport to and from the CFAC site offsite, and connectivity to the adjacent and downgradient Flathead River. The upper hydrogeologic unit consists of glacial outwash and alluvium and is present throughout the site. Although the soil matrix varies, this unit has a high permeability. It is underlain by glacial till, which has a lower permeability compared to the glacial outwash and alluvium, with the exception of sand and gravel lenses within the till that forms the lower hydrogeologic unit. Site stratigraphy as defined by the completion of 52 new monitoring wells to supplement the existing 20 wells, depicts a well-defined plume of contaminants migrating toward the Flathead River, not Aluminum City. Hydraulic conductivity, as determined by slug test data in monitoring wells, is high (11 feet per day).

CFAC & Surface Water

The CFAC site is in the Flathead River-Columbia Falls subwatershed. It is bordered by surface water features on each side, including the Flathead River to the south, Cedar Creek to the west, Cedar Creek Reservoir to the north, and Cedar Creek Reservoir Overflow Ditch to the east. Regional groundwater is typically recharged from numerous reservoirs, ponds, streams, and lakes, and also by infiltration of precipitation. Groundwater may also discharge to surface water bodies. Spring snowmelt and increased seasonal precipitation causes high flow in the Flathead River and the river recharges groundwater. In late summer, dry weather lowers the river stage so that the Flathead River becomes a gaining stream.

Groundwater seepage from the steep banks below the site to the Flathead River was documented along roughly 2,680 linear feet and was permitted as an outfall in 1994 under a surface water discharge permit (MPDES) issued by the Montana Department of Environmental Quality. This seepage area (Seep Area) was later subdivided in the CERCLA RI into three units: Backwater Seep Sampling Area, South Percolation Ponds, and Riparian Sampling Area. The Backwater Seep Sampling Area is the western portion of the Seep Area that was historically sampled under the MPDES permit and was further sampled in the RI. The South Percolation Ponds represent the central portion of the Seep Area. The Riparian Sampling Area, a well-vegetated area west of the South Percolation Ponds, included a small stream that discharged to the Backwater Seep Sampling Area.

Cedar Creek is the main surface water drainage that flows through the site. It originates north of the site in the area contributing to the Cedar Creek Reservoir (Roux 2020a). From the reservoir outlet, Cedar Creek flows approximately 3 miles south-west toward the City of Columbia Falls. The creek elevation is higher than groundwater elevations within the site, indicating that it is a losing stream. The RI notes the presence of an unnamed tributary to Cedar Creek that lies east of the Industrial Landfill and joins Cedar Creek approximately a half mile below that landfill.

The Northern Surface Water Feature is an intermittent surface water body between Cedar Creek and Cedar Creek Reservoir Overflow Ditch south of the Industrial Landfill. It is likely a pothole depression developed by past glacial activity that is infiltrated seasonally with groundwater during snowmelt and increased precipitation events. The substrate is predominantly grass covered with areas of channelization which help direct groundwater from the seeps from a nearby cliff.

Overview of CFAC Site Contamination As Regards Water Resources

The CFAC RI examined potential contaminant sources: landfills, percolation ponds, plant drainage systems, the former drum storage area, underground and aboveground storage tanks, and waste and raw materials storage and handling areas. It evaluated the potential exposure pathways from the preliminary CSM (ambient air, groundwater, surface water and sediments, and soil, as well as porewater.

The RI was conducted in two phases:

- Phase I (2016 and 2017) included soil gas samples, geophysics, Geoprobe samples, monitoring wells, sediment, and surface water samples, and groundwater samples.
- Phase II (2018 and 2019) included soil borings, wells, sediment samples, sediment porewater samples, surface water samples, and groundwater samples. A background study was conducted of off-site soil, sediment, and surface water.

RI data were collected from multiple rounds under varying conditions to develop a complete characterization of the nature and extent of contamination. *See* Exhibit B.

The RI report (Roux 2020a) documented the following: (1) Fluoride and cyanide are present in groundwater, and the primary sources are the West Landfill and Wet Scrubber Sludge Pond. The East Landfill is a secondary contributing source. (2) PAHs are present in shallow soils

at the North Percolation Ponds, Effluent Ditch, and Main Plant Area. (3) Metals are present in shallow soils at the North Percolation Ponds, Main Plant Area, and all landfills. (4) Contamination is present in the percolation ponds, Backwater Seep, and Riparian Area. (5) Pollutants associated with the CFAC site were unnaturally elevated and exceeding applicable water quality standards in near-short reaches of the Flathead River. Cyanide and fluoride were identified as the primary pollutants of concern in groundwater leaving the CERCLA site and discharging to the Flathead River based on the frequency of detection and chronic exceedances of water quality standards, as well as the contribution to estimated human and ecological risks.

The existing and RI data indicate that West Landfill and Wet Scrubber Sludge Pond are the primary sources of cyanide and fluoride in groundwater at the site. The contaminant distribution maps indicate that the highest cyanide and fluoride concentrations in groundwater originating at these two features. This is consistent across all six rounds of sampling. Adjacent to the West Landfill and Wet Scrubber Sludge Pond, groundwater elevations in the upper hydrogeologic unit can fluctuate more than 70 feet seasonally. Cyanide and fluoride emanate from this source area and migrate in south/south-westerly direction from the landfills toward the Flathead River.

EPA's ROD, Section 5.4.2 "Migration Potential in Surface Water" states that "[m]igration of site contaminants into surface water has been documented where seeps discharge to a backwater area of the Flathead River. Concentrations of cyanide and fluoride in this area exceed EPA MCLs and DEQ-7 water quality standards. They also have been high enough to pose unacceptable ecological risk in surface water and porewater." Page 5-19.

Similarly, EPA's ROD, Section 5.4.3 "Migration Potential in Groundwater," states that "six rounds of RI groundwater sampling documented a consistent pattern of migration (Figures 5-4 and 5-5) from the primary sources (West Landfill and Wet Scrubber Sludge Pond). Cyanide migrates in a south/southwesterly direction from the primary sources toward the Flathead River." Page 5-19. "Fluoride migration is also in a south/southwesterly direction toward the Flathead River." *Id.*

Later, EPA's ROD, Section 5.4.4 "Migration to the Flathead River" states that site-related contaminants do not contribute an unacceptable risk to fish in the Flathead River based on assessment of ambient, instream pollutant of concern sampling from the Flathead River thalweg, and based on separate whole effluent toxicity testing studies to the Fathead Minnow and the daphnid, performed under the State of Montana's surface water discharge permit for CFAC. The ROD concludes that "to percent or greater dilution of discharging groundwater with surface water from the Flathead River would mitigate any short-term effects on the survival of representative fish and invertebrates." Page 5-20.

No section of the ROD examines groundwater-based pollutant discharges into near-shore reaches of the Flathead River to determine impacts on the threatened Bull trout, despite admitting the Flathead River adjacent to and downgradient from the CFAC Site is in fact Critical Habitat for the Bull Trout, and despite Bull trout having been documented in reaches of the Flathead River proximate to the CFAC Site. Section 7.2.2 "Exposure Assessment" examines so-called "Aquatic Exposure Areas," and lists six federally threatened or proposed threatened

species as present in the project area, based on a query of the USFWS Information for Planning and Consultation. The same section further admits that critical habitat for the Bull trout exists at the site. Page 7-14.

ROD Section 7.2.4.3 "Aquatic Exposure Areas" presents overall results and conclusions relevant to Bull trout, despite never examining pollutants of concern or any proposed CERCLA remedy to determine impacts to Bull trout or its critical habitat. The subsection "Flathead River - Backwater Seep Sampling Area" states that "the greatest potential for ecological exposure to site-related constituents is associated with direct contact exposure within the Backwater Seep Sampling Area, and areas where groundwater containing cyanide and fluoride discharges to surface water. Surface water exposure was greatest to cyanide (total and free), barium, and aluminum, with greater concentrations observed in the Backwater Seep Sampling Area and adjacent stations immediately downstream of the Backwater Seep Sampling Area."

"Attenuation of surface water concentrations occurs rapidly with increasing distance from the Backwater Seep Sampling Area, particularly during periods of elevated discharge within the Flathead River. Outside of the stations within the Backwater Seep Sampling Area and stations along the shoreline immediately downstream of the Backwater Seep Sampling Area [.] free and total cyanide concentrations did not exceed chronic NRWQC- and DEQ-7-based benchmarks, respectively, in multiple rounds of surface water sampling events. This finding indicates that the potential area of exposure to aquatic receptors at concentrations exceeding NOECs and LOECs based on NRWQC (free cyanide) and DEQ (total cyanide) benchmarks is spatially limited to a groundwater–surface water mixing zone along the shoreline within and immediately adjacent to the Backwater Seep Sampling Area. Potential risks associated with direct and incidental wildlife ingestion pathways are considered to be minimal in the Backwater Seep Sampling Area." Section 7.2.4.3, Page 7-19.

The ROD subsection "Flathead River Riparian Area Channel" states the evaluation of sediment and surface water data in the Flathead River Riparian Area Channel indicate the potential for adverse effects associated with direct contact exposure of aquatic receptors to cyanide (total and free), fluoride, and metals (i.e., aluminum, barium, copper, and iron) in surface water. Surface water data indicate potential exposure to COCs may be influenced by groundwater discharge associated with the Backwater Seep Sampling Area and surface discharge from the South Percolation Ponds. A temporal analysis of COC concentrations in surface water indicates that the greatest chronic exposure to cyanide in the Flathead River Riparian Area Channel likely occurs during periods of elevated discharge within the Flathead River. Page 7-19.

The CFAC ROD fails to provide any evaluation of admitted toxic pollutants, at levels exceeding applicable water quality standards, discharging into near-shore reaches of the Flathead River vis-a-vis examination of impacts on Bull trout or its critical habitat.

Ultimately, the CFAC ROD, Section 12, selects the preferred remedy as the Selected Remedy for the ROD. This Selected Remedy includes the techniques of containment at the Site via capping, installing slurry walls, interior extraction, and monitoring. Section 12 does not reference or discuss Bull trout, its critical habitat, or provide any evaluation of impacts on the species.

CBF FOIA to USFWS

On April 7, 2025, Citizens for a Better Flathead submitted a Freedom of Information Act Request to USFWS regarding:

from March 26, 2015 to the date FWS conducts this search:

- *any requests for Section 7 consultation concerning the threatened bull trout (salvelinus confluentus); and*
- *any and all records of Section 7 consultation(s) performed regarding the Environmental Protection Agency's decision-making under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for the Columbia Falls Aluminum Company ("CFAC") plant, also known as the Anaconda Aluminum Co Columbia Falls Reduction Plant.*

On May 6, 2025, USFWS provided CBF a letter in response to its FOIA request stating, *inter alia*:

> For your first bullet point staff have indicated the records you are seeking are located here, please review and let me know after you have searched if there is something we can narrow your search to.
> https://www.fws.gov/species/bull-trout-salvelinus-confluentus
>
> For the second bullet point we have no records responsive to this.

USFWS FOIA Response Letter, May 6, 2025.

Thus, no informal or formal consultation was performed by EPA with USFWS regarding its CERCLA Record of Decision for the CFAC Site for Bull trout or Bull trout critical habitat.

STATEMENT OF LAW

The ESA is the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 180 (1978). The U.S. Supreme Court holds that Congress "viewed the value of endangered species as incalculable," *id.* at 187, and that the "plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.*" *id.* at 184 *(*emphasis added). In passing the ESA, Congress wanted to save the bull trout from extinction. *Id.* at 183 - 84 (citing 119 Cong.Rec. 42913 (1973)).

ESA §7

ESA § 7 requires that all federal agencies work toward recovery of listed species. Pursuant to that purpose, ESA § 7 contains both a procedural requirement and a substantive requirement. Substantively, it requires that federal agencies ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). To carry out the duty to avoid jeopardy and adverse modification of critical

habitat, ESA § 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service (USFWS), to evaluate the consequences of a proposed action on a listed species. *Id.* § 1536(a)(2).

The U.S. Court of Appeals for the Ninth Circuit has held that "[o]nce an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment." *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). If the biological assessment concludes and the expert agency agrees that the proposed action "may affect" but will "not adversely affect" a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14(b)(1), 402.12(j), (k). If the action "is likely to adversely affect" a listed species, the action agency must formally consult with the expert agency, and the expert agency must provide the action agency with a Biological Opinion explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a)–(c); 50 C.F.R. § 402.14. If the Biological Opinion concludes that the proposed action will jeopardize the continued existence of a listed species, it must outline "reasonable and prudent alternatives," if any are available, that would allow an action agency to carry out the purpose of its proposed activity without jeopardizing the existence of listed species. 16 U.S.C. §1536(b)(3)(A).

If the Biological Opinion concludes that the action will not result in jeopardy but may incidentally "take" or "harm" a protected species, the expert agency has authority to provide the action agency with an "incidental take statement." This statement must specify the impact of such incidental taking on the species, set forth "reasonable and prudent measures" that the expert agency considers necessary to minimize such impact, and include the "terms and conditions" that the action agency must comply with to implement those measures. *Id.* § 1536(b)(4); 50 C.F.R. § 402.14. If the action agency adopts such measures and implements their terms and conditions, the resulting level of incidental take authorized in the incidental take statement is excepted from the ESA's ban on take. 16 U.S.C. § 1539. During this assessment process, the agencies must use the best available science. *Id.* § 1536; 50 C.F.R. § 402.14(d).

As defined in the ESA's regulations, an "action" subject to consultation includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. 50 C.F.R. § 402.02. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. *Id.* The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language "admit[s] of no limitations" and that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA." *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). The procedural consultation requirements in the ESA are judicially enforceable and strictly construed:

> If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than the provisions of the National Environmental Policy Act], because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements,

> there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d at 764.

ESA § 9

ESA § 9 prohibits the "take" of any species. 16 U.S.C. § 1538(a). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Harm means an act which "actually kills or injures wildlife" and includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

The Ninth Circuit has held that a take occurs when habitat degradation "prevents, or possibly, retards, recovery of the species," so long as the plaintiff can show significant impairment of essential behavioral patterns, including spawning. *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1238 (9th Cir. 2001) (citing 17 C.F.R. 13 (current through Feb. 25, 2022)). Requiring a threat of extinction before an injunction may be issued "would be contrary to the spirit of the statute, whose goal of preserving threatened and endangered species can also be achieved through incremental steps." *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 n.4 (9th Cir. 1995). Additionally, ESA's prohibition on take does not distinguish between taking of whole species and the taking of only one individual of a species. *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 896 F. Supp. 1170 (M.D. Fla. 1995). As such, any taking and every taking, even of a single individual of protected species, is prohibited by ESA; even the future threat of even single taking is sufficient to invoke authority of ESA. The ESA prohibits any person from "taking" endangered species without an incidental take statement that permits the take. The take prohibition encompasses activities that harass or otherwise harm listed species. Moreover, the prohibition against taking can be enforced against state and local governments. *Strahan* v. *Coxe.,* 127 F.3d 155. 168 (1st Cir. 1997).

Accordingly, here EPA has violated, and is continuing to violate, the ESA for the following reasons:

1. Failure to conduct any ESA Section 7 consultation for the agency's 2025 Record of Decision authorizing a CERCLA remedy for the CFAC site, including plans that address undisputed offsite discharges of pollutants to the Flathead River, in which the protect bull trout exists and which is critical habitat for the same;
2. Failure to comply with ESA Section 9 by allowing/causing ongoing unpermitted CFAC offsite discharges to the Flathead River to take threatened bull trout and harass and harm the species as a result of said discharges, without an Incidental Take Statement.

Accordingly, the agency has ignored its duty under the ESA, 16 U.S.C. § 1531 et seq., to ensure its actions do not jeopardize threatened or endangered species, that its actions do not result in unauthorized take of these species of wildlife, and that its actions promote recovery of the species. The agency's actions in this matter represent an unlawful departure from its legally binding mandate to protect and recover imperiled species and their habitats.

If the violations of law described above are not cured within 60 days, the parties noted above intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,
/s/Timothy M. Bechtold
/s/Guy Alsentzer

cc:
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Montana Attorney General
P.O. Box 201401
Helena, MT 59620-1401

Montana DEQ Director
2401 Colonial Dr.
Helena, MT 59601

Exhibit A: CFAC Site Features

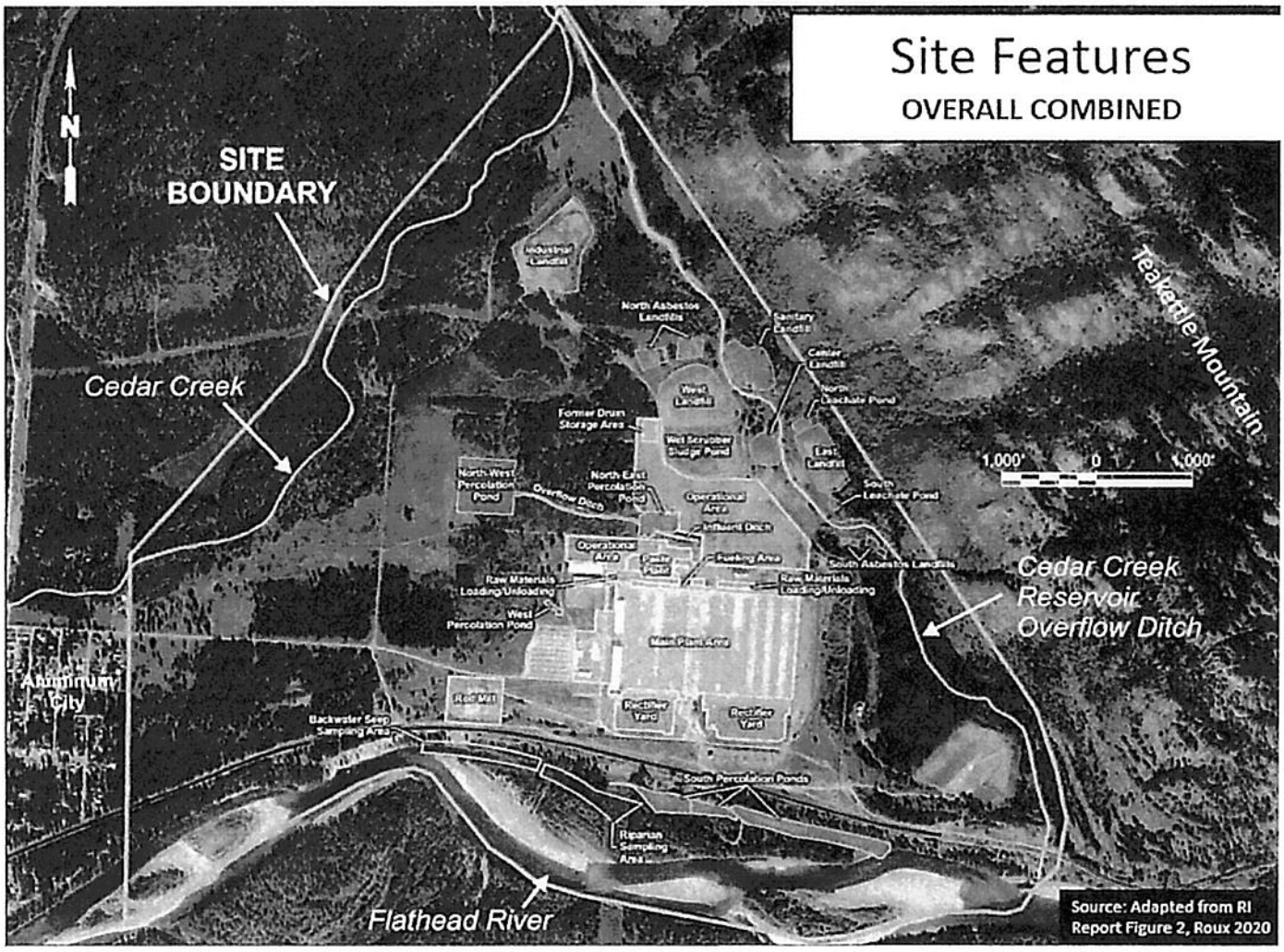

Exhibit B: Figure 5-3,

Extent of RI Sampling 2025 CFAC ROD

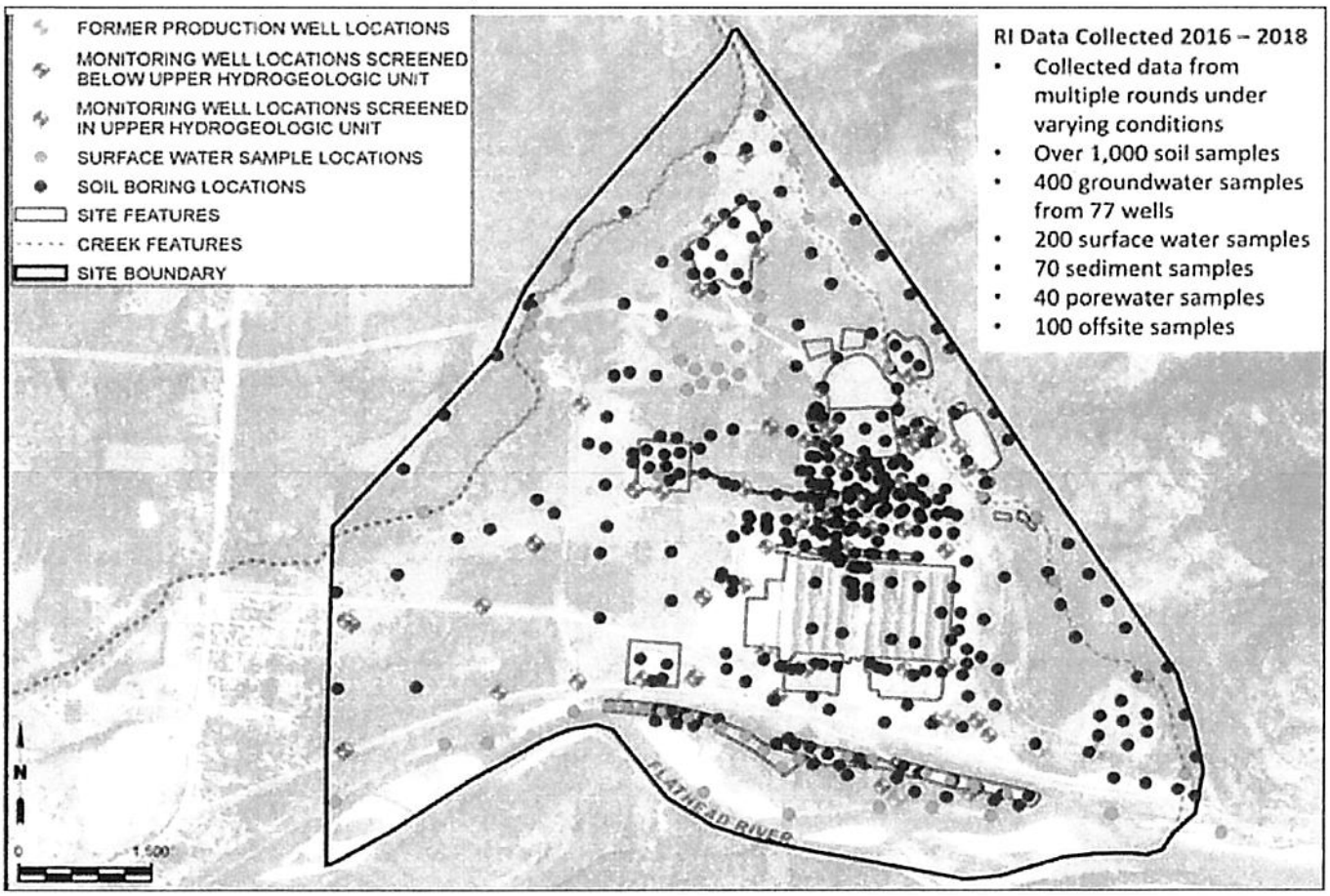

Figure 5-3. Extent of RI Sampling