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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'
OPENING BRIEF
REGARDING PROPOSED
TIMING FOR A
REASONABLE NEPA
PROCESS**

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In its May 4, 2016 Opinion and Order (“Order”), the Court found that the U.S. Army Corps of Engineers (“Corps”) and U.S. Bureau of Reclamation (“Reclamation”) violated the National Environmental Policy Act (“NEPA”), and directed them to set forth their proposed timing for completing a new NEPA process. The Court urged the agencies to take a fresh look at innovative solutions, which will allow them, the public, and public officials to consider new approaches that may enable the region to break through the current “logjam” that decades of effort and litigation have not yet been able to do. ECF No. 2065 at 144-45. Accordingly, the Court’s Order contemplates a rigorous, comprehensive, and inclusive NEPA process that ensures consideration of a reasonable range of alternative actions and provides for robust public involvement in identifying a long-term strategy for the operation and configuration of the Federal Columbia River Power System (“FCRPS”). To comply with the Court’s direction, the Corps and Reclamation, in conjunction with the Bonneville Power Administration (together the “Action Agencies”) are now focused on initiating and completing this NEPA process.

To do it right—to complete a system-wide comprehensive environmental impact statement (“EIS”) that includes a full evaluation of reasonable alternatives, addresses potential environmental effects of operating the multiple-use FCRPS projects, and provides for meaningful public participation—will require a minimum of five years. This estimated timeframe was determined through careful evaluation of the direction provided by the Court; making a preliminary determination of what will be required to prepare an EIS that complies with that direction; and ground-truthing this projection against previous NEPA processes involving system operations, as indicated in the sworn declarations of Lorri Lee, Regional Director of the Pacific Northwest Region of the U.S. Bureau of Reclamation and David J. Ponganis, Director of Programs, Northwestern Division, U.S. Army Corps of Engineers.

This five-year process will yield considerable dividends: consistent with the Court's direction, the Action Agencies are determined to embark on and complete a process that ensures an informed, well-considered, and publicly vetted long-term strategy for the FCRPS that complies with all federal laws, including Section 7 of the Endangered Species Act ("ESA"). The Court should allow the requisite investment of time for them to do so, and it should order that the Action Agencies have five years to complete a NEPA process complying with the Court's May 4, 2016 Order.

BACKGROUND

On May 4, 2016, the Court issued its Order on the parties' cross-motions for summary judgment. ECF No. 2065. With respect to Plaintiffs' ESA claims, the Court held that the 2014 Supplemental Biological Opinion ("2014 BiOp") was arbitrary and capricious, remanded the 2014 BiOp for further consultation, and ordered NOAA Fisheries to complete a new biological opinion by March 1, 2018. *Id.* at 148. The Court directed NOAA Fisheries and the Action Agencies to keep in place the 2014 BiOp and the related incidental take statement, and to continue to fund and implement the BiOp's Reasonable and Prudent Alternative ("RPA") until the new biological opinion is prepared and filed. *Id.*

With respect to Plaintiffs' NEPA claims, the Court held that the Action Agencies had violated NEPA by failing to prepare a single EIS to address their decisions to adopt and implement the 2014 supplemental BiOp and RPA. *Id.* at 144. The Court emphasized that such an EIS would have allowed the agencies to take the required "'hard look' at *all* reasonable alternatives." *Id.* at 136 (emphasis in original). Going forward, the Court noted that preparation of a "comprehensive environmental impact statement may allow, even encourage, new and innovative solutions to be developed, discussed, and considered. The federal agencies, the

public, and our public officials will then be in a better position to evaluate the costs and benefits of various alternatives and to make important decisions.” *Id.* at 19. The Court informed the parties that it intends to set a deadline for the Action Agencies to undertake this process, and therefore ordered Federal Defendants to submit a brief setting forth their proposed time for a reasonable NEPA process. *Id.* at 146.

APPLICABLE LAW

It is a bedrock principle of judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*, that upon finding that an agency’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), the appropriate remedy is to remand the matter back to the agency for “further consideration.” *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (quoting *Camp v Pitts*, 411 U.S. 138, 143 (1973) and citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). “[T]he function of the reviewing court ends when an error of law is laid bare.” *Fed. Power Comm’n v Idaho Power Co.*, 344 U.S. 17, 20 (1952). A court is not to “substitute its judgment for that of the agency” by dictating how that agency should comply with the law in the future. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Thus, in ordering a remand, a court generally should not “proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry.” *Fed. Power Comm’n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

Nonetheless, the Ninth Circuit has indicated that, under some circumstances, a court has discretionary authority to impose a deadline for remand proceedings. *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2008). In imposing such a deadline, however, a court should defer to the agency’s determination of how long it will take to complete

the remanded action. Faced with “a factual dispute the resolution of which implicates substantial agency expertise,” courts “must defer to ‘the informed discretion of the responsible federal agencies.’” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376-77 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). This principle applies with particular force with respect to agencies’ determinations of how much time is necessary to complete a task. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 35 F. Supp. 3d 1137, 1154 (N.D. Cal. 2014) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987)) (“courts 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.’”); *see also Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3rd Cir. 1998) (a court must “afford[] the agency ‘considerable deference in establishing a timetable for completing its proceedings’”) (citing *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987)). As the D.C. Circuit emphasized, 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.” *In re Barr Lab., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991).

Such deference is appropriately applied in setting deadlines for remand. In the Central Valley Project (“CVP”) litigation, referenced by the Court in its merits order, the district court expressly did so when extending a deadline on remand for the completion of analyses under NEPA and the ESA, explaining:

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 required tasks.

See Delta Smelt Consol. Cases, 1:09-cv-00407 OWW DLB, 2011 WL 1740308, at *6 (E.D. Cal. May 4, 2011). *See also Ctr. for Biological Diversity*, 35 F. Supp. 2d at 1154 (noting that “[t]he

Court is also mindful that although courts may compel an agency to ‘act within a reasonable time,’ . . . courts 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,’” and therefore adopting agency’s proposed deadline) (citing *Sierra Club*, 828 F.2d at 797).

DISCUSSION

A. Federal Defendants’ Proposed Timeline for Preparing an EIS Comports with the Court’s Guidance and Allows for Meaningful Public Involvement

In its May 4, 2016 Order, the Court held that the Action Agencies violated NEPA by failing to prepare an EIS that addressed the agencies’ decisions—made following completion of the ESA consultation—on FCRPS system operations and other actions identified in NOAA Fisheries’ RPA. The Court’s Order provides guidance to the Action Agencies, both in its rationale for finding a NEPA violation and in its discussion of options for the agencies to consider for their future NEPA compliance efforts. In particular, the Order emphasizes that the Action Agencies, in preparing their new EIS, should: (1) take a “hard look” at all reasonable alternatives, which may include actions that the agencies currently lack authorization or funding to undertake; and (2) ensure meaningful public involvement in the process. ECF No. 2065 at 18-20, 136-37; *see also* Ponganis Decl. ¶¶ 6-7.

As described below, the Action Agencies have identified a schedule—based on currently available information and reasonable estimates—that would allow them to complete a process (subject to the availability of funding) that complies with the Court’s guidance and NEPA, culminating in signed records of decision (“RODs”), within five years of the Court issuing its remedy order. This investment of time and resources will allow for an inclusive, comprehensive analysis of the potential environmental impacts of a reasonable range of alternatives, robust

public input with respect to such alternatives, and fully informed decisionmaking as envisioned by the Court's order.¹

1. Federal Defendants' Proposed Schedule

The process for preparing an EIS is governed by regulations promulgated by the Council on Environmental Quality ("CEQ"). Under the regulations, the EIS process entails: (1) scoping, initiated by the announcement of an agency's intent to prepare an EIS through issuance of a notice of intent ("NOI"), 40 C.F.R. § 1501.7; (2) preparation of a draft EIS, and issuance of the document for public comment, *id.* § 1502.9(a); (3) preparation of a final EIS, which responds to the public comments on the draft EIS, *id.* § 1502.9(b); and (4) preparation and signing of a record of decision, *id.* § 1505.2. The Action Agencies' timeline for meeting each of these milestones under their proposed schedule is set forth below.²

a. Scoping

The initial phase in preparing an EIS is the scoping process, in which the Action Agencies will make a preliminary determination of the scope of issues to be addressed in the EIS. To initiate this scoping process, the Action Agencies will draft an NOI, which will be published in the Federal Register. 40 C.F.R. § 1501.7. During this period of scoping, the Action

¹ In submitting this response in compliance with the Court's order, Federal Defendants do not waive any right to appeal any aspect of the Court's decision and order in the future if Federal Defendants determine any appeal would be appropriate.

² NEPA processes can be very complex, because they involve a broad range of analysis on varied resources and the coordination of numerous stakeholders. For that reason, it is rarely possible to accurately predict how long a NEPA process will take. For instance, the length of time needed to complete a rigorous and legally sound NEPA analysis will be impacted by the outcome of the scoping process, the number and scope of comments received, and many other factors. Keen interest in the operation of the FCRPS, the breadth of issues, and the geographic scope of the relevant area has the potential to expand the scope of analysis beyond that assumed to develop this schedule. Ponganis Decl. ¶ 20. Thus, while the Action Agencies have made reasonable assumptions and attempted to account for uncertainties in proposing the deadline set forth herein, *id.*, unanticipated events or new information may require the Action Agencies to request adjustments to the schedule.

Agencies will solicit written and oral public comments, hold public meetings, assess all public, tribal, and federal and state agency input, formulate alternatives to be analyzed, and identify the appropriate analyses necessary to evaluate impacts to the resources identified during scoping. Ponganis Decl. ¶ 10. The Action Agencies project it will take approximately one year from issuance of the NOI to the completion of the scoping process. Lee Decl. ¶ 22(a); Ponganis Decl. ¶ 10.

Under the CEQ regulations, scoping is to be an “early and open” process, designed to determine the scope of the issues to be addressed in the EIS, and to identify any significant issues related to the proposed action. 40 C.F.R. § 1501.7. Here, the Action Agencies intend to conduct a multi-state scoping process in light of public interest and the Court’s guidance. *See* Lee Decl. ¶ 13(b); Ponganis Decl. ¶ 10. *See also* 40 C.F.R. § 1501.7(a)(1) (requiring, as part of scoping process, that an agency “[i]nvite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds).”); 33 C.F.R. § 230.12 (Corps regulation requiring the invitation of public participation in the scoping process).

To ensure that the agencies are undertaking an inclusive NEPA process, and that they are setting the stage for a comprehensive and enduring decision-making process, the agencies will solicit and utilize input from the public with respect to proposed alternatives for the agencies to evaluate in the EIS. Ponganis Decl. ¶ 13. Further, to ensure adequate public participation, the agencies will not only invite written comments, but also intend to host a series of public meetings throughout the region. *Id.* ¶ 10.

Throughout the NEPA process, the Action Agencies will seek the involvement of the numerous regional tribes that are interested parties regarding FCRPS operations, in accordance

with their responsibilities pursuant to Executive Orders, treaties, and statutes. Lee Decl. ¶ 13(b); Ponganis Decl. ¶ 11. Thus, during scoping the Action Agencies will reach out to these tribes. *See* Lee Decl. ¶ 13(b); Ponganis Decl. ¶ 10. Similarly, the Action Agencies expect robust engagement from other entities, including at least four states, environmental and other interested organizations, and others who are impacted by FCRPS operations. *See* Lee Decl. ¶ 13(b); Ponganis Decl. ¶ 10.³ The results of the scoping process will be incorporated into the formulation of the draft EIS. *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”).

b. Draft EIS

Even before scoping is finished, the Action Agencies will begin to prepare a draft EIS. In the Action Agencies’ assessment, preparation of the draft EIS will be the most time-consuming portion of the NEPA process: they predict that preparing a draft EIS will take approximately two-and-a-half years. Lee Decl. ¶ 22(b); Ponganis Decl. ¶ 12.

CEQ regulations identify the categories of information and analysis that an EIS (and therefore a draft EIS) must include. Specifically, an EIS must include a statement of the purpose and need of the proposed action; a description of the various alternatives to the proposed action; a description of the affected environment; and a discussion of the direct, indirect, and cumulative effects of the implementation of each of the alternatives. 40 C.F.R. §§ 1502.10-16. The time and resources required to draft such sections depends upon the scope and complexity of the proposed action, action alternatives, and NEPA process.

Here, ensuring that the draft EIS meets the requirements of NEPA and aligns with the guidance from the Court will require substantial dedication of agency time and resources. First,

³ During scoping, the Action Agencies will also be discussing with NOAA Fisheries key issues and alternatives appropriate for analysis.

consistent with the Court’s guidance, the Action Agencies will ensure that the draft EIS evaluates a reasonable range of alternatives. At this point—prior to initiating scoping—the Action Agencies are contemplating approaches for analyzing an array of alternatives for different system operations for all fourteen FCRPS dams and structural modifications that have the potential to improve fish passage, including the breaching of one or more of the federal dams that currently provide for adult and juvenile fish passage. Ponganis Decl. ¶ 13. The range of alternatives may well be expanded as a result of the public scoping process. *Id.* Further, non-operational measures such as habitat actions in the tributaries and estuary, predation management actions, and conservation and safety net hatcheries to offset or minimize environmental impacts may also be evaluated in the event that the Action Agencies determine such measures would serve as potential mitigation measures. *Id.* ¶ 14.

For each of the alternatives, the draft EIS will analyze impacts on a wide variety of resource issues related to the operation and maintenance of the FCRPS. While the agencies may be able to utilize information contained in recent biological opinions to inform a portion of their analyses related to impacts on some threatened and endangered species, *see, e.g.*, ECF No. 2065 at 143, the environmental and socio-economic impacts that the EIS must evaluate will implicate numerous other resources. Ponganis Decl. ¶ 15; *see also* 40 C.F.R. § 1508.14 (EIS must address economic or social effects which are interrelated with natural or physical environmental effects). For instance, in the 1995 *Columbia River System Operation Review Final Environmental Impact Statement* (the “SOR EIS”), which addressed FCRPS system operations, the agencies evaluated potential impacts to environmental resources including: earth resources (i.e., geology and groundwater); water quality; air quality; anadromous and resident fish; wildlife; cultural resources; resources of particular interest to Native Americans; and aesthetics. Ponganis Decl. ¶

15. *See also* ACE 562 at 55265-66. The SOR EIS also evaluated economic and social impacts of the various alternatives on flood control; navigation; power; irrigation; municipal and industrial water supply, and recreation. Ponganis Decl. ¶ 15. This SOR EIS included 27 volumes of analysis with over 5800 pages. Ponganis Decl. ¶ 22. *See also id.* ¶ 15 (noting that 2002 *Lower Snake River Juvenile Salmon Migration Feasibility Study and EIS*, or “LSR Study,” addressed impacts to wide range of resources); ACE 569 at 59902-60465 (over 550 pages in main body of LSR Study describing relevant affected resources and impacts of alternatives on 13 categories of resources). Moreover (and consistent with the Court’s order), the impacts to these resources will be addressed in light of changing climate conditions. Ponganis Decl. ¶ 13.

As part of the evaluation of the potential impacts to the relevant resources, the Action Agencies expect that they will need to develop various models, which will be time and resource intensive. Lee Decl. ¶ 22(b); Ponganis Decl. ¶ 16. Finally, the Action Agencies will solicit the expertise of the Tribes and States, cooperating agencies, and others in conducting the evaluation of the proposed actions and alternatives. Ponganis Decl. ¶ 16; *see also* 43 C.F.R. § 46.225 (regulation requiring Interior Department bureaus to consider requests by eligible governmental entities, including State, tribal, or local agencies, to act as cooperating agencies). While robust participation by cooperating agencies and others will facilitate a fresh look at alternatives, it will also necessarily increase the time required to complete the NEPA process.⁴ Finally, to conclude this phase, the Action Agencies will file a copy of the draft EIS with the U.S. Environmental Protection Agency (“EPA”), which will publish a Notice of Availability (“NOA”) in the Federal Register and issue the draft EIS. Ponganis Decl. ¶ 17. *See also* 40 C.F.R. §§ 1506.9 & 1506.10.

⁴ At the draft EIS stage of the NEPA process, the Action Agencies also will continue coordination with NOAA Fisheries; for instance, the agencies may use a potential preferred alternative in the draft EIS as the proposed action for an ESA § 7 consultation.

Ultimately the Action Agencies expect that this two-and-a-half year (plus) process will be essential for ensuring “[t]he agencies, public, and public officials will be able to evaluate the costs and benefits of various alternatives.” ECF No. 2065 at 145.

c. Final EIS

After preparing the draft EIS, the Action Agencies must obtain comments of any “Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.” 40 C.F.R. § 1503.1(a)(1). In addition, the agencies must request comments from state and local agencies, Indian tribes, interested agencies, and the public. 40 C.F.R. §§ 1503.1(a)(2)-(4). NEPA regulations include detailed public notice requirements, *id.* § 1506.6, and a period of “not less than 45 days for comments on [a] draft [EIS]” by the public. *Id.* § 1506.10(c). After the close of the public comment period, the agency will prepare a final EIS, which, among other things, must respond to comments received on the draft EIS. *Id.* § 1502.9(b). The Action Agencies project that it will take them approximately one year following publication of the draft EIS to adequately consider and respond to the public comments, and then issue a final EIS.

In light of the public’s interest in a meaningful opportunity to comment on a draft EIS that addresses numerous complicated and potentially controversial topics, an extension of the 45-day regulatory minimum period for public comment will likely be warranted (as is often the case for complex NEPA processes). *See, e.g.,* Ponganis Decl. ¶ 17. Further, in addition to inviting written comments, the agencies anticipate holding multiple public meetings on the draft EIS, to ensure the public and interested parties have an adequate opportunity to understand the alternatives and voice their opinions. *Id.* These measures, while increasing the time for the

process, will be necessary for the overall objective of the agencies—to complete a comprehensive and meaningful NEPA process.

The Action Agencies expect to receive a substantial volume of public comments. *See* Lee Decl. ¶ 22(c); Ponganis Decl. ¶ 18. Under the CEQ regulations, the Action Agencies must respond to these comments by, for instance, modifying alternatives or the proposed action, developing and evaluating new alternatives, supplementing earlier analyses or correcting factual errors, or explaining why comments do not warrant further response. 40 C.F.R. § 1503.4(a). Given the number of comments expected, a year is the minimum amount of time the agencies will need to prepare a final EIS. Lee Decl. ¶ 22(c); Ponganis Decl. ¶ 18. Consistent with the CEQ regulations, the Action Agencies will then file a copy of the final EIS with the EPA, which will then publish an NOA for the final EIS in the Federal Register. Ponganis Decl. ¶ 19. *See also* 40 C.F.R. §§ 1506.9 & 1506.10.

d. Issuance of ROD

The final step in the process will be for the Action Agencies to prepare and sign RODs or other decision documents on the proposed action, which must, among other things, state the agency decision; identify alternatives considered by the agency in reaching its decision; and address whether the agency adopted measures to offset or minimize environmental impacts from the alternative selected. 40 C.F.R. § 1505.2. The Action Agencies anticipate that they will be able to do so within six months of EPA's publication of the NOA. Ponganis Decl. ¶ 19.

Under the CEQ regulations, the Action Agencies must wait a minimum of thirty days after the publication of the NOA to issue a signed ROD. 40 C.F.R. § 1506.10(b)(2). However, based on prior EISs in the basin, the Action Agencies anticipate there will be numerous comments on the final EIS that will need to be considered and addressed. Ponganis Decl. ¶ 19.

Assuming that no further substantive analysis is warranted, and that there are no significant new circumstances or information related to environmental concerns that may necessitate preparation of a supplement following either the draft or final EIS, 40 C.F.R. § 1502.9(c), the Action Agencies anticipate they could issue their respective RODs approximately six months following EPA's issuance of the NOA, and approximately five years from initiating the NEPA process. Lee Decl. ¶ 22(d); Ponganis Decl. ¶ 19.

The Action Agencies' proposed schedule is, as the next section demonstrates, aggressive. The proposed schedule will require a high level of agency resources and funding. Ponganis Decl. ¶ 27. It also relies on the assumption that the NEPA process generally will follow a standard course for drafting the analyses and allowing reasonable timelines for public involvement. Lee Decl. ¶ 23; Ponganis Decl. ¶ 20. Of course, the substantial interest in the operation and configuration of the FCRPS and the breadth of issues and geographic scope of the region has the potential to expand the scope of analysis beyond what the agencies have assumed. Lee Decl. ¶ 23; Ponganis Decl. ¶ 20. Thus, while the Action Agencies have made reasonable assumptions and attempted to account for uncertainties in proposing the deadline set forth herein, it is possible that intervening circumstances or new information over the course of the NEPA process may require adjustments to the schedule. Nonetheless, based on the current available information, the Action Agencies believe a five-year schedule is achievable. Ponganis Decl. ¶ 27.

2. Federal Defendants' Proposed Schedule is Corroborated by Prior NEPA Processes

Federal Defendants' development of their Proposed Schedule is based, in part, on their experiences in preparing other complex operational EISs. These prior NEPA processes substantiate the reasonableness of the Action Agencies' proposed schedule.

Among the examples the agencies considered were two prior EISs related to the FCRPS, namely: (1) the SOR EIS, a comprehensive analysis of the effects of several Columbia River system operation strategies to meet authorized project uses, and (2) the LSR Study, an evaluation of alternatives for addressing survival of juvenile anadromous fish through the Lower Snake River projects, including breaching of the dams. Ponganis Decl. ¶ 21.

The SOR EIS—a joint document prepared by the Corps, Reclamation, and BPA, along with three other federal cooperating agencies—analyzed several system strategies for operating the FCRPS to address competing uses of the river (in addition to alternative ways to meet regional power coordination requirements and, pursuant to the Columbia River Treaty, to allocate the Canadian share of power under the Canadian Entitlement Allocation Agreements). *Id.* ¶ 22. As is anticipated for this EIS, the public outreach was extensive and included public meetings held throughout the Columbia River Basin. *Id.* ¶ 23. The SOR EIS process, like the anticipated process for this EIS, required coordination with a large number of local, state, and federal agencies, as well as many tribes. *Id.* The Action Agencies considered thousands of public comments and extended the comment periods several times at the request of tribes, governors of states in the region, and other interested parties. *Id.* All told, the process, from NOI to signed RODs, took over six and a half years. *Id.*

As another example, the 2002 LSR Study, conducted by the Corps, with Reclamation and BPA as cooperating agencies, analyzed four alternatives to study possible improvements to passage for the four lower Snake River ESA-listed salmon and steelhead evolutionarily significant units (ESU): (1) no action or existing condition; (2) maximum transport of juvenile salmon; (3) system improvements that could be accomplished without a drawdown; and (4) breaching all four lower Snake River dams. *Id.* ¶ 24. Again, the agencies provided extensive

periods for public involvement due to the heightened regional interest in the LSR Study, including a scoping period of two years during which 26 public meetings took place, with over 2,000 participants. *Id.* ¶ 25. During the five month draft EIS comment period, the Agencies held fifteen formal meetings in which approximately 9,000 people participated. *Id.* The final LSR Study totaled over 5,000 pages of analysis, and it took over seven years to complete. *Id.* ¶ 24.

In addition to these two FCRPS EISs, the Action Agencies also considered more recent EIS processes and determined that two relatively complicated EIS processes that Reclamation recently participated in are instructive: (1) the court-ordered EIS addressing the CVP; and (2) an EIS prepared by the Department of the Interior (“Interior”) addressing a proposal to remove four non-federal dams on the Klamath River. *Lee Decl.* ¶ 2. For the CVP, Reclamation prepared an EIS to analyze the potential environmental impacts of modifying CVP system operations in central and northern California, including the effects of adopting two biological opinions and reasonable and prudent alternatives for operation of the CVP. *Id.* ¶ 3. The CVP is a significantly smaller system than the FCRPS, affecting a much smaller geographical area, and the CVP proceedings entailed a less extensive scoping process than undertaken in the SOR EIS and LSR Study processes described above. *See Lee Decl.* ¶¶ 3, 13(a), 13(d), 13(e). Even so, Reclamation needed three years to complete a draft EIS for public comment. *Id.* ¶ 8. The draft EIS evaluated five alternatives, and due to time constraints arising from a court deadline, the public outreach process for comments on the draft EIS was significantly more abbreviated than that for the previous FCRPS EISs, or even Reclamation’s normal process. *See id.* ¶¶ 8-9. Allowing for the minimum regulatory time between the filing of the final EIS and the issuance of the ROD, Reclamation required almost four years to complete the EIS. *Id.* ¶ 11.

The Action Agencies also considered the *Klamath Facilities Removal Environmental Impact Statement/Environmental Impact Report* (“Klamath Facilities EIS”), in which Interior (with Reclamation’s support) analyzed the environmental impacts of removing four PacifiCorp dams on the Klamath River. Lee Decl. ¶ 14. Again, the geographical scope of the action was considerably smaller than that of the FCRPS, and public involvement (including with respect to both scoping and the draft EIS), was not as expansive as that for the SOR EIS and LSR Study. *See id.* ¶¶ 16, 21(d). That is not to say that public involvement was not substantial—in fact, Interior received 4,000 comments on the draft document, requiring 13 months to respond to the comments and prepare the final EIS. *Id.* ¶ 19. Interior’s final EIS analyzed five alternatives and in the end, totaled more than 7,500 pages, reflecting the work of nearly 100 individuals. *Id.* ¶¶ 19-20. Ultimately, the process of completing a final EIS required nearly three years, but the process is ongoing, as no ROD has yet issued. *Id.* ¶ 15.

These examples illustrate the amount of time and resources that can be expected to complete an EIS addressing complex federal projects authorized to meet several purposes. However, the task of preparing the Action Agencies’ new EIS on the FCRPS likely will be more challenging and resource-intensive than each of these examples. For instance, other than the SOR EIS, these examples all addressed a much smaller geographic area and fewer complex facilities than the EIS here. *See* Lee Decl. ¶¶ 13(d); 21(d); Ponganis Decl. ¶ 26. Indeed, the CVP and Klamath projects are a fraction of the size of the FCRPS, not just in terms of geographic reach, but also in terms of water storage and hydropower generation capacities. Lee Decl. ¶¶ 3, 14. With a far greater geographic scope, the new EIS process will entail more public outreach, coordination with affected sovereigns, and even coordination among federal agencies than did the CVP and Klamath Facilities EISs. *See* Lee Decl. ¶¶ 13(b), 13(c), 21(c), 21(e).

Likewise, while both address the FCRPS, the analysis in the new EIS will be more challenging in some ways than that in the SOR EIS. The new EIS will likely address a more complex range of issues. For instance, the new EIS will address potentially breaching or bypassing dams, climate change information and analysis, and additional listings under the ESA. Ponganis Decl. ¶ 26. Furthermore, the Action Agencies’ new EIS will look at more than system operating strategies—including potentially addressing various actions as mitigation. Ponganis Decl. ¶¶ 14, 27.⁵

3. The Court Should Adopt Federal Defendants’ Proposed Schedule

The Court should give considerable weight to the Action Agencies’ determination of how much time is necessary to complete the EIS process here. As the Court ultimately held in the CVP litigation, “[t]he agencies, not the Court, are in the best position to determine how long it will take them to complete these required processes.” *See Delta Smelt Consol. Cases*, 2011 WL 1740308, at *6. *See also Ctr. for Biological Diversity*, 35 F. Supp. 3d at 1154 (recognizing that “courts are ill-suited to review the order in which an agency conducts its business”). Because the Action Agencies’ determination of an appropriate schedule for preparing their EIS is reasonable, and indeed, is corroborated by specific EIS processes, including those related to the very federal system at issue in this litigation, the Court should adopt the agencies’ proposed schedule.

Importantly, not allowing adequate time to complete the EIS will be counterproductive and inefficient. The interests of the public and of the environment are better served by allowing the Federal Defendants to invest the time needed to properly comply with NEPA and undertake the analysis and public process advised by the Court, rather than creating a situation where the

⁵ The range of issues contemplated for the new EIS is also significantly broader than those in the LSR Study, CVP EIS, and Klamath Facilities EIS. Ponganis Decl. ¶ 26; Lee Decl. ¶¶ 13(e), 21(a).

need to conduct a thorough analysis is overshadowed by the specter of failing to meet a judicially imposed deadline. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 606, 605 (9th Cir. 2014) (observing that “[d]eadlines become a substantive constraint on what an agency can reasonably do” and that the district court’s imposition of a tight deadline for FWS’s production of a Biological Opinion under the ESA resulted in that document being “a jumble of disjointed facts and analyses”); *id.* at 606 (“We wonder whether anyone was ultimately well-served by the imposition of tight deadlines in a matter of such consequence.”). Accordingly, the Court should allow the Action Agencies five years to complete their EIS process, consistent with their expert determination of the time necessary to complete the process.

B. Coordination of NEPA Review and ESA Consultation Process.

While the Court directed briefing only on the NEPA process, given that process’s interrelationship with the ESA consultation process, we also wish to apprise the Court of sequencing issues that the agencies have identified in responding to the Court’s Order. In addition to directing the Action Agencies to undertake a new NEPA process, the Court directed NOAA to issue a new biological opinion by March 1, 2018.⁶ As this Court recognized, the NEPA and ESA processes can inform each other, *see* ECF 2065 at 19, and ideally these processes would run concurrently. *See* Ponganis Decl. ¶ 28; *see also Jewell*, 747 F.3d at 648 (stating that “agencies are expected to concurrently comply with both Section 7 of the ESA and

⁶ This deadline requires NOAA to issue a new biological opinion approximately 10 months sooner than originally envisioned. The 2008, 2010, and 2014 biological opinions reviewed a 10-year action that ran through the end of 2018. 2014 BiOp at 40; *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1120 (D. Or. 2011) (2008 and 2010 BiOps conclude “that through 2018, FCRPS operations are not likely to jeopardize the continued existence of any listed species”). Thus, the agencies had anticipated implementing the RPA actions through the end of 2018, completing studies and evaluating monitoring and evaluation data generated in 2017 and early 2018, and ultimately completing a new ESA consultation in early 2019. *See* 2014 BiOp at 40. Accordingly, the Action Agencies and NOAA will need to expedite the consultation process beyond what had been anticipated if they are to meet the March 2018 date.

NEPA”); 40 C.F.R. § 1500.2 (“Federal agencies shall to the fullest extent possible: . . . integrate the requirements of NEPA with other planning and environmental review procedures . . . so that all such procedures run concurrently rather than consecutively.”). Thoughtful integration of these two independent, yet parallel processes on actions of the scale and complexity of the FCRPS will undoubtedly be complicated and the schedule for one process likely could affect the schedule for the other process.⁷ Accordingly, Federal Defendants are not presently in a position to precisely delineate how the two processes will be coordinated and sequenced. Once the Court approves a NEPA schedule, the Federal Defendants intend to evaluate how best to integrate the ESA consultation and the NEPA review, informed by the NEPA timeline.⁸

CONCLUSION

The Action Agencies have taken seriously the guidance from the Court’s May 4, 2016 Order. They are committed to planning and implementing a comprehensive, inclusive process that will allow for informed decision-making as to the future of the FCRPS, consistent with NEPA and the Court’s order. This process requires an investment of time and resources that the Agencies are poised to make. The Court should give the Action Agencies the opportunity to do so, and should allow them five years to complete the NEPA process.

Dated this 3rd day of June, 2016.

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⁷ The Action Agencies will need to complete ESA consultation with both NOAA Fisheries and U.S. Fish and Wildlife Service on the proposed action before any ROD is signed. *See Ponganis Decl.* ¶ 28.

⁸ For example, Federal defendants may consider seeking an adjustment to the current deadline for a new biological opinion during the pendency of the NEPA review while the agencies develop a longer-term strategy for the FCRPS that synchronizes the ESA consultation with the information developed through the NEPA process.

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CERTIFICATE OF SERVICE

I certify that on June 3, 2016, the foregoing was electronically filed with the Court's electronic filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. I also certify that the following will be manually served via overnight mail:

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