CRAG
LAW CENTER

917 SW Oak St.
Suite 417
Portland, OR
97205

TEL:
503.525.2724

FAX:
503.296.5454

www.crag.org

Christopher Winter
*Co-Executive Director*
*chris@crag.org*

May 5, 2015

**VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Hon. Penny Pritzker
Secretary Of Commerce
1401 Constitution Ave NW
Washington, D.C. 20230
TheSec@doc.gov

Dr. Kathryn Sullivan
NOAA Administrator
1315 East-West Highway
Silver Spring, MD 20910
kathryn.sullivan@noaa.gov

Eileen Sobeck
Assistant Administrator for Fisheries
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910
eileen.sobeck@noaa.gov

Will Stelle
Administrator, Northwest Region
National Marine Fisheries Service
7600 Sand Point Way, NE, Bldg 1
Seattle, WA 98115-0070
Will.Stelle@noaa.gov

**RE: Notice of Intent to Sue to Remedy Violation of the Endangered Species Act in Regard to the National Marine Fisheries Service's Failure to Produce a Recovery Plan for the Oregon Coast Coho (*Oncorhynchus kisutch*) Evolutionarily Significant Unit (ESU).**

Dear Secretary Pritzker, Dr. Sullivan, Ms. Sobeck, and Mr. Stelle,

I am writing to provide you with notice that the National Marine Fisheries Service ("NMFS" or "Service") is in violation of section 4(f) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(f), because it has failed to prepare and implement a recovery plan for the Oregon coast coho (*Oncorhynchus kisutch*) Evolutionarily Significant Unit (ESU) even though almost seven years has passed since the ESU's relisting as threatened under the ESA.

Oregon coast coho (OC coho) are an evolutionarily significant unit of coho salmon. They are anadromous—they spend the initial part of their life cycle rearing and feeding in streams and small freshwater tributaries and the rest of their life in estuarine and marine waters. Coho return to their natal streams to spawn at the end of their lives. As a result, coho require navigable passage back to their natal streams, stable gravel substrates for spawning and redd building, clear

water for spawning and feeding, pools for sheltering and feeding, and cool water. Unfortunately, OC coho face significant ongoing threats to the quality of their habitats. These threats are exacerbated by, among other things, the inadequacy of current regulatory mechanisms and the impacts of climate change. Despite these serious threats, NMFS has yet to prepare a recovery plan for the ESU.

This letter provides you, the National Marine Fisheries Service, and the Department of Commerce with sixty days' notice that The Center for Biological Diversity and Oregon Wild intend to file a citizen suit against you under Section 11 of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. §1540, for failing to develop, publish, and implement a recovery plan for the Oregon coast coho and/or for failing to make a finding that a recovery plan would not promote the conservation of the species. Your failure to perform, and/or your unreasonable delay in performing, the nondiscretionary duties imposed by ESA Section 4(f) violates the Act and is subject to citizen suit enforcement under ESA Section 11(g).

## The Endangered Species Act

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). It was enacted to "provide a program for the conservation of . . . endangered species and threatened species" and to "provide a means by which the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To receive the full protections of the Act, a species must first be listed by the Secretary of the Interior or Secretary of Commerce as "endangered" or "threatened" pursuant to ESA Section 4. *See id.* § 1533. The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A "threatened" species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). The term "species" is defined to include "any subspecies of fish . . . and any distinct population segment of any species of vertebrate fish . . . which interbreeds when mature." *Id.* § 1532(16).

## NMFS has a duty to prepare recovery plans in a timely manner

The ESA establishes a congressional policy that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." 16 U.S.C. § 1531(c). "Conservation," under the ESA, means to recover such species from their imperiled status. *See id.* § 1532(3). To effectuate this policy, once a species is listed as "endangered" or "threatened," the ESA requires the Secretary to "develop and implement plans ... for the conservation and survival of [such listed] species . . . , unless he finds that such a plan will not promote the conservation of the species." *Id.* § 1533(f). Each recovery plan must include, to the maximum extent practicable,

> "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; objective, measurable criteria which, when met, would result in a determination, in

> accordance with the provisions of this section, that the species be removed from the list; and estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal."

*Id.* § 1533(f)(1)(B)(i)-(iii). FWS's internal recovery planning guidelines provide that final recovery plans "should be completed within 2.5 years of listing[.]" NATIONAL MARINE FISHERIES SERVICE & U.S. FISH AND WILDLIFE SERVICE, INTERIM ENDANGERED AND THREATENED SPECIES RECOVERY PLANNING GUIDANCE VERSION 1.3 at 1.5-2 (2010).

Overall, the Secretary is to give priority "to those endangered species or threatened species . . . that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity[.]" 16 U.S.C. § 1533(f)(1)(A). NMFS's Recovery Priority Guidelines state that there are three criteria for species recovery priority—extinction threat, recovery potential, and conflict with economic activity. Listing and Recovery Priority Guidelines, 55 Fed. Reg. 24296, 24297 (June 15, 1990). Species are assigned a recovery priority number on a scale of 1 (high priority) to 12 (low priority). *Id.*

**The Oregon coast coho ESU**

The Oregon coast coho (*Oncorhynchus kisutch*) ESU has been listed as threatened under the ESA since May 12, 2008. *See* 50 C.F.R. § 223.102; Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon, 73 Fed. Reg. 7816 (Feb. 11, 2008) (designating as "threatened" all naturally spawned populations of coho salmon in Oregon coastal streams south of the Columbia River and north of Cape Blanco, including the Cow Creek coho hatchery program). Critical habitat for Oregon coast coho is designated throughout Oregon's coast range. *Id.* NOAA has assigned the OC coho a recovery priority number of 1. U.S. DEP'T OF COMMERCE, RECOVERING THREATENED AND ENDANGERED SPECIES FISCAL YEARS 2011-2012 REPORT TO CONGRESS 11 [hereinafter 2012 REPORT TO CONGRESS].

Listing the Oregon coast coho triggered the Secretary's duties to develop and implement a recovery plan for the species. 16 U.S.C. §§1533(f). Unfortunately, no recovery plan has been developed or implemented even though the Service recognizes that the species' population level is historically low, the species suffers from severe habitat degradation, there is ongoing uncertainty about the future management of the species' habitat, particularly forested habitat on state, Federal, and private lands, and that the species has the highest recovery priority number (1). *See* Threatened Status for the Oregon Coast Coho Salmon Evolutionarily Significant Unit, 76 Fed. Reg. 35755, 35765, 35770 (June 20, 2011); 2012 REPORT TO CONGRESS at 11. While NMFS issued a Notice of Intent to prepare a recovery plan for Oregon coast coho salmon in June of 2013—more than five years after the relisting of the species—it has since failed to publish anything more than a draft table of contents for the recovery plan. *See* Notice of Intent to Prepare a Recovery Plan for Oregon Coast Coho Salmon Evolutionarily Significant Unit, 78 Fed. Reg.

38011, 38012 (June 25, 2013). At this date, nearly seven years have passed since the re-listing of the OC coho, and there is still no recovery plan. This delay violates the ESA.

Despite its failure to draft a plan, NMFS acknowledges that the status of the OC coho remains vulnerable. In 2011, NMFS completed a status review of the species, in which it summarized the current population status and array of threats to the Oregon coast coho. It determined that the species should remain under threatened status. 76 Fed. Reg. at 35769. While current returns are higher than they were in the 1990s, NMFS's Biological Review Team still has "considerable concerns about the long-term viability of the ESU." H.A. STOUT ET AL., SCIENTIFIC CONCLUSIONS OF THE STATUS REVIEW FOR OREGON COAST COHO SALMON (*ONCORHYNCHUS KISUTCH*), NOAA TECH. MEMO, NMFS-NWFSC-118, at x (2012). Even with the recent increases, spawning abundance remains at only ten percent of NMFS's estimated historical spawning abundance. *Id.*

OC coho and its habitat are also in constant conflict with economic activities, development, and construction. *See* 16 U.S.C. 1533(f)(1)(A). NMFS's Biological Review Team has concluded the areas of highest habitat diversity have been severely degraded by past forest management practices, lowland agriculture, and urban development. STOUT ET AL., at 119. Timber harvest and road building have reduced stream shade, increased fine sediment levels, reduced levels of instream large wood, and altered watershed hydrology. 76 Fed. Reg. at 35766; *See* STOUT ET AL., at 79-84. Fish access has been impacted by culverts, tide gates, and other structures. *Id.* at 64-67. Urbanization has removed vegetation and increased impervious surfaces, which alter normal hydraulic processes. *Id.* at 91-96; 76 Fed. Reg. at 35766. This is likely to continue in the future as rural land is converted to urban and suburban uses. 76 Fed. Reg. at 35766. Urban and rural residential development causes profound changes to the pathways, volume, timing, and chemical composition of stormwater runoff. STOUT ET AL., at 91.

The decision to retain the listing concluded that, considered collectively, ongoing efforts to protect OC coho salmon and its habitat ". . . do not comprehensively address the threats to the OC coho salmon ESU from past, ongoing, and future land management activities and global climate change." 76 Fed. Reg. at 35769. NMFS expressed concern that existing efforts to regulate actions affecting the species' habitat are "insufficient to provide habitat conditions that support a viable ESU." 76 Fed. Reg. at 35766. Additionally, the Biological Review Team expressed concern that global climate change will lead to a long-term downward trend in freshwater and marine coho salmon habitat. STOUT ET AL., at xi, 62-63. The BRT also notes that OC coho are also negatively impacted by predation and competition from non-indigenous species. STOUT ET AL., at 110-11. In sum, the species needs a recovery plan in order address past and present habitat degradation, the inadequacy of existing regulatory mechanisms, predation, and other factors, which will be exacerbated by climate change.

**A recovery plan is needed to address impacts to OC coho from forestry activities, especially on state and private lands.**

NMFS has identified logging as a contributor to the decline of coho habitat. 73 Fed Reg. at 7827. Logging helped precipitate the decline of coho. *See, e.g.* Proposed Threatened Status for

Three Contiguous ESUs of Coho Salmon Ranging From Oregon Through Central California, 60 Fed. Reg. 38,011, 38,024 (July 25, 1995). In its 1995 proposal, NMFS recognized that timber harvest was creating a suite of water quality and habitat threats for OC coho:

> Logging activities, and the associated road networks, often result in soil erosion and stream sedimentation such that spawning habitat is seriously degraded. Removal of trees within the riparian zone of coastal streams has resulted in increased summer water temperatures, eliminated the potential for trees to fall into streams, and altered the natural hydrograph. Decreases in large woody material in streams reduces habitat complexity and contributes to the loss of cover, shade, and pools; these habitat features are required by juvenile coho salmon.

*Id.* Logging remains an ongoing threat to OC coho. Indeed, at the time of relisting in 2008, NMFS identified logging operations as activities which may "take" the species through habitat degradation. 73 Fed. Reg. at 7830. The Critical Habitat Analytical Review Team identified forestry as an activity that threatens the physical and biological features essential to listed salmon. *Id.* at 7833. The 2011 status review reiterated that timber harvest and associated roads have extensive effects on the ecosystem, and that the effects of human landscape disturbance constitute an ongoing threat to OCCS. STOUT ET AL., at 79-84.

Timber harvest effects on fish and habitat are likely most pronounced on private and state lands. STOUT ET AL., at 83. NMFS has expressed significant concern that the state's regulation of forestry on private lands may be inadequate to protect OC coho. 76 Fed. Reg. at 35767. The Oregon Forest Practices Act (OFPA) and Forest Practice Rules regulate the management of riparian areas on private forest lands within the range of OC coho salmon. NMFS concluded that on some streams, forestry operations conducted in compliance with [the OFPA] are "likely to reduce stream shade, slow the recruitment of large woody debris, and add fine sediments." *Id.* In January of this year, NOAA determined that Oregon's logging rules still do not do enough to protect the water quality that sustains fish habitat. NOAA & EPA, FINDING THAT OREGON HAS NOT SUBMITTED A FULLY APPROVABLE COASTAL NONPOINT PROGRAM 4 (Jan 30, 2015); *See* Notice of Availability, 80 Fed. Reg. 10667 (Feb. 27, 2015).

NOAA's January finding reviewed multiple studies on the OFPA's effectiveness in protecting temperatures and water quality generally. ODF's 2011 Riparian Stream Temperature Effectiveness Monitoring Project found that the OFPA's riparian protections on private forest lands did not ensure achievement of the state's Protection of Cold Water criterion, which prohibit human activities (like timber harvest) from increasing stream temperatures by more than 0.3 degrees Celsius at locations critical to salmon. NOAA & EPA FINDING at 5. While the OFPA standards for small and medium-sized fish-bearing streams require only a 20-foot (or ~7 meter) no-cut buffer within a riparian management zone, the EPA has determined that dramatic temperature effects can occur with such small buffers. *Id.* at 6 (citing P. Leinenbach, et al., *Effects of Riparian Management Strategies on Stream Temperature*, Prepared for the Interagency Coordinating Subgroup (ICS) (2013)). No-cut buffer widths under 20 meters are associated with pronounced increases in temperature as compared with wider widths. *Id.* Buffer widths less than

or equal to 10 meters are associated with the most dramatic temperature effects. *Id.* As the BRT noted in its status review, forest practice regulations for state and private lands "reduce the size of the streamside riparian area to less than that needed to maintain the full suite of ecological processes provided by riparian areas and allow for removal of trees from within this zone, which further reduces ecological effectiveness." STOUT ET AL., at 83.

Clearly, Oregon's riparian protection measures for timber harvest are inadequate under the current science. It is imperative that NMFS develop a comprehensive OC coho recovery plan to address the fact that 2948 miles of OC coho habitat exceed standards for summer water temperature for salmon, and that state practices are perpetuating this degradation. Thomas Wainwright & Laurie Weitkamp, *Effects of Climate Change on Oregon Coast Coho Salmon: Habitat and Life-Cycle Interactions*, 87 NW. SCI. 219, 228 (2013); *See* NOAA & EPA FINDING at 7; *See also* STOUT ET AL., at 105-06 (depicting the vast reaches of OC coho habitat which are impaired under Section 303(d) of the CWA, and impaired reaches for temperature in particular).

Additionally, NOAA's January decision on Oregon's coastal nonpoint source pollution program found that Oregon is not doing enough to address sediment loading from logging roads and unstable slopes. In particular, the state has failed to adequately address the impacts of legacy roads—those logging roads constructed before the OFPA, and closed without proper treatment. Many of these are improperly sited in valley bottoms, near streams, as was historic custom. As NOAA acknowledges, these roads alter surface drainage, contribute sediment, divert natural channels, and contribute to landslides and erosion. NOAA & EPA FINDING at 8. There are also significant gaps in the state's regulation of existing forestry roads. *Id.* at 9. Specifically, the state's revised drainage rule, designed to reduce sediment delivery from logging roads does not apply to existing roads unless reconstruction is proposed. *Id.* Additionally, the state's landslide hazard restrictions are not appropriately tailored to impacts on water quality and designated used (including fish spawning). *Id.* at 11-12. Road construction and timber harvest are not restricted on high-risk landslide areas unless they would pose a risk to human health or property. *Id.* Harvesting on landslide-prone slopes degrades water quality. NOAA explicitly referenced its impact on salmon spawning in its decision, noting that landslides and related sediment input can directly kill fish, suffocate their eggs and food sources, damage their gills, and impact spawning habitat. *Id.* at 13-14.

The state is also directly impacting OC coho through practices it undertakes on its own forestlands. The Center has put the state on notice that its harvest activities and logging roads are causing take of the species. *See* Sixty-Day Notice of Intent to Sue for Violations of Sections 4(d) and 9 and of the Endangered Species Act (Feb. 13, 2014). The activities that cause take include timber hauling (especially over roads that are hydrologically connected to salmon-bearing streams), road maintenance, road construction, logging of landslide prone areas, logging of riparian areas, and the synergistic effects of these activities within specific watersheds where Oregon coast coho are located. *Id.*

Given the fact that state laws are currently inadequate to protect habitat from forest practices on private lands, and that the state itself is contributing to habitat degradation, NMFS must act immediately to develop a comprehensive plan that will reach across government lines to

protect and recover OC coho.

**Habitat limiting factors are well understood, and must be comprehensively addressed to buffer the effects of climate change and oscillating ocean conditions**

Biological and ecological limiting factors and threats to the species' existence are well known. In the Umpqua River basin, diversion of water for agriculture reduces stream flow which can affect juvenile coho survivorship. STOUT ET AL., at 68. Water availability is a primary limiting factor for the Middle Umpqua and South Umpqua OC coho populations. OREGON DEPT. OF FISH AND WILDLIFE, OREGON COASTAL COHO CONSERVATION PLAN FOR THE STATE OF OREGON 25 (2007). Of the other OC coho populations, 13 are considered stream complexity limited. *Id.* Additionally, invasions by non-indigenous species may constitute a threat to the species, via predation, competition, and ecosystem impacts. *See* STOUT ET AL., at 63-64, 110-11. Non-indigenous fish species are listed at the primary limitation for three of the populations. ODFW at 25. Water quality is a secondary limiting factor for 15 OC coho populations. *Id.* Other limiting factors include spawning gravel and hatchery impacts. *Id.*

A recovery plan is especially necessary to manage and mitigate for the substantial adverse impacts to OC coho salmon that we anticipate from climate change. As NMFS has acknowledged, a recent analysis by Thomas Wainwright and Laurie Weitkamp (two of the BRT's members) has reviewed the science of climate impacts on the physical and chemical environment upon which Oregon coast coho rely, and assessed how climate change is likely to affect the OC coho ESU. Thomas Wainwright & Laurie Weitkamp, *Effects of Climate Change on Oregon Coast Coho Salmon: Habitat and Life-Cycle Interactions*, 87 NW. SCI. 219 (2013). They acknowledge that changes in freshwater habitats such as reduced summer stream flow, earlier spring peak flow, increased flood frequency, and higher stream temperatures will all have effects on salmon. *Id.* at 227. For example, reduced summer stream flows will affect the availability of summer rearing habitat, especially in combination with warmer temperatures. *Id.* at 227. Already, 43% of available stream habitat in the range of the Oregon coast coho has been identified as having summer temperatures exceeding tolerance limits for salmon, and this fraction exceeds 70% in the Umpqua river basin. *Id.* at 228. The authors conclude that we can expect future reductions in available freshwater rearing habitat as average water temperatures increase. *Id.* Additionally, changes in stream flow can create a migration timing mismatch, and increased flood frequency and intensity may increase egg and fry mortality. *Id.* at 227. In general, increased temperatures are also expected to have the effect of increased disease and parasite susceptibility, changes in migration timing, and increasing abundance of warm-water predators. *Id.* at 226.

Out at sea, OC coho may face a number of rising challenges, including warmer temperatures, increased predation (predators' distribution is shifting), acidification, and disruption of food supply. *Id.* at 229-30. Indeed, it is likely that the largest influence of climate change on OC coho will be through effects on ecosystem structure and food webs. *Id.* at 230. Overall, the study predicts a decline in OC coho population due to climate change. *Id.* at 234-35.

Because climate change—not to mention the existing oscillations of Pacific Ocean

conditions—will exacerbate already inadequate habitat conditions, NMFS should speedily develop a recovery plan that will promote the resilience of the species before it is too late. How will OC coho respond when marine conditions are poor and/or climate stresses increase? A recovery plan for OC coho to improve habitat conditions is necessary to help "buffer" the negative response. *See* 76 Fed. Reg. at 35766-67 (stating that "in the past much of [OC Coho's] freshwater habitat was in good condition, buffering the effects of ocean/ climate variability on population abundance and productivity."); STOUT ET AL., at 33 (opining that "Marine conditions will continue to cycle (Lawson 1993) and, with current freshwater habitat conditions, the ability of the OCCS ESU to survive another prolonged period of poor marine survival remains in question.").

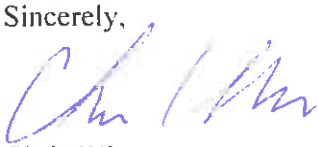
**The Service's failure to develop and implement an Oregon coast coho recovery plan violates the Endangered Species Act.**

The Center for Biological Diversity and Oregon Wild hereby provide sixty days' notice of their intent to file suit against the Secretary of Commerce and NMFS for the violations described herein. NMFS's failure to develop and implement an Oregon coast coho recovery plan violates the spirit and letter of the Act and constitutes a failure to perform the nondiscretionary duties imposed by ESA Section 4(f). Additionally, NMFS's delay in developing, promulgating, and implementing an OC coho recovery plan is unreasonable and constitutes action unlawfully withheld and/or unreasonably delayed under the Administrative Procedure Act.

These failures and delays are subject to the ESA's citizen suit provisions. Therefore, under Section 11(g) of the Act, 16 U.S.C. §1540(g), the Center for Biological Diversity and Oregon Wild intend to seek injunctive relief to ensure prompt completion and implementation of an Oregon coast coho recovery plan, as well as such other relief permitted by law. Additionally, should they prevail in any action related to this notice letter, they will seek to recover the costs of litigation, including attorneys' and expert witness fees. *See* 16 U.S.C. §1540(g)(4).

During this sixty day notice period the Center and Oregon Wild will be willing to discuss effective remedies for the violations described in this letter. If you wish to pursue discussions in the absence of litigation, please contact me at (503) 525-2725, or chris@crag.org. Thank you for your attention to this matter.

Sincerely,



Chris Winter
Co-Executive Director and Staff Attorney
Crag Law Center

Paul Kampmeier
Staff Attorney
Washington Forest Law Center