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December 21, 2020

Via CERTIFIED MAIL – Return Receipt Requested

Lieutenant General Scott A. Spellmon
Commanding General & Chief of Engineers
U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

**Re: NOTICE OF INTENT TO SUE THE U.S. ARMY CORPS OF ENGINEERS AND
LIEUTENANT GENERAL SPELLMON UNDER THE CLEAN WATER ACT**

Dear Lieutenant General Spellmon:

This letter is to provide you with sixty days' notice of Snake River Waterkeeper's ("SRW") intent to file a citizen suit against the United States Army Corps of Engineers and Lieutenant General Scott A. Spellmon, in his official capacity as the Commanding General and Chief of Engineers of the United States Army Corps of Engineers (collectively, the "Corps"), under section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, for the violations described herein. The CWA prohibits any person from discharging any pollutant to waters of the United States except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. Continuing to discharge pollutants without securing an NPDES permit constitutes an ongoing violation of the CWA.

The Corps has and continues to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants to waters of the United States and to the State of Idaho from the Dworshak Dam and Reservoir Hydroelectric Project and from its associated structures and facilities (collectively "Dam").¹ Specifically, the Corps discharges oils, greases, other lubricants, and cooling water from the Dam without the authorization of an NPDES permit in violation of the CWA.

This notice of intent to sue is part of SRW's effort to protect people who rely on the Snake River and its tributaries throughout the Snake River Basin—which includes the North Fork Clearwater River and Clearwater River—for uses including drinking water, food, and

¹ The term "Dam," as used herein, includes the Dworshak Dam and Reservoir Hydroelectric Project and all associated structures and facilities, including turbines, powerhouses, transformers, spillways, and cranes. The approximate location of the Dam is identified in Appendix 1.

recreation. SRW's mission is "applying science and law to protect, restore, and sustain waters of the Snake River Basin." The organization's strategy for protecting the Snake River and its tributaries includes working with and within communities that depend on local waterways and enforcing laws that promote public health and safety while protecting trout, salmon, and other native fish and wildlife.

I. Legal Background.

Idaho's rivers, and the use of rivers by people, fish, and wildlife, are protected by both federal and state law. In 1972, Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA is the cornerstone of surface water quality protection in the United States. In the forty years since its passage, the CWA has dramatically increased the number of waterways that are once again safe for fishing and swimming. Despite the great progress in reducing water pollution, many of the Nation's waters still do not meet the water quality goals. In fact, the vast majority of rivers and streams in Idaho are not assessed for or fail to meet basic state water quality standards for pollutants such as toxics and temperature.² These standards are designed to protect designated uses, including aquatic life, fishing, swimming, and drinking water.

The NPDES permitting scheme is the primary means by which discharges of pollutants are controlled. At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. *See* 33 U.S.C. §§ 1311, 1342, 1318. EPA formerly and now the state of Idaho issue permits for pollution discharges into the rivers and streams of Idaho. These include permits that regulate the discharge of toxic pollution, hot water, bacteria, and other pollutants. According to EPA, improvements to the quality of water in our rivers are directly linked to the implementation of the NPDES program and the associated control of pollutants discharged from both municipal and industrial point sources.³

II. The Heavy Toll of Pollution on the Snake River and Its Tributaries.

The Snake River and its tributaries make up one of the West's most scenic and productive aquatic ecosystems, flowing from the headwaters of Wyoming, across the full breadth of Idaho, and to its mouth near Washington's Tri-cities where it joins the Columbia River. This river system supports rich fishing traditions, provides water for communities and agriculture, recreation opportunities, and power for hydroelectric dams. The river system is also severely degraded by pollution. Toxic pollution threatens the health of people that eat local fish and jeopardizes the public's right to eat fish caught locally. Rising water temperatures also threaten the health of salmon and other aquatic life that rely on cool water for survival. The Columbia River, to which the Snake River is a tributary, faces these same threats.

² *See* Idaho Dep't of Env'tl. Quality, Integrated Report, *available at* <https://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>.

³ U.S. EPA, *Water Permitting 101* at 11, <http://www.epa.gov/npdes/pubs/101pape.pdf>.

Indeed, relevant units of the Clearwater Basin, Snake River, and Columbia River watersheds have a variety of designated beneficial uses, including cold water aquatic life, salmon spawning, primary contact recreation, domestic water supply, and more.⁴ And unfortunately, waterbodies downstream of the Dworshak Dam are listed as impaired and require or have total maximum daily loads (“TMDLs”) for temperature and toxic pollutants, including mercury, PCBs, DDE, dieldrin, dioxins, and toxaphene.⁵ Studies have confirmed the pollution crisis that exists on these critical waterbodies.⁶

Pollution discharges from the Corps’ Dam contribute to the pollution crisis on the Columbia River. According to the National Oceanic & Atmospheric Administration (“NOAA”):

Spilled oil can harm living things because its chemical constituents are poisonous. This can affect organisms both from internal exposure to oil through ingestion or inhalation and from external exposure through skin and eye irritation. Oil can also smother some small species of fish or invertebrates and coat feathers and fur, reducing birds’ and mammals’ ability to maintain their body temperatures.⁷

The impacts of oil pollution are sobering. Yet the Corps discharges oil and other pollution from the Dam without the NPDES permit authorization required by the CWA. In turn, the Corps fails to monitor and report pollution in a manner that enables the public to fully understand the extent and severity of the problem.

The Dam also discharges heat in the form of cooling water to a river system recognized by EPA as too warm to support designated uses, including salmon habitat. Salmon need cool water to survive. Hot water pollution from point sources, including the Dam, contributes to elevated water temperatures in the Snake and Columbia Rivers. Specifically, the Corps uses water to cool a variety of Dam components and materials, including turbines, generators, transformers, and lubricating oils. The Corps discharges this cooling water directly to the North

⁴ E.g., Idaho Admin. Code r. 58.01.02.120, Wash. Admin. Code § 173-201A-602.

⁵ Idaho Dep’t of Env’tl. Quality, Integrated Report, *available at* <https://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>; Wash. Dep’t of Ecology, Washington State Water Quality Assessment, *available at* <https://apps.ecology.wa.gov/ApprovedWQA/ApprovedPages/ApprovedSearch.aspx>.

⁶ E.g., U.S. EPA, *Columbia River Basin State of River Report for Toxics* (hereafter *State of the River Report*) (January 2009), <https://www.epa.gov/columbiariver/2009-state-river-report-toxics>; Lower Columbia River Estuary Partnership, *Lower Columbia River and Estuary Ecosystem Monitoring: Water Quality and Salmon Sampling Report* (2007).

⁷ NOAA, Office of Response and Restoration, *How Oil Effects Fish and Wildlife in Marine Environments*, <http://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/how-oil-harms-animals-and-plants-marine-environments.html>.

Fork Clearwater River and/or Clearwater River, which contributes warm water to a river system that is already too warm to support healthy fish populations.

III. Unpermitted Pollutant Discharges from the Dam.

Section 301(a) of the CWA prohibits discharges of oils, greases, lubricants, cooling water, and other pollutants to the North Fork Clearwater River and/or Clearwater River from the Dam without NPDES permit authorization. 33 U.S.C. § 1311(a). Without an NPDES permit, the Corps is failing to monitor, report, and reduce pollution discharges pursuant to the CWA and state and federal implementing rules.

A. Chronic Pollutant Discharges from the Dam.

The Dam discharges oils, greases, lubricants, and other pollutants collected from various sources through sumps, including powerhouse drainage sumps, unwatering sumps, spillway sumps, and/or other systems to the North Fork Clearwater River and/or Clearwater River. The Corps violates section 301(a) of the CWA by discharging pollutants from these various drainage and/or un-watering sumps and other systems at the Dam. These violations occurred each and every time the Corps made these discharges in the past six years and continue to occur.⁸

The Dam discharges cooling water, and the associated heat, used to cool a variety of Dam components and materials, including transformers, lubricating oils, shaft and thrust bearings, turbines, and/or generators to the North Fork Clearwater River and/or Clearwater River. The Corps is in violation of section 301(a) of the CWA by discharging cooling water, and the associated heat, from the Dam each and every day for the past six years.

The Dam utilizes Francis turbines, which discharge grease to the North Fork Clearwater River and/or Clearwater River. Wicket gates control the amount of water flowing through the turbines at the Dam. The Wicket gate bearings are lubricated with grease or another lubricant. This grease or lubricant is continuously fed into the bearings and discharged directly into surface waters. The Corps is in violation of section 301(a) of the CWA by discharging grease or lubricant from the bearings at each of the turbine wicket gates at the Dam each and every day for the past six years.

B. Acute Pollutant Discharges from the Dams.

The Corps violates section 301(a) of the CWA every time it discharges oil, a lubricant, or other pollutants to the North Fork Clearwater River and/or Clearwater River from the Dam, including when such discharges occur as a result of machinery, equipment, or structural failure. SRW reviewed the United States Coast Guard's National Response Center Website, which maintains a national database of oil spills. Table 1 describes reported acute pollution discharges

⁸ The Corps is in the best position to know the specific location of the point sources (i.e., the structures that discharge pollutants from drainage sumps, unwatering sumps, spillway sumps, and other systems into the North Fork Clearwater River and/or Clearwater River) at the Dam.

from the Dam to the North Fork Clearwater River and/or Clearwater River during the last six years. SRW does not concede that the amount of pollution reported is, in fact, the amount of pollution actually discharged from the Dam.

Table 1 Dworshak Dam Reported Discharges			
Reported Date of Discharge	Reported Pollutant Discharged	Reported Amount Discharged	Comments from Discharge Report
6/8/2015	Gasoline: Automotive (Unleaded)	Unknown	Vessel parked at the docks and sank overnight for unknown reasons.
5/10/2018	Turbine Oil	1 quart	Turbine oil discharged into the North Fork of the Clearwater River and/or Clearwater River from a unit on the Dam due to an unknown cause.
5/19/2018	Unknown	Unknown	Sheen discovered on waters of the Dam; possible spill from facility.
5/21/2018	Turbine Oil	1 cup	Turbine oil discharged from the Unit #1 generator, due to a turbine bearing cooler burp.
6/27/2018	Turbine Oil	½ cup	Turbine oil was released into the North Fork Clearwater River and/or Clearwater River from a generator at a dam that has been down for a couple years. They watered the unit up and any residual oil on the walls was released into the river.
6/27/18	Turbine Oil	Unknown	Sump of a hydropower unit overflowed, discharging turbine oil into the North Fork Clearwater River and/or Clearwater River. This resulted in a sheen on the water within the boom.
7/2/18	Turbine Oil	Unknown	Turbine oil released from Unit #3 of the power house.
7/12/18	Turbine Oil	1 cup	Turbine oil released into the North Fork of the Clearwater River and/or Clearwater River from the Generator Unit #3 of the Dam due to equipment failure.
8/11/2018 or 8/15/2018	Transformer Oil	10 gallons	Transformer's bushings blew up, resulting in a spray of transformer oil on the deck and the roof of the facility from the pad mounted transformer.
1/23/20	Turbine Oil	1 cup	Turbine oil discharged from Unit #1, which is shutdown, due to an unknown cause at the time. It possibly has something to do with the maintenance on Unit #1.
1/24/20	Turbine Oil	1 cup	Turbine oil discharged from Unit #1, after an investigation and restart due to an unknown reason.

IV. Public Documents Announce the Need for an NPDES Permit for Dam Discharges.

The Corps is aware that the CWA prohibits its discharges of oil, greases, lubricants, cooling water, and other pollution to waters of the United States from the Dam absent an NPDES permit. Notably, the Corps has been sued several times in the past for failing to obtain pollution discharge permits for dams on the Columbia River and Snake River (Bonneville, The Dalles, Ice Harbor, John Day, Little Goose, Lower Monumental, McNary, Lower Granite, Chief Joseph).⁹ As the Corps is aware, these lawsuits have required the Corps to:

1. Apply to EPA for NPDES discharge permits;
2. Investigate using less harmful lubricants in dam equipment; and
3. Monitor the type and quantity of pollution being discharged into the rivers.¹⁰

Although the Corps agreed to apply for NPDES permits for the above dams, the Corps still has not obtained an NPDES permit for the Dworshak Dam.

And while EPA began the permitting process for hydroelectric dams in Idaho,¹¹ it never completed that process. Since then, the State of Idaho has taken over permitting authority and has yet to permit the Corps' Dworshak Dam operations.

In short, the Corps has been aware since long before this notice of intent to sue letter that discharges associated with the Dam require an NPDES permit. Yet, based upon the information available to SRW, the Corps has neither applied for nor obtained an NPDES permit for discharges of oils, greases, lubricants, cooling water, and other pollution from the Dam.

V. Party Giving Notice of Intent to Sue.

The full name, address, and telephone number of the party giving notice is:

Snake River Waterkeeper
2123 N. 16th Street
Boise, ID 83702
(208) 806-1303

⁹ *E.g.*, COLUMBIA RIVERKEEPER, STOPPING OIL POLLUTION FROM DAMS, <https://www.columbiariverkeeper.org/our-work-saving-salmon/stopping-oil-pollution-dams> (last visited July 24, 2018).

¹⁰ *Id.*

¹¹ THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NPDES FACT SHEET: WASTEWATER DISCHARGES FROM HYDROELECTRIC GENERATING FACILITIES GENERAL PERMIT (2018), *available at* <https://www.epa.gov/sites/production/files/2018-04/documents/r10-npdes-idaho-hydroelectric-gp-idg360000-fact-sheet-2018.pdf>.

VI. Attorneys Representing Snake River Waterkeeper.

The attorneys representing SRW in this matter are:

KAMPMEIER & KNUTSEN, PLLC
Brian A. Knutsen
Emma Bruden
1300 SE Stark Street, Suite 202
Portland, Oregon 97214
Tel.: (503) 841-6515 (Knutsen)
(503) 719-5641 (Bruden)
Email: brian@kampmeierknutsen.com
emma@kampmeierknutsen.com

SNAKE RIVER WATERKEEPER
Ferrell S. Ryan, III
2123 N. 16th Street
Boise, ID 83702
Tel.: (208) 806-1303
Email: buck@snakeriverwaterkeeper.org

VII. Conclusion.

The violations described herein reflect those indicated by the information currently available to SRW. SRW intends to sue for all violations, including those yet to be uncovered and those committed after the date of this notice of intent to sue.

SRW intends to seek injunctive relief to prevent further CWA violations under sections 505(a) and (d) of the CWA, 33 U.S.C § 1365(a) and (d), and such other relief as is permitted by law. SRW will further seek to recover its litigation expenses as authorized by section 505(d) of the CWA, 33 USC § 1365(d).

SRW believes that this notice of intent to sue sufficiently states grounds for filing suit. SRW intends to file a citizen suit against the United States Army Corps of Engineers and Lieutenant General Scott A. Spellmon, in his official capacity as the Commanding General and Chief of Engineers of the United States Army Corps of Engineers, under section 505(a) of the CWA, 33 U.S.C. § 1365(a), for the violations described herein at the expiration of the sixty-day notice period or shortly thereafter.

SRW is willing to discuss effective remedies for the violations addressed in this notice of intent to sue letter and appropriate settlement terms. Please direct all correspondence to Brian A. Knutsen at (503) 841-6515 or brian@kampmeierknutsen.com.

Very truly yours,

KAMPMEIER & KNUTSEN, PLLC

By: 

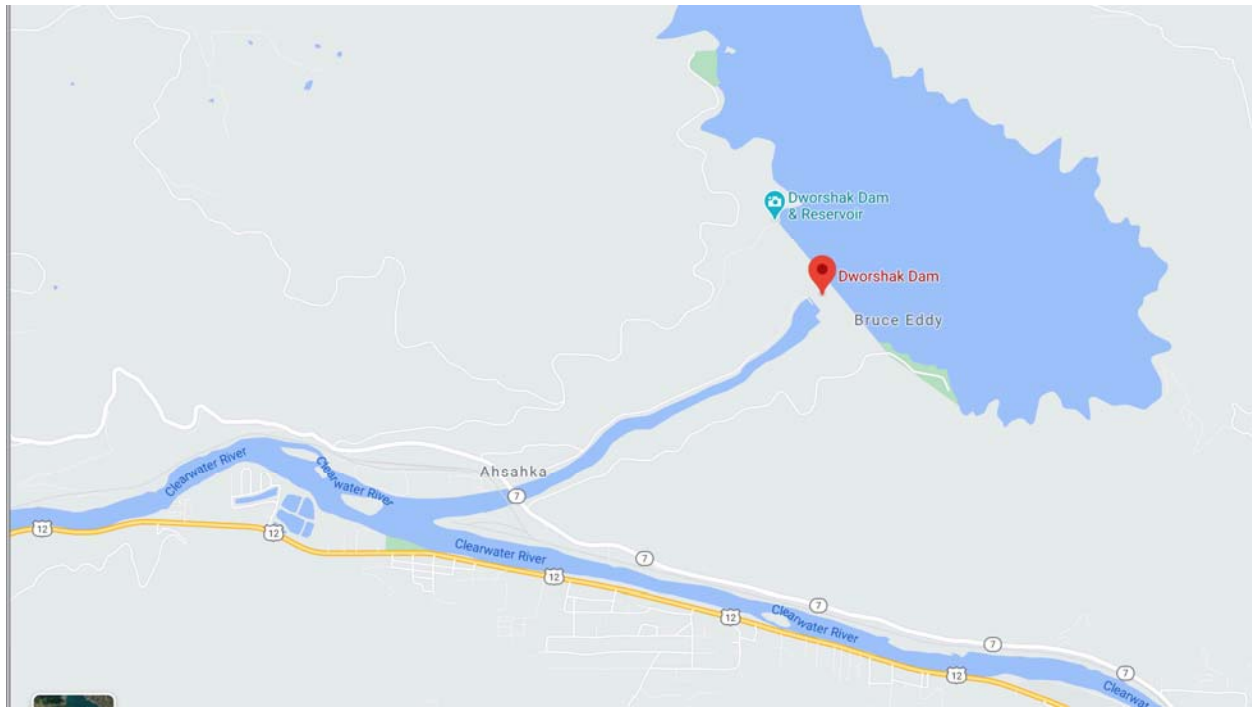
Brian A. Knutsen

APPENDIX I

Dworshak Dam: Ahsahka, Idaho 83520

Approximate Coordinates: 46°30'57"N, 116°17'49"W

Map:



CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the United States that I am counsel for Snake River Waterkeeper and that on December 21, 2020, I caused copies of the foregoing Notice of Intent to Sue the U.S. Army Corps of Engineers and Lieutenant General Spellmon under the Clean Water Act to be served on the following by depositing them with the United States Postal Service, certified mail, return receipt requested, postage prepaid:

Lieutenant General Scott A. Spellmon
Commanding General & Chief of Engineers
U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code 1101A
Washington, D.C. 20460

Regional Administrator Chris Hladick
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

Director Jess Byrne
Idaho Department of Environmental Quality
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Brian A. Knutsen