



May 5, 2026

VIA EMAIL ONLY TO
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Lee Zeldin, Administrator
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Howard Lutnick, Secretary
United States Department of Commerce
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Doug Burgum, Secretary
United States Department of the Interior
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**Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act
Related to Puget Sound Salmon and Steelhead Population Segments**

Dear Administrator Zeldin, Secretary Lutnick, and Secretary Burgum:

This letter provides notice that Northwest Environmental Advocates (“NWEA”) intends to file suit pursuant to Section 11(g)(1)(A) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(1)(A), against the U.S. Environmental Protection Agency (“EPA”) for violating the ESA in approving a set of Washington Total Maximum Daily Loads (“TMDL”) for temperature.

On May 6, 2020, EPA approved the Washington Department of Ecology’s (“Ecology”) submission of TMDLs for the South Fork Nooksack River. *See Letter from to Vince McGowan, Ecology, Re: Final EPA Action on the South Fork Nooksack River Temperature Total Maximum Daily Load (May 6, 2020).* In taking this final agency action to approve the South Fork Nooksack TMDL, EPA has failed to comply with its ESA Section 7 obligations to consult with

the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) (together “the Services”) to ensure that EPA’s actions are not likely to jeopardize ESA-listed species in the South Fork Nooksack watershed or result in destruction or adverse modification of critical habitat.

NWEA is concerned about the harm caused by EPA’s failure to consult and/or complete consultation with the Services to the numerous ESA-listed species that are likely to be adversely affected by the levels of temperature pollution allowed by the South Fork Nooksack TMDL. EPA’s failure to consult with the Services also harms the interests of NWEA by undermining the procedural requirements of the ESA, which ensure that agencies, such as EPA, make informed decisions and act in conformity with the ESA’s substantive requirements.

If EPA does not come into compliance with the ESA, upon expiration of the 60 days NWEA intends to file suit in United States federal court in the Western District of Washington against EPA pursuant to the ESA. We are available to discuss potential remedies prior to the expiration of this notice.

I. Endangered Species Act Legal Framework

The Endangered Species Act seeks to bring about the recovery of species facing extinction by affording these species the “highest of priorities.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). One of the primary purposes of the ESA is to preserve the habitat upon which threatened and endangered species rely. 16 U.S.C. § 1531(b). Section 7(a)(2) of the ESA sets out two substantive mandates. First, it contains a blanket provision against any federal action that “jeopardizes the continued existence of” species listed as threatened or endangered. 16 U.S.C. § 1536(a)(2). Second, it bans federal actions that result in the “destruction or adverse modification” of designated critical habitat of listed species. *Id.* The obligation to ensure against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to the endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). An agency must initiate consultation under section 7(a)(2) whenever it undertakes an action that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”).

Congress established a consultation process explicitly “to ensure compliance with the [ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Under the ESA, agencies obtain advice from the Services prior to taking actions that affect threatened or endangered species or result in adverse modification of or destruction of their critical habitat. The end product of the ESA section 7 consultation is a biological opinion (BiOp) in which the Services determine whether a proposed action will jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. §

1536(b)(3); *Idaho Dept. of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995). As the Ninth Circuit stated, “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.” *Thomas v. Peterson*, 753 F.2d at 764 (citing *TVA v. Hill*, 437 U.S. 153); *see also Conner v. Burford*, 848 F.2d 1441, 1458 (9th Cir. 1988) (The ESA’s “strict substantive provisions . . . justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”); *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

To ensure that agencies consult with the Services and that the Services issue a biological opinion, Congress explicitly addressed the action agency’s and Services’ obligations to complete formal consultation. Specifically, section 7(b)(1)(A) provides that

Consultation under subsection (a)(2) with respect to an agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B) [which outlines procedures when an applicant is involved], within such other period of time as is mutually agreeable to the Secretary and the Federal Agency.

16 U.S.C. § 1536(b)(1)(A). If the Services and the action agency agree on a period of time other than the statutorily prescribed 90-day period to conclude consultation, it cannot be undefined. *See* 50 C.F.R. §§ 402.14(e) (“Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for *a specific period of time.*”) (emphasis added); *see also* Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and Conferences (“Consultation Handbook”), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998, at 4-7 (“The consultation timeframe cannot be ‘suspended.’ If the Services need more time to analyze the data or prepare the final opinion, or the action agency needs to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. *Extensions should not be indefinite, and should specify a schedule for completing the consultation.*”) (emphasis added).

In addition, after the initiation of consultation, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d); *see also Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996).

II. EPA Has Failed to Ensure Against Jeopardy for Approving the South Fork Nooksack TMDL that Changes Washington's Water Quality Standards

To the best of our knowledge, it is EPA's position that it does not engage in ESA consultation on its approval of TMDLs in Washington State and, thus, has not engaged in ESA consultation on its approval of the South Fork Nooksack TMDL. Regulations implementing Section 7(a)(2) establish the obligations for EPA as the action agency by broadly defining the scope of agency actions subject to consultation to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (definition of "action"). Agencies also must consult on ongoing agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. 50 C.F.R. § 402.03; 50 C.F.R. § 402.16; *see also Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-56 (9th Cir. 1994). Finally, "[e]ach Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required[.]" 50 C.F.R. § 402.14(a) (emphasis added).

In this case, EPA's approval of the South Fork Nooksack TMDL has changed (or attempted to change) the water quality standards that would otherwise be applicable, from EPA-approved biologically-based numeric criteria on which EPA has consulted with the Services, to superseding natural conditions criteria produced by modeling purportedly natural temperatures for which EPA has not completed an ESA Section 7 consultation. *See, e.g., Ecology, South Fork Nooksack River Temperature Total Maximum Daily Load Water Quality Improvement Report and Implementation Plan* (February 2020) (hereinafter "South Fork Nooksack TMDL") at 124 ("The estimate of stream temperatures under 100-year SPV (scenario 5), is used in this analysis to represent an approximation of the stream's natural background temperature and therefore, its loading capacity."). Temperature water quality standards and TMDLs are needed in this watershed to protect nine native Pacific Northwest salmonid species that rely on the South Fork Nooksack for migration spawning, incubation, rearing, and foraging habitats. Chinook salmon (*Oncorhynchus tshawytscha*), bull trout (*Salvelinus confluentus*), and steelhead (*Oncorhynchus mykiss*) are federally listed as threatened under the ESA. Chinook salmon, in turn, are the primary source of food for the ESA-listed endangered Southern Resident killer whales, the critical habitat for which includes most of Puget Sound.

EPA's approval of the South Fork Nooksack TMDL changed (or attempted to change) the Washington temperature criteria from a biologically-based numeric criteria of 12° for Char Spawning and Rearing and 16° C for Core Summer Salmonid Habitat to temperatures established by "Scenario 5" in the TMDL ranging from 12° C to approximately 21.3° C. Many of these supplanting criteria represent temperatures that EPA has determined will harm or kill ESA-listed salmonids. EPA's ongoing failure to seek consultation with the Services on these changes to the numeric criteria through its approval of the South Fork Nooksack TMDL is a violation of EPA's mandatory duty to consult with the Services to ensure against jeopardy. The ESA requires that "[e]ach federal agency shall, in consultation with and with the assistance of the

Secretary, 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 destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). An action agency must initiate consultation under Section 7(a)(2) whenever it undertakes an action that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a).

It is indisputable that Washington’s revisions to its water quality standards for temperature through EPA’s approval of the South Fork Nooksack TMDL “may affect” threatened and endangered species, triggering EPA’s duty under the ESA to consult with the Services. EPA thus violated Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations at 50 C.F.R. § 402, when it failed to consult with the Services to ensure against jeopardy and adverse modification of critical habitat prior to approving the South Fork Nooksack TMDL that changed or attempted to change Washington’s water quality standards that are intended to protect or have the ability affect aquatic life, including threatened and endangered species. Approving a TMDL that does not meet Washington’s EPA-approved “applicable” water quality standards under the Clean Water Act threatens harm to listed species.

In addition, other aspects of EPA’s approval of the South Fork Nooksack TMDL require ESA consultation because they pertain to whether the TMDL “may affect” threatened and endangered species. For example, TMDLs are required to demonstrate that there is reasonable assurance the TMDLs’ load allocations to nonpoint sources will be achieved, which is the only method by which the TMDL can ensure against jeopardy and adverse modification of critical habitat. Finally, the load and wasteload allocations in the TMDL also may affect listed species, requiring consultation under the ESA.

III. Persons Giving Notice and Representing Attorneys

The full name, address, and telephone number of the parties providing this notice are:

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The attorneys representing the parties in this notice are:

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IV. Conclusion

If EPA does not come into compliance with the Endangered Species Act upon expiration of the 60 days NWEA intends to file suit against EPA pursuant to the ESA. NWEA anticipates filing suit in the United States Western District Court District of Washington, requesting declaratory and injunctive relief. We are available to discuss potential remedies prior to the expiration of this notice.

Very truly yours,

TELEGIN LAW PLLC

A handwritten signature in blue ink, appearing to read "Bryan Telegin". The signature is stylized with a large initial "B" and a long, sweeping underline.

Bryan Telegin
Counsel for NWEA