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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

No. 3:01-cv-00640-SI

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, U.S.  
ARMY CORPS OF ENGINEERS, and U.S. BUREAU  
OF RECLAMATION,

Defendants,

and

NWF'S REPLY MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT  
AND IN OPPOSITION TO  
DEFENDANTS' AND  
INTERVENORS'  
CROSS-MOTIONS

NWF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS'  
AND INTERVENORS CROSS-MOTIONS

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NORTHWEST RIVERPARTNERS, INLAND PORTS  
AND NAVIGATION GROUP, STATE OF IDAHO,  
STATE OF MONTANA, STATE OF WASHINGTON,  
KOOTENAI TRIBE OF IDAHO, CONFEDERATED  
SALISH AND KOOTENAI TRIBES, and  
NORTHWEST POWER AND CONSERVATION  
COUNCIL,

Intervenor-Defendants.

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## INTRODUCTION

NWF has moved for summary judgment on its claims against the 2014 BiOp and the action agency Records of Decision for violations of the Endangered Species Act and, for the agency Decisions, violations of the National Environmental Policy Act. Federal Defendants have cross-moved for summary judgment on all of these claims, supported by intervenors and amici. Their collective defense is rooted in a carefully curated and optimistic framing of both a series of illegal biological opinions and of the condition of the listed salmon and steelhead.

Indeed, the first eight pages of Federal Defendants' summary judgment memorandum are an extended panegyric to their failed efforts over the past decade and more to comply with the ESA, a narrative that describes this case through a one-sided, and materially incomplete presentation. Four points help place this opening in context:

- First, the 2014 BiOp (like its predecessors in 2008 and 2010) sets out an RPA because the proposed action—operation of the FCRPS during the Base Period—*jeopardized* the continued existence of the ESA-listed salmon and steelhead. *See* 50 C.F.R. § 402.14(h)(3); 2008 BiOp at 1-6 to 1-7. The RPA, of course, must *avoid* jeopardy. Yet the principal conclusion NOAA says it draws from its updated analysis of the species in the 2014 BiOp is that “this analysis showed that the status of the populations had not materially changed from the 2008 BiOp’s base period estimates.” Fed. SJ Mem. at 18; *see also* 2014 BiOp at 109 (“new information indicates no statistically significant changes in Base Period metrics”). Certainly the survival *improvements* NOAA predicted in the 2008 BiOp from more than a decade of past actions (the Base-to-Current upward survival adjustment), and from the RPA (the Current-to-Pro prospective upward survival adjustment), have not appeared. By NOAA’s own account, this unchanged status does not avoid jeopardy; it perpetuates it—a result the ESA prohibits.
- Second, Federal Defendants’ insistence that the only concern the Court had with the 2008 and 2010 BiOps was their failure to be more specific about tributary habitat actions from 2014 to 2018, Fed. SJ Mem. at 2, does not actually reflect the scope of that opinion or the lengthy record of previous opinions, informal guidance from the Court, and letters to counsel dating back to the draft BiOp in 2007. *See* Fifth Supp. Compl. (Dkt.1492) at ¶¶ 66, 69 (quoting questions from the Court regarding draft BiOp); Seventh Supp. Compl. at ¶¶ 48-57 Dkt. (1928) (additional statements from the Court). The fact that the Court ultimately chose not to “throw the book” at Federal Defendants does not mean there was only one minor flaw in the 2008/2010 BiOps.

- Third, Federal Defendants’ selective description of the process that led to the 2008 BiOp, and the Obama administration’s review of that BiOp in 2009, Fed. SJ Mem. at 4-6, 8, omits any mention of criticism or concern about the 2008 BiOp’s analysis, especially of habitat actions, even by a group of hand-picked outside scientists that NOAA carefully guided through this review, *see* NWF SJ Mem. at 25-26 (citing reviewers comments that habitat data was “weak” and that “the numerical gain in survival from a given effort in habitat is unknown”), as well as subsequent critical reviews of numeric survival improvements predictions for habitat actions that are integral to the no-jeopardy finding for the RPA. *See infra* at 14-18 (describing this evidence in more detail).
- Finally, Federal Defendants’ rosy recitation of improvements in the status of the species, Fed. SJ Mem. at 7-8, depends on a few carefully selected numbers that are misleading. For example, they point to a return of 2,500 endangered Snake River sockeye, citing not the 2014 BiOp but the action agencies’ 2013 Comprehensive Evaluation. *Id.* at 8. This is the total number of these sockeye that reached Lower Granite Dam in 2011. However, less than half of these fish actually reached the culmination of their upriver migration, and of those 1,100 fish only 146 were naturally-spawned Snake River sockeye, 2014 BiOp at 128 (Table 2.1-18), the ultimate focus of ESA protection. Moreover, wild returns in subsequent years have fallen precipitously. *Id.* Likewise, the claim that Snake River spring/summer Chinook average abundance has increased, Fed. SJ Mem. at 8, includes, for example, average increases in Chinook abundance from 12 to 16 fish (Yankee Fork population), from 46 to 49 fish (Chamberlain Creek population), and from 47 to 65 fish (Upper Grande Ronde population). 2014 BiOp at 80 (Table 2.1-5). In fact for 18 of 28 of these Chinook populations, average abundance remains well under one-third (and in many cases less than 10%) of the minimum population numbers NOAA cites (but does not use), *id.*

In short, Federal Defendants’ framing of this case—as well as their arguments and those of their allies—seek to glide past these and many other inconvenient truths. Their narrative, much like the 2014 BiOp itself, focuses more on identifying any drop of water they think they can find in the glass, than on whether there is enough water in the glass to avoid jeopardy and comply with the law. In the remainder of this memorandum, NWF brings the focus back to the requirements of the ESA, NEPA, and their implementing regulations and the flaws in the 2014 BiOp and agency RODs that make these actions arbitrary, capricious and contrary to law.

## ARGUMENT

## I. THE JEOPARDY STANDARD AND ANALYSIS ARE ILLEGAL AND ARBITRARY

A. The Jeopardy Standard Is Contrary to the ESA and Its Regulations.

The starting point for determining whether the jeopardy standard in the 2008, 2010 and 2014 BiOps complies with the law is the regulation that defines the statutory phrase “likely to jeopardize the continued existence of.” 16 U.S.C. § 1536(a)(2). This language says, “to jeopardize the continued existence of” means “to reduce appreciably the likelihood of both the survival and recovery of a listed species.” 50 C.F.R. § 402.02. It does not say anything about “meaningful changes in the species’ likelihood of recovery,” Fed. SJ Mem. at 10, 14, or “a resulting survival and recovery potential,” *id.* at 10, or even “whether the species can be expected to survive with an adequate potential for recovery (e.g., trending towards recovery) under the effects of the action . . . ,” *id.* at 9-10 (quoting 2008 BiOp at 1-10) (in turn citing and relying on the 2006 Jeopardy Metric Memos, NOAA 2008 AR B.343, B.344). The issue the above phrases raise is whether, as they are actually deployed in the 2008/10/14 BiOps, they require NOAA to make the determination set out the regulation—or allow it to make some different determination.

NOAA<sup>1</sup> illustrates the divergence between the current jeopardy standard and the requirements of the regulation succinctly with its discussion of the quite different jeopardy standard employed in the 2000 BiOp. It says, “[i]n 2000, NMFS addressed whether there is an ‘adequate potential for recovery’ by, in part, assessing probabilities of reaching interim recovery abundance levels in 48 and 100 years.” Fed. SJ Mem. at 13. As NWF explained in its opening memorandum, this standard actually tracks and implements the requirements of the regulation because, as the quoted language indicates, the 2000 BiOp jeopardy standard included components that required NOAA to use some measure of recovery abundance and time to recovery, two elements of the inquiry set by the regulation. *See* NWF SJ Mem. at 7-8.<sup>2</sup> The

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<sup>1</sup> For convenience, NWF refers to all of the Federal Defendants in this memorandum as “NOAA” unless the context requires otherwise.

<sup>2</sup> The renewed argument that the Court has forbidden NOAA to even consider a temporal component in evaluating whether the RPA would cause “an appreciable reduction in the

2000 BiOp standard also identified a likelihood of jeopardy that would be “appreciable,” another necessary element of the regulation’s standard. *See id.* (citing 2000 BiOp at 1-14 and 6-79 and explaining that the 2000 jeopardy standard indicated a greater than 50% probability of *not* reaching the interim recovery abundances in either 48 or 100 years would be an “appreciable” reduction in the likelihood of recovery and hence cause jeopardy).<sup>3</sup>

As NWF has explained, these legally necessary elements are missing from the 2008 and 2014 BiOp jeopardy standard as implemented under the “trending towards recovery” rubric. *See* NWF SJ Mem. at 9-11. To be clear, NWF and NOAA agree that NOAA’s current jeopardy standard requires some detectable growth in a population. *See* Fed. SJ Mem. at 11, 14 (“NMFS uses prospective productivity goals greater than 1.0”); NWF SJ Mem. at 9 (“NOAA’s approach . . . would show a ‘trend towards recovery’ if a population’s growth rate . . . is predicted to be at or above 1:1 replacement”).<sup>4</sup> But as NWF has explained, some detectable population

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likelihood of recovery,” Fed. SJ Mem. at 13, Colville SJ Mem. at 17-18, is wrong. The Court did not forbid NOAA from considering population projections over 48 or 100 years to evaluate jeopardy, but simply rejected the agency’s attempt to fill the present gap necessary to avoid jeopardy with uncertain and speculative actions by others. Indeed the “ongoing and anticipated measures” language NOAA quotes, Fed. SJ Mem. at 13 (citing 2014 NOAA AR B275 at 24552) refers specifically to the “Basinwide Recovery Strategy” which included actions well beyond the RPA on which NOAA improperly relied. *NWF v. NMFS*, 254 F. Supp. 2d 1196, 1213, 1215 (D. Or. 2003). The only assumption NOAA made about future conditions in the 2000 BiOp was that “[p]opulation trends are projected under the assumption that all conditions will stay the same into the future.” 2014 NOAA AR B275 25065 & n.2. Properly employing population projections like this does not require assumptions about *actual* future actions over an extended period of time. *See* NWF 2008 SJ Reply Mem. at 12-13 (Dkt. 1595) (explaining this in more detail). Moreover, NOAA continues to rely on a 24-year endpoint for assessing risk to survival even though this too involves predicting probabilities into the future.

<sup>3</sup> NWF’s comparison of this jeopardy standard to the current jeopardy standard is not a “new-found affinity.” Fed. SJ Mem. at 13. NWF has been contrasting the elements of the 2000 standard to the current standard since the new standard first emerged. *See* 2008 SJ Mem. at 14-17. Nor is NWF’s challenge to NOAA’s application of this framework relevant. NWF argued not about the standard but that the level of risk to recovery imposed by using a 50% likelihood of failure was considerably more than “appreciable. *See* 2008 SJ Reply Mem. at 3 & n.1.

<sup>4</sup> This standard is met as long as one more adult fish returns in each successive generation. *See* NWF 2008 SJ Mem. at 8-12; NWF SJ Mem. at 11 (citing cases that reject this approach). This is not the same as merely slowing a population’s rate of decline (e.g., NOAA’s example of slowing the rate of decline from .50 to .51, Fed. SJ. Mem. at 14), a standard NWF does not argue NOAA

growth (on the one hand) and avoiding an appreciable reduction in the likelihood of recovery (on the other hand) are not the same. *See* NWF SJ Mem. at 10. A standard that requires only some detectable positive growth is missing the end points embedded in the regulation: some approximation of what would constitute recovery and of when NOAA expects the species achieve this.<sup>5</sup> This difference is not just one of semantics but one of substantive risk to the future of the listed species and the ultimate goal of the ESA. *See* 16 U.S.C. §§ 1531(b), 1532(3) (definition of “conservation” as delisting of a species upon recovery). As NOAA itself has explained, “the longer a species remains at low population levels, the greater the probability of extinction from chance events, inbreeding depression, or additional environmental disturbance.” ESA Consultation Handbook at 4-21 (2004 AR B.251). Similarly, NOAA has said “impeding a species’ progress toward recovery exposes it to additional risk” and “in order for an action to not ‘appreciably reduce’ the likelihood of survival, it must not prevent *or appreciably delay recovery.*” 2004 AR Doc. B.154 at 3 (emphasis added).<sup>6</sup> NOAA cannot avoid the requirements

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uses. NOAA’s separate point that the jeopardy regulation can be implemented without any consideration of endpoints, *id.* at 11, is baffling. The regulation itself sets the relevant endpoints, “survival” and “recovery.” These are not untethered abstractions. Determining whether an action (here an RPA) appreciably reduces the likelihood of achieving them requires a comparison between some articulation of these endpoints and the likely condition of the species following the action—coupled with an articulation of what would constitute an “appreciable” reduction in the likelihood of achieving the endpoints. That’s what the regulation says.

<sup>5</sup> Notwithstanding repeated mischaracterization of NWF’s point, *see, e.g.*, Fed. SJ Mem. at 12 (NWF is seeking to “incorporate Section 4’s recovery planning requirements”), NWF has explained more than once that including some approximation of time and recovery population characteristics in a jeopardy standard does not require an action to achieve recovery to avoid jeopardy, and does not require NOAA to decide exactly when recovery will occur or what population characteristics constitute recovery. *See* NWF SJ Mem. at 7; NWF 2008 SJ Reply at 3-5 & n.4. Nor does *Home Builders v. FWS*, 616 F.3d 983, 989 (9th Cir. 2010) (cited in Fed. SJ Mem. at 12), help NOAA. *See* NWF 2010 SJ Reply Mem. at 6 & n.8 (distinguishing this case).

<sup>6</sup> NOAA also acknowledged the relevance of these factors in the 2008 BiOp, *see, e.g.*, 2008 BiOp at 7-16 (discussing “elevated risk at low densities” and its relevance to “long-term risk of extinction”); *see also* NWF 2008 AR Excerpts (Dkt. 1596) (filed conventionally) at JA-71 (Toole email, Aug. 4, 2006, Att. at 1) (stating “in order to assess a ‘trend towards recovery,’ with meaningful metrics, one must have some idea of what constitutes recovery”).

of the jeopardy regulation just because it prefers a different inquiry under a different standard.<sup>7</sup>

Moreover—and by contrast—the standard NOAA employs in the 2008 and 2014 BiOps to evaluate whether the RPA will “reduce appreciably the likelihood of . . . *survival* . . . of a listed species”—regulatory language that exactly parallels the language for recovery—addresses each of the essential components of the regulation, *unlike* their standard for recovery. For assessing whether the RPA will “appreciably reduce” the likelihood of *survival*, NOAA evaluates whether the RPA is predicted to pose a greater than 5% risk of extinction in 24 years, with extinction defined as a “quasi-extinction threshold” of fewer than 50 fish four years in a row. 2008 BiOp at 7-14 to 7-18. This approach defines an “appreciable” risk to survival (greater than a 5% risk of extinction over 24 years), identifies a survival abundance for implementing the regulation (the 50 fish quasi-extinction threshold), and provides a timeframe for assessing risk to survival (24 years).<sup>8</sup> NOAA does not explain—or attempt to explain—why it takes such a different approach to *identical* regulatory language for recovery, especially when the 2000 BiOp identified the information to address each component of the regulation in assessing risk to recovery and NOAA said it would use this information. Deference to an agency’s interpretation of its regulations is “unwarranted . . . when the agency’s interpretation conflicts with a prior interpretation.” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156,

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<sup>7</sup> *Oceana v. Pritzker*, No. CV 08-1881, 2014 WL 7174875, at \*11 (D.D.C. Dec. 17, 2014), actually confirms NWF’s point. *But see* Fed. SJ Mem. at 9 (citing *Oceana*). The issue there was whether the agency’s interpretation of the word “appreciable” to mean “significant” or “considerable” was unlawful, and the court concluded it was not. *Id.* at \*9-11. This is similar to NWF’s point about the 2000 BiOp jeopardy standard. *See supra* at 4 & n.3. NOAA, however, does not explain how the 2008/2014 BiOp jeopardy standard actually addresses “appreciable,” or explain how its “trending towards recovery” phrase and metrics implement this or other components of the regulation. Likewise, *NRDC v. EPA*, 638 F.3d 1183, 1192 (9th Cir. 2011), does not help NOAA—as the quoted language says, deference ends where “the agency’s interpretation . . . is plainly erroneous or *inconsistent with the regulation*,” *id.* (emphasis added).

<sup>8</sup> To be clear, NWF’s discussion of survival in the 2008 BiOp jeopardy standard confirms that NOAA knows what the necessary elements of a jeopardy standard are but does not indicate NWF agrees with the way NOAA actually assessed risk to survival. *See* NWF 2008 SJ Mem. at 17 & n.13 (explaining that NOAA does not even employ the survival standard it said it would).

2166 (2012) (citing cases).<sup>9</sup> The jeopardy standard for recovery is arbitrary and contrary to law.

NOAA's argument that a jeopardy standard which allows a species to at least grow at some detectable level is sufficient to comply with the language of the regulation also disregards the context for the 2008/2014 BiOps. Each of these BiOps is built on the predicate that continued FCRPS operations, as they had occurred up to 1999, would *jeopardize* the listed species and hence the agencies had to develop—if possible—a reasonable and prudent alternative that would *avoid* jeopardy. *See* 2008 BiOp at 1-4, 1-6 to 1-7. In the Ninth Circuit's language, the ongoing FCRPS operations during the Base Period had *already* “tip[ped] the species from a state of precarious survival into a state of likely extinction.” *NWF v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008), a point made even more apparent by the fact that FCRPS operations are responsible for the overwhelming majority of the human-caused mortality to these species. *See, e.g.*, 2008 NOAA AR B143 at 32 (Fig. 8A) (graph showing FCRPS responsible for 43-74% of human-caused mortality for overall Snake River spring/summer Chinook populations); *id.* (up to 87% for populations with low habitat improvement potential). The listed species can neither survive nor recover without substantially loosening the stranglehold on them FCRPS operations impose. “[I]ncremental improvements [that] pale in comparison to the requirements for survival and recovery,” are “insufficient to avoid jeopardy in light of the

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<sup>9</sup> NOAA says the 2014 BiOp and its predecessors use the information on which NOAA said in the 2000 BiOp it would rely. Fed. SJ Mem. at 11, 14 (stating that NOAA “examine[d] the characteristics of a ‘viable salmonid population,’ and that they are “relevant” to or “informed” its jeopardy analysis). But then its argument shifts from how and whether the VSP factors, and the work of the ICTRT, were actually applied in the 2014 jeopardy standard and analysis (on the one hand) to a defense of their trending-towards-recovery-means-some-detectable-population-growth approach (on the other). *Id.* at 11-12. This is because the ICTRT findings NOAA committed in the 2000 BiOp to apply in its jeopardy standard were not actually used in the 2008/2014 BiOp jeopardy standard or analysis. *See, e.g.*, 2008 BiOp at 7-35 to 7-37 (reciting these criteria but not actually employing them as metrics or otherwise in the jeopardy standard or analysis); *see also* NWF SJ Mem. at 8 & n.3 (explaining that in the 2000 BiOp NOAA said the ICTRT analyses would provide the “relevant measure of the status of the species relative to the recovery component of the jeopardy standard” (citing 2000 BiOp at 1-14)). These analyses were complete in 2007. NWF's point is not that NOAA was legally required to use the exact ICTRT criteria, but that credible scientific information was available (which NOAA had said it would use) to properly apply the requirements of the jeopardy regulation for assessing risk to recovery.

already vulnerable status of the listed species.” *ALCOA v. BPA*, 175 F.3d 1156, 1162 & n.6 (9th Cir. 1999) (“an action agency can[not] ‘stay the course’ just because doing so has been shown slightly less harmful to the listed species than previous operations”). An RPA must walk the species back from *beyond* the jeopardy precipice— actually *improve* its chances of survival and recovery, not just by some detectable amount but by *enough* so that FCRPS operations will no longer “reduce appreciably the likelihood of both the survival and recovery.” 50 C.F.R. § 402.02. This requires a standard that actually can assess how much the species must improve, as compared to the regulation’s endpoints of survival and recovery, in order to avoid jeopardy.

Ultimately, this issue is not about whether the phrases NOAA prefers to describe its jeopardy standard are somehow “reasonable;” it is about what the phrases actually lead NOAA to do in its jeopardy analysis for recovery. On this issue, NOAA’s analysis fails to implement the language of the regulation and its essential components because the analysis impermissibly substitutes a different inquiry for the one the regulation and the law require.

#### B. The Jeopardy Analysis Is Arbitrary

NWF has explained that the 2008 BiOp jeopardy analysis does not rationally account for the very large uncertainty in its quantitative predictions about the effects of the RPA. *See* NWF SJ Mem. at 13 (citing Bowles and Orzack Declarations and NWF’s 2008 summary judgment memorandum). And it has explained how the updated analysis in the 2014 BiOp reverses direction and seeks to make this very large uncertainty the centerpiece of an analysis to show that the RPA is performing as predicted. *Id.* at 12, 14-16. NOAA’s lead response is that the Court must defer to its analysis. *Fed. SJ Mem.* at 15-16. Appropriate deference, however, is not a shield for arbitrary agency action. “A biological opinion is arbitrary and capricious . . . when it has failed to articulate a satisfactory explanation for its conclusions or when it has entirely failed to consider an important aspect of the problem.” *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000); *see also Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (“The deference accorded an agency’s scientific or technical expertise is not unlimited [and] . . . can be

rebutted when its decisions, while relying on scientific expertise, are not reasoned”) (internal citations omitted).

Here, NOAA does not argue that it accounted for the uncertainty in its 2008 quantitative analysis *quantitatively*, *see* Fed. SJ Mem. at 17 (noting that the analysis reported the confidence intervals and analytic assumptions and that they separately required monitoring, none of which actually incorporate an accounting for uncertainty into their analysis); *see also, e.g.*, 2008 BiOp at 8.3-47 (Table 8.3.2-1) (with confidence intervals); *but see* NWF SJ Mem. at 18 (citing Bowles 2008 SJ Dec. at ¶¶ 51-64) (describing ways to quantitatively account for uncertainty).<sup>10</sup> Instead, NOAA explains that it addressed the large uncertainty of its quantitative analysis *qualitatively*, Fed. SJ Mem. at 17-18, and asserts that the Court must defer to this discussion, *id.* at 18. This qualitative assessment of uncertainty consists of an undifferentiated, and virtually identical, formulaic summary of a list of qualitative considerations regarding NOAA’s predictions of success for the RPA ending with a conclusory assertion that the RPA will avoid jeopardy. *See* NWF SJ Mem. at 18-20 (discussing this qualitative analysis and its shortcomings); NWF 2008 SJ Mem. at 38-40 (discussing and citing examples of NOAA’s “qualitative analysis” from the 2008 BiOp). The relevant case law does not require the Court to defer to a “blackbox” discussion it cannot even evaluate, let alone try to follow a missing chain of reasoning which necessarily fails to rationally weigh and combine relevant factors. *See Brower v. Evans*, 257 F.3d at 1067; *PCFFA v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001).

NOAA’s defense of its “updated” analysis in the 2014 BiOp fares no better. First, NOAA states unequivocally its conclusion that “this analysis showed that the status of the

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<sup>10</sup> NOAA’s argument that the point estimates for its population metrics in the 2008 BiOp “reflect ‘the most accurate estimates possible for comparison with the standard,’” Fed. SJ Mem. at 17, begs the question of whether these point estimates can rationally be relied on to determine whether a population is or is not exceeding a specific numeric threshold. As NWF and others have explained, NOAA’s failure to actually account for the uncertainty around its point estimates of population performance means its conclusions about whether a population is growing are not reliable and do not meet relevant scientific standards for addressing uncertainty. *See* NWF SJ Mem. at 13 & n.8, 18 & n.10 (citing declarations explaining these technical matters).

populations had not materially changed from the 2008 BiOp’s base period estimates.” Fed. SJ Mem. at 18. As NWF has explained, the 2008 BiOp adopted an RPA for FCRPS operations precisely because operation of the system during the Base Period jeopardized ESA-listed salmon and steelhead. *See* 2008 BiOp at 1-4 (noting that the 2000 BiOp “determined that the FCRPS Action Agencies’ proposed action was likely to jeopardize the listed stocks”); *id.* at 1-7 (“NOAA Fisheries does not revisit” that finding and focuses instead on developing a new RPA to avoid jeopardy). As NOAA explained, the Base Period “include[s] spawner returns through about 2004 or 2005 ... [and] include[s] many of the major changes in management action that have occurred in recent decades.” 2008 BiOp at 7-11. Taking NOAA’s conclusion in the 2014 BiOp at face value—that the present condition of the species has not changed materially since the Base Period—indicates failure, not success. It shows that that the FCRPS actions have continued to jeopardize the species *since* the Base Period, when the ESA requires the agencies to ensure just the opposite—avoid jeopardy. NOAA never confronts its own conclusion—that the species continue to be jeopardized by the FCRPS operations even with the RPA—because it is irrationally focused on attempting to re-purpose the wide confidence intervals for the population performance metrics from the 2008 BiOp (that it failed to address rationally in 2008) into a basis for staying the course in 2014 even though, by its own account, this is jeopardy.

Beyond NOAA’s conclusion in the 2014 BiOp that continued jeopardy actually means no-jeopardy, its arguments about the updated quantitative analysis in the 2014 BiOp either fail to address NWF’s points or rely on cherry-picking a few facts in an effort to support its position without providing the full picture—which is consistently much less favorable. For example, NOAA asserts that “[p]laintiffs favor seizing on one metric,” while it “holistically evaluated [a] combination of data” and found that the observed pattern was “consistent with density dependence, a well-established biological process where *high abundance* leads decreased productivity . . . .” Fed. SJ Mem. at 18-19 (emphasis added). Apparently, NOAA considers an average abundance of 16 fish for a population with a minimum viable abundance of 500 fish “high.” *Compare* 2014 BiOp at 80 (Table 2.1-5) (average abundance of 16 fish for Yankee Fork

population) *with id.* at 90 (Table 2.1-9) (updated R/S for same population declined from .63 to .50, well below 1.0 in any event). Comparing these two tables further shows this pattern of *low* average abundance and declining productivity for at least half the Snake River spring/summer Chinook populations, most of which are far below their recognized minimum abundance and have updated productivity, as measured by R/S, below 1.0 as well. As Dr. Connors has explained, this pattern may reflect density dependent interactions at low abundance, Connors SJ Dec. at ¶¶ 10-14, and logically should have led NOAA to examine other lines of evidence to assess why both average abundance and productivity remain persistently low, *id.* at ¶¶ 15-18, especially since many of them spawn in pristine wilderness habitats that have not suffered degradation and cannot be “improved.” NOAA dismisses Dr. Connors’ observations by arguing that NWF’s “theory that there is low productivity at ‘very low abundance levels,’ . . . disregards the data.” Fed. SJ Mem. at 19. As Dr. Connors explains in his Reply Declaration, his observations are actually consistent with the available data, including the data NOAA cites. *See* Reply Declaration of Brendan M. Connors at ¶¶ 9-17 (hereinafter “Connors SJ Reply Dec.”).

Moreover, NOAA’s claim that “the average R/S changes in the new data were associated with high abundances (in many cases exceeding recovery abundance thresholds),” Fed. SJ Mem. at 19 (citing 2014 BiOp at 114 (Figure 2.1-25)), notably does not cite the Table that actually provides the current average abundance for Snake River spring/summer Chinook populations, 2014 BiOp at 80 (Table 2.1-5), but an illustrative figure for one population that shows four years in the last twenty-five, 2001 through 2004, where *annual* abundance exceeded the ICTRT minimum abundance number. As Dr. Connors notes in his Reply Declaration, these years include historic high returns for many populations, Connors SJ Reply at ¶¶ 11-12 (discussing Isaak and Thurow), and these historic returns have not been repeated. Given the lower annual returns recently, once these high-return years fall out of the calculation of average abundance, average abundance likely will go down for this population and others. And even with these years, both average abundance and productivity for most populations remains very low.

The problem for NOAA—and the 2008 and 2014 BiOps—cannot be dismissed by

selective reference to details or pleas for deference. The failure to initially address rationally the implications of uncertainty in NOAA’s 2008 quantitative analysis, its subsequent reliance on this uncertainty to support a no-jeopardy finding in the 2014 BiOp (even though using uncertainty in this way actually shows the FCRPS continues to jeopardize the species), and its discussion of a series of qualitative factors in the 2008/2014 BiOps with no explanation of how they are weighed or assembled, is arbitrary. *See IDFG v. NMFS*, 850 F. Supp. 886, 899 (D. Or. 1994) (BiOp failed to “adequately explain why [the agency] prefers uncertain favorable model results”).

## II. THE 2014 BIOP FAILS TO RATIONALLY ADDRESS THE RISKS AND UNCERTAINTY OF RPA ACTIONS

As NWF has explained, the ESA and the APA together require NOAA to: (1) allocate risk to the action, not the species; and, (2) consider and rationally address evidence that is relevant to making this determination, including especially evidence that is contrary to the agency’s preferred conclusion. *See* NWF SJ Mem. at 20-21 (citing and discussing cases). Requiring NOAA’s analysis of a proposed action or RPA to “give the benefit of the doubt” to the species, *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987), does not impose any new legal requirement on the agency. This requirement is embedded in the ESA itself. *See, e.g., Wash. Toxics Coal. v. Env’tl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005) (“placing the burden on the acting agency to prove the action is non-jeopardizing is consistent with the purpose of the ESA and what we have termed its ‘institutionalized caution mandate[ ]’”).<sup>11</sup>

In practical terms, as this Court has held, this requirement and the APA standard mean NOAA must provide a rational account of “why it prefers uncertain favorable” evidence over more pessimistic or unfavorable evidence, *IDFG*, 850 F. Supp. at 899. Its analysis must logically and fully address unfavorable or contrary evidence rather than dismiss it based on sweeping assertions of agency expertise. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S.*

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<sup>11</sup> When Congress amended § 7 in 1979, it retained this institutionalized caution: the “likely to” jeopardize “language continues to give the benefit of the doubt to species, and . . . place the burden on the action agency to demonstrate . . . its action will not violate § 7(a)(2).” H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576.

*Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005) (“to permit an agency to ‘implicitly’ conclude that a species would not be jeopardized by a proposed activity, and not require the agency to articulate a basis for its conclusion, ‘would reject the bedrock concept of record review’”). This is precisely the standard the Court consistently has applied in rejecting the 2000, 2004, and 2008/2010 BiOps. *See, e.g., NWF v. NMFS.*, 839 F. Supp. 2d 1117, 1127 (D. Or. 2011) (“[c]oupled with the significant uncertainty surrounding the reliability of NOAA Fisheries’ habitat methodologies, the evidence that habitat actions are falling behind schedule, and that benefits are not accruing as promised, NOAA Fisheries’ approach to these issues is neither cautious nor rational”).<sup>12</sup>

Nor does mere “incorporation of mitigation actions into the BiOp render[] the actions enforceable and, therefore, properly relied upon.” Fed. SJ Mem. at 31-32 (citing *CBD v. BLM*, 698 F.3d 1101, 1117 (9th Cir. 2012)). This point is apparently intended to support NOAA’s repeated argument of last resort—that because the action agencies have “committed” to achieve the survival improvements the RPA predicts from tributary and estuary habitat and other actions, NOAA can rely on this commitment, in lieu of actual actions, identifiable replacement actions, or evidence of real survival improvements, even in the face of contrary evidence. *See, e.g., Fed. SJ Mem.* at 38, 41, 43 (resorting to this “commitment”); *see also* Declaration of Michael Tehan at ¶ 60 (hereinafter “Tehan SJ Dec.”) (same). The point of *CBD v. BLM* is not to give NOAA a “blank check” to rely on anything an action agency commits to in an RPA regardless of whether there is a rational basis for concluding the commitment can be achieved; it is to clarify that the agency cannot rely on unenforceable and uncertain actions *outside* the proposed federal action or RPA to reach a no-jeopardy finding. 698 F.3d at 1113-1119. In short, none of the cases NOAA cites change the basic legal standards that govern review of the 2008/2014 BiOp.

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<sup>12</sup> The cases that say NOAA “has the flexibility to choose among several appropriate alternatives,” Fed. SJ Mem. at 31-32 (citing these cases), are beside the point. These cases do not even suggest that NOAA can forego a rational explanation of its decisions, or rely on an RPA that impermissibly places the risk of failure on the listed species, just because the agency labels its preference for optimistic assumptions and favorable evidence “flexibility.”

A. NOAA Continues to Rely on Arbitrary Predictions of Survival Improvements from Estuary and Tributary Habitat Actions.

The Court has consistently faulted NOAA's jeopardy analysis for its reliance on estuary and tributary habitat actions where the available and relevant scientific evidence indicates quantitative, numeric predictions of survival improvements from these actions are not reliable or scientifically supportable. *See, e.g., NWF v. NMFS*, 839 F. Supp. 2d at 1125, 1129; Court Memorandum to Counsel at 1-2 (May 18, 2009) (Dkt 1699); Court Memorandum to Counsel at 4 (estuary survival improvements), 4-5 (tributary survival improvements) (Feb. 18, 2009) (Dkt. 1682). As NWF has explained, the Court is not alone: every outside review that addresses predicting specific survival increases from particular tributary and estuary habitat actions has concluded that the scientific basis for making these predictions is not reliable or even available, starting with the carefully managed 2009 internal review of the 2008 BiOp by scientists NOAA selected, *see* NWF SJ Mem. at 25 (quoting reviews concluding that tributary habitat projections "lack[] connections between habitat actions and conditions, and more important, habitat conditions and survival"), and continuing with more recent ISAB reviews of both tributary and estuary habitat restoration, *see* ISAB, Review of the 2009 Fish and Wildlife Program (NOAA 2014 AR B.188 at 16029) (concluding that "[i]t is highly uncertain that habitat restoration will be successful as presently configured"); Olney SJ Dec. at ¶ 23 (quoting ISAB review of survival benefits scoring from estuary actions, 2014 Corps AR 3671, and ISAB conclusion that the accuracy of these predictions is "probably low in terms of actual survival benefits").

For tributary habitat, NOAA's response to this contrary evidence is to dismiss it as addressing a different habitat program than the RPA, Fed. SJ Mem. at 39,<sup>13</sup> and to focus on aspects of the ISAB's process advice, rather than its unfavorable substantive conclusions. Yet NOAA has not identified any outside review or article which concludes it is currently possible to

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<sup>13</sup> But as Mr. Tehan explains, the Power Council's Fish and Wildlife Program that the ISAB addresses is largely coextensive with the RPA's tributary habitat program: "[t]he Fish and Wildlife Program guides BPA funding of mitigation for the effects of the FCRPS dams, and the program provides additional review of BPA-funded tributary habitat improvement actions implemented under the BiOp." Tehan SJ Dec. at ¶ 58 & n.21 (citation omitted).

predict—let alone reliably predict—numeric population survival increases from specific tributary habitat restorations actions. This situation led the Northwest Power Council and its Independent Science Review Panel staff to conclude that it should not participate in such an exercise. *See* Memorandum to Council Wildlife Comm. at 2 (staff “remain[s] skeptical of the method to assess survival benefits resulting from habitat projects. Staff does not recommend the Council participate in [FCRPS action agencies’] survival benefit calculations or estimates”) (Sept. 1, 2011) (*available at* <http://goo.gl/UykuID>).<sup>14</sup> The same disconnect between NOAA’s analysis and the available evidence applies to the estuary. NOAA says its process and predictions are based on “professional judgment [and] a rigorous qualitative process” that is “dynamic,” Fed. SJ Mem. at 42-43, points which do not address the ISAB’s conclusion: the accuracy of the process and its predictions is “probably low in terms of actual survival benefits.” *See* Olney SJ Dec. at ¶ 23 (quoting ISAB); *see also* Olney SJ Reply at ¶¶ 16-18, 23-32 (discussing additional relevant evidence that NOAA’s survival predictions for estuary actions do not address).

NOAA cannot avoid this history of contrary evidence just by asserting its confidence in achieving the survival improvements it predicts from tributary and estuary habitat actions, summarizing what the agencies have done, and declaring it the “best available science.” *See* Fed. SJ Mem. at 34-35 (describing process for tributary habitat, citing declarations), *id.* at 40-43 (same for predictions of survival benefits from estuary habitat projects). Having the “best available science” for building a time-travel machine is not the same as actually being able to build a time travel machine that works—and it is irrational to conclude otherwise. Nothing in the ESA compels NOAA to rely on habitat restoration or unreliable numeric predictions about its survival benefits as the centerpiece of its attempt to mitigate the impacts of the FCRPS and avoid

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<sup>14</sup> Of course neither NOAA’s process for predicting habitat quality improvements nor, more importantly, the action agencies’ approach to converting these predictions into the numeric survival improvements on which NOAA relies, have ever been the subject of an independent, outside peer review. *But see* Fed. SJ Mem. at 29 & n.26 (dismissing relevant evidence about these survival improvements because it lacked peer-review). If NOAA believes it should rely only on peer-reviewed analyses, most of the 2008 and 2014 BiOps would have to be discarded.

jeopardy, the law simply requires the agencies to avoid jeopardy. And if that cannot be fully accomplished in a precautionary and reasonably certain way with habitat measures and predictions, NOAA must seek another solution—or declare there is no solution that avoids jeopardy. *See* 16 U.S.C. §§ 1536(a)(2); *see also id.* § 1536(g)-(h). What the ESA and APA do not allow is reliance on whatever evidence NOAA chooses by generically asserting its expertise and declaring that evidence “the best available science.” *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (rejecting assertion of agency expertise where agency disregarded other credible views without explaining why); *see also Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1061-62 (E.D. Cal. 2010) (same) (citing additional cases).

Nor can NOAA avoid evidence that its quantitative, numeric predictions of survival increases from tributary and estuary habitat actions—predictions that form the central basis for their no-jeopardy finding in the 2008/2014 BiOps—lack scientific support and are unreliable by attempting to shift the focus away from these specific predictions and arguing that in some general way “tributary habitat actions can and do benefit salmonids,” *id.* at 35; *see also id.* (“studies show that restoring habitat can improve survival”), or that, for the estuary, “[t]he science component of the estuary program is robust and sound,” *id.* at 43. The 2008/2014 BiOp simply does not say NOAA expects some generalized improvement in survival from tributary and estuary habitat actions that will help avoid jeopardy. Instead, it lists specific, numeric survival improvements (by individual population for tributary habitat actions and by fish type for the estuary), 2008 BiOp, RPAs 35 & 36, then uses these numbers as multipliers in its quantitative analysis to support a no-jeopardy finding, *see, e.g., id.* at 8.3-54, with a general discussion of qualitative factors it says supports reliance on its quantitative predictions, *id.* at 8.3-42.<sup>15</sup> It is not NWF that has tied its success to numeric predictions of survival improvements

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<sup>15</sup> NOAA asserts that the Court’s recognition of the need to “mak[e] predictions about the effects of future actions” supports its specific predictions of survival improvements, Fed SJ Mem. at 36 & n.32. The Court was not endorsing predictions that far outrun any supporting evidence but acknowledging that rational predictions about the future are appropriate. Had the Court intended its statement as NOAA reads it, it would have upheld the 2008/2010 BiOps.

from the RPA’s tributary and estuary habitat actions, *but see* Fed. SJ Mem. at 36 (arguing that for tributary habitat, “[p]laintiffs are requesting a level of certainty not required by the ESA”), 43-44 (same point for estuary). It is NOAA that made these specific predictions of survival improvements the foundation of its no-jeopardy analysis and conclusions. It cannot now rationally defend these predictions by arguing that some more generalized benefit from these actions may accrue at some unknown point in the future.

Worse, NOAA must now also seek to explain away the inconvenient fact that the specific survival improvements for tributary and estuary habitat it predicted have not actually materialized or been detected for any population. *See* NWF SJ Mem. at 27-28 (regarding tributary habitat), 22-24 (estuary habitat), 29 (quoting 2008 BiOp statements about specific survival improvements from habitat actions); *see also* Olney SJ Reply at ¶¶ 10-15 (discussing estuary predictions). NOAA does not dispute that it is unable to detect the predicted survival increases from tributary habitat actions even today. *See* Fed. SJ Mem. at 36 (explaining that habitat benefits “accrue over time” and survival improvements “may take years to detect” (citing Tehan SJ Dec.)). While Mr. Tehan carefully says it is not possible to reliably detect the predicted survival improvements from tributary habitat actions “for every population within the timeframe of the BiOp,” Tehan SJ Dec. at ¶ 63, what he means is that NOAA cannot actually detect the specifically predicted survival improvements for *any* population. And yet, Mr. Tehan also says the “estimates of habitat function and survival change” NOAA relies on its jeopardy analysis are only those “that will *accrue in the near term* (i.e., through 2018).” *Id.* at ¶ 66 (emphasis added). It is precisely these survival improvements predicted to accrue by 2018—the ones at the heart of the no-jeopardy finding in the 2008/2014 BiOps—that NOAA cannot detect, *see* NWF SJ Mem. at 27, and that the ISAB and other outside scientists say cannot even be credibly predicted, *id.* at 25. NOAA cannot rationally have it both ways: acknowledge (on the one hand)—as it must—that its no-jeopardy finding depends on achieving the numeric survival improvements set out in RPAs 35 and 36 and predicted to accrue by 2018, but then assert (on the other hand) that the absence of any evidence of these survival increases is of no relevance since

they cannot actually be detected and NOAA now says it does not expect them to arrive for many years.<sup>16</sup> This situation is the opposite of “giv[ing] . . . the ‘benefit of the doubt’ to preserving endangered species,” *Marsh*, 816 F.2d at 1386, and does not reflect the “institutionalized caution mandate” that permeates the ESA, *Wash. Toxics Coal.*, 413 F.3d at 1031.

B. The Estuary and Tributary Habitat Actions Necessary to Achieve the Predicted Survival Increases Are Not Reasonably Certain to Occur.

Apart from NOAA’s arbitrary predictions of survival improvements from estuary and tributary habitat actions, its continued assertion that implementation of these actions will meet the habitat restoration predictions of the RPA is at odds with the evidence.

In the estuary, as Mr. Olney explains, the available evidence indicates the action agencies are not on track to provide the 6% and 9% survival improvements from estuary habitat restoration. *See* Olney SJ Reply at ¶¶ 10-15. These predicted survival increases are based on the action agencies’ implementation of estuary habitat projects that would produce 30 survival benefit units (SBUs) for stream-type salmon and steelhead and 45 SBUs for ocean-type fish. *See* Olney SJ Dec. at ¶ 22. This habitat program, however, keeps falling further and further behind, not “ramping up” and catching up. *But see* Fed. SJ Mem. at 44-45. In fact, there is a widening, but unacknowledged and unaddressed, discrepancy between the number of SBUs NOAA’s declarant, Dr. Krasnow, reports actually have been achieved through 2014 (and are projected to be achieved through 2015), and the action agencies’ *predictions* of the SBUs they hoped to accomplish by these dates (to which Dr. Krasnow refers). *See* Olney SJ Reply at ¶¶ 10-15.<sup>17</sup>

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<sup>16</sup> Mr. Tehan’s discussion of the Pahsimeroi population of Snake River spring/summer Chinook actually confirms this problem. NOAA predicted the largest survival improvements of all from tributary habitat actions for this population—41%, 2008 BiOp at RPA 35 (Table 5). As Mr. Tehan confirms, these increases were to come from actions predicted to provide benefits by 2018. Tehan SJ Dec. at ¶ 66. But as Mr. Tehan acknowledges, there are “likely not significantly more fish present in the Pahsimeroi population” now; “they [are] just distributing themselves into the newly opened habitat.” *Id.* at ¶ 71. NOAA may hope some actual survival improvements will arrive some day for this population but it has based its no jeopardy finding on something far more specific—and unreliable and irrational, a 41% survival increase.

<sup>17</sup> In addressing the points Dr. Krasnow makes in her declaration, Mr. Olney in his Reply Declaration also describes considerable relevant evidence about the use of the ERTG SBU

Comparing Dr. Krasnow’s statements about the number of SBUs the action agencies have actually accomplished in the estuary through 2014 to what they predicted they would accomplish by this date (in a graph from the action agencies Dr. Krasnow reproduces and relies on), reveals that the actual accomplishment falls short of the predicted accomplishment by almost half. *Id.* at ¶ 11. Comparing Dr. Krasnow’s statements about actual accomplishment through 2014 and her projection of accomplishment through 2015 (on the one hand) to the action agencies’ graph showing their hoped-for accomplishment by 2015 (on the other hand) shows an even larger discrepancy—the action agencies’ projections are more than twice as high as Dr. Krasnow’s summary of actual and likely accomplishment for both ocean- and stream-type fish. *Id.* at ¶ 12.

In other words, the available evidence shows the shortfall in estuary habitat restoration is *increasing* not decreasing. Based on the evidence NOAA provides, the action agencies would need to increase by more than *five-fold* the number of SBUs they achieve *annually* over the remaining period of the 2014 BiOp, as compared to what they actually accomplished each year in 2013 and 2014. *Id.* at ¶ 13. This level of increase is well beyond anything Dr. Krasnow addresses since her prediction of a “ramp-up” is based on a graph that is at odds with the facts she reports. *See* Krasnow SJ Dec. at ¶ 34. These facts do, however, confirm NWF’s point that there is very little evidence to support NOAA’s continued confidence the estuary program actually will accomplish the level of restoration NOAA says is necessary (and there is abundant evidence NOAA does not address that indicates it will not do so), quite apart from the question of whether these activities, even if they occur, will provide the predicted survival improvements. NOAA does not explain why it prefers lines on a graph to facts on the ground—an especially

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scoring criteria and the 2011 Estuary Module that the predictions of survival improvements from estuary habitat actions do not address or account for. *See* Olney SJ Reply at ¶ 15 (citing his prior declaration at paragraphs ¶¶ 25-29 which explains estuary actions in the “feasibility” stage of development), ¶¶ 16-19 (explaining the divergence between the action agencies’ predictions of estuary habitat restoration benefits and the tools they now use to predict these benefits, including the role of “weighting factors”), ¶¶ 20-27 (explaining unaddressed but relevant evidence regarding the effects of deleting RPA 38 (Piling and Piling Dike Removal Program)), ¶¶ 28-32 (addressing the ISAB review of the ERTG scoring criteria and other relevant aspects of NOAA’s use of these criteria and the Estuary Module).

relevant failure since the facts on the ground contradict the rosy predictions and promises of better accomplishment for the estuary habitat program NOAA has been offering since at least 2009. *See* Olney SJ Dec. at ¶ 25 (quoting litany of promised improvement).

The situation is hardly better for tributary habitat actions. First, as NWF points out above, NOAA's predictions of specific survival improvements from tributary habitat actions is widely regarded as unreliable by outside scientists and NOAA cannot detect, and does not expect to be able to detect, any of these survival improvements (if they actually occur) until sometime years after the 2018 BiOp has expired. *See supra* at 17-18. Moreover, for the six priority populations NOAA admits will not meet the habitat restoration predictions of the RPA without additional actions (quite apart whether there will be actual survival improvements), the agency also acknowledges that its confidence in success for these populations depends on habitat projects that have not been reviewed by its expert panels (and will not be reviewed by them until 2016). *See* Tehan SJ Dec. at ¶ 55 ("it was not possible to consult the expert panels"). It also acknowledges what NWF has said and what is plain from the record—these projects are still in development and are not yet actual, specific habitat actions. This is most apparent from the action agencies' 2014-2018 Implementation Plan which provides a list of habitat limiting factors and metrics to be achieved by population in Appendix A for currently planned tributary habitat actions and includes a column, "Projects through which 2013-2018 Actions will be Implemented," which identifies multiple, specific contracts for these actions. *See* Corps AR 9 at 1441-1467 (App. A) (Tributary Habitat Projects). By contrast, the supplemental actions described in Appendix B of the Implementation Plan for these six populations have a column for "Source of Projects and Metrics," but no column for identification of projects or contracts through which these as yet undeveloped actions will be implemented. *See id.* at 1567-69. As Mr. Tehan says, these supplemental actions include only "the source of the project" but not a specific contract and "not all of the supplemental actions have yet been reviewed under the NPCC's Fish and Wildlife Program," *id.* at 58, a prerequisite to BPA funding actual actions.

In some cases, these unspecified supplemental actions alone are expected to provide as

much as three times the survival increase for a population as *all* other projects implemented and planned through 2018. Corps AR 9 at 1567 (predictions for supplemental actions for Grande Ronde River Upper Mainstem spring/summer Chinook population). As with the unidentified and unplanned estuary projects on which it relies, NOAA provides no explanation for its unguarded optimism that these undefined projects are somehow likely to produce even greater benefits than those already completed or under contract. Finally, there are no actual backup or contingency tributary habitat actions at all should any of the supplemental actions—or any other tributary habitat actions for that matter—either fail to materialize or fail to provide the habitat improvement anticipated (since identifying any shortfall in actual survival improvements is out of the question even by NOAA’s account). *See id.* at 1573-1576 (App. D describing a “Tributary Habitat Replacement Project Strategy” that consists of a series of “exchange factors” to be used where projects to benefit one population have to be replaced with projects to benefit another and a commitment to *begin planning* replacement projects after it becomes apparent in 2015, 2016 or 2017 that they may be needed). If NOAA’s “try harder” and “plan more” approach were sufficient to avoid jeopardy, *Sierra Club v. Marsh* would have come out differently. *See* 816 F.2d at 1385-86 (rejecting promise to acquire mitigation habitat in the future). That approach, however, fails to reflect the “institutionalized caution” of the ESA and is not rational.

C. The 2014 BiOp Does Not Rationally Address Climate Impacts, the Environmental Baseline, or Cumulative Impacts.

NOAA relied on RPA actions to improve salmon and steelhead survival by dramatically reducing Caspian tern predation (RPA 45), by reducing predation on these fish by cormorants to the levels assumed in the 2008 BiOp (RPA 46), and by increasing the survival of ESA-listed steelhead through a kelt reconditioning program (RPA 33), even though the available and relevant evidence indicates each of these actions is not working as predicted and is unlikely to work. NWF SJ Mem. at 29-33. On each of these subjects, NOAA summarizes what it said in the 2014 BiOp and asserts that its analysis was “reasonable.” Fed. SJ Mem. at 45-49. What it does not do—and could not do since NOAA did not address this information in the 2014 BiOp

itself—is explain why the relevant information NWF has identified does not make these RPA actions at least far more risky than NOAA acknowledges, if not unlikely to actually succeed.

NOAA’s response to NWF’s points about Caspian terns is emblematic. It recites the fact that the agencies have implemented the Caspian tern RPA by reducing the acreage of the nesting colony as required and developing alternative nesting sites, Fed. SJ Mem. at 46, but then—in an excess of understatement—NOAA observes that “terns still prey on more smolts than anticipated,” *id.* What NOAA means is that tern predation on smolts has not declined at all, 2014 BiOp at 411 (“salmonid smolt consumption [by terns] remains similar to pre-implementation levels”), because the remaining terns “are tolerating higher nesting densities and [are] slower to abandon their habitat . . . than expected,” Graves SJ Dec. at ¶ 51—and apparently now eat more smolts per tern too. Undeterred by these facts, NOAA states unequivocally that “the terns will be attracted to the new [replacement] habitat” and the “tern management plan will meet the BiOp performance standards.” Fed. SJ Mem. at 46-47.<sup>18</sup> Mr. Graves is less sanguine of success, acknowledging that it is not possible to draw conclusions yet about whether or not the action will succeed, and that it “will take several years to determine whether tern predation will be reduced as predicted.” Graves SJ Dec. at ¶ 51; *see also* Olney SJ Reply at ¶¶ 44-49 (addressing Mr. Graves’ points). What neither Mr. Graves nor NOAA can point to is any evidence that terns will suddenly stop “tolerating higher nesting densities” as they currently are, or quickly “abandon their habitat” which they have not done as predicted, or most importantly, that the remaining terns will actually consume millions fewer smolts than they currently are, the

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<sup>18</sup> NOAA’s evidence of success for its tern relocation plans in the 2014 BiOp actually consists of citation to its previous effort to relocate this same tern colony from one island in the Columbia estuary to another, *see* Fed. SJ Mem. at 46-47 (touting success at “relocat[ing] and entire estuarine colony of terns” and citing documents), and reports of less than successful efforts to move much smaller tern colonies to new locations away from the river, *id.* at 47 (citing additional documents). What NOAA does not have is any evidence of successfully and permanently relocating most of a large, established tern colony hundreds of miles to achieve a long-term reduction in tern predation where the food source that attracted them remains present.

*sine qua non* of this RPA with respect to which there has been *no* evidence of change.<sup>19</sup>

NOAA's parallel refusal to acknowledge any risk of anything less than 100% success for its plan to reduce cormorant predation on juvenile salmon and steelhead by more than half—down to the level assumed in the 2008 BiOp's jeopardy analysis—is similarly optimistic and arbitrary. This new RPA action would require the effective elimination of well over 7,000 breeding *pairs* of cormorants to reduce this colony of some 15,000 breeding pairs in 2013 to the fewer than 6,000 pairs the 2014 BiOp says is necessary. Olney SJ Dec. at ¶ 45; *see also* 2014 BiOp at 410. While NOAA does not specify exactly how this reduction must be accomplished, the primary study it discusses (and presumably relies on to conclude the program will succeed), Schultz et al (2012), involved a program of shooting cormorants at Leech Lake in Minnesota. 2014 BiOp at 411. Whether a similar endeavor on a much larger scale in the estuary will be 100% successful over the long term is another matter. Moreover, a subsequent peer-reviewed report of the Leech Lake project, in Schultz et al. (2013), concluded that increased fish stocking and other actions “indicat[e] that the effects of cormorant management . . . are thoroughly confounded with other management actions.” Olney SJ Reply at ¶ 51 (quoting Schultz et al. (2013)). NOAA acknowledges that it did not consider this peer-reviewed study but dismisses it anyway (apparently following some undisclosed recent review) as an “article on cormorant population and fish consumption modeling.” Graves SJ Dec. at ¶ 56. Mr. Graves does not explain why this distinction makes Schultz et al. (2013) and its conclusions irrelevant. NOAA has not articulated a rational basis for concluding that a massive cormorant removal effort will be 100% successful over the long term in the face of relevant and unaddressed contrary evidence.<sup>20</sup>

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<sup>19</sup> As Mr. Olney also explains, the predicted survival improvements for this RPA assume 0% compensatory mortality, despite NOAA's conclusion that an assumption of 50% compensatory mortality is reasonable (which would cut in half the survival improvements for this action). Olney SJ Dec. at ¶¶ 48-50 (citing sources); Olney SJ Reply at ¶¶ 33-43 (addressing this issue). He also explains why Mr. Graves' discussion dismissing the relevance of compensatory mortality confuses the application of this factor to tern predation (where it does apply) with its application to cormorant predation (where it does not). Olney SJ Reply at ¶¶ 34-43.

<sup>20</sup> The Leech Lake project removed many fewer cormorants from a much smaller colony, one about one-twelfth the size of the East Sand Island colony, over a period of five years or more,

Finally, as NWF has explained, the 2014 BiOp continues to rely without qualification on a 6% survival increase for Snake River steelhead populations from a long-term kelt reconditioning program that has so far provided none of this survival increase itself, Graves SJ Dec at ¶ 68, and where the available evidence from outside scientific reviews consistently state that the specific success of the program is unproven, and its results so far discouraging, Olney SJ Reply at ¶¶ 53-54. Moreover, the action agencies' ability to actually capture enough fish to provide the predicted 6% increase in steelhead spawners depends on the very optimistic assumption that 100% of these hoped-for spawners will survive following reconditioning and release and will be 100% as effective as first-time wild spawners, *id.* at ¶¶ 66-68, assumptions for which NOAA and the action agencies have no actual relevant evidence, quite apart from the fact that so far they have failed to capture and recondition for release even one third of the fish necessary even with these 100% effectiveness assumptions, *id.*

NOAA seeks to defend its increasingly blind optimism about achieving the numeric survival improvements from this program by asserting it has “preliminary results” indicating reconditioned kelts are as effective as wild, first-time spawners, Fed. SJ Mem. at 48; *but see* Olney SJ Reply at ¶¶ 54-60 (describing major relevant differences between these “preliminary results” and the circumstances reconditioned Snake River kelts face); that the action agencies are now “using weirs to capture more suitable kelts,” Fed. SJ Mem. at 48; *but see* Olney SJ Reply at ¶¶ 61-69 (reviewing data that fails to show the action agencies have—or even can—capture enough kelts); and that NOAA has credited other hydrosystem modifications for a small fraction

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and even determining the effects of this effort on cormorant predation was very uncertain. *See* Olney SJ Dec., Ex. A (Schultz et al. 2013) (Leech Lake colony of 1,000 breeding pairs reduced to 500 pairs but with the effects on predation “confounded” by other factors). The other studies NOAA identifies, *see* 2014 BiOp at 411, are either broad surveys of cormorant/fisheries conflicts and options (Carss 2003), environmental assessments for cormorant management in the Eastern U.S. (USFWS 2009), or actually caution that removal of cormorants by lethal means often leads to a surge in cormorant productivity making these methods problematic for long-term cormorant reductions, *see* NOAA 2014 AR B363 at 37736-37745 (Russell 2012) (“there are problems with killing birds in practice because dead birds are very often quickly replaced by others” and discussing problems with other removal techniques such as egg oiling).

of the 6% survival improvement kelt reconditioning was supposed to provide, Fed. SJ Mem. at 48; *but see* Olney SJ Reply at ¶¶ 70-72 (explaining that this survival credit is inconsistent with other conclusions NOAA has drawn). Far from demonstrating a conservative approach, NOAA's treatment of the above issues, plus the fact that the action agencies have so far managed to recondition and release a total of only nine steelhead kelts, Fed. SJ Mem. at 48, when they need to capture enough fish to recondition and release at least 180 kelts *each year*, and have each of these fish actually survive to spawn *and* produce offspring that also survive, Olney SJ Reply at ¶¶ 60, 66-68, shows that NOAA's unwavering confidence in this RPA is not rational.<sup>21</sup>

1. *The 2014 BiOp Fails to Rationally Address Climate Change Impacts.*

NWF has demonstrated that the 2014 BiOp failed to employ the best available science about climate impacts on future ocean conditions and freshwater habitat, and in turn on ESA-listed salmon and steelhead. Likewise, NWF has shown that NOAA continues to arbitrarily double-count actions required to mitigate the effects of FCRPS operations as also responsive to the additive impacts of climate change. NOAA responds by attempting to recast their double-counting and by mischaracterizing NWF's argument as an attack on how or where the agency presented its analysis of climate change. Fed. SJ Mem. at 20. The problem with NOAA's approach in the 2014 BiOp is not one of presentation but of substance. While the 2014 BiOp dutifully catalogues new information on the severity and magnitude of climate impacts, NOAA has once again failed to *apply* that information to its analysis or conclusions: it does not revise a single previous finding about climate change, and does not propose a single new action to address its effects. Instead, it concludes that all of the new and unfavorable information about

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<sup>21</sup> It is a leitmotif of the arbitrary and irrational analysis in the 2014 BiOp that NOAA gives full confidence and credit to the success of the tern and cormorant predation and the kelt reconditioning RPA, notwithstanding the extensive evidence that the predicted survival increases from these are highly uncertain as explained above, but at the same time refuses to credit actual data of significant *decreases* in adult survival through the FCRPS because that data is too "uncertain" and requires more study and monitoring. *See* Fed. SJ Mem. at 48-49; *see also* Olney SJ Reply at ¶¶ 73-76, 78-88 (discussing the implications of this decreased adult survival data and changes in transportation rates).

increased climate impacts is “consistent with expectations in the 2008/2010 BiOps.” 2014 BiOp at 181. NOAA cannot rationally conclude that the RPA will avoid jeopardy without incorporating this new climate science into its analysis.

- a. The 2014 BiOp did not use the best available science regarding the impacts of climate change.

NOAA first justifies its refusal to consider the new climate science by highlighting that the precise magnitude and severity of climate impacts are still not certain. Fed. SJ Mem. at 20, 22-23 (selectively highlighting areas of uncertainty and asking court to defer to its choice to dismiss or discount the information). But highlighting some degree of “uncertainty” in the science does not excuse the agency’s failure to “develop projections based on the information that was available.” *Greenpeace*, 80 F. Supp. 2d at 1150.<sup>22</sup> As NOAA recognizes, the ESA requires the agency to base its analysis on “the best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2), not “the best conceivable scientific information.” *Cabinet Res. Grp. v. U.S. Fish & Wildlife Serv.*, 465 F. Supp. 2d 1067, 1088 (D. Mont. 2006). Yet that is exactly what NOAA tries to justify here: the agency *knows* that its assumptions in the 2008 BiOp about

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<sup>22</sup> NOAA’s use of uncertainty to shield its failure to consider the latest climate science flips the precautionary intent of the ESA and the best available science requirement on its head. Using available science, “as opposed to requiring absolute scientific certainty, is in keeping with congressional intent that an agency take preventive measures before a species is conclusively headed for extinction.” *Ctr. for Biological Diversity*, 296 F. Supp. 2d at 1236 (internal quotations and citations omitted) (emphasis in original). See also *Marsh*, 816 F.2d at 1383, 1386 (ESA’s “institutionalized caution mandate[],” requires NOAA to give the “benefit of the doubt to preserving endangered species,”) (citations omitted)). Because it is tied to the ESA’s precautionary mandate and structure, the duty to use the best available science requires the agency to use what it *does* know to avoid a risk, but as explained *infra* at 26-27, it does not justify putting the species *at risk* because it prefers uncertain information. Compare Fed. SJ Mem. at 20 (highlighting uncertainty in the precise magnitude of climate impacts) *with id.* at 36 (arguing that NOAA may credit uncertain benefits from habitat actions because it “may not ignore evidence simply because it falls short of absolute scientific certainty” and that requiring “scientific certainty in estimating the anticipated results” from habitat actions would be “inconsistent with the ESA’s best available science standard” (quoting *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007))). Indeed, in *Nw. Ecosystem Alliance*, the Court applied this precautionary approach and rejected the agency’s dismissal of even anecdotal data that showed a possible decline in the population. *Id.*

future climate conditions “are not valid, and for those time periods there are a wealth of future climate and hydrological” data for the agency to use. NWF Excerpts of 2010 AR (Dkt. 1804), Att. G (ER 137, Att. at 2). Indeed, NOAA summarized much of this new information in the 2014 BiOp. *See* NWF SJ Mem. at 34-35 (citing NOAA’s summary of this information). The ESA’s best available science standard requires far more than simply acknowledging the existence of this scientific information. It requires the agency to engage with the science, develop an analysis that reflects what is known (even if it requires appropriate accounting for uncertainty to minimize risk), rationally consider how the science affects its conclusions, and analyze whether additional or different actions are necessary. The 2014 BiOp fails to do this.

Second, NOAA struggles to portray new evidence of dramatic contractions in marine salmon habitat (as soon as the 2020s) as “consistent with” its assumptions about ocean conditions in the 2008 BiOp. Fed. SJ Mem. at 21 (selectively quoting from authors’ 2011 discussion of 1998, 2007, and 2008 studies in 2014 NOAA AR B1 at 643).<sup>23</sup> It was NOAA—not NWF—that highlighted this 2011 study in the 2014 BiOp as “new information” and an example of an effect that “may be greater than previously anticipated.” 2014 BiOp at 178. NOAA’s attempt to now discount this 2011 study as merely “more of the same” conflicts with this record. None of the 1998, 2007, or 2008 studies referenced in the quote NOAA selects, Fed. SJ Mem. at 21, were considered—or even cited—in the 2008 BiOp. *See* 2014 NOAA AR B282 at 28327-28380 (2008 BiOp references list). Whether the 2011 study is consistent with information

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<sup>23</sup> To support this consistency argument, NOAA mischaracterizes its assumption in the 2008 BiOp that “base period”/recent ocean conditions will continue as a “pessimistic ... scenario.” Fed. SJ Mem. at 20; *see also* Tehan SJ Dec. at ¶ 25 at ¶ 25. While it is true that NOAA arbitrarily assumed that ocean conditions would be no worse than those of the recent past, *see* 2008 BiOp at 7-31, this was not a pessimistic assumption. As is clear from the ICTRT analysis that NOAA cites, recent ocean conditions were the mid-range—not the pessimistic—scenario. *See* 2014 NOAA AR B176 at 14164 (detailing the three scenarios); *id.* at 14165 (showing far larger survival increases required under the “warm” scenario). Given that the ISAB later found that even the ICTRT’s pessimistic warm scenario was not “sufficiently pessimistic,” 2008 NOAA AR B214 at 3, NOAA’s attempt to paint its assumption that ocean conditions would track the even more optimistic “recent” scenario as “conservative” is contrary to the record.

NOAA never considered in the first place hardly justifies the agency's continued failure to address this change in ocean conditions. Further, in the same paragraph that NOAA cites, the authors makes clear that "[i]n contrast, [to the smaller changes modeled in these previous studies], our analysis showed substantial reductions of summer as well as winter habitats for sockeye and only summer habitats for the other five species." 2014 NOAA AR B1 at 643. The Court should reject NOAA's attempt to categorize these predicted significant changes in ocean habitat conditions as "consistent with" evidence the agency did not consider and an analysis it did not perform in the 2008 BiOp.<sup>24</sup> *See S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1274 (E.D. Cal. 2010) (holding that NMFS "failed to address an important part of the problem" in BiOp by ignoring climate change study).<sup>25</sup>

Third, NOAA continues to dismiss its failure to consider the implications of new information about the freshwater impacts of climate change by asserting that its "qualitative" consideration of freshwater impacts in the 2008 BiOp "addressed *the degree to which* the RPA actions address ... possible future effects" of climate in freshwater. Fed. SJ Mem. at 21 (emphasis added). But NOAA's "qualitative" consideration of these impacts in the 2008 BiOp is not an actual analysis of the effects of climate impacts or mitigation actions, it is merely an observation about whether RPA actions meant to mitigate for the impacts of the FCRPS overlap with categories of actions the ISAB recommended to mitigate the separate impacts of climate

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<sup>24</sup> NOAA's access to this study and other long-term data specific to impacts on marine and freshwater salmon habitat distinguishes this case from *Oceana, Inc.*, 2014 WL 7174875, at \*15-16 (cited in RiverPartners SJ Mem. at 24). There the court excused NOAA from looking past the ten-year term of a BiOp because the agency lacked "long-term data" for climate impacts to loggerhead turtles and plaintiffs did not show how the agency's finding that it lacked the "ability to quantify these predicted impacts" was arbitrary.

<sup>25</sup> NOAA's continued focus on the "more favorable" ocean conditions of the past six years is irrelevant to NWF's point that NOAA has ignored the evidence showing future ocean conditions will be far worse than the recent past. *See* 2014 NOAA AR B1 at 643-644 (study finding that "historical changes in the summer and winter habitat areas of Pacific salmon species during [both favorable and unfavorable oceans regimes in] ... the 20th century were within a few percent of the reference 1980s habitats .... The projected changes ... during the 21st century were much larger than those in the historical time frames"). NOAA cannot continue to ignore the best available science about *future* ocean conditions by looking only to the *recent past*.

change. NWF SJ Mem. at 27; Nez Perce Mem. at 12-14. Because NOAA never assessed the magnitude of the impacts of climate change in the first place, it was (and remains) impossible for the agency to assess the “degree to which”—if any—RPA actions meant to mitigate the effects of the hydrosystem can also ameliorate the added effects of climate change. *See infra* at 30-33.

Finally, NOAA relies on predicted benefits from habitat actions that may not accrue for decades *after* the 2018 end date of the 2014 BiOp, while at the same time ignoring the climate change impacts over that same period that are likely to diminish or offset those predicted benefits. *See* NWF SJ Mem. at 38; 2008 NOAA AR B18 (study demonstrating that existing habitat restoration actions are likely to fall far short of providing the survival improvements necessary to address impacts of both existing degradation and climate change). In response, NOAA argues that while it did quantitatively rely on the post-2018 benefits from the RPA’s 2007-2009 habitat actions (the only actions it actually identified), it did not assume any *quantitative* long-term benefits from the unidentified habitat actions after 2009. Fed. SJ Mem. at 22. But as NWF has explained, the agency has already *qualitatively* relied on the post-2018 benefits from these other habitat measures—and other actions—in the 2008/2014 BiOps. NWF SJ Mem. at 38 (citing and quoting 2008 BiOp at 7-45 to 7-46), *see also* Tehan SJ Dec. at ¶ 29 (asserting that “many habitat actions will result in additional habitat quality and survival improvements beyond 2018, thus contributing additional resilience for future effects of climate change.”).<sup>26</sup> *How* NOAA credited those benefits—whether quantitatively or qualitatively—is irrelevant. The point is that NOAA arbitrarily assumed post-2018 benefits from habitat actions in the 2014 BiOp jeopardy analysis without then balancing those predicted benefits against the

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<sup>26</sup> Moreover, nothing in Mr. Tehan’s post-hoc explanation actually demonstrates that NOAA evaluated freshwater climate impacts in the 2014 BiOp. Instead, Mr. Tehan implies—tellingly without citation to the record—that climate change impacts may be addressed to some extent by the “expert panels” during the tributary habitat project selection process. Tehan SJ Dec. at ¶ 30. But to whatever degree these panels consider climate in the context of a discrete tributary habitat project, their consideration is untethered to any analysis in the 2014 BiOp of the magnitude or number of projects required to mitigate for adverse climate impacts.

concurrent negative impacts of climate change.<sup>27</sup> *Greenpeace*, 80 F. Supp. 2d at 1147 (BiOp invalid where NOAA “entirely failed to consider an important aspect of the problem”).

- b. NOAA continues to double-count FCRPS mitigation actions toward alleviating climate impacts.

NOAA does not dispute that the 2014 BiOp does not contain a single new action specifically to address the additive harm from climate change. Instead, they reiterate their longstanding view that the RPA contains “numerous” actions, which are admittedly required to avoid jeopardy from ongoing FCRPS operations, that may also permissibly “count” to mitigate the additional impacts of climate change because they are the kinds of actions the ISAB recommended to address climate change in 2007. Fed. SJ Mem. at 22-23. Their argument is about labeling not substance. NOAA has not—and cannot—explain why it may credit the same actions to mitigate two distinct *and additive* impacts: (1) the existing jeopardy from the FCRPS; and, (2) the additive harm from ongoing climate change.

First, the argument that RPA actions sufficiently address the combined harm of the FCRPS and climate change in order to avoid jeopardy is premised on an analysis of the magnitude or severity of climate impacts that, as explained above, NOAA did not perform.<sup>28</sup> In

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<sup>27</sup> The Court should not credit NOAA’s revisionist view that it “did not limit [its climate] analysis to the 10-year term of the BiOp.” Fed. SJ Mem. at 22 & n.20. The record is clear that NOAA refused to analyze future climate impacts because “the full effects of climate change are unlikely to be realized during the period covered by this BiOp,” 2010 BiOp, App. F. at 33; *see also* 2008 BiOp at 7-13 (refusing to consider future ocean conditions outside “the period of ... this opinion,”); Fed. 2010 Supp. SJ Mem. at 54 (Dkt. 1806) (admitting that NOAA limited consideration of climate change in 2010 BiOp to “the next eight years”); 2014 NOAA AR B282 at 27635 (2008 BiOp merely “sets the stage for [climate] mitigation actions should they become necessary”). NOAA may not avoid analysis of the detrimental and relevant climate change impacts by arbitrarily limiting its analysis to the term of the BiOp. *See Intertribal Sinkiyone Wilderness Council v. NMFS*, 970 F. Supp. 2d 988, 1003-1007 (N.D. Cal. 2013).

<sup>28</sup> NOAA did such an analysis in the CVP BiOp—it modeled the specific additional harms from climate change, and developed responsive actions to address that additive harm. 2010 NOAA AR Doc. BB281 at 172-173, 464-465; NWF SJ. Mem. at 40, n.25. There is no similar analysis in the 2008, 2010, or 2014 BiOps. Apart from observing that the Central Valley dams are a “different project,” Fed. SJ Mem. at 22 & n.21, NOAA has never actually explained why it refuses to follow the same logical and precautionary approach here. *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010) (“Courts will not ‘assume [an agency] has

the absence of that analysis, a comparison of projects necessary to mitigate the impacts of the FCRPS to the ISAB’s recommendations for actions to address climate impacts yields no rational basis for determining whether the FCRPS actions are sufficient in number or magnitude to address the additive impacts of climate change. Without that evaluation—qualitative or quantitative—NOAA cannot rationally conclude that the RPA mitigates for “*all aggregate effects ... including future climate change impacts.*” Fed. SJ Mem. at 22 (emphasis in original). Asking whether a project is similar in kind to an action that could potentially ameliorate the effects of climate change does not address whether it will yield sufficient benefits to both compensate for the FCRPS impacts *and* the additive adverse effects of climate change that also must be mitigated if the FCRPS action is to actually avoid jeopardy.<sup>29</sup>

Moreover, the 2014 BiOp’s “evaluation” of actions undertaken to address climate change consists only of a handful of “examples” that “illustrate[.]” actions “relevant to climate change.” 2014 BiOp at 437-441.<sup>30</sup> These narrative summaries, however, are not accompanied by any description of what criteria NOAA applied to determine that these (relatively few) examples

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engaged in reasoned decision making’ when it ‘implicitly’ departs from its prior precedent and provides no explanation for doing so”) (citation omitted)).

<sup>29</sup> NOAA’s related contention that any benefits from the RPA will, by improving salmon survival, also necessarily increase the resiliency of salmonid populations to climate change, Fed. SJ Mem. at 21, might be accurate if NOAA were addressing only one problem—either the harm from the FCRPS or that from climate change. But it must address both if it is to effectively avoid jeopardy from FCRPS operations. And there is no evidence or analysis to show that the RPA actions to mitigate FCRPS effects provide *any* excess or surplus benefits (let alone to what degree) to also increase salmon resiliency to climate change.

<sup>30</sup> It is impossible to call this discussion “NOAA’s” analysis. This entire section of the 2014 BiOp is copied nearly verbatim (with minor stylistic edits) from a memorandum provided to NOAA by the action agencies. *Compare, e.g.,* 2014 BiOp at 437-441 (tributary, estuary, mainstem hydropower measures) *with* 2014 NOAA AR B331 at 35339-35844 (same). The only original substantive content is the final paragraph where NOAA asserts in a single sentence that “sufficient actions consistent with the ISAB’s recommendations ... have been included in the RPA and are being implemented by the action agencies as planned.” 2014 BiOp at 442. In circular fashion, NOAA asserts that it based this conclusion on only those actions “that address possible climate change.” Fed. SJ Mem. at 23 (citing 2014 BiOp and Tehan SJ Dec. at ¶¶ 27-28). Mr. Tehan’s Declaration supplies no additional detail about NOAA’s review but just parrots this conclusory assertion in the 2014 BiOp. Tehan SJ Dec. at ¶ 28.

were “sufficient.” NOAA offers no description of what factors it considered, what criteria it applied to which projects, or even the extent/degree to which any individual project alleviated any identified climate impacts. An agency’s ability to consider a factor “qualitatively” does not relieve it from the requirement that its decisions be “complete, reasoned, and adequately explained.” *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052, n.7 (9th Cir. 2008). NOAA’s summary bears none of these hallmarks. A court may not “infer an agency’s reasoning from mere silence.” *PCFFA*, 426 F.3d at 1091.

Finally, NOAA’s approach in the 2014 BiOp ignores the mounting evidence that its assumptions about the dual benefits of RPA actions are wrong. For example, cold water releases from Dworshak reservoir are among the actions NOAA lists as alleviating both the harm from the Snake River dams and as responsive “to address climate change.” 2014 BiOp at 440-441; 2010 BiOp at 61 (same). These releases have been required to mitigate for the impacts of the hydrosystem since the 1995 BiOp. *See Nez Perce SJ Mem.* at 15-17. As NOAA elsewhere acknowledges, high water temperatures in the fish ladder at Lower Granite Dam during July of 2013—despite the simultaneous release of cool water from Dworshak—resulted in the loss of over 30% of the critically endangered adult Snake River sockeye run. 2014 BiOp at 355-56. To whatever extent these cold-water releases under RPA 4 help mitigate the existing impacts of the FCRPS, the significant adult mortality in 2013 demonstrates the limits of these benefits, and undermines NOAA’s contention that this action can serve both to mitigate for the FCRPS *and* the increased harm from more frequent high river temperatures.<sup>31</sup>

NOAA’s continued effort to rely on the same actions to mitigate for two distinct and additive adverse effects leads to an irrational conclusion that the RPA actions will both produce and sustain the survival benefits necessary to avoid jeopardy from FCRPS operations *and*

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<sup>31</sup> Indeed, in 2008, NOAA’s scientists determined that many of the hydro measures included in the 2008 RPA were “essentially a statement of the status quo ... considered for implementation under current conditions, but [do] not address any *additional* impacts that might occur over the next ten years from climate change.” NWF AR Excerpts (Dkt. 1596) (filed conventionally) CC-8 at 5 (describing action agencies’ Comprehensive Analysis) (emphasis in original).

address the additive and adverse climate impacts NOAA has not even analyzed.<sup>32</sup>

2. *The 2014 BiOp Does Not Rationally Address the Environmental Baseline or Cumulative Effects*

a. The environmental baseline

NOAA acknowledges that the “environmental baseline”—the starting point for the analyses in its 2008/2014 BiOps—must include the effects of federal actions in the FCRPS action area that have already undergone ESA consultation. Fed. SJ Mem. at 24. NOAA does not dispute that neither BiOp added the effects of these federal actions, both positive and negative, to the environmental baseline. Instead, it argues that the BiOps used a “biological proxy” for this analysis, specifically the “estimates of base period fish survival, as adjusted.” *Id.* at 25.

The record shows that NOAA’s “proxy” omitted impacts that should have been part of the environmental baseline because it considered only positive actions. In the 2008 BiOp, NOAA described the environmental baseline by starting with the baseline from its 2004 BiOp. 2008 BiOp at 8.3-12 (findings for Snake River spring-summer Chinook, but NOAA’s flawed approach is the same for each species). In 2004, the agency derived baseline conditions—in a manner consistent with the ESA—by examining on-the-ground conditions affecting spring/summer Chinook habitat with “additions” consisting of “the *beneficial and adverse effects* of past and current non-Federal actions and Federal actions that have undergone Section 7 consultation. Both types of information were considered in assessing the type and extent of factors limiting listed salmonids in the action area and in estimating the potential to improve habitat conditions.” 2004 BiOp at 5-45 (emphasis added). In contrast, the 2008 BiOp added to

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<sup>32</sup> The idea that the FCRPS—despite jeopardizing eight runs of ESA-listed fish—should be also “credited” for mitigating the impacts of climate change is public relations rhetoric. See Fed. SJ Mem. at 23 & n.22; RiverPartners Mem. at 6, 25. It is premised on a false choice between hydroelectric power and fossil fuels, not an inevitability that any reduction in hydropower generation to avoid jeopardy must be replaced with fossil fuels. Sixth Power Plan, Chp. 6 at 6-11 to 6-12, *available at* <http://goo.gl/SJBktY> (comparison of price for various resources demonstrating, for example, that wind is cost-competitive with natural gas even in the near-term and that energy conservation is least expensive). And none of these alleged “positive effects” play any role in in the 2014 BiOp in any event.

the baseline only *beneficial* effects of select federal actions by projecting “base-to-current” salmon survival increases due in part to federally-funded habitat improvement projects already completed. 2008 BiOp at 8.3-10, 8.3-13 & n.3. This “adjustment” included only estimates of survival *increases* due to tributary habitat projects; it did not include any *adverse* habitat impacts from federal actions subject to § 7 consultation after 2004, despite acknowledging that these adverse impacts had occurred. *See* 2008 BiOp at 8.3-10 (describing predicted base-to-current survival increases due to tributary habitat projects).<sup>33</sup> Finally, the 2008 BiOp listed—but did not adjust the baseline to account for the impacts of—other federal actions with completed § 7 consultations. *See* 2008 BiOp at 8.3-12 to 8.3-17 (acknowledging that some actions may benefit salmon while others with “short- or even long-term adverse effects” had been found individually not to cause jeopardy or adversely modify critical habitat).

In its 2014 BiOp, NOAA took a further step away from incorporating into the environmental baseline federal actions with completed § 7 consultations: it did not even search its consultation database<sup>34</sup> to identify actions affecting spring/summer Chinook and their habitat in the FCRPS action area for which consultations had been completed since 2008 (and so the BiOp of course did not discuss these actions). Instead, the 2014 BiOp provides two paragraphs—which cover not only spring/summer Chinook but *all* listed species and *all* aspects of the environmental baseline—generically asserting that some (unspecified) § 7 consultations subsequent to 2008 found benefits to the listed species and their critical habitat, and other (unspecified) consultations identified short or long-term adverse impacts to these species and

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<sup>33</sup> The 2008 BiOp explicitly notes that its “base-to-current” adjustment for survival increases from habitat measures is *separate* from its general acknowledgement that § 7 consultations had occurred between 2004 and 2007. *See* 2008 BiOp at 8.3-13 & n.3.

<sup>34</sup> NOAA faults NWF for not identifying § 7 consultations the 2014 BiOp overlooked. *See* Fed. SJ Mem. at 26 & n.23. There is no need for NWF to do this, however, because NOAA keeps a database of biological opinions for this purpose. NOAA could—and should—have searched its own PCTS database for relevant consultations, as it did for the 2004 and 2008 BiOps, and should have taken these effects into account as it did in 2004 but not 2008 and 2014.

their critical habitat. 2014 BiOp at 189-190.<sup>35</sup> But the 2014 BiOp makes no effort to assess the additive beneficial or negative impacts of these federal actions or adjust the BiOp's environmental baseline in any way. *See id.* NOAA's assessment of jeopardy and critical habitat in the 2014 BiOp was thus off track from the beginning. Courts have overturned BiOps for precisely this reason. *See* NWF SJ Mem. at 44 (citing cases).

- b. NOAA failed to consider any cumulative effects from harmful actions.

The 2008 and 2014 BiOps also failed to consider cumulative effects with adverse impacts to listed salmon and steelhead and their critical habitat, despite acknowledging that such impacts are reasonably certain to occur. NOAA responds that it did consider cumulative effects but then admits that those included in the 2008 BiOp were only effects "expected to benefit recovery efforts." Fed. SJ Mem. at 24 (also noting that the 2014 BiOp found the 2008 BiOp's cumulative effects analysis to be "still accurate"). NOAA makes no effort to justify the dismissal of adverse cumulative effects based on its labeling of these impacts as "unquantifiable"—a boilerplate assertion repeated for each listed species. *See, e.g.,* 2008 BiOp at 8.2-17, 8.3-18, 8.4-15 to 16.

NOAA suggests that, at least for tributary habitat actions, the expert panels the action agencies relied on to estimate habitat improvements somehow accounted for adverse cumulative impacts to tributary habitat and thus allowed NOAA to consider these effects as part of determining the "effects of the action" subject to consultation. *See* Fed. SJ Mem. at 25; 50 C.F.R. § 402.14(g)(4). The administrative record does not support this point; the methodology NOAA references is a one-way ratchet for identifying only *beneficial* impacts to salmon habitat. *See* 2014 BiOp at 247 (referencing the 2007 Comprehensive Analysis, App. C at 1-1) (explaining expert panel methodology is aimed at estimating "tributary habitat survival improvement

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<sup>35</sup> The 2014 BiOp does describe one federal project with a completed § 7 consultation. *See* 2014 BiOp at 185-186 (discussing the Odessa Groundwater Replacement Project). That limited description, however, both shows that NOAA is capable of identifying and addressing new actions in the baseline and highlights the importance of its failure to consider how this and other unspecified federal actions with "short- or even long-term adverse effects" could have affected the agency's evaluation of the environmental baseline. *See id.* at 189-190, 193.

benefits” to each species). Further, NOAA does not even attempt to identify any means to account for the range of additional actions that NOAA acknowledges have adverse cumulative effects on listed species and critical habitat. *See* 2014 BiOp at 221 (acknowledging many types of adverse cumulative effects). Its failure to consider the full range of cumulative effects violates the ESA’s implementing regulations and is arbitrary.

### III. THE 2014 BIOP’S ANALYSIS OF CRITICAL HABITAT IS UNLAWFUL

NOAA asserts that the ESA “focuses on whether the conservation value of critical habitat is ‘appreciably diminished,’ not whether it is improved.” Fed. SJ Mem. at 54 (citing *Rock Creek Alliance v. FWS*, 663 F.3d 439 (9th Cir. 2011)). More specifically, the 2014 BiOp and the Hogarth Memo specify that a proposed federal action complies with § 7(a)(2) so long as it allows affected critical habitat to “remain functional (or retain the current ability for the [PCEs] to be functionally established) to serve the intended conservation role for each species.” Fed. SJ Mem. at 50.<sup>36</sup> As NWF explains below, however, NOAA is only halfway correct. When critical habitat is presently functional, i.e., its PCEs are currently sufficient to meet the conservation needs of a species, courts have allowed impacts that marginally reduce critical habitat conditions, so long as those reduced conditions do not “appreciably diminish” the critical habitat’s ability to support the species’ conservation needs. On the other hand, where critical habitat is presently *not* capable of meeting a species’ conservation needs (as is the case here) courts and even NOAA itself have refused to sanction proposals that only maintain a deficient status quo.

Courts have upheld determinations that even some adverse impacts on critical habitat are permitted where critical habitat *is currently able to support its conservation role for a listed species*. For example, in *Rock Creek*, the agency determined that a proposed mine would have temporary impacts on a small segment of a creek, but the affected critical habitat would still be

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<sup>36</sup> This approach renders the adverse modification inquiry virtually meaningless for ongoing actions like dam operations: where critical habitat is not properly functioning due to these ongoing operations, the action agencies perpetually *retain the ability* to modify those operations to improve river conditions for listed species—without ever actually having to do so.

functional, albeit at a somewhat lower level, during the period of those impacts, resulting in only a “slight slowing” of the rate of bull trout recovery. 663 F.3d at 443. In *Butte Envtl. Council v. Corps of Eng’rs*, 620 F.3d 936, 948 (9th Cir. 2010), there was no indication that the small loss of critical habitat there would materially limit or preclude the ability of thousands of acres of remaining critical habitat to meet the recovery needs of the species. *Id.*<sup>37</sup>

On the other hand, courts—as well as NOAA—have reached very different conclusions when critical habitat is not presently meeting the conservation needs of a species. In *Nez Perce Tribe v. NOAA Fisheries*, CV-07-247-N-BLW, 2008 WL 938430 (D. Idaho Apr. 7, 2008), NOAA found no destruction or adverse modification from proposed irrigation operations that were no worse than the status quo and contained some improvements over time—the precise standard NOAA seeks to apply in this case. The court, however, rejected this conclusion, holding that where steelhead critical habitat was in “poor or non-functioning condition,” “prolong[ing] the current habitat degradation would violate the ESA.” *Id.* at \*10. “To put it affirmatively, the BOR must improve . . . operations to stop the destruction of critical habitat.” *Id.* at \*8. This interpretation of § 7 is similar to the Ninth Circuit’s decision in *Locke*, 776 F.3d at 1000, 1008, where the court upheld a NOAA BiOp finding that proposed dam operations in California’s Central Valley Project would destroy or adversely modify critical habitat. *Id.* (“juvenile rearing habitat and connectivity will continue to be degraded by New Melones operations, as proposed”). NOAA based this finding on the fact that existing dam operations had resulted in “poor quality of spawning gravels,” and developed an RPA imposing minimum flows to improve spawning. *Id.* See also NWF SJ Mem. at 50 (discussing NOAA’s determination that Willamette Basin dam operations would destroy or adversely modify critical habitat because they

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<sup>37</sup> In both of these cases, the amount of critical habitat affected by the action represented only a small fraction of the species’ critical habitats. That is not the situation here, where FCRPS operations adversely modify the species’ entire freshwater migratory habitat which is necessary for their survival and recovery. See *NWF v. NMFS*, 2005 WL 1278878 at \*16 (D. Or. May 26, 2005) (purpose of “safe passage” is “survival through the migratory corridor at a rate sufficient to support increasing populations up to at least a recovery level.”) (quoting 2004 BiOp).

continued the poor functioning of PCEs “that have impaired the ability of critical habitat to serve its conservation role for the species.”<sup>38</sup>

The Court should likewise reject NOAA’s argument that the RPA satisfies the critical habitat requirements of § 7(a)(2) so long as the PCEs retain their present ability to “become functionally established” at some point in the future. As in the examples above, NOAA acknowledged in the 2008 BiOp that critical habitat was “adversely modified” by the action agencies’ proposed 10-year hydrosystem operations in 1999. *See* 2008 BiOp at 1-6 to 1-7 (adopting adverse modification findings from 2000 BiOp). This finding means that those operations “appreciably diminish[ed] the value of critical habitat” for the conservation of the listed stocks. *See* 50 C.F.R. § 402.02 (definition of “destruction or adverse modification”); *see also* 79 Fed. Reg. 27060, 27066 (May 12, 2014) (proposed regulation revising definition of this term). The 2008 BiOp also acknowledged that while critical habitat conditions had improved since 2000, they still did “not yet fully support the conservation value of designated critical habitat” for any listed species. 2008 BiOp. at 8.3-45 (the 2008 BiOp contains nearly identical statements for each of the listed species). The 2014 BiOp also cites improvement, but continues to acknowledge that conditions “as a whole do[] not yet fully support the conservation value of critical habitat for each species.” 2014 BiOp at 477.

NOAA’s statements beg the relevant legal question: are the “improvements” to critical habitat enough to avoid “appreciably diminishing” the value of the safe passage PCEs which NOAA previously concluded had been adversely modified. NOAA simply has not explained—because it does not address—whether critical habitat conditions have improved to the extent that designated critical habitat’s value to the species’ conservation, i.e., recovery, is no longer

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<sup>38</sup> Each of these results would have been different had the courts or NOAA applied the agency’s “retain the current ability for PCEs to become functionally established” standard. In each instance, the proposed agency action was no worse than status quo operations—and even somewhat better than current operations in *Nez Perce*—and under the “retain” standard NOAA applies here, these actions would have avoided adverse modification of critical habitat. Yet the courts and NOAA itself expressly and correctly rejected that outcome.

appreciably diminished. *Compare* 50 C.F.R. § 402.02 (defining recovery) *with* 16 U.S.C. § 1532(3) (defining conservation). As Oregon explains in more detail in arguments with which NWF concurs, the 2008 BiOp admits that critical habitat was adversely modified under the 1999 proposed operations, and since then NOAA has recognized that critical habitat still does not function well enough to support its “conservation role.” 2014 BiOp at 477; 2008 BiOp at 8.3-45. In these same circumstances, courts and even NOAA itself have refused to sanction a finding of no adverse modification.<sup>39</sup>

In an effort to avoid this result, NOAA now argues against its own BiOps by asserting “the safe passage PCE is functioning.” Fed. SJ Mem. at 53, n.44. This new assertion in its summary judgment memorandum is based on a discussion of a litany of structural modifications to the dams and a purported decrease in juvenile travel time to the ocean.<sup>40</sup> This theme forms much of NOAA’s argument on critical habitat: trust us because critical habitat for listed salmon and steelhead is getting better under the RPA—although NOAA tellingly never mentions that for all the new structures at the dams, the 2008/2014 BiOps allow actual flow and spill conditions in the mainstem to become *worse* for fish than they have been in recent years.<sup>41</sup>

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<sup>39</sup> NOAA argues the facts of *Nez Perce* are very different from this case because the species and habitat in *Nez Perce* were in worse shape. *See* Fed. SJ Mem. at 53 & n.43. But the beleaguered Snake River steelhead in *Nez Perce* are among the species at issue in this case. And, like the “poor or non-functioning” habitat in *Nez Perce* (which is itself part of the critical habitat at issue here), NOAA has found that critical habitat in the salmon and steelhead addressed in the 2008/2014 BiOps does not support the conservation needs of these species. *See id.* at 477.

<sup>40</sup> The State of Oregon describes evidence that conflicts with this new and optimistic assessment in the Declaration of Kathryn Kostow, including explaining that juvenile travel time has not actually decreased and that structural changes to the FCRPS dams have not produced the predicted survival increases even for changes that occurred years ago. *See, e.g.*, Declaration of Kathryn Kostow at ¶¶ 29-31 (discussing juvenile travel time); *id.* at ¶ 42 (“FCRPS changes”).

<sup>41</sup> The Fish Passage Center’s comments on the Draft 2014 BiOp explained in detail the RPA’s reductions in spill. 2014 NOAA AR C31651 at 265077-265083; *see also* 2014 BiOp at 346-349. Hydro modeling in the action agencies’ 2007 Comprehensive Analysis also showed that flow targets will likely be met in fewer years under the Prospective Action analyzed in the 2008 BiOp. *Compare, e.g.*, 2014 NOAA AR B422 at 45143 (Table B-2) (flows at Lower Granite and McNary) *with id.* at 45152 (Table B-11) (same) (showing decreased likelihood of meeting flow targets in crucial salmon migration months of May, July, and August).

NOAA's assurances of a better tomorrow for critical habitat begs the key question the Ninth Circuit has posed in at least two cases: Will critical habitat PCEs improve under the RPA to the extent that critical habitat is *no longer being adversely modified* by continued FCRPS operations, as NOAA recognizes it has been. *See* 2008 BiOp at 1-6 to 1-7. In *NWF v. NMFS*, the Ninth Circuit pointed to NOAA's failure to provide an answer to this question in overturning the 2004 BiOp's conclusion that RPA would not destroy or adversely modify critical habitat. *See* 524 F.3d at 936 (finding NOAA had "inappropriately evaluated recovery impacts without knowing the in-river survival levels necessary to support recovery"). In doing so, the court echoed the decisions discussed above by underlining the importance of ensuring that critical habitat's value to species' recovery is no longer appreciably diminished. *See* 524 F.3d at 934, n.15 (calling a previous NOAA critical habitat analysis "incompatible with the statute's plain language and clear purpose of improving endangered species' condition over time"). Similarly, *Gifford Pinchot Task Force v. FWS* faulted a BiOp's analysis of critical habitat for providing "no discussion of the specific impact on recovery . . . ." 378 F.3d 1059, 1073 (9th Cir. 2004). The bottom line: given that the 2008 BiOp re-affirmed a finding of adverse modification of critical habitat for prior FCRPS operations, and the 2008 and 2014 BiOps both admit designated critical habitat still cannot meet the recovery needs of listed salmon and steelhead in the Columbia Basin, it is not sufficient for NOAA to merely assert that the RPA is leading to improvements to critical habitat PCEs, or that the PCEs retain the ability to someday become functional. Rather, NOAA must explain how FCRPS operations provide for "safe passage . . . through the migratory corridor at a rate sufficient to support increasing populations up to at least a recovery level." *NWF v. NMFS*, 2005 WL 1278878, at \*16. NOAA's "destruction or adverse modification" analysis must not only assess whether PCEs will improve, but whether this improvement will be sufficient in light of the "in-river survival levels necessary to support recovery" to ensure that critical habitat's value to the species' recovery is no longer appreciably diminished.

IV. NOAA ARBITRARILY CONCURRED IN THE ACTION AGENCIES’ “NOT LIKELY TO ADVERSELY AFFECT” FINDING FOR SOUTHERN RESIDENT KILLER WHALES.

NWF has explained that the 2014 BiOp, like its predecessors, arbitrarily dismisses the effects of the FCRPS on endangered Southern Resident killer whales by applying a comparative framework which asks only whether the current number of hatchery Chinook can replace the number of Chinook killed by ongoing FCRPS operation under the RPA. NWF SJ Mem. at 53-55. This simplistic comparison arbitrarily assumes that current Chinook abundance is adequate to avoid adversely affecting the whales’ survival and recovery, and it allows FCRPS operations to continue reducing the already insufficient prey available to these whales. *Id.* at 53-54.

NOAA responds that it need not consider the full effects of the FCRPS on the whales’ survival and recovery because its findings were made in the course of an “informal” consultation process that does not require assessing any baseline impacts. Fed SJ Mem. at 56-57. This form-over-substance argument cannot excuse NOAA from rationally evaluating the full effects of FCRPS operations in order to determine whether continued operations under the RPA will jeopardize the survival and recovery of endangered killer whales.<sup>42</sup> Both informal and formal consultation serve the same requirement under § 7 of the ESA—to ensure that a federal action does not jeopardize a listed species. Informal consultation may be a procedural shortcut but nothing suggests it is also a substantive shortcut. To the contrary, NOAA must carefully consider the “effects of the action”—including the impacts of past actions in the baseline, and the future direct and indirect effects of the action, before it concurs in an NLAA finding. *See* 50 C.F.R. § 402.02 (“effects of the action” include the environmental baseline and direct and indirect effects); § 402.12 (a) (action agencies’ biological assessment (“BA”), which “is used in determining whether formal consultation ... is necessary,” “shall evaluate the potential effects of the action ”); *see also* 50 C.F.R. § 402.12(j) (requiring submission of the BA to NOAA for its

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<sup>42</sup> A “not likely to adversely affect” (“NLAA”) finding for a species is limited to “only those activities which are found to have beneficial, discountable, or insignificant effects upon listed species or their critical habitats.” 51 Fed. Reg. 19926, 19949 (Jun. 3, 1986) (regulatory preamble); *see also* NWF SJ Mem. at 52 & n.38.

response “as to whether or not [it] concurs with the findings of the biological assessment”).<sup>43</sup>

Both this Court and the Ninth Circuit have made clear that NOAA cannot perform this analysis by employing the comparative approach it seeks to defend here: “Requiring NMFS to consider the proposed FCRPS operations in their actual context does not, as NMFS argues, effectively expand the ‘agency action’ at issue to include all independent baseline harms to the species.” *NWF v. NMFS*, 524 F.3d at 930. *But see* Fed. SJ Mem. at 57 (selectively quoting this same passage to support an inference that evaluating the action in isolation from the baseline is permissible). Here, that “actual context” includes impacts to killer whale prey from past and ongoing mortality caused by the FCRPS (especially as carried forward under the RPA).

NOAA argues in the alternative that its NLAA concurrence was “tantamount to formal consultation.” Fed. SJ Mem. at 57. But NOAA’s concurrence is neither rational nor based on a thorough consideration of the relevant factors—including its own findings elsewhere. NOAA has made clear in other biological opinions issued after the 2008 BiOp that whales need far more than 221,000 Chinook available in coastal waters (NOAA’s estimate of prey needs in the 2008 BiOp at 9-10), and that current levels of prey are *not* sufficient to avoid adverse effects to the whales’ survival, let alone its recovery. *See* NWF SJ Mem. at 53-54 (discussing CVP and ocean salmon fisheries BiOp). *See also* 2010 AR BB.281 at 165-166 (CVP BiOp concluding through formal consultation that killer whales “may need from approximately 356,000 to 1.76 million” salmon in coastal waters and concluding that dam operations would jeopardize whales by failing to ensure an adequate long-term abundance of Chinook prey).<sup>44</sup> The Ninth Circuit upheld the

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<sup>43</sup> *Conservation Cong. v. Forest Serv.*, 720 F.3d 1048, 1056 (9th Cir. 2013) (cited in Fed. SJ Mem. at 56), is inapposite. There the plaintiffs sought to require the Service to consider “cumulative effects” in an informal consultation. *Id.* The Court rejected this argument because cumulative effects are distinct from the “effects of the action” the agencies must consider in informal consultation, and nothing in the regulations requires consideration of this separate category of effects. *Id.* Here, NOAA’s illegal comparative approach ignores the “effects of the action” specifically enumerated in the regulations, including the environmental baseline and the ongoing effects of FCRPS operations and the salmon declines those actions have caused.

<sup>44</sup> NOAA struggles to distinguish its findings of insufficient prey in its 2009 Fisheries BiOp as “conservative” (and therefore somehow inapplicable), Fed. SJ Mem. at 58, but this effort only

CVP BiOp’s analysis in *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d at 971, 998 (9th Cir. 2014). NOAA cannot explain why it continues to rely on its findings from 2008 in the 2014 BiOp without even trying to reconcile its earlier findings with these subsequent and more pessimistic findings about killer whale prey.

NOAA’s continued willingness to dismiss the effects of the FCRPS also stands in contrast to its emphasis in other BiOps on the importance of “scrutiniz[ing] even small effects” because the precarious status of this population means “the loss of a single individual, or the decrease in reproductive capacity of a single individual, is likely to” jeopardize the species. 2010 NOAA AR BB.280 at 56; *see also id.* BB.281 at 573 (same). Here, the population has declined by approximately 10 percent since 2008, yet NOAA refuses to use this same precautionary approach in the 2014 BiOp. NOAA’s conclusion in the 2014 BiOp that its “past evaluation of effects on Southern Resident killer whales remains valid,” 2014 BiOp at 487, is based on an improper comparative analysis that is incomplete and arbitrarily refuses to reevaluate the whale’s prey needs in light of what NOAA has learned since 2008.<sup>45</sup>

#### V. THE CORPS AND BOR DID NOT COMPLY WITH NEPA.

NEPA requires federal agencies to prepare an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. The Ninth Circuit has specifically held that an agency’s decision to adopt the reasonable and

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begs the question of why the 2014 BiOp recycled the far more optimistic approach from the 2008 BiOp without any such conservative assumptions, and why it did so despite new evidence confirming the “conservative” findings in the 2009 Fisheries BiOp. *Compare* NOAA 2010 NOAA AR BB.280 at 37 (conservatively basing projections of daily caloric needs “on the high-end of a typical range in daily needs”) *with* 2014 BiOp at 485 (affirming that prey needs should be based on the “high end of the range in daily energy expenditures”).

<sup>45</sup> NOAA incorrectly asserts NWF has not adequately contested its NLAA for orcas. Fed. SJ Mem. at 58. NWF has explained that NOAA’s comparative analysis ignores evidence that continued FCRPS operations under the RPA are likely to adversely affect the survival and recovery of these whales, and that NOAA has failed to follow proper procedures. *See* NWF SJ Mem. at 53-54. “It is not the responsibility of the plaintiffs to prove, nor the function of the court to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.” *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985).

prudent alternative from a biological opinion *is* a major federal action. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646-55 (9th Cir. 2014) (“*Jewell*”). It is undisputed that the Corps and BOR did not prepare an environmental impact statement—or any other NEPA document—as part of their decisions to adopt the 2014 BiOp and its RPA. It is not surprising, therefore, that the agencies and their supporters respond to NWF’s NEPA claim by mischaracterizing arguments and raising illusory obstacles, none of which have merit.

A. The Decision to Adopt the RPA is a Major Federal Action.

The Corps and BOR cannot distinguish the facts in *Jewell* from their decisions to adopt and implement the RPA from the 2014 BiOp. First, they cannot distinguish *Jewell* on the grounds that the RPA in *Jewell* contained fewer actions than the 2014 RPA here. Fed. SJ Mem. at 67. Nothing in *Jewell* limits its holding to only “narrower” RPAs. Indeed, the Court specifically rejected the argument that NEPA compliance was impractical because of the time or resources needed to prepare an EIS for an RPA. *Jewell*, 747 F.3d at 644 (“the fact that completing an EIS might be time consuming or costly does not excuse an agency from complying with NEPA”). Nor is *Jewell*’s holding limited to the “operational components” of an RPA. Fed. SJ Mem. at 67. While the district court in *Jewell* did comment that the appropriate focus of NEPA compliance is on “[p]roject operations,” *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1042 (E.D. Cal. 2009), the Ninth Circuit did not adopt this limitation.<sup>46</sup> Moreover, there is no need to decide the proper scope of a NEPA analysis where, as here, BOR and the Corps have failed to conduct *any* NEPA analysis for their 2014 RODs.

The agencies’ attempt to dodge their NEPA duty by arguing the 2014 BiOp/RPA includes some modified or completed actions, and actions which “will not themselves have an

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<sup>46</sup> While BOR had previously provided notice that it would analyze only the “operational components” of the RPA in its EIS, *see* 77 Fed. Reg. 18858-02 (Mar. 28, 2012), it is the plain language of the Ninth Circuit’s holding in *Jewell*—not BOR’s statements of intent prior to that ruling—that controls. Indeed, the focus on the “operational components” of an RPA harkens back to NOAA’s failed efforts in 2004 to distinguish between discretionary and non-discretionary FCRPS operations. *See NWF v. NMFS*, 524 F.3d at 928.

environmental impact,” also fails. Fed. SJ Mem. at 67-68 (citing *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995)).<sup>47</sup> *Jewell* addressed this argument and distinguished *Douglas Cnty.* on the grounds that the action there concerned designation of critical habitat, not a decision to implement an RPA, a decision which “does far more than leave nature alone.” *Jewell*, 747 F.3d at 651-52.<sup>48</sup> The fact that some RPA actions have changed over the years, or have even been completed, also does not change the fact that there will be environmental impacts from the decision to adopt and implement the 2014 BiOp/RPA. See Seventh Supp. Complaint at ¶¶ 58-99 (describing environmental impacts from implementing the 2014 BiOp/RPA). Moreover, the regulation defining “major federal action” specifically includes “continuing activities” and projects that have been “entirely or partly financed, assisted, conducted, regulated, or approved.” 40 C.F.R. § 1508.18. And the Ninth Circuit has ruled that completed agency actions cannot moot a NEPA claim: if completing an action “were sufficient . . . an agency ‘could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine . . . .’” *Pit River Tribe v. Forest Serv.*, 469 F.3d 768, 786 (9th Cir. 2006). The relief NWF seeks for the agencies’ violations is still fully available—a declaration that they have failed to prepare an EIS for their decisions to adopt the 2014 BiOp/RPA and must do so.

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<sup>47</sup> The Corps and BOR also argue that NWF would have “limited” standing if it had sought to demonstrate an individual NEPA violation for a specific RPA. Fed. SJ Mem. at 68 & n.55. This argument is not germane. NWF did not challenge NEPA compliance for the implementation of individual RPA actions but the failure to conduct a NEPA review for the decision to adopt the 2014 BiOp’s RPA. NWF alleged a variety of environmental harms from adoption of the RPA, see Seventh Supp. Complaint at ¶¶ 58-99 (Dkt 1928), and while many of those harms also stem from individual RPA actions, see, e.g., *id.* ¶ 81 (alleging problems with the estuary habitat actions); ¶ 85 (alleging tributary habitat actions are far behind schedule and have failed to provide the predicted survival benefits), the agencies’ failure to consider alternatives to adopting the entire RPA is at the heart of NWF’s claim, NWF SJ Mem. at 59-60. NWF’s declarations also establish standing to pursue its NEPA claim. See, e.g., Third Declaration of Joseph Bogaard at ¶¶ 13-14; Third Declaration of Liz Hamilton at ¶¶ 14-16.

<sup>48</sup> The argument that preparation of an EIS is superfluous, Fed. SJ Mem. at 69 (citing cases), also was rejected in *Jewell*, 747 F.3d at 649-50 (“We cannot say that Section 7 of the ESA renders NEPA ‘superfluous’ when the statutes evaluate different types of environmental impacts through processes that involve varying degrees of public participation”).

B. Previous EISs Do Not Evaluate the Environmental Impacts of the 2014 BiOp/RPA.

The references in the 2014 RODs to several earlier NEPA documents cannot excuse the agencies from their failure to prepare an EIS for their decisions to adopt the 2014 BiOp/RPA. *See* NWF SJ Mem. at 56-60. The nine NEPA documents the Corps and BOR cite relate to projects and actions of varying types and scope over the last 25 years. This collection of NEPA documents cannot discharge the agencies' specific and present NEPA duty for their decisions to adopt the 2014 BiOp/RPA.<sup>49</sup> As the Corps and BOR themselves explain, the 2014 RPA is “an extensive suite of 74 [] actions addressing all factors that affect salmonid survival and recovery—hydrosystem, habitat (including predation), harvest and hatcheries.” Fed. SJ Mem. at 5. None of the NEPA documents the Corps or BOR cite, individually or collectively, address the environmental impacts of this “suite of 74 RPA actions,” nor do those documents consider alternatives to the agencies' overall approach. *See* 42 U.S.C. § 4332(2)(C)(i), (iii); 40 C.F.R. § 1502.14 (identifying and analyzing alternatives is “the heart of” the NEPA process).<sup>50</sup> The Corps and BOR next assert that each RPA is “independent” and not sufficiently “connected” to other RPAs to require analysis in a single EIS. Fed. SJ Mem. at 64-66. As noted above, however, the RPA actions are not stand-alone, independent measures, but a part of an integrated “suite” of actions that must all be implemented fully to avoid jeopardy. *See, e.g.*, Fed. SJ Mem. at 5 (the RPA “represents the most comprehensive, coordinated set of FCRPS operations and mitigation actions developed to benefit fish” to date). The Colville Tribe's related argument—that an EIS for each of the actions in the RPA would be “impractical and unwieldy,” Colville SJ

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<sup>49</sup> This haphazard collection of NEPA documents includes three EISs that at least considered outdated aspects of broader FCRPS management, but which are all well over ten years old: the 1992 Columbia River Salmon Flow Improvement Measures EIS (and a 1993 supplement), a 1997 System Operation Review EIS, and a 2002 Lower Snake River Juvenile Salmon Migration Feasibility Report/EIS. The remainder of the cited documents address site-specific projects that affect an individual piece of FCRPS operations or a subpart of an action included in the RPA. 2014 Corps AR 1 at 9; 2014 BOR AR 1 at Att. A (2010 ROD) at 9, n.8.

<sup>50</sup> The Ninth Circuit has held that even multiple prior EISs cannot discharge an agency's duty to comply with NEPA if those prior EISs do not actually address the impacts of, and alternatives to, the currently proposed action. *See Pit River Tribe*, 469 F.3d at 781-88.

Mem. at 32-35—fails for similar reasons. The analysis NEPA requires would address the effects of—and alternatives to—adopting the RPA’s “comprehensive coordinated set of actions.”<sup>51</sup>

Finally, the Corps and BOR argue that NWF has failed to identify any environmental impacts not addressed in one of the agencies’ prior NEPA documents. This is a strained argument at best: the NEPA documents they cite range from the more programmatic, but outdated, analyses from the mid-1990s to a narrow, site-specific 2014 EA for one RPA (47, Inland Avian Predation). These documents address very limited aspects of the 2008/2010/2014 RPA and/or very different FCRPS operations (e.g., the documents from 2002 and earlier). In addition, as NOAA is happy to opine in the 2014 BiOp, knowledge about habitat conditions, project operations, and many other environmental impacts have all changed significantly in recent years.<sup>52</sup> And there is no dispute that our understanding of the impacts of climate change has advanced since the preparation of the old EISs. Nor can the Corps and BOR claim that because some of their old EISs addressed a subject years ago, the documents are up-to-date and address environmental conditions now. *But see* Fed. SJ Mem. at 69 (making this claim). Indeed,

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<sup>51</sup> Moreover, because NMFS’s no-jeopardy finding is premised on the *aggregate* effects of all the actions in the RPA, whether the RPA measures are sufficiently “connected” to warrant consideration in a single EIS is simply not an issue. In a similar case, a district court has explained: “The ROD and the FEIS adopted and incorporated the BiOps’ RPMs as mitigation measures. Whatever nomenclature is applied to the relationship between the BiOps’ RPMs, the EIS, and the ROD, the end result is that they are inextricably intertwined as part of the same action to restore Trinity River fishery, which in turn requires they be analyzed in the same EIS.” *Westlands Water Dist. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1157, 1190-91 (E.D. Cal. 2002), *aff’d in part, rev’d in part & remanded on other grounds*, 376 F.3d 853 (9th Cir. 2004).

<sup>52</sup> Even in 2008, the Corps and BOR were touting the “significant changes” that have been made to the hydrosystem as a result of court remands. *See* 2008 Fed. SJ Mem. at 2-3 (Dkt 1559). To the extent the nine prior NEPA documents are relevant at all, at a minimum, they require extensive supplementation—which necessarily would amount to a new analysis—due to both their age and changes in the projects and environmental circumstances. *See* NWF SJ Mem. at 58-59; *see also* 40 C.F.R. § 1502.9 (requiring supplementation when either the environmental impacts have changed significantly or when the agency makes substantial changes that affect the environmental impacts); CEQ “Forty Most Asked Questions About NEPA” at Question 32 (indicating that an EIS more than five years old is presumptively stale), *available at* <https://ceq.doe.gov/nepa/regs/40/30-40.HTM#32>. Of course, NWF is not arguing that supplementation of these old documents can comply with NEPA. Both NEPA itself and *Jewell* require an EIS for the 2014 ROD decisions to adopt the 2014 BiOp/RPA.

they do not dispute that over 10,000 megawatts of new power generation has been added to the grid the FCRPS serves, *id.*, although their reply—that NWF “provide[s] no detail as to why [this] should alter the analyses,” *id.*, demonstrates the root of the problem: there has been *no* NEPA analysis of the environmental implications of these changes for current system operations at all. The argument that the new spill studies NWF cites are not “conclusive,” *id.*, even if true, would likewise only underscore the need to assess the current predicted environmental impacts of the decisions to adopt the 2014 RPA and any alternative courses of action.

C. NWF Does Not Have to Tell the Corps and BOR to Comply With NEPA.

Finally, the agencies try to blame their failure to comply with NEPA on NWF. According to the Corps and BOR, it was incumbent on NWF to inform the agencies of their legal duties under NEPA in earlier complaints or during non-NEPA comment periods. Fed. SJ Mem. at 62-64. But the Supreme Court and Ninth Circuit have consistently found that the primary responsibility for complying with NEPA rests with the agency, not with plaintiffs. *See, e.g., Ilio’ulaokalani Coa. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (quoting the Supreme Court in *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004): “the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA’s or EIS’ flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action”). The Corps’ and BOR’s novel assertion that NWF is responsible for informing the agencies of their NEPA duties in the first instance is based on an unsupportable reading of cases addressing whether plaintiffs had sufficiently raised specific flaws in a NEPA document *during a NEPA administrative process*, not whether plaintiffs must remind an agency to comply with NEPA at all. *See, e.g., N. Idaho Cmty. Action Network v. Dep’t of Transp.*, 545 F.3d 1147, 1156 n.2 (9th Cir. 2008) (finding that plaintiffs waived a specific complaint that DOT should have considered a “tunnel alternative” by failing to raise it during the NEPA review). The Corps and BOR do not cite—and NWF is not aware of—any decision that extends the holdings about the need to adequately raise a specific issue during a

NEPA process to the threshold question of whether NEPA applies to an agency's action.

To the contrary, the Ninth Circuit has long distinguished between specific challenges regarding the adequacy of an EA or EIS, and procedural challenges regarding an agency's failure to comply with its duties under NEPA. *See, e.g., Ilio'ulaokalani Coa.*, 464 F.3d at 1092 ("This court has drawn a distinction between situations in which NEPA plaintiffs submitted comments that did not alert the agency to their concerns ... and situations in which plaintiffs allege procedural violations of NEPA"). This distinction is rooted in *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1534 (9th Cir. 1997) ("*NEDC*"). There, the Ninth Circuit applied NEPA-waiver cases to conclude a plaintiff was not required to have previously raised a violation of the Northwest Power Act because "[w]hile it would have been preferable to raise the issue earlier, BPA had a duty to comply with public participation processes provided for in the Northwest Power Act regardless of whether participants complain of violations." *Id.* at 1535. Courts have subsequently used *NEDC* and its progeny to distinguish between failure to follow NEPA procedures (on the one hand) and specific flaws in a NEPA document (on the other). *See Ilio'ulaokalani Coa.*, 464 F.3d at 1092; *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 990 (N.D. Cal. 2002) (citing *NEDC* and noting that "the Forest Service has a duty to address cumulative action regardless of whether plaintiffs complain of violations").

Finally, even if the Court finds that NWF should have told the agencies NEPA applies to their actions (a finding it should not make for the reasons discussed above), NWF and others have sufficiently and repeatedly raised the substance of their NEPA complaint. As NWF has explained, applying NEPA will require the Corps and BOR to, among other things, consider a full range of alternatives to continued status quo operation of the hydrosystem under the RPA. NWF SJ Mem. at 59-60. The federal agencies' failure to consider these alternatives lies at the heart of NWF's NEPA claim. *See id.* at 60. The Corps and BOR cannot claim they lacked notice that both NWF and this Court have repeatedly stressed the need to consider alternatives to the inadequate measures in the 2014 BiOp/RPA and its predecessors. *See, e.g.,* NWF Comments on 2011 Progress Report p. 25 (Oct. 31, 2012) (Dkt. 1900) (quoting the Court's request that

Federal Defendants consider more aggressive actions such as dam removal); NWF Comments on 2014-2018 Draft Implementation Plan at 7 (Sept. 23, 2013) (urging Federal Defendants to “focus on implementation of alternative actions”); *see also NWF v. NMFS*, Opinion and Order of Remand at 5-13 (Oct. 7, 2005); *NWF v. NMFS*, 839 F. Supp. 2d at 1127-30. The agencies’ failure to “put two and two together”—that they need to consider alternatives to their current actions, and that they have a duty under NEPA to do so—cannot be blamed on NWF.<sup>53</sup>

### CONCLUSION

For all of the foregoing reasons, NWF respectfully asks the Court to deny the cross-motions for summary judgment by NOAA and its allied intervenors and to grant NWF’s motion for summary judgment by declaring that the 2014 BiOp violates the ESA and that the action agencies’ 2014 RODs violate both the ESA and NEPA.

Respectfully submitted this 6th day of April, 2015.

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<sup>53</sup> Indeed, the Ninth Circuit has specifically held that plaintiffs need not alert an agency that it violated NEPA or one of its implementing regulations to preserve a NEPA claim as long as they raised their general concerns in underlying NEPA proceedings (of which there were none here). *See, e.g., Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968 (9th Cir. 2006) (although plaintiff’s comments did not specifically articulate subsequently alleged NEPA violation, they sufficiently outlined concerns about the connected nature of two projects). Even where formal exhaustion requirements apply (and they do not here), there is no requirement that a party’s concern be stated with precision to be adequately preserved. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899-900 (9th Cir. 2002) (plaintiffs sufficiently raised NEPA argument that agency should have prepared one comprehensive EA or EIS because they “objected generally to the road density amendment” and the process used for adopting it).

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On April 6, 2015, I served a true and correct copy of the following documents on the parties listed below:

1. NWF’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants’ and Intervenors’ Cross-Motions;
2. Second Declaration of Brendan M. Connors; and
3. Second Declaration of Frederick E. Olney.

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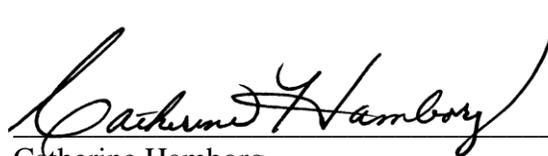
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