

Supplemental Filing
OSC FILE No. DI-17-1993
By Judith (Jody) Marshall or Whistleblower (WB)
August 17, 2020

I. UPDATE

I am providing an update on Office of Special Counsel (OSC) review of OSC File No. DI-17-1993. I provided my complete allegations to OSC in May 2017. On July 9, 2018, the OSC found a "substantial likelihood of validity" that my disclosure of systemic non-compliance with key environmental and cultural resource protections by the US Army Corps of Engineers (Corps), Portland District (NWP) and the Northwest Division (NWD), over their entire civil works program in Oregon and in parts of Washington along the Columbia River evidenced "violation of law, rule, or regulation". The OSC instructed the US Department of Army (DOA) to investigate my disclosure. In turn, Secretary Esper instructed the Corps to prepare an investigative officer's (IO) report on the matter.

In a document dated April 24, 2019, the Corps forwarded the report from its designated Investigation Officer (IO) back to OSC. Two months later, OSC forwarded that response to me. On July 19, 2019, pursuant to 5 U.S.C. § 1213(e)(1), I provided comments to the OSC regarding the IO report.

On September 19, 2019, I along with my legal representatives from Public Employees for Environmental Responsibility (PEER), had a conference call with OSC. In that call, the OSC requested from me what type of documents one would expect from the Corps if there is compliance with the laws cited in my disclosure.

On October 11, 2019, PEER provided OSC with a description of documents and answers to questions that the Corps would need to provide in order to demonstrate compliance with the laws cited in my disclosure. Based on the phone call with OSC, PEER, and the Whistleblower on July 17, 2020, it is apparent that the OSC did not ask the Corps to provide those answers or that documentation. Instead, the OSC only requested certain updates on activities, specifically,

- *"regarding an updated Environmental Impact Statement for the Willamette Valley Project,*
- *the Portland District's investigation and any determinations made on the need for National Pollutant Discharge Elimination System permits in Willamette Valley,*
- *and whether the agency had implemented the recommendation made by the Investigating Officer."*

I contend that those updates cannot possibly demonstrate compliance with the laws, rules, and regulations that are the subject of my disclosure.

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On **August 10, 2020**, OSC provided me the DOA's redacted IO report (2020 IO report) at my request. I found new information in the 2020 IO report, and I also found PII that was not redacted in Tab B.

Today, I am providing supplementary comments evidencing ongoing violations by the Corps.

II. ONGOING VIOLATIONS

The substance of my disclosure was that the Corps has systematically been substantially derelict in its legal responsibilities under key environmental statutes such as: the National Environmental Policy Act (NEPA); Endangered Species Act (ESA); Clean Water Act (CWA); and the National Historic Preservation Act (NHPA) for programs and major operational decisions for multiple dams, reservoirs, navigation channels, and hatcheries in the Willamette, Columbia and Rogue watersheds. These watersheds are central to the environmental health of the Pacific northwest.

Apart from violations of laws, regulations and policies, this abdication means that Corps activities across this wide area have largely gone unexamined for several years and, in some cases, decades. As a result, the Corps is NOT actively making "informed decisions" as required by NEPA about the operation of these major facilities. These violations also denote an absence of meaningful federal oversight concerning a broad array of agency actions.

This is not a merely academic or procedural concern. As detailed below, these lapses have very serious real-world consequences, including:

- Adverse impacts on federally protected fish populations¹;
- Increased hazardous algae bloom (HAB) outbreaks that are harmful to humans as well as listed fish;
- Unchecked damage and looting of historic properties and archaeological resources;
- Introduction and spread of invasive species;
- Water contaminated with elements such as arsenic and mercury from residual stockpiles left after the dams were constructed;
- Effects of climate change;
- The public is uninformed and confused about what is happening to our water in these major drainages; and
- Continued waste of our federal taxes and state taxes in Oregon.

Significantly, the US District Court in Portland, Oregon, confirmed that new NEPA analyses must be done when changes have occurred similar to those here. This was done for the Federal Columbia River Power System (FCRPS), a system of Corps and US Department of Interior,

¹ <https://repository.library.noaa.gov/view/noaa/17028>

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Bureau of Reclamation (BOR) on the Columbia and Snake Rivers. The Corps was directed in 2016, through court order, to conduct long-overdue NEPA for the FCRPS.² In that case, US District Court Judge Simon held that the Corps could not rely on stale data from the 1990s when many changes had occurred since then, including a 2014 biological opinion (BiOp) and its reasonable and prudent alternative (RPA) to avoid jeopardy to federally listed fish protected under the ESA. Judge Simon further found that when the Corps accepted the BiOp and its RPA, the Corps was required to do NEPA for the actions and effects not considered in its prior NEPA document that predated the 2014 BiOp.

The May 2016 decision was the fifth consecutive Corps plan in this region deemed illegal by three different judges across two decades.

WILLAMETTE VALLEY SYSTEM OR PROJECT (WVS OR WVP)

A. Violation of NEPA. I charged that the Corps failed to study the environmental impact of changes in WVP operations, including changes in WVP hatcheries and the listing/delisting of endangered and/or threatened species in the Willamette River Basin, and to supplement the Environmental Impact Statement (EIS) prepared for the WVP in 1980, in violation of 40 C.F.R. §§ 1502.9 (c) (1) and 1506.1(c).

In essence, the Corps does not have NEPA coverage for its on-going operations and maintenance; of the: 13 dams and 11 reservoirs; 5 hatcheries; and adjoining land management for the WVS.

As in the case of the FCRPS, the Corps did not conduct a NEPA analysis or conduct public involvement when it claimed to implement the 2008 BiOp from US Department of Commerce, National Oceanic Atmospheric Administration (NOAA) Fisheries³ (sometimes referred to National Marine Fisheries Service or NMFS). Up to 2008, the Corps was operating the WVS such that NOAA Fisheries claimed their actions would jeopardize the continued existence of upper Willamette River (UWR) steelhead and Chinook salmon under the Endangered Species Act (ESA) without implementing the RPA stated in NOAA's 2008 biological opinion.

The NOAA Fisheries defines the RPA in the 2008 BiOp/RPA as the following:

“The measures in this RPA are additive to the Action Agencies’ Proposed Action (USACE 2007a). That is, the two sets of measures combined create the complete RPA that NMFS will analyze. For the sake of brevity, the RPA measures provided below only include

² NATIONAL WILDLIFE FEDERATION, et al., v. NATIONAL MARINE FISHERIES SERVICE, et al., for the U.S. District Court, District Court of Oregon (Case No. 3:01-cv-00640-SI, filed 05/04/2016)

³ <https://www.fisheries.noaa.gov/resource/document/consultation-willamette-river-basin-flood-control-project>

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measures that are not in the PA⁴, and PA measures that are changed in some way. In the event there are inconsistencies between the PA and RPA, this RPA will take precedence.” (page 9-7).

The NOAA Fisheries BiOp and RPA include a variety of comprehensive measures related to the following to avoid jeopardizing listed fish: coordination; flow management; water contract program; fish passage; water quality; hatcheries; habitat; ESA compliance and coordination; research, monitoring and evaluation (RM&E); and maintenance.

As part of the ESA consultation, the RPA also states,

“Decision-making for all of the final actions and implementation of measures included in the RPA must comply with all applicable statutes and regulations. Among those the Action Agencies must consider are NEPA, the Clean Water Act and the Northwest Power Planning Act. In so doing, the criteria the Action Agencies will apply are whether the action is: (1) biologically feasible and beneficial; (2) technically feasible; and (3) cost effective.” (page 9-6).

The RPA is significant in impacts and costs. Further 40 Code of Federal Regulations (CFR) § 1501.(b) states,

“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.” (underlining for emphasis)

The truly significant issues of today are the adverse effects to salmonids and steelhead and concern for their survival in the years to come. The 1980 EIS for the WVS did not have this focus.

Some of the RPA measures involve operational changes, new facilities, and operation of those new facilities. The RPA commits the federal government to construct **hundreds of millions of dollars** of new facilities, which is funded by taxpayers.

⁴ PA is the proposed action.

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The Corps IO report stated that the 1980 environmental impact statement (EIS) was very broad in scope, but it did not claim that it was broad enough to address the situations we have today:⁵

“The Willamette Valley Project...was analyzed by a 1980 EIS that was very broad in scope. Changes to ongoing operations may require additional analysis, but the line between changes that require additional analysis and those that is not black and white.” (p. 35)

Here, the IO is careful not to take a position on whether the changes to ongoing operations require additional analysis. The 1980 EIS is obviously not sufficient according to the US District Court’s opinion and order from Judge Simon in 2016 and NEPA regulations found in 40 CFR § 1500 - 1508.

As specified in original response to the IO report, legal deficiencies following my disclosure led to their decision to prepare a new EIS for the WVS, including;

- **March 13, 2018**, Plaintiffs filed a lawsuit against the Corps alleging ESA violations of the 2008 WVP BiOp;⁶
- **April 9, 2018**, the Corps and the NOAA Fisheries agree to reinitiate consultation;⁷
- **November 30, 2018**, Native Fish Society seeks a preliminary injunction to implement immediate measures for protection of listed fish;⁸ and
- **April 1, 2019**, the Corps issues a notice of intent (NOI) in the Federal Register to do an EIS for the Willamette Valley Project.⁹

So, while the Corps has been out of compliance under NEPA, the IO report states:

⁵ Page 15

⁶ <https://nativefishsociety.org/us-media/dfs-and-conservation-partners-file-lawsuit-to-save-willamette-river-chinook-salmon-and-steelhead>

⁷ <https://nativefishsociety.org/campaigns/rewild-the-willamette>

⁸ See <https://nativefishsociety.org/news-media/nfs-conservation-partners-request-preliminary-injunction-seeking-immediate-changes-at-willamette-dams> and <https://advocateswest.org/case/willamette-river-salmon-and-steelhead/>

⁹ <https://www.federalregister.gov/documents/2019/04/01/2019-06258/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-willamette-valley-system>

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“...the District recognized a couple of years ago that it would be prudent and would minimize legal risk to update the EIS and requested funding to do so.” (page 15)

What really happened is the Corps is very behind their commitments in the 2008 biological opinion and is not meeting the scheduled RPA dates when the Corps needed to complete actions stated in the RPA measures. Page 9-6 of the RPA states,

“In order to assure timely progress toward implementing critical on-the-ground actions, NMFS’ RPA establishes deadlines for completing studies, structural and operational improvements at the dams and hatcheries, and for implementing habitat restoration programs. Specific projects are identified that must be completed in the short term, while other, larger projects must be completed during later years of the term of the Opinion. In the RPA, certain specific fish passage and temperature control measures will be completed by 2023, the end of the Opinion term...”

The Corps was being sued to come into compliance. It therefore began preparing an EIS for the WVS along with reinitiating consultation with NOAA Fisheries.

As an example of the Corps’ failures to comply with the BiOp’s RPA timeframes, the Corps initiated the Willamette Basin Review (WBR or Willamette River Basin Review (WRBR)). The Corps is directed by RPA measure 2.9 to,

*“Protecting Stored Water Released for Fish: In coordination with the OWRD¹⁰ and ODFW,¹¹ the Action Agencies will facilitate conversion of stored water to an instream flow water right. After being converted to water rights under Oregon law, OWRD can protect the minimum perennial stream flows from illegal diversion...In particular, USACE and Reclamation will coordinate with OWRD...to accomplish this measure... This effort will begin immediately. **By the end of 2009**, the Action Agencies will have coordinated with all appropriate agencies and determined the path forward in order to accomplish this action.” (pages 9-24 - 9-25)*

The stored water is the water that is impounded behind the dam, and the BOR is assigned the job of allocating it to agricultural/irrigation (AI) users. The Corps started this effort in **2015** as noted in the draft final feasibility study/environmental assessment (FS/EA), Willamette Basin Review Feasibility Study, Final Draft, Integrated Feasibility Report and Environmental Assessment

¹⁰ OWRD is the Oregon Water Resources Department

¹¹ ODFW is the Oregon Department of Fish and Wildlife

