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RE: 60-day notice of intent to sue under the Endangered Species Act for the Environmental Protection Agency's failure to comply with the Act regarding the Final Rule for National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities

Dear Administrator McCarthy:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("the Act" or "ESA"), 16 U.S.C. § 1540(g), you are hereby notified that Sierra Club, Waterkeeper Alliance and Center for Biological Diversity, contact information for which are provided below, intend to bring a civil action in federal court challenging your failure to comply fully with the ESA regarding the Final Rule for National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities ("Final Rule"). 79 Fed. Reg. 48,300; *see also* Agency Docket ID No. EPA–HQ–OW–2008–0667, FRL–9817–3. EPA's Final Rule authorizes power plants to continue operating cooling water intakes that kill millions of

threatened and endangered fish and other animals and also have adverse effects on the habitats of hundreds of threatened and endangered species. The threatened and endangered species and habitats at issue include the more than 200 identified in the EPA Biological Evaluation on the 316(b) Rule, *e.g.* Southern Resident Killer Whale, Cook Inlet beluga whale, Hawaiian Monk Seals, Leatherback Sea Turtle, Loggerhead Sea Turtle, Green Sea Turtle, Hawksbill Sea Turtle, Kemp's Ridley Sea Turtle, Salmonids, including Chinook, Shortnose sturgeon, Atlantic sturgeon, Gulf sturgeon, Pallid sturgeon, Abalone, and staghorn and elkhorn corals.

Under the ESA, every federal agency must "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species"; and "insure" that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" deemed critical to such species. 16 U.S.C. § 1536(a)(1) and (2). However, the Final Rule does not satisfy these requirements. It provides for situations where certain species can and will be jeopardized and/or their critical habitat adversely modified. The EPA's reliance on the Services' findings of no jeopardy and no adverse modification of critical habitat is arbitrary and capricious since, among other things, the Services' findings were not based on the best available science, were improperly limited in scope, were contrary to the evidence before the agency, did not meet the requirements for an incremental or programmatic consultation, and otherwise do not meet the requirements of the ESA and applicable regulations.

Moreover, the EPA did not comply fully with the ESA's consultation requirements. Under ESA section 7, if an agency's proposed action is likely to affect an endangered species, the agency must consult with the Secretary of the Interior, through the U.S. Fish & Wildlife Service and the National Marine Fisheries Service ("the Services"), to obtain an opinion evaluating the agency's action under the Act. *Id.* § 1536; 50 C.F.R. §§ 402.01, 402.14. As part of the consulting process, the acting agency submits a Biological Evaluation to assist the Services in evaluating whether the agency's proposed action "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4), (h).

On June 18, 2013, EPA did submit a Biological Evaluation, supporting materials, and a request for formal consultation regarding the Final Rule, pursuant to Section 7(a)(2) of the ESA, to the Services. However, the Biological Evaluation was written at a level of generality that did not allow for any meaningful analysis. And EPA provided virtually no data to the Services about the status of the various populations of threatened and endangered species that would be harmed by federally-regulated cooling water systems. On October 31, 2013, Sierra Club and multiple allied environmental groups submitted timely comments to EPA and the Services detailing those and multiple other flaws in the consultation process that were violations of the law. Those comments are attached hereto and incorporated by reference into this letter. Nevertheless, those violations were not remedied and form part of the basis for this proposed citizen suit.

At the outset, EPA's characterization of the consultation was fundamentally at odds with the ESA. EPA indicated that the Services' Biological Opinion would not need to include a thorough analysis of the impacts on listed species or critical habitat because a full ESA analysis can be deferred to a later date. This proposition is unlawful and unrealistic. First, for most

existing intakes, no federal agency will be involved in the reissuance of their NPDES permit because these permits are issued by state agencies in states where EPA has delegated permitting authority to the states. The consultation on the Final Rule is thus the only opportunity for the Services to complete a comprehensive biological opinion on the EPA's action. Second, many of the states that administer the NPDES program have not examined the effects of existing cooling water intake structures in decades and have ignored existing federal law that requires such review in every NPDES cycle. EPA has rarely, if ever, challenged these practices. Third, the NPDES permit backlog for large power plants that are the main users of cooling water is so great that the five-year cycle often takes ten years or more to complete. At coal fired power plants alone, more than 87 million MWh of generation operates without an up-to-date permit as of 2011, and nationwide, 255 existing plants were operation on expired permits. EPA's rule will only worsen this problem by creating further extended timelines before "best technology available" decisions are made. Thus, EPA's approach is not reasonably certain to avoid harm, jeopardy or adverse modification of critical habitat, and is no substitute for complying with the agency's consultation duties under ESA section 7.

EPA also did not comply with its duty to provide the Services with "the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat." 50 C.F.R. § 402.14(d); and see the Act at §1536(a)(2)("each agency shall use the best scientific and commercial data available."). Instead, EPA provided limited information in the categories typical for such a document. EPA did not even collect and evaluate all Incidental Take Statements, Incidental Take Permits, and state, federal and/or permittee monitoring reports or studies on endangered and threatened species and their habitat related to currently permitted facilities.

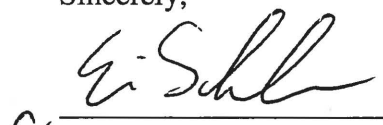
The Services repeatedly noted the lack of data provided by EPA in their final Biological Opinion. *See* Endangered Species Act Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act, May 19, 2014 ("Biological Opinion"), at 47 ("The biological evaluation provided limited data regarding the effect of impingement and entrainment on ESA-listed species."), and generally 41-49. This failure violates the ESA and is arbitrary and capricious. Without assessing the best available data, the Services could not reach a thorough, comprehensive, and reasoned opinion as to whether EPA's rule "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat," as required under the ESA. 50 C.F.R. § 402.14(g)(4).

Further, EPA's Biological Evaluation failed to take into account and be coordinated with the States' Clean Water Act § 303(d) lists to determine whether the waters impacted by cooling water intake and subsequent discharge are listed due to habitat degradation, temperature, dissolved oxygen levels, or other factors related to once-through cooling water intakes. EPA also neglected to consider the Final Rule's effect on total maximum daily loads (TMDLs) for temperature in impaired waters, or the absence of such TMDLs. Both Section 303(d) lists and TMDLs are subject to EPA approval, and thus in EPA's possession, and should have been considered "available" data.

Federal courts have demanded complete, thorough consultations that meet of all of the ESA's standards in similarly complex situations in the past. *See Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 466 (4th Cir. 2013)(vacating and remanding a pesticide reregistration Biological Opinion for failure to explain modeling and overlooking recent data); *Forest Serv. Emples. For Envt'l Ethics v. Wunited States Forest Serv.*, 726 F. Supp. 2d 1195, 1202 (D. Mont. 2010)(rejecting claims that a proper consultation involving 387 species and an action area of more than 192 million acres would be too hard, and noting that "Defendants cannot excuse the failure to comply with the law Congress passed by arguing that compliance would be too hard"); *NRDC v. Evans*, 364 F. Supp. 2d 1083 (N.D. Cal. 2003). In sum, EPA's failure to adequately consult, and then the agency's resulting unreasonable reliance on the legally flawed Biological Opinion in promulgating the Final Rule is a violation of the ESA.

This letter serves to put EPA on notice of its liability for violating the ESA and informs EPA of the intent of Sierra Club, Waterkeeper Alliance and Center for Biological Diversity that should EPA's violations of the ESA remain uncorrected, the parties to this notice intend to file suit following the expiration of the statutory 60-day notice period, seeking injunctive relief to compel compliance with the ESA, as set forth above, as well as other appropriate relief including but not limited to costs and attorneys' fees. This notice is provided pursuant to, and in accordance with, ESA § 11(g)(2), 16 U.S.C. § 1540(g)(2).

Sincerely,



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