

NORTHWEST ENVIRONMENTAL ADVOCATES



February 1, 2013

Blair H. Brady, Chair
Daniel L. Cothren, Vice Chair
Mike Backman
Board of Wahkiakum County Commissioners
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Maurice Mooers, Chair
Wahkiakum Diking District #4
P.O. Box 586
Cathlamet, WA 98612

Re: **Wahkiakum County and Wahkiakum Diking District #4's Endangered Species Act Liability for Maintenance and Repair of Steamboat Slough Road Dike**

Dear Chair Brady, Commissioners Cothren and Backman, and Chair Mooers:

Northwest Environmental Advocates has been watching with grave concern the continued deterioration and impending breach of the Steamboat Slough Road Dike (“dike”). As you are aware, the breach of this dike, which is owned and maintained by Wahkiakum Diking District #4 and Wahkiakum County, would flood a large portion of the Julia Butler Hansen Refuge for the Columbian White-tailed Deer (“refuge”), a refuge that is essential to the survival of a federally-protected endangered species, the Columbia white-tailed deer (“deer”). We understand that the Army Corps of Engineers (“Corps”) – whose construction, maintenance, and operation of the Columbia River navigation channel likely has caused and contributed to the erosion of the dike – has made available \$4 million to build a new setback dike and to breach the existing dike, a less expensive alternative to repairing the dike but with similar outcomes. We likewise understand that the Board of Wahkiakum County Commissioners (“Board”) voted on January 8, 2013 to reject these federal funds and/or to place restrictions on the construction of a replacement dike such that the result of those restrictions would prevent the construction of a new dike. It is unclear whether the Wahkiakum Diking District #4 (“District”) has taken any formal action to prevent or support repair of the dike; it has not acted to repair or replace the dike. Failure to repair or replace the dike will result, upon its inevitable breach, in the flooding of the refuge and the subsequent harm, harassment, and death of the endangered Columbia white-tailed deer.

This letter constitutes Northwest Environmental Advocates’ advance notice that we may file an intent to sue the Board of Wahkiakum County Commissioners, collectively and individually, and the Wahkiakum Diking District #4 for violations of the substantive requirements imposed by the Endangered Species Act (“ESA”), namely the prohibition on “take” of listed species in section 9 of the ESA, 16 U.S.C. § 1538. The nature of these violations are set forth in detail below. This

letter describes the basis for your liability under Section 9 of the ESA and serves as a preliminary notice that Northwest Environmental Advocates may in the future, pursuant to 16 U.S.C. § 1540(g)(1)(A), provide you with an intent to bring a citizen suit to enjoin the violations described herein.

We understand that despite your recent action, described below, in rejecting the needed repairs to the dike, the Board is preparing on February 5, 2013 to reconsider its previous decision. Tony Lystra, *Wahkiakum County rethinking stance on federal fix for dike*, The Daily News (January 25, 2013) available at http://tdn.com/news/local/wahkiakum-county-rethinking-stance-on-federal-fix-for-dike/article_47f4d318-675f-11e2-ac5e-0019bb2963f4.html; Wahkiakum County Board, *Amended Agenda, Regular Meeting, February 5, 2013* (“10:35 Other/Unfinished Business, Item No. 3 “Steamboat Slough – Setback Dike (action)”). We strongly urge you to reverse your previous decision and to allow the fix to this problem to proceed.

I. THE ENDANGERED SPECIES ACT PROHIBITION ON “TAKE”

Section 9 of the ESA prohibits take of endangered species. 16 U.S.C. § 1538(a)(1)(B). The take prohibition makes it unlawful for any person to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a protected animal. 16 U.S.C. § 1532(19). Congress intended to define “take” under Section 9 in the “broadest possible manner to include every conceivable way” in which a person could harm protected fish or wildlife. S. Rep. No. 93-307, 93d Cong., 1st Sess. 7 (1973).

The U.S. Fish and Wildlife Service’s (“FWS”) implementing regulations define “harm” prohibited by Section 9 to include “any act which actually kills or injures wildlife,” including “significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The U.S. Supreme Court has upheld FWS’s regulation interpreting “harm” prohibited by Section 9 to include acts or omissions that proximately cause the death or injury of protected fish or wildlife. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Ore.*, 515 U.S. 687,697-98 (1995); *see also* Fish and Wildlife Serv., Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981) (stating in preamble to rule defining “harm” under Section 9 that “the Service feels that ‘act’ [in the definition of ‘harm’] is inclusive of either commissions or omissions which would be prohibited by section 9”).

As stated above, Section 9 likewise makes it unlawful to “harass” protected fish or wildlife. 16 U.S.C. § 1532(19). FWS regulations provide that under Section 9, “harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

II. THE FACTS: MAINTENANCE OF WAHKIAKUM COUNTY'S STEAMBOAT SLOUGH ROAD DIKE IS ESSENTIAL TO PREVENT TAKE OF THE COLUMBIAN WHITE-TAILED DEER

A. The Columbian white-tailed deer

The Columbian white-tailed deer, *Odocoileus virginianus leucurus*, has been listed under the federal ESA with a status of “endangered” since March 11, 1967. 50 C.F.R. § 17.11(h). When it was listed, the deer population was estimated to be fewer than 1,000 individual animals. FWS, *Oregon Fish & Wildlife Office, Species Fact Sheet, Columbian white-tailed deer*, <http://www.fws.gov/oregonfwo/Species/Data/ColumbianWhiteTailedDeer/>. The Lower Columbia River Distinct Population Segment (DPS) population has continued to be listed as endangered for over 40 years and consists of approximately 600 animals. FWS, *Columbian White-Tailed Deer Translocation Final Environmental Impact Assessment: Proposed Translocation of Deer from the Julia Butler Hansen Refuge for the Columbian White-tailed Deer and Puget Island to Ridgefield National Wildlife Refuge and Cottonwood Island (“EA”) 7* (undated), available at [http://www.fws.gov/jbh/pdf/Translocation/CWTD%20Translocation%20Final%20EA%201-21-13%20\(1\).pdf](http://www.fws.gov/jbh/pdf/Translocation/CWTD%20Translocation%20Final%20EA%201-21-13%20(1).pdf).

The Julia Butler Hansen Refuge for the Columbian White-tailed Deer was established in 1972. EA at 4. The refuge consists of six units, one of which is the Mainland Unit, the subject of this letter. *Id.* The refuge supports nearly 40 percent of the Lower Columbia DPS. *Id.* The Recovery Plan for this DPS considers any one of a series of subpopulations of the deer to be “viable and secure if they support 50 or more animals and are not under threat of development or radical change.” *Id.* at 2. Only two populations meet this definition, both of which are on the refuge. *Id.* The Mainland Unit supports 70-90 deer, which represents 13 percent of the total DPS. *Id.* The Steamboat Slough Road Dike protects the refuge from flooding with water from the Columbia River.

B. The Steamboat Slough Road Dike and the Columbian White-Tailed Deer

It is widely acknowledged and undisputed that Wahkiakum County Diking District #4 and Wahkiakum County maintain ownership of and responsibility for the Steamboat Slough Road Dike. The FWS has explained the ownership as follows:

The Mainland Unit is located within Wahkiakum County Diking District #4 which has an easement for the refuge dike, and is responsible for maintenance of the refuge tidegates. Because the district has limited resources, the refuge has commonly either cost shared or provided sole funding for more recent tidegate and expulsion pump repairs and replacements. Both Steamboat Slough and Brooks Slough Roads are county roads and are managed and maintained by the county.

FWS, *Final Comprehensive Conservation Plan and Environmental Impact Statement*, 5-4 (August 2010), available at <http://www.fws.gov/pacific/planning/main/docs/WA/jbh-lc/Draft%20CCP%20EIS/5%20Chapter%205%20Social%20and%20Economic%20Environment.pdf>; *see also Diking Districts, Wahkiakum County, WA*, available at http://www.co.wahkiakum.wa.us/depts/pw/documents/Diking_Districts.pdf.

Wahkiakum County has been aware of the eroding dike since at least March 2011. EA at 2. The dike has been deemed to be at imminent risk of failure and the results of such failure are relatively easily predicted. *Id.* According to the FWS,

a dike breach at this location would result in the flooding of JBH Mainland Unit at high tides. Prior week-long flood events in February 1996, November 2007 and December 2009 in this unit have reduced deer numbers by up to 50% from existing levels. It is expected that daily flooding from a breach at this location could substantially reduce or eliminate this secure subpopulation to where it could not recover.

Id. at 2-3. The FWS further notes that “[a] similar dike breach on Karlson Island in the lower Columbia River eliminated the small herd there, and islands in the Lewis and Clark Refuge that undergo daily inundation support few if any deer.” *Id.* at 7. Moreover, FWS observes that this population placed at risk by the impending dike breach is of particular importance:

The Mainland Unit is an important [Columbian white-tailed deer] subpopulation for this DPS, not only because it is one of two viable and secure subpopulations, but also because of its relative genetic purity (Piaggio and Hopken 2009) and low risk of further hybridization with black-tailed deer.

Id. at 8. It has also concluded that “[l]osing the mainland subpopulation would return the population back to conditions similar to those in 1972, when only one secure subpopulation existed.” *Id.* at 18.

The basis for this conclusion is that

A dike breach on the JBH Mainland Unit would lead to nearly daily flooding of most of the Unit and could substantially reduce or possibly eliminate this [Columbian white-tailed deer] subpopulation. Dike failure would likely cause high mortality, reduce reproductive output, and significantly lower or eliminate the number of resident deer. A certain number of deer would probably cross the Columbia River and arrive at Tenasillahe Island where they would become part of that subpopulation. In the other three directions, the JBH Mainland Unit is surrounded by marginal to poor-quality [Columbian white-tailed deer] habitat.

Areas outside the unit are typified by dense coniferous forests that support black-tailed deer. Flooding of the unit would force most of the resident deer into these marginal or unsuitable habitats where they would experience a high degree of competition. In addition to lowered health and productivity, a certain amount of direct and indirect mortality would occur due to vehicle strikes (deer in flooded habitat tend to linger on the raised roadsides), drowning (deer caught in fences and vegetation), and starvation (deer in suboptimal habitat). Prior one-week flooding events have resulted in population drops of 27 percent (2009) and 19 percent (2006) and a reduction in fawn recruitment of 12 percent and 88 percent, respectively. The result of chronic flooding has not been documented but can be expected to be much higher. By comparison, the dike breach at Karlson Island effectively eliminated the small herd there, and other intertidal areas on the lower Columbia support few if any deer.

Id. Because of the inevitable and imminent risk of failure of the dike, and its predicted impact on the species, the FWS has issued a Final EA and Finding of No Significant Impact, pursuant to the National Environmental Policy Act (“NEPA”), to translocate approximately half the deer from the Mainland Unit to the Ridgefield National Wildlife Refuge. *Id.* at 3.

C. Wahkiakum County Has Failed to Repair or Allow the Repair of the Impending Breach of the Steamboat Slough Road Dike

Wahkiakum County and the Wahkiakum County Diking District #4 have taken no action to repair or replace the eroding dike. According to the FWS,

Wahkiakum County Diking District #4 (District) owns the Steamboat Slough Dike, and they currently do not have enough funds or resources to repair the dike. Wahkiakum County (County), Army Corps of Engineers (ACOE), Washington Department of Transportation, Congresswoman Herrera Beutler, Senator Murray and Senator Cantwell’s offices and the Refuge have explored numerous possibilities for dike repair, but no solution (with funding) has been found to repair the dike in place. The only viable source of funding that has been located from the ACOE’s Section 536 proposal to restore endangered fish habitat on JBH Refuge. This proposal includes building a new set-back dike on the Refuge and would protect the [deer], the Mainland Unit of the Refuge, and its \$28 million of facilities. *This proposal, however, needs approval from both the District and County to allow the ACOE to breach Steamboat Slough dike/road to create approximately 100 acres of estuary after the setback levee is built. To date, no agreement has been reached and neither the District nor County has approved this proposal.*

Id. at 10 (emphasis added). This refusal to approve a potential funding source noted by FWS is confirmed by the Board’s meeting minutes that report “the commissioners concurred that they did not have enough information to make a decision at this time to give Steamboat Slough Road to the Corps.” Board of Wahkiakum County Commissioners, *Minutes, Regular Meeting, January 8, 2013* at 2; *see also* Natalie St. John, *Wahkiakum County turns down federal offer to fix failing dike*, The Daily News (January 8, 2013), available at http://tdn.com/news/local/wahkiakum-county-turns-down-federal-offer-to-fix-failing-dike/article_593f6a56-59ff-1e2-90f0-001a4bcf887a.html.

After a significant passage of time, the Corps proposed to pay for a repair, by means of a replacement, in December 2012:

[Corps Project Manager Laura] Hicks recommended placing a setback levee inland in front of Winter Slough turning approximately 200 acres into fish habitat. Hicks added the Corps cannot adversely affect private property rights and will need approval from the county and diking district before they can go forward. Hicks asked the county to make a decision on whether they should proceed with the setback levee by January 10, 2013 because the Section 536 funds will be divided among competing projects along the Columbia River. The board agreed to make a decision on this matter before January 10.

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Board of Wahkiakum County Commissioners, *Minutes, Regular Meeting, December 18, 2012, Work Session* at 4. The Board, however, has continued to withhold approval.

The Wahkiakum County Diking District #4 also appears to have withheld approval to allow repairs that involve the breaching of the Steamboat Slough Road dike. FWS wrote a letter following up on a January 4, 2013 meeting with Maurice Mooers, Chair, Wahkiakum Diking District #4, and Pete Ringen, Wahkiakum County Public Works Director, and in response to a letter from Mr. Mooers of December 20, 2012. This letter summarizes the demands of the district and the county and expresses the FWS's desire to accommodate the county to the extent legally and fiscally possible. Letter from Jackie Ferrier, FWS, to Maurice Mooers, Wahkiakum Diking District #4 (January 7, 2013), available at http://www.waheagle.com/news/article.exm/2013-01-10_fish_and_wildlife_service_responds_to_diking_district.

III. ENDANGERED SPECIES ACT VIOLATIONS

As the owners of the Steamboat Slough Road Dike, you have violated and continue to violate Section 9 of the ESA by failing to maintain the dike and to repair the dike to prevent its impending breach, which failure imminently threatens to cause harm, harassment, injury and death to Columbian white-tailed deer. Your failure to either repair or allow the U.S. Fish and Wildlife Service or Army Corps of Engineers to repair this dike is the proximate cause of this threatened unlawful take of an endangered species.

This action and inaction threatens significant harm and harassment of Columbian white-tailed deer. *See Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784-5 (9th Cir. 1995) (holding that "harm" prohibited by Section 9 of the ESA includes an imminent threat of harm). The harm, harassment, death and injury to Columbian white-tailed deer caused by a foreseeable dike breach and your maintaining and inadequate operation of it constitute an unlawful take under ESA section 9.

If the Board of Wahkiakum County Commissioners and Wahkiakum County Diking District #4 do not cure the violations of law described above immediately, we intend to file a notice of intent to sue. Upon expiration of the 60 days required by that notice, we intend to file suit against the Board of Wahkiakum County Commissioners and Wahkiakum County Diking District #4 pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). Such actions on our part can likely be forestalled by an immediate action on your part to allow the eroding dike to be replaced as proposed by the federal agencies.

Sincerely,



Nina Bell
Executive Director

cc: Laura Hicks, Corps
Jackie Ferrier, FWS