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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants,

and

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.

Case No. 3:01-cv-0640-SI

NORTHWEST RIVERPARTNERS' MOTION FOR LEAVE TO FILE BRIEF RE PROPOSED NEPA SCHEDULE

MOTION FOR LEAVE TO FILE BRIEF RE NEPA SCHEDULE

Northwest RiverPartners ("RiverPartners") seeks leave to file the attached brief concerning the time necessary to complete the Court's National Environmental Policy Act ("NEPA") remand. The Court's May 4, 2016 Opinion and Order directed the Federal Defendants and Plaintiffs to submit briefs addressing the proposed time frame necessary to complete the Court's NEPA remand.

RiverPartners submits that the Court would benefit from receiving input from other interested parties, including the views of the energy sector represented by RiverPartners, who obviously hold a keen interest in the forthcoming public process that will be convened as a result of the Court's remand order. RiverPartners intends to participate fully in that process and has expectations and strongly held views about what that process will and will not encompass. The attached memorandum articulates those views and advocates for the lengthier process proposed by the federal government.

Pursuant to LR7-1(a), the undersigned counsel certifies that she contacted counsel for Plaintiffs and Federal Defendants. Federal Defendants take no position. As of the filing of this motion Plaintiffs have not responded. Intervenor-Plaintiff, the State of Oregon does not oppose this motion.

Dated: July 1, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 5 and Fed. R. Civ. P. 5(d), I certify that on July 1, 2016, the foregoing document will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all Parties enrolled to receive such notice. The following will be manually served by first-class U.S. mail:

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NORTHWEST RIVERPARTNERS' RESPONSE TO COURT'S REQUEST FOR PROPOSED SCHEDULE ON REMAND

I. INTRODUCTION

Northwest RiverPartners ("RiverPartners") hereby submits this response to the Court's request for a proposed schedule for the completion of the remand ordered by the Court.

For the reasons discussed below, the Federal Defendants' proposed schedule of five years to complete the NEPA process is reasonable and appropriate given the comprehensive scope and nature of the reasonable and prudent alternative ("RPA") for the Federal Columbia River Power System ("FCRPS"). The Court's summary judgment order at Docket No. 2065 (the "Order") requires a comprehensive look at the environmental impacts of the operation and maintenance of 14 hydropower dams in four states, which affects (directly or indirectly) thousands of river miles and a 260,000-square-mile drainage basin, and provides essential carbon free power generation, navigation, flood control, recreation and irrigation functions to the entire Pacific Northwest region. The comprehensive NEPA analysis also must address the 73 measures in the FCRPS Biological Opinion ("BiOp") and their synergistic effect on the listed salmonids and critical habitat at issue.

Development and consideration of alternatives that are both reasonable and feasible will require the participation of all of the tribal, state, local, federal and private stakeholders affected directly or indirectly by the operation of the FCRPS, and must provide for adequate public involvement. It is entirely reasonable for the Federal Defendants to conclude that this comprehensive look and detailed consideration of alternatives (and associated environmental impacts) will take at least five years to develop.

The truncated schedule proposed by Plaintiffs is premised on the faulty assumption that dam removal and more spill are the only alternatives that need be addressed, when applicable Ninth Circuit case law would hold the reverse. In fact, neither dam removal nor spill at

significantly higher levels are reasonable and feasible alternatives to the on-going operation of the federal hydro-system- the most important carbon-free energy resource in the Pacific Northwest. For this reason, and because Plaintiffs' truncated schedule sets the Federal Defendants up for failure by not affording the government the necessary time to conduct the comprehensive analysis required by the Court's remand order, RiverPartners respectfully urges the Court to adopt the five year time frame requested by the federal defendants.

II. DISCUSSION

A. The Federal Defendants' Proposed Schedule Is Reasonable in Light of the Comprehensive NEPA Analysis Required by the Order.

The Court's Order instructs the Federal Defendants to produce a single comprehensive environmental impact statement ("EIS") governing the suite of mitigation measures that are part of the RPA for the FCRPS. Order at 127-30. The Court reached that conclusion because the "threats facing the listed species and the required responses are 'simply too interconnected' to have any response other than a response of a 'suite' of 'all-H' measures," including measures to address threats associated with "habitat, hatchery, harvest, and hydropower" impacts. Order at 128 (quoting Federal Defendants' merits briefing). Recognizing that the RPA "actions are broad and diverse, and include actions such as restoring habitat, regulating fish harvest, implementing operational measures such as spill requirements and surface weirs, and killing DCCO to reduce avian predation," the Court emphasized that the individual RPA measures must operate "synergistically" to address all these risk factors. Order at 127-29. The Court then ordered the Federal Defendants to evaluate this comprehensive suite of measures in a single EIS that can provide "the opportunity to meaningfully consider programmatic alternatives." Order at 132.

The Federal Defendants' proposed schedule is reasonable (if not overly optimistic) in light of the scale of the task imposed. This Court's Order contemplates the evaluation of these

impacts along with the necessary measures to reduce those impacts (Order at 128) in a massive geographic area reaching outward to the fisheries and species in the Pacific Ocean. For example, the current harvest biological opinion relies on the same jeopardy analysis and the same 73-part RPA to avoid jeopardy as the FCRPS BiOp. In order to have a comprehensive "All H" and complete process as the Court envisions, and to ensure that the two linked BiOps and their synergies are fairly addressed, harvest needs to be considered to avoid a balkanized, piecemealed approach. Ratepayers are currently spending billions of dollars to achieve modest survival improvements at all life stages with the goal of increasing the abundance and productivity rates of natural spawning salmonids. Harvest obviously is a major factor in the salmon's lifecycle, which directly affects their ability to return to their natal rivers and spawn and logically must be part of any comprehensive EIS. *See* Order at 130-40 (connected actions and cumulative effects must be considered in single EIS). Indeed, the Court's concern about climate change also argues for a comprehensive, all H approach to the NEPA analysis to help identify a suite of actions that can be swiftly implemented.

Conducting a properly designed and comprehensively scoped NEPA process spanning a large geographic area and covering the full gamut of the "4Hs" is a daunting task that will take time to be done correctly. Unlike the forest management plans or land resource management plans cited by Plaintiffs, where the federal agency has complete control over the relevant geographic landscape, the action agencies here are far more constrained. The action agencies cannot dictate solutions for habitat, hatchery or harvest (or even hydropower as there are many dams on the Columbia River and its tributaries that are not under federal control). Instead, they must engage multiple stakeholders such as the States, tribes, counties, local governments, public utilities, corporations and private individuals who control those activities. The schedule

proposed by the Federal Defendants builds in the necessary time for the federal agencies to work with these other stakeholders and should be approved on this basis.

B. Plaintiffs' Truncated Schedule Is Erroneously Premised on the Consideration of Alternatives That Are Neither Reasonable nor Feasible.

Plaintiffs attempt to minimize the effort involved in developing and evaluating reasonable alternatives by claiming that "[c]omponents of some of these alternatives for a NEPA analysis are already apparent, such as bypassing the four lower Snake River dams," or "increasing spill levels during spring juvenile migration season" to levels that violate water quality standard under the federal Clean Water Act ("CWA"). *See* Dkt. 2074 at 15. Indeed, Plaintiffs are so confident that bypass or removal of the lower Snake River dams is an appropriate alternative[1], to the point of threatening a motion for injunctive relief to stop maintenance and repair activities on the lower Snake River dams to ensure that the Corps does not prejudice the future NEPA process and its consideration of an alternative that would remove one or more of those dams at a later date. *Id*. at 23-24.[2]

These arguments incorrectly prejudge that dam removal and increased spill are reasonable alternatives that merit detailed consideration in an EIS. The appropriate scope of alternatives, of course, must await the results of the NEPA scoping process and cannot be determined by this Court at this time, in advance of the public administrative process that has yet

[1] It is noteworthy that Plaintiffs focus exclusively on the lower Snake Dams which affect, at most, only four out of ten Evolutionary Significant Units (Snake River Spring/Summer Chinook. Snake River Fall Chinook, Snake River Sockeye, and Snake River Steelhead. *See* 2008 NOAA Record C1155 at 39 (Snake River dam breaching only benefits 4 ESUs). The fact that Plaintiffs place so much emphasis on the lower Snake dams has more to do with politics than salmon recovery.

[2] Moreover, the repair activities on the lock system and the upgrades to the turbines have independent utility under NEPA and are plainly not harming listed salmonids. Plaintiffs have no basis for seeking an injunction against these routine and operationally necessary activities.

to be convened. However, removal or bypass of the lower four Snake River dams is not now, and never has been, a reasonable alternative to the maintenance and operation of the FCRPS. Nor is setting spill at levels that violate water quality standards under the CWA.

Dam removal is not a reasonable or feasible alternative for the maintenance and operation of the FCRPS because that alternative requires congressional authorization (and funding) which is very unlikely to ensue. Agencies are neither required to consider all conceivable alternatives, nor those that are speculative, just those that are reasonable and feasible and consistent with the purpose and need of the proposed action.

In some circumstances, an alternative requiring congressional approval could be reasonable and feasible. The Court's Order in this case correctly cites NEPA regulations explaining that an EIS "shall" "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency" (40 C.F.R. § 1502.14(c)) and CEQ guidance explaining that "[a]lternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable" (Order at 136-37 (citing CEQ Frequently Asked Questions)).

However, the Ninth Circuit has repeatedly construed this requirement *narrowly*, and controlling precedent requires agencies to give detailed consideration to alternatives that require congressional approval only in "very rare circumstances." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208-09 (9th Cir. 2004) (internal quotation marks and citation omitted). This follows directly from the fact that NEPA requires consideration of only *reasonable* alternatives, and courts "'do not suppose Congress intended an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, the repeal of the antitrust laws.'" *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1984) (quoting *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)). In considering whether

an alternative requiring congressional approval is reasonable, courts "may certainly take into account the strength and vitality of legislation that forbids it." *Id.* Alternatives that are not "ascertainable and reasonably within reach" or present "significant feasibility issues" may be dismissed in an EIS without detailed consideration. *Protect Our Communities Found. v. Jewell*, Nos. 14-55666, 14-55842, 2016 WL 3165630, at *6 (9th Cir. June 7, 2016) (internal quotation marks and citation omitted).

Applying these principles, the Ninth Circuit affirmed a decision by an agency to decline to consider the alternative of seeking additional funding from Congress based on an "informed understanding" that Congress was not willing to fund such an alternative. *City of Sausalito*, 386 F.3d at 1120. Likewise, the Ninth Circuit affirmed a decision not to consider an alternative that would require an amendment of the CWA because such a result is "substantially remote from reality." *Kilroy*, 738 F.2d at 1454. And, the Ninth Circuit affirmed an agency decision to decline to consider a land exchange alternative that would require legislation because Congress was unlikely to reverse its prior decision. *City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 & n.2 (9th Cir. 1986).

This reasoning applies with equal force in the context of dam removal. The decision to leave the FCRPS in place and to operate the dams as a unit is within the exclusive province of Congress. *See National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1179 (9th Cir. 2004)(the Corps is not required to take action that would nullify the purpose of the Columbia River federal dams, including forgoing water impoundment and power generation, which, in practical effect is similar to removing the dams, which can only be authorized by Congress.). Indeed, "[d]am removal will in most proceedings not be considered a reasonable alternative by anyone," because "[d]ams, and the reservoirs they create, usually serve a variety of

non-power public purposes, such as flood control, irrigation, and recreation." *Am. Rivers v. FERC*, 201 F.3d 1186, 1201 (9th Cir. 1999) (brackets in original; quotation and citation omitted). Moreover, as the D.C. Circuit explained when considering alternatives to a congressionally approved dam construction project, "[w]hen Congress has enacted legislation approving a specific project, the implementing agency's obligation to discuss alternatives in its environmental impact statement is relatively narrow." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 372 (D.C. Cir. 1981). That is so because under NEPA's "rule of reason" congressional action "ha[s] a bearing on what is considered a reasonable alternative." *Id.* (quotations and citation omitted).

In the case of the lower Snake River dams, the history of congressional action makes it unreasonable to assume that Congress would authorize removal of the dams. Congress authorized the construction of the lower four Snake River dams in the River and Harbors Act of 1945, Pub. L. No. 79-14, 59 Stat. 10. The purpose of the dams was to provide "slack water navigation and irrigation," to develop the basin's transportation and agricultural network; power generation was a secondary function. 59 Stat. at 21. Those projects continue to serve those vital functions. Currently, about 9 million tons of cargo worth $3 billion transit annually through locks on the Snake-Columbia River inland navigation system, including about 40 percent of the nation's wheat.[3]

Since their initial construction, Congress has repeatedly affirmed the need for and utility of those dams, and has consistently provided funding for both their maintenance and upkeep, and

[3] *See* Press Release, U.S. Army Corps of Engineers, Corps awards 2 navigation lock repair contracts; work to occur during system-wide 2016-2017 extended lock outage (Feb. 1, 2016), http://www.nww.usace.army.mil/Media/News-Releases/Article/648083/16-002-corps-awards-2-navigation-lock-repair-contracts-work-to-occur-during-sys/

for maintenance of the federal navigation channel created by these dams. *See e.g., Idaho Rivers United v. U.S. Army Corps of Eng'rs*, No. C14-1800JLR, 2016 WL 498911, at *20 (W.D. Wash. Feb. 9, 2016).[4]

Equally telling, prior proposals to remove the lower Snake River dams have failed to garner any congressional support. Representative McDermott in 2006 and again in 2011 introduced legislation to remove the lower Snake River dams for salmon restoration purposes. *See* H.R. 1615, 109th Cong. (2006); H.R. 2111, 112th Cong. (2011). Neither bill even made it out of committee.

To assume that dam removal is a reasonable alternative, Congress would have to reverse course on more than seven decades of Congressional funding approvals for the continued operation and maintenance of the inland navigation system supported by the lower Snake River dams. Because the likelihood of such a reversal is "substantially remote from reality" dam removal need not be given detailed consideration in an EIS. *Kilroy*, 738 F.2d at 1454.

In addition to an alternative focusing on Snake River dam removal, alternatives centered around increased spill are equally unreasonable because they likewise require a change in the law that is exceedingly unlikely to occur. Spill causes levels of total dissolved gas ("TDG") to increase in the water column, which can be lethal to fish and other aquatic organisms. The State of Washington sets water quality standards by regulation for the Columbia River (applicable to the dams), and previously made a limited exception for TDG to allow spill above normal water quality standards to benefit juvenile salmon outmigration. *See* Wash. Admin. Code 173-201A-200(1)(f)(ii). The Washington Department of Ecology ("Ecology") passed this exemption in

[4] Indeed, as Plaintiffs emphasize, Congress recently appropriated capital funds for major maintenance and repair of lock facilities at the Snake River dams in 2016 and 2017. Dkt. 2074 at 18-19.

2006 and *rejected* requests by Plaintiffs in this case to further increase that exception in 2007, 2009, and 2010. *See Nw. Sportfishing Indus. Ass'n v. Wash. Dep't of Ecology*, 288 P.3d 677, 686 (Wash. Ct. App. 2012). The State's decision to reject the requested spill increases was affirmed in a separate lawsuit. *Id.*

Therefore, an alternative that would require either Congress to amend the CWA or Washington to radically amend its water quality standards in a manner it has already rejected, like dam removal, is "substantially remote from reality" and need not be considered in detail in an EIS. *Kilroy*, 738 F.2d at 1454. Increased spill is therefore not a reasonable or feasible alternative either.

II. CONCLUSION

The Federal Defendants' proposed schedule provides the time necessary to develop meaningful alternatives that could reasonably and feasibly be implemented to achieve the robust and comprehensive analysis required by this Court's May 4, 2016 Order. In contrast, the two year time frame proposed by Plaintiffs will guarantee that the parties will be back before this Court once again, on a failed administrative effort that will have suffered from a lack of adequate time to develop the comprehensive ("all H") analysis required under both NEPA and this Court's May 4, 2016 Order. For the foregoing reasons, RiverPartners respectfully requests that the Court adopt the schedule proposed by the Federal Defendants.

Dated: July 1, 2016.

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CERTIFICATE OF SERVICE

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