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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants.

Case No.: 3:01-CV-00640-SI

FEDERAL DEFENDANTS' REPLY BRIEF REGARDING PROPOSED TIMING FOR A REASONABLE NEPA PROCESS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

In response to the Court's direction to prepare a reasonable schedule for the U.S. Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("Reclamation") (together with the Bonneville Power Administration, the "Action Agencies") to complete the National Environmental Policy Act ("NEPA") process, the Action Agencies have proposed a five-year schedule. This schedule, while aggressive, is necessary to allow the agencies to undertake the rigorous, comprehensive, and inclusive process envisioned by the Court's Order and required by NEPA, including ensuring consideration of a reasonable range of alternative actions and providing for robust public involvement. Federal Defendants will integrate compliance with the Endangered Species Act ("ESA") through NOAA Fisheries' issuance of a biological opinion in 2018, followed by a subsequent ESA consultation that concludes concurrently with, and is informed by, Federal Defendants' proposed five-year NEPA process. This process will allow Federal Defendants to identify a long-term strategy for the operation and configuration of the Federal Columbia River Power System ("FCRPS") that complies with applicable statutes, including the ESA and NEPA.

As detailed in our opening brief, this timeline was carefully developed by the Action Agencies after thorough consideration of the Court's opinion, NEPA's procedural and legal requirements, the resources necessary to undertake a comprehensive NEPA process on an action at the scale of the FCRPS, and comparisons to other NEPA processes on other Federal actions of similar type, albeit not as expansive as the FCRPS. Just as importantly, it is informed by the experience of agency professionals who have the expertise required to manage this complex system and first-hand knowledge of the time necessary to conduct a satisfactory NEPA review on projects of this scope.

Plaintiffs largely brush this evidence aside, claiming simply that five years is just too long. Instead, Plaintiffs insist that Federal Defendants can complete the process in half of the time—in just two and a half years. Notably, in making this claim, Plaintiffs cannot identify a comparable NEPA process that was completed in a similar timeframe. Instead, Plaintiffs claim

that this is possible because, *inter alia*, Federal Defendants can simply build off of the 2008 to 2014 BiOp analyses and prior NEPA analyses, and can constrain the timeframes for interagency and public participation. Plaintiffs' rosy projections are not grounded in the realities of what is necessary to undertake a new, inclusive evaluation of the operations of the FCRPS as directed by the Court's order and NEPA. Nor is Plaintiffs' preferred schedule consistent with NEPA's requirements that the Agencies ensure robust public involvement. Plaintiffs' schedule also ignores the fact that the EIS—unlike a BiOp—will have to address a much broader scope of issues and resource impacts than only the effects on ESA-listed species, and it disregards the reality that an abbreviated schedule will necessarily reduce the scope and thoroughness of the EIS.

In short, Plaintiffs vigorously argued in this latest challenge that the extensive existing NEPA analyses are stale and insufficient, and that the 2008 through 2014 BiOp analyses are woefully deficient. Now they insist that these very same analyses are sufficient to allow the agencies to truncate the required NEPA review by two and a half years. Plaintiffs cannot have it both ways. If a comprehensive NEPA review, as envisioned by the Court, with opportunities for meaningful comment and participation by the public and all of the numerous stakeholders in the region is to occur, then the agencies need to be afforded the time to properly undertake that process. As demonstrated below and in our opening brief, that timeline is five years. Accordingly, the Court should allow the Action Agencies the requisite time to prepare a comprehensive EIS that evaluates a reasonable range of alternatives and creates an appropriate foundation for development of a long-term strategy for the FCRPS.

DISCUSSION

Before addressing the nature of the NEPA schedule, it bears noting that Plaintiffs' consistent theme permeating their filing—that a truncated schedule is justified by a purported 20 years of agency "intransigence"—is neither sound nor consistent with the record. ECF No. 2074 at 10. First, even if Plaintiffs' justification was supported by the facts—which it is not—imposing a punitive, arbitrary timeline for this public process is, at best, counterproductive. *San*

Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 606 (9th Cir. 2014) ("We wonder whether anyone was ultimately well-served by the imposition of tight deadlines in a matter of such consequence."); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845, 2011 WL 1636235 at *3 (E.D. Cal. April 29, 2011) (rejecting proposals that the agencies simply use prior analyses on remand, rather than allowing "time to thoroughly consider any new findings," because such an approach "would increase the risk of producing another inadequate [document] and present more delay …").

Second, Plaintiffs' rhetoric does not constitute a fair or accurate assessment of the underlying facts. The agencies have consistently conducted NEPA reviews for the configuration and operation of the FCRPS. In the 20 years that Plaintiffs have been involved in the FCRPS litigation, Plaintiffs themselves did not allege NEPA violations before 2014, and this is the first time in decades where a court has found a NEPA violation with respect to the FCRPS.[1] Plaintiffs are also consistently dismissive of the agencies' statutory obligations to operate and maintain the dams, *see, e.g.*, ECF No. 2074 at 23 & n.9, but conspicuously disregard the fact that the construction, operation, and maintenance of the dams for specified project purposes are not a matter of agency choice, but are carried out pursuant to express congressional statutory mandate. *See, e.g.*, 2014 Corps 001:52-56.[2] Thus, any suggestion that the Court should impose an overly restrictive timeline to vindicate some longstanding NEPA intransigence is without merit.

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[1] For example, the Ninth Circuit recently upheld the Corps' and Bonneville Power Administration's NEPA analysis conducted on the Flexible Winter Power Operations at Albeni Falls Dam, one of the FCRPS dams. *See Idaho Conservation League v. Bonneville Power Admin.*, ---F.3d---, 2016 WL 3430538 (9th Cir. June 21, 2016).

[2] *Cf. NWF v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 179 (9th Cir. 2004) ("Our review … does not extend to Congress's decision to create these dams almost sixty years ago, which of course was not within the discretion of the Corps. We cannot determine that the Corps was acting arbitrary and capricious, or acted contrary to law, in not taking action that would nullify the purpose of the federal dams, including forgoing water impoundment and power generation, in practical effect similar to removing the dams, where the Corps had no power to take such action."); *see also id.* ("Congress's decision to build the four dams on the lower Snake River was a matter of policy, and Congress alone in its legislative function must determine if the dams are to remain in the face of the Corps' recognition that the existence of the dams causes some temperature shift in the lower Snake River.").

The facts similarly refute Plaintiffs' gratuitous attacks on the integrity of the government's and other sovereigns' ESA compliance efforts in 2008 through 2014—efforts that were expressly recognized by this Court. The expansive RPA developed in a good faith effort to comply with the ESA belies these assertions. *See* May 4, 2016 Opinion (ECF No. 2065) at 119 (upholding NOAA Fisheries' critical habitat analysis and the "significant improvements to the mainstem habitat" provided under the RPA). The RPA was produced after an extensive, unprecedented, collaborative process with the four affected States, the relevant Tribes, and all other interested parties in the region. *See, e.g.*, ECF No. 1682 at 1 ("I commend Federal Defendants for their efforts in collaborating with the sovereigns in developing [the 2008 BiOp] and committing themselves to substantial funding for habitat and hatchery improvement throughout the Columbia River Basin."); ECF No. 1736 at 2 ("We have come a long way since the 2004 BiOp. In many ways, we have come full circle. Federal Defendants have finally made a good faith effort to address the flaws in the 2000 BiOp; they deserve credit for working with local, tribal, and state entities to attempt to ensure that this BiOp's tributary and estuary habitat mitigation measures are reasonably certain to occur.").[3] The final RPA ultimately was reviewed and supported by two different Administrations and garnered the support of the majority of the States and Tribal sovereigns in the region (all of whom—not just Plaintiffs—have a longstanding and vested desire to ensure salmon survival and recovery in the region).

In a similar vein, Plaintiffs' suggestions that the agencies should have abandoned the 2008 and 2010 BiOp and RPA prior to issuing the 2014 BiOp, or at any other time, are directly

[3] *See also* ECF No. 1699 at 3-4 (identifying concerns with the 2008 BiOp, but recognizing that the agencies "have [] begun to commit the kind of financial and political capital necessary to save these threatened and endangered species …" and stating that the Court is "encouraged by recent news that Federal Defendants have already committed additional funds to both tributary and estuary habitat improvement" and that "[t]hese are positive developments, and demonstrate that the parties are finally starting to work together"); ECF No. 1749 at 1 ("I gave you my preliminary view on the validity of the [2008 BiOp] … The Adaptive Management Implementation Plan ("AMIP") is a positive development. Federal Defendants deserve credit for developing additional mitigation measures, enhanced research, monitoring and evaluation actions, new biological triggers, and contingency actions to address some of the flaws in the 2008 BiOp.").

contrary to the guidance provided by this Court. While Judge Redden raised concerns with aspects of the agencies' analysis after the 2008 BiOp was issued, he did not tell the four agencies, two Administrations, three states, seven tribes, and everyone else not aligned with the Plaintiffs that they had embarked on a fundamentally incorrect path. Indeed, the Court's guidance was exactly the opposite, explaining in 2009 that defendants "need not 'start over from scratch,' or develop a new jeopardy framework." ECF No. 1749 at 2; *accord Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1130 (D. Or. 2011) (retaining jurisdiction over the 2010 BiOp remand specifically to guard against the agencies "abruptly changing course").[4]

In short, there is a large difference between being unsuccessful, as the Court has now found with respect to the latest consultation, and Plaintiffs' allegations that the government, aligned sovereigns, and other regional parties approached the prior consultation or their obligations under NEPA—or will approach the remand—with apathy, a lack of urgency, or an indifference to the law. Any suggestion to this effect therefore should be rejected.

A. The Court Should Adopt the Federal Defendants' Proposed Schedule, Not That of Plaintiffs

Plaintiffs emphatically argue that "the Court, not the Agencies, should set a schedule for remand" and that the Court has the authority to impose the schedule that it views as appropriate under the circumstances. ECF No. 2074 at 9 (all caps font removed). Plaintiffs are fabricating a dispute. In their opening brief, Federal Defendants expressly recognize the Court's authority to impose a schedule for remand. ECF No. 2070 at 7 (citing *Nat'l Wildlife Fed'n v. Nat'l Marine*

[4] *See also* ECF No. 1735 at 1 ("I am encouraged by Federal Defendants' efforts to address the court's concerns regarding the" 2008 BiOp and "I am still hopeful that Federal Defendants can make this BiOp work"); ECF No. 1738 at 144 ("I really appreciate the efforts that everybody has made. It is not like the early days when they would have just said this way or the highway; there was no consideration really about the Endangered Species Act. That is not the case now. I think this BiOp and this AMIP are really a good piece of work. I think I could pick it all apart. I think probably defendants could pick it apart. I think they're good documents. And I think we can -- I think you have all agreed that we could put our heads together, and I think we can do it.").

Fisheries Serv., 524 F.3d 917, 937 (9th Cir. 2007)).[5] The pertinent question (and one that Plaintiffs ignore) is different—whether the Court should defer to *Plaintiffs*, rather than Federal Defendants—in setting the schedule. As compared to Plaintiffs (who have never been responsible for preparing a NEPA analysis, will bear none of the cost, and are focused on championing their own singular interests), Federal Defendants (who will be responsible for dedicating substantial time and public resources in undertaking the process, providing *all* of the interested and affected public an opportunity to fully participate, and ensuring that *all* input is considered) are indisputably in a better position to propose an appropriate schedule for remand

This common-sense proposition is, of course, well-supported by the case law. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 35 F. Supp. 3d 1137, 1154 (N.D. Cal. 2014) ("[C]ourts are 'ill-suited to review the order in which an agency conducts its business' and 'hesitant to upset an agency's priorities by ordering it to expedite one specific action.'") (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987)); *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998) (a court must "afford[] the agency 'considerable deference in establishing a timetable for completing its proceedings'") (quoting *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987)); *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (an agency is "in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way.") Plaintiffs' weak rebuttal—that not all of these cases dealt with the specific circumstances of remand—does not detract from the validity of the cases' fundamental point: agencies are uniquely capable of determining the time necessary to accomplish a statutorily required task.

Furthermore, Plaintiffs cannot avoid the fact that, when addressing analogous

[5] Plaintiffs expend considerable effort rebutting their straw man argument, citing various cases (including Judge Redden's 2005 remand order from this case (ECF No. 1087)) addressing the Court's authority to issue orders on remand. ECF No. 2074 at 14-15. But here, the Court has already indicated that it will impose a deadline and the only question being addressed is the ultimate deadline imposed by the Court.

circumstances, another court in this Circuit expressly applied the very deference Plaintiffs find unwarranted:

> The agencies, not the Court, are in the best position to determine how long it will take them to complete these required processes. A court cannot tell the agencies how to allocate resources on remand, nor how to accomplish the required tasks.

See Delta Smelt Consol. Cases, No. 1:09–cv–00407 OWW DLB, 2011 WL 1740308, at *6 (E.D. Cal. May 4, 2011). Plaintiffs can only respond that this decision "reflects a different district court's exercise of its equitable discretion in a different case." ECF No. 2074 at 16. Perhaps so—but this "different district court's" decision to defer to the agency's schedule was consistent with case law and common sense, and Plaintiffs fail to identify any meaningful distinction between *Delta Smelt* and this case.

Moreover, the very cases Plaintiffs cite implicitly recognize the same principle. For instance, in *National Wildlife Federation v. FEMA*, 345 F. Supp. 2d 1151, 1173 (W.D. Wash. 2004), the court set a 60-day deadline for the defendant agency to *reinitiate consultation*, but with respect to *completing consultation*, the court deferred to the agency. The court merely ordered defendants to file, within 60 days, "a status report *advising* the Court and the parties to this litigation *as to the schedule for completion of its formal consultation.*" *Id.* at 1177 (emphases added). Similarly, Plaintiffs' citation to *South Yuba River Citizens League*, 2011 WL 1636235, also undercuts their argument. While the court in that case did not provide the defendant agency the *full* amount of time it requested, it also rejected the plaintiffs' suggestion for an abbreviated timeline. In doing so, the court expressly credited the federal defendants' rationale for the tasks that would need to be completed on remand. *Id.* at *3 (agreeing with the federal defendants that they should be allowed adequate time to restructure previous analytical framework and seek independent peer review, and that it was reasonable, "given the new information that will be available in the updated Biological Assessment, for the defendants to allow time to thoroughly consider any new findings in this assessment"). Moreover, the court emphasized that to not allow the defendants sufficient time on remand "would increase the risk

of producing another inadequate BiOp and present more delay and greater danger to the species which the law seeks to protect." *Id.*[6]

To summarize, contrary to Plaintiffs' response, Federal Defendants are not arguing that the Court does not have the authority to order a deadline for them to complete the NEPA process required under its May 2016 Order. However, when it comes to determining that deadline, there is no question that Federal Defendants are better placed than Plaintiffs to identify a reasonable schedule that will ensure the agencies are able to undertake a comprehensive, rigorous, and inclusive NEPA process that allows for public participation commensurate with the regional importance of the FCRPS.

B. Federal Defendants' Schedule is Necessary and Appropriate

As discussed in our opening brief, Federal Defendants have proposed a reasonable (and indeed, aggressive) schedule to complete a system-wide comprehensive EIS that evaluates reasonable alternatives, addresses potential environmental effects of operating the multiple-use FCRPS projects, and provides for meaningful public participation. Federal Defendants believe that, to get it right, the process will require a five-year investment of time and resources. *See id.*

Plaintiffs have now proposed an alternative schedule that is over two years shorter than that of Federal Defendants.[7] However, the differences in the two schedules are almost

[6] Plaintiffs also cite *Idaho Department of Fish & Game v. National Marine Fisheries Service*, 850 F. Supp. 886 (D. Or. 1994), as "establishing a 60 day deadline for completion of a new biological opinion." ECF No. 2074 at 11. Plaintiffs neglect to mention any of the context surrounding that abbreviated deadline, however. As the Ninth Circuit explained on appeal, "[a]t the time the court rendered its [March 28, 1994 summary judgment] decision, NMFS' 1993 BO was due to expire in twelve days." *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071, 1074 (9th Cir. 1995). As the district court was aware, federal defendants had already prepared a BiOp for the 1994-1998 operations plan. Indeed, "[o]n April 8, the federal defendants advised the district court that the errors it had identified in the 1993 BO had been carried over into the BO that had been prepared for the 1994–1998 Operations Plan," and the district court allowed them to reinitiate consultation on that plan. The BiOp resulting from this re-initiation issued on March 2, 1995. *Id.* So Plaintiffs' implication that the court set a two-month deadline for the parties to initiate and complete a new BiOp is inaccurate.

[7] While Federal Defendants' proposed schedule concludes with the issuance of Records of Decision ("RODs"), the termination of the NEPA process under 40 C.F.R. § 1505.2, Plaintiffs' proposed schedule concludes with the publication of an EIS. ECF No. 2074 at 17. While Plaintiffs note that RODs "from the action agencies would ordinarily follow a final EIS and BiOps in 30 to 60 days," they do not include this as part of their proposed schedule that they

completely on the front end. In fact, for the time period between issuance of a draft EIS and the publication of a final EIS, Plaintiffs allow 13 months—one month more than the 12 months provided under Federal Defendants' proposal.

The Parties' Proposed Schedules (without ROD date)

Task	Defendants	Plaintiffs
Scoping (from NOI)	1 year	90 days
Draft EIS (from conclusion of scoping)	2.5 years	11 months
Final EIS (from publication of Draft EIS)	12 months	13 months
Total	4.5 years	2.25 years

But the front-end tasks—the scoping and the preparation of the draft EIS (including formulating a reasonable range of alternatives, the necessary data-gathering, and analyses of the environmental and socio-economic impacts of these alternatives)—are collectively the most time-consuming tasks in the NEPA process and are central to the sufficiency and quality of the final EIS and decision-making process. By attempting to shortchange these critical phases of the NEPA process, Plaintiffs' schedule would impair the Action Agencies' ability to develop an informed, well-considered, and publicly vetted long-term strategy for the FCRPS. This approach will ensure only one thing: additional rounds of litigation.

1. Plaintiffs' 90-day Scoping Period is Inadequate

In their proposed schedule, Plaintiffs allow 90 days for the Action Agencies to complete the scoping process, which they identify as comprising a public comment period.[8] ECF No.

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would like the Court to order. And Plaintiffs provide no reason that Federal Defendants' projection of six months between issuance of the EIS and the RODs, given the public comment that will be expected on the final EIS, is unreasonable.

[8] Plaintiffs inaccurately claim that their schedule allows for a six-month scoping period, based on their apparent contention that the scoping process commences at some unidentified point *before* the issuance of a notice of intent to prepare an EIS (or "NOI"). However, NEPA's implementing regulations make clear that the scoping process does not begin until after the NOI is published. 40 C.F.R. § 1501.7 ("As soon as practicable after its decision to prepare an environmental impact statement and *before the scoping process* the lead agency shall publish a notice of intent.") (emphasis added). Therefore, the scoping period in Plaintiffs' schedule is from September 30, 2016, to January 1, 2017—*i.e.*, 90 days. *See* ECF No. 2074 at 19.

2074 at 14. Plaintiffs vastly oversimplify the scoping process, which involves far more than simply issuing an NOI and then accepting comments from the public. Plaintiffs' proposed scoping period will not allow the Action Agencies to ensure they are starting the NEPA process with a full understanding of the issues and alternatives that the public, the Tribes, and the States believe need to be addressed.

As the phase that commences the NEPA process, scoping is vital. *See Lands Council v. Powell*, 395 F.3d 1019, 1025 n.3 (9th Cir. 2004) ("'Scoping' describes when an agency begins initial consideration of a project, and identifies the significant issues related to the contemplated action"); 40 C.F.R. § 1501.7 (instructing that scoping is to be an "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action"). Essential to the scoping process is the solicitation of comments and input from the public and other governmental entities. *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1022 (10th Cir. 2002); *Webster v. U.S. Dep't of Agric*., 685 F.3d 411, 418 (4th Cir. 2012) ("During the scoping process, the agency must, among other things, invite participation and input by federal, state, and local agencies, as well as the public."). As its name suggests, scoping ultimately results in the determination of the "scope" of the ensuing EIS, including the major issues and range of alternatives to be evaluated. *See* 40 C.F.R. § 1502.9(a) (agency is to prepare draft EIS "in accordance with the scope decided upon in the scoping process").

As an initial matter, the scoping process will require significant logistical planning. Given the broad geographic scope of the FCRPS and affected resources, the Action Agencies intend to conduct a multi-state scoping process. *See* ECF No. 2071 (hereinafter "Lee Decl.") ¶ 13(b); ECF No. 2072 (hereinafter "Ponganis Decl.") ¶ 10. Over a two-to-three month period, the agencies anticipate having over a dozen public meetings in separate geographic locations. Preparation for such meetings involves a great deal of planning, ranging from the substantive (the preparation and vetting of materials for the meetings) to the logistical (arranging for venues in appropriate geographical locations suitable for the expected number of participants). The Action Agencies,

moreover, cannot begin the meetings immediately after publication of their NOI; under 40 C.F.R. § 1506.6(c)(2), a minimum of 15 days is required between the notice of a public meeting and the actual meeting—and longer periods are advisable to ensure members of the public have sufficient time to plan and attend. *See* Reclamation NEPA Handbook at 7-6 (available at www.usbr.gov/nepa/docs/NEPA_ Handbook2012.pdf) (suggesting 30-day period between notice and public meeting).[9] Finally, Plaintiffs also would save time by reducing the number of days between the conclusions of the meetings and the close of the public comment period for scoping. This, however, would not promote the public's ability to participate meaningfully through written comments because it would deprive the public of the time needed to digest information obtained at the meetings. Given the importance of ensuring public involvement (under both Federal Defendants' reading of the May 2016 Order and NEPA generally), a 90-day public scoping period would be insufficient.

Plaintiffs also pay scant regard to the time necessary to ensure that the Action Agencies are adequately involving the Tribes during scoping. The Action Agencies plan to engage in government-to-government consultations with many tribes that have significant interests in the resources related to the FCRPS and the Columbia and lower Snake rivers. Lee Decl. ¶ 13(b); Ponganis Decl. ¶ 11.[10] Robust tribal engagement will be a necessary component in ensuring the NEPA process adequately accounts for the concerns of tribal governments—and is something that the Action Agencies take seriously. *See e.g.*, Bureau of Reclamation Website at

[9] Plaintiffs overlook other timing matters as well. For instance, Plaintiffs' proposed schedule places a portion of the already narrow public comment and meeting period in November and December. Yet the agencies, consistent with their normal practice, will attempt to avoid scheduling public meetings during times when holidays in November and December would be expected to reduce public participation.

[10] The Tribes participating in this litigation do not represent the full complement of tribal governments that have significant interests in the Columbia Basin project operations and will be approached in scoping. However, the fact that the Tribes that are participating in the litigation have expended the time and resources to ensure their perspective is represented in this litigation demonstrates the importance that they place on issues related to the operation of the FCRPS, and suggests that they will devote a commensurate amount of attention and energy to the administrative processes on remand.

http://www.usbr.gov/native/policy/policy_protocol.html (listing relevant guidance and policy documents including Executive Order 13175; 2009 Presidential Memorandum on Tribal Consultation; 2011 Department of the Interior Policy on Consultation with Indian Tribes and related Secretarial Order 3317; 2012 Reclamation Protocol Guidelines for consultation with tribal governments); Corps Website at http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations (describing Corps' Tribal Policy Principles for consultation for projects or policies that may affect Tribes). Similarly, (and, again, as evidenced by their active participation in this litigation), the Action Agencies expect vigorous engagement by the governments of the states of Idaho, Montana, Oregon, Washington, and potentially others (*e.g.*, Alaska). *Id. See also Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1219 (D. Wyo. 2003) ("When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful").

In short, even if the scoping process was limited to simply collecting public input as Plaintiffs contend, the 90-day time limit that Plaintiffs would have this Court impose on that process would significantly limit the ability of numerous key stakeholders to participate meaningfully. The scoping process, however, is not limited to the collection of public input. In addition to *obtaining* input from the public and tribal and government entities, the Action Agencies must *use* that input to "[d]etermine the scope and the significant issues to be analyzed in depth in the environmental impact statement." 40 C.F.R. § 1501.7(a)(2). As a result, the Action Agencies will need to implement procedures that will allow them to meaningfully use the input provided by the public regarding resources of concern. As such, they will need to, for instance: (a) review, categorize, and synthesize public comments; (b) identify key issues from public scoping and tribal consultations; and (c) consider alternatives identified by the public and tribal and government agencies.

Moreover, the agencies' deliberative duties in the scoping process are not limited to reacting to information provided by the public and other entities. Rather, the Action Agencies

will need to be making their own independent assessments of the analyses that will need to be undertaken and what issues should be included. *See* Ponganis Decl. ¶ 10. The Action Agencies will need to identify physical and ecological resources that may need to be addressed as part of the affected environment; potential consequences to these resources (e.g., impacts to land use, recreation, socio-economics, wildlife, cultural resources, etc.); potential implications to authorized project purposes; and the models or other tools appropriate for conducting the analyses of these issues. Thus, in addition to truncating the public comment period, Plaintiffs' proposed schedule is problematic because it fails to provide *any time* for the agencies to undertake the deliberative process of reviewing, analyzing, and synthesizing the information obtained through scoping to make informed determinations as to the potential scope of the EIS and identify the major issues that the EIS process must address.

As a result, adopting Plaintiffs' limited scoping schedule will be detrimental to the public process that the NEPA regulations contemplate. While Plaintiffs' proposed schedule might afford *Plaintiffs* enough time to ensure their thoughts are communicated (indeed, they have already provided Federal Defendants a preview of their scoping comments in their brief), NEPA is a public process—not a private negotiation among a limited group of interested parties. The Action Agencies will need to consider various viewpoints, above and beyond Plaintiffs' specific concern for the ESA-listed anadromous species impacted by the FCRPS. The Court should ensure that the Action Agencies are allowed sufficient time to conduct a scoping process that can serve as a firm foundation for the rest of the NEPA process as contemplated by the statute, the implementing regulations, and case law.[11]

2. Plaintiffs Underestimate the Time Necessary to Prepare a Draft EIS

There is probably no more critical stage of the NEPA process than the actual formulation of alternatives and preparation of the appropriate analyses and content for the draft EIS, which will form the foundation of any final EIS published by the Action Agencies. Even Plaintiffs

[11] The Action Agencies are already working on drafting an NOI and preparing for the upcoming process given their known NEPA process requirements.

admit that "preparing a thorough draft programmatic EIS may be the most time consuming step in the NEPA process." ECF No. 2074 at 21. Yet Plaintiffs, in their schedule, allow less time for this than they do for the turnaround from the draft EIS to the final.[12] By imposing such a tight deadline on the Action Agencies, Plaintiffs' schedule would necessarily limit the scope of alternative development and depth of the analyses that the Action Agencies would be able to undertake. *See Jewell*, 747 F.3d at 606 (observing that "[d]eadlines become a substantive constraint on what an agency can reasonably do").

As an initial matter, the actual writing of the draft EIS is only a portion of the Action Agencies' task in this phase. First, the Action Agencies must develop alternatives that address the purpose and need of the EIS, and determine the appropriate tools and methodologies to undertake the requisite studies and analyses that are the best available science and necessary to inform the basis of the draft EIS's content. 40 C.F.R. § 1502.24 (environmental impact statements "shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement"). Preparation of the new EIS addressing FCRPS operations will require, among others, modeling and analysis of the relevant hydrology of the existing system, followed by modeling and analysis of changes in hydrology associated with alternatives. *See* Ponganis Decl. ¶ 16. While the agencies' modeling will not start from scratch, *id.* ¶ 17, for NEPA purposes, modeling the system as currently operated and configured will take time to confirm assumptions, run the models, and validate the results. As a result, modeling existing conditions will require updating and revamping of inputs. Additionally, evaluation of alternatives addressing operations that change hydrology or include structural modifications (and certainly any that include dam breaching) will require additional

[12] Plaintiffs' schedule allows "almost seventeen months *from now*" for the Action Agencies to prepare the draft EIS and all associated studies. ECF No. 2074 at 21. But it is facile to contend that the Action Agencies can commence the substantive drafting process now. Indeed, Plaintiffs' schedule would impose significant inefficiencies in the NEPA process, when time is already at a premium, by commencing drafting before: (1) scoping has commenced; and (2) the Action Agencies have any certainty regarding the amount of time they will have to complete the process (which necessarily will impact the scope of alternative development and level of the analysis). *See, e.g., Jewell*, 747 F.3d at 606.

time (i.e., several months) to ensure modeling accurately reflects the objectives of the alternative, is reliable for implementation decisions, and demonstrates how an alternative may impact other system operations.[13] Moreover, for each alternative, after the hydrology is modeled, various climate change scenarios will be analyzed, which takes additional time. *Cf.* ECF No. 2065 at 97-102 (Court noting the importance of quantitative modeling and assessment to inform portions of the agencies' analyses).

After modeling the system's hydrology under each of the Draft EIS's alternatives, the Action Agencies will then have to analyze how the hydrological outputs of the models translate into impacts to all resources—and the analysis for each resource will be unique. *See, e.g.*, ACE 562 at 55290 (describing how, for the analyses in FCRPS System Operation Review ("SOR") EIS, work groups assigned to specific resources "applied their own impact analysis models and procedures to the hydroregulation result, assessed changes in key value measures for their respective resources, and formulated impact conclusions"); ACE 570 (Appendices to Lower Snake Juvenile Salmon Migration Feasibility Study/EIS ("LSR Study") documenting analyses of impacts to various resources). The analysis of anadromous fish survival through the hydrosystem

[13] In their brief, Plaintiffs propose some very generally described options for alternatives for the Agencies to consider. However, the fact that Plaintiffs have vague ideas as to some components of an alternative does very little to demonstrate that their 11-month proposal is reasonable. First, preparing for the modeling effort requires turning general concepts about, for instance, configuration changes at certain dams, or operations for fish passage spill exceeding current state water quality standards, into reservoir operating criteria that can then be translated for use in a mathematical computer model. This is a complicated and time-consuming effort. Moreover, (assuming the federal agencies are allotted sufficient time), identification of alternatives that the Action Agencies can evaluate in detail, so that they are implementable, will be determined not just by Plaintiffs' proposed ideas—but by consideration of proposals for alternatives through the public scoping process and collaboration with Tribes, state and local agencies, and other stakeholders—all of whom may have different ideas of the most sensible alternative to evaluate. Plaintiffs, for instance, make several suggestions in their brief that, in their view, should be evaluated—and the Action Agencies will certainly be considering these as potential alternatives, as well as other actions that are proposed through the public scoping process. In developing alternatives after public scoping, the Action Agencies will also consider the status of the species and the best available science, which will likely suggest that potential alternatives should not focus only on actions that affect the listed fish that migrate through the lower Snake River dams. Indeed, those dams' effects are limited to only four of the species evaluated in the BiOp. 2008 NOAA S77 at 37; 2008 NOAA C1155 at 39 ("Only four of 13 listed salmon and steelhead migrate past the Snake River dams, and *dam removal would have virtually no effect on nine of the [listed species]*") (emphasis added).

will be one of the many resource impacts that needs to be evaluated. The Action Agencies will also need to evaluate impacts of the alternatives on resources and issues such as air quality, water quality, water supply, riparian/wildlife habitat, sediment impacts, flood control, power production, recreation, and navigation. *See* Ponganis Decl. ¶ 15. As one example, different alternatives for operation of the FCRPS could potentially affect cultural resources (such as archeological and historic sites, tribal sacred sites, and traditional cultural properties) throughout the entire system. *See, e.g.*, Corps 569 at 60316-17 (LSR Study describing potential impacts to cultural resources just in the area of the LSR dams). Undertaking an adequate effects analysis will involve, for the entire affected area of the FCRPS, conferrals with appropriate tribal and state officials (including government-to-government consultation where requested by a tribe) to identify potential resources and areas of concern; acquisition of GIS and other spatial data; and evaluation of the impacts to such sites under the outputs of the various hydrological and resource impact models.

The Action Agencies will not be able to undertake these types of analyses (and certainly not for any reasonable range of alternatives) in the eleven months allowed for in Plaintiffs' schedule. They also will not be able to ensure: (1) reliance on contemporary and updated analyses (rather than relying upon the existing analyses that Plaintiffs' faulted the agencies for relying upon in merits briefing); (2) collaboration in formulating their analyses with the Tribes, four northwest states, cooperating agencies, and others, Ponganis Decl. ¶ 16; and (3) evaluation of an array of alternatives for different system operations. *Id.* ¶ 13.[14] Additionally, the agencies have obligations that would require external review by technical experts to ensure technical quality and practical application under these circumstances. *See, e.g.,* 33 U.S.C. § 2343.

[14] The unduly abbreviated nature of Plaintiffs' proposed schedule is also corroborated by the NEPA schedule—which these very Plaintiffs agreed to—for the preparation of the recent Lower Snake River Programmatic Sediment Management Plan EIS. *See* Ex. A. For this EIS, which addressed a much narrower issue, the adoption of a federal navigation channel maintenance plan for the LSR dams, Plaintiffs agreed that a *three-year period,* from issuance of an NOI to issuance of a draft EIS, was appropriate. *See id.* at 6.

Plaintiffs' failure to acknowledge this reality appears to derive from three primary misapprehensions. First, Plaintiffs downplay the fact that the scope of issues and environmental impacts that this EIS must address under NEPA is far more expansive than the system's impact on ESA-listed anadromous fish. ECF No. 2074 at 13 (agreeing that the 2014 BiOp proceedings "ha[ve] done much of the heavy lifting for an EIS"). *See also id.* at 14 (suggesting that there are existing analyses that the agencies can rely upon—but all of which focus singularly on anadromous fish). As discussed above, impacts to anadromous fish, although clearly important, will be only one of many resources analyzed in the EIS.

Second, Plaintiffs' assertion that the Action Agencies already have numerous analyses that they can rely upon is unwarranted (as well as counter to their litigation position up to this point). First, despite their confident claim, Plaintiffs identify less than a handful of suggested sources addressing anadromous fish. ECF No. 2074 at 14. Moreover, Plaintiffs admit, albeit euphemistically, that even these limited sources may be "in need of thoughtful updating." Indeed, in a sudden pivot from their position on the merits, Plaintiffs suggest that the Action Agencies can now rely upon the 2002 LSR Study (at least as "a partial starting place"), as well as the nearly 20-year old "Plan for Analyzing and Testing Hypotheses (PATH) Weight of Evidence Report" (ESSA Technologies 1998). ECF No. 2074 at 14. *See also* 2014 NOAA C33559 at 281251 (describing technical critique of PATH modeling weaknesses). The Action Agencies, in contrast, interpret the Court's order as suggesting that they undertake a comprehensive "hard look" at a range of alternatives, as opposed to focusing on existing analyses, including those the Court has already found inadequate.

Finally, Plaintiffs appear to believe that the Action Agencies can fully meet their obligations under NEPA by preparing what they refer to as a "programmatic" EIS. *See* ECF No. 2074 at 22. However, as the Ninth Circuit has made clear, preparation of a programmatic EIS does not eliminate the need for specific detail under NEPA. *See 'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006) (the "critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not *whether* the project's site-specific

impact should be evaluated in detail, but *when* such detailed evaluation should occur") (emphasis added). Thus, agencies will typically tier site-specific, or implementation-stage, NEPA analyses to a broader, and more general, programmatic EIS. *See id.* at 1094; *see also* 40 C.F.R. § 1508.28 ("'Tiering' refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared."). This type of staged NEPA decision-making process is typified by the process often used in the implementation of land use plans, such as U.S. Forest Service forest plans. *See 'Ilio'ulaokalani Coal.*, 464 F.3d at 1094 ("Following the programmatic stage is the implementation stage during which individual site specific projects, consistent with the forest plan, are proposed and assessed") (citation omitted).

The system-wide operations of the FCRPS are not comparable to the staged decision-making process that occurs under such land use plans. Rather, the EIS in this case will need to evaluate the environmental and socio-economic impacts of the proposed operations and configuration of the FCRPS, and therefore, unlike with a land use plan, most of the detailed evaluation required under NEPA cannot be put off to a later, implementation-stage analysis. Plaintiffs do not explain how they believe the Action Agencies could comply with NEPA by preparing a programmatic EIS, without also relying upon the preparation of additional site-specific or implementation-stage environmental analyses, for which additional time would have to be factored into the NEPA schedule.

To conclude, the Action Agencies have interpreted the Court's order as directing them to take a "hard look" at all reasonable alternatives, and ensure meaningful public involvement in the process. ECF No. 2065 at 18-20, 135-39; *see also* Ponganis Decl. ¶¶ 6-7. The Agencies have provided an aggressive and realistic projection of what this will take, and the Court should allow the Action Agencies to invest the time and resources necessary to complete a comprehensive EIS

on FCRPS operations.[15]

3. Plaintiffs' Examples of Abbreviated NEPA Processes Do Not Support their Argument

Plaintiffs argue that their two-and-a-half year schedule is in fact generous, as compared to other examples in which Federal agencies undertook NEPA analyses utilizing abbreviated timelines. However, neither of Plaintiffs' two examples support their argument.

Plaintiffs first refer to the U.S. Forest Service's preparation of the "Northwest Forest Plan" and its associated EIS in the early 1990s. ECF No. 2074 at 11.[16] Plaintiffs' assertion that the development of the Northwest Forest Plan and a new EIS addressing the plan occurred in "one year" is, at best, inaccurate. *See* ECF No. 2074 at 11. The "multi-agency draft and final EIS" referred to by Plaintiffs was in fact a *supplemental* EIS (hereinafter "SEIS") that supplemented and built upon numerous, recently-prepared final and draft NEPA documents.[17] These included the Final Environmental Impact Statement on Management for the Northern Spotted Owl in the National Forests (published just one year prior) as well as several other recent draft EISs prepared by the Bureau of Land Management. *Id.* at 1-7. Indeed, the SEIS expressly explained this:

The Assessment Team and the SEIS Interdisciplinary Team's work built on the

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[15] It is important to note that if the scope or depth of the analyses in the draft EIS suffers due to the agencies having insufficient time, this will not be curable without the agencies preparing a supplemental draft EIS, which would significantly lengthen the process. *See Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) ("If the final action departs substantially from the alternatives described in the draft EIS, however, a supplemental draft EIS is required"); 40 C.F.R. § 1502.9(c) ("Agencies ... [s]hall prepare supplements *to either draft or final* environmental impact statements if ... [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns") (emphasis added).

[16] Plaintiffs confusingly assert that the Court has already noted "similarities to EIS and BiOps for the Northwest Forest Plan" in its May 2016 Order. ECF No. 2074 at 11 (citing ECF No. 2065 at 143). The Court's order includes no such reference.

[17] The name of the document was the "Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl." Excerpts of this supplemental EIS are attached hereto as Exhibit B.

> analyses in earlier plans and environmental impact statements for lands administered by the Forest Service and BLM. So, too, does the analysis in this SEIS take into account the data and analysis in each of the NEPA documents it is supplementing.

Id. Here, in contrast, Plaintiffs successfully argued that the NEPA analyses relied upon by the Action Agencies were not sufficiently current. *See* ECF No. 2016 (arguing that the Action Agencies' existing NEPA analyses "cannot discharge the agencies' specific and present NEPA duty for their decisions to adopt the 2014 BiOp/RPA").

Nor was the SEIS building upon only recently-prepared NEPA documents: it also expressly incorporated elements into the alternatives from recent administrative documents prepared to address habitat management. It explained: "[i]n developing the options on which the action alternatives are based, the Assessment Team borrowed from previous Federal Government efforts to develop a strategy for management of habitat for the northern spotted owl and other old-growth associated species." *Id.* at 2-25. The documents the agencies "borrowed from" included a variety of recent studies and reports. *See id.* at 2-25 to 2-32

Finally, the SEIS made clear that it was a programmatic document and, as such, provided insufficient NEPA coverage for implementation of site- or project-specific actions. It stated: "[t]he regional scope of this analysis renders impracticable site-specific detail in this SEIS. The agencies will complete environmental analysis as appropriate for site-specific activities." *Id.* at 1-7. As noted above, Plaintiffs do not explain how the Action Agencies could comply with NEPA here by preparing a programmatic EIS that does not also require tiering site-specific or implementation-stage NEPA analyses. To the contrary, because of the ongoing nature of FCRPS operations, which cannot be held in abeyance pending further NEPA analysis for implementation, the NEPA analysis that this Court has directed the Action Agencies to prepare will need to fully address the system's environmental impacts in the first instance rather than deferring "site-specific detail" to a subsequent implementation stage.

Plaintiffs also argue that the abbreviated process for the U.S. Forest Service's Roadless Areas Conservation Final Environmental Impact Statement, which addressed the Forest

Service's heavily litigated "Roadless Rule," shows the reasonableness of their proposed schedule. ECF No. 2074 at 11 n.4. First, the proposed action—a proposed rule *prohibiting* new actions impacting currently undeveloped areas—is much narrower than the proposed action in this case, and is therefore inapposite. Even then, the Roadless Rule was the subject of judicial challenge (including claims that the Forest Service failed to allow for adequate public comment), as well as additional agency proceedings arising from concerns as to the adequacy of the original administrative process. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002), *abrogated by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (describing Roadless Rule proceedings and litigation). The suggestion, therefore, that the Roadless Rule process should be used as a model for the Action Agencies' decision process in this case is far from persuasive.

Finally, Plaintiffs stridently argue that three of the NEPA processes that the Action Agencies relied upon in formulating their schedule are not relevant because they were not prepared under Court-ordered deadline, but were pursuant to schedules set "by the agencies themselves." ECF No. 2074 at 12. Ironically, in the two examples of NEPA processes that Plaintiffs rely upon, the relevant agencies actually were operating under schedules set "by the agencies themselves." *See id.* Plaintiffs themselves, then, disprove their suggestion that the Government will work diligently only when under Court order. Here, the Action Agencies have committed to undertaking the NEPA process in an aggressive five-year time frame. Ponganis Decl. ¶ 27; Lee Decl. ¶ 22. The Court should credit their sworn declarations and allow the Action Agencies to invest the necessary time for the process.

C. The Court Should Adopt Federal Defendants' Proposal for Coordinating the ESA and NEPA Processes

Plaintiffs object to Federal Defendants' schedule because it fails to provide for "parallel, coordinated compliance with both NEPA and the ESA." ECF No. 2074 at 17. But the Federal Defendants agree that "[t]houghtful integration of these two independent, yet parallel processes" is important. ECF No. 2070 at 22-23 (also recognizing that "ideally these processes would run

concurrently"); *see also* ECF No. 2072 ¶ 28 (same). The only dispute on this point revolves around Plaintiffs' contention that the NEPA and ESA processes must be integrated into a single expedited process predicated on rehashing prior analyses (ECF No. 2074 at 13-14 & n.5), reducing participation and regional collaboration (*id*. at 20-22), and actively diverting resources away from the NEPA and ESA processes and into the courtroom (*id*. at 13, 18, 23-26). The ESA and NEPA can be integrated effectively and legally through NOAA Fisheries' issuance of a biological opinion in March or December of 2018,[18] followed by a subsequent ESA consultation that concludes concurrently with the completion of Federal Defendants' proposed five-year NEPA process. *See* ECF No. 2072 ¶ 28.

This proposal, rather than Plaintiffs' suggestions, provides the best chance for effectively leveraging the two processes to reach the most informed outcome. First, the Court left in place and remanded the 2014 BiOp, directing NOAA Fisheries to prepare a new BiOp in 2018 and explaining that, in the interim, the "2014 BiOp provides some protection for the listed species." ECF No. 2065 at 148. In 2018, it is NOAA Fisheries' responsibility to develop a new biological opinion that complies with the law. *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559 (9th Cir. 2011) ("Our decision requires only that the Service grapple with the problem the statute defines. We likewise do not dictate the correct substantive outcome on remand."); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 937 (remand order cannot "direct the substance of the agencies' actions on remand"). The Court has issued a 149-page opinion providing guidance and direction to accomplish this task, and a 2018 consultation allows for the agencies' compliance with the ESA's substantive mandates. Unlike NEPA, the ESA imposes substantive mandates, and Federal Defendants will address these substantive requirements in 2018, as the Court ordered. This therefore refutes Plaintiffs' repeated claims that of a lack of

[18] The Court ordered the new biological opinion to be completed by March 1, 2018. ECF No. 2065 at 148-49. As we noted (ECF No. 2070 at 22 n.6), and as Plaintiffs acknowledge (ECF No. 2074 at 22), NOAA Fisheries and the Action Agencies contemplated that the 2014 BiOp would be implemented through 2018. Thus, modifying the Court's ESA deadline to December 31, 2018, would be appropriate and acceptable to the federal agencies.

"urgency." ECF No. 2074 at 7.

Second, NOAA Fisheries' issuance of a 2018 BiOp does not negate the agencies' ability to ensure ESA compliance for any action adopted following the NEPA process. ECF No. 2072 ¶ 28. Under Federal Defendants' proposed schedule, further ESA consultation would take place after the 2018 BiOp is issued. After 2018, the Action Agencies propose to issue a draft EIS. ECF No. 2070 at 12. "[T]he very purpose of a draft [EIS] and the ensuing comment period is to elicit suggestions and criticisms to enhance the proposed project." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1156 (9th Cir. 1997). This step can be used effectively in a subsequent ESA consultation. For instance, NOAA Fisheries can evaluate the Action Agencies' preferred alternative, the full range of alternatives and public comments received, and other information generated during the NEPA process to inform its development of a biological opinion. Thus, the agencies can effectively "capitalize on the broader process and procedures contained in NEPA" to further ensure compliance with the ESA "before a ROD is signed." ECF No. 2072 ¶ 28.

This stepwise approach is not unprecedented, and NOAA Fisheries' 1995 BiOp (2014 NOAA B273) is instructive. In the 1995 BiOp, NOAA Fisheries found that the agencies' proposed 1994 to 1998 FCRPS operations were likely to jeopardize listed species, and it "recommended a multi-part RPA for avoiding jeopardy." *Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999); 2014 NOAA B273 at 23813-46 (1995 RPA). The RPA focused on "interim measures designed to ensure survival and *potential* recovery," *Am Rivers, Inc. v. Nat'l Marine Fisheries Serv.*, No. Civ. 96-384-MA, 1997 WL 33797790, at *6 (D. Or. Apr. 3, 1997), while also allowing for the evaluation and development of long-term protections for the species, *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 168 F.3d 497, 1999 WL 68644, at *1 n.2 (9th Cir. Feb. 11, 1999). The 1995 BiOp was upheld because, *inter alia*, the issues were "resolved in part by expert choices and in part by commitments for further study."

Aluminum Co., 175 F.3d at 1162.[19]

As the 1995 BiOp shows, "a staged structuring of consultation may comply fully with Section 7's mandate," *Defenders of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1122 (11th Cir. 2013), and Federal Defendants' proposal to address ESA compliance in 2018, followed by further ESA consultation during the NEPA process and prior to adoption of RODs, is a permissible and rational staged course for addressing both the ESA and the Court's opinion on remand.

Plaintiffs provide no reason to depart from this approach. While they object that Federal Defendants would violate NEPA by adopting a BiOp and possible RPA in 2018 without having completed the NEPA process, ECF No. 2074 at 8 n.3, they ignore the current posture of this case. The Court has found violations of NEPA, and the Federal Defendants are proposing a comprehensive NEPA process that is intended to meet the Court's expectations and remedy this violation. The Court has equitable discretion to order that the NEPA process be completed in five years, while also ordering the agencies to address compliance with the ESA as the broader NEPA compliance efforts are ongoing. In other words, the Court has discretion to allow activities to proceed— including an ESA consultation—pending compliance with NEPA. *See N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 844-45 (9th Cir. 2007) (allowing some oil and gas development to proceed pending completion of an EIS); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833-34 (9th Cir. 2002) (allowing grazing activities to continue under conditions proposed by agency pending further NEPA review); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100 (E.D. Cal. 2013); *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d. 1014 (E.D. Cal. 2013).

In a similar vein, Plaintiffs' proposed coordination of the NEPA and the ESA processes is

[19] *See Am. Rivers, Inc. v. Nat' Marine Fisheries Serv.*, No. Civ. 94-940-MA, 1995 WL 464544, at *8 (D. Or. Apr. 14, 1995); *Am. Rivers, Inc. v. Nat'l Marine Fisheries Serv.*, No. Civ. 96-384-MA, 1997 WL 33797790, at *6 (D. Or. Apr. 3, 1997); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, No. Civ. 96-384-MA, 1997 WL 33797901, at *3 (D. Or. Oct. 17, 1997); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, No. 97-36159, Slip Opinion (9th Cir. Mar. 8, 1999) (available at ECF No. 825-3).

neither compelled by the law nor justified by the facts. Plaintiffs argue that NOAA Fisheries should determine how it will conduct its ESA analysis during NEPA scoping and, further, issue a draft BiOp co-extensive with a draft EIS. ECF No. 2074 at 19, 21. The law does not constrain the process in this manner. The ESA, ESA regulations, and NEPA regulations all explain how action agencies (like the Corps, Reclamation, and Bonneville Power Administration) may permissibly coordinate their own analyses. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.06(a); 40 C.F.R. § 1500.2; *see, e.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1221 (9th Cir. 2004) (finding that the Park Service satisfied its ESA obligations in issuing "a biological assessment in the form of the FEIS"). The law does not, as Plaintiffs argue, dictate a specified stepwise approach to coordinating NEPA and ESA reviews. Plaintiffs therefore overreach by seeking to dictate how the agencies can most effectively structure the NEPA and ESA processes. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 544 (1978) ("[T]he agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as it develops.'").

In sum, the Court should reject Plaintiffs' argument that the NEPA process must be complete by the time NOAA Fisheries issues a biological opinion in 2018. The law provides the Court with discretion to craft deadlines that have the best chance of remedying the legal violations identified in the Court's order. A five-year NEPA process, where NOAA Fisheries and the Action Agencies address compliance with the ESA in 2018 and with the completion of the NEPA process, is both reasonable and warranted.

D. Plaintiffs' Requests for Additional Judicial Process on Remand Should be Rejected

At the same time Plaintiffs push for abbreviated NEPA and ESA processes, they actively seek to divert the agencies' (and region's) attention away from these processes and into the courtroom. As discussed below, Plaintiffs advocate for a two-and-a-half year NEPA process, while at the same time contemplating that the parties may spend the next three to six (or more)

months mired in injunctive proceedings (including discovery). ECF No. 2074 at 23-26. On top of that, Plaintiffs would require "bi-monthly or quarterly reporting," judicial status conferences, judicial proceedings to consider draft agency products, and other tasks. *Id.* 18-19, 21. Plaintiffs blithely ignore the inherent inconsistency in their requests—that the agencies expedite the NEPA and ESA processes while, at the same time, reallocating resources away from those processes. The fact is the agency managers, experts, and staff responsible for conducting the NEPA and ESA analyses, collaborating with the sovereign States and Tribes on every facet of FCRPS operations and maintenance, and working on the ground to implement the current RPA are many of the same ones that would be responding to requests for injunctive relief, preparing status reports, preparing for and attending status conferences, and engaging in the other judicial processes.

With respect to Plaintiffs' request for regular reporting and related judicial oversight,[20] this suggested reallocation of resources is unnecessary for two reasons. First, Plaintiffs' proposed judicial processes are not necessary to ensure compliance with the Court's orders on remand. The Court issued a detailed 149-page opinion, and the agencies will follow that direction (and any remedy order) as long as it remains controlling. Any contrary presumption simply is not justified. *See* Discussion *supra* at pp. 2-4; *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010) ("While bureaucratic inertia may be a risk, we presume that agencies will follow the law.").

Second, Plaintiffs' proposed judicial processes are not necessary to apprise Plaintiffs or anyone else of the status of the NEPA or ESA consultations. NEPA is a public process, and everyone interested in that process will be able to determine how the process is progressing and remain informed of what analyses are being undertaken. *See* ECF No. 2072 ¶ 6 (developing a schedule that "emphasiz[es] the importance of meaningful public participation"). As to the ESA, all of the agencies including the Action Agencies, while under no statutory obligation to do so,

[20] Federal Defendants address the question of injunctive relief below.

have voluntarily shared draft products with the sovereigns and the region, including Plaintiffs. *See, e.g.*, 2008 NOAA C1155; 2014 NOAA C33559; 2014 NOAA C34293; 2014 Corps 11. And there are a myriad of regional technical and scientific groups established and operating effectively in the region. ECF No. 1872 at 6-9; ECF No. 1872-1 at 47-53; ECF No. 1989 at 9-18. There is no basis to assume these actions will not continue and, thus, no need for the Court to direct the agencies to do what they have been doing since 2008. *Cf. Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 791 (7th Cir. 2011) (rejecting a request for relief that "asks for steps already being taken").[21]

Plaintiffs' requests that NOAA Fisheries be ordered to file draft ESA analyses, particularly on the time-frames they propose, are equally unfounded. ECF No. 2074 at 19, 21. The ESA does not require NOAA Fisheries to develop "analytical frameworks" or share draft BiOps at all, let alone at a specific juncture in a NEPA process.[22] As the Supreme Court has made clear, there is no "independent right to public comment with regard to consultations conducted under § 7(a)(2)." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 660 n.6 (2007). Further, these draft documents would constitute "initial comments [that are] preliminary and subject to change as understanding of [] issues expanded, the factual record

[21] These facts render Plaintiffs' reliance on the Court's 2005 remand order inapposite. ECF No. 2074 at 9-10. At issue in the 2005 remand order was the 2004 BiOp, which the Court found "was a cynical and transparent attempt to avoid responsibility for the decline of listed Columbia and Snake River salmon and steelhead." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F.Supp.2d at 1130. The remand order was directed at remedying this situation. Ten intervening years, however, have materially changed the circumstances the Court confronted in 2005—the agencies, as a matter of course: collaborate with the regional sovereigns on every significant aspect of the configuration and operation of the FCRPS; make good faith, concerted efforts to comply with the Court's orders; and develop actions (such as the 2008 RPA) that devote extraordinary resources to the fish. *See* Discussion *supra* at pp. 4-5. That is not conduct substantiating Plaintiffs' unfounded allegations that the Federal agencies are attempting to "avoid responsibility," and it is not conduct that renders the 2005 remand order apposite to the facts and situation presently before the Court.

[22] As noted above, Plaintiffs misconstrue the CEQ regulations to justify their proposed timing for development of a draft BiOp. ECF No. 2074 at 21. The CEQ regulations contemplate that the action agencies' analyses may be combined and coordinated, not that a BiOp (draft or final) should issue at particular junctures in the NEPA process. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.06(a); 40 C.F.R. § 1500.2(c).

developed, and the mitigation plan [was] created." *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 946 (9th Cir. 2010) (citation omitted). Thus, the only reason to require NOAA Fisheries to file a draft "jeopardy framework" or draft BiOp is to create a forum for Plaintiffs to litigate the propriety of non-final, preliminary analyses. *See also* ECF No. 2074 at 18 (seeking judicial processes to "address any issues that may arise in the course of the remand"). These procedures are plainly contrary to law. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 937 (noting the "limits to the courts' power to control an agency's conduct on remand," such as directing the filing of an "evidentiary report to the court") (citation omitted); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008 (*en banc*) (courts may not "impose on the agency [their] notion of which procedures are 'best' or most likely to further some vague, undefined public good"); *Cobell v. Norton*, 392 F.3d 461, 472-75 (D.C. Cir. 2004) (striking down relief that placed the Court in the role of supervising the agency's day-to-day compliance with a statutory mandate).

As the Supreme Court observed, "[c]ourts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 15 (1942). Here, the declarations of senior agency officials (ECF Nos. 2071, 2072) show that the agencies are listening to the Court and seeking to develop a compliance schedule that provides "a fair and adequate opportunity for public comment and the consideration of all relevant alternatives and cumulative effects." ECF No. 2065 at 20. This, along with the agencies' clear record of good faith collaboration with the regional parties and aggressive on-the-ground efforts taken to protect ESA-listed salmonids, amply shows why Plaintiffs' requests to reallocate agency resources to litigation during the remand should be rejected.

E. Injunctive Relief

Plaintiffs devote over three pages to pondering whether injunctive relief may be

appropriate.[23] Plaintiffs are free to move the Court for relief if at some future point they deem it necessary. But they have not done so now, and the Court should not delay entering an order providing a deadline for completing the NEPA process so that the parties and region can move forward in addressing the Court's May 4, 2016 Opinion.

CONCLUSION

Federal Defendants have provided the Court with their proposed schedule to plan and implement a comprehensive, inclusive process that will allow for informed decision-making on the future of the FCRPS, consistent with NEPA and the Court's order. Plaintiffs are not in a position to structure an appropriate NEPA process on this highly complex system, and the Court should adopt the five-year schedule the Federal Defendants have identified that comprises the time necessary to correctly undertake the process.

Dated this 1st day of July, 2016.

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[23] Plaintiffs' decision to continue considering the propriety of injunctive relief is well-founded, as their preliminary discussions are based on clearly incorrect standards. For example, while Plaintiffs appear to be contemplating the use of injunction proceedings to compromise the safe operation and functionality of four dams, contrary to congressional direction, they do not appear to confront Ninth Circuit law finding that irreversible and irretrievable commitments of resources occurs when an agency "commit[s] … natural resources, not necessarily the agency's financial resources." *WildWest Inst. v. Bull*, 547 F.3d 1162, 1168 (9th Cir. 2008). Likewise, injunctive relief is not based on whether a measure will "better protect" fish or subjectively "avoid unnecessary harm." ECF No. 2074 at 25. There is no presumption that "an injunction is the proper remedy," and Plaintiffs must show, *inter alia*, that any relief is narrowly tailored to avoid immediate, irreparable injury. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57, 165-66 (2010); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 799–800 (9th Cir. 2005).

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CERTIFICATE OF SERVICE

I certify that on July 1, 2016, the foregoing was electronically filed with the Court's electronic filing system, which will generate automatic service upon all Parties enrolled to receive such notice. I also certify that the following will be manually served via overnight mail:

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