



Confederated Tribes and Bands  
the Yakama Nation

Established by the  
Treaty of June 9, 1855

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May 2, 2023

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**RE: NOTICE OF INTENT TO SUE UNDER CERCLA, 42 U.S.C. § 9659(a)**  
***Bradford Island National Priorities List Site, Multnomah County, Oregon***

Dear President Biden, Attorney General Garland, Assistant Secretary Conner, Administrator Regan, Governor Kotek, Attorney General Rosenblum, Governor Inslee, and Attorney General Ferguson:

This letter provides notice to the U.S. Department of the Army (“DOA”) of the Confederated Tribes and Bands of the Yakama Nation’s (“Yakama Nation”) intent to file a Citizen Suit against DOA and the U.S. Army Corps of Engineers (“USACE”) pursuant to Sections 310(a)(1) and 310(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9659(a)(1)-(2), in the United States District Court for the District of Oregon.

The Citizen Suit will allege violations of CERCLA’s standards, regulations, and requirements at the Bradford Island National Priorities List (“NPL”) Site in Multnomah County, Oregon. The suit will also allege that USACE has failed to perform acts or duties under CERCLA regarding Bradford Island

which are not discretionary with the agency. Any such suit will be filed by myself, the Chairman of the Yakama Tribal Council as plaintiff (a “person” as defined under the statute). This Notice satisfies the jurisdictional requirements set out in 42 U.S.C. § 9659(d)(1)-(2); 42 U.S.C. § 9613(l); and 40 CFR §§ 374.2(a)(3) and 374.2(b).

Final Remedial Investigations and Feasibility Studies (“RI/FS”) issued by USACE are in violation of CERCLA cleanup standards and requirements established by the U.S. Environmental Protection Agency (“EPA”) pursuant to 42 U.S.C. § 9621 as regulations in the National Contingency Plan (“NCP”), 40 CFR Part 300, Subpart E. As such the RI/FS decisions made by USACE are “in violation of any standard, regulation, condition, requirement, or order which has become effective” pursuant to [CERCLA] (including any provision of an agreement under section 9620 of [CERCLA], relating to federal facilities).” See 42 U.S.C. § 9659(a)(1).

In addition, certain actions and omissions by USACE constitute “failure[s] of the President or of such other officer to perform...an act or duty under section 9620 of [CERCLA] (relating to federal facilities), which is not discretionary with the President or such other officer.” These include failure to recognize the Yakama Nation as a participating agency as required by Sections 107(a), 126(a), and 120(e) of CERCLA, as well as failure to enter into an interagency agreement with the EPA Administrator within 180 days of EPA’s review of the RI/FS as required by Section 120(e) of CERCLA. See 42 U.S.C. § 9659(a)(2).

## **BACKGROUND**

### **Hazardous Substance Releases at Bradford Island**

USACE Portland District, within the Northwest Division, currently owns and operates the Bradford Island Site (“Site”) as part of Bonneville Dam and Lock, including a visitor center, fish ladders, a service center building, an equipment building, and a sandblast building. From approximately 1934 until 1982, USACE managed and disposed of waste materials at a landfill in excavated pits or existing depressions at the eastern end of the Site (“landfill”). Waste materials placed in the landfill included household waste, facility-related waste (e.g., grease, light bulbs, sandblast grit), electrical debris, light ballasts, metal debris, metal cables, building materials containing asbestos, burned debris, wood debris, rubber tires, and mercury vapor lamps. Pesticides and/or herbicides were also mixed and rinsed from application equipment in landfill area. Handling and disposal practices of hazardous substances, and equipment bearing hazardous substances by USACE at the landfill have impacted the Site’s soil and groundwater with petroleum hydrocarbons, polycyclic aromatic hydrocarbons (“PAHs”), metals, polychlorinated biphenyls (“PCBs”), and pesticides/herbicides.

North and east of the landfill, USACE disposed of electrical equipment debris directly into the Columbia River. This equipment included light ballasts, electrical insulators, lightning arresters, electrical switches, rocker switches, a breaker box, and electrical capacitors. This disposal resulted in releases of PCBs, PAHs, and various metals into the surrounding river sediment. West of the landfill on the north portion of the Site, USACE disposed of electrical light bulb debris on a steep slope extending into the Columbia River (“bulb slope”). Materials disposed by USACE at the bulb slope included internal and external light bulbs, fluorescent light bulbs, automobile light bulbs, as well as other electrical lighting waste. Disposal at the bulb slope has resulted in releases of lead, mercury, PCBs, and total petroleum hydrocarbons (“TPH”) to surface soils. At the base of both the bulb slope

and the landfill, contaminated soil has migrated into the Columbia River through wave erosion and slope failure.

From 1958 until 1988, USACE used the sandblast building on the west-central portion of the Site for sandblasting operations and painting of equipment. USACE disposed of the sandblast grit directly onto open areas surrounding the sandblast building. The sandblast grit consisted of paint materials that contain metallic compounds (including lead and zinc chromate), organometallic compounds and PCBs. This disposal of spent sandblast grit has resulted in releases of metallic, organometallic, and PCB constituents into the Site's soil and potentially into the Columbia River via the storm water drainage system. Other operations by USACE at the sandblast building included electrical transformer disassembly and aboveground storage of hazardous waste materials, which resulted in additional releases of PCBs, metals, pesticides, TPH, PAHs, and volatile organic compounds ("VOCs") to Site soils. South of the sandblast building on the southern portion of the Site, USACE used a pistol range from the 1940s until the 1970s for small arms target practice. Soils in the vicinity of the pistol range on the south end of the Site have been impacted with metals associated with this operation.

Beginning in 1997, USACE conducted soil, groundwater and sediment investigations at the Site in coordination with the Oregon Department of Environmental Quality ("ODEQ"). Remedial Investigations conducted by USACE have shown that, as a result of past waste disposal practices the Site, soil, sediment and groundwater are now severely contaminated with PCBs, PAHs, TPH, VOCs, semi-volatile organic compounds (SVOCs), pesticides, and metals. As a result of this contamination, metals and PCBs have also been found in samples of fish and other aquatic species in the Columbia River near the Site.

Releases from the Site have severely impacted Yakama Nation treaty reserved fisheries resources in the Columbia River. Elevated levels of PCBs have been found in resident fish at the Site, and the Yakama Nation tribal government in 2012 decided to suspend traditional platform fishing at the Site through a tribal fishing regulation. The NPL Site is uniquely dangerous to both human health and the environment. Concentrations of PCBs and mercury in resident fish and shellfish within one river mile of Bradford Island have been among the highest reported in the nation and are several orders of magnitude greater than PCB concentrations at other major PCB-driven Superfund sites, such as the Lower Duwamish Waterway in Washington, Portland Harbor in Oregon, Fox River in Wisconsin, and the Hudson River in New York. These toxins have direct exposure pathways to Yakama tribal members and members of the public; other wildlife and biota are also directly exposed to these toxins through consumption of fish and shellfish, as well as through other pathways. Tribal members' exposure to contamination, including to bio-accumulative toxins such as PCBs, pesticides, and heavy metals through consumption of resident fish and shellfish from the NPL Site is orders of magnitude greater than the exposure risk posed to the general public.

Reported concentrations of PCBs and mercury are so high that in 2013 the Oregon Health Authority and Washington Department of Health both issued a DO NOT EAT advisory for resident fish taken between Bonneville Dam and Ruckel Creek. This one river mile reach falls directly within Yakama Nation's usual and accustomed fishing areas. Upland contamination on Bradford Island has multiple direct migration pathways to the Columbia River, including storm water runoff, mass wasting events, and groundwater discharge. Columbia River aquatic biota, including species listed under the Endangered Species Act, are already under significant stress due to pressure applied from the Columbia River dam system, climate change, and other industrial pollution. Additional concentrated

point-source exposure from Bradford Island (which has measurable localized impacts) further exacerbates existing problems in an already severely stressed system.

### **Yakama Nation Participation at the Site**

Pursuant to Executive Order 12580, USACE has been the lead agency for the Bradford Island facility since 1997, when the Portland District began conducting investigations at the facility in coordination with ODEQ under a Voluntary Cleanup Action program. The NPL Site is currently divided into two operable units (“OUs”) for upland and river remedial actions. Response actions taken by USACE include removal actions in the Columbia River in 2000, 2002 and 2007, Remedial Investigation reports for both OUs in 2012, and a Feasibility Study for the Upland OU in 2017. Prior to 2022 the Yakama Nation, ODEQ, and the Washington Department of Ecology (“WDOE”) participated in USACE actions through a Technical Advisory Group (“TAG”). The U.S. Fish and Wildlife Service (“USFWS”) has also been a participant in this process.

As stated in the tribe’s comment letters to USACE regarding the RI/FS documents, the Yakama Nation became extremely concerned that the agency has never fully considered the nature and extent of contamination or exposure routes for human health at the Site. Both Yakama tribal staff and attorneys pointed out that USACE must assess both the actual and potential exposure pathways, especially for sensitive populations such as Yakama tribal members who both reside and conduct subsistence fishing at the NPL Site, and that failure to fully complete this investigative process will result in a remedial action that will not protect human health and the environment. In other words, without a thorough understanding of Site conditions, the USACE will not be able to design a remedy that is protective of future exercise of the Yakama Nation's treaty rights.

Yakama Nation provided technical comments on the 2016 Remedial Investigations and Risk Assessments; on July 1, 2016, USACE rejected the majority of them. On August 16, 2016, USACE proceeded to the next phase, releasing the Upland OU Draft Feasibility Study for TAG review and comment. Not only did USACE reject the majority of Yakama Nation technical input, but also that of the ODEQ and USFWS. In addition, USACE rejected use of the Oregon Environmental Cleanup regulations as Applicable or Relevant and Appropriate Requirements (“ARARs”) as required by CERCLA.

Shortly thereafter, the Yakama Nation, ODEQ and WDOE began negotiating an interagency Memorandum of Understanding (“MOU”) with USACE to govern the Bradford Island cleanup process, with its stated purpose “to provide a framework for coordination and cooperation to assist the Corps, as the lead agency, in ensuring the protection of human health and the environment.” The Yakama Nation was hopeful that this agreement would facilitate interagency relationships and provide some guidance for site managers and staff regarding appropriate protocols for communications, technical coordination, and dispute resolution. By 2019, USACE was still indicating to Yakama Fisheries staff that it supported signing the MOU (which was then almost in final draft). However, by 2020 USACE was no longer interested in signing any such agreement.

In a letter to the Region 10 Administrator dated October 10, 2019, the Yakama Nation, ODEQ, and WDOE jointly requested that EPA add the Site to the National Priorities List pursuant to the NCP, 40 CFR Part 300. On September 3, 2020, EPA issued a notice of a proposed rule for public comment (85 FR 54970) that would add four sites to the NPL; Bradford Island was not included. However, on March 16, 2022, EPA made a final rulemaking which placed the Site on the NPL, and conducted a video

press conference webinar the next day. EPA Region 10 began working with USACE to negotiate a Federal Facility Agreement (“FFA”) as required by Section 120 of CERCLA.

On April 5, 2022, the Yakama Nation Tribal Council met with representatives from the USACE Portland District and EPA Region 10 in government-to-government consultation to discuss the final NPL listing and what to expect from the agencies over the next year. The Yakama Nation made four specific action requests at the meeting, and USACE agreed to:

- Prioritize and expedite cleanup actions where possible using, as appropriate, removal actions, interim Records of Decision, and any other available authorities;
- Involve the Yakama Nation meaningfully in the development and implementation of the FFA and Site Management Plan (“SMP”), and execute the FFA within 1 year;
- Re-establish the TAG, and to convene regular monthly technical meetings among the technical staff of the Yakama Nation and other government agencies; and
- Agree to yearly government-to-government meetings to update the Yakama Tribal Council on cleanup activities, and to assess progress at the Site.

However, actions by the Portland District and/or Northwestern Division of USACE since the 2022 consultation meeting have actually impeded the requested actions to which the agency agreed. USACE managers and attorneys have done the following:

- Refused to involve the Yakama Nation in any discussions of the FFA or the SMP, and also refused to distribute drafts of either document to the negotiating agencies under alleged FOIA disclosure concerns;
- Officially disbanded the TAG, including participation by the State agencies;
- Discontinued any regularly scheduled technical meetings with Yakama Nation Fisheries staff, and initiated a Restoration Advisory Board (“RAB”) for the Bradford Island Site in order to marginalize the Yakama Nation’s technical input and subsume tribal perspectives under those of the general public at large;
- Failed to schedule interim expedited cleanup actions, largely because of continued disagreements between USACE and the other agencies; and
- Pushed through key decisions and documents without interagency input.

The Yakama Nation, EPA, ODEQ, and Ecology all became increasingly alarmed at the roadblocks that USACE was throwing in the way of progress towards any form of Site cleanup. This resulted in an interagency conference at the Pentagon on December 7, 2022, with the Assistant Secretary of the Army for Civil Works, Michael Conner. At the meeting the four parties expressed their continued frustration and impatience with the lack of progress since last spring’s consultation, reiterating that the situation at Bradford Island appeared to be getting worse rather than better in the wake of the March 2022 NPL listing. An FFA still has not been executed as of one year from the effective date of the EPA rulemaking, which was April 15, 2022, and the Yakama Nation is still being excluded by USACE from all regular technical meetings and any involvement in FFA/SMP negotiations.

### **Yakama Nation CERCLA Cost Recovery Litigation**

In December 2014 the Yakama Nation filed a legal action against the Department of the Army and USACE pursuant to Section 107(a) of CERCLA in the U.S. District Court for the District of Oregon.

See *Confederated Tribes and Bands of the Yakama Nation v. United States, et. al.*, 2015 WL 9942044 (D. Or.). The case sought to recover the costs of the tribe’s participation in the removal action and remedial investigation at Bradford Island since 2005. The only issue in dispute on cross-motions for summary judgment was whether the Yakama Nation’s asserted costs were response costs caused by the release or threatened release of a hazardous substance, and whether the tribe’s response actions were “not inconsistent with the NCP.” U.S. Magistrate Paul Papak issued findings and recommendations to the U.S. District Court Judge on December 18, 2015, and disagreed with the Army’s position that the tribe needed some type of “oversight authority” to collect its incurred costs. *Id.* at 8. Judge Papak also pointed out that the “primary limitation on the Tribe’s ability to recover its response costs is the requirement that its response actions not be ‘inconsistent with the [NCP],’” and that USACE had failed to meet its burden of proof that the tribe’s response actions were arbitrary and capricious.

U.S. District Judge Anna Brown issued a final Court order on February 2, 2016, affirming the Magistrate’s holdings, with one exception – she reversed the Magistrate’s denial of a declaratory judgment on USACE liability for all future response costs. This ruling led to a negotiated consent decree with the U.S. Department of Justice (“USDOJ”) entered with the court on July 7, 2017, and which requires funding by USDOJ of all future response costs incurred by the Yakama Nation for its oversight of the Bradford Island cleanup. That consent decree is still in effect and funds all of the Yakama Nation’s CERCLA response actions.

## **CERCLA LEGAL FRAMEWORK**

### **RI/FS Requirements for Federal Facilities**

Relevant requirements for federally owned facilities are in Section 120 of CERCLA. These include the following provision:

All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this chapter for facilities at which [hazardous substances](#) are located, applicable to evaluations of such facilities under the [National Contingency Plan](#), applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this chapter.

42 U.S.C. § 9620(a)(2). The NCP’s relevant requirements for remedial investigations are therefore also applicable to federal facilities:

The [lead agency](#) shall characterize the nature of and threat posed by the hazardous substances and hazardous materials and gather data necessary to assess the extent to which the [release](#) poses a threat to human health or the environment or to support the analysis and design of potential [response actions](#) by conducting, as appropriate, field investigations to assess the following factors:

- (i) Physical characteristics of the site, including important surface features, soils, geology, hydrogeology, meteorology, and ecology;
- (ii) Characteristics or classifications of air, surface water, and [ground water](#);
- (iii) The general characteristics of the waste, including quantities, [state](#), concentration, toxicity, propensity to bioaccumulate, persistence, and mobility;
- (iv) The extent to which the source can be adequately identified and characterized;
- (v) Actual and potential exposure pathways through environmental media;
- (vi) Actual and potential exposure routes, for example, inhalation and ingestion; and
- (vii) Other factors, such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives.

40 CFR § 300.430(d)(2). The NCP's provisions regarding risk assessments also apply:

Using the data developed under paragraphs (d)(1) and (2) of this section, the [lead agency](#) shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to [ground water](#) or surface water, releasing to air, leaching through soil, remaining in the soil, and bioaccumulating in the food chain. The results of the baseline risk assessment will help establish acceptable exposure levels for use in developing remedial alternatives in the FS.

40 CFR § 300.430(d)(4). Relevant statutory requirements also include application of state standards for removal and remedial actions:

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) when such facilities are not included on the National Priorities List.

42 U.S.C. § 9620(a)(4). Under the NCP the applicable state standards have been fleshed out:

Only those [state](#) standards that are promulgated, are identified by the [state](#) in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate [ARAR]. For purposes of identification and notification of promulgated [state](#) standards, the term *promulgated* means that the standards are of general applicability and are legally enforceable.

40 CFR § 300.400(g)(4).

### **Non-Discretionary Acts and Duties for Federal Facilities**

The following actions are required of lead federal agencies at all federal CERCLA facilities once they are placed on the NPL:

Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency, or instrumentality which owns or operates such facility shall, in consultation

with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study for such facility.

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The Administrator and appropriate State authorities shall publish a timetable and deadlines for expeditious completion of such investigation and study.

42 U.S.C. § 9620(e)(1). In addition, federal facility agreements are required to be negotiated with EPA and entered into by the relevant federal agency:

The Administrator shall review the results of each investigation and study conducted as provided in paragraph (1). Within 180 days thereafter, the head of the department, agency, or instrumentality concerned shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility. Substantial continuous physical onsite remedial action shall be commenced at each facility not later than 15 months after completion of the investigation and study. All such interagency agreements, including review of alternative remedial action plans and selection of remedial action, shall comply with the public participation requirements of section 9617 of this title.

42 U.S.C. § 9620(e)(2). States and other governments are also required to be included in the actions taken at federal facilities:

The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 9621 of this title.

42 U.S.C. § 9620(f). Such participating governments also include federally recognized Indian tribes, which are recognized as states for purposes of applying CERCLA regulations and criteria to federal facilities:

The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of [section 9603\(a\) of this title](#) (regarding notification of releases), [section 9604\(c\)\(2\) of this title](#) (regarding consultation on remedial actions), [section 9604\(e\) of this title](#) (regarding access to information), [section 9604\(i\) of this title](#) (regarding health authorities) and [section 9605 of this title](#) (regarding roles and responsibilities under the [national contingency plan](#) and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one [facility](#) per State on the National Priorities List).

42 U.S.C. § 9626(a).

### **Court Jurisdiction for CERCLA Citizen Suits**

Citizen suit enforcement is specifically authorized by §310(a) of CERCLA. Because Bradford Island is a “federal facility,” any remedial action is and will be conducted under § 120(e) of CERCLA, 42 U.S.C. § 9620(e). Therefore, the jurisdictional bar in CERCLA § 113(h) regarding review of



remedial actions in U.S. District Court does not and will not apply to any Citizen Suit filed pursuant to this Notice. See *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828 (9<sup>th</sup> Cir. 1999). The citizen suit provision provides in relevant part as follows:

Any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under [section 9620 of this title](#), relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under [section 9620 of this title](#) (relating to Federal facilities), which is not discretionary with the President or such other officer.

42 U.S.C. § 9659(a). Judicial review of “any issues concerning the adequacy of any [response](#) action taken or ordered by the President shall be limited to the administrative record.” 42 U.S.C. § 9613(j)(1). U.S. District Courts have jurisdiction in actions brought under § 310(a)(1) “to enforce the standard, regulation, condition, requirement, or order concerned....to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation.” 42 U.S.C. § 9659(c). Federal court jurisdiction is also authorized in actions brought under § 310(a)(2) “to order the President or other officer to perform the act or duty concerned.” *Id.*

## **SPECIFIC ALLEGATIONS IN CITIZEN SUIT**

### **Violations of CERCLA and the National Contingency Plan in the RI/FS**

According to the Upland and River Operable Units (OU) Remedial Investigation Report (URS, 2012; RI) and the Final Feasibility Study for Bradford Island (USACE, 2017; Upland FS), USACE is the lead agency to conduct the cleanup in accordance with CERCLA. The Corps has maintained in both the RI and Upland FS, as well as supplemental documents such as the Baseline Human Health and Environmental Risk Assessment (URS, 2016), that the work and or methodologies applied at Bradford Island follow CERCLA. However, Yakama Nation’s review of USACE’s work to date finds it to be both technically lacking and frequently inconsistent with even some of the broadest requirements of CERCLA and the NCP.

**1. In the Final Remedial Investigations for Bradford Island, USACE failed to adequately characterize the nature of, and threat posed by, the releases of hazardous substances and has not gathered the necessary data to assess the extent of them.**

USACE is required to “characterize the nature of and threat posed by the hazardous substances and hazardous materials and gather data necessary to assess the extent” of them. See 40 CFR § 300.430(d)(2). Multiple substantive data gaps remain unresolved that preclude development of final protective remedies. Most obviously, a complete and comprehensive conceptual site model that

identifies the source of PCBs and heavy metals in the River OU has not been produced for public review.<sup>1</sup> And, critically, contamination in the Columbia River and in aquatic biota has not been fully characterized, despite these being the most significant exposure pathways to tribal members and the public. Source(s) and/or the pathway(s) from those sources, were not unequivocally identified, and the sampling to define the extent of contamination (both in space and over time) has been inadequate. Without sufficient Site characterization and delineation, an agency cannot evaluate the effectiveness of any remedy that is being considered.

Upland source areas at Bradford Island remain poorly characterized and the nature and extent of contamination has not been fully evaluated, an essential step to performing any successful cleanup. An analysis of data gaps for the Site and development of a Work Plan to address those data gaps has not been performed; and a conceptual site model (“CSM”) that identifies sources of contamination and complete pathways for fate and transport of hazardous substances at each source that accurately reflects the data collected has not been developed.

It remains unclear how the present areas of concern were initially identified to begin evaluating the Upland OU. To date, evaluations of the Sandblast and Bulb Slope Areas of Potential Concern remain incomplete. Groundwater at the Site has been confirmed to be contaminated; but the groundwater to surface water pathway was not carried forward in the RI for further evaluation on the basis that the reported concentrations were low and the total discharge of groundwater was limited. Thorough evaluation of the fractured bedrock below Bradford Island and the potential migration pathways therein for groundwater to surface water has not been performed.

Fate and transport of hazardous substances from the Upland OU to the River OU has not been thoroughly evaluated and often has been performed in a disjointed or illogical manner. In 2021, the Optimization Review Report commissioned by EPA pointed out that established remedial action objectives for the Final Upland FS “did not address the potential for unacceptable impacts to the River OU resulting from the Upland OU.” The Optimization Report followed the completion of the Human Health Environmental Risk Assessment in 2016, which was appended to the Upland FS and stated explicitly that “Upland OU to River OU pathways (i.e. potential mass wasting and soil erosion) that were evaluated in the Final RI were not addressed herein, as these possible pathways *will be considered in the Upland OU FS or the River OU FS* [emphasis added].”

Appropriate evaluation of the nature and extent of releases in the Upland OU must be completed *prior* to evaluating potential impacts to the River OU; otherwise any analysis based on Upland OU data will be similarly incomplete and subject to future revision. USACE has continued to collect basic Uplands OU characterization data on an *ad hoc* basis from different areas of potential concern since completion of the 2012 RI for the Upland OU. Confusingly, USACE has also repeatedly asserted that the 2012 RI is substantially complete (ongoing data collection notwithstanding) and sufficient to support the Upland OU FS.

For the River OU, no samples were collected farther out in the river channel, or farther upstream, to better determine whether or not there are other sources of contamination. It is unclear how the River

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<sup>1</sup> USACE’s position not only violates the law, but is inconsistent with the manner in which it has treated other areas of the very same Site. For example, the recently released Sandblast Area of Potential Concern Work Plan and Quality Assurance Program Plan (2021), includes discussion of how lateral and vertical extents of upland contamination are not fully defined and therefore require additional sampling.

OU eastern delineation line was drawn, since there are no data upriver of this line besides the reference area (approximately 2 miles upstream). Based on RI information, sediment and tissue samples indicate human health risks extend across the entire OU, including to locations at the upriver boundary.

In sampling data from 2011, the concentrations of PCBs in fish, clams, and sediments were high along the north side of Bradford Island, with concentrations in all media increasing toward the eastern end of the island. The sampling at Bradford Island was limited to the north side of the island; however, it did not bound the extent of the high concentration area to the south, west (including downstream areas), or north (i.e. towards the forebay). One of the debris piles was located near the eastern end of Bradford Island. Columbia River current flow is around the eastern end of the island at least some of the time, providing a reasonable basis to believe that residual high concentrations of PCBs would be found in this location. Considered together with the potential for heterogeneity in the PCB distributions, these data are simply too limited to confidently delineate the present distribution of PCB contamination at Bradford Island.

There is also a paucity of data collected in the Bonneville Dam forebay. Because the forebay is a dynamic environment, understanding where contamination has come to be located over time is essentially to identifying appropriate cleanup actions and cleanup action design. Collecting insufficient data to fully evaluate the nature and extent of the Site and incorporating this information in the CSM adds greater uncertainty. Older data show that the PCB contamination was heterogeneously distributed in sediment (when present), indicating that a high frequency sampling was necessary to identify the “hot spots” at that time. There is no reason to assume that same heterogeneity is not present today, leaving the possibility that areas with higher contamination have been missed in the limited sampling.

Goose Island Slough was constructed in 1989-1993 by removing a portion of the southeastern tip of Bradford Island. One of the most heavily impacted sediment locations is at the present eastern tip of Bradford Island. At the time Goose Island Slough was constructed this material was not evaluated for the presence of contamination; however, limited sampling of slough sediments and fish tissue post-construction has been completed. This data is inconclusive about whether or not contaminated sediments were re-located into this area. However, the highest measured concentrations of PCBs in smallmouth bass at Goose Island was observed in the farthest east (upriver) sample suggesting that the sampling program completed to date remains inadequate to properly characterize all sources of PCBs associated with the construction and operation of the Bonneville Dam Complex.

By failing to collect adequate sampling data to characterize the Bradford Island Site and the extent to which the releases therefrom pose a threat to human health or the environment, or to support the analysis and design of potential [response actions](#), USACE is in violation of EPA regulations in the NCP which have become effective pursuant to CERCLA at 40 CFR § 300.430(d)(2).

**2. In the Final Remedial Investigations for Bradford Island, USACE has failed to adequately assess contaminant exposure risks through both actual and potential pathways, including sensitive populations such as Yakama enrolled members who have high fish consumption rates.**

In its Risk Assessments for both Remedial Investigations, USACE is required to assess both actual and potential exposure pathways, especially for sensitive populations such as Yakama enrolled members who both reside and conduct subsistence fishing at the Site. 40 CFR § 300.430(d)(2)(v-vii). Yakama members' exposure to contamination, including to bio-accumulative toxins such as PCBs, pesticides, and heavy metals through consumption of resident fish and shellfish, from the Bradford Island site is orders of magnitude greater than the exposure risk posed to the general public.

Yakama enrolled fishers tend to occupy treaty fishing areas for most if not all of their lives, including residential use. These platforms and locations are handed down, generation to generation, and are fished by the entire family. Following cleanup and restoration of Bradford Island, the Yakama Nation expects its fishers to be able to resume occupancy of the island and surrounding shorelines and to fish the platform locations that they and their ancestors have fished since time immemorial. Without a thorough understanding of both Site conditions and proper risk scenarios, the Corps will not be able to design a remedy that is protective of the Yakama Nation's future exercise of treaty fishing rights.

Although the decades of exposure began as early as the 1930s, Bradford Island fish toxicity was not understood until well into the 2000s. Since discovering the extremely high fish tissue concentrations and toxicity, USACE has yet to evaluate a risk scenario specific or acceptable to Yakama tribal members. Remarkably, USACE's evaluation of exposure scenarios in the RI did not include an exposure scenario for Tribal members using fishing platforms on the island; this had to be added in the Baseline Human Health and Environmental Risk Assessment, Upland OU (HHERA, URS, 2016). Moreover, the RI did not use Tribal fish consumption rates representative of the Yakama nor has USACE been willing to evaluate a cumulative risk scenario for a tribal member living and platform fishing on Bradford Island. Contamination of the Columbia River from the upland portions of Bradford Island has been occurring since the Site was first identified in 1996, when USEPA requested sediment sampling of Columbia River sediments and groundwater seeps at what is now the Landfill Area of Potential Concern (URS, 2012). Since that time, and despite all evidence to the contrary, USACE has repeatedly attempted to separate risks between the Upland and River OUs.

A heritage fish consumption rate is "the amount of fish that was traditionally consumed prior to non-indigenous or modern sources of contamination or interference with the natural lifecycle of fish." This rate "may be the only practical way to estimate unsuppressed rates – that is, free from the biasing influence of suppression effects, and may be useful in establishing a baseline for legally protected fishing rights for fishing tribes" (EPA, 2016). Examples of "suppression effects" that have occurred in the vicinity of Bradford Island include health-based reduction or avoidance due to contaminants in fish and fish advisories; reduced fish populations due to environmental changes such as contamination, dams and shoreline development; reduced access; creel limits; and other factors. However, a 2015 Nez Perce survey indicated an increase in tribal fish consumption rates over the two decades since 1994, resulting from tribal/state habitat and hatchery efforts which have increased main stem fisheries populations.

USACE has been unwilling to use an accurate fish consumption rate for its risk evaluations despite numerous efforts by Yakama Nation. Documented heritage tribal fish consumption rates range between approximately 401-995 grams per day (g/d) per person, with approximately 0-45% and 55-100% of the tribal fish consumption diet from resident and anadromous fish, respectively. Tribal members continue to have the right to consume fish at these heritage rates, and Risk Assessments

must reflect this consumption rate range. Nevertheless, USACE continues to use a significantly suppressed – and inaccurate – tribal fish consumption rate of 175 g/d.

By failing to adequately assess contaminant exposure risks through both actual and potential pathways and routes, and other factors such as sensitive populations, that pertain to the characterization of the site or support the analysis of potential remedial action alternatives, USACE is in violation of EPA regulations in the NCP which have become effective pursuant to CERCLA at 40 CFR § 300.430(d)(2).

**3. In its Final Feasibility Study for Upland Operable Unit, USACE has failed to recognize or incorporate Oregon and/or Washington State regulations as applicable or relevant and appropriate requirements (ARARs).**

USACE has not used any State regulations as ARARs in its Feasibility Study for the Upland OU. The Yakama Nation, WDOE, and ODEQ, have repeatedly informed USACE that State cleanup standards and rules apply directly to the Bradford Island site. See 42 U.S.C. § 9621(d)(2)(A); 42 U.S.C. § 9620(a)(4); 40 CFR § 300.400(g)(4). However, USACE has consistently maintained that state screening and cleanup levels are not ARARs to be considered during sampling and cleanup, a position that is inconsistent with both CERCLA and the NCP. Instead, USACE views them as optional To Be Considered (TBC) criteria.

Work performed at the NPL Site is required to comply with State environmental laws that are promulgated, more stringent than Federal laws, and identified by the State in a timely manner. As an example, ODEQ has repeatedly requested USACE include sampling for TPH, which are listed as hazardous substances in Oregon. However, USACE has consistently ignored or otherwise denied these requests on the basis that TPH are not listed as hazardous substances under CERCLA, even though the statute requires that USACE comply with Oregon State law. USACE was previously advised of this requirement by EPA Region 10 in a June 20, 2020, letter from Mark Adler to Col. Randall Butler. USACE's ongoing failure to identify appropriate ARARs, including State cleanup levels, and to select analytical methods with sufficient precision to evaluate against State requirements, has resulted in data that frequently is not usable.

In addition, OAR 340-122-0115 sets risk level criteria for carcinogens at one in one million (i.e.,  $1 \times 10^{-6}$ ) and one in one hundred thousand (i.e.,  $1 \times 10^{-5}$ ) for individual and cumulative excess cancer risk, respectively. Allowable cumulative cancer risk for Sites with multiple contaminants under Washington cleanup regulations is one in one hundred thousand. USACE has selected an allowable risk threshold of one in ten thousand (i.e.,  $1 \times 10^{-4}$ ) for evaluation of Bradford Island. By selectively ignoring applicable State requirements, the Upland FS has dropped several contaminants of concern (COCs) and contaminants of ecologic concern (CECs) with risks of up to one in ten thousand (i.e.,  $1 \times 10^{-4}$ ) from any further consideration at the Site. As a result they are not considered when setting preliminary remediation goals (PRG) or cleanup levels, and are not included in monitoring during pre-design or cleanup performance and confirmation phases. Elimination of COCs or CECs based on allowing a higher levels of risk at the Site that are supported under State law will ultimately will lead to a non-compliant and incomplete cleanup that will be insufficiently protective of both human health and the environment.

Federally-promulgated Clean Water Act Effective Human Health Criteria Applicable to Washington were signed into effect by EPA on November 15, 2016. The FS and subsequent response decisions

do recognize these criteria as ARARs. These criteria affect Upland FS decisions with respect to overland flow, groundwater, and seep contributions to the Columbia River, a surface water body under Washington State's jurisdiction. Of particular note is the significant decrease in the PCB criteria, a primary risk driver at the NPL Site. USACE has consistently declined to re-evaluate existing data against new surface water criteria.

USACE cannot simply ignore these ARARs – they do not cease to be mandatory if the agency unilaterally elects not to comply with them. Compliance with ARARs is considered a threshold requirement for selection of a remedial alternative under the NCP. 40 CFR § 300.430(f)(1)(i)(A). By failing to recognize and incorporate state regulatory requirements into the Upland OU Feasibility Study as ARARs, USACE is in violation of EPA regulations in the NCP which have become effective pursuant to CERCLA at 40 CFR § 300.400(g)(4).

### **Failure to Perform Acts and Duties under CERCLA**

#### **1. USACE has failed to enter into an interagency agreement (federal facilities agreement) within 180 days of EPA's review of results of the RI/FS as required under CERCLA. 42 U.S.C. § 9620(e)(2).**

By the time the Bradford Island Site's NPL listing became effective on April 15, 2022, USACE had already completed an RI/FS for the Upland OU, and had also finalized an RI for the River OU. This is an unusual situation for an NPL Site, since CERCLA requires the federal agency with administrative jurisdiction over the newly listed facility to consult with EPA and the appropriate state/tribal authorities to *begin* an RI/FS within six months of the final NPL rulemaking. 42 U.S.C. § 9620(e)(1). As a result, the statutory timeline for reaching agreement on a final federal facilities agreement ("FFA") for Bradford Island is significantly tighter than normal. Within 180 days of the completion of any RI/FS and subsequent review by EPA, CERCLA § 120(e)(2) requires USACE to enter into such an interagency agreement with EPA to govern the remedial actions to be taken at the facility. 42 U.S.C. § 9620(e)(2). If EPA and USACE fail to negotiate the terms of an interagency agreement, Section 120(e)(4) authorizes the EPA Administrator to resolve the dispute and select the remedial actions he deems most appropriate to protect human health and the environment. 42 U.S.C. § 9620(e)(4)(A). Those 180 days, which began running upon Region 10's review of the Bradford Island RI/FS documents in the autumn of 2022, have either already passed or will end soon.

However, even with the deadline for execution now looming (or already expired), progress on the FFA has been stalled for months. This situation has resulted from the USACE Northwest Division's use of bad faith negotiating tactics in order to dictate terms and continue to unilaterally control management of the cleanup despite its recent NPL listing. USACE has insisted on strict adherence to the 2009 Fort Eustis Model, even when project-specific differences justify minor changes and updates. Nevertheless, USACE negotiators have made their own substantive edits to that template, but are not accepting edits from EPA or the States. The Fort Eustis FFA was drafted for a site in southeast Virginia where no tribal interests existed, and several aspects of it are simply not applicable to the Bradford Island situation. When the FFA was adopted as a model, it was clear from Department of Defense correspondence with EPA that "site-specific changes" would be needed for any DOD site, but USACE has either not accepted that recommendation or applies it arbitrarily for its own purposes. See March 25, 2009 letter from Wayne Army, Deputy Under Secretary of Defense, to Catherine McCabe, EPA Acting Assistant Administrator.

USACE is also insisting on strict confidentiality despite public records disclosure laws, and has not provided any further drafts of the FFA or a Site Management Plan (“SMP”) to EPA or the States because of alleged concerns about Freedom of Information Act (FOIA) requests. Given this approach, there is absolutely no expectation that EPA or the two States will be able to work with USACE to agree on an FFA or SMP at all, much less within the 180-day timeline.

By declining to enter into an interagency agreement with EPA for the expeditious completion of all necessary remedial action at Bradford Island within 180 days after EPA has reviewed the RI/FS, USACE has failed to perform an act or duty under section 9620 of CERCLA relating to Federal facilities, which is not discretionary with such agency.

**2. USACE has failed to recognize or include the Yakama Nation as a participating government in the RI/FS and FFA negotiations as a response agency and with substantially the same treatment as the States of Oregon and Washington as required under CERCLA. 42 U.S.C. § 9607(a); 42 U.S.C. § 9620(f); 42 U.S.C. § 9626(a).**

Since the listing of the Bradford Island site on the NPL in 2022, USACE has taken numerous actions to prevent the Yakama Nation from participating as a support agency, despite its involvement with the RI/FS process since 2005. Communications from USACE legal counsel indicate that the agency no longer recognizes the Yakama tribal government as being equal in status to the States of Oregon and Washington under CERCLA or the NCP. This assumption is not correct, and the intent of Congress to include Indian tribes as full participants in the remediation process for federal facilities must control.

This issue has already been the subject of judicial review in litigation with USACE in 2014-2017. Under Section 107(a) of CERCLA, any potentially responsible party (including the U.S.) may be held liable for all costs incurred by an Indian tribe in responding to any release or threatened release of hazardous substances at a facility, unless the PRP can show divisibility or any other statutory defenses. 42 U.S.C. § 9607(a)(4)(A). The U.S. District Court for the District of Oregon ruled that the Yakama Nation has legal authority under CERCLA to recover all of its past and future costs from USACE for response activities for hazardous releases from Bradford Island. See *Confederated Tribes and Bands of the Yakama Nation v. United States, et. al.*, 2015 WL 9942044 (D. Or. Civ. No. 14-1963). As a defense, the Department of Justice argued that there is an implied requirement in CERCLA that only lead agencies have authority to recover costs, because they are the only agencies that can provide “oversight” of facility cleanups. This runs contrary to the principle that courts should not impart an implied congressional meaning or intent into statutes where the express plain language does not reflect it. The Court’s decision includes the following passage that summarizes its rationale:

Indeed, the policy underpinning CERCLA strongly suggests the statute permits Yakama Nation to engage in oversight response actions with respect to the Bradford Island cleanup. CERCLA was enacted to “ensure the prompt and effective cleanup of waste disposal sites” and to “assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created.” *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 968 (9th Cir. 2013) (alteration in original) (citation and internal quotation marks omitted). To effectuate its underlying purpose, CERCLA makes polluters liable to Native American tribes for “all costs of removal or remedial action ... not inconsistent with the national contingency plan.” 42

U.S.C. § 9607(a)(4)(A). Thus, Yakama Nation was not required to have express authority to engage in oversight activities in relation to the Bradford Island cleanup.

*Id.* at 4-5. All of the Yakama Nation’s response costs for the Bradford Island NPL Site are now being reimbursed through a consent decree with USDOJ that has been in effect for over five years. *Id.*, Consent Decree (Doc. #76) (July 7, 2017).

Note also that Section 107(a)(4)(A) of CERCLA contains implicit congressional intent that states and tribes have similar status. In providing for liability for response costs “incurred by the United States Government or a State or an Indian tribe,” the statute places all three sovereign governments in the same phrase for purposes of participating in removals or remedial actions. The only way to read this subsection is to assume that Congress permits tribes to participate in any cleanups in which federal agencies or states are also involved.

This principle – that tribes and states are equivalent support agencies – has been essentially conceded by the United States in settlement of litigation with the State of Oregon. In a letter to ODEQ Director Richard Whitman dated July 21, 2020, the USACE Portland District demanded recoupment of over \$769,000 in USACE funding provided to ODEQ for its participation in the Bradford Island cleanup under an agreement dating back over two decades. This attempt at collection resulted in legal action by the State of Oregon in U.S. District Court to recover ODEQ’s response costs pursuant to Section 107(a)(4)(A). A consent decree requiring USACE funding of ODEQ’s costs was entered on February 10, 2022, and its provisions are virtually identical to the order with the Yakama Nation almost five years before. The two sovereigns are now being funded by USDOJ through similar means, which raises a substantial issue as to why USACE is now treating them in a disparate manner.

Directly addressing that question, Section 126 of CERCLA requires the governing body of an Indian tribe to be accorded the same treatment as a state with respect to certain provisions of the statute. 42 U.S.C. § 9626(a). Lead agencies are required by CERCLA to consult with Indian tribes before selecting a remedial action (42 U.S.C. § 9604(c)(2)); provide tribes with access to all information about releases and remedial measures (42 U.S.C. § 9604(e)); and regarding roles and responsibilities under the NCP (42 U.S.C. § 9605(a)(4)). The 1986 amendments to CERCLA also applied Subpart F of the NCP to Indian tribes and authorized EPA and other lead agencies to interact directly with tribal governments. See 42 U.S.C. § 9605(a)(4); 40 CFR § 300.515(b). Accordingly, the definition of “State” in the NCP was revised to also include Indian tribes. 40 CFR § 300.5. For standing and participation in cleanups, the NCP and EPA guidance require that Indian tribes be federally recognized; have a governing body that promotes the health, safety and welfare of affected tribal members within a defined geographic area; and have jurisdiction over a site that is listed on the NPL. 40 CFR § 300.515(b); *Interim Final Guidance on Indian Involvement in the Superfund Program*, OSWER Directive 9375.5-02 (Oct. 18, 1989) at 3.

In addition, USACE has admitted that the Yakama Nation is a trustee for natural resources at the NPL Site. Sections 104 and 120 of CERCLA require USACE to promptly notify trustees of potential damages from releases. 42 U.S.C. § 9604(b)(2); 42 U.S.C. § 9620(a)(2). Pursuant to the NCP, the Yakama Nation in its role as trustee has the authority to “conduct a preliminary survey of the area affected by the discharge or release to determine if trust resources under their jurisdiction are, or potentially may be, affected.” 40 CFR § 300.615(c)(1)(i). In addition, the tribe has authority in the NCP to coordinate with the Remedial Project Manager in any “assessments, investigations, and planning” in the remedial actions. 40 CFR § 300.615(c)(1)(ii). This coordination is not just for the



natural resource damage assessment process, but also includes a direct trustee role in the removal and/or remedial action itself. 42 U.S.C. § 9604(b)(2) (lead agency coordination with trustees refers specifically to actions taken “under this section,” i.e., responses to releases).

USACE may argue that the rules for Indian tribes are different for federal facilities because the cleanups are conducted under the authority of Section 120 of CERCLA, not Section 104. However, any statutory rules or criteria that apply to Section 104 cleanups also apply to federal facilities. 42 U.S.C. § 9620(a)(2). Section 120 also provides that the lead agency at a federal facility “shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans.” 42 U.S.C. § 9620(f). The term “local officials” is not defined in the statute, but Congress could not have intended that they be restricted only to county, city or municipal governments, since Section 104 repeatedly refers to those entities as “political subdivisions” of States to distinguish them from Indian tribes. See, e.g., 42 U.S.C. § 9604(c)(3) (operation and maintenance assurances); 42 U.S.C. § 9604(d) (cooperative agreements); 42 U.S.C. § 9604(e) (authorizing response actions).

Note also that Section 105(a) provides for NCP roles and responsibilities for “local governments” to distinguish them from States or tribes – which are treated as States in the NCP under Section 126. 42 U.S.C. § 9605(a)(4); 42 U.S.C. § 9626(a). Congress would not have intended for tribes to fully participate in non-federal facilities but not federal NPL facilities, especially given the unique trust responsibility that federal agencies have with Indian tribes. See *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515, 1519 (W.D.Wash. 1996); see also *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981). Therefore, the term “local officials” for inclusion in federal facility cleanups under CERCLA § 120 must be interpreted to include not only “political subdivisions” of States but also any officials from “local” federally recognized Indian tribes who may have a significant and compelling interest in protecting treaty or other resource and public health interests. At Bradford Island, these include the Yakama Tribal Council and other tribal officials, who exercise treaty fishing rights and wield substantial regulatory authority in the direct vicinity of the NPL Site. These rights and authority are in many ways far more significant to the cleanup than any other parties involved, including the lead agency itself.

Under Article III of the Treaty of 1855, Yakama tribes and bands reserved the right to harvest fish at all usual and accustomed (U&A) places on the Columbia River, including fishing sites at and near Bradford Island. The area of Cascade Locks, including Bonneville Dam, is judicially recognized as a Yakama U&A fishing place. *State of Washington v. James*, 72 Wn.2d 746, 751, 435 P.2d 521, 524 (1967); see also *Seufert Brothers Co. v. U.S.*, 249 U.S. 194 (1919) (Yakama U&A include sites in Oregon). Tribal members who fish in the area between Bonneville Dam and the Bridge of the Gods (approximately two river miles upstream) primarily use the traditional hoop net manner of fishing from wooden platforms extending from the river bank over the surface of the river. These platforms are erected at locations on the bank where river currents and channel configuration draw migrating fish near shore where they are accessible from the platform. Yakama enrolled fishers tend to occupy treaty fishing areas for most or all of their lives, including residential use. See *Sohappy v. Hodel*, 911 F.2d 1312, 1319 (9<sup>th</sup> Cir. 1990). These platforms and locations are handed down, generation to generation, and are fished by the entire family.

Most of the tribal fishing platforms in the Cascade Locks fishery are on lands owned by USACE within the area of the Columbia River affected by contaminants from Bradford Island. Directly below

Bonneville Dam there is also an area that is opened for subsistence fishing from time to time by the Yakama Tribal Council. This fishing area was established through a 2007 Memorandum of Understanding with the State of Washington (“MOU”). In that MOU the State stipulated that members of the Yakama Nation historically fished at the Cascade Fishery, which extends from present-day Cascade Locks downstream several miles to at least the site of Bonneville Dam. This reach of the Bonneville Pool continues to support the highest density of tribal subsistence fishing sites on the Columbia River.

Yakama fishing sites are regulated under tribal laws, and tribal law enforcement authorities have jurisdiction to enter USACE-owned lands and cite enrolled members for fishing violations thereon. *Settler v. Lameer*, 507 F.2d 231 (1974). As the governing body of the Yakama Nation, the Yakama Tribal Council adopts subsistence fishing regulations for its tribal members on the Columbia River and certain of its tributaries. These regulations directly concern the health, safety and welfare of tribal members within the U&A fishing sites of the Bonneville Pool and the rest of Zone 6 all the way upstream to McNary Dam. Chapter 32 of the Revised Yakama Code contains permanent tribal regulations providing for certain fishing methods, fishing areas, prohibitions, and other provisions that regulate the orderly conduct of tribal fisheries. These regulations allow subsistence fishing year around (except for traditional Sunday closures) because as a traditional activity, it is regulated only as required to stay within agreed-to catch quotas for each run of salmon.

The Yakama tribal government also issues emergency orders from time to time that open or close fisheries when and where appropriate. These orders can be based on several factors, including the abundance of certain fish stocks relative to the conservation goals for those stocks, or the presence of conditions hazardous to tribal members. In 2012, the Yakama Nation Fish & Wildlife Committee enacted a tribal regulation which “prohibits platform/hook and line fishing on Bradford Island and over and inside any Dam structures outside 150 feet of Bonneville Dam.” The regulation is based partly on findings that “Bradford Island is highly contaminated.” This prohibition is still in place and treaty fishing is still prohibited by the Yakama Nation in the immediate vicinity of the Bradford Island NPL Site.

These tribal laws and regulations indisputably govern the activities of enrolled Yakama members within defined geographic areas, and are intended to promote the health, safety and welfare of those members during treaty fishing. 40 CFR § 300.515(b)(2). They are enforceable within the immediate area of Bradford Island or wherever there are traditional fishing platforms controlled by Yakama families. As such they are certainly equal to those regulations enforced by the States of Oregon and Washington. Note that the states only have authority over tribal members’ fishing activities if there is a proven conservation necessity for the state regulations being enforced. *Sohappy v. Smith*, 302 F. Supp. 899, 906-909 (D. Or. 1969). This means that the Yakama Nation has legal authority that is sufficiently exclusive to also meet the jurisdictional requirement of the NCP for tribal involvement in remedial actions. 40 CFR § 300.515(b)(3).

In addition to regulatory authority to enforce its fishing laws on all USACE lands, the Yakama Nation also has much broader criminal jurisdiction over an area of Columbia shoreline within the NPL Site’s approximate boundaries. Upstream on the Washington shore of the Columbia River, less than a mile from Bradford Island, is the North Bonneville Treaty Fishing Access Site (“TFAS”). The North Bonneville TFAS was built in 1995-96 – the first new site constructed under PL 100-581. The site is approximately 8 acres. This area, also known as Ft. Rains, has a long history of tribal occupation and use, as noted by Lewis and Clark in their historic journals, and is within the North

Bonneville Archeological District. This site receives extensive tribal use throughout the year. Up to forty people, including children, have resided on this site.

Establishment of this TFAS was authorized by a 1988 statute directing USACE to improve federally owned lands adjacent to the Columbia River “to provide access to usual and accustomed fishing areas and ancillary fishing facilities” for enrolled members of the treaty tribes, including the Yakama Nation. Pub. L. No. 100-581, § 401(a), 102 Stat. at 2944. Like an earlier 1945 statute establishing “in-lieu sites,” Title IV authorized USACE to improve and maintain the fishing sites and then transfer them to the Department of the Interior to be held for the exclusive benefit of the tribes. *Id.*, § 401(b)(2). Subsequent amendments to Title IV clarified the location of these sites. Pub. L. No. 104-303, § 512, 110 Stat. 3762 (1996). In 1967 and 1997, the Bureau of Indian Affairs (“BIA”) promulgated regulations regarding the TFAS, restricting their use to enrolled members of the four CRITFC treaty tribes designated in the 1988 statute. 25 CFR § 247.3. Under these regulations all sites are under the direct control of the Northwest Area Director of the BIA. 25 CFR § 247.2(c).

Exclusive federal and tribal criminal jurisdiction at all the TFAS was established by a court decision involving the Maryhill fishing site near Biggs Junction, in which the Washington Department of Fish & Wildlife attempted to enforce its sturgeon fishing regulations against a Yakama tribal member at the site. The Washington Supreme Court held that the TFAS was an “Indian reservation,” which excluded the site from any state criminal jurisdiction over treaty tribal members under the state’s “partial” P.L. 280 statute (RCW 37.12.010). *State of Washington v. Jim*, 173 Wn.2d 672, 273 P.3d 434 (2012). This decision was important in establishing that TFAS are within “Indian country” for purposes of enforcement of any state criminal statutes. See 18 U.S.C. § 1151(a) (defining “Indian country” as including “all land within the limits of any Indian reservation”).

Therefore, the North Bonneville TFAS is “Indian country” for purposes of concurrent USDOJ/Yakama Nation criminal jurisdiction as well as BIA and EPA civil regulatory jurisdiction. Neither Washington nor Oregon has any civil or criminal jurisdiction over the site for treaty fishing or any other activities by Yakama enrolled members. This unquestionably meets the definition of Indian tribal “jurisdiction over a site” under the EPA criteria in the NCP. 40 CFR § 300.515(b)(3). Although the TFAS is a circumscribed area and does not cover the entire NPL Site, neither Washington nor Oregon have exclusive geographic jurisdiction either (and none is necessary).

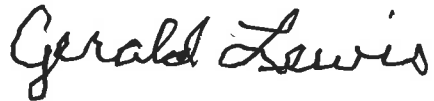
This tribal authority entitles the Yakama tribal government to be treated the same as the States of Oregon and Washington for purposes of remedial actions taken at the NPL Site. By declining to recognize and include the Yakama Nation as a full participant in the Bradford Island CERCLA response and the FFA negotiation process, USACE has failed to perform an act or duty under CERCLA, including an act or duty under section 9620 of the statute relating to Federal facilities, which is not discretionary with such agency.

## **COURT JURISDICTION AND REMEDIES**

The Yakama Nation, through myself as plaintiff, will seek appropriate relief from the U.S. District Court under § 310(c) of CERCLA, including any “such action as may be necessary to correct the violation[s].” This may entail obtaining a preliminary and/or permanent injunction, and a remand to the agencies for enforcement of the proper cleanup standards under the NCP. The plaintiff will also seek an order from the court directing USACE to enter into an FFA with EPA, and to engage with the Yakama Nation for its full participation in the FFA negotiations and any further cleanup plans

for Bradford Island. 42 U.S.C. § 9659(c). The suit will also seek recovery of all costs of the litigation, including attorney fees, pursuant to 42 U.S.C. § 9659(f).

Sincerely,

A handwritten signature in black ink that reads "Gerald Lewis". The signature is written in a cursive, slightly slanted style.

Gerald Lewis  
Chairman  
Yakama Tribal Council

cc: Colonel Michael Helton, USACE NW District Commander  
Craig Schmauder, Department of the Army, IECW Deputy General Council  
Casey Sixkiller, USEPA Regional Administrator  
Calvin Terada, USEPA SEMD Director  
Richard Mednick, USEPA ORC Attorney  
Leah Feldon, Oregon DEQ Director  
Gary Vrooman, Oregon DOJ Attorney  
Laura Watson, Washington Ecology Director  
John A. Level, Washington OAG Attorney