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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

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

No. 3:01-cv-00640-SI

JOINT RESPONSE OF NWF, OREGON AND THE NEZ PERCE TRIBE TO FEDERAL DEFENDANTS' OPENING BRIEF RE REMAND SCHEDULE

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, the State of Oregon, and the Nez Perce Tribe offer this joint response to Federal Defendants' opening brief regarding a schedule on remand. Federal Defendants' proposed NEPA schedule fails to acknowledge or address the fact that the FCRPS has been operating in violation of the law since at least December of 2000 and, under its current configuration and operation, the system is failing to avoid jeopardy to ESA-listed salmon and steelhead. The lethal conditions these fish faced in 2015 only underscore the urgency of this problem. Unfortunately, Federal Defendants' lengthy proposed schedule fails to offer a path to expeditious and concurrent compliance with both NEPA and the ESA as the law requires. The Court should reject Federal Defendants' proposed schedule for preparing an Environmental Impact Statement ("EIS") and, instead, adopt the schedule and reporting procedures described below which would achieve compliance with NEPA and the ESA no later than December 31, 2018.

BACKGROUND

Through five arbitrary and illegal biological opinions ("BiOps") over a period of almost 17 years, NOAA and the action agencies have avoided the changes necessary to comply with the ESA, a law Congress emphatically intended to protect species at risk of extinction "whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The Court's decisions to leave each of these inadequate biological opinions in place after rejecting them have not been implicit endorsements of the government's failures. They have been pragmatic attempts to use available legal tools to avoid making a bad situation even worse.[1] *See, e.g., Klamath-Siskiyou Wildlands*

[1] And, the Court did not simply leave the 2004 and 2008/2010 BiOps in place, it also enjoined the agencies to provide additional spill to help reduce, to at least some extent, the irreparable harm caused by FCRPS operations under the inadequate BiOps. *NWF v. NMFS*, Civ. No. 10-64-RE, Opinion and Order at 8 (June 10, 2005) (ECF No. 1015) ("As currently operated, I find that the DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made"); *id.* at 10 (granting plaintiffs' request to provide increased

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Ctr. v. NOAA, 109 F.Supp.3d 1238, 1241-42 (N.D. Cal. 2015) (although vacatur is the ordinary remedy under the APA, a court may, "in rare circumstances," choose not to vacate a flawed agency action if "vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error").

Under these circumstances, Federal Defendants' proposed schedule fails to reflect an appropriate sense of urgency to correct the "deficit situation," *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 850 F. Supp. 886, 900 (D. Or. 1994), in which ESA-listed salmon and steelhead in the Columbia basin have existed for far too long. Of course, the longer Federal Defendants take to complete a lawful BiOp and NEPA analysis, the longer these species will remain at risk. Rather than address this situation, Federal Defendants base their proposed schedule for preparing a programmatic EIS largely on EISs prepared on the agencies' own time line, not under a court order following repeated violations of the law and continuing high risk to ESA-listed species.[2] Their approach could postpone compliance with the environmental laws that govern FCRPS operations for a total of more than 20 years. Other agencies engaged in a similar pattern of violating the environmental laws, and under court order to comply with these laws, have produced comprehensive scientific analyses, a multi-agency draft and final programmatic EIS, complementary BiOps from both NOAA and the U.S. Fish & Wildlife Service, and records of decision—not in five years but in just *one*. *See* Record of Decision, Northwest Forest Plan at 1 (April 13, 1994) (describing schedule and process for preparing the

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spill); *aff'd* at 422 F.3d 782 (9th Cir. 2005); *see also NWF v. NMFS*, 839 F.Supp.2d 1117, 1131 (D.Or. 2011) (holding that "there is ample evidence in the record that indicates that the operation of the FCRPS causes substantial harm to listed salmonids .... As in the past, I find that irreparable harm will result to listed species as a result of the operation of the FCRPS" and ordering continuation of spill injunction).

[2] Even at the protracted pace the agencies propose—a "minimum of five years"—they also indicate that they may ask for still *more* time to comply with NEPA. Fed. Schedule Br. at 1, 6 & n. 2. The unstated scope of this implication is troubling to say the least.

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Northwest Forest Plan between April 2, 1993 and April 13, 1994), *available at* http://www.reo.gov/riec/newroda.pdf. The point is not that Federal Defendants can or must prepare a programmatic EIS and new BiOp within twelve months, but that their effort to comply with the law should be undertaken with an urgency commensurate to the scale of the problem they have created.

Unfortunately, Federal Defendants' schedule response both fails to reflect such a sense of urgency and, more fundamentally, fails to offer the Court a schedule that "concurrently compl[ies] with both Section 7 of the ESA and NEPA." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 648 (9th Cir. 2014), *cert. denied sub nom. Stewart & Jasper Orchards v. Jewell*, 135 S. Ct. 948 (2015), & *State Water Contractors v. Jewell*, 135 S. Ct. 950 (2015). Federal Defendants acknowledge this failure but propose no solution, implying instead that they will either produce a new BiOp without also complying with NEPA, or possibly seek to continue to operate under the current illegal BiOp for "a minimum of five years" until they hope to comply with both laws. Fed. Schedule Br. at 18-19. This proposed schedule for compliance with NEPA is inconsistent with the Court's Opinion and Order – including the Court's direction to prepare by March 1, 2018, a new BiOp that complies with the ESA – as well as the biological realities of this case. *See NWF v. NMFS*, No. 01-640-SI, Opinion and Order at 6-15, 148 (May 4, 2016) (ECF 2065) ("SJ Opinion and Order").[3] The most straightforward reading of the Court's Opinion contemplates preparation of a programmatic EIS on a reasonable schedule that would also dovetail with completion of a new BiOp by March 1, 2018.

[3] By asking the Court to disconnect the ESA and NEPA processes by at least three more years, well beyond the expiration of the illegal 2014 BiOp, Federal Defendants apparently are asking the Court to allow them to commit the same NEPA violation the Court just found with respect to the 2014 BiOp: adopting yet another BiOp (or extending the current one) without preparing an EIS that evaluates and considers a full range of reasonable alternatives. *See* SJ Opinion and Order at 140, 143, 144.

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Accordingly, after responding to a number of points in the Federal Defendants' opening brief, NWF, Oregon, and the Nez Perce Tribe discuss and describe below a reasonable schedule for preparation of a programmatic EIS on FCRPS operations and new BiOp that would extend a few months beyond March 1, 2018, yet is also a schedule the agencies could meet – and should be required to meet. Ensuring that Federal Defendants will meet such a schedule, however, will require regular reporting on progress to the Court, careful supervision of the remand process – and perhaps further clarification to Federal Defendants that business-as-usual operation of the FCRPS for an extended period in continuing violation of the ESA and NEPA is unacceptable.

ARGUMENT

I. THE COURT, NOT THE AGENCIES, SHOULD SET A SCHEDULE FOR A REMAND.

Federal Defendants' response regarding a schedule on remand seeks "a minimum of five years" to comply with NEPA. Fed. Schedule Br. at 1. It also attempts to caution the Court against setting any schedule the action agencies would view as too expeditious because these agencies are the experts in such matters and if the Court fails to heed their asserted expertise, they may not do a good job. *Id*. at 3-5, 17-18. This combined assertion of unique expertise beyond the ability of the Court to assess, and an implied threat of failure if the Court tries, is unwarranted and incorrect.

A. The Court Has Ample Authority To Set A Schedule For A Remand That Is Shorter Than The One The Agencies Propose.

Courts routinely set schedules for—and supervise—remands where agencies have violated the law, and they often do not defer to the agencies' schedule proposals. Where, as here, Federal Defendants have repeatedly violated the law since at least 2000, it is appropriate and necessary for the Court to set firm deadlines and provide ongoing supervision. In fact, Federal Defendants fail to cite or discuss the ruling most relevant to this point: the Court's 2005

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Order in this case remanding the 2004 BiOp. *See NWF v. NMFS*, No. 01-640-RE, Opinion and Order on Remand (Oct. 7, 2005) (ECF 1015) ("2005 Remand Order"). There, the Court denied Federal Defendants' request to either set no schedule on remand or to allow a minimum of two years for preparation of a new BiOp. *Id*. at 4. Much of the Court's discussion in that Order is fully applicable to the circumstances facing the Court today – except, of course, that more than a decade has gone by since that order without agency compliance with the law. As the Court said in 2005:

> [e]xperience, however, shows that the court should, and sometimes must, be more than a passive participant in the remand process. The many failures in the past have taught us that the preparation or revision of NOAA's biological opinion on remand must not be a secret process with a disastrous surprise ending. …Based on prior history and the experience of the last remand, it is clear that progress can only be made if the agencies understand exactly what is required of them.

Id. at 8. The fact that Federal Defendants are no closer today to compliance with the law than they were *in 2005* is the result of an intransigence that should no longer be tolerated. *See id*. at 4 ("I should not and will not, however, allow another loss of valuable time as occurred during the remand of the 2000 Biological Opinion (2000BiOp)"); *see also Seattle Audubon Society v. Evans*, 771 F.Supp. 1081, 1090 (W.D. Wa. 1991) ("[m]ore is involved here than a simple failure by an agency to comply with its governing statute") (granting an injunction and setting a one-year schedule on remand for completion of an EIS and new plan).

In fact, even apart from prior orders in this case, other courts have routinely set expeditious schedules for the completion of a remand under NEPA as well as the ESA. *See S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, CIV. S-06-2845 LKK, 2011 WL 1636235 at *4 (E.D. Cal. Apr. 29, 2011) (remanding for preparation of a new BiOp within six months because actions were "ongoing [and] without a sufficient BiOp, the possibility of

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irreparable harm to the species remains, and there is therefore some urgency in issuing the new BiOp"); *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1177 (W.D. Wash. 2004) (requiring agency to "initiate consultation with NMFS … within 60 days of the entry of this Order"); *Idaho Dep't of Fish and Game v. Nat'l Marine Fisheries Serv.*, 850 F. Supp. 886, 901 (D. Or. 1994) (establishing a 60-day deadline for completion of new biological opinion).

In a closely parallel situation which the Court has recognized, *see* SJ Opinion and Order (ECF 2065) at 143 (noting similarities to EIS and BiOps for the Northwest Forest Plan), the government prepared a new, comprehensive scientific analysis, a multi-agency draft and final EIS, completed consultation with both expert agencies under the ESA, and executed records of decision in one year, all in order to finally comply with multiple adverse court decisions and a second court-ordered remand resulting from these decisions. Record of Decision, Northwest Forest Plan at 1 (April 13, 1994) (describing schedule and process for preparing the Northwest Forest Plan), *available at* http://www.reo.gov/riec/newroda.pdf; *see also Seattle Audubon Society v. Moseley*, 798 F.Supp. 1494, 1498-99 (W.D.Wa. 1992), *aff'd*, 998 F.2d 699 (9th Cir.1993) (setting a thirteen-month schedule for compliance with NEPA on second remand that led to Northwest Forest Plan).[4] Even if the government were correct that the programmatic EIS it must

[4] Likewise in preparing a programmatic EIS for a comprehensive rule to protect more than 58 million acres of undeveloped National Forest land, the U.S. Forest Service completed scoping, a draft and final EIS, ESA compliance, and issued a record of decision in just over one year. *See* http://www.fs.usda.gov/roaddocument/roadless/2001roadlessrule/finalruledocuments. While this EIS process was not undertaken under court order or supervision, President Clinton did direct the Forest Service, in October of 1999, to develop options and analysis for permanently protecting all remaining roadless areas and soon thereafter, the agency published a scoping notice. *See* 64 Fed. Reg. 56,306 (Oct. 19, 1999). Over the ensuing 60-day scoping comment period, the agency conducted 187 public meetings and accepted more than 517,000 public comments, each an unprecedented number. After analyzing this input, some seven months later, the Forest Service published a draft Roadless Rule and associated draft EIS. *See generally* 65 Fed. Reg. 30,276

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now prepare for FCRPS operations, and the accompanying new BiOps, are more complex than those for the Northwest Forest Plan (which is unlikely since that process itself addressed the impacts of federal actions across millions of acres of forest on hundreds of terrestrial and aquatic species), there is no reason to think it should take upwards of five times as long to complete as the Northwest Forest Plan. Plaintiffs respectfully submit that in this case, and in light of the agencies' history of failed BiOps, an expeditious court-ordered schedule to bring the FCRPS into compliance with NEPA and the ESA is both necessary and appropriate to address the urgency the situation requires.

B. Neither The Facts Nor The Cases Federal Defendants Cite Justify The Lengthy Remand Schedule They Seek.

The EIS processes and cases Federal Defendants cite to support their request for a minimum of five years to comply with NEPA do not alter the need for a much more expeditious schedule than the one they propose.

First, the EIS processes the agencies cite in their brief and declarations were largely undertaken, not under court order following more than twenty years of legal violations, but pursuant to schedules set – and often extended – by the agencies themselves. *See, e.g.*, Declaration of David J. Ponganis at ¶¶ 21-27 (discussing two prior EIS processes, the System Operation Review EIS and the Lower Snake River Feasibility Study EIS). The former was completed under the agencies' own direction and while it purported to address court decisions that occurred during its development, the timing for the EIS was entirely within the agencies' control. *See* Corps AR at 55207-55210 (summary of process). The Lower Snake River

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(May 10, 2000). The agency followed its issuance of the DEIS with an extensive public outreach effort that included a 60-day comment period and about 430 public meetings across the country. 66 Fed. Reg. 3,244, 3,248 (Jan. 12, 2001). The Forest Service received approximately 1.1 *million* written public comments on the draft Rule and EIS – a record number at the time – which it managed to analyze and address in time to publish a final EIS on November 9 followed by a final rule on January 12, 2001. *Id*. at 66 Fed. Reg. at 3244.

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Feasibility Study EIS was initiated to assess dam operation or configuration changes during preparation of the 1995 BiOp, but because the timing of that EIS also was entirely within the Corps' control, the process extended years beyond issuance of the 1995 BiOp.[5] Federal Defendants also cite and discuss two additional EISs, one for the Central Valley Project ("CVP") and one for the Klamath River dams. *See* Declaration of Lorri Lee ¶¶ 2-12 (discussing CVP EIS and Klamath Facilities EIS). The Klamath EIS, like the two described in Mr. Ponganis's Declaration was prepared on the agency's own schedule and not under any court order or supervision. The CVP EIS was prepared pursuant to a court-ordered schedule that initially allowed some 32 months for its preparation (later extended based on actual progress the agency had made). The relevance of the agency-initiated EISs to the FCRPS context and court-ordered remand in this case is limited at best. And the schedule for the CVP EIS and its extension reflect the particular facts of that situation, facts that do not include a seventeen-year failure to comply with the law, the extensive material already available to Federal Defendants to help speed their work, or any evidence of actual progress towards complying with the law.

As the Court has recognized, "the 2014 BiOp process already has done much of the heavy lifting for an EIS, except for the consideration of reasonable alternatives, and this will serve to reduce the burden on the Action Agencies in preparing an EIS." SJ Opinion and Order

[5] It is worth noting that the alternative the Corps selected in that EIS – the so-called "Major System Improvements (Adaptive Migration)" alternative – is the strategy the agencies have been implementing since 2002, yet it is also a strategy that has consistently failed to comply with the law. *See* SJ Opinion and Order at 18-19 (finding that current approach of measures that minimize impacts to the hydropower system while focusing on speculative mitigation elsewhere has not produced success). Of the remaining alternatives considered in that EIS, only the dam breaching alternative qualifies as an "alternative measure[] that may increase the survival of juvenile anadromous fish through the Lower Snake River Project . . . and assist in the recovery of listed salmon and steelhead stocks." Corps AR at 59824 (Corps' statement of purpose and need for that EIS); *id*. at 59805 (Table ES-2, comparing alternatives, available in color at http://www.nww.usace.army.mil/portals/28/docs/environmental/lsrstudy/ExecutiveSummary.pdf.

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at 143. Indeed, there are numerous agency and other analyses going back many years that, while in need of thoughtful updating, are both relevant and useful. *See id.* at 50 (noting failure to use the ICTRT viability analysis); *see also, e.g.*, 2008 AR Doc. B.143 (Interim Report: Relative Magnitude of Human-Related Mortality Factors Affecting Listed Salmon and Steelhead in the Interior Columbia River Basin at 20-58 (May 4, 2006) (demonstrating that for many stocks, the hydrosystem is largest source of human-caused mortiality); Marmorek & Peters, Plan for Analyzing and Testing Hypotheses (PATH) Weight of Evidence Report (Aug. 1998) (2000 NOAA AR Doc.C312).[6] Even if these analyses need to be updated and adapted, and even if some new analyses need to be prepared, Federal Defendants are far from having to start from scratch.

Second, contrary to Federal Defendants' characterization of the case law, as noted above, it is well-established that courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Center for the Environment v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (upholding district court's imposition of "specific steps" on remand "in order to bring about any progress toward achieving the congressional objectives of the [Clean Water Act]" where the agencies had failed to meet these objectives for thirteen years); *see also ASARCO, Inc. v. Occupational Safety and Health Admin.*, 647 F.2d 1, 2 (9th Cir. 1981) (when fashioning a remand, the court "may adjust [its] relief to the exigencies of the case in accordance with the equitable principles governing judicial action."); *NWF v. NMFS*, 524 F.3d at

[6] To varying degrees, even the existing outdated or mismatched EISs that Federal Defendants invoked in their failed attempt to demonstrate compliance with NEPA in briefing the merits of this case can at least serve as a partial starting place to begin a new analysis. *See* SJ Opinion and Order at 123-27 (discussing these documents). For example, while the Court has identified the Lower Snake River Feasibility Study EIS as unequal in scope to an EIS for FCRPS operations, at least as it pertains to the Snake River, it could provide a foundation for an updated and more accurate analysis of a bypass/breach alternative for the four lower Snake River dams that does not require the agencies to completely reinvent the wheel.

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936-37 (upholding this Court's schedule and detailed remand order for 2004 BiOp). Indeed, when confronted with the same plea for deference from Federal Defendants in 2005, this Court rejected the notion that it would be:

> improper for me to issue an order that specifically identifies steps NOAA and the Action Agencies should take during the remand to produce a valid biological opinion, because to do so would inject the court into the deliberative process of the administrative agencies. I disagree. … Courts do defer to administrative agencies, and they should, and I have. Experience, however, shows that the court should, and sometimes must, be more than a passive participant in the remand process.

2005 Remand Order at 8 (Oct. 7, 2005), *aff'd* 524 F.3d 936-37. This observation is even more compelling nearly eleven years later.

Further, most of the cases Federal Defendants rely on to urge deference to their schedule are irrelevant to the question before the Court and do not in any way undermine its authority to set a remand schedule or to supervise the process. To the contrary, the cited cases and quoted passages are either incomplete or merely restate the applicable APA standard of review. *See, e.g.*, Fed. Schedule Br. at 3-5 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) and *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 376-77 (1989) (both reciting APA arbitrary and capricious standard for review of merits but not addressing the court's authority to set the terms of a remand following a decision on the merits); *id.* at 4 (citing *Center for Biological Diversity v. Bureau of Land Management*, 35 F. Supp. 3d 1137, 1154 (N.D. Cal. 2014); *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987); *Oil, Chemical, and Atomic Workers Union v. Occupational Safety and Health Administration*, 145 F.3d 120, 123 (3d Cir. 1998) (all reviewing claims seeking to compel agency actions "unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1), which is not the situation here). Here, the Court has already held that the agencies' decisions violate the ESA and NEPA, and the issue is how –

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and how expeditiously – to remedy these violations. Whatever deference may be applicable in considering the agencies' decisions on the merits, or in assessing an unreasonable delay claim, it does not apply at the remedy stage. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 799 (9th Cir. 2005) (holding that after the district court rejected a BiOp on the merits, "there was no formal agency finding to which deference might arguably be owed" and upholding this Court's injunction).

Federal Defendants' citation to *Delta Smelt Consol. Cases*, No. 1:09-CV-00407 OWW DL, 2011 WL 1740308, at *6-7 (E.D. Cal. May 4, 2011) (cited in Fed. Schedule Br. at 4, 17), does not change either the scope of the Court's authority with respect to a remand or the need for an expeditious schedule and close Court oversight. It simply reflects a different district court's exercise of its equitable discretion in a different case. The history of the *Delta Smelt* litigation at the time of the district court's order was neither so long, nor were the agencies' failures to comply with the law so pervasive. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 863 (E.D. Cal. 2010), *aff'd in part, rev'd in part sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014) (explaining the procedural history of the consolidated delta smelt cases which at the time included only one prior illegal BiOp). And even then, the agencies were proposing a schedule of some 30 months to comply with NEPA, *Delta Smelt Consol. Cases*, 2011 WL 1740308, at *5, essentially the same amount of time proposed below. This case neither requires deference to Federal Defendants' proposed schedule nor justifies "a minimum of five years" for compliance with NEPA. Likewise Federal Defendants' cautionary citation of *Jewell*, 747 F.3d at 605-06 (cited in Fed. Schedule Br. at 18), overlooks at least two critical facts: (1) nothwithstanding the Ninth Circuit's concern with the organization and readability of the BiOp there, it concluded that it was not arbitrary, capricious

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or contrary to law, *id*. at 606, a result that has eluded Federal Defendants in this case regardless of the time allowed; and, (2) the abbreviated schedule the court criticized in *Jewell* was just for a BiOp, *id*., a document the Court here has already allowed Federal Defendants nearly twice as long to complete (a schedule we propose below could be extend by several more months in order to converge with the NEPA process). In short, neither case serves as a bar to a much more expeditious schedule than the one Federal Defendants propose; nor do they limit in any way the Court's authority to set such a schedule or supervise progress under it.

Finally, Federal Defendants' citation to *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), is especially unpersuasive, Fed. Schedule Br. at 3, because the Court already rejected the same interpretation of this case in its 2005 Remand Order. *Compare id. with* Oct. 7, 2005 Remand Opinion and Order at 8-9 (noting that Federal Defendants "cite[] to *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp*., 423 U.S. 326, 333 (1976), for the proposition that in the absence of "substantial justification," a court should not dictate to an administrative agency 'the methods, procedures, and time dimension' of the remand."). As the Court correctly concluded then "the history of NOAA's failures to comply with the ESA[] constitutes 'substantial justification' for a process that is somewhat detailed and monitored by the court." *Id*. at 9 (*aff'd* at 524 F.3d at 937). Federal Defendants' "history of … failures" by 2005 was more than enough to justify judicial direction and close supervision in that remand; it is an even more compelling justification for such direction and close supervision of yet another remand eleven years later.

II. FEDERAL DEFENDANTS CAN COMPLY WITH NEPA AND THE ESA BOTH CONCURRENTLY AND EXPEDITIOUSLY.

As noted above, the Court's Opinion and Order plainly contemplates parallel, coordinated compliance with both NEPA and the ESA, with the latter to be completed by March

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1, 2018, almost two full years after the Court's decision. The "reasonable schedule" the Court requested for complying with NEPA thus should set out a path for a coordinated NEPA/ESA process that is both expeditious and concludes concurrently, but Federal Defendants have entirely failed to offer such a path. NWF, Oregon, and the Nez Perce Tribe therefore provide this roadmap below.

A. The Court Should Closely Monitor the Progress of the Remand

First, as the Court concluded in its 2005 Remand Order, the Court here should closely monitor progress of this remand by requiring regular bi-monthly or quarterly reporting to both the Court and the parties, and by scheduling status conferences as necessary to address any issues that may arise in the course of the remand. *See* 2005 Remand Order at 11-13 (describing remand supervision requirements). These measures are well within the Court's authority, especially where, as here, the agencies have demonstrated a pattern of legal violations. *See id.* at 8-10; *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381 (W.D. Wash. 1992), *aff'd sub nom. Alaska Ctr. for Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994) ("Retaining jurisdiction to ensure compliance with the court's order is within the court's equitable discretion to fashion appropriate relief"); *Friends of the Wild Swan v. United States Forest Serv.*, 910 F. Supp. 1500, 1509 (D. Or. 1995) (ordering Forest Service to submit report on its progress in complying with obligation to provide protection for bull trout by specific date); *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992) (ordering the Bureau of Land Management to "submit to this court within 30 days … a timetable for completion of [an environmental review document] or its functional equivalent" and then the court "will thereafter promulgate a timetable for completion … and issue an order to the BLM to comply with the terms"), *aff'd*, 998 F.2d 705 (9th Cir. 1993).

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B. Scoping

Federal Defendants are correct that the first formal step in preparing an EIS is publication of a brief "scoping notice" for the proposed EIS in the Federal Register in order to solicit public input about "the scope … and the significant issues to be analyzed in depth" in the EIS. 40 C.F.R. § 1501.7 (a)(1). The agencies have failed to identify any reason such a notice cannot be prepared and published by **September 30, 2016**. Federal Defendants also are correct that NEPA and its implementing regulations require a public comment period following the scoping notice. While the comment period for scoping can be shorter, we believe a 90-day comment period would be appropriate and we welcome Federal Defendants' proposal for public hearings on the scoping notice during this comment period. Under this schedule, the scoping process would require approximately six months and be completed by **January 1, 2017**.[7]

The scoping process is not, however, the only activity Federal Defendants should be engaged in during this period. First, as Federal Defendants point out, the action agencies can and should begin work on a draft EIS during the scoping period. Fed. Schedule Br. at 8. In addition, in order to prepare a new BiOp and programmatic EIS for FCRPS operations in an expeditious and concurrent manner, NOAA must use this period to develop and describe a new jeopardy framework and appropriate analytical steps, consistent with the Court's Opinion and Order, that it and the action agencies can refine and employ in developing and evaluating the alternatives in a draft EIS. The Court should require NOAA to submit its proposed draft jeopardy framework and analytic approach to the Court and parties by the end of the comment period for scoping as part of the remand reporting process described above.

[7] This is longer than the scoping process for the Klamath EIS but shorter than the one for the CVP EIS discussed in the Declaration of Lorri Lee. *See* Lee Declaration at ¶ 22a. It also does not account for the additional two months since the Court issued its opinion on May 4, 2016, time the agencies should have been using to at least begin the scoping process.

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C. Draft EIS

Federal Defendants also are correct that the next step in the NEPA process is preparation and publication of a draft EIS. Fed. Schedule Br. at 8. The draft EIS will need to articulate and evaluate the impacts of a range of reasonable alternatives for operating the FCRPS in a way that avoids jeopardy to ESA-listed salmon and steelhead and otherwise complies with all applicable laws.

Components of some of these alternatives for a NEPA analysis are already apparent, such as bypassing the four lower Snake River dams, *see, e.g.*, 2000 BiOp at 9-5 (acknowledging that this measure would "provide more certainty of long-term survival and recovery than would other measures," but stating that it was not a necessary measure based on the belief that the agencies could avoid jeopardy through other actions – the failed approach of the last 16 years); *see also supra* at 8 & n.5 (discussing Lower Snake River EIS). Other options, such as increasing spill levels during the spring juvenile migration season to revised total dissolved gas caps, as proposed by Oregon and others, *see* Comparative Survival Study, 2013 Annual Report (NOAA 2014 AR B.408); ISAB, Review of the Proposed Spill Experiment (ISAB 2014-2) (Corps 2014 AR 21029), drawing down John Day or other reservoirs during juvenile migration season to increase water travel time, *see* 1995 BiOp at 109-10 (RPA #5) (2014 NOAA AR Doc. B273), or increasing river flows to meet specific minimum flow targets on a weekly basis during the migration seasons, *id.*, Attachment 1 (Basis for Flow Objectives for Operation of the Federal Columbia River Power System at 9-12) (2014 NOAA AR Doc. B273 at 23,902), may well also warrant development and evaluation, even if some of them may require additional regulatory changes or steps to implement. And as Federal Defendants note, it may be appropriate to consider some of these measures in combination with each other and with other mitigation measures. *See* Ponganis Declaration at ¶¶ 12-14.

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In order to develop and present this range of alternatives, and accurately and objectively assess their environmental and other impacts, the government may well need to contract for, update, or prepare analyses of market and non-market economic effects, effects on power generation, and other issues in addition to evaluating the direct, indirect and cumulative environmental impacts of the alternatives. As noted above, however, for many of these analyses, the government has existing studies as a starting point and does not need to start from scratch across the board. For reasons including the above, preparing a thorough draft programmatic EIS may be the most time consuming step in the NEPA process, *see* Fed. Schedule Br. at 8, and the agencies may need a total of almost seventeen months from now – until **November 30, 2017** – to prepare and publish such a draft (assuming effective use of the scoping period to begin work on the analyses for a draft EIS, *see id*.).

Moreover, preparation of a draft should proceed in coordination with further work on consultation under the ESA. It would thus be appropriate for the Court to direct submission of a draft biological opinion concurrently with or soon after publication of a draft EIS. *See* 40 C.F.R. § 1502.5 (requiring EIS to be prepared "early enough so that it can serve practically as an important contribution to the decision-making process"); *id.* at § 1502.25(a) (requiring agencies to "prepare draft environmental impact statements concurrently with and integrated with … analyses and related surveys and studies required by … the Endangered Species Act…."); *see also* SJ Opinion and Order at 143 (citation omitted).

Again, a public comment period of 90 days on the draft EIS, until **March 1, 2018**, can and should follow its publication. And again, we welcome Federal Defendants' offer of public hearings and believe they would be appropriate to facilitate public engagement and comment.

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D. Final EIS and New BiOp

As Federal Defendants indicate, following the close of comment on the draft EIS, the agencies must review the comments they receive and prepare a final EIS. The release of a Final EIS should be closely contemporaneous with release of a new BiOp. NOAA and the action agencies should complete these steps no later than **December 31, 2018**, the date on which the agencies indicate the current, illegal BiOp will expire.[8] Formal records of decision from the action agencies would ordinarily follow a final EIS and BiOps in 30 to 60 days.

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The schedule proposed above allows Federal Defendants as much as two and one half years from July 2016 to complete a programmatic EIS and new BiOp, and nearly three years from the date of the Court's Opinion and Order. This is some ten months longer than the date for a new BiOp set by the Court, but even this schedule could be shortened by several months simply by shortening the time for preparing a scoping notice, draft EIS and/or final EIS and public comment periods by 30 days each. This schedule proposal provides a clear path for integrating compliance with NEPA and the ESA and avoids the fundamental flaws of the Federal Defendants' proposal which would require either a new BiOp when the current illegal one expires in the absence of compliance with NEPA, or a significant and unanalyzed extension of the inadequate 2014 BiOp. It is a reasonable and appropriate schedule given the biological realities of this case for the listed species, and in light of other court-ordered schedules in similar situations, including this case itself. In short, NWF, Oregon, and the Nez Perce Tribe urge the Court to adopt the schedule set out above, or one that is even shorter, for compliance by Federal

[8] As Federal Defendants note, for the CVP EIS, they were able to "progress from a draft to a final EIS in just four months because of a looming court deadline to complete the NEPA process." Lee Dec. ¶ 10. The schedule we propose allows more than twice as much time for this step but could be several months shorter.

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Defendants with both NEPA and the ESA.

III. APPROPRIATE INJUNCTIVE RELIEF UNDER NEPA AND THE ESA.

This Court, in explaining its intent to set a reasonable schedule to comply with NEPA, also invited the parties to address the scope of any appropriate injunctive relief. SJ Opinion and Order at 146. NWF, Oregon and the Nez Perce Tribe address the potential need for injunctive relief under both NEPA and the ESA below.

A. Injunctive Relief Under NEPA

One of the fundamental tenants of NEPA is that federal agencies cannot take actions that prejudice the consideration of alternatives in a NEPA process. *See* 40 C.F.R. § 1502.2(f) ("Agencies shall not commit resources prejudicing selection of alternatives before making a final decision"); 40 C.F.R. § 1506.1 (Until an agency issues a record of decision, no action may be taken which would "have an adverse environmental impact" or "limit the choice of reasonable alternative"); *Metcalf v. Daley*, 214 F.3d 1135, 1143-44 (9th Cir. 2000) (an agency entering into a contract prior to preparing an EIS "might be subject to at least a subtle bias" and therefore "eliminate the opportunity to choose among alternatives").[9]

Here, NWF, Oregon, and the Nez Perce Tribe are aware that Federal Defendants are proposing additional capital spending for the FCRPS, including refurbishing turbines, upgrading lock facilities, and completing other capital projects at the four Lower Snake River dams. *See, e.g.*, http://www.nww.usace.army.mil/Media/NewsReleases/tabid/2614/Article/648083/16-002-corps-awards-2-navigation-lock-repair-contracts-work-to-occur-during-sys.aspx;

[9] It is a practical reality "that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project." *Sierra Club v. Marsh*, 872 F.2d 497, 500–01 (1st Cir. 1989) (Breyer, J.); *see also N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (noting that "[b]ureaucratic rationalization and bureaucratic momentum are real dangers to be anticipated and avoided"); *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (same).

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http://www.nww.usace.army.mil/Media/NewsReleases/tabid/2614/Article/721002/16-017-corps-awards-turbine-repair-contract-turbine-removed-after-20-years.aspx (both describing work on these dams that already has begun or is soon scheduled to begin). These and other planned investment in the four Lower Snake River dams alone will cost tens of millions (if not more than one hundred million) dollars in federal tax- and rate-payer funds during the next several years, expenditures that may be unnecessary, or that may be more appropriately used for other actions, depending on the outcome of the agencies' NEPA analysis. If Federal Defendants continue to make these capital expenditures now and over the course of the remand, it may prejudice future consideration of alternatives in the NEPA process.

For this reason, NWF, Oregon and the Nez Perce Tribe are carefully considering seeking the most basic of NEPA injunctions: that the Court enjoin the Corps and Bureau of Reclamation from taking specific actions that would prejudice the consideration of alternatives in the NEPA process. To fully evaluate the scope of, and need for, such a request, however, plaintiffs may seek to informally confer with Federal Defendants about the exact nature and purpose of their spending plans and/or undertake more formal but limited written discovery. We do not anticipate that this effort will require more than 90 days. Based on the results of this effort, we may seek injunctive relief from the Court under NEPA with respect to specific proposed actions in order to ensure the integrity of the EIS process.

B. Injunctive Relief Under the ESA.

As the Court is aware, following the Court's rejection of the 2004 BiOp, NWF sought a permanent injunction to better protect listed salmon and steelhead pending compliance with the ESA. The Court granted, in part, and denied, in part, those requests. The centerpiece of the Court's injunction was ordering additional spill at the eight mainstem Columbia and Snake River dams during the spring and summer salmon migration seasons. *See NWF v. NMFS*, Civ. No. 10-

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64-RE, Opinion and Order at 10 (June 10, 2005) (ECF No. 1015); *NWF v. NMFS*, 839 F.Supp.2d at 1131. That spill has been provided in every year since, even though the 2014 BiOp indicated that the agencies may elect to curtail spill levels in the future. *See, e.g.*, 2014 BiOp at 39 (Figure 1.3-1 and n.4).

NWF, Oregon and the Nez Perce Tribe are currently reviewing the most recent information on population status and trends, changes in environmental conditions, and actions the Federal Defendants could take to better protect both juvenile and adult salmon and steelhead pending compliance with the ESA and NEPA. As this Court observed, "[e]ven a single year with detrimental climate conditions can have a devastating effect on listed salmonids." SJ Opinion and Order at 15. Last year's drought, low flows and high temperatures resulting in significant mortality to ESA-listed sockeye salmon only highlight the need for additional protections for these species as soon as possible. Accordingly, we are presently evaluating whether to seek additional injunctive relief regarding FCRPS operations, particularly for the period beginning in 2017 and continuing to the completion of a new BiOp and NEPA analysis, in order to avoid unnecessary harm to both juvenile and adult fish. Our review of measures to better protect the species pending compliance with the law will include, but not be limited to, the need for additional spill, changes to in-river vs. transport operations, and measures that would provide cooler water temperatures to both juvenile and adult salmon during their migrations.[10] We anticipate being in a position to request such relief, if necessary, concurrently with any request for injunctive relief under NEPA.

If plaintiffs conclude that a motion for injunctive relief under NEPA, the ESA, or both is

[10] This may, for example, include re-examination of implementing measures previously identified in the water quality implementation plan prepared in conjunction with the 2000 BiOp, a plan that largely has been abandoned by the action agencies even though it contains potential measures to improve water quality and avoid water quality standard violations.

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necessary, we will promptly ask the Court to set a schedule for such a motion that allows sufficient time both for its presentation and for the Court to resolve any such motion in a manner that would allow implementation of any relief the Court may grant for the 2017 juvenile migration season.

CONCLUSION

NWF, the State of Oregon, and the Nez Perce Tribe respectfully request that the Court establish a schedule for concurrent compliance with both NEPA and the ESA, as described above, by December 31, 2018, the date on which the current illegal BiOp will expire, or even sooner. Given the history of this case and the urgent biological realities underlying it, this is a more than reasonable schedule for achieving compliance with both laws and returning FCRPS operations to the right side of the law where they have not been for far too long.

We also suggest that the Court set a status conference as soon as convenient for the Court following submission of Federal Defendants' reply in order to address the schedule on remand and related issues.

Dated: June 17, 2016

Respectfully submitted,

/s/ Todd D. True

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, I electronically filed the foregoing *Joint Response of NWF, Oregon and The Nez Perce Tribe to Federal Defendants' Opening Brief Re Remand Schedule* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants. I further certify that the following additional counsel were served via method(s) indicated:

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