

TODD D. TRUE (WSB #12864)
ttrue@earthjustice.org
STEPHEN D. MASHUDA (MSB #4231)
smashuda@earthjustice.org
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]

THE HONORABLE JAMES A. REDDEN

DANIEL J. ROHLF (OSB #99006)
rohlf@lclark.edu
Pacific Environmental Advocacy Center
10015 S.W. Terwilliger Boulevard
Portland, OR 97219
(503) 768-6707
(503) 768-6642 [FAX]
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Civ. No. CV 01-00640-RE

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE,

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC
POWER COUNCIL, WASHINGTON STATE FARM
BUREAU FEDERATION, FRANKLIN COUNTY
FARM BUREAU FEDERATION, GRANT COUNTY
FARM BUREAU FEDERATION, STATE OF
WASHINGTON, and STATE OF IDAHO,

Intervenor-Defendants.

NWF'S MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

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INTRODUCTION

In its first motion for summary judgment in this case more than two years ago, plaintiffs, National Wildlife Federation et al. (“NWF”), observed that:

Salmon and steelhead in the Columbia and Snake River Basins were – and still are – a vital part of the Northwest’s ecological, cultural, and economic fabric. ... The effort to restore these species . . . is among the most pressing issues facing this region.¹

Certainly the importance of salmon and steelhead to the Northwest and its future has not changed in the intervening years. What has changed, however – and dramatically – is the nature of the federal government’s effort to restore these species. Even though the Court has invalidated the biological opinion for operation of the Federal Columbia River Power System (“FCRPS”) that NWF originally challenged, National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp.2d 1196 (D. Or. 2003) (“NWF v. NMFS”), and remanded it to the National Marine Fisheries Service (“NMFS” or “NOAA”) to correct the specific errors the Court identified, the agency chose instead to prepare an entirely new and radically different biological opinion for FCRPS operations.

Rather than acknowledge and resolve the grave risks to ESA-listed salmon and steelhead in the Columbia basin from FCRPS operations, the new opinion truncates consideration of these risks, attempts to create the appearance that the federal action agencies are not accountable for most of the harm the FCRPS is causing, and discards the best available analytical tools for assessing the substantial risks these species face. As a consequence of these sweeping changes in analysis – not actions – NMFS concludes that on-going operation, maintenance, and configuration of the FCRPS will not jeopardize Columbia basin salmon and steelhead.

As NWF explains more fully below, NMFS’ new opinion, the “Endangered Species Act – Section 7 Consultation Biological Opinion for the Consultation on Remand for Operation of

¹ NWF’s Amended Memorandum in Support of Motion for Summary Judgment at 1 (filed Nov. 14, 2002), Docket # 344.

the Columbia River Power System and 19 Bureau of Reclamation Projects in the Columbia Basin” (“2004 BiOp”), is contrary to law, arbitrary, and capricious, in violation of Section 7(a)(2) of the ESA and Section 10 of the Administrative Procedure Act (“APA”).²

BACKGROUND

Salmon and steelhead populations in the Columbia River basin are in a perilous decline and currently face a very high risk of extinction, despite recent improved adult returns. Second Supplemental Complaint for Declaratory and Injunctive Relief (“2d Complaint”) at ¶¶ 24-28; NWF v. NMFS, 254 F. Supp. at 1201 (salmon “remain in a state of perilous decline throughout the Columbia River Basin”); NWF v. NMFS, CV 01-640-RE Opinion & Order (July 29, 2004) (characterizing status of fish as a “deficit situation”); see also e.g., 69 Fed Reg. 33102, 33127-28 (June 14, 2004) (NMFS’ proposed listing determination for Upper Columbia River Spring chinook). In order to place these risks in context, Dr. Gretchen Oosterhout explains in an accompanying declaration³ that applying the same analytical methods and standards NMFS employed in the jeopardy analysis for the 2000 BiOp to the most current information about salmon and steelhead survival rates reveals that even with recent adult returns, these species would still fall well short of the survival rates NMFS calculated were necessary to avoid jeopardy in its 2000 opinion. See Third Declaration of Gretchen Oosterhout, Ph.D., in support of motion for summary judgment at ¶¶ 11-21 (“3d Oosterhout Decl.”).⁴ The fundamental

² The 2004 BiOp is included in the Administrative Record as AR Doc. A.1. Its predecessor opinion, the “2000 BiOp,” appears at AR Doc. B.156. NWF refers to each of these documents by their abbreviated names – “2004 BiOp” and “2000 BiOp” – throughout this brief.

³ Although review of agency decisions under the APA is generally limited to the administrative record, this declaration is admissible under well-established exceptions to that rule. The Court may properly consider Dr. Oosterhout’s declaration “to determine what matters the agency should have considered but did not,” Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980), and to help explain complex, technical matters, Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520, n.22 (9th Cir. 1992).

⁴ As Dr. Oosterhout explains, her “analyses show [] that if NMFS had employed the same approach and framework in the 2004 FCRPS BiOp that it employed in 2000 for estimating the survival improvements necessary to avoid jeopardy, and if it had taken into account all of the

difference between the 2004 BiOp and earlier opinions lies not in changes in species survival between 1999 and today, but in a sea-change in NMFS' framework for evaluating jeopardy to these species.

I. PRIOR BIOLOGICAL OPINIONS FOR FCRPS OPERATIONS

In earlier biological opinions for FCRPS operations in 1995 and 2000, following this Court's rejection of a 1993 biological opinion in IDFG v. NMFS, 850 F. Supp. 886 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995), NMFS framed the fundamental question posed by FCRPS operations as:

[W]hether the species can be expected to survive with an adequate potential for recovery under the effects of the proposed or continuing action [or RPA], the effects of the environmental baseline, and any cumulative effects, and considering measures for survival and recovery specific to other life stages. [This] "jeopardy standard" would be met if the mortality attributable to the proposed action [or RPA is] below a level that, when combined with mortality occurring in other life stages, provides a high likelihood of survival and a moderate to high likelihood of recovery.

2000 BiOp at 1-9. To evaluate and help answer these questions, NMFS assessed the then current population growth rates of the listed species, see, e.g., id. at 4-2, 4-4, 4-6, 4-12, 4-13, & App. A, identified both a survival and a recovery threshold, id. at 1-13 to 1-14 & App. A, and calculated the change in then-current survival rates that would be needed to allow the species to survive with an adequate potential for recovery, see e.g., id. App. A at A-20 (Table A-4).

NMFS concluded that the action agencies' proposed operation of the FCRPS would fall short of these thresholds and jeopardize the continued existence of eight up-river salmon and steelhead ESUs. 2000 BiOp, Chpts. 6, 8. Consequently, NMFS formulated a reasonable and prudent alternative ("RPA") for hydrosystem operations. NMFS then assessed quantitatively

available information on recent salmon and steelhead returns, such an analysis would show [that] the survival improvements necessary to avoid jeopardy to the ESA-listed ESUs under the 2000 FCRPS BiOp analytic framework are still very large for most ESUs [and] the fraction of these survival improvements that would be provided by the hydrosystem measures of the [Updated Proposed Action] is small . . ." 3d Oosterhout Decl. at ¶ 21.

whether, when combined with the environmental baseline and cumulative effects, the RPA would avoid jeopardy, i.e., increase the survival of each ESU enough to avoid an appreciable reduction in both survival and recovery. *Id.*, Chpt. 9. Because the agency concluded that the RPA alone would not increase the prospects of survival and the recovery enough to avoid jeopardy, it assessed qualitatively whether a complex collection of “off-site” mitigation activities would provide the necessary survival improvements. *Id.* Although NMFS concluded that with these off-site actions, FCRPS operations would avoid jeopardy, the Court found that the agency’s consideration of the off-site measures strayed from the requirements of the ESA and its implementing regulations. *NWF v. NMFS*, 254 F. Supp.2d at 1211-12.⁵ The Court, therefore, remanded the opinion to NMFS to determine whether mitigation measures that complied with the regulations, when considered together with the environmental baseline and cumulative effects, would avoid jeopardy. *See NWF v. NMFS*, CV No. 01-640-RE, Opinion at 2 (July 1, 2003) (Docket #439).

II. THE 2004 BIOP

The agency on remand did not limit itself to correcting the problems the Court identified, which required only that NMFS and the action agencies identify particular mitigation actions that complied with the regulations and determine whether these would allow FCRPS operations to meet the ESA’s jeopardy standard.⁶ [*See NWF v. NMFS*, CV 01-640-RE Opinion & Order (May 13, 2004) (Docket #496) (“the court is concerned that the remand process may also have

⁵ NWF raised a number of other claims that the Court did not resolve. *NWF v. NMFS*, 254 F. Supp.2d at 1203, 1216.

⁶ NMFS nonetheless consistently asserts that it is the Court’s opinion that re-interpreted the ESA regulations and required the agency’s new jeopardy framework: “NOAA Fisheries’ ‘new framework’ is not new but is the framework that has been in place for almost twenty years since its consultation regulations, 50 C.F.R. Part 402, were adopted in 1986. What is new is the interpretation of these regulations by the District Court in *NWF v. NMFS* to focus the jeopardy analysis on the effects of the action, with reference to the environmental baseline within the action area and to any cumulative effects within the action area.” AR Doc. C.293 at 1-12 (emphasis added); see also 2004 BiOp at 1-5.

diverged from the intent and terms of the court’s Order”)]. Instead, NMFS has fundamentally restructured its approach to assessing jeopardy from FCRPS operations. See 2d Complaint at ¶¶ 46-67.

Although there are many infirmities in the 2004 BiOp, the dispositive analysis – and the keystone legal flaw – is grounded in the agency’s unprecedented interpretation of the regulatory definition of “jeopardize the continued existence of.” 50 C.F.R. § 402.02. The regulation defines this phrase as “engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” Id. NMFS identifies in this definition two distinct, sequential inquiries. In step one, NMFS asserts that it must determine whether the effects of the proposed action, standing alone, will “reduce[] the reproduction, numbers, or distribution of a species.” See, e.g., 2004 BiOp at 1-12. NMFS then asserts that if the proposed action considered in isolation has “no net effect” on a species’ current reproduction, numbers or distribution, the jeopardy inquiry is at an end and the only appropriate finding is “no-jeopardy.” As the agency states:

[I]f, in step 3, NOAA Fisheries determines that the proposed action would either not affect or would result in a net improvement in survival or habitat condition for a given ESU, NOAA Fisheries would conclude that the action is not likely to jeopardize that ESU or adversely modify critical habitat. Because there would be no net reduction in the productivity, abundance or distribution of the ESU, there could not be an appreciable reduction in the likelihood of both survival and recovery in accordance with the regulatory definition of “jeopardize the continued existence of” (50 C.F.R. § 402.02).

2004 BiOp at 1-12 (emphasis added); see also id. at 8-1.

Only if NMFS finds in answer to the first question that there will be a net reduction in a species’ reproduction, numbers or distribution as a result of a proposed action must it consider the second question – whether that net reduction has an “appreciable” effect on the species’ prospects of survival and recovery. 2004 BiOp at 1-12. According to NMFS, only at this second stage must it consider the proposed action together with the current status of the species, the

effects of the environmental baseline, and any cumulative effects, 2004 BiOp at 1-12, 8-2 to 8-3, in short the components of a jeopardy analysis required by the ESA regulations. See 50 C.F.R. § 402.14(g). As NMFS emphasizes in its response to comments on the draft 2004 BiOp:

[T]his Opinion isolates the precise action, the operation of the FCRPS, from its environmental baseline. Focusing on the proposed action, NOAA Fisheries determines the extent to which that action “reduces the reproduction, numbers or distribution of a listed species.” The weight of past actions, which is the environmental baseline, is properly considered when determining whether any adverse effect caused by the action “appreciably reduces the likelihood of both survival and recovery.”

AR Doc. C.293 at 1-8.

With this hypertechnical and unprecedented parsing of the definition of “jeopardize the existence of” as the basis for its analysis, NMFS states that in order to determine whether the proposed action will have a net negative effect on any ESU, it must evaluate the effects of the action “compared to the environmental baseline.” 2004 BiOp at 1-12 (emphasis added); see also id. at 6-1. Based solely on the comparison of these alleged effects, NMFS determines that the action will have no “net effect” on any ESU. Compare, e.g., 2004 BiOp at 6-68 (predicting “no net change” for Snake River spring/summer chinook) with id. at 8-7 (“no change” means that “the proposed action is not likely to appreciably reduce the likelihood of survival and recovery of the ESU”); see also 2d Complaint at ¶ 58 (listing other ESUs). Because it finds no “net effect,” NMFS determines that it is not actually necessary for it to consider the status of the species, the environmental baseline, or any cumulative effects in its jeopardy analysis. Instead, these are discussed briefly and generally to provide “context” for the no-jeopardy findings NMFS has already reached. 2004 BiOp at 8-1 to 8-3.

An essential component of this narrow, comparative assessment is NMFS’ equally striking limitation of the agency action for consultation. Based on its interpretation of another ESA regulation, 50 C.F.R. § 402.03, NMFS asserts first that the agency action for consultation is limited to only those aspects of FCRPS operations that lie within the action agencies’

“discretionary authority,” 2004 BiOp at 1-9, and second, that the vast majority of on-going FCRPS operations and effects do not meet this criterion, *id.* at 5-5.⁷ Because, as NMFS candidly admits, it actually is impossible to determine what FCRPS actions and effects meet its “discretionary authority” threshold and what actions and effects do not, it resorts to the formulation of a hypothetical “reference operation” as the “point of reference for measuring effects of the proposed hydro operation, i.e., the difference between the two operations represents the effects caused by the Action Agencies’ exercise of discretion to achieve all authorized project purposes,” *id.* at 5-5 to 5-6. Although NMFS asserts that this “reference operation” is designed to “maximize fish benefits,” and thereby attribute more negative effects to the proposed action than it allegedly will have, *id.* at 5-6, both the reference operation and these characterizations of it have met with considerable skepticism from other fish and wildlife agencies and experts.⁸

Nonetheless, NMFS combines its new interpretations of the ESA regulations, and the remarkable “action” and “reference operation” they produce, with a substantially limited scientific analysis. This analysis focuses only on determining the net effects of the narrowly defined agency action as compared to the “reference operation” surrogate for the environmental baseline, 2004 BiOp at 6-1, and even then concludes that the limited FCRPS operations it considers would have net negative effects on listed salmon and steelhead without additional “offsite” mitigation in tributary habitat and the estuary, *id.* at 6-33 to 6-56 (tables showing negative relative survival difference for proposed action); see also AR Doc. C.109 at 8-3 (draft

⁷ In addition to the limitations the agency finds in this regulation, NMFS further narrows the action it considers in this consultation by improperly excluding the Bureau of Reclamation’s (BOR) upper Snake projects. See 2004 BiOp at 1-4; see also *infra* at 37-43 (addressing this issue).

⁸ Criticism of NMFS’ “reference operation” and the claim that it “maximizes fish benefits” has been extensive and includes comments from, among others, the Oregon Dept. of Fish & Wildlife, AR Doc. C.237 at 2, 9-13, the independent Fish Passage Center, AR Doc. C.198 at 2-3, and the Columbia River Treaty Tribes, AR Doc. C.231 at 8-17.

BiOp jeopardy finding for Snake River spring/summer chinook, similar findings for other up-river ESUs at subsequent pages). These “gap” and “net effects” analyses, however, do not employ the methods NMFS used to calculate population trends for the jeopardy analysis in the 2000 BiOp or the survival-based thresholds NMFS concluded in that analysis were necessary to avoid jeopardy. 3d Oosterhout Decl. at ¶¶ 42-47.

Finally, NMFS also employs new standards to determine whether the proposed agency action will adversely destroy or modify the designated critical habitat of any listed ESU. Like its new jeopardy analysis, these standards evaluate whether the action would adversely modify critical habitat under two different but very limited yardsticks: the “Environmental Baseline Approach” and the “Listing Conditions Approach.” 2004 BiOp at 6-1 to 6-2. Each of these standards involves comparing the effects of the narrowly defined action to either the current condition of critical habitat or the condition of that habitat at the time the species were first listed. Id.

While the rationale NMFS offers for these marked legal and scientific departures from the jeopardy framework and analysis of past biological opinions is convoluted and implausible, the result of this shift – and the real reason for it – is unmistakable. In 2000, applying the same regulations to a nearly identical set of FCRPS operations, NMFS determined that without extraordinary help from other actions and actors in the basin, these on-going operations would jeopardize eight ESA-listed salmon and steelhead ESUs. See, e.g., 2000 BiOp at 9-287; NWF v. NMFS, 254 F. Supp.2d at 1214-15. In the intervening four years, the impacts of on-going FCRPS operations, maintenance and configuration on these fish have not changed materially, nor has there been any dramatic shift in the status of the species. 3d Oosterhout Decl. at ¶¶ 6-9 (citing recent NMFS analyses), 11-21 (up-dating her prior analysis using NMFS methods and most up-to-date information); see also, e.g., 2004 BiOp at 5-53 (NMFS finding that “the biological requirements of [Snake River spring/summer chinook] juveniles have not been fully

met within the range of recent runoff conditions and would not be fully met under the reference operation”). Rather than acknowledge these facts and address the specific problems in the 2000 BiOp that this Court identified, NMFS has produced an entirely new opinion that reaches an otherwise unattainable “no jeopardy” finding by simply eliminating most of the effects of on-going FCRPS operations from consideration. In so doing, NMFS has either condemned the listed salmon and steelhead to extinction or pushed much of the burden of ensuring their survival and recovery onto others – the states, tribes, and private parties. For the reasons discussed more fully below, NMFS’ new jeopardy framework and its application in the 2004 BiOp are contrary to law, arbitrary and capricious.

STANDARD OF REVIEW

Section 7 of the ESA embodies an explicit Congressional decision to give first priority to conserving endangered species, a priority that overrides the other statutory missions of federal agencies. TVA v. Hill, 437 U.S. 153, 185 (1978). In applying § 7, an agency must “give the benefit of the doubt” to the species. Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987) (citations omitted). In fact, in language that “admits of no exception,” TVA v. Hill, 437 U.S. at 173, the ESA requires federal agencies to “insure” that their actions are not likely to jeopardize the continued existence of threatened and endangered salmon and steelhead or adversely modify the species’ designated critical habitat. 16 U.S.C. § 1536(a)(2). In meeting this unambiguous and “rigorous” requirement, Marsh, 816 F.2d at 1385, agencies must base their decisions on the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

In a motion for summary judgment under Fed. R. Civ. P. 56 seeking review of a biological opinion, the core inquiry for determining whether the opinion violates ESA § 7(a)(2) and is arbitrary and capricious or not in accordance with law is whether NMFS correctly applied the law and “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Pacific Coast Fed’n of Fishermen’s Ass’ns v. NMFS, 265

F.3d 1028, 1034 (9th Cir. 2001) (citations omitted). “A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or when it has entirely failed to consider an important aspect of the problem.” Greenpeace v. NMFS, 80 F. Supp.2d 1137, 1147 (W.D. Wash. 2000); see also Center for Biological Diversity v. Rumsfeld, 198 F. Supp.2d 1139 (D. Ariz. 2002) (setting aside biological opinion as contrary to law).

In applying these standards, the Court must perform a “thorough, probing, in-depth review.” Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 482 (W.D. Wash. 1988). “While courts must defer to an agency’s reasonable interpretation of equivocal scientific evidence, such deference is not unlimited. The presumption of agency expertise may be rebutted if its decisions, even though based on scientific expertise, are not reasoned.” Greenpeace, 80 F. Supp.2d at 1147; see also Greenpeace v. NMFS, 55 F. Supp.2d 1248, 1259 (W.D. Wash. 1999). Courts “do not hear cases merely to rubber stamp agency actions. . . . The Service cannot rely on ‘reminders that its scientific determinations are entitled to deference’ in the absence of reasoned analysis. . . .” NRDC v. Daley, 209 F.3d 747, 755 (D.C. Cir. 2000) (quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995)). Even a decision that involves agency expertise is nonetheless arbitrary and capricious if it is not reasoned in light of evidence in the record. Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001).

ARGUMENT

There are at least two inter-related legal flaws in the new jeopardy framework for the 2004 BiOp, either of which provides a basis for concluding that the Opinion is contrary to law. First, the new framework employs an improperly truncated jeopardy analysis, see section I below, and second, it fails to address the entire agency action, see section II below. In addition, the new opinion arbitrarily disregards relevant scientific analysis and relies on widely criticized methods without addressing credible criticism of these methods. See section III below. Finally,

the new opinion sets forth an evaluation of critical habitat that is both contrary to law and arbitrary. See section IV below.

I. THE JEOPARDY ANALYSIS IN THE 2004 BIOP IS CONTRARY TO LAW

NMFS' analysis in the 2004 BiOp of whether the agency action it considers will avoid jeopardy is fundamentally flawed. NMFS concludes that the action will avoid jeopardy because, as compared to the effects of a hypothetical "reference operation," the proposed action will have no net effect on the "reproduction, numbers, or distribution" of any ESA-listed salmon or steelhead ESU. See 50 C.F.R. § 402.02 (definition of "jeopardize the existence of"). Based on this assessment of the relative difference in effects between these two sets of actions, NMFS concludes that the proposed action could not cause "an appreciable reduction in the likelihood of both survival and recovery" of any ESU. 2004 BiOp at 1-12; see also id. at 5-1, 6-1, 8-1. In this dispositive analysis of net effects, NMFS never asks the question at the core of § 7: whether or not, in light of the current status of the species and the impacts of the environmental baseline together with cumulative effects, the effects of the proposed action will jeopardize the species. See 50 C.F.R. § 402.14(g) (describing jeopardy analysis); 2004 BiOp at 8-1 (the discussion of these factors in chapter 8 of the Opinion is offered merely "to provide the full context for this analysis."). Instead, as NMFS readily admits, because the comparative analysis of net effects in chapter 6 of the Opinion "indicates that there are not likely to be any net adverse effects to an ESU from the proposed action, NOAA Fisheries' conclusion will necessarily be that the action is not likely to jeopardize the ESU's continued existence." Id. (emphasis added). This truncated approach to determining whether an action will avoid jeopardy is contrary to law.

A. The ESA Implementing Regulations and the Joint Consultation Handbook Carefully and Completely Define the Steps in a Jeopardy Analysis.

The ESA's implementing regulations detail precisely a set of comprehensive factors and steps that NMFS must consider and complete in order to determine whether an action will jeopardize an ESA-listed species. 50 C.F.R. §§ 402.14(g)(2)-(4); 402.02. This multi-step

analysis requires NMFS to:

- (1) Evaluate the current status of the listed species or critical habitat.
- (2) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
- (3) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.14(g)(2)-(4). The regulatory definitions further define the effects that must be addressed in this analysis. Specifically, the “effects of the action” that the agency must evaluate include the “direct and indirect effects of an action . . . together with effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R. § 402.02. The “environmental baseline,” in turn, includes “all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone” their own consultation and any “contemporaneous” state or private actions. *Id.* Finally, the regulations define “cumulative effects” to include any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area.” 50 C.F.R. § 402.02 (emphasis added); see also NWF, 254 F. Supp.2d at 1205-1206 (describing the steps in a jeopardy analysis). The regulations thus prescribe a comprehensive assessment of effects that must combine the existing impacts to the species from baseline conditions, cumulative effects, and the impacts of the proposed action in order to determine whether, taking into consideration the current status of the species, the action will cause jeopardy.

NMFS’ Consultation Handbook confirms this comprehensive approach. The Handbook states that when “determining whether an action is likely to jeopardize the continued existence of a species, the action is viewed against the aggregate effects of everything that has led to the species’ current status. . . . The final analysis then looks at whether, given the aggregate effects,

the species can be expected to both survive and recover.” AR Doc. B.251 (Endangered Species Consultation Handbook) at 4-35 (emphasis added). As the Handbook explains, the consultation process requires NMFS to evaluate actions chronologically as federal agencies propose them and make a jeopardy determination for each action:

[W]here numerous actions impact a species, changes in the baseline due to successive effects can be addressed on a continuing basis using biological opinions. Such a series of biological opinions can be used like building blocks to first establish a concern, then warn of potential impacts, and finally result in a **jeopardy** call. . . . Extrapolation of a diminishing baseline can help show where future **jeopardy** thresholds may be reached.

Id. at 4-2 (emphasis in original). The environmental baseline – the impacts of past actions and current conditions in the action area on the listed species – is thus the foundation with which the effects of the proposed action and cumulative effects are combined in each jeopardy analysis. If those combined effects will not jeopardize a species, the proposed action is permitted to move forward and then, itself, becomes part of the environmental baseline when NMFS evaluates the next federal action.⁹

⁹ The Handbook also explains what is required to determine the current status of the species. This step includes assessing factors such as population dynamics (the size, stability, and variability of species’ populations over time), the species’ overall range-wide trend, and any new threats to its health. AR Doc. B.251 at 4-20 to 4-21. As the Handbook makes clear, none of these characteristics, standing alone, necessarily provides a complete picture of the species’ status. For example, NMFS cautions that when assessing a species’ current health and status, a determination of

[h]ow long a species will persist before extinction depends on more than population size. Large populations may not protect a species from extinction in the face of extreme environmental disturbance. . . . As a population fluctuates, [due to increases and decreases in food supply, reproductive rates or predation] one or more factors can lead to a chance extinction, e.g., irreversibly lowering population size to a point where it can no longer recover. Consequently, an action increasing a species’ population variability may affect the continued existence of the species more significantly than a reduction in population size.

Id. As explained in the 3d Oosterhout Decl., NMFS also has failed to present in the 2004 BiOp a complete or scientifically credible assessment of the current population status of listed salmon and steelhead. See 3d Oosterhout Decl. at ¶¶ 10-22; 39-52; see also infra at 44-48 (addressing this issue).

Notably, the Consultation Handbook explicitly confirms that on-going operations of a federal project like the FCRPS are subject to “the same approach as for other types of section 7 analyses.” AR Doc. B.251 at 4-28 to 4-29. Indeed, the Handbook specifically states that for such projects:

- The total effects of all past activities, including effects of the past operation of the project, current non-Federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline;
- To this baseline, future direct and indirect impacts of the operation over the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain future non-Federal activities (cumulative effects), are added to determine the total effect on listed species and their habitat.”

Id. (emphasis added).

In sum, the jeopardy analysis outlined in the regulations and Handbook require NMFS to “evaluate” the actual biological condition of the species, “evaluate” the direct and indirect effects of a proposed action, “together with” the effects of any interrelated or interdependent actions, “added to” the impacts of all past actions, contemporaneous State or private actions, any federal actions that have undergone their own Section 7 consultation, “taken together with” all future State and private actions that are reasonably certain to occur. 50 C.F.R. §§ 402.02; 402.14(g).¹⁰

¹⁰ Even though its discussion of cumulative effects does not actually play a role in the agency’s no jeopardy finding, see 2004 BiOp at 8-1, NMFS’ identification of those effects in Chapter 7 is contrary to law for at least two reasons. First, it relies almost exclusively on States and Tribes to identify cumulative effects when it is the duty of NMFS and the action agencies to gather this information. Through its passive reliance on others, NMFS misses a number of ongoing and future private actions that are reasonably certain to occur in the action area. Indeed, for an action that stretches across large swaths of the Columbia River basin NMFS provides only the most general discussion of any private activities. See, e.g., id. at 7-5 (declining to analyze the “extent of private mining” in John Day River basin). NMFS compounds this error by making the remarkable claim that the “reasonably certain to occur” language of the regulations regarding cumulative effects requires it to assume all harmful activities now occurring “are not necessarily going to occur in the future,” and that, therefore, conditions in the Columbia River Basin will improve toward a “more pristine condition over time.” Id. at 7-2, 7-4. Not only does this assumption test the boundaries of rationality for species that have been and continue to be impacted by innumerable ongoing actions, it also inappropriately attempts to blame the regulations and this Court’s ruling in NWF v. NMFS for the agency’s inadequate assessment of cumulative effects.

Only then can NMFS “formulate its biological opinion” as to whether the combined effects of all of these factors will cause the proposed action to jeopardize the species.

B. The Courts Have Already Rejected NMFS’ Limited, Comparative Approach to Evaluating Jeopardy.

The courts have consistently reiterated the ESA regulations’ plain command that NMFS must make a jeopardy finding for an action in light of the current status of the species and the combined effects of the action, the environmental baseline, and any cumulative effects. In doing so, the courts have specifically rejected the comparative, “net effects” approach NMFS employs in the 2004 BiOp. For example, in Kandra v. United States, 145 F. Supp.2d 1192 (D. Or. 2001), this Court rejected an argument for the same approach NMFS employs in the 2004 BiOp. In that case, irrigators claimed that the Bureau of Reclamation’s 2001 Annual Operations Plan for the Klamath Project was arbitrary and capricious because it “failed to develop an environmental baseline to determine the actual effects of the Project.” Id. at 1206. Plaintiffs argued that “an environmental baseline must be established so as to compare ‘some thing or some condition’ to ‘something else or some other condition.’” Id. (emphasis added).¹¹ The Court rejected this argument, holding that:

[A]ll human activities that impact the listed species must be considered in the environmental baseline. The effects of the proposed action are then addressed “in conjunction with the impacts that constitute the baseline.” Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121, 127-28 (D.D.C.2001). . . . The environmental baseline is part of the entire “effects of the action” on the listed species or habitat that must be considered, rather than some concrete standard or condition to which other standards or conditions are compared.

Id. at 1207 –08 (emphasis added).

The court in Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121 (D.D.C. 2001),

¹¹ Ironically, as a defendant in Kandra, NMFS vigorously opposed the plaintiffs’ argument that jeopardy could be determined through a comparative, net effects approach. See Exh. 1 at 23-24 (NMFS stating there is “no support for this novel assertion that the environmental baseline must ‘compare some thing to something else.’”).

reached the same conclusion. In that case, plaintiffs challenged several biological opinions for actions affecting the Sonoran Pronghorn antelope. Although different agencies had jurisdiction over the individual activities, all were taking place within the limited range of the species. Plaintiffs claimed that “while some of the BO’s list or acknowledge other federal activities affecting pronghorn, none of the BOs provides an *analysis* of the impacts of all federal activities on the species or analyzes the proposed actions in the context of that aggregate impact.” *Id.* at 125-26 (emphasis in original). The Court agreed, repeatedly emphasizing the foundational importance the regulations place on the environmental baseline within the comprehensive structure of a jeopardy analysis. *See, e.g., id.* at 126 (“applicable regulations require an agency to analyze the effects of its activities when added to the past and present impacts of all federal activities in the action area”) (emphasis added); *id.* at 127 (“[T]he analysis of the effects of the action must address these effects in conjunction with the impacts that constitute the baseline.”). The court held that “[t]he BO must also include an analysis . . . of the total impact on the species.” *Id.* (emphasis in original).

Indeed, the new comparative approach NMFS employs in the 2004 BiOp – which allows the agency to find that a narrowly defined set of FCRPS operations will have “no net effect” on listed salmon and steelhead as compared to the existing effects of past and other continuing activities – has been rejected by the Ninth Circuit and this Court in earlier cases involving the FCRPS. In ALCOA v. BPA, 175 F.3d 1156 (9th Cir. 1999), for example, industrial power users challenged BPA’s adoption of the RPA from the 1995 FCRPS BiOp. The Ninth Circuit specifically rejected their argument that NMFS’ jeopardy analysis should have been limited to determining whether the proposed action would have an incremental negative effect as compared to past actions:

NMFS correctly viewed incremental improvements as insufficient to avoid jeopardy in light of the already vulnerable status of the listed species. We agree with NMFS that the regulatory definition of jeopardy, i.e., an appreciable reduction in the likelihood of both survival and recovery, 50 C.F.R. § 402.2, does

not mean that an action agency can ‘stay the course’ just because doing so has been shown slightly less harmful to the listed species than previous operations. Here the species already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery.

Id. at 1162, n.6; see also id. (finding that NMFS “appropriately considered the effects of future FCRPS operations within the context of other existing human activities that impact listed species.”).

More directly on point, in IDFG v. NMFS, 850 F. Supp. at 899, Judge Marsh rejected the same comparative approach to making a jeopardy determination that NMFS has adopted in the 2004 BiOp. In that case, intervenor-defendants Public Power Council (“PPC”) and Pacific Northwest Generating Cooperative (also intervenor-defendants here) argued that “any agency proposal found to result in improved ‘survival’ as a matter of law could not be said to have ‘reduced both the likelihood of survival and recovery’ so as to constitute jeopardy.” Id. at 899 (emphasis in original).¹² Judge Marsh rejected this argument because it was:

contrary to legislative intent (i.e., that there be no clear distinction between survival and recovery) and could lead to an incongruous result. For example, if 100 listed species are expected to survive downstream juvenile migration in 1993 and 99 survived in 1990, PPC’s argument would mandate a ‘no jeopardy’ finding – even though a 100 survival level may still be considered so low as to constitute a continued threat to the species’ existence.

Id. at 899.

¹² In their briefs on this issue, PPC argued nearly word-for-word what NMFS has now adopted as its approach to evaluating jeopardy in the 2004 BiOp. Compare Exh. 2 at 14 (“Joint Memorandum of DSIs, PPC, and PNGC in Opposition to IDFG’s Motion for Summary Judgment”) (“NMFS and the action agencies were supposed to evaluate only those additional effects of the action over and above the environmental baseline” and consider “whether those additional effects ‘reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both survival and recovery. . . .’ (citing 50 C.F.R. § 402.02)); id. at 15-16 (“As a matter of law, a proposed action that improves survival conditions over the baseline cannot be [sic] ‘reduce appreciably the likelihood of survival and recovery’ of the total species, 50 CFR 402.02, and thereby ‘jeopardized th[eir] continued existence’”) with 2004 BiOp at 1-12 (“Because there would be no net reduction in the productivity, abundance or distribution of the ESU, there could not be an appreciable reduction in the likelihood of survival and recovery in accordance with the regulatory definition of ‘jeopardize the continued existence of’” (50 CFR § 402.02)).

In sum, the courts have consistently held that § 7 requires a comprehensive jeopardy analysis that includes all of the impacts of the environmental baseline, the direct and indirect effects of the proposed action, and any cumulative effects in order to determine the “total effect” to the species, not an analysis limited to determining whether a proposed action will have a “net effect” on the species when compared to the environmental baseline.

C. NMFS Has Failed to Provide Any Legal Basis for Its Abbreviated Jeopardy Analysis.

Nothing in the regulations, the Handbook, or the extensive case law interpreting § 7 suggests that the abbreviated analysis of net effects NMFS employs in the 2004 BiOp is an acceptable legal shortcut to a comprehensive, biologically-based jeopardy analysis. Nonetheless, NMFS rejects this well-established approach because it believes “[t]he jeopardy standard applies to ‘actions’ taken, not the weight of past actions that have accumulated in the environmental baseline.” AR Doc. C.293 at 1-8. NMFS’ analysis and no-jeopardy conclusion in the 2004 BiOp are thus based on the contention that the limited FCRPS operations NMFS considers the “agency action” will not have a net negative effect on any ESU as compared to the effects and harms that the species have already suffered and that has produced their current status.

NMFS asserts that it was required to abandon a comprehensive approach to evaluating jeopardy and adopt its new approach by this Court’s holding in NWF v. NMFS. See, e.g., 2004 BiOp at 1-5. The agency thus mysteriously characterizes the Court’s holding – which simply found the agency had erred by relying on speculative range-wide mitigation actions that were not reasonably certain to occur or had not undergone their own § 7 consultation – as requiring it to “focus the jeopardy analysis on the effects of the action, with reference to the environmental baseline in the action area and to any cumulative effects within the action area.” AR Doc. C.293 at 1-8. Evidently, what NMFS means by this is that a jeopardy analysis can properly be limited to evaluating whether an improperly circumscribed agency action, standing alone, will or will not have a net negative effect on the species’ current “reproduction, numbers, or distribution.”

See, e.g., id. (“The jeopardy standard applies to ‘actions’ taken . . . [and] determines the extent to which that action ‘reduces the reproduction, numbers or distribution of a listed species.’”). Nothing in the Court’s opinion in NWF v. NMFS even appears to suggest, let alone require, this new and narrow focus.¹³ See, e.g., NWF v. NMFS, CV-01-640-RE Opinion (July 1, 2003) (Docket #439) at 2 (summarizing that 2000 BiOp is “arbitrary and capricious in two specific respects: it relies on federal mitigation actions that have not undergone section 7 consultation under the ESA; and it relies on range-wide off-site non-federal mitigation actions that are not reasonably certain to occur” and noting that “[t]he court remanded to NOAA for its resolution of these two specific deficiencies.”). In short, NMFS’ task on remand was to consider only proper mitigation actions and to determine whether these were sufficient, when added to the effects of the action, the environmental baseline, and other cumulative effects, to avoid jeopardy. Id.

NMFS’ only articulated attempt to justify its new truncated jeopardy analysis focuses on one isolated and out-of-context snippet from the ESA regulations. NMFS emphasizes the portion of the definition of “jeopardize” in 50 C.F.R. § 402.02 which states “jeopardiz[ing] the continued existence of” a species means “to engage in an action” that would reduce appreciably the likelihood of survival and recovery. 2004 BiOp at 1-12; AR Doc. 293 at 1-8 (“The jeopardy standard applies to actions taken”); id. at 1-4 (“the relevant question is . . . whether the proposed action is likely to jeopardize the continued existence of the species.”); id. at 1-12. The agency’s myopic focus on the definition’s use of the word “action,” without even acknowledging the comprehensive jeopardy analysis described in the regulations, violates the most basic premise of statutory and regulatory interpretation. “It is a fundamental canon of statutory construction that

¹³ NMFS tellingly offers its expansive interpretation of this Court’s holding without any citation to the Court’s opinion. In fact, it is exceedingly difficult to square NMFS’ new narrow interpretation of the regulations with this Court’s decision, which specifically summarized the comprehensive jeopardy analysis that the regulations require, but found that NMFS erred by relying on actions outside this regulatory framework to reach a no-jeopardy finding for the RPA. See, e.g., 254 F. Supp.2d at 1205-1206 (describing the steps and terms in a jeopardy analysis).

the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” Turtle Island Restoration Network v. NMFS, 340 F.3d 969, 975 (9th Cir. 2003). As the Supreme Court has repeatedly noted, “it is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.” Bennett v. Spear, 520 U.S. 173, 177 (1997) (internal quotations omitted). But emasculating entire provisions of the ESA regulations is exactly what NMFS’ interpretation of the isolated word “action” would do. There is no way to square NMFS’ new parsing of the language of “jeopardize the continued existence of” in 50 C.F.R. § 402.02 with the specific enumeration of the steps and factors required to make a determination of whether a proposed action will jeopardize the continued existence of a species outlined in 50 C.F.R. § 402.14(g)(2)-(4), the additional explanation of the Handbook, and the existing case law.

D. NMFS Also Incorrectly Concludes That an Action Cannot Jeopardize a Species If It Has No Net Effect on the Species, Current Numbers, Reproduction and Distribution.

Even if the ESA regulations allowed a short-form jeopardy analysis that focuses only on the net effect of an action in isolation (which they do not), NMFS has used the wrong yardstick for its assessment of net effects. The relevant benchmark under the ESA for assessing the effects of the action is whether the action will appreciably reduce the “reproduction, numbers or distribution,” 50 C.F.R. § 402.02, of the species in a way that jeopardizes its “continued existence,” 16 U.S.C. § 1536(a)(2) (emphasis added). This is a significantly different inquiry than the one in which NMFS engaged: whether the narrowly defined action it considers will have a net effect on the species’ current “reproduction, numbers or distribution.” See AR Doc. C.293 at 1-11 (“the goalposts for the jeopardy standard are the existing likelihood of survival and recovery”) (emphasis added); *id.* at 1-58 (same).

NMFS’ exclusive focus on the effects of the action on the species’ current population and existing likelihood of survival and recovery, instead of the “reproduction, numbers or

distribution” that are necessary for the species’ “continued existence,” is inconsistent with both the language of the ESA and the Consultation Handbook. The effect of an action on the numbers, reproduction, and distribution of a species are measured from a point at which the species will survive and recover, not from whatever happens to be the condition of the species at the moment. See, e.g., AR Doc. B.154 at 3. Yet under NMFS’ approach, the only relevant question is whether the action leaves the species any worse off than it already is, even if its current reproduction, numbers or distribution mean it will soon be extinct or unable to recover. Section 7(a)(2) proscribes federal actions that would be likely to jeopardize the “continued existence” of a species, not just those that would further degrade the species’ current condition. 16 U.S.C. § 1536(a)(2).¹⁴

NMFS’ Consultation Handbook explains this distinction between continued existence and current existence carefully. The Handbook confirms that the starting point for determining whether an action will jeopardize a species is a condition in which the species will continue to exist. Thus, the Handbook explains that the survival prong of the jeopardy standard is not the species’ current condition, whatever that may happen to be, but:

[T]he species’ persistence . . . beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition [survival] is characterized by a species with a sufficiently large population represented by all necessary age classes, genetic heterogeneity, and numbers of sexually mature

¹⁴ Of course, a jeopardy determination also requires consideration of an action’s effects on species’ recovery. 50 C.F.R. § 402.02; IDFG, 850 F. Supp. at 894-95 (there is no “bright-line” between survival and recovery); see also AR Doc. B.154 at 3 (because “impeding a species’ progress toward recovery exposes it to additional risk, and so reduces its likelihood of survival . . . in order for a an action to not ‘appreciably reduce’ the likelihood of survival, it must not prevent or appreciably delay recovery.”). In the 2000 BiOp, NMFS set a recovery standard as one prong of its jeopardy analysis to measure whether the action or the RPA would appreciably reduce the species’ prospects of recovery in 48 or 100 years. 2000 BiOp at 1-14. Neither this recovery standard nor any other plays a part in the 2004 BiOp’s no-jeopardy finding, contrary to the requirements of the regulations and NMFS’ prior interpretation of them.

individuals producing viable offspring, which exist in an environment providing all requirement for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

AR Doc. B.251 at 4-35 (emphasis added). Nothing in this description of survival suggests that its terms can be met by simply avoiding a reduction in the current “reproduction, numbers or distribution” of the species at whatever level they happen to presently exist.

More important, the statutory phrase “continued existence” cannot be modified to “current existence.” For many listed species, their current existence may be – or since listing may have become – inadequate to allow them to continue to exist into the future, let alone recover. The Court should not lightly infer that in a key substantive provision of a statute which the Supreme Court has concluded was meant to “halt and reverse the trend toward species extinction, whatever the cost,” TVA v. Hill, 437 U.S. at 184, Congress actually adopted a requirement that could be met as long as federal agency action did not hasten a listed species inevitable demise by making its current condition worse. Congress’ careful choice of the words “continued existence” in § 7 cannot properly be robbed of its effectiveness in protecting listed species by revising the statutory language to protect only “current existence.” See Good Samaritan Hospital v. Shalala, 508 U.S. 402, 409 (1993)(“The starting point in interpreting a statute is its language, for ‘if the intent of Congress is clear, that is the end of the matter.’”) (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984)).

In the 2004 BiOp, NMFS has not made any attempt to evaluate or demonstrate that the current reproduction, numbers, and distribution of ESA-listed salmon and steelhead will allow these species to “persist . . . beyond the conditions leading to their endangerment.” AR Doc. B.251 at 4-35. Instead, NMFS has erroneously assumed, without analysis or discussion, that if its calculations show that its narrowly defined action will not reduce current salmon reproduction, numbers or distribution, the action “by definition” cannot cause jeopardy. 2004 BiOp at 1-12, 5-1, 8-1. Neither the ESA, nor its implementing regulations, nor the agency’s Consultation Handbook support this limited and unprecedented approach.

II. NMFS HAS IMPROPERLY FAILED TO CONSULT ON THE ENTIRE AGENCY ACTION.

NMFS compounds the errors in its comparative jeopardy analysis by also misapplying another ESA regulation to exclude from consideration a significant portion of the agency action, and consequently its effects. In sharp contrast to past FCRPS biological opinions, NMFS now asserts that the proposed agency action subject to consultation includes only those activities that are within the action agencies' "discretionary authority." 2004 BiOp at 1-10 ("the ESA requires a Federal agency to consult on actions that it proposes to authorize, fund, or carry out that are within its discretionary authority" (citing 50 C.F.R. § 402.03) (emphasis added));¹⁵ see also id. at 1-9, 5-1, 5-5. This is not correct. The ESA states plainly that the scope of consultation must include *any* action "authorized, funded or carried out" by a federal agency. 16 U.S.C. § 1536(a)(2). And, in fact, consistent with this statutory language, the regulations and case law, the regulation NMFS cites has been applied only in very narrow circumstances to clarify whether there is a federal action that triggers consultation in the first instance.

NMFS' misapplication of 50 C.F.R. § 402.03 to limit the scope of the agency action and effects that it will consider is part and parcel of its new framework for truncating the jeopardy analysis. NMFS use of this regulation is based on two incorrect premises: (1) that only actions within the action agencies' discretionary authority may be part of the action subject to consultation and; (2) that most of the action agencies' activities in their continuing operation, maintenance and configuration of the FCRPS are non-discretionary. 2004 BiOp at 1-9, 5-1, 5-5. Consequently, NMFS claims that it must separate the effects of these purportedly discretionary actions from the effects of purportedly non-discretionary actions, as well as the existence of the FCRPS, in order to limit the scope of consultation to the former only. Id.

Having declared that it must segregate actions and effects in this way, NMFS admits in

¹⁵ The entire regulation states: "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03.

the next breath that it is impossible to actually do so. 2004 BiOp at 5-5. Instead, NMFS creates and employs a reference operation as a “surrogate” for the effects of the non-discretionary operations and the existence of the system. Id. at 5-5 to 5-6. NMFS then asserts that the only impacts relevant to its jeopardy determination are those represented by the difference between the effects of this hypothetical reference operation and the effects of the purportedly discretionary operations that constitute the proposed action. 2004 BiOp at 6-1.¹⁶ In addition to this improper attempt to limit the scope of the action for consultation, NMFS also improperly attempts to segment a single federal action – coordinated operation of all of the multi-purpose federal water projects in the Columbia and Snake basins – into two separate actions for consultation. The house of cards NMFS has constructed around its re-interpretation of 50 C.F.R. § 402.03 and its segmentation of a single federal action cannot stand.

A. The ESA, Its Implementing Regulations, and Case Law Confirm That the Scope of Consultation Must Include the Effects of the *Entire* Federal Action.

Section 7 of the ESA unambiguously states that “any action authorized, funded, or carried out” by a federal agency must avoid jeopardy to the continued existence of any threatened or endangered species. 16 U.S.C. § 1536(a)(2). An agency’s compliance with this substantive requirement is assured through strict adherence to the consultation process. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). Significantly, the ESA states that “any action authorized, funded, or carried” out by a federal agency must avoid jeopardy. 16 U.S.C. § 1536(a)(2) (emphasis added). The ESA’s implementing regulations confirm that “agency

¹⁶ NWF has already explained the legal flaws in NMFS’ reading of the definition of “jeopardize the existence of” as a basis for a short-form jeopardy analysis. See supra at 11-23. Had NMFS conducted a proper jeopardy analysis, its removal of many of the effects of the FCRPS from the action into the baseline might not have affected its conclusion so dramatically because it would have considered whether all of these FCRPS effects and other effects, together with cumulative effects, jeopardize the continued existence of the species. Id. As Judge Marsh observed in IDFG v. NMFS, when a jeopardy analysis is done properly, it may not matter where the effects of different parts of an on-going action are allocated. IDFG v. NMFS, 850 F. Supp. at 894. Here, however, allocation of many of the effects of the action to the baseline is fundamental to NMFS’ early exit strategy from the comprehensive jeopardy analysis the law requires.

action” is not limited to purportedly discretionary actions. They define “action” for purposes of consultation as:

all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.

Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the granting of licenses, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.2 (emphasis added). As the Supreme Court noted of § 7 in TVA v. Hill, and as the above regulations confirm, “this language admits of no exceptions.” 437 U.S. at 173.

Case law too confirms the scope of the action and effects that must be considered in consultation are not limited to those caused by federal activities that can be characterized as “discretionary.” In TVA, for example, the Supreme Court addressed whether the proscription of jeopardy in § 7 prohibited the completion and operation of a dam that was largely complete and where the action agency had no discretion to halt construction or abandon the project.¹⁷ Under these circumstances, the government argued that the ESA did not apply to projects that Congress had expressly funded and directed the agency to complete. TVA, 437 U.S. at 163, 173. The Court rejected these arguments based on the plain language of § 7, stating that:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to insure that actions authorized, funded, or carried out by them do no jeopardize the continued existence of an endangered species. . . . This language admits of no exception.

Id. at 173 (emphasis in original).

The debate between the majority and dissent in TVA confirms that the presence or absence of agency discretion does not limit the scope of agency actions that must comply with §

¹⁷ Indeed, in TVA, Congress continued to make clear through funding and Committee statements, that it intended the dam to be completed despite endangered species concerns. TVA, 437 U.S. at 164, 167, 170-171.

7. Justice Powell’s main criticism of the majority opinion was that it would apply the ESA to actions that already were substantially finished or even complete. See, e.g., id. at 203, n.12 (reproducing argument transcript about whether the ESA would affect the completed Grand Coulee Dam). The majority opinion responded that the ESA’s plain language required consultation on *any* action that agencies must still “carry out,” without any qualification regarding the scope of the agency’s remaining discretion. Id. at 187, n.32 (“Our holding merely gives effect to the plain words of the statute, namely, that § 7 affects all projects which remain to be authorized, funded, or carried out.”) (emphasis added).¹⁸

Significantly, given the unambiguous and broad scope of § 7, the Court concluded, “Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act.” Id. at 186. This conclusion too admits of no exception for on-going but non-discretionary federal actions so long as they are still being authorized, funded or carried out by a federal agency. See Sierra Club v. Babbitt, 65 F.3d 1502, 1510 (9th Cir. 1995) (TVA, while construing agency action broadly, “made plain that Congress did not intend for section 7 to apply retroactively, but only to ‘projects that remain to be authorized, funded or carried out’ by the federal agency.”) (citing TVA, 437 U.S. at 173, 186 & n.32). Thus, while § 7 may not apply retroactively to require consultation on actions that have been fully completed,¹⁹

¹⁸ As the majority clarified, “the dissent’s position logically means that an agency would be obligated to comply with § 7 only when a project is in the planning stage. But if Congress had meant to so limit the Act, it surely would have used words to that effect, as it did in the National Environmental Policy Act. . . .” 437 U.S. at 173, n.18. As the majority noted with regard to the differences between the ESA and NEPA, “it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment. Section 7, on the other hand, compels agencies not only to consider the effect of their projects on endangered species, but to take such actions as are necessary to insure that species are not extirpated as a result of federal activities.” Id. at 189, n.34.

¹⁹ Of course, even the impacts of such wholly past actions are part of a proper jeopardy analysis because they form a component of the impacts of the environmental baseline. See supra at 11-15 (discussing the comprehensive nature of a proper jeopardy analysis).

or where the agency has no further activity to “authorize, fund, or carry out,” wherever there is federal action that “remains to be carried out,” § 7 requires consultation on the entire action whether or not it is discretionary.²⁰

The Ninth Circuit consistently has followed the Supreme Court’s broad interpretation of agency action. *See, e.g., Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). In *Thomas*, the Forest Service argued that Land and Resource Management Plans (LRMPs) for two National Forests were not “agency action” requiring § 7 consultation because they were “adopted before the chinook were listed as a ‘threatened’ species,” and because they were “not ongoing agency action throughout their duration, but only when they were adopted in 1990 or if they are revised or amended in the future.” *Id.* at 1051, 1053. The court rejected this argument and required consultation on the entire LRMP “because the LRMPs have an ongoing and long-lasting effect even after their adoption, we hold that the LRMPs represent on-going agency action.” *Id.* at 1053 (emphasis added). Significantly, the Court recognized *TVA*’s “observation” that agencies may need to modify ongoing actions to comply with § 7’s substantive jeopardy prohibition. *Id.* at 1055 (citing *TVA*, 437 U.S. at 186).

The statute, regulations and case law thus confirm that the presence or absence of agency discretion does not determine the scope of the action and its effects that must be addressed in

²⁰ NMFS’ interpretation of § 402.03 to sharply restrict the scope of consultation is further undermined by the regulation’s history. When it proposed changes to the ESA regulations in 1983, following the Supreme Court’s decision in *TVA v. Hill*, NMFS simply reiterated the broad language of the statute in the draft of what became § 402.03: “Section 7 and the requirements of this Part apply to all actions in which there is Federal involvement or control.” 48 Fed. Reg. 29990, 29999 (June 29, 1983). Although no commentators suggested the change, NMFS altered this proposed definition in the final rule by adding the word “discretionary” without comment or explanation. *See* 51 Fed. Reg. 19926, 19937 (June 3, 1986). The agency could not properly have intended the silent addition of a single word to the regulation to create a large exception to the statutory scheme – one that, as applied here, conflicts with the plain language of the statute and the Supreme Court’s decision in *TVA*. In fact, the agency said only that “[t]his section, which explains the applicability of section 7, implicitly covers Federal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of ‘action’ in § 402.02.” *Id.*

consultation. Greenpeace v. NMFS, 80 F. Supp.2d at 1146 (“an agency may not unilaterally relieve itself of its full legal obligations under the ESA by narrowly describing the agency action at issue in a biological opinion.”), citing Connor v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988). Rather, as discussed below, 402.03 simply serves to confirm whether or not there is any agency action to trigger § 7 in the first instance, a question that is not relevant here.

B. The Only Federal Actions That Do Not Trigger § 7 Consultation Are Those Where the Federal Agency Is Not Actually Authorizing, Funding or Carrying Out Anything.

Some courts have relied on 50 C.F.R. § 402.03 as a limitation on the kinds of federal actions that can trigger consultation. These cases, however, have no application here where there is no dispute that operation of the FCRPS is subject to the ESA and any broader reading of the regulation based on these cases would place the regulation in direct conflict with the structure and language of the statute.

1. Some courts have relied on 50 C.F.R. § 402.03 to determine whether an agency must initiate consultation under § 7.

Several cases in the Ninth Circuit rely, in part, on 50 C.F.R. § 402.03 to determine whether an agency is required to initiate consultation under § 7. This is a threshold question: Is a federal agency actually engaged in any “action” at all? These cases frequently involve permits issued to private entities by a federal agency where the legal issue is whether, once the permit has issued, the federal agency is still “authorizing, funding or carrying” out anything. Importantly, none of the cases that look to 50 C.F.R. § 402.03 involve an on-going federal action, like continued operation of the FCRPS, where the federal agencies are authorizing, funding and carrying out a broad range of activities on an ongoing basis.

This point is made most clearly in Sierra Club v. Babbitt, 65 F.3d at 1509, where the court had to decide whether a contract the Bureau of Land Management (“BLM”) entered into in 1962 allowing a private party to construct roads over BLM lands to access its commercial logging property still involved federal action in 1990. 65 F.3d at 1505-06. The agreement

required the private party to notify BLM of any plans to build a road. If BLM did not object within 30 days, the plans were deemed approved and the road could be built. The contract authorized BLM to object only if the road: (1) was not the most direct route, (2) would interfere with existing or proposed facilities, or (3) would result in excessive soil erosion. In 1990, the private party submitted plans for an 810-foot road across BLM land. Sierra Club sued, asserting that BLM should have consulted with the Fish and Wildlife Service under § 7 on the impacts of the road and ensuing private logging on spotted owls. The Ninth Circuit framed the question very narrowly: “To what extent does section 7 apply where the BLM granted right-of-way by contract to a private entity before passage of the ESA and the agency’s continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl.” *Id.* at 1508 (emphasis in original).

The Court found no action to trigger § 7 because BLM had already acted and there was no further action it could take. According to the Court, the “fixed agreement” in Sierra Club, signed long before the ESA, had none of the indicia that the court found dispositive in Thomas, where the LRMPs had “ongoing effects extending beyond their mere approval.” 30 F.3d at 1509. The Court was careful to distinguish Sierra Club from Thomas, noting that “a project undertaken pursuant to a preexisting agreement could not avoid the procedural requirements of section 7(a)(2) if the project’s implementation depended on additional agency action.” *Id.* at 1508 (emphasis added) (citing U.S. v. O’Neill, 50 F.3d 677, 686 (9th Cir. 1995) (ESA applies to preexisting water service contract where agency must act each year to supply the water, even if contract does not provide explicit discretion).²¹

²¹ The Court in Sierra Club carefully emphasized that its holding applied to the “narrow circumstances” presented in that case, concluding that “Congress did not intend for section 7 to apply to an agreement finalized before the passage of the ESA where the federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species.” 65 F.3d at 1511-12. In other words, the agency action had been completed well before the ESA was even enacted and there was no “re-opener” clause that would allow BLM to return at a later date and change the contract. Compare WaterWatch v. U.S. Army Corps of Engineers,

Subsequent cases from the Ninth Circuit have applied the analysis of Sierra Club to determine whether a federal permit already granted to a private party can still trigger consultation. In each of these cases, the distinguishing feature is that the agency had no “action” left to authorize, fund or carry out. *See, e.g., EPIC v. Simpson Lumber*, 255 F.3d 1073, 1080-82 (9th Cir. 2001) (specific language of incidental take permit for northern spotted owl, once issued to a private party, left no federal action to re-open permit to protect subsequently listed species); Turtle Island Restoration Network, 340 F.3d at 974-75 (relying on Thomas to distinguish EPIC and Sierra Club because in the latter cases, “the agency activity had been completed and there was no ongoing agency activity, therefore, the consultation requirements of ESA were not invoked. Conversely, the Fisheries Service’s continued issuance of fishing permits under the Compliance Act constitutes ongoing agency action. . . .”).²² *But see Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (finding that § 7 consultation is triggered where federal agency is negotiating renewal of a contract with a private party even if renewal is required and agency cannot unilaterally modify the contract).

As these cases demonstrate, the protections of § 7 are invoked for all federal actions

2000 WL 1100059 (D. Or. June 7, 2000) at *7) (agency required to consult on permit issued before listing of species because agency retained ability to alter or amend the permit).

²² After finding that issuance of fishing permits was an ongoing action, the court found that “issuance of fishing permits by the Fisheries Service under the [High Seas Fishing] Compliance Act constitutes ‘agency action’ implicating the ESA” because the specific provisions of the underlying statute “provide[] [the] Fisheries Service with ample discretion to protect listed species.” 340 F.3d at 977. Two more recent decisions also focus on whether the action agency has any authority to act at all in order to determine whether consultation is required in the first instance. *See Ground Zero Center for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (Navy need not consult on impacts from siting nuclear submarine facility because the “environmental implications for the listed species [arise from] the basic decision by the President to site the Trident II missiles at Bangor” and the ESA does not apply to Presidential directives); National Wildlife Federation v. Federal Emergency Management Agency, 345 F. Supp.2d 1151, 1174 (W.D. Wash. 2004) (of four elements comprising National Flood Insurance Program, only strictly ministerial action of issuing flood insurance to individuals who met established criteria did not require consultation because agency has no authority to deny insurance once criteria were met).

except where there is no on-going federal action of any kind that is still being “authorized, funded, or carried out” by a federal agency or where the agency is otherwise precluded from acting. Neither of these conditions is present here. First, the action agencies indisputably are still authorizing, funding and carrying out all of the on-going operation, maintenance and configuration of the FCRPS. Second, as in Turtle Island, neither NMFS nor the action agencies can identify any specific statutory limitation on the action agencies’ authority that would leave the agencies with no authority to act at all.

2. *NMFS’ interpretation of § 402.03 is in direct conflict with the language and structure of the ESA.*

Moreover, NMFS’ attempt to reinterpret 50 C.F.R. § 402.03 as a sweeping constraint on the scope of consultation must be rejected because the agency’s position, if accepted, would place the regulation and the cases interpreting it in direct conflict with the language, history, and structure of the ESA itself. Congress was not writing on a blank slate when it enacted the ESA in 1973. A prior incarnation of the law, the Endangered Species Act of 1966, 80 Stat. 926, *repealed*, 87 Stat. 903, directed federal agencies to protect imperiled species “insofar as is practicable and consistent with the[ir] primary purposes.” See TVA, 437 U.S. at 175. Congress specifically considered, and rejected, this “practicable and consistent” limitation when it passed the ESA, a fact that the U.S. Supreme Court found compelling when it enjoined the Tellico Dam – an action explicitly funded and authorized by Congress – to prevent jeopardy to an endangered fish. “The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” TVA, 437 U.S. at 185 (emphasis added).

The statute and the rest of the ESA regulations support this broad view of agency action. For example, if NMFS finds that an action will jeopardize a listed species, it must propose a reasonable and prudent alternative (“RPA”) that “can be implemented consistent with the scope

of the Federal agency's legal authority and jurisdiction.” 50 C.F.R. § 402.02. If there is no RPA for an action (e.g., because there is no alternative within the current authority of the federal agency that it could take to avoid jeopardy), NMFS must issue a “jeopardy” biological opinion that effectively prohibits the agency from taking the proposed action. The agency's only recourse is to accept the opinion and cease the activity or to apply to the Endangered Species Committee for an exemption from § 7. 16 U.S.C. § 1536(g); 50 C.F.R. § 402.15(b). Unlike NMFS' consideration of an RPA, when the Endangered Species Committee considers whether to grant an exemption for an action, it is required to consider “alternative courses of action,” 16 U.S.C. § 1536(h)(1)(A)(ii), a term that is defined to *include* “all alternatives and thus is not limited to the original project objectives and agency jurisdiction,” *id.* § 1532(1) (emphasis added). Thus, Congress clearly grappled with questions about the scope of an agency's discretion and authority, and chose not to limit § 7 to discretionary actions.

Significantly, NMFS' approach in the 2004 BiOp of limiting the scope of consultation to only discretionary aspects of federal actions would render the ESA exemption process superfluous for all purportedly non-discretionary federal actions, regardless of their effects on listed species. Such actions – by NMFS' definition – would never be considered as “action” in consultation at all and consequently could never receive a jeopardy biological opinion that would lead to exemption proceedings. See 16 U.S.C. § 1536 (g)(1) (exemption proceedings apply only to actions that receive a jeopardy biological opinion). The ESA simply does not contemplate allowing an agency to disregard the effects of non-discretionary actions that it “authorize[s], fund[s], or carr[ies] out, ” even if they would cause jeopardy. Yet, under NMFS' interpretation of 50 C.F.R. § 402.03, such actions and their effects would fall outside the scope of consultation, and hence proceed outside the structure Congress established for protecting listed species from the harmful effects of federal actions. In fact, it would mean that any agency action that could be characterized as “non-discretionary” could go forward without regard to the prohibition on

jeopardy imposed by § 7, even if that action resulted in the extinction of a listed species. Nearly thirty years after the Supreme Court’s unequivocal decision in TVA v. Hill, NMFS cannot suddenly discover a limitation on the scope of § 7 that would render it largely ineffective in protecting listed species from the jeopardizing effects of a broad category of ongoing actions that are “authorized, funded and carried out” by federal agencies.²³

C. NMFS’ Reference Operation Does Not Cure Its Improper Restriction of the Agency Action.

NMFS’ attempt to misapply 50 C.F.R. § 402.03 to limit the reach of § 7, combined with its improper comparative approach to assessing jeopardy, see supra at II, fatally undermines the 2004 BiOp. NMFS cannot brush all of these problems aside by claiming that its “reference operation” “maximize[s] fish benefits” without regard to the limits of discretion, and hence any discrepancy in the level of effects attributed to the discretionary system operations it believes are the subject of consultation necessarily favors and protects the listed species. 2004 BiOp at 5-6, 5-7 to 5-8.

Even if NMFS could limit consultation to the discretionary components of the activities carried out by the action agencies, which it cannot, it is incorrect that such limitations actually exist here. Indeed, even while claiming that most operations of the FCRPS are non-discretionary, NMFS is forced to admit that it is not sure how. Compare 2004 BiOp at 5-1, 5-5 (asserting that activities associated with navigation, irrigation, flood control and power production are “non-discretionary” and must be eliminated from the agency action) with 2004 BiOp at 5-8 (“the Action Agencies have been unable to define [the discretionary] limits on their authorities”). This should come as no surprise. Virtually everything about the way the action

²³ Although it did not do so in the 2004 BiOp, NMFS may highlight the Ninth Circuit’s recent decision in National Wildlife Federation v. U.S. Army Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004), in an attempt to provide some justification for its segregation of the agency action. This case has no bearing on consultation under ESA § 7 because it involved compliance with the Clean Water Act (“CWA”). Id. at 1171 (“the Corps’ compliance with the ESA did not mean that it complied with the CWA”).

agencies operate the FCRPS is both within the agencies' on-going control and authorized, funded, and carried out by them.²⁴

Even a cursory examination of the statutes that govern operation of the FCRPS demonstrates that they provide the action agencies with broad discretion. For example, Congress authorized the Snake River navigation system to provide generally for slackwater navigation, irrigation, and power generation. See P.L. 14, 79th Cong., 1st Sess. (March 2, 1945), adopting House Doc. 704, 75th Cong., 3rd Sess.; see also Flood Control Act of 1962 P.L. 87-874, Title II (Oct. 23, 1962). Congress also authorized the Corps to maintain a navigation channel of specific depths in the Snake and Columbia Rivers. Congress did not, however, mandate that such a channel be provided 365 days a year, 24 hours a day, and the Corps regularly exercises its discretion to provide a navigation channel of shallower than authorized depths and for less than uninterrupted year-round service.²⁵ Similarly, the courts have routinely found that BOR water project authorizations do not eliminate the agency's authority to forego some or all irrigation in order to protect ESA-listed species. See, e.g., Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir.1999) (affirming that water contractors' right to water "[was] subservient to the ESA" because the Bureau of Reclamation had the "authority to direct Dam operations to comply with the ESA"); PCFFA v. BOR, 138 F. Supp.2d 1228, 1250 & n.20 (N.D. Cal. 2001) (BOR's delivery of water to irrigators subject to ESA).

²⁴ The idea that the agencies are somehow severely constrained in their authority to protect salmon from the harmful effects of the FCRPS also ignores this Court's earlier admonition that "the idea that dams are immutable and uncontrollable like the weather ignores decades of fish protection improvements (such as bypass facilities and ladders) and other structural and operational enhancements." IDFG, 850 F. Supp. at 894.

²⁵ For example, the Army Corps of Engineers is "authorized" to maintain the Columbia River navigation channel at a depth of 27 feet. However, in the exercise of its discretion, it maintains it at a depth of 17 feet. See U.S. Army Corps of Engineers, Dredged Material Management Plan and Environmental Impact Statement (Final: July 2002) at 1-4 (the "27-foot- (8.2-m-) deep channel is typically only maintained to a 17-foot (5.2-m) depth, reflecting the needs of vessels using this reach"), available at <http://www.nww.usace.army.mil/dmmp/report.htm> (visited Fed. 11, 2004).

Indeed, even where management of projects for flood control is at issue, the agencies cannot argue that such activities are non-discretionary. For example, elsewhere the courts have recognized the Corps' broad authority to manage and modify flood control operations to protect ESA-listed species and have not found that these activities are beyond the scope of § 7 consultation. Thus in cases involving management of the Missouri River pursuant to the Flood Control Act, at least two courts have confirmed that:

if an agency has any statutory discretion over the action in question, that agency has the authority, and thus the responsibility, to comply with the ESA. . . . Moreover, such ESA compliance can come at the expense of other interests, including navigation and flood control given the Supreme Court's conclusion that the ESA "reveal[ed] a conscious decision by Congress to give endangered species *priority over* the "primary missions" of federal agencies.

American Rivers v. U.S. Army Corps of Engineers, 271 F. Supp.2d 230, 251-252 (D.D.C. 2003) (citing TVA, 437 U.S. at 185) (first emphasis added); see also In re: Operation of the Missouri River System Litigation, 2004 WL 1402563 (D. Minn. June 21, 2004) at *3 ("There is no language in either case law or legislative history that dictates that the Corps must always maintain a particular water level or specific water season in its river operations. . . . The Court finds that the FCA does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths. . . . The priority that the Corps gives the competing river interests is a discretionary function, and subject to the ESA.").

Finally, the action agencies' authority to provide hydroelectric power is, at best, on an equal footing with their responsibility to protect salmon and steelhead and balancing these needs certainly requires discretion. 16 U.S.C. § 839b(h)(11)(A)(i). Moreover, BPA's governing statutes limit BPA's role to selling such power as the FCRPS can produce after meeting any other statutory requirements. See, e.g., 16 U.S.C. § 832a; 16 U.S.C. §§ 791-828c. Nothing in these statutes suggests a limitation on the action agencies' authority that would prohibit consultation on all power production activities.

As these cases confirm, agencies are not invited to take measures to protect ESA-listed

species only when conveniently consistent with existing activities that they wish to label “discretionary.” Rather, the ESA flatly prohibits agency actions – even if authorized by separate legislation or funding – that could jeopardize listed species or adversely modify critical habitat. See TVA v. Hill, 437 U.S. at 170-171, 194. Moreover, even if some of the harm to salmon migrating through the Columbia and Snake Rivers is not a result of actions that are currently being authorized, funded and carried out by the action agencies – actions taken, completed, and not subject to any further modification of any kind, for example – the limited subset of these wholly past actions is different from, and much smaller than, the actions and effects NMFS includes in its “reference operation.” Indeed, the reference operation includes many ongoing FCRPS operations and actions that are neither purely past nor unchangeable.²⁶

Under these circumstances, NMFS cannot properly conclude that its line-drawing exercise to create a “reference operation” necessarily allocates more harmful effects to the proposed action than it actually has. Nor has it offered any basis for eliminating *any* on-going FCRPS operation, management or system configuration activities from the duties imposed by § 7.

D. The 2004 BiOp Improperly Segments a Single Federal Action Into Multiple Consultations.

Finally, in addition to the above flaws, the 2004 BiOp improperly addresses only part of a larger federal action – operation of the *entire* federal Columbia/Snake River hydrosystem – because it improperly excludes consideration of the operations and effects of BOR’s eleven upper Snake projects. The ESA plainly requires a biological opinion to assess all of the effects of the entire agency action. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). As the Ninth

²⁶ The effect on NMFS’ analysis of including these “discretionary” operations in its reference operation rather than in the proposed action is to reduce, likely considerably, the difference between the effects of the proposed action and the reference operation. See AR Doc. C.237 at 2, 9-13; AR Doc. C.198 at 2-3; AR Doc. C.231 at 8-17. Of course, it is this artificially narrow “gap” that enables NMFS to reach its “no net effects” finding based on its improper short-form jeopardy analysis. See supra at xx-xx.

Circuit has stated, “the ESA on its face requires that a biological opinion consider the entire agency action,” and that “[t]he biological opinion[] must be coextensive with the agency action.” Conner, 848 F.2d at 1455, 1457-58. Disregarding selected aspects, features or effects of an action violates both the express language and the spirit of the ESA. See, e.g., Greenpeace, 80 F. Supp.2d at 1150 (noting that “[i]n sum, the ESA requires a comprehensive biological opinion that addresses the full scope of the agency action[.]”); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988) (requiring “comprehensive biological opinions”). The logic of this requirement is self-evident: segmenting a single action into several components for purposes of consultation may allow the parts of the action to appear less significant or may allow combined effects or potential mitigation options to be ignored. See American Rivers v. U.S. Army Corps of Engineers, 271 F. Supp.2d at 255.

There are two main impacts to fish arising from the operation of BOR’s upper Snake projects – one negative and one positive. First, these projects cause from 1.6 to 3.8 million-acre-feet (maf) of flow depletions in the Snake River every year. Compare AR Doc. B.157 at 6-29 (draft 2000 BiOp calculating 3.8 maf of flow depletion) with Exh 3 at 6-2 (2001 Upper Snake BiOp calculating flow depletions of 1.6 maf). These flow depletions are harmful to salmon and have a nearly deterministic effect on streamflow mitigation in the lower Snake River. Exh. 4 at 3 (1.6 maf of flow depletion does have adverse effects on downstream salmon); AR Doc. B.157 at 6-28 (draft 2000 BiOp) (“[f]low depletions caused by BOR-based irrigation activities are a major impediment to meeting NMFS’ flow objectives” for ESA-listed salmon and steelhead.) (emphasis added). Second, as part of overall operation of the hydrosystem, BOR can, and to some extent does, release water from its upper Snake projects to provide “flow augmentation” for salmon and steelhead in the Snake and Columbia Rivers. This flow augmentation does not approximate, or even attempt to approximate, the amount of water removed from the river for irrigation by BOR. See Exh 5 at 2 (noting that provision of flow augmentation from upper Snake

projects “should not be construed as providing Section 7 coverage for those projects. . . . [C]ontribution to offsite mitigation for the FCRPS projects would have to be above and beyond any measures necessary for the operations of the upper Snake projects to comply with the ESA.”). Instead, flow augmentation attempts to mitigate to some extent the harmful effects of the overall operation of the *downstream* dams on the Snake and Columbia Rivers, particularly in the summer months when these effects are most acute.

By segmenting the upper Snake projects from the 2004 BiOp, NMFS limits its analysis of the effects of these BOR projects to the narrow benefits they voluntarily deliver to help mitigate for impacts of the downstream FCRPS dams in the Snake River and beyond. 2004 BiOp at 1-4; AR Doc. C.293 at 1-18. This is a far different – and much narrower – question than the one the ESA poses. Greenpeace, 80 F. Supp.2d at 1148 (“a comprehensive biological opinion . . . should, at the very least, identify all the relevant management measures and explain how these measures individually, and in combination, affect the listed species”). NMFS cannot continue to avoid doing what a proper jeopardy analysis would require: examining all of the effects of all of the federal projects in the Columbia and Snake Rivers that can be and are operated in coordination for multiple purposes in order to determine whether these combined activities jeopardize listed salmon and steelhead.

1. The 2004 BiOp does not include consultation on the BOR’s upper Snake projects

In the 2004 BiOp at Figure 1-1 on page 1-2, NMFS provides a map of “major facilities that make up the Federal Columbia River Power System.” This map includes many of the BOR facilities in the upper Snake River basin. Yet in Figure 5-1 on page 5-4, NMFS’ map of the “FCRPS and USBR Action Area” *excludes* the Snake River above the impassable barrier of the Hells Canyon Complex dams entirely – even though at the same time it *includes* facilities on the upper Columbia River above the impassable barrier of Grand Coulee. Indeed, the proposed action assumes a certain quantity of flow augmentation from the upper Snake projects. See AR

Doc. C.293 at 1-18; C.289 at 47-48 (UPA discussing flow objectives for Lower Snake River, some of which must come from BOR's projects). Despite the agency's statement that "[t]his is a biological opinion . . . on the operation and maintenance of the Federal Columbia River Power System (FCRPS, see Figure 1-1,)" 2004 BiOp at 1-1, it plainly does not include, even by the agencies' own account, the entire system. Rather, the 2004 BiOp evaluates only "19 U.S. Bureau of Reclamation (USBR) projects and their effects on ESA-listed salmon and steelhead." Id. NMFS' only explanation for excluding the BOR's upper Snake projects from this consultation is the un-illuminating and circular claim that these projects were not considered because they are "either outside the action area of this consultation or . . . are undergoing separate section 7 consultation. . . ." Id., App. D at D-13; id. at 1-4.²⁷

The fact that projects which are part of a single course of action are dealt with together for most purposes, as the upper Snake projects are in FCRPS power planning, operations, and flow augmentation, confirms that these projects actually are part of a single coordinated course of federal action.²⁸ There is simply no reason – aside from defendants' desire to avoid a full accounting of the projects' effects – for BOR's upper Snake projects to be treated separately

²⁷ In 1999, BOR and the other FCRPS action agencies submitted a Biological Assessment ("BA") to begin formal consultation for the 2000 BiOp. In this BA, the action agencies correctly identified the action subject to consultation as operation of all of their projects in the Columbia River basin – that is, the federal dams, water projects, and power facilities on the Columbia and Snake Rivers and their tributaries owned and operated for multiple purposes by the Corps and BOR, including the generation of hydroelectric power for BPA to market. Exh. 6 (1999 BA). As the 1999 BA indicates, BOR's upper Snake projects are either operated in coordination with downstream projects or have operational effects on these projects by supplying or removing water or contributing to the amount or timing of power that BPA markets. Id.

²⁸ It is important to note that the term "FCRPS" itself is at best "one of art," not of law or precision. As even the government admits, this term means different things to different agencies at different times. See, e.g., Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 14-16 in American Rivers v. NMFS, Civ. No. 04-0061-RE (filed Nov. 5, 2004). The real issue is not whether the government considers the BOR's upper Snake projects part of the "FCRPS" at this time and place, but whether they are, as a matter of fact, part of a coordinated and comprehensive federal action that has combined effects on ESA-listed species. BOR's upper Snake projects easily satisfy this requirement.

from the down-river projects in consultation under ESA § 7. Indeed, the record for the 2000 BiOp and the 2001 Upper Snake BiOp show that BOR initially included the upper Snake projects in its BA for the FCRPS precisely because it recognized (1) that its upper Snake projects have direct effects on water quality, water quantity, and flow timing in the rest of the system; and, (2) that these effects had not been addressed adequately in past consultations. Thus, when it withdrew these projects from the 2000 BiOp consultation, BOR stated that “in order to avoid inappropriate segmentation of ESA consultation on Reclamation projects, Reclamation proposes that subsequent BiOps on Reclamation’s upper Snake River projects include a comprehensive analysis of all of the effects of these projects on listed species.” Exh. 7 at 2.²⁹ As all of these documents make clear, NMFS has segmented consultation on the up and down-river projects and continues to do so in the 2004 BiOp.

2. *The ESA regulations do not provide a safe-haven to segment projects and present them piecemeal for consultation.*

Although the ESA regulations do not provide an explicit definition of what constitutes a single federal action for purposes of consultation, this absence of explicit boundaries to define an action does not provide NMFS with unfettered discretion to evaluate actions presented in whatever fragmentary fashion an action agency chooses. Indeed, the courts have routinely set aside biological opinions that considered less than the entire coordinated federal action – and for good reason. As the court in American Rivers found, “such impermissible segmentation would allow agencies to engage in a series of limited consultations without ever undertaking a comprehensive assessment of the impacts of their overall activity on protected species.” 271 F. Supp.2d at 255; Conner, 848 F.2d at 1454; Greenpeace, 80 F. Supp.2d at 1148-49. As these

²⁹ As NMFS too observed, an earlier 1999 biological opinion on the upper Snake projects “was supplemental to the 1995 FCRPS biop and was very narrowly focused on the ability of USBR to provide 427 kaf in support of that biop. It was clear from the record that NMFS did not consult on all aspects of the USBR upper Snake River basin projects in 1999 and that a ‘no jeopardy’ conclusion was only reached on a very narrow aspect of the USBR’s operations under the umbrella of the 1995 FCRPS BIOP.” Exh. 8 at 7 (emphasis in original).

cases note, the law requires comprehensive consideration of all of the effects of a single course of federal action, whether it occurs in a series of linked temporal steps or in a series of linked physical steps. Without rigorous insistence on this comprehensive approach, the risk that some effects of an action will go unaddressed to the detriment of a listed species cannot be avoided, a risk that is “impermissible.” Thomas v. Peterson, 753 F.2d at 764.

The ESA itself confirms that this comprehensive approach to consultation under section 7 is required in order to avoid overlooking effects as NMFS has here. As the cases interpreting what constitutes a federal action for purposes of engaging in § 7 consultation make clear, the reach of § 7 consultation must be broad, consistent with the overriding remedial purposes of the statute. Pacific Rivers Council, 30 F.3d at 1054; Lane Cty. Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992). It is no less important to ensure that an individual consultation, once commenced, encompasses the entire federal action so that no effects go unaddressed. In Greenpeace, for example, the issue was whether NMFS’ separate consultations on several temporally and physically overlapping fishing plans were permissible. 80 F. Supp.2d at 1143. The Court there focused on the fact that NMFS was missing effects to the species by undertaking separate consultations on each separate fishery. Id. at 1148-49.³⁰ The same problem arises here if NMFS can consult on the effects of the entire action in separate segments. The opportunity to alter the flow depleting effects of the upper Snake projects, or alter the operation of the downstream projects to take advantage of changed upstream operations, simply disappears from the current segmented consultation structure. See 2004 BiOp, App. D at D-13 (refusing to consider whether additional flows from the BOR’s upper Snake projects should be required or

³⁰ It makes no difference to NMFS’ analysis whether BOR considers its projects separate from the rest of the system. In Greenpeace, 80 F. Supp.2d at 1146, “the Court agree[d] with the industry that adoption of the FMPs [Fishery Management Plans] and the authorization of the yearly fishery are separate and discrete agency actions. Nevertheless, the Court rejects the industry’s claim that NMFS need not have addressed the entire FMPs in BiOp2.” See also Conner, 848 F.2d at 1443.

would better protect listed species.)³¹

Further, to the extent NMFS contends it may properly include only some of the effects of an action in a consultation, e.g., the provision of some limited amount of flow augmentation from the upper Snake projects, but not others, e.g., the much larger flow depleting effects of these projects, it misapprehends the requirements of the ESA. The law and regulations require NMFS to consult on “actions,” not on selected parts of actions or selected “effects” of an action. See 50 C.F.R. §§ 402.14(a) (requiring consultation for “any action that may affect a listed species”); 402.02 (defining “actions” which trigger consultation requirements and “effects of the action” that are considered in consultation). As the regulations make clear, NMFS cannot simply pick and choose narrow portions of actions or only certain effects of actions to include in a consultation. Once it has included any part of an action in a consultation, it must consult on all of that action and all of its effects.

In sum, the ESA, its regulations and the relevant case law establish at least two legal requirements for consultations that are dispositive of NWF’s segmentation claim. First, a consultation must be co-extensive with the actual scope of an agency action and the action cannot be re-packaged to exclude some parts of a single coordinated and comprehensive course of federal conduct. Second, a consultation cannot select among the effects of a federal action or be structured to avoid evaluation of some effects of an action; it must address all of the effects of the entire action. The 2004 BiOp fails both of these requirements.

III. NMFS’ NO-JEOPARDY FINDING IN THE 2004 BIOP IS ARBITRARY AND CAPRICIOUS.

In addition to unlawfully abbreviating its jeopardy analysis and considering an

³¹ In this case, the improper segmentation of the agency action to exclude the BOR’s upper Snake projects has the additional pernicious effect of allowing NMFS to arbitrarily exclude from its supposedly “fish friendly” reference operation any additional flows from the BOR’s upper Snake projects. See 2004 BiOp, App. D at D-13. Of course, as NWF has explained, the entire reference operation approach in this biological opinion is contrary to law. See supra at II.

unlawfully circumscribed agency action in the 2004 BiOp, NMFS no-jeopardy finding is based on analysis that is arbitrary and capricious. First, NMFS disregards without explanation the analytic framework, critical elements of the scientific analysis, and important conclusions it employed in the 2000 BiOp. Second, the agency fails to take into account its own scientific assessments about the severe risks faced by ESA-listed salmon and steelhead, without articulating a rational basis for doing so. Finally, even with the limited analysis and information that NMFS does employ, the agency fails to explain why it disregards credible scientific criticism of the tools it uses, bases its analysis on assumptions that are contrary to principles of conservation biology, and relies on a “net effects” evaluation that is internally inconsistent and conclusory. Each of these failings leaves NMFS’ no-jeopardy finding far short of the ultimate legal requirement it must meet: to insure that FCRPS operations do not jeopardize listed species. 16 U.S.C. § 1536(a)(2).

A. NMFS Does Not Explain Why It Disregards the Analytic Tools of the 2000 BiOp for Assessing Population Status and Determining Jeopardy.

A lawful jeopardy analysis must begin with a rigorous assessment of the status of the species. 50 C.F.R. § 402.14(g)(2). However, NMFS does not evaluate the current status of ESA-listed salmon and steelhead populations in the 2004 BiOp using the most up-to-date information. Instead, it abandons without explanation the analytic tools it concluded in 2000 represented the best scientific information available for assessing salmon population growth rates. NMFS has relied on these tools consistently up until it issued the 2004 BiOp. 3d Oosterhout Decl. at ¶¶ 6-9, 39-41 (citing NMFS studies and independent analyses supporting the use of these methods). Even though these methods were available to NMFS, the agency neither up-dated and applied them nor adequately explained its change in direction. NMFS explains its departure from using these methods as follows:

The previous analysis depended upon a prospective, range-wide evaluation of the likelihood of survival and recovery, projecting species survival rates up to 100 years in the future under reasonable scenarios of activities that would affect

survival and recovery. This analysis required an estimation of the beneficial and harmful effects of future Federal and non-Federal actions.

2004 BiOp at 1-5. This explanation for setting aside the methods and framework of the 2000 BiOp is contrary to relevant and credible scientific information.³² As Dr. Oosterhout explains, the tools NMFS employed in the 2000 BiOp to assess current population growth rates do not require any assumptions about future actions. 3d Oosterhout Decl. at ¶¶ 44-46. Instead, they employ common, well-established scientific tools from the field of conservation biology to assess what the future population status of each ESU would be if past population trends continue. Id. Such analyses are essential to identifying and evaluating risks to a species threatened with extinction. Id. Indeed, a jeopardy analysis must involve some level of prediction, and NMFS cannot explain how it would make a cogent jeopardy analysis – an evaluation that must employ the best scientific data available, 16 U.S.C. § 1536(a)(2) – in the absence of such projections. NMFS’ basis for discarding tools it previously has identified as the best available science fails to identify a relevant scientific basis for doing so. “An agency ‘cannot ignore available biological information or fail to develop projections’ which may indicate potential conflicts between the proposed action and the preservation of endangered species.” Greenpeace, 80 F. Supp.2d at 1150 (citing Conner v. Burford, 848 F.2d at 1454); see also id. (finding that NMFS violated ESA’s best available science requirement because it “entirely ignored relevant factors and admittedly failed to develop projections based on information that was available.”)

As Dr. Oosterhout explains in her declaration, NMFS could have employed this recent information and these tools to calculate long-term population growth rates for each ESU. 3d

³² NWF addressed this same argument when it was first made by NMFS’ counsel in briefing that led to the Court’s decision in NWF v. NMFS. See NWF’s Reply Memorandum in Support of Motion for Summary Judgment (filed Feb. 14, 2003) (Docket # 370) at 11-12 (highlighting in response to counsel’s claim that the agency speculated about future actions in its population models that “there is no discussion of any general future harmful habitat measures in Appendix C [to the 2000 BiOp] (or any beneficial ones either for that matter), let alone a discussion of a single specific timber sale, or even the possible impacts of timber harvest generally, as NOAA implies.”).

Oosterhout Decl. at ¶¶ 10-21. It also could have compared these current population growth rates to the survival rates it identified as necessary to avoid jeopardy in the 2000 BiOp. *Id.* It even could have resolved the problems in its prior analyses, and properly evaluated the survival improvements available from the hydrosystem measures of the proposed action, determined the range of survival improvements that would still be needed from off-site measures, and assessed whether properly defined mitigation measures would allow the action or an RPA to meet the jeopardy standard the agency used in 2000. *Id.* at ¶¶ 15-21. NMFS presents none of these steps or analyses in the 2004 BiOp.

In order to show what such an analysis would reveal and to provide relevant background to understand the short-comings of the analysis in the 2004 BiOp, Dr. Oosterhout employs NMFS' methods from the 2000 BiOp and the jeopardy standard from that Opinion, together with the most recent information available on salmon and steelhead returns, to up-date NMFS' current population growth rate and survival improvement calculations from the 2000 BiOp. She then uses this information to calculate, using NMFS' methods, how much survival improvement – beyond the hydrosystem measures of the UPA – would still be necessary for each ESU to meet the jeopardy standard the agency set in 2000. 3d Oosterhout Decl. at ¶¶ 10-21 & Table 2. These remaining survival improvements, beyond those available from the hydrosystem measures of the UPA, are very substantial even though they are based on assumptions that favor the effectiveness of the proposed action. *Id.* at ¶¶ 12-14, 18. For example, using NMFS' own methods reveals that “Wenatchee chinook still need a sustained life-cycle survival increase of 162% - 183% (more than double to nearly triple); UCR steelhead need 115% - 321.3% (more than double to more than quadruple the current survival); SR steelhead need 131% - 424% (more than double to more than quintuple the current survival).” *Id.* at ¶ 18. It is highly unlikely that the offsite measures that are part of the new proposed action would provide these very large remaining survival improvements, because they are much more limited in scope than the extensive suite of

basin-wide offsite measures that NMFS considered qualitatively in the 2000 BiOp, many of which were improper. NWF v. NMFS, 254 F. Supp. at 1214-15.³³

Equally significant, the limited assessment NMFS offers of recent salmon return data is inconsistent with requirements that it has previously identified for a reliable scientific assessment of population trends. 3d Oosterhout Decl. at ¶¶ 48-52. In a number of prior studies and analyses, NMFS has emphasized the critical importance of evaluating the current population status of salmon and steelhead using information about survival rates that extends back to at least 1980. Id. at ¶ 49 (citing studies). Yet a key new analysis NMFS cites in support of its no-jeopardy finding for the proposed action is an unreviewed comparison of recent above-average salmon and steelhead returns from 2000 to 2003 to the record low returns during the 1990s. See, e.g., 2004 BiOp at 4-5 (citing new analysis), 4-7, 4-8, 8-7, 8-16 (citing “[s]trong returns” of adults during the past four years). NMFS does not explain why, in light of its prior studies that emphasize the importance of a long time-series of returns to understanding population performance, it may rely on this limited analysis of short-term data to support the conclusion that salmon populations have improved significantly. 3d Oosterhout Decl. at ¶¶ 48-52 (summarizing both NMFS’ prior studies and the approach of the new study). Nor does it explain how the results of this most recent analysis are consistent with the findings in numerous prior analyses of population trends. Id. at ¶ 51-52. Moreover, this Court has already rejected NMFS’ reliance on base periods that are carefully selected to produce overly-optimistic results. IDFG v. NMFS, 850 F. Supp. at 893 (projections “failed to consider relevant facts such as . . . low run numbers of the species during the base period”).

In sum, NMFS has jettisoned scientific methods that it previously identified as the best

³³ In addition, as Dr. Oosterhout notes, “the fraction of these survival improvements that would be provided by the hydrosystem measures of the UPA is small for almost all of the ESUs and smallest for the ESUs that would require the largest overall survival improvement,” 3d Oosterhout Decl. at ¶ 21, making it even less likely that the offsite measures would provide the survival improvements necessary to meet NMFS’ 2000 jeopardy standard.

available, but has not provided an explanation for this change based on a consideration of all of the relevant factors. It also has employed analyses that are based on limited information, when it previously has concluded that such limited information is unreliable, without explaining why its prior concerns are no longer relevant. These unexplained shifts are the essence of arbitrary and capricious agency action. See Motor Vehicles Mfg. Ass’n v. State Farm Ins. Co., 463 U.S. 29, 41-42 (1983) (where agency abandons its prior position, it is “obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”); see also Lynch v. Dawson, 820 F.2d 1014, 1021 (9th Cir. 1987); Louisiana Pub. Serv. Comm’n v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999) (“For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.”). This is an especially serious flaw here because if NMFS had employed the methods and standards it used in the 2000 BiOp, it undoubtedly would have reached a jeopardy finding for the proposed action.

B. NMFS Has Failed to Address Credible Scientific Criticism of a Key Analytic Tool It Employs in the 2004 BiOp.

A core feature of the 2004 BiOp is NMFS’ calculation of the “difference between the effects of the proposed action and the ‘reference operation’” to listed salmon and steelhead. 2004 BiOp at 6-1. According to NMFS, the purpose of this analysis is to determine whether the hydrosystem measures of the proposed action will have a net negative effect on any ESU when compared to the reference operation and, if so, how large. Id. at 6-1 to 6-4, App. D. The principle analytic tool NMFS employs to calculate these relative effects is the SIMPAS model. Id., App. D at D-1. As NMFS acknowledges, its use of this model has been widely criticized. Id., App. D at D-5.

NMFS’ nonetheless waves away this criticism, insisting that the SIMPAS model is its preferred tool. However, criticism of NMFS’ reliance on this model comes from almost every outside expert to review its analysis, including state fish and wildlife agencies, tribal fishery

experts, and the Fish Passage Center, among others. 3d Oosterhout Decl. at ¶¶ 24-36 & Table 3 (citing and quoting criticism). Moreover, NMFS' dismissal of this criticism fails to address its substance. Dr. Oosterhout provides the background information necessary to both understand the criticisms of SIMPAS and the nature of NMFS' response. *Id.* at ¶¶ 23-36. As her summaries of this information reveal, NMFS' responses fail to address the problems raised by some of the criticisms, *e.g.*, *id.* at ¶¶ 28-31, 33-36 (discussing variability and uncertainty), ignore others, *e.g.*, *id.* at ¶¶ 25-27 (discussing oversimplification), and acknowledge still others without answering them, *e.g.*, *id.* at ¶ 32 (discussing removable spillway wiers).³⁴

NMFS cannot properly disregard credible scientific criticism of its analyses; instead, it must make a response that actually addresses the criticism and explains why it can be safely ignored. *See Carlton v. Babbitt*, 26 F. Supp.2d 102, 109-110 (D.D.C. 1998) (finding that FWS' application of grizzly bear population study to small bear population despite study author's caution that such use was "inappropriate," was arbitrary and capricious); *cf.*, *Sierra Club v. Eubanks*, 335 F. Supp.2d 1070, 1076 (E.D. Cal. 2004) ("[c]redible scientific evidence that [contradicts] a proposed action must also be evaluated and considered"); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) (agency must "disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it.").

C. Critical Aspects of NMFS' Analysis in the 2004 BiOp Are Contrary to Established Scientific Principles.

Based on its SIMPAS-driven comparative analysis between the proposed operation and

³⁴ For example, NMFS acknowledges that the SIMPAS model cannot take uncertainty and variability into account, 3d Oosterhout Decl. at ¶¶ 33-36 (citing sources for this limitation of SIMPAS and NMFS' recognition of the problem), and admits that it must determine whether "the uncertainty is greater in the analysis of the presumed positive effects of non-hydro offsets compared to presumed negative effects of hydro operations, or if the level of uncertainty is comparable," 2004 BiOp at 8-3. Yet the agency does not appear to have presented any analysis to address and resolve this issue.

the “reference” operation, NMFS concludes that the proposed action will have some level of negative effects on eight ESUs. See, e.g., 2004 BiOp at 6-57 to 6-61 (discussing effects on Snake River spring/summer chinook), 6-77 to 6-84 (same for fall chinook); see also AR Doc. C.109 at 8-3 (July 2004 draft biological opinion reaching a jeopardy finding for proposed action without including offsite measures). In order to reach a no-jeopardy finding for the UPA despite this determination, NMFS considers “qualitatively” whether off-site actions that are a part of the UPA can mitigate for the negative effects of the hydrosystem measures so that, by 2014, the proposed action will have no net adverse impacts. 2004 BiOp at 6-4 to 6-9 (discussing methods for evaluating offsite measures); 6-76, 6-89, 6-97, 6-109, 6-116, 6-136 (concluding for each up-river ESU that the net effects of the proposed action will be either neutral or positive).

This qualitative analysis is built on the assumption that survival impacts in one salmon life stage can be offset by a corresponding survival improvement at any other life stage. 2004 BiOp at 6-6; 3d Oosterhout Decl. at ¶¶ 67-69 (explaining assumption). This mathematically simple assumption is inconsistent with population ecology and available data. Salmon are not fungible widgets; impacts and mitigation are not interchangeable across their entire lifecycle. As Dr. Oosterhout points out, if this assumption were correct, past large harvest reductions would have led to proportional increases in subsequent salmon and steelhead returns. 3d Oosterhout Decl. at ¶ 68. Yet despite these harvest reductions, these species have continued to decline. Id. The assumption that underlies NMFS’ offset analysis simply disregards well-recognized features of population dynamics, especially for small, at-risk populations like those of listed salmon and steelhead. Id. at ¶ 69.

In addition, based on this simple assumption, NMFS and its scientists engage in an offset analysis that attempts to determine qualitatively and based on “professional judgment” whether tributary and estuary measures could mitigate for the negative impacts of proposed hydrosystem operations. 2004 BiOp, App E & Chpt. 6. But this offset analysis mixes indiscriminately, and

without transparency or reproducibility, a combination of relative rankings, independent ratings, and absolute and relative measures. 3d Oosterhout Decl. at ¶ 56-66 (describing features of NMFS’ analysis and explaining what rankings, ratings, and comparisons of tradeoffs among disparate measures require). As Dr. Oosterhout explains, these rankings and ratings are fundamentally different and cannot be used interchangeably or across disparate measures. *Id.* NMFS does not explain how it resolved these fundamental discrepancies in its methods for assessing offset measures. *Id.* at ¶ 64-66. In the end, NMFS resorts to the assertion of professional judgment as a substitute for a transparent and reproducible scientific analysis that employs specifically identified data. 2004 BiOp at 6-5, 6-7. Such “trust us, it will work” assertions, however, do not meet established legal standard for rational decisionmaking. Greenpeace v. NMFS, 55 F. Supp.2d at 1259 (“[T]he presumption of agency expertise may be rebutted if its decisions, even though based on scientific expertise, are not reasoned.”) (citations omitted); see also Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150-51 (9th Cir. 1998) (recognizing that if an agency is allowed to rely on its own expert opinion without hard data or analysis, a plaintiff would be unable to permissibly challenge the agency action under the APA standard of review); PCFFA, 265 F.3d at 1034 (heart of the inquiry under this APA standard is whether the agency “articulated a rational connection between the facts found and the choice made”).

In sum, even apart from the fundamental legal flaws in the 2004 BiOp, the limited analysis of the effects of the proposed action that NMFS presents does not directly employ tools it has previously identified as the best available science, disregards its own prior scientific findings, dismisses credible criticism without addressing it or explaining why it can be ignored, and relies on limited analyses that conflict with recognized scientific principles and data. This cavalier approach to science is quintessential arbitrary and capricious action. In IDFG v. NMFS, this Court set aside a biological opinion for FCRPS operations in part because “NMFS[] fail[ed]

to adequately explain why it prefers uncertain favorable model results and rejects other equally uncertain model results tending to undermine a no jeopardy conclusion.” 850 F. Supp. at 899. The 2004 BiOp has much in common with the biological opinion the Court rejected in IDFG – even beyond a no-jeopardy finding for FCRPS operations – and certainly does no better at complying with fundamental principles of administrative law.

IV. NMFS’ CRITICAL HABITAT DETERMINATIONS ARE CONTRARY TO LAW, ARBITRARY, AND CAPRICIOUS.

A. NMFS’ Framework for Evaluating Impacts to Critical Habitat.

Section 7(a)(2) requires federal agencies to insure that their actions are not likely to “result in the destruction or adverse modification of habitat ... determined by the Secretary ... to be critical....” 16 U.S.C. §1536(a)(2). The ESA defines “critical habitat” to include “the specific areas within the geographical area occupied by the species, at the time it is listed ..., on which are found those physical or biological features (I) essential to the conservation of the species....” Id. at §1532(5)(A)(i). In the past, NMFS has interpreted the ESA’s prohibition against destruction or adverse modification of critical habitat to be indistinguishable from the statute’s jeopardy prohibition. See, e.g., AR Doc. B.151 (1995 BiOp) at 82 (“[t]he analysis of whether the proposed action jeopardizes the listed salmon ... encompasses the closely related determination of whether that operation adversely modifies or destroys the listed salmon’s critical habitat”).

The Ninth Circuit recently rejected this merger of the jeopardy and adverse modification inquiries, which previously had the effect of allowing agencies to focus exclusively on whether alterations to critical habitat affect a listed species’ survival. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F. 3d 1059, 1070 (9th Cir. 2004) (“GP Task Force”). There, the court concluded that this narrow focus “offends the ESA because the ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted.” Id. (citing the ESA’s definition of

“conservation,” 16 U.S.C. § 1532(3)). The court, therefore, invalidated the challenged biological opinions because they failed to consider “whether adequate critical habitat would remain to ensure species recovery.” *Id.* at 1072-74.

Three ESA-listed Columbia basin salmon and steelhead ESUs – Snake River sockeye, fall chinook, and spring/summer chinook – currently have designated critical habitat.³⁵ Prior to completing the 2004 BiOp, NMFS prepared an Issue Paper discussing its post-GP Task Force interpretation of the § 7 standard for destruction or adverse modification of critical habitat. Under what it termed an “Environmental Baseline Approach,” NMFS proposed to modify the thrust of the existing regulatory definition to only “evaluate [whether an action will cause] a change in the value of critical habitat for ‘survival or recovery.’” AR Doc. C.290 at 2 (emphasis in original). NMFS also suggested an approach to interpreting § 7’s critical habitat standard that did not rely on the regulation rejected by the court in GP Task Force. Under this alternative “Listing Condition Approach,” NMFS “would find an alteration of an essential feature of critical habitat if the conditions under the proposed action would be worse than those in existence at the time of listing.” *Id.* NMFS adopts both of these methods in the 2004 BiOp for its critical habitat analysis. 2004 BiOp at 6-1; 6-2; 8-7 to 8-9; 8-12 to 8-14; 8-35 to 8-36.

B. NMFS’ Critical Habitat Determination Using the Environmental Baseline Approach Is Flawed.

In GP Task Force, the Ninth Circuit not only recognized that critical habitat plays a central role under the ESA in protecting recovery of listed species, but the court also found that it is “logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species survival....” 378 F.3d at 1069. In this case, however, NMFS found

³⁵ NMFS had previously designated critical habitat for all Columbia Basin ESUs, but temporarily withdrew these designations save for the Snake River ESUs to settle a lawsuit challenging economic analyses used in these designation. *See* 2d Complaint at ¶26, n.3. NMFS has proposed to re-designate critical habitat for the ESUs that do not currently have critical habitat. 69 Fed. Reg. 74572 (Dec. 14, 2004).

that the proposed action is not likely to destroy or adversely modify the critical habitat of the three Snake River ESUs even though the agency also found that the action likely will further degrade already poor existing conditions in critical habitat. This conclusion is contrary to the ESA and the GP Task Force decision.

For the Snake River ESUs, NMFS concludes that essential features of critical habitat, especially safe passage for juveniles, are in “poor” condition. 2004 BiOp at 8-8, 8-13, 8-36. For spring/summer chinook, for example, NMFS noted that the proposed action would have “significant” negative impacts on the essential critical habitat feature of safe passage for listed juveniles during the 2005-2009 period, but determined that a “net improvement” in safe passage would occur in 2010-2014, and that these improved conditions would persist beyond 2014. *Id.* at 8-7. Relying “primarily” on projected net improvements in passage conditions after 2010 as a result of “structural modifications to dams,”³⁶ the agency concluded that for spring/summer chinook, the proposed action “is not likely to appreciably reduce the value of critical habitat for survival or recovery of Snake River spring/summer chinook on a time scale relevant to the recovery of the ESU, especially in light of the recent (short-term) improvement in the status of the ESU.” *Id.* at 8-8. For sockeye, however, NMFS found it possible that safe passage “would continue to be altered” from 2010 to 2014, though with planned system improvements these impacts “would be reduced, possibly to zero.” *Id.* at 8-36. NMFS then concluded that the proposed action would not adversely modify sockeye critical habitat because “the condition of critical habitat in the juvenile migration corridor either would be equivalent to the condition associated with the reference operation or reduced by a relatively small amount, which is not

³⁶ These “structural improvements largely consist of the hoped-for benefits of removable spillway wiers (RSWs). *See, e.g.*, 2004 BiOp at 6-60 (improvements “due largely to system configuration improvements such as the installation and operation of RSWs”). Relying on these anticipated benefits has been widely criticized by state and tribal wildlife agencies and others. 3d Oosterhout Decl. at ¶ 32 & Table 3 (describing concerns, citing sources, and describing NMFS’ response).

considered ‘appreciable.’” Id. at 8-36. Similarly, NMFS notes that safe passage and other features of critical habitat for fall chinook are also “poor” and also likely to be further degraded from 2005 to 2009. Id. at 8-13.

NMFS fails to provide a rational basis for its finding that the proposed action will not destroy or adversely modify critical habitat for these three ESUs. First, as the Ninth Circuit explained in GP Task Force, § 7’s “requirement to preserve critical habitat is designed to promote both conservation and survival.” 378 F.3d at 1070. Snake River sockeye’s ability to meet either standard under current conditions is in serious doubt. NMFS notes that “the mainstem habitat-related biological requirements of [sockeye] juveniles are not being fully met within the action area.” 2004 BiOp at 8-34. According to NMFS, a species’ habitat-related “biological requirements” refers to “habitat conditions necessary to ensure the species’ continued existence.” AR Doc. B.154 at 5. The 2004 BiOp also identifies “safe passage” for juvenile sockeye as one of the “essential features” of critical habitat for the ESU. 2004 BiOp at 8-35. Despite highlighting both the importance of safe passage as an essential feature of sockeye critical habitat and the present inadequacies of this feature, NMFS makes no effort to explain how a proposed action that would – at best – merely maintain current inadequate passage conditions can satisfy the requirements of § 7. NMFS provides no rationale for why maintaining or even slightly worsening safe passage conditions for sockeye – conditions that the agency admits are not adequate to provide for the sockeye’s continued existence, let alone protect its recovery – is consistent with congressional intent that critical habitat “promote both conservation and survival” of listed species. GP Task Force, 378 F.3d at 1070; National Wildlife Federation v. NMFS, 235 F. Supp.2d 1143, 1159-60 (W.D. Wash. 2002) (“Further degradation of that [unoccupied] habitat only makes the species’ return less likely.”).³⁷

³⁷ In a 1999 NMFS document called “The Habitat Approach,” which NMFS cites in the 2004 BiOp at pages 1-6 to 1-7, NMFS concluded that an appreciable delay in salmon recovery would expose ESUs to additional risk and thus appreciably reduce even their chances for survival. AR Doc. B.154 at 3. This conclusion further undermines NMFS’ finding that merely maintaining

NMFS' conclusion regarding adverse modification of sockeye critical habitat is also at odds with the approach set forth in the Consultation Handbook. The Handbook provides that § 7's "adverse modification threshold is exceeded when the proposed action will adversely affect the critical habitat's constituent elements or their management in a manner likely to appreciably diminish or preclude the role of that habitat in both the survival and recovery of the species." AR Doc. B.251 at 4-39. Here, NMFS acknowledges that the safe passage feature of sockeye critical habitat already is not only degraded to the point that the habitat cannot meet the biological requirements of this ESU, but that this compromised condition also will persist or even worsen over the life of the 2004 BiOp. Yet the agency makes no effort to explain why this result does not diminish or preclude the role that critical habitat plays in fostering recovery of the sockeye ESU. In GP Task Force, the Court faulted FWS' biological opinions because they contained "no discussion of the specific impact [of the proposed actions] on recovery." 378 F.3d at 1074. NMFS' 2004 BiOp suffers from the same flaw and the agency's findings on critical habitat should likewise be set aside.³⁸

NMFS also unlawfully ignores the short-term negative impacts of the proposed action on the essential features of both sockeye and spring/summer chinook critical habitat. In PCFFA v. NMFS, 265 F.3d at 1037-1038, the Ninth Circuit found that NMFS' decision to ignore impacts

current adverse habitat conditions for at least another decade, for a species that is admittedly harmed by these conditions, does not constitute adverse modification of critical habitat.

³⁸ NMFS' conclusion for Snake River spring/summer chinook critical habitat is similarly flawed. Even assuming passage conditions for these fish after 2009 are in fact better than current conditions, this alone cannot serve as the legal basis for a finding that the proposed action avoids destruction or adverse modification of critical habitat. The 2004 BiOp acknowledges that current passage conditions are "poor" for this ESU. 2004 BiOp at 8-36; 8-8. The relevant question is not whether the UPA will make these conditions marginally better but whether, even after implementation of the UPA, the critical habitat provides conditions in which the species can survive and eventually recover. See GP Task Force, 378 F. 3d at 1069-1070 (current § 7 regulations allow an agency to "authorize the complete elimination of critical habitat necessary only for recovery, . . . so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished. . . . This cannot be right.").

to the habitat of listed salmon unless the impacts persist for more than 10 years illegally allowed the agency to “assume away” potentially important habitat effects without “assess[ing] degradation over a time frame that takes into account the actual behavior of the species in danger.” This case presents an even more compelling situation: NMFS’ characterization of Snake River sockeye’s status as “extremely poor” is perhaps an understatement given that only 16 naturally produced adults have returned to Redfish Lake to spawn since 1991. 2004 BiOp at 8-36; 4-22. These fish literally may not survive a “significant” impact on safe passage conditions in their critical habitat until things improve in 5-10 years. Therefore, in addition to failing to explain how the overall impacts to critical habitat for sockeye and spring/summer chinook will avoid impairing the recovery of these ESUs, NMFS has failed to assess whether the proposed action’s “significant” short-term impacts to critical habitat could put even the survival of these fish at risk. See PCFFA, 265 F.3d at 1037 (“This generous [10-20 year] time frame ignores the life cycle and migration cycle of anadromous fish. In ten years, a badly degraded habitat will likely result in the total extinction of the subspecies that formerly returned to a particular creek for spawning.”).³⁹

Unlike for spring/summer chinook and sockeye, where the agency found that future improvements to passage conditions would in part offset impacts to essential features of critical habitat, for fall chinook, conditions after 2009 would still remain below even the “poor” conditions that currently exist. 2004 BiOp at 8-13. NMFS reasons that this long-term reduction in safe passage would not rise to a level that would “appreciably” reduce the value of critical habitat for fall chinook survival because “the in-river survival change indicative of safe passage

³⁹ Apparently recognizing the grave threats posed by reductions in safe passage for sockeye, NMFS also asserts in the 2004 BiOp that “[t]he hatchery program [for the sockeye ESU] is operated at a level sufficient to overcome the small losses resulting from the proposed operations as compared to baseline operations.” 2004 BiOp at 8-36. However, the Opinion itself contradicts this attempt to downplay the significance of the impacts from decreased safe passage conditions for sockeye juveniles, noting that the hatchery program “does not substantially reduce the extinction risk of the ESU in-total.” Id. at 4-23.

only affects a small proportion of the total juvenile migrants, given that the remaining juvenile migrants either residualize, die during dam and reservoir passage, or are transported.” *Id.* at 8-13 (emphasis added). The fact that many members of the species will die if they remain in these adverse critical habitat conditions, however, serves to amplify rather than discount the action’s adverse impacts to critical habitat.⁴⁰

NMFS also concludes that the long-term net decrease in safe passage would not “appreciably” reduce the value of critical habitat for recovery of fall chinook because even though reduced spill under the proposed action would increase mortality of these fish and harm their habitat relative to the hypothetical reference operation, the proposed action “does not reduce the future availability of spillways for safer passage.” *Id.* This conclusion elevates form over substance: as long as critical habitat can, in theory, serve its statutory purposes at some future time, its inability to do so today is of no concern. If accepted, this approach would give NMFS a fee pass to ignore any impact of a proposed action on critical habitat today. Indeed, under this reasoning, NMFS could eliminate critical habitat altogether as long as it is theoretically possible to restore the habitat at some later date. Nothing in the ESA or its regulations allows NMFS to authorize actions that will currently adversely modify critical habitat

⁴⁰ Nor can NMFS rely on removing species from their habitat as a substitute for protecting the essential features of salmon critical habitat. Under the Juvenile Smolt Transportation program, the action agencies are authorized to remove the majority of Snake River salmon and steelhead smolts from their designated critical habitat – the Snake and Columbia Rivers – each year as they attempt to migrate to the ocean, and place them in barges and trucks for transport around the dams because the river is too lethal for them to survive. NWF has argued that the need for this intervention dramatically confirms the fact that these ESU’s critical habitat is adversely modified by on-going FCRPS operations: we are putting fish in boats because it is no longer safe for them to swim in the river. *See, e.g.*, Plaintiffs’ Amended Memorandum in Support of Motion for Summary Judgment at 52-57 (filed Nov. 14, 2002)(Docket # 344). The Court did not reach this claim in its May 7, 2003, decision. The current permit for this program expires on December 31, 2005, *see* 2004 BiOp at 1-3, n.1 (noting that because the “Court’s May 7, 2003 Opinion did not identify any errors” in the program “there is no need to reconsider [it] in this Opinion.”). To the extent NMFS seeks to defend its critical habitat determination by relying on this transportation program, NWF renews its claim that the program illegally masks adverse modification of critical habitat and incorporates its prior arguments on this point here by reference.

so long as it is possible – though not called for by the proposed action under review – that an agency could reverse that action at some point in the future. Cf. Sierra Club v. Marsh, 816 F.2d at 1386 (finding that “the [Corps] is in violation of Section 7(a)(2) by allowing the destruction or adverse modification of any part of the birds’ habitat without first insuring the acquisition and preservation of the mitigation lands”).⁴¹

C. NMFS’ Critical Habitat Determinations Using the Listing Condition Approach Also Is Flawed.

NMFS also conclude that the proposed action is not likely to destroy or adversely modify critical habitat for any of the three Snake River ESUs based on the agency’s alternative method for assessing impacts on critical habitat, which NMFS has dubbed its “Listing Condition Approach.” See 2004 BiOp at 6-2. For each of the three ESUs, NMFS supports this finding based solely on its assertion that “there is not likely to be any alteration of essential features of critical habitat below their condition at the time this ESU was listed.” Id. at 8-8; 8-14; 8-36 (emphasis added). Even assuming this is true,⁴² it begs the question whether the proposed action avoids destruction and adverse modification of critical habitat.

⁴¹ NMFS’ conclusion for fall chinook critical habitat also suffers from the same flaw as its finding for sockeye critical habitat: the 2004 BiOp acknowledges that current juvenile passage conditions do not satisfy the biological requirements of fall chinook, yet NMFS asserts that a further decline in safe passage conditions will not adversely modify fall chinook critical habitat. See id. at 8-9 (noting only improvements to “survival” of juvenile fish). Whether a further decline in safe passage conditions will affect survival is only part of the analysis – Congress intended that protections for critical habitat facilitate not only the survival but also the recovery of listed species.

⁴² NMFS provides no discussion to back up its assertion that conditions of the Snake River ESUs’ critical habitat after implementation of the proposed action will be no worse than at the time these fish were listed. See 2004 BiOp at 8-8; 8-14; 8-36. It is clear, however, that critical habitat is already in bad shape. See 2004 BiOp at 8-6; 8-8; 8-9; 8-13; 8-34; 8-36 (“the mainstem habitat-related requirements of juveniles are not being fully met” today, and characterizing current habitat conditions, particularly related to juvenile passage, as “poor.”). Added to this, NMFS acknowledges that the proposed action will have further adverse impacts on safe passage for juveniles in the next five years, and will have a long-term negative impact on fall chinook and possibly sockeye as well. See supra at 53-58.

As the Ninth Circuit emphasized in GP Task Force, Congress designed the ESA's critical habitat protections "not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted." 378 F.3d at 1070. At the time it listed the Snake River stocks as endangered and threatened, NMFS described the then-existing adverse habitat conditions for migrating juveniles as threats to their survival and one of the reasons the fish required listing. See 56 Fed. Reg. 58619, 58622 (Nov. 20, 1991); 57 Fed. Reg. 14653,14660 (Apr. 22, 1992) (citing turbine mortality, delays in migration time, and reservoir mortality of juveniles as reasons for their poor conservation status).

NMFS makes no effort to explain how maintaining critical habitat in the condition that contributed to the endangered and threatened status of these ESUs would be consistent with allowing these species even to survive, let alone recover. NWF. v NMFS, 235 F. Supp.2d at 1160 (NMFS' "failure to explain how dredging in . . . critical habitat will not adversely modify that habitat" is arbitrary and capricious). NMFS' conclusion is flatly inconsistent with Congress' intent that critical habitat both forestall extinction and bring about species recovery. It also is inconsistent with the regulations which define "destruction or adverse modification" of critical habitat as any action that appreciably "diminishes the value of critical habitat for both survival and recovery," 50 C.F.R. § 402.02, not whatever degraded value it may have had when the species was first listed, in this case, apparently a value that would not support either survival or recovery. In short, the juvenile passage conditions at the time the Snake River salmon and steelhead were first listed are part of a description of the problems facing these fish, not a measure of what § 7 requires.

CONCLUSION

Faced with the task of revising the 2000 BiOp to comply with the ESA, NMFS chose instead change direction and prepare a completely new opinion that bears little resemblance to the opinion the Court remanded for correction. In doing so, NMFS has missed few opportunities

to eviscerate the ESA, its implementing regulations, and over thirty years of case law and agency practice. After NMFS combines its truncated jeopardy analysis and its narrow definition of the agency action, a no-jeopardy finding is nearly a foregone conclusion for the limited FCRPS actions NMFS considers. NMFS compounds its legal errors by abandoning the best available tools for assessing the health of salmon populations in favor of short-term assessments of recent salmon and steelhead returns that paint an overly optimistic picture, simplistic models that ignore scientific criticism, an analysis of off-site mitigation actions that disregards relevant scientific factors, and a critical habitat analysis that flies in the face of the ESA and recent Ninth Circuit case law.

In the 2000 BiOp, NMFS admitted that the FCRPS was the key obstacle to survival and recovery of ESA-listed salmon and steelhead but failed to devise a legal way to avoid jeopardy. In the 2004 BiOp, by contrast, NMFS has twisted the law and the science in knots to deny that the FCRPS even presents a problem. By denying responsibility for the decline of one of the region's most valuable natural resources, NMFS has, in effect, washed its hands and walked away. The ESA plainly requires more. During the remand process, states, tribes, scientists, and tens of thousands of the region's citizens implored NMFS and the action agencies not to abandon Columbia and Snake River salmon and steelhead. Their pleas have been ignored. The matter now rests in the hands of this Court, and, accordingly, NWF respectfully requests that the Court

grant its motion for summary judgment against the 2004 BiOp.

Respectfully submitted this 11th day of February, 2004.

/s/ Todd D. True

TODD D. TRUE (WSB #12864)

STEPHEN D. MASHUDA (MSB #4231)

Earthjustice

705 Second Avenue, Suite 203

Seattle, WA 98104

(206) 343-7340

(206) 343-1526 [FAX]

ttrue@earthjustice.org

smashuda@earthjustice.org

DANIEL J. ROHLF (OSB #99006)

Pacific Environmental Advocacy Center

10015 S.W. Terwilliger Boulevard

Portland, OR 97219

(503) 768-6707

(503) 768-6642 [FAX]

rohlf@lclark.edu

Attorneys for Plaintiffs