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Via Certified Mail and Email

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Re: Notice of Violations of the Endangered Species Act and the National Environmental Policy Act in Connection with the Champlain Hudson Power Express Project

Dear Sirs/Madams:

This letter serves as formal notice pursuant to 16 U.S.C. § 1540(g) by the Center for Biological Diversity, North American Megadam Resistance Alliance, and Innu Nation of Labrador that the U.S. Department of Energy and Assistant Secretary Walker, in his official capacity (collectively, the “Department”), and the National Marine Fisheries Service (“NMFS” or the “Service”) are in violation of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), regarding the failure to reinstate ESA Section 7 consultation for the Champlain Hudson Power Express project (“CHPE” or the “Project”).

As set forth herein, not only must the Department and the Service reinstate and complete formal ESA consultation on the impacts of the Project on critical habitat for Atlantic sturgeon in the Hudson River, but the Department must also provide a supplemental analysis under the National Environmental Policy Act (“NEPA”) regarding the serious environmental impacts associated with development of dams in Canada that are intended to provide energy for the Project.

Background

Under Section 7 of the ESA, federal agencies must “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.”¹ To comply with this mandate, federal agencies must consult with the appropriate expert wildlife whenever their actions “may affect” endangered species or their critical habitat.² If a proposed action is likely to adversely affect listed species or critical habitat, the ESA requires the action agency and the Service to engage in formal consultation.³ The threshold for triggering formal consultation is “very low.”⁴

After the completion of consultation and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the action agency and the Service must reinitiate consultation if, *inter alia*, a new species is listed or critical habitat designated that may be affected by the identified action.⁵ Both the action agency and the consulting agency have a duty to reinitiate consultation where necessary.⁶

The proposed Project involves construction of a 336-mile long electric power transmission line, intended to transmit power generated from dams in Canada to load centers in the New York metro area. The 1,000-megawatt high voltage transmission line would be installed through various lakes and rivers, including the Hudson River. The entire length of the transmission system would be buried, including beneath the Hudson River. The Hudson River segment is around 90-miles long (with one short segment upland of the river), beginning near the town of Catskill, New York, and continuing to the confluence with the Harlem River in New York city. Construction has not yet commenced for the Project; however, modifications to the Project route were approved by the New York Public Service Commission on March 19, 2020 and August 13, 2020.

The Department provided a biological assessment to the Service on July 17, 2014, which determined that the Project was not likely to adversely affect any listed species that occur in the Project area, including Atlantic sturgeon. On September 18, 2014, the Service issued a concurrence letter, completing the informal Section 7 consultation for the Project. The Service

¹ 16 U.S.C. § 1536(a)(2). To “jeopardize” means to “engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

² See 50 C.F.R. § 402.14.

³ 50 C.F.R. §§ 402.12(k), 402.14(a).

⁴ See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

⁵ 50 C.F.R. § 402.16.

⁶ See *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (“The duty to reinitiate consultation lies with both the action agency and the consulting agency.”); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (same).

stated in the concurrence letter that “there is no designated critical habitat under our jurisdiction in the project area, so none will be affected.”

However, on August 17, 2017, the Service designated critical habitat for Atlantic sturgeon, including for the endangered New York bight, covering 340 miles of aquatic habitat in several rivers.⁷ For the Hudson River, the designated critical habitat includes the aquatic habitat from the Troy Lock and Dam (also known as the Federal Dam) downstream to where the main stem river discharges at its mouth into New York City Harbor. The Hudson River portion of the Project would be within this critical habitat.

The Service noted in the critical habitat designation that the physical features essential to the conservation of the species, and which therefore require protection, include hard bottom substrates that serve as refuge for fertilized eggs as well as provide habitat for growth and early life stage development of Atlantic sturgeon, and soft substrates between river mouths and spawning sites for juvenile foraging and physiological development.⁸

ESA Violation

The Department and the Service are required to reinitiate consultation to determine whether the Project would destroy or adversely modify critical habitat for the Atlantic sturgeon in the Hudson River in violation of Section 7(a)(2) of the ESA. Since it is readily apparent that construction of the Project is likely to adversely affect critical habitat in the Hudson River for the endangered New York bight, formal consultation is required.

Indeed, there can be no doubt that construction of the Project would adversely affect designated critical habitat for sturgeon in the Hudson River. According to the Service’s 2014 concurrence letter, along the bottom of the Hudson River the route would be cleared of debris (including the hard and soft substrates that sturgeon rely on) by dragging a large grapnel, which may require several stages of clearing, including with a de-trenching grapnel that would penetrate up to three feet into the riverbed. A third stage of clearing (*i.e.*, plow pre-rip) would be required if the site conditions indicate the potential for sub-surface debris.

The transmission line would then be installed via jet plowing with hydraulic pressure nozzles that create a downward and backward flow to create a trench, using a plow blade that cuts into the riverbed while it is towed along the pre-cleared route to carry out a simultaneous lay-and-burial operation. Blasting would also be required where the transmission line would cross exposed bedrock, requiring approximately 300 drill holes in the Hudson River. An estimated 1,200 tons of rock material is anticipated to be removed from the trench and temporarily stored on the river bottom adjacent to the trench.

Construction of the Project would therefore undoubtedly result in direct impacts to the benthic substrates on which Atlantic sturgeon depend for reproduction, feeding, and development. Indeed, the Service’s concurrence letter acknowledges that construction of the

⁷ See 82 Fed. Reg. 39,160.

⁸ *Id.* at 39,161.

project would affect sturgeon habitat, including through “impacts to benthic habitat and water quality.”⁹ The Service determined that installation of the proposed transmission line would result in up to 569 acres of riverbed disturbance in the Hudson and Harlem Rivers.¹⁰ It further found that riverbed disturbance would include the redeposition of suspended sediment, which could lead to “reduced water quality, reduced ability to locate food, decreased gas exchange, toxicity to aerobic species, reduced light intensity in the water column, physical abrasion, and smothering of benthic and demersal species present at the time of the activity.”¹¹ And, the Service acknowledged that redeposition of sediments could change the bottom composition of the riverbed if existing coarser grains lie on top of finer grains, which would affect the species composition of the benthic community.¹²

Furthermore, NMFS acknowledged that contaminants that occur in the sediments could be mobilized and become bioavailable as a result of sediment disturbance during route clearing and installation of the transmission line.¹³ Construction activities have the potential to disperse arsenic, cadmium, mercury, benz(a)anthracene, pyrene, 4,4-DDE, copper, lead, phenanthrene, naphthalene, dioxin and PCBs into the Hudson River.

These impacts will occur in areas that have been designated as critical habitat for Atlantic sturgeon. The Service’s concurrence letter notes that the area of the Project around Hyde Park (MP 254) has consistently been identified as a spawning area through scientific studies and historical records.¹⁴ It further states that spawning sites occur within the Project area, including from MPs 254 to 269, and that young of the year and juvenile Atlantic sturgeon have been recorded in the Hudson River between approximate MPs 245 (near Kingston, New York) and 295 (north of Haverstraw Bay).¹⁵ Therefore, construction of the Project is certainly “likely to adversely affect” designated critical habitat areas that Atlantic sturgeon rely on in the Hudson River.

The installment of a 1,000-megawatt high voltage transmission line would also result in increased electromagnetic fields (“EMF”) in the Hudson River that could harm sturgeon and adversely modify their critical habitat. Several studies have shown that EMF can harm sturgeon because sturgeon utilize electroreceptor senses to locate prey and may exhibit varying behavior at different electric field frequencies. Electrical fields are therefore a concern as they may impact migration or their ability to find prey.¹⁶ While the Service’s concurrence letter acknowledges that

⁹ Service’s Concurrence at 16.

¹⁰ *Id.* at 19.

¹¹ *Id.* at 20.

¹² *Id.*

¹³ *Id.* at 26.

¹⁴ *Id.* at 14.

¹⁵ *Id.*

¹⁶ See e.g. Oak Ridge National Laboratory, Effects on Freshwater Organisms of Magnetic Fields Associated with Hydrokinetic Turbines (July, 2011) (available at <https://info.ornl.gov/sites/publications/Files/Pub31337.pdf>); Oak Ridge National Laboratory,

EMF may adversely affect sturgeon, it failed to adequately assess the potential impacts, instead relying on shielding to find that the Project would not result in harm. NMFS failed, however, to provide any science to support its conclusions. It did not provide any information on the effectiveness of the proposed shielding, the potential EMF levels even with the shielding, and did not consider the potential impacts to the species should the shielding break down over time or otherwise fail to adequately limit EMF. NMFS therefore failed to use the best available science to address the potential impacts to Atlantic sturgeon from the Project, as the ESA requires.¹⁷ The impacts of EMF on sturgeon and how increased EMF may inhibit the use of the area as critical habitat must be fully considered during the reinitiated consultation.

Reinitiation and completion of formal ESA Section 7 consultation is therefore required to ensure that critical habitat for endangered Atlantic sturgeon is not destroyed or adversely modified by the Project. Until such consultation is completed, no construction activities may commence. Allowing construction (including any route clearing) to begin before the Department and Service have complied with the requirements of Section 7(a)(2) of the ESA would be an irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable and prudent alternative measures to minimize take of listed species, in violation of ESA Section 7(d).¹⁸ Pursuant to ESA Section 7(d), construction cannot begin, and the status quo must be preserved, until the Department complies with ESA Section 7(a)(2).

Supplemental NEPA Analysis Required

After the publication of the Environmental Impact Statement (“EIS”) for the Project, significant new information has come to light concerning the Project’s impacts on the environment. This new information demonstrates that the Project will impact the environment in a manner not considered in the Department’s August 2014 EIS. Therefore, the Department cannot satisfy its obligation to take a “hard look” at the environmental impacts of the Project pursuant to NEPA without a supplemental analysis that is made available for public comment.¹⁹

Under NEPA and its implementing regulations, agencies are required to “prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the

Effects of Electromagnetic Fields on Behavior of Largemouth Bass and Pallid Sturgeon in an Experimental Pond Setting (Sep. 2015) (available at <https://tethys.pnnl.gov/sites/default/files/publications/Bevelhimer-et-al-2015.pdf>); Mark S. Bevelhimer, et al., Behavioral Responses of Representative Freshwater Fish Species to Electromagnetic Fields, *Transactions of the American Fisheries Society*, 142:3, 802-813 (Apr. 10, 2013).

¹⁷ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

¹⁸ 16 U.S.C. § 1536(d).

¹⁹ See *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d at 518, 528 (7th Cir. 2012) (holding that agencies are required to take a “hard look” at the new information when deciding whether to supplement their environmental analyses).

proposed action or its impacts.”²⁰ When “new information is sufficient to show [the proposed action] will affect the quality of the human environment in a significant manner or to a significant extent not already considered,” the agency *must* prepare a supplemental environmental impact statement to consider the changes and their impacts.²¹

This standard is clearly satisfied with regards to the Project. As discussed above, critical habitat for the Atlantic sturgeon has been designated in the Hudson River that would be adversely affected by the Project, requiring reinitiation of consultation as well as a supplemental EIS.²² Furthermore, modifications to the Project route that were approved by the New York Public Service Commission on March 19, 2020 and August 13, 2020 require a supplemental analysis of the environmental impacts of the Project.²³ These route changes may alter the impacts of the project on local resources and wildlife along the Project route. The fact that the route was changed suggests that there were (and are) alternatives for the placement of the Project, and these alternatives must be fully analyzed in a supplemental EIS, as NEPA requires.²⁴

The supplemental NEPA analysis must also consider the environmental impacts associated with the development of dams in Canada that would not have been built without the expectation that the electricity from these dams would be exported from Canada to New York via projects such as CHPE. NEPA directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects, which are caused by the action, are later in time or farther removed in distance, but are still reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem, as well as cumulative effects.²⁵ Case law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries.²⁶

²⁰ 40 C.F.R. § 1502.9(c).

²¹ *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 374 (1989).

²² See 40 C.F.R. § 1508.27(b)(9) (providing that impacts to endangered species and critical habitat must be considered when evaluating the intensity of an action to determine whether an EIS is required).

²³ For example, the Public Service Commission’s March 19, 2020 Order allowed changes to the corridor width where “topographical, environmental, proximity (to nearby infrastructure), or other constraints exist.” Order at 7, 14.

²⁴ 40 C.F.R. § 1502.14; *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002) (stating NEPA’s alternatives requirement is the “heart” of the EIS and requires the agency to produce an EIS that “rigorously explores and objectively evaluates all reasonable alternatives” so that the agency can “sharply define the issues and provide a clear basis for choice among options by the decisionmaker and the public”).

²⁵ 40 CFR 1508.8(b); 40 CFR 1508.7.

²⁶ See, for example, *Sierra Club v. U.S. Forest Service*, 46 F.3d 835 (8th Cir. 1995); *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300 and 8 F.3d 1394 (9th Cir. 1993); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988); *County of Josephine v. Watt*, 539

Here, the Department’s EIS failed to consider the environmental impacts of Hydro-Quebec’s development of dam infrastructure in Canada to support the Project. Hydro-Quebec has embarked on an aggressive strategic plan to build new dams to produce electricity to export to the U.S. It has added 5,000 megawatts of hydroelectric generating capacity in anticipation of new markets in the U.S., including New York.²⁷ The construction of Hydro-Quebec’s new dams to supply 5,000 MW of electricity for export is a reasonably foreseeable action linked inextricably to the CHPE corridor, and the environmental impacts of these projects must be fully considered through an EIS—including the impacts on Indigenous communities, which have historically been ignored.

The story of the Innu of Labrador provides a stark example of the destructive impacts to Indigenous peoples caused by these hydroelectric dams, which were built without adequate environmental protections and without Indigenous rights-holders’ consent. For example, Hydro-Quebec financed and otherwise supported the development and construction of Churchill Falls Generating Station (“CFGS”), which provides about one-sixth of Hydro-Quebec’s total generation capacity. The CFGS is a massive hydroelectric dam with a 5428 MW capacity in western Labrador that is powered by an immense, man-made reservoir known as the Smallwood Reservoir, which covers an area of approximately 2,566 square miles—larger than the state of Delaware. Before the area was flooded to create the reservoir, this area was a gathering place for the Innu from across the Québec-Labrador Peninsula. It was known to the Innu as the Meshikamau area, named for Lake Meshikamau. The Meshikamau area was rich in fish and wildlife and was on the migration path of two caribou herds, which are integral to the Innu diet and cultural and spiritual identity. The Meshikamau area was also a burial ground for the Innu.

Damming the Churchill Falls and flooding the Meshikamau area destroyed the waters and lands that the Innu relied on, as well as the wildlife habitat the area provided. The Innu’s hunting and trapping lands were inundated. Innu whose families had hunted in the region for generations lost their canoes, traps, caribou-hide scrapers, and other tools that they stored in caches along the river’s edges. Beaver in the headwater ponds froze to death because of reduced water levels. Salmon spawning grounds were destroyed. Fish living in the Reservoir have been poisoned with methylmercury. Caribou calving grounds and waterfowl nesting areas were drowned. And Innu burial grounds surrounding the waterways were destroyed. Bones have been washed away, and burial grounds are continuing to be eroded.

The Innu were not consulted about the building of the CFGS, nor were they consulted about the flooding required to create the Smallwood Reservoir. Their consent to these profound, destructive alterations of their lands and waters was neither sought nor obtained. The Innu were also not told when the flooding would happen, and the scale of it was not explained to them. The construction of the CFGS—and the construction of other such dams to provide export capacity to projects like CHPE—was a massive theft of Innu lands and resources. Indeed, 95% of the power generated by CFGS is exported, much of it to the US. This is what is at stake when

F.Supp. 696 (N.D. Cal. 1982); *see also* Council on Environmental Quality, *Guidance on NEPA Analyses for Transboundary Impacts* (July 1, 1997).

²⁷ Testimony of Hydro-Quebec CEO and President Sophie Brochu, July 29, 2020, Hearing before the U.S. International Trade Commission, page 38-39.

cities like New York support the development of additional hydroelectric dams by Hydro-Quebec for export projects like CHPE.

And there is no doubt that the CHPE project is driving further dam development that adversely impacts indigenous groups. New hydroelectric dams under construction for export supply via CHPE include the four-dam complex on the Romaine River, a wild river that currently sweeps through northern boreal forest and bio-diverse wetlands, then spreads out into the unique Mingan Archipelago National Park Reserve before spilling into the Gulf of the St. Lawrence on the Lower North Shore east of Havre-Saint-Pierre. Hydro-Quebec's plans include four large dams with four reservoirs, one to flood 87 square miles of virgin wilderness; power plants; a 500-km transmission line; construction camps; and 227.2 km of new roads with more than 500 culverts. This electricity will be added to Hydro-Quebec's distribution system that is used for export supply.

On the Churchill River, a second dam—Muskrat Falls—was completed by Nalcor Energy in 2019, and the generating station is expected to be operational shortly. Export to New York via CHPE is a potential market for this electricity, since a recently built 500-kilometer transmission link connects Muskrat Falls to the CFGS, which is operated as part of Hydro-Quebec's transmission and distribution system that supplies the U.S. A third dam on the Churchill River at Gull Island is planned, and if there is a U.S. export market such as would be provided by the CHPE corridor, it would be much likelier to proceed toward construction.

These and other such dams being built and planned by Hydro-Quebec to provide energy for export to the U.S., including via the Project, pose significant harm to local communities and Indigenous peoples and wildlife. Many Indigenous communities would be severely affected by the Romaine dams and the loss of salmon, moose and caribou habitat in the areas slated to be flooded. Indigenous communities, including some located only a few miles from the Romaine, would be particularly hard hit because salmon are a vital source of food and revenue for them.

Large hydro dams also cause environmental harm by releasing methylmercury into the environment, posing significant risk to the health of people and wildlife. Hydro-electric reservoirs allow the conversion of naturally occurring inorganic mercury into organic methylmercury, a potent neurotoxin. Long term mercury contamination is an important environmental and health issue, particularly for Indigenous and local communities that rely on local food sources. The bioaccumulation of mercury at each level of the food chain can result in mercury levels in fish more than seven times the safe limit of 0.05ug/g.

At the Romaine dam complex under construction for energy export via projects like CHPE, the loss of extensive wildlife habitat is a significant concern. These dam projects will flood habitat for moose, endangered woodland caribou (already in dangerous decline throughout its range), and at-risk species like lynx, wolf, wolverine, black bear, peregrine falcon, golden eagle, osprey, and short eared owl, among others. These dams will eradicate the spawning runs and grounds of two kinds of genetically unique Atlantic salmon, already in dangerous decline. Additionally, loss of boreal forest, peat deposits and wetlands through flooding, decaying organic matter in flooded areas, as well as construction activities including roads, and transmission line corridor clearing, would put millions of tons of methane and Co2 into the

atmosphere, exacerbating the climate crisis and adversely affecting people and species in the U.S. as well as in Canada.²⁸

Since the Department's Record of Decision for the Project was issued in 2012, new science has emerged about the greenhouse gas emissions associated with northern boreal reservoirs such as those used by Hydro-Quebec to generate electricity for export via CHPE. A 2012 study of Hydro-Quebec's flooding of the Eastmain reservoir for its hydroelectricity generating station Eastmain-1 shows a sudden pulse of carbon and methane and continued greenhouse gas emissions over time.²⁹ And a 2016 study showed that greenhouse gas emissions from hydroelectric reservoirs are higher than previously reported and recommended methods for managing the production of greenhouse gas emissions from reservoirs such as those used by Hydro-Quebec to produce electricity for export via CHPE.³⁰ Furthermore, since the CHPE application was filed in 2010, the planet has experienced more rapid climate change impacts than previously predicted, including global temperature increases, extreme weather events, ocean acidification and the melting of permafrost in tundra and loss of sea ice in the Canadian north.

However, the Department failed to evaluate these environmental impacts associated with the proposed Project in the EIS, which therefore failed to take a "hard look" at the environmental consequences of the Project, as NEPA requires. The Department must publish a supplemental EIS that analyzes the impacts associated with Hydro-Quebec's construction of dams to supply power for the Project, including impacts on local communities, wildlife, and the contribution to climate change from dam construction. New information on the development of dams associated with the Project is highly relevant to environmental concerns and presents "a *seriously* different picture of the environmental landscape" which must be fully analyzed in a supplemental EIS.³¹

²⁸ In its December 19, 2019 application to amend the Certificate, the Applicant cited New York's 2019 Climate Leadership and Community Protection Act, a new law to curtail greenhouse gas emissions, with a goal of having 70% of the State's energy needs supplied by renewable energy by 2030. Application ¶ 5-11. Applicant claimed that CHPE will help the State achieve this goal. NEPA requires a supplemental EIS to ascertain the climate impacts of the electricity generation that will be transmitted over CHPE to determine whether this fact, relied upon by DOE in the original EIS, remains true given new information on dam development and climate impacts.

²⁹ Teodoru, et al., The Net Carbon Footprint of a Newly Created Boreal Hydroelectric Reservoir. *Global Biogeochemical Cycles*, Vol. 26 Iss. 2 (May 17, 2012) (available at <http://doi.org/10.1029/2011GB004187>)

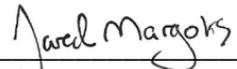
³⁰ Deemer, et al., Greenhouse Gas Emissions from Reservoir Water Surfaces: A New Global Synthesis. *BioScience*, Vol. 66 Iss. 11 Pages 949-964 (Nov. 1, 2016) (available at <http://doi.org/10.1093/biosci/biw117>)

³¹ *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (describing when agencies must issue supplements to their EISs). Insofar as these impacts adversely affect listed species, including those in the U.S., they also constitute new information that further supports the need to reinitiate Section 7 consultation.

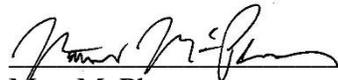
Conclusion

For the forgoing reasons, the Department and the Service must reinitiate Section 7 consultation for the Project, or they will be in direct violation of the ESA. Additionally, the Department must supplement the EIS for the Project as discussed herein. The agencies have sixty days to remedy the violations identified in this letter. If these violations are not promptly corrected, we will assume that no corrective action is being taken and will proceed accordingly. Please do not hesitate to contact the undersigned if we can provide additional information or otherwise assist in this matter, rather than having to resort to judicial remedies. We look forward to your prompt response.

Sincerely,



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