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16 UNITED STATES OF AMERICA

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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 THE UNITED STATES OF AMERICA,) AMENDED COMPLAINT
21 Plaintiff,) Case No. 16-CV-06178-SBA
22 v.)
23 JACK NOBLE,)
24 Defendant.)
25 _____)

1 **AMENDED COMPLAINT**

2 The United States of America, through its undersigned attorneys, by the authority of the Attorney
3 General and at the request of the Administrator of the United States Environmental Protection Agency
4 (“EPA”), and of the Office of the General Counsel of the National Oceanic and Atmospheric
5 Administration (“NOAA”) allege as follows:

6 **NATURE OF THE ACTION**

7 1. This is a civil action commenced under section 309(b) and (d) of the Clean Water Act (“CWA”),
8 33 U.S.C. § 1319(b) and (d), to obtain injunctive relief and civil penalties against Jack Noble
9 (“Defendant”) for the discharge of pollutants, including dredged or fill material, into waters of the
10 United States in Humboldt County, California, without authorization by a permit issued by the United
11 States Army Corps of Engineers (“Corps”), in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

12 2. The United States seeks: (a) injunctive relief to prohibit the Defendant from further discharging
13 pollutants, including dredged or fill material, into waters of the United States without a permit in
14 violation of CWA section 301(a), 33 U.S.C. § 1311(a); (b) injunctive relief to require Defendant to
15 restore and mitigate the damage caused by his unlawful activities; (c) an order requiring Defendant to
16 pay civil penalties as provided in CWA section 309(d), 33 U.S.C. § 1319(d); and (d) such other relief as
17 the Court may deem appropriate.

18 3. This action also seeks declaratory and injunctive relief to address ongoing unlawful take of
19 threatened California Coastal evolutionarily significant unit (“ESU”) of Chinook Salmon, Southern
20 Oregon/Northern California Coast ESU Coho Salmon, and Northern California distinct population
21 segment (“DPS”) of Steelhead (“Threatened Salmonids”) by Defendant, in violation of Section 9 of the
22 Endangered Species Act (“ESA”), 16 U.S.C. § 1538, by dumping material, including, among other
23 things, concrete, asphalt, rebar, trees and vegetation, gravel, excavated soil and other construction
24 debris, onto the banks of the Van Duzen River and into the river itself, by constructing instream
25 structures, and by crossing the Van Duzen River while Threatened Salmonids and their redds are present
26 in the River.

27 4. In this action, the United States seeks: (a) declaratory relief that Defendant’s activities are
28 causing take of the Threatened Salmonids; (b) injunctive relief against Defendant to enjoin unlawful

1 take in violation of the ESA caused by Defendant’s activities; and (c) such other relief as the Court may
2 deem appropriate.

3 **JURISDICTION, VENUE, INTRADISTRICT ASSIGNMENT**

4 3. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309,
5 33 U.S.C. § 1319, and the ESA, 16 U.S.C. § 1540(c), and 28 U.S.C. §§ 1331, 1345, and 1355.

6 4. Venue is proper in the Northern District of California pursuant to CWA section 309(b), 33
7 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Defendant conducts business in and resides
8 in this District, the waters of the United States into which pollutants were discharged and ESA take
9 occurred are located in this District, and the events giving rise to these claims occurred in this District.

10 5. Notice of the commencement of this action is being provided to the State of California pursuant
11 to CWA section 309(b), 33 U.S.C. § 1319(b).

12 6. This action arises in Humboldt County.

13 **THE PARTIES**

14 7. Plaintiff in this action is the United States of America. Authority to bring this action is vested in
15 the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, 16 U.S.C. § 1540(e)(6),
16 and 33 U.S.C. § 1366.

17 8. Defendant Jack Noble is a private individual who resides in Humboldt County, California.

18 9. At all times relevant to the Complaint, Defendant owned, leased and/or otherwise controlled the
19 real property that is the subject of this Complaint and/or otherwise controlled and/or participated in the
20 activities relevant to this Complaint.

21 10. Although Jack Noble is the only named defendant at this time, the United States may seek to
22 amend this Complaint to add additional defendants, including Van Duzen River Ranch, as appropriate
23 based on information obtained during discovery regarding their involvement with or responsibility for
24 the ESA and CWA violations alleged in this Complaint.

25 **STATUTORY BACKGROUND**

26 **THE CLEAN WATER ACT**

27 11. CWA section 101(a), 33 U.S.C. § 1251(a), provides that “[t]he objective of this chapter is to
28 restore and maintain the chemical, physical and biological integrity of the nation’s waters.”

1 12. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable
2 waters except in compliance with, *inter alia*, a permit issued by the Corps pursuant to CWA Section
3 404, 33 U.S.C. § 1344.

4 13. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Corps to issue permits for the
5 discharge of dredge or fill material at specified disposal sites, after notice and opportunity for public
6 comment.

7 14. CWA section 502(5), 33 U.S.C. § 1362(5), defines “person” to include “an individual [or]
8 corporation.”

9 15. CWA section § 502(12), 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any
10 addition of any pollutant to navigable waters from any point source.”

11 16. CWA section 502(6), 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, biological
12 materials, dredged spoil, rock, waste, and sand.

13 17. CWA section 502(14), 33 U.S.C. § 1362(14), defines “point source” to include “any discernible,
14 confined and discrete conveyance...from which pollutants are or may be discharged.”

15 18. CWA section 502(7), 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the
16 United States, including the territorial seas.”

17 19. 33 C.F.R. § 328.3(a), and 40 C.F.R. § 232.2 define “waters of the United States” to include, *inter*
18 *alia*: all waters which are currently used, were used in the past, or may be susceptible to use in interstate
19 or foreign commerce (“traditional navigable waters”) and tributaries of traditional navigable waters.¹

20 20. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for
21 appropriate relief, including a permanent or temporary injunction, against any person who, *inter alia*,
22 violates CWA Section 301(a), 33 U.S.C. § 1311(a), by discharging dredged or fill material without
23 obtaining a permit issued by the Corps pursuant to CWA section 404, 33 U.S.C. § 1344.

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27 ¹ These regulations have since been amended by the “Clean Water Rule,” 80 Fed. Reg. 37,054
28 (June 29, 2015), but the applicability date of the Clean Water Rule has been extended to February 6,
2020. 83 Fed. Reg. 5200 (Feb. 6, 2018).

1 21. CWA section 309(d), 33 U.S.C. § 1319(d), provides that any person who violates CWA section
2 301(a), 33 U.S.C. § 1311(a) shall be subject to a civil penalty not to exceed \$25,000 per day for each
3 violation.

4 22. 40 C.F.R. § 19.4, adjusts the \$25,000 amount provided in CWA section 309(d), 33 U.S.C. §
5 1319(d), for inflation, to \$37,500 per day for violations that occurred after January 12, 2009, and to
6 \$53,484 per day for violations that occurred after November 2, 2015.²

7 23. Each day that dredged or fill material remains in the place where it was discharged without
8 authorization constitutes an additional and continuing violation of CWA section 301(a), 33 U.S.C. §
9 1311(a).

10 THE ENDANGERED SPECIES ACT

11 24. The ESA, 16 U.S.C. §§ 1531, et seq., was enacted in 1973 to provide a means of conserving
12 endangered or threatened species and their critical habitat, to provide a program for the conservation of
13 such species, and to take appropriate steps to achieve the purposes of various treaties and conventions
14 regarding wildlife protection listed in the ESA. 16 U.S.C. § 1531(b). The ESA is comprehensive
15 legislation that contains both substantive and procedural requirements designed to carry out its goal of
16 conserving endangered and threatened species and the ecosystems on which they depend.

17 25. The ESA is administered either by the Secretary of the Interior or the Secretary of Commerce. 16
18 U.S.C. § 1532(15). The species involved in this suit, the Threatened Salmonids, fall under the
19 jurisdiction of the Secretary of Commerce. The Secretary of Commerce has delegated his ESA
20 responsibilities to the National Marine Fisheries Service (NMFS), an agency of NOAA.

21 26. Species are listed as “endangered” or “threatened” according to the rulemaking procedures
22 described in ESA Section 4. 16 U.S.C. § 1533. An “endangered species” is “in danger of extinction
23 throughout all or a significant portion of its range,” and a “threatened species” is “likely to become an
24 endangered species within the foreseeable future throughout all or a significant portion of its range.” 16

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28 ² The latest penalty adjustment for inflation applies to penalties assessed as of January 15, 2018,
for violations that occurred after November 2, 2015. *See* 83 Fed. Reg. 1190 (Jan. 20, 2018).

1 U.S.C. § 1532(6), (20). The term “species” includes any subspecies of fish or wildlife or plants and any
2 distinct population segment of any species of vertebrate fish. 16 U.S.C. § 1532(16).

3 27. The Secretary of Commerce (or the Secretary of the Interior) may designate a species as
4 endangered or threatened based on any of the following factors, whether alone or in combination:

5 (A) the present or threatened destruction, modification, or curtailment of its habitat or range;

6 (B) overutilization for commercial, recreational, scientific, or educational purposes;

7 (C) disease or predation;

8 (D) the inadequacy of existing regulatory mechanisms; or

9 (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1); see
10 also 16 U.S.C. § 1532(15).

11 27. ESA Section 9 makes it unlawful for any “person” to “take” an endangered species or “violate
12 any regulation pertaining to” an endangered or threatened species, unless such take is otherwise
13 authorized under ESA Section 7 or 10. 16 U.S.C. § 1538(a)(1)(B) and (G).

14 28. The term “person” is defined as “an individual, corporation, partnership, trust, association, or any
15 private entity , . . . or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. §
16 1532(13).

17 29. “Take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or
18 to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The Supreme Court has given the
19 term a broad interpretation, noting that “[t]ake’ is defined . . . in the broadest possible manner to include
20 every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Babbitt v.*
21 *Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 704 (1995) (citation omitted).

22 30. Regulations define “harm” as an act “which actually kills or injures fish or wildlife,” and “may
23 include significant habitat modification or degradation which actually kills or injures fish or wildlife by
24 significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating,
25 feeding or sheltering.” 50 C.F.R. § 222.102.

26 31. ESA Section 9 expressly only addresses the take of any species of fish and wildlife listed as
27 endangered, as opposed to threatened. ESA Section 4(d), however, provides that the Secretary may by
28 regulation extend the ESA Section 9(a)(1) take prohibition to any species of fish or wildlife listed as

1 threatened. 16 U.S.C. § 1533(d). That Section also directs the agency to issue regulations it considers
2 necessary and advisable for the conservation of the species. *Id.* Thus, Section 4(d) protective regulations
3 may prohibit, with respect to threatened species, some or all of the acts which section 9(a) of the ESA
4 prohibits with respect to endangered species, including take of the species. *Id.*; *see also* 16 U.S.C. §
5 1538(a)(1)(G).

6 32. The Secretary has issued ESA Section 4(d) regulations extending the prohibitions of ESA
7 Section 9(a)(1) to steelhead, coho, and chinook with an intact adipose fin³ that are part of a threatened
8 DPS or ESU. 50 C.F.R. §§ 223.203(a); 223.102.

9 33. The Threatened Salmonids are a “threatened species” for purposes of the ESA. *See* 50 C.F.R. §
10 17.11(h).⁴

11 34. The term “person” is defined under the ESA as “an individual, corporation, partnership, trust,
12 association, or any private entity, . . . or any other entity subject to the jurisdiction of the United States.”
13 16 U.S.C. § 1532(13).

14 35. The ESA Section 9 prohibition applies to persons engaged in activities that are not intended or
15 designed to take species listed under the ESA, but which may nevertheless take species incidentally.
16 Incidental taking of listed species by private entities that does not jeopardize the continued existence of
17 that species may be authorized by the Secretary of the Interior or Commerce pursuant to an incidental
18 take permit issued under Section 10 of the ESA, 16 U.S.C. § 1539. Moreover, Defendant has not been
19 the recipient of an Incidental Take Statement after an ESA Section 7 consultation.
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22 ³ “Wild” fish are fish whose entire lifecycle is in the wild. In addition to wild populations,
23 several ESA-listed steelhead DPSs and coho or chinook ESUs are artificially propagated in hatcheries
24 where they are spawned, raised, and then released each year. Under NMFS’ Hatchery Listing Policy, 70
25 Fed. Reg. 37204 (2005), both the wild and hatchery stocks of the same DPS or ESU are treated as part
26 of the ESA-listed entity, assuming their genetic make-up is largely the same. However, by regulations
27 issued under ESA Section 4(d), NMFS may apply different levels of protection to wild and hatchery
28 fish, respectively. To distinguish between ESA-protected and unprotected fish, per regulation, fish from
hatchery stocks not receiving ESA protection are required to have their adipose fin “clipped” at the
hatchery, while wild fish will retain an intact adipose fin.

⁴ “Salmonid” is a technical term used by fishery experts to generally refer to fish of the family
Salmonidae, including salmon, trout, chars, grayling, and whitefish. In general usage, the term usually
refers to salmon and steelhead trout. See the NMFS online glossary:
http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/recovery_planning_and_implementation/recovery_glossary.html.

1 36. Take that is in compliance with the terms and conditions set forth in a Section 10 incidental take
2 permit is exempted from the Section 9 prohibition and is lawful.

3 **GENERALLY APPLICABLE ALLEGATIONS**

4 **Location of the Violations**

5 37. This case involves the discharge of pollutants by Defendant Jack Noble into the Van Duzen
6 River, approximately between geographic coordinates 40.530028°, -124.107627° and 40.528706°, -
7 124.057751°, in Humboldt County, California.

8 38. The CWA violations alleged in this Complaint occurred on real property in and along the Van
9 Duzen River in Humboldt County, California, close to Hydesville and Fortuna. This real property shares
10 approximately 5.5 miles of banks with the Van Duzen River.

11 39. Humboldt County records indicate that this real property includes Humboldt County parcels with
12 Assessor Parcel Numbers (“APN”) 204-101-003, 204-101-002, 204-101-024, 204-101-026, 204-111-
13 011, 204-111-005, 204-111-006, 204-071-010, 204-071-005, and 204-063-011.

14 40. Jack Noble owns, leases, operates, or otherwise controls this real property.

15 41. For shorthand purposes, this Complaint refers to this real property referenced in Paragraphs 37-
16 40 above as “the Site.”

17 42. This case also involves Defendant Jack Noble’s take of ESA-listed species that spawn, rear, and
18 migrate in the Van Duzen River by dumping materials onto the banks of and into the river, by
19 constructing instream structures, and by conducting river crossings in the same locations as the CWA
20 violations.

21 **Waters of the United States**

22 43. From the Site, the Van Duzen River flows approximately 3 miles west to the Eel River, which
23 then flows approximately 13 miles northwest to the Pacific Ocean.

24 44. Exhibit 1 to the Complaint, ECF 1, is a map that fairly and accurately depicts the flow path of the
25 Van Duzen River and the Eel River from the Site to the Pacific Ocean.

26 45. The Van Duzen River is designated a “Wild and Scenic River” pursuant to California Resources
27 Code section 5093.545(g).

- 1 46. The Van Duzen River is designated a “Wild and Scenic River” pursuant to the federal Wild and
- 2 Scenic Rivers Act. 16 U.S.C. § 1271 *et seq.*
- 3 47. The Van Duzen River is 73.5 miles long.
- 4 48. The Van Duzen River basin encompasses approximately 429 square miles.
- 5 49. The Van Duzen River is currently used in interstate commerce.
- 6 50. The Van Duzen River was used in the past in interstate commerce.
- 7 51. The Van Duzen River is susceptible for use in interstate commerce.
- 8 52. The Van Duzen River is navigable in fact.
- 9 53. The Van Duzen River has a bed, bank, and an ordinary high water mark.
- 10 54. The Van Duzen River contributes to the flow of the Eel River.
- 11 55. The Van Duzen River flows perennially.
- 12 56. The Eel River is 196 miles long.
- 13 57. The Eel River drains 3,684 square miles in five counties in California.
- 14 58. The Eel River has been designated as a “Wild and Scenic River” pursuant to the federal Wild
- 15 and Scenic Rivers Act. 16 U.S.C. § 1271 *et seq.*
- 16 59. The Eel River is currently used in interstate commerce.
- 17 60. The Eel River was used in the past in interstate commerce.
- 18 61. The Eel River is susceptible for use in interstate commerce.
- 19 62. The Eel River is navigable in fact.
- 20 63. Under the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.*, the Corps has designated that at least
- 21 the first 7 miles of the Eel River, from the Pacific Ocean, is navigable. 33 C.F.R. § 329.16.
- 22 64. The Eel River has a bed, bank, and an ordinary high water mark.
- 23 65. The Eel River flows perennially.
- 24 66. The Van Duzen River and Eel Rivers are designated critical habitat for, *inter alia*, the three
- 25 Threatened Salmonids: California Coastal ESU Chinook Salmon (*Oncorhynchus tshawytscha*), Southern
- 26 Oregon/Northern California Coast ESU Coho Salmon (*Oncorhynchus kisutch*), and Northern California
- 27 DPS Steelhead (*Oncorhynchus mykiss*). 50 C.F.R. § 223.102(e). The Endangered Species Act (“ESA”)
- 28 defines “critical habitat” for a threatened or endangered species, in pertinent part, as “the specific areas

1 within the geographical area occupied by the species, at the time it is listed in accordance with the
2 provisions of section 1533 of this title, on which are found those physical or biological features (I)
3 essential to the conservation of the species and (II) which may require special management
4 considerations or protections”; and “specific areas outside the geographical area occupied by the species
5 at the time it is listed in accordance with the provisions of section 1533 of this title, upon a
6 determination by the Secretary of the Interior that such areas are essential for the conservation of the
7 species.” 16 U.S.C. § 1532(5)(A)(i), (ii).

8 67. Coho and Chinook salmon and Steelhead are “anadromous,” meaning that they hatch in
9 freshwater, spend most of their life in oceanic waters, and return to freshwater to spawn.

10 68. Threatened Salmonids spawn in tributaries to the Van Duzen River, rear in these tributaries or in
11 the river itself, and migrate to the ocean before returning to tributaries to spawn. Threatened Salmonids
12 that spawn in tributaries to the Van Duzen River spend time in and/or pass through the portion of the
13 Van Duzen River that shares its banks with Defendant’s property.

14 69. Designated critical habitat for the Chinook includes, *inter alia*, the Eel River upstream to the Van
15 Duzen River, latitude 40.5337°, longitude – 124.1262° and the Van Duzen River, latitude 40.5337°,
16 longitude -124.1262°, upstream to endpoints in Yager Creek, latitude 40.5583°, longitude -124.0571°.
17 50 C.F.R. § 226.211(f)(5).

18 70. Exhibit 2 to the Complaint, ECF 1, is a true and correct copy of a map codified at 50 C.F.R. §
19 226.211(f), which depicts areas of designated critical habitat for the Chinook, which includes the Site.

20 71. Designated critical habitat for the Coho includes accessible reaches of all rivers between the
21 Mattole River in California and the Elk River in Oregon and includes the water, substrate, and adjacent
22 riparian zone, which includes the Site. 50 C.F.R. § 226.210.

23 72. Designated critical habitat for the Steelhead includes, *inter alia*, the Eel River, latitude 40.6275°,
24 longitude -124.2520° upstream to the Van Duzen River, latitude 40.5337°, longitude -124.1262°; Van
25 Duzen River, latitude 40.5337°, longitude -124.1262° upstream to Yager Creek, latitude 40.5583°,
26 longitude -124.0577°; and the Van Duzen River, latitude 40.4942°, longitude -123.9720° upstream to
27 Little Larrabee Creek, latitude 40.4708°, longitude -123.7395° to the Van Duzen River latitude
28 40.4820°, longitude -123.6629°. 50 C.F.R. § 226.211(g)(5).

1 73. Exhibit 3 to the Complaint is a true and correct copy of a map codified at 50 C.F.R. 226.11(g),
2 which depicts areas of designated critical habitat for the Steelhead, which includes the Site.

3 74. Alterations in the timing and volume of water flows and sediment transport in the Van Duzen
4 River and the Eel River alter conditions for maintaining water quality.

5 75. Alterations in the morphology, timing, and volume of water flows and sedimentation in the Van
6 Duzen River and the Eel River alter conditions for maintaining suitable habitat for support of several
7 classes of aquatic faunal species including adult and juvenile fishes.

8 76. At all times relevant to the CWA violations alleged in this Complaint, the Van Duzen River and
9 Eel River constitute “waters of the United States” and “navigable waters” within the meaning of 33
10 U.S.C. § 1362(7).

11 77. The Van Duzen River is a traditional navigable water within the meaning of 33 C.F.R. §
12 328.3(a)(1) from at least the Site to its confluence with Eel River.

13 78. The Eel River is a traditional navigable water within the meaning of 33 C.F.R. § 328.3(a)(1)
14 from at least its confluence with the Van Duzen River to the Pacific Ocean.

15 79. The Van Duzen River is a “tributary” of the Eel River within the meaning of 33 C.F.R. §
16 328.3(a)(5).

17 80. The Van Duzen River is a permanent, continuously flowing body of water.

18 81. The Van Duzen River, either alone or in combination with similarly situated lands in the region,
19 significantly affects the chemical, physical, or biological integrity of the Eel River.

20 **COUNT I**

21 82. The allegations in Paragraphs 1 through 81 are adopted and reincorporated by reference.

22 83. Defendant Jack Noble is a “person” within the meaning of CWA section 502(5), 33 U.S.C. §
23 1362(5).

24 84. Beginning approximately 2013 and continuing until at least this month, at times and locations
25 best known to Defendant, Defendant and/or persons acting on his behalf operated an excavator and/or
26 other earthmoving equipment at the Site that the Defendant owned or otherwise controlled.

27 85. Defendant either owned, leased, or otherwise controlled the property on which each unauthorized
28 discharge of dredged or fill material into waters of the United States occurred.

1 86. As operated, this equipment constituted a “point source” within the meaning of CWA section
2 502(14), 33 U.S.C. § 1362(14).

3 87. This equipment operated below the ordinary high water mark of the Van Duzen River, a water of
4 the United States.

5 88. Operation of this equipment resulted in the placement of fill material, including, among other
6 things, concrete, asphalt, rebar, trees and vegetation, gravel, excavated soil and other construction
7 debris, all of which constitute “pollutants” as defined in CWA section 502(6), 33 U.S.C. § 1362(6), into
8 waters of the United States, namely the Van Duzen River.

9 Operation of this equipment resulted in the alteration of the river banks and in construction of roads,
10 levies, berms, and groins in Van Duzen River.

11 89. Operation of this equipment had the effect of replacing one or more portions of waters of the
12 United States with dry land.

13 90. Operation of this equipment had the effect of changing the bottom elevation of one or more
14 portions of waters of the United States.

15 91. Operation of this equipment resulted in the “discharge of any pollutant” within the meaning of
16 33 U.S.C. § 1311(a).

17 92. Defendant’s unlawful activities have resulted in the discharge of pollutants in at least 3,595
18 linear feet of the Van Duzen River.

19 93. At no time did Defendant, or any person on his behalf, apply for, secure, or comply with a CWA
20 section 404 permit to discharge dredged or fill material into waters of the United States as required by
21 CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344.

22 94. Defendant has violated and continues to violate CWA section 301(a), 33 U.S.C. § 1311(a), by his
23 unauthorized discharges of dredged and fill material into the Van Duzen River, a water of the United
24 States, at the Site.

25 95. Each day that such material remains in place constitutes a separate violation of CWA section
26 301(a), 33 U.S.C. § 1311(a).

1 96. Unless enjoined, Defendant is likely to continue to discharge dredged or fill material into, or
2 allow discharged dredged or fill material to remain in, waters of the United States at the Site, in violation
3 of CWA section 301(a), 33 U.S.C. § 1311(a).

4 **COUNT 2**

5 97. The United States repeats and realleges the allegations set forth in paragraphs 1 through 96
6 above.

7 98. California Coastal ESU Chinook Salmon, Southern Oregon/Northern California Coast ESU
8 Coho Salmon, and Northern California DPS Steelhead are listed as threatened species under the ESA. 50
9 C.F.R. § 223.102(e).

10 99. Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), makes it unlawful for any person
11 subject to the jurisdiction of the United States to take any species listed as endangered under the ESA.
12 The term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
13 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

14 100. The Secretary of Commerce has extended these prohibitions to California Coastal ESU Chinook
15 Salmon, Southern Oregon/Northern California Coast ESU Coho Salmon, and Northern California DPS
16 Steelhead. 50 C.F.R. §§ 223.203(a), 223.102.

17 101. Section 11(e)(6) of the ESA, 16 U.S.C. § 1540(e)(6), authorizes the Attorney General of the
18 United States to seek to enjoin any person who is alleged to be in violation of any provision of the ESA
19 or its implementing regulations.

20 102. Defendant is a “person” within the meaning of the ESA, 16 U.S.C. § 1532(13).

21 103. Beginning approximately 2013 and continuing until at least this month, at times and locations
22 best known to Defendant, Defendant and/or persons acting on his behalf operated an excavator and/or
23 other earthmoving equipment or vehicles at the Site that the Defendant owned or otherwise controlled.
24

25 104. Beginning approximately 2013 and continuing through this year, Defendant used this equipment
26 to place material, including, among other things, concrete, asphalt, rebar, trees and vegetation, gravel,
27
28

1 excavated soil and other construction debris, onto the banks of the Van Duzen River and into the river
2 itself and constructed instream structures while California Coastal ESU Chinook Salmon, Southern
3 Oregon/Northern California Coast ESU Coho Salmon, and Northern California DPS Steelhead were
4 migrating, rearing, feeding, or spawning in the Van Duzen River. These activities are reasonably certain
5 to kill, harm, harass, capture, and/or trap California Coastal ESU Chinook Salmon, Southern
6 Oregon/Northern California Coast ESU Coho Salmon, and Northern California DPS Steelhead in
7 violation of 16 U.S.C. § 1538(a)(1)(B), (G).

9 105. Beginning approximately 2013 and continuing through this year, Defendant used this equipment
10 to cross the Van Duzen River while California Coastal ESU Chinook Salmon, Southern
11 Oregon/Northern California Coast ESU Coho Salmon, and Northern California DPS Steelhead were
12 migrating, rearing, feeding, or spawning in the Van Duzen River. These activities are reasonably certain
13 to kill, harm, harass, capture, and/or trap California Coastal ESU Chinook Salmon, Southern
14 Oregon/Northern California Coast ESU Coho Salmon, and Northern California DPS Steelhead in
15 violation of 16 U.S.C. § 1538(a)(1)(B), (G).

17 106. Defendant has not been the recipient of an Incidental Take Statement after an ESA Section 7
18 consultation, nor has he applied for or received an Incidental Take Permit under ESA Section 10.

19 107. Unless enjoined, Defendant will continue to take California Coastal ESU Chinook Salmon,
20 Southern Oregon/Northern California Coast ESU Coho Salmon, and Northern California DPS Steelhead
21 in violation of ESA Section 9.

23 108. Because Defendant's actions constitute an unauthorized, illegal take of threatened species, the
24 United States is entitled to declaratory judgment and injunctive relief pursuant to 16 U.S.C. §
25 1540(e)(6).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully requests that this Court order the following relief:

- 1. Declare that the Defendant is engaged in the present and ongoing unauthorized, illegal take of California Coastal ESU Chinook Salmon, Southern Oregon/Northern California Coast ESU Coho Salmon, and/or Northern California DPS Steelhead in violation of Section 9 of the ESA;
- 2. Permanently enjoin Defendant from illegally taking California Coastal ESU Chinook Salmon, Southern Oregon/Northern California Coast ESU Coho Salmon, and/or Northern California DPS Steelhead and award Plaintiff the United States all appropriate injunctive relief;
- 3. Permanently enjoin Defendant from further discharges of dredged or fill material or other pollutants into any waters of the United States except as in compliance with the CWA;
- 4. Compel Defendant, at Defendant’s own expense and at the direction of EPA, to restore the impacted waters of the United States, and/or mitigate for impacted waters of the United States, as appropriate, including payment for off-site mitigation;
- 5. Assess and direct Defendant to pay civil penalties;
- 6. Award costs and disbursements in this action to the United States; and
- 7. Grant the United States such other relief as the Court may deem just and proper.

Respectfully submitted June 1, 2018 by:

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Acting Assistant Attorney General
Environment and Natural Resources Division

s/ Andrea Gelatt
ANDREA GELATT
Trial Attorneys
Wildlife and Marine Resources Section

JOHN THOMAS H. DO
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Environment and Natural Resources Division

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