



## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

FREEDOM OF INFORMATION ACT PROGRAM

December 9, 2020

In reply refer to: FOIA #BPA-2021-00162-F

James Buchal  
Murphy & Buchal LLP  
3425 SE Yamhill St Ste 100  
Portland, OR 97214  
Email: [jbuchal@mblp.com](mailto:jbuchal@mblp.com)

Dear Mr. Buchal,

Thank you for your interest in the Bonneville Power Administration (BPA). The agency received your request for records made under the Freedom of Information Act, 5 U.S.C. § 552, (FOIA) on November 25, 2020. Your request was assigned Department of Energy (DOE) tracking number BPA-2021-00162-F. Please use that number in any correspondence with the agency concerning your request. This communication is the agency's formal acknowledgment and final response to your request.

### **Request**

"...all sixty-day notices of intent to sue issued by the State of Oregon concerning the Joint Record of Decision for Columbia River System Operations dated September 28, 2020."

### **Acknowledgement**

BPA has reviewed your request and has determined that it fulfills all of the criteria of a proper request under the FOIA and DOE regulations at Title 10, Code of Federal Regulations, Part 1004.

### **Response**

The agency's Office of General Counsel searched for records responsive to your request and located 21 pages. BPA is herein releasing the 21 responsive pages, in full, with no redactions applied.

### **Fees**

There are no fees associated with processing your FOIA request.

**Certification**

Pursuant to 10 C.F.R. § 1004.7(b)(2), I am the individual responsible for the search and records release described above. Your FOIA request BPA-2021-00162-F is now closed with all responsive agency records provided.

**Appeal**

The adequacy of the search may be appealed within 90 calendar days from your receipt of this letter pursuant to 10 C.F.R. § 1004.8. Appeals should be addressed to:

Director, Office of Hearings and Appeals  
HG-1, L'Enfant Plaza  
U.S. Department of Energy  
1000 Independence Avenue, S.W.  
Washington, D.C. 20585-1615

The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. You may also submit your appeal by e-mail to [OHA.filings@hq.doe.gov](mailto:OHA.filings@hq.doe.gov), including the phrase "Freedom of Information Appeal" in the subject line. (The Office of Hearings and Appeals prefers to receive appeals by email.) The appeal must contain all the elements required by 10 C.F.R. § 1004.8, including a copy of the determination letter. Thereafter, judicial review will be available to you in the Federal District Court either (1) in the district where you reside, (2) where you have your principal place of business, (3) where DOE's records are situated, or (4) in the District of Columbia.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
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Toll-free: 1-877-684-6448  
Fax: 202-741-5769

Questions about this communication may be directed to Thanh Knudson, at [etknudson@bpa.gov](mailto:etknudson@bpa.gov) or 503.230.5221

Sincerely,



Candice D. Palen, Freedom of Information/Privacy Act Officer

[Responsive agency records accompany this communication.](#)



**DEPARTMENT OF JUSTICE  
TRIAL DIVISION**

November 23, 2020

**VIA FEDERAL EXPRESS OVERNIGHT DELIVERY**

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David L. Bernhardt  
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Department of the Interior  
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Re: Sixty-Day Notice of Intent to Sue the Bureau of Reclamation and the U.S. Army Corps of Engineers for Violations of the Endangered Species Act Regarding Impacts of the Columbia River System on Threatened and Endangered Species

Dear Sir or Madam:

The State of Oregon hereby provides notice pursuant to 16 U.S.C. § 1540(g) of its intent to sue the Bureau of Reclamation (“BOR”) and the U.S. Army Corps of Engineers (“Corps”) (together, the “Action Agencies”) for violations of §§ 7 and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1536, 1538. The Action Agencies’ decision reflected in the Columbia River System Operations Environmental Impact Statement Record of Decision, September 2020 (“ROD”) to operate the Columbia River System according to the description of the Preferred Alternative in the Final Environmental Impact Statement and the proposed action analyzed in the

2020 U.S. Fish and Wildlife Service and National Marine Fisheries Service (“NMFS”) Columbia River System (“CRS”) Biological Opinion (“2020 BiOp”) does not comply with the substantive and procedural requirements imposed by ESA § 7, 16 U.S.C. § 1536, nor the prohibition on “take” of listed species in ESA § 9, 16 U.S.C. § 1538.

The State of Oregon is committed to working with regional partners to achieve a collaborative solution for future operation of the CRS that protects salmon and steelhead while assuring sustained economic growth for the region. In that spirit, Oregon worked alongside the Action Agencies, as well as the State of Washington and the Nez Perce Tribe, to negotiate and execute the three-year Flexible Spill Agreement in December 2018. In the Flexible Spill Agreement, the parties agreed to interim operations to avoid litigation and allow the Action Agencies an opportunity to develop an Environmental Impact Statement under the National Environmental Policy Act (“NEPA”) and issue a Biological Opinion that complies with the ESA. Oregon is disappointed, however, because the Action Agencies missed that opportunity; the 2020 BiOp and ROD contain several fundamental and significant legal flaws that necessitate the issuance of this notice. Oregon remains open to exploring collaborative regional efforts to address Columbia River System operations, but the legal violations of the ESA and its implementing regulations identified below must be rectified.

## **I. BACKGROUND**

### **A. Listed Columbia River Basin Salmon and Steelhead Populations**

The decline of Columbia and Snake River salmon and steelhead populations is reflected in the listings of eight Evolutionarily Significant Units (“ESUs”) and five Distinct Population Segments (“DPSs”)<sup>1</sup> under the ESA. The following salmon and steelhead ESUs/DPSs in the Columbia River Basin are listed as threatened or endangered and their migratory, spawning, and rearing habitat in the Basin is designated critical habitat: Snake River Sockeye Salmon, Snake River spring/summer Chinook Salmon, Snake River fall Chinook Salmon, Snake River Basin steelhead, Upper Columbia River steelhead, Lower Columbia River steelhead, Upper Columbia River spring-run Chinook Salmon, Lower Columbia River Chinook Salmon, Middle Columbia River steelhead, Upper Willamette River steelhead, Upper Willamette River Chinook Salmon, Columbia River Chum Salmon, and Lower Columbia River Coho Salmon. *See* 70 Fed. Reg. 37,160 (June 28, 2005) (listing salmon ESUs); 71 Fed. Reg. 834 (Jan. 5, 2006) (listing steelhead DPSs). Recent status reviews of all ESUs confirm that each of them remains threatened or endangered, and no ESU has been proposed for delisting.

Several ESUs have recently seen unprecedented declines in their abundance levels. These declines are so significant that they tripped the “Significant Decline Trigger” of the Adaptive Management Implementation Plan (“AMIP”) as defined in the 2014 BiOp. The Significant Decline Trigger is a crisis safety net, which was never expected to be triggered. Moreover, the AMIP required only a process to identify response actions, not the implementation of any actions to protect the species, and no additional actions were taken when these Significant

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<sup>1</sup> ESUs and DPSs are the regulatory units for populations of salmon and steelhead, respectively, protected under the ESA. For simplification, they are referred to collectively hereafter as ESUs.

Decline Triggers were tripped. The 2020 BiOp has removed these Significant Decline Triggers entirely.

Endangered Southern Resident Killer Whales (“SRKW” or “orcas”) rely on Columbia and Snake River salmon, especially Chinook, as a critical part of their diet. National Oceanic and Atmospheric Administration (“NOAA”) listed the Southern Residents as endangered in 2005. Since then the population has continued to decline. New research underscores that prey, along with pollutants and vessel disturbances, is one of the primary factor driving the whales’ precipitous decline, and that salmon from the Columbia and Snake Rivers form a critical part of their seasonal diet in the early spring months.

## **B. BOR Operations, Corps Operations, and BPA Power Marketing**

BOR and the Corps jointly manage and operate the dams, reservoirs, irrigation projects, and other facilities, including those referred to as the CRS<sup>2</sup> projects. Bonneville Power Administration (“BPA”) distributes and markets power generated by these facilities.

Specifically, within the Columbia River Basin, BOR oversees 56 irrigation projects. Of these, 28 are located along the Columbia River or its non-Snake River tributaries and 28 are located within the Snake River Basin. Management actions by BOR at all of these projects, including administration of uncontracted water, power production, and other project management decisions, have significant influence on the hydrology and water quality of the Columbia and Snake Rivers.

The Corps has responsibility for operating 20 hydroelectric projects in the Columbia River Basin. The Corps’ hydroelectric dam operations directly affect the survival of salmon and steelhead attempting to migrate up and down the Snake and Columbia Rivers past the CRS dams and impounded reservoirs. The Corps also oversees the juvenile fish transportation program that is currently authorized under §10 of the ESA.

BPA markets the electric power created by these projects and has statutory duties to fund mitigation projects and studies in the Columbia River Basin in an attempt to offset the significant adverse impacts of dam operations on salmon and other natural resources.

## **II. LEGAL FRAMEWORK**

### **A. The Endangered Species Act**

Under ESA § 7(a)(2), “[e]ach federal agency *shall ... insure* that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2) (emphasis added). The obligation

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<sup>2</sup> In earlier Biological Opinions, the Columbia River System was referred to as the Federal Columbia River Power System (“FCRPS”). This letter retains the FCRPS acronym when referring to previous biological opinions and RODs but uses CRS to refer to the 2020 BiOp and ROD.

to “insure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The ESA does not define the phrase “jeopardize the continued existence of,” and NOAA’s regulation defines that phrase as meaning “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. The substantive duty imposed by § 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); *Conner v. Burford*, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

The ESA’s substantive protections are implemented in part through the consultation process, which Congress designed explicitly “to ensure compliance with the substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). As the Ninth Circuit stated, “[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.” *Id.* (citing *TVA v. Hill*, 437 U.S. 153 (1978)). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency—NOAA Fisheries (hereafter, “NOAA” or “NMFS”), in the case of anadromous fish—and, if appropriate, obtain a biological opinion evaluating the effects of any federal agency action on listed species and their critical habitat. *Id.* If NOAA concludes that a proposed action is likely to jeopardize a listed salmon species or result in adverse modification of its critical habitat, NOAA must propose reasonable and prudent alternatives, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b); *Idaho Dept. of Fish and Game v. National Marine Fisheries Service*, 56 F.3d 1071 (9th Cir. 1995).

Compliance with the procedural requirements of the ESA—making the determination of the effects of the action through the consultation process—is integral to compliance with the substantive requirements of the Act. Under this statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency ensures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Pac. Coast Fed’n of Fishermen’s Assoc. v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining delivery of project water to irrigators until a valid consultation was complete); *Greenpeace v. National Marine Fisheries Service*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); *Conner v. Burford*, 848 F.2d at 1441, 1453–55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete).

The ultimate duty to ensure that an activity does not jeopardize a listed species lies with the Action Agencies. An Action Agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. *See, e.g., Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). Thus, the substantive duty not to jeopardize listed species or adversely modify critical habitat remains in effect regardless of the status of the consultation.

In addition, ESA § 7(a)(1) requires federal agencies to “utilize their authorities in furtherance of the purposes of this chapter by *carrying out* programs for the conservation of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1) (emphasis added). Like the duty to avoid jeopardy, this conservation duty is discharged, in part, in consultation with NMFS. *Id.* A program of “conservation” is one that brings the species to the point of recovery and delisting. *Id.* at § 1532(3).

Separately, ESA § 7(d) prohibits federal agencies, after the initiation of consultation under ESA § 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); *Natural Res. Defense Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998). This prohibition remains in effect until the procedural requirements of § 7(a)(2) are satisfied, 50 C.F.R. § 402.09, and it ensures that § 7(a)(2)’s substantive mandate is met, *see, e.g., Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). Section 7(d) thus does not permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2). *See* 51 Fed. Reg. 19,926, 19,940 (June 3, 1986) (“[S]ection 7(d) is strictly prohibitory in nature”). Additionally, harm to the protected resource itself is considered a violation of § 7(d). *See Pac. Rivers Council*, 30 F.3d at 1057; *Lane County Audubon v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

Finally, § 9 of the ESA prohibits all activities that cause a “take” of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C); 50 C.F.R. § 17.11(h). “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NMFS has further defined “harm” as “an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering” 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2412–14 (1995) (upholding similar definition used by the U.S. Fish and Wildlife Service).

Section 9’s take prohibition applies on its face to two of the 13 listed ESUs affected by the BOR’s and Corps’ activities because they are listed as “endangered.” Additionally, NMFS has enacted rules pursuant to ESA § 4(d) that extend the take prohibition to nine of the salmon and steelhead ESUs in the Snake and Columbia Basins that are listed as “threatened.” 16 U.S.C. § 1533(d); 65 Fed. Reg. 42, 421, 42,422 (July 10, 2000). The rule, in which NMFS concluded that listed salmon and steelhead were at risk of extinction “primarily because their populations have been reduced by human take” became effective between September 2000 and January 2001 for these ESUs. *Id.* at 42,422. While the rule contains some exemptions to the take prohibition for threatened species, none are applicable here.

Federal actions that have completed a legally valid § 7(a)(2) consultation and have a biological opinion generally obtain an “incidental take statement” (“ITS”). 50 C.F.R. § 402.14(i). The ITS authorizes the agency, if in compliance with the terms and conditions of the ITS, to “take” listed species without facing § 9 liability. *Id.* at § (i)(5). However, if a biological opinion is legally flawed, the ITS cannot shield the Action Agency from liability.

## **B. New ESA Regulations**

On July 25, 2018, the Secretaries of the Departments of the Interior and Commerce, acting through the U.S. Fish and Wildlife Service and NMFS (collectively “Services”) proposed to revise the regulations interpreting and implementing § 7 of the ESA. *See* 83 Fed. Reg. 35178. On August 27, 2019, the Services finalized the revised § 7 regulations.<sup>3</sup> *See* 84 Fed. Reg. 44976. The revised ESA regulations became effective on October 28, 2019.

Seventeen states (including Oregon, Washington and California), the District of Columbia, and the City of New York brought a facial challenge to the revised ESA regulations on the basis that they violate the ESA, APA, and NEPA. *See California v. Bernhardt*, 4:19-CV-06013 (N.D. Cal. Sept. 25, 2019). That litigation is ongoing. Even if the Court does not strike down these new regulations on their face, the new regulations are unlawful as applied in the 2020 BiOp and ROD.

The 2020 BiOp and ROD apply several provisions of the revised ESA regulations, including: (1) the “clarification” and discussion of the term “appreciably diminish”; (2) a new definition of “Environmental Baseline”; (3) a new definition of “Destruction or Adverse Modification”; (4) a new definition of “Effects of the Action”; and (5) a new definition of “[a]ctivities that are reasonably certain to occur.”

The revised ESA regulations, as applied in the 2020 BiOp and ROD, are arbitrary and contrary to law, including the controlling Ninth Circuit and District Court precedent in this case. Even if the Court upholds these regulations, the 2020 BiOp and ROD are invalid to the extent that the analysis does not comply with the revised regulations and/or applies the new regulations inconsistently.

## **C. Litigation History**

For decades, the Action Agencies have failed to adopt a record of decision that complies with the ESA. This history is instructive because, in the 2020 BiOp, the Action Agencies redouble illegal analyses and approaches that have been squarely rejected by the Courts for decades.

### **1. 1993 BiOp (No Jeopardy)**

The 1993 BiOp violated the ESA because, among other reasons, the agencies did not consider enhanced risks associated with low population abundance numbers and drought conditions during the base period. *Idaho Dep’t of Fish and Game v. NMFS* (hereafter “*IDF&G*”), 850 F. Supp. 886, 898 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995); *see also NWF v. NMFS*, No. CV 01-640-RE, CV 05-23-RE, 2005 WL 1278878, at \*30 (D. Or.

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<sup>3</sup> The Services also revised § 4 of the ESA, and FWS revised § 4(d). *See* 84 Fed. Reg. 45020 (§ 4 revisions); 84 Fed. Reg. 44753 (§ 4(d) revisions). The § 4 and 4(d) revised regulations became effective on September 26, 2019.



May 26, 2005). The Court held that operations that result in improved fish survival may still cause jeopardy, particularly for those populations that are still hovering at low population levels even with improved survival. *IDF&G*, 850 F. Supp. at 899. The agencies optimistically discounted low range assumptions and evaluated the effects of the hydrosystem operations in a manner that consistently favored the status quo. *Id.* at 899–900.

## **2. 2000 BiOp (Jeopardy)**

The present action commenced as a challenge to the 2000 BiOp, in which NOAA determined the effects of the proposed action, continued operations of the FCRPS, would jeopardize eight listed salmon and steelhead ESUs and adversely modify their critical habitat. *NWF v. NMFS*, 254 F. Supp. 2d 1196, 1201 (D. Or. 2003) (ECF Doc. 396-2). The Reasonable and Prudent Alternatives (“RPA”) included modifications to FCRPS on-site operations, including giving “highest priority” to “measures that increase juvenile fish passage over the FCRPS project spillways” because “juvenile survival is generally highest through this passage route.” *See* 2000 BiOp at 9-82; *NWF*, 254 F. Supp. 2d at 1202. However, NOAA could not conclude that the FCRPS operations, even as modified, would avoid jeopardy or adverse modification of critical habitat; therefore, the agencies turned to range-wide, off-site mitigation to reach a no jeopardy conclusion. *NWF*, 254 F. Supp. 2d at 1202–03. This Court found NOAA’s no-jeopardy conclusion in the 2000 BiOp arbitrary and capricious because it relied on off-site mitigation that was not reasonably certain to occur or had not undergone § 7 consultation. *Id.* at 1214–15. Because NOAA relied upon the improper factor of off-site mitigation, the Court did not reach any of the other issues. The District Court remanded the 2000 BiOp to NOAA, while also leaving it in effect, and allowed NOAA one year to complete remand proceedings. Order on Motions for Summary Judgment (ECF No. 406).

## **3. 2004 BiOp (No Jeopardy)**

In the 2004 BiOp, the agencies took a novel approach to avoid a jeopardy and adverse modification determination. The District Court again held that the 2004 BiOp was legally flawed in four respects. First, the Court rejected the agencies attempt to limit the extent and magnitude of the adverse effects of the operations by only including in the proposed action any impacts from operations that the agencies deemed discretionary. *NWF*, No. CV 01-640-RE, CV 05-23-RE, 2005 WL 1278878, at \*10, 12. Second, the Court invalidated NOAA’s approach of comparing “the proposed action to the share of the proposed action it chose to re-categorize as part of the environmental baseline” rather than aggregating the effects of “the proposed action in its entirety.” *Id.* at \*14. Third, the 2004 BiOp’s critical habitat analysis was arbitrary and capricious because NOAA did not “analyze the short-term negative effects of the proposed action in the context of the species’ life cycles and migration patterns.” *Id.* at \*16. The 2004 BiOp erroneously “relied on uncertain long-term improvements to critical habitat to offset the short-term degradation of critical habitat,” and “did not analyze the significant degradation in the already poor condition of critical habitat, in the context of the life cycles and migration patterns of the ... species.” *Id.* Lastly, the determination was arbitrary and capricious because NOAA concluded “that the species’ critical habitat was sufficient for purposes of recovery even though NOAA did not have the information on in-river survival rates to make that determination.” *Id.*

The Ninth Circuit affirmed, holding that “the 2004 BiOp impermissibly failed to incorporate degraded baseline conditions into its jeopardy analysis,” and rejecting “NMFS’s insistence that it may conduct the bulk of its jeopardy analysis in a vacuum.” *NWF v. NMFS*, 524 F.3d 917, 929 (9th Cir. 2008). With respect to adverse modification, the Ninth Circuit agreed that the BiOp did not adequately consider recovery needs. Specifically, the Ninth Circuit held that NOAA inappropriately evaluated recovery impacts without knowing the in-river survival levels necessary to support recovery, reasoning that “[i]t is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from ‘significant’ impairments to habitat that is already severely degraded.” *Id.* at 936. The Court castigated the 2004 BiOp for disregarding the Court’s “clear instruction that NMFS must consider near-term habitat loss to populations with short life cycles,” *id.* at 934 (internal quotation marks omitted) and agreed that NMFS improperly relied on habitat improvements that were not reasonably certain to occur, *id.* at 936.

#### **4. 2008 BiOp & 2010 Supplemental BiOp (Jeopardy)**

In the 2008 BiOp, NMFS swept aside the 2004 BiOp and instead chose to “correct the legal deficiencies of its 2000 FCRPS Biological Opinion and RPA.” 2008 BiOp at 1-6. Since the 2000 BiOp determined that the proposed action (FCRPS operations) was likely to jeopardize eight listed species and adversely modify associated critical habitat, the 2008 BiOp accepted that determination and avoided the “threshold step” of consulting on the proposed action. *Id.* at 1-6 to 1-7. Instead, the 2008 BiOp evaluates whether *the RPA* avoids jeopardy and adverse modification. *Id.* at 1-7. To avoid jeopardy, the 2008 consultation and BiOp included tributary and estuary habitat, hydropower, and hatchery measures. In December 2010, NOAA issued the 2010 Supplemental BiOp, which incorporated an Adaptive Management Implementation Plan (“AMIP”) into the 2008 BiOp. *See* 2010 BiOp at § 3.3. The 2010 BiOp relied on two types of habitat mitigation actions: (1) identified actions scheduled to occur between 2008 and 2013; and (2) unidentified actions to be identified and implemented after 2013. *NWF v. NMFS*, 839 F.Supp.2d 1117, 1226 (D. Or. 2011).

Like the 1993, 2000, and 2004 BiOps before it, the District Court found that the 2008/2010 BiOp violated the ESA. Noting “[t]he history of Federal Defendant’s lack of, or at best, marginal compliance with the procedural and substantive requirements of the ESA as to FCRPS operations,” *id.* at 1122 n.2, the Court determined that NOAA once again violated the ESA by relying “on habitat mitigation measures that are neither reasonably specific nor reasonably certain to occur, and in some cases not even identified,” *id.* at 1126. The District Court ordered NOAA to keep the BiOp and its incidental take statement in place through 2013, and to produce, by January 1, 2014, a new biological opinion. *Id.* at 1129–30. The Court further ordered that the 2014 BiOp “reevaluate[] the efficacy of the RPAs in avoiding jeopardy, identif[y] reasonably specific mitigation plans for the life of the biological opinion, and consider[] whether more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy.” *Id.* at 1130. The Court further noted that, “[a]s a practical matter, it may be difficult for Federal Defendants to develop a long-term biological opinion that relies only on mitigation measures that are reasonably certain to occur. *Id.*

## 5. 2014 BiOp (Jeopardy)

On January 17, 2014, after two years on remand, NOAA issued the 2014 Supplemental BiOp, which supplements the prior 2008/2010 BiOps. Like the 2008/2010 BiOps, the 2014 Supplemental BiOp found that operation of the FCRPS would jeopardize the listed species and adversely modify critical habitat, but concluded that jeopardy and adverse modifications would be avoided through implementation of the RPAs. The 2014 Supplemental BiOp largely repeats and incorporates the problems that plagued the 2008/2010 BiOps, including a continued reliance on estuary and tributary habitat actions that are not reasonably certain to occur, that have uncertain benefits, or both.

In May 2016, the District Court again found the BiOp arbitrary and capricious and in violation of the ESA. *NWF, et al., v. NMFS, et al.*, 1184 F. Supp. 3d 861 (D. Or. 2015). The Court found numerous errors associated with the analysis in the 2014 Supplemental BiOp including the use of the “trending toward recovery” standard, and reliance on mitigation measures without “specific and binding plans” and “a clear, definite commitment of resources to implement those measures.” *Id.* at 873 (footnotes omitted). The Court also found that NMFS did not properly analyze the impact of climate change by, among other things, failing to analyze “its additive harm, how it may reduce the effectiveness of the reasonable and prudent alternative actions, particularly habitat actions that are not expected to achieve full benefits for decades, and how it increases the chances of an event that would be catastrophic for the survival of the listed endangered or threatened species.” *Id.* at 874. NMFS further erred by not analyzing whether the actions will “appreciably diminish[] the value of critical habitat for either survival or recover of the listed species[.]” *Id.* at 875. While the RPAs “need not restore habitat to a fully functioning level, ... they must at least include improvements sufficient to avoid adverse modification.” *Id.*

The District Court summarized the status of the FRCPS litigation as follows:

For more than 20 years, however, the federal agencies have ignored these admonishments and have continued to focus essentially on the same approach to saving the listed species—hydro-mitigation efforts that minimize the effect on hydropower generation operations with a predominant focus on habitat restoration. These efforts have already cost billions of dollars, yet they are failing. Many populations of the listed species continue to be in a perilous state.

The 2014 BiOp continues down the same well-worn and legally insufficient path taken during the last 20 years. It impermissibly relies on supposedly precise, numerical survival improvement assumptions from habitat mitigation efforts that, in fact, have uncertain benefits and are not reasonably certain to occur. It also fails adequately to consider the effects of climate change and relies on a recovery standard that ignores the dangerously low abundance levels of many of the populations of the listed species.

*Id.* at 876.

## 6. Remand and Flex Spill

The District Court once again remanded the 2014 BiOp and set a schedule for issuance of a new BiOp and compliance with NEPA. The Corps, BOR and NOAA took the position that they needed five years to complete a remand and comply with the ESA and NEPA; the Court therefore allowed the agencies until Sept. 24, 2021, to complete the EIS and issue new RODs. On Oct. 19, 2018, the President directed the agencies to complete the remand and produce a final EIS, new BiOp and RODs by Sept. 30, 2020, a year earlier than the agencies stated was possible. *See* 2020 BiOp at 95 & 95 n.16. The agencies complied with the President’s directive.

In January 2017, plaintiffs moved for an injunction to increase voluntary spring spill at the lower Snake and lower Columbia River dams to the maximum the level allowed by state water quality standards. The Court granted the motion but delayed implementation until the spring of 2018 to allow the regional scientists to develop more specific plans for implementing this increased spring spill. *NWF v. NMFS*, No. 3:01-cv-0640-SI, 2017 WL 1829588 (D. Or. April 3, 2017). The Ninth Circuit affirmed the District Court’s order. *NWF v. NMFS*, 886 F.3d 803 (9th Cir. 2018).

In December 2018, Oregon, Washington, the Nez Perce Tribe, the Corps, BOR, and BPA negotiated a “Flexible Spill Agreement” to govern voluntary spring spill operations during the remainder of the remand (spring of 2019, 2020, and 2021), or until NOAA issued a new BiOp concurrent with an EIS and the Action Agencies adopted new RODs.<sup>4</sup> *NWF v. NMFS*, Status Report re: 2019-2021 Spill Operations Agreement (Dec. 18, 2018) (ECF No. 2298) (and Exhibit thereto). The remaining parties agreed not to pursue further litigation in this case for the three-year-term of the Flexible Spill Agreement so long as the Action Agencies implemented the Flexible Spill Agreement. *Id.* NMFS subsequently issued a Biological Opinion on March 29, 2019 (“2019 BiOp”). The 2019 BiOp contained and perpetuated the legal errors identified above with the previous decades of biological opinions. Consistent with the commitments in the Flexible Spill Agreement, however, there was no litigation over the 2019 BiOp.

It appears at this time that the Action Agencies intend to continue to implement the actions outlined in Flexible Spill Agreement in 2021 even though they have now issued new RODs.

### III. The 2020 BiOp (No Jeopardy) and the Action Agencies’ Joint ROD

The ROD relies on the 2020 BiOp as the basis for concluding that the proposed action will comply with the ESA. The 2020 BiOp does not correct the legal flaws in the 1993, 2000, 2004, and 2008/2010/2014 BiOps. Instead, the 2020 BiOp repeats, incorporates, and exacerbates the legal errors in those BiOps identified above; those legal errors are included within the scope of this notice with respect to the 2020 BiOp. In addition, the 2020 BiOp does not use the best available science to assess whether the proposed action will avoid jeopardy to the listed species and destruction or adverse modification of critical habitat and minimize take.

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<sup>4</sup> The Flexible Spill Agreement explicitly recognized that “no [p]arty makes any concessions regarding the legal validity [or] scientific validity . . . of the spill operations contemplated in this Agreement.” Agreement § X.B. (ECF No. 2298-1).

To the extent that the 2020 BiOp and ROD attempt to justify their unlawful analyses by relying on the revisions to the ESA regulations or “clarifications” provided in those regulations, those regulatory changes and “clarifications” are illegal and contrary to law as applied in the 2020 BiOp and ROD. In the alternative, even if the Court does not invalidate these regulations as applied in the 2020 BiOp and ROD, the 2020 BiOp and ROD are arbitrary and capricious to the extent that the analysis does not comply with the revised regulations and/or applies them inconsistently.

The State urges the Action Agencies to rectify the following violations of the ESA and its implementing regulations within the following 60-day period.

**A. The 2020 BiOp Misapplies the Law by Manipulating the Environmental Baseline and Employing a Comparative—Rather than Additive—Approach that has been Rejected by the Courts.**

Like the 2004 BiOp, the 2020 BiOp employs the previously-litigated and unlawful approach of categorizing “nondiscretionary” dam operations as part of the environmental baseline and comparing, rather than aggregating, the effects of the proposed action to the environmental baseline. The environmental baseline therefore includes the effects of the decades of harm to listed species resulting from the Action Agencies’ unlawful operation of the Columbia River System for over twenty years. The 2020 BiOp then divorces the harms in the environmental baseline from the analysis on the basis that the terms “jeopardize the continued existence of” and “destruction or adverse modification” relate solely to the effects of the proposed action, and not the environmental baseline. The 2020 BiOp erroneously concludes that there is no jeopardy or adverse modification so long as the effects of the proposed action are comparatively the same or not much worse than the effects of the decades of illegal operations that have brought the listed species to the brink of extinction.

The 2020 BiOp compounds this error by applying the new, unlawful, regulatory definition of “effects of the action,” which states that the “effects of the action” are only those consequences to the listed species or critical habitat that would not occur but for the proposed action and are reasonably certain to occur. By applying this unlawful definition, the 2020 BiOp attempts to wipe the slate clean by dismissing from the analysis the effects of the prior decades of illegal actions that caused the decline of ESA-listed species (which are relegated to the environmental baseline). The 2020 BiOp allows the species to continue to decline toward extinction by failing to incorporate degraded baseline conditions into the jeopardy and critical habitat analyses, minimizing the cumulative adverse effects of the proposed action, and allowing NOAA to conduct the ESA analysis in a vacuum.

**B. The Jeopardy and Critical Habitat Analyses Violate the ESA Because, Among Other Things, They Ignore the Status of the Species, Do Not Analyze Likelihood of Recovery, and Allow the Species to Continue on the Path to Extinction.**

The jeopardy and critical habitat analyses violate the ESA because they do not properly consider and account for the degraded status of the species and the impact of prolonged low

population abundances on the species' likelihood of survival and recovery, and the conservation value of critical habitat. The 2020 BiOp's analysis thus arbitrarily concludes that the proposed action will avoid jeopardy without addressing or accounting for the available scientific information which shows that the species are not likely to survive or recover and instead will continue to trend toward extinction under the proposed action. To the extent the 2020 BiOp relies on the new definition of "destruction or adverse modification" of critical habitat—which strikes the reference to direct or indirect alterations to the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features—the application of that new definition is arbitrary and contrary to law.

According to the controlling law of this case and Ninth Circuit precedent, a proposed action that improves fish survival can still jeopardize the continued existence of a species. The 2020 BiOp expressly rejects this controlling caselaw, citing to discussion of the term "appreciably diminish" in the new ESA rules. *See* BiOp at 46. The 2020 BiOp then sets an even lower bar by concluding that there is no jeopardy or adverse modification so long as a species' status is not appreciably *worse* under the proposed action than it was under the previous unlawful actions.

The 2020 BiOp does not remedy the problem with the 2014 BiOp's "trending toward recovery" standard; it does not consider the individual abundance levels of the various endangered or threatened populations or what population growth trends are necessary to ensure that the likelihood of recovery of the population or the listed species is not appreciably diminished. The 2020 BiOp uses life-cycle modeling to project geometric mean abundances and Quasi-Extinction Threshold ("QET") probabilities for various populations but does not analyze or rationally explain what these projections mean for the species' likelihood of survival or recovery. In addition, the BiOp predominantly relies on evaluating hydrosystem survival impacts on total abundance, rather than 10-year geometric mean natural-origin abundance, which is the objective, measurable criteria for ESA delisting.

Moreover, the analysis in the 2020 BiOp does not satisfy even the exceedingly low, and unlawful, jeopardy bar it has set. QET focuses on an *extinction level*, and the 2020 BiOp provides that QET must be below the arbitrary levels of 30 or 50 fish for four consecutive years to constitute jeopardy. Thus, this standard requires that an entire life cycle cohort become functionally extinct before there can be a finding that the proposed action is likely to jeopardize the listed species. The 2020 BiOp and ROD do not explain how a standard that allows for functional extinction is also one that avoids an appreciable reduction in the species' likelihood of survival and recovery. Extinction, of course, is far too late for a species to survive or achieve recovery. This analysis does not satisfy even the illegal standard of "no further decline" set in the 2020 BiOp.

The Action Agencies consistently do not consider and use the best currently available scientific information throughout their ROD and the 2020 BiOp, including, but not limited to, not using available and credible quantitative information and analyses regarding the listed species.

**C. The ROD and 2020 BiOp Do Not Articulate a Rational Connection Between the Facts Found and the Conclusions of No Jeopardy or Adverse Modification.**

The ROD and 2020 BiOp's analysis of the species' likelihood of survival and recovery consists of merely listing the effects of the proposed action, stating that some elements of the proposed action will harm fish while others will benefit fish, and then summarily concluding that the proposed action is not likely to jeopardize any listed species. The ROD and 2020 BiOp do not articulate a rational connection between the stated factors and the conclusion of no jeopardy or adverse modification. There is no explanation of how, and to what extent, the harmful effects to fish are offset or mitigated by the asserted beneficial effects, nor is there any analysis of how the harmful and beneficial effects factor into the species' likelihood of survival and recovery.

The analysis of critical habitat is flawed for these same reasons. The 2020 BiOp acknowledges that critical habitat is not fully functioning, lists principal factors impairing the functioning of critical habitat, and notes that—while some actions have been taken to improve the functioning of critical habitat—more improvements will be necessary before many areas function at a level that supports recovery. The 2020 BiOp concludes that the proposed action does not destroy or adversely modify critical habitat, however, because the proposed action will not make conditions worse by “a meaningful amount.” *See, e.g.*, BiOp at 293. The 2020 BiOp's critical habitat analysis does not consider recovery nor ensure that the proposed action is not likely to destroy or adversely modify critical habitat.

Several of the measures incorporated into the proposed action are likely to have both adverse and beneficial impacts for fish, but the 2020 BiOp does not meaningfully analyze the overall impact of the measures on fish survival and recovery. For example, under the proposed action ponding will occur behind John Day Dam for the purported purpose of reducing avian predation. This measure, however, will also adversely impact flow and, consequently, fish travel time and water temperature. The ROD and 2020 BiOp do not analyze or consider these associated negative effects on fish. As a second example, the ROD and 2020 BiOp assume benefits to the species from “fish-friendly” turbines but do not account for the fact that these higher-capacity turbines draw more fish away from other safer-passage routes. They also do not use the best available science in claiming that these turbines are “fish friendly.” The most credible assessments indicate that these turbines are neutral in fish benefits. The ROD and BiOp arbitrarily assume the benefits of these actions without analyzing or considering the tradeoffs that may precipitate an overall detriment to survival and recovery of fish species.

The ROD and 2020 BiOp roll back protective measures for fish and critical habitat without sufficient—or any—analysis of the corresponding negative effects on survival and recovery. For example, the 2014 BiOp allowed the Action Agencies to cease nighttime flows in the Snake River starting no earlier than December 1 with abundance-based criteria that must be met prior to implementation.<sup>5</sup> The 2020 BiOp extends this operation by 45 days and adopts an earlier fixed start date of October 15; this allows the Action Agencies to stop flows during periods when listed fish are actively migrating. The ROD and 2020 BiOp allow this operation to

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<sup>5</sup> These limitations on operations remained in place when the 2019-2021 Flexible Spill Agreement was entered into and during its implementation.

occur despite the fact that there has been no analysis of its adverse effect on fish survival and a monitoring plan has not been developed, let alone put in place, to assess the magnitude of deleterious impacts.

**D. The ROD and the 2020 BiOp's Climate Change Analysis Overlooks Relevant Factors and Important Aspects of the Problem.**

As highlighted by the summer of 2015's devastating impact on water temperature and fish survival, the adverse impacts of climate change on the listed species and critical habitat are already a present-day reality. Yet, the ROD and 2020 BiOp erroneously conduct the climate change analysis in a vacuum, without giving appropriate consideration to the adverse effects of the action within the context of climate change impacts. The analysis ignores that, in light of climate impacts on listed species and their critical habitat, the adverse effects of the proposed action on the species and their critical habitat will be compounded and therefore additional actions and remediation is required to ensure that the proposed action does not cause jeopardy or adverse modification.

The ROD and 2020 BiOp acknowledge that climate change will affect anadromous fish in all stages of life and poses a substantial threat to the species' likelihood of survival and recovery. Nonetheless, they conclude that there is no jeopardy or adverse modification because projected abundances *may* decline less under the proposed action than they would under the *status quo* operation (which this Court found to violate the ESA). *See, e.g.*, 2020 BiOp at 750 ("If these predictions are realized, they would represent a near-term improvement in productivity and abundance ... and, over time, would somewhat reduce the severity of expected declines in abundance and productivity caused by a warming climate and deteriorating ocean conditions.").

The Action Agencies must consider, and account for, adverse impacts from climate change on salmonids and critical habitat in order to meet the statutory mandate to "insure" that the proposed action is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat. They are not free to exclude from the analysis or arbitrarily minimize climate impacts that they deem to be outside their control.

Climate change exacerbates many of the adverse effects of the action, including, among other things, thermal impacts/exposure from reservoirs and curtailment of flow to benefit power production. The ROD and 2020 BiOp do not appropriately analyze, consider, or account for the many ways in which climate change worsens and intensifies the adverse effects of the CRS on listed species and critical habitat.

The ROD and 2020 BiOp's climate change analyses do not give the benefit of the doubt to species. The analyses arbitrarily assume benefits to species and habitat resiliency from future habitat improvements; those putative improvements and benefits are speculative and not reasonably certain to occur. For example, the cumulative adverse impacts to tributary, mainstem and estuary habitats resulting from the ongoing and expected impacts of other federal and non-federal actions are likely to continue to largely offset or negate the benefits to the species and habitat resiliency that are assumed in the climate change analysis. The ROD and 2020 BiOp do



not propose or analyze new actions or measures that are needed to address and counter climate change impacts to species and critical habitat.

**E. The Proposed Action is Vague and Uncertain, Yet the 2020 BiOp Provides ESA Coverage for a 15-year Period.**

The ROD and 2020 BiOp are replete with uncertainty; both the proposed action itself and the benefits that the ROD and 2020 BiOp assume will accrue to the species and critical habitat are highly uncertain and largely speculative. In light of these significant uncertainties, the ROD and 2020 BiOp lack a rational basis for concluding no jeopardy or adverse modification. The ROD and 2020 BiOp do not resolve these uncertainties in favor of the listed species.

The proposed action purportedly analyzed in the 2020 BiOp is the operation, maintenance, and associated non-operational conservation measures for the 14 CRS dams for a period of 15 years. The 2020 BiOp and ROD conclude that the proposed action is not likely to jeopardize the listed species or destroy or adversely modify critical habitat for the full 15-year term of the BiOp. This conclusion is arbitrary and capricious because the proposed action is so vague and undefined that it is impossible for NOAA to have a rational basis to assume what the actual action is, let alone *insure*, that it is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat of such species. In addition, the Action Agencies claim that there is uncertainty about the precise extent of “latent mortality” and that the 15-year proposed action will help to clarify their understanding of this issue, without acknowledging that the assumptions about latent mortality used in the 2020 BiOp and relied on in the ROD lack a rational basis, and that any uncertainty regarding these effects must be resolved in favor of protecting the species.

The beneficial effects that the BiOp assumes will accrue are much too attenuated and uncertain to meet with the new regulatory definitions of “effects of the action” and “activities that are reasonably certain to occur,” to the extent that the Court finds those definitions lawful. For example:

- Voluntary spill for fish passage—a key component of the operation of the CRS dams—is only defined in the first year (2021). After the 2021 spill season, the spill operation is not specified; instead, the Action Agencies express an intent to engage in some nebulous “adaptive management” process to determine a yet to be defined voluntary spill operation. The 2020 BiOp cannot rationally conclude that an unidentified, non-specific voluntary spill operation—without any stated floor for spill operations—is not likely to jeopardize listed species or adversely modify critical habitat for the remaining 14 years of the BiOp term.
- Similarly, the 2020 BiOp cannot rationally conclude that an undefined voluntary spill operation will benefit listed species and their critical habitat. Nonetheless, the BiOp arbitrarily assumes the benefits of the flexible spill agreement’s operation for anadromous fish over the full 15-year term of the BiOp. These benefits are not reasonably certain to occur because the proposed amorphous adaptive management may have differing consequent effects on species. The BiOp’s reliance on an undefined spill operation to conclude “no jeopardy” and no

adverse modification of critical habitat for fifteen ESU/DPS and “not likely to adversely affect” and not likely to adversely affect critical habitat for SRKW and Southern DPS of Green Sturgeon is arbitrary and capricious.

- There are significant discrepancies between the Final Environmental Impact Statement (“FEIS”) Preferred Alternative (“PA”), Biological Assessment (“BA”), the proposed action in the 2020 BiOp, and the Selected Alternative in the ROD regarding several measures—for example, the frequency and duration of zero flow conditions at the four Snake River projects. These discrepancies create significant uncertainty about what operation will be imposed by the Action Agencies, which operation has been analyzed, and the resulting impacts on listed fish and critical habitat.
- The 2020 BiOp’s no jeopardy or adverse modification determination relies on tributary and estuary habitat mitigation programs; predator management programs; research, monitoring, and evaluation (“RME”) programs; and reporting expectations that are not reasonably certain to occur nor reasonably certain to provide assumed benefits.
  - The BiOp arbitrarily assumes that past actions and programs have begun to result in measurable benefits to the species and critical habitat, and that future actions are reasonably likely to occur and that such actions will offset both impacts from the proposed action as well as future adverse climate change effects on the species and critical habitats.
  - The 2020 BiOp arbitrarily assumes a perpetual, compounding of benefits from existing mitigation actions. The BiOp overlooks relevant factors and important aspects of the problem. Previously funded actions/projects may terminate or sunset (*e.g.*, an instream water lease ends and is not renewed), or change (*e.g.*, a landownership change results in a protected riparian area being returned active pasture). Unless additional actions are added to the portfolio to compensate for those changes, the result is a decrease in the potential benefits. In practice, flat-funded, reduced, and/or terminated contracts have significantly limited the already assumed habitat improvements. Continued flat funding of proposed measures, at or below the level of inflation, undermines the certainty that assumed habitat actions will be implemented, and if so, whether the RME necessary to effectively evaluate success and demonstrate species-habitat improvements will be available. The BiOp’s assumptions about future habitat mitigation programs, predator management programs and RME overlook important ongoing and future constraints and limitations.
  - Even if—despite a track record of reduced project funding—all these habitat restoration activities were to actually occur, responses to these habitat restorations will inevitably require a substantial amount of time to detect (*e.g.*, if benefits accrue it may be at a very slow rate), can vary dramatically in space and among species, and can be highly uncertain

(e.g., a seemingly positive outcome may be misleading). Given the perilous state of the listed species now, time spent trying to determine whether a positive outcome has occurred constrains resources necessary to implement more effective and immediate actions.

- Even if restoration actions are implemented at the scope and magnitude assumed in the BiOp, the benefits of these actions are unlikely to offset impacts from the proposed action, especially given the impacts of climate change and cumulative societal habitat degradation. NMFS has repeatedly stated that continued degradation of habitat associated with land use and development is one of the biggest detriments to the survival and resiliency of listed populations and the critical habitat on which they rely. Yet it is not clear if, and to what extent, NMFS considered continued habitat degradation in its analysis.

There is additional uncertainty because the 2020 BiOp is a “no jeopardy” BiOp, unlike the 2000, and 2008/2010/2014 BiOps which concluded that the proposed action was likely to jeopardize listed species and adversely modify or destroy critical habitat and therefore adopted RPAs to try to avoid jeopardy and adverse modification. In the ROD and 2020 BiOp, measures previously proposed as RPAs have been adopted as part of the proposed action. In doing so, the jeopardy and critical habitat analyses in the ROD and 2020 BiOp are undermined. For example, the ROD and 2020 BiOp scale back the RME necessary to evaluate the effectiveness of the mitigation actions, thereby rendering arbitrary and capricious the Action Agencies’ reliance on the asserted benefits of such mitigation actions. The type of robust RME that is necessary to meaningfully evaluate the mitigation measures are merely “conservation recommendations” in the ROD and 2020 BiOp; they are, therefore, completely discretionary. The “non-discretionary” RME that is included in the Incidental Take Statement as a Reasonable and Prudent Measure is vague and insufficiently robust to meaningfully evaluate the effectiveness of the measures that are relied upon to avoid take and ensure that the proposed action is not likely to cause jeopardy or adverse modification. The discretionary conservation measures contain key pieces that are central to ensuring that the assumed benefits have accrued. The ROD and 2020 BiOp do not rationally analyze or explain the choice to make the RME discretionary and the effects of that choice. The failure to make these measures non-discretionary is arbitrary, capricious, and contrary to law.

**F. The ROD and 2020 BiOp’s Conclusion that the Proposed Action is Not Likely to Adversely Affect SRKWs and Their Designated Critical Habitat is Arbitrary and Capricious.**

The ROD and 2020 BiOp’s conclusion that the proposed action is not likely to adversely affect SRKW and their designated critical habitat is legally flawed because, among other reasons, that conclusion is based on the premise that “*increased* prey availability through CRS-funded hatchery production” will offset negative effects on SRKW prey base caused by the proposed hydrosystem operations and maintenance. *See* 2020 BiOp at 1367 (emphasis added). However, the proposed action has no additional hatchery production over existing levels; the Action Agencies therefore cannot reasonably rely on an increase to the prey base from hatchery production to conclude that the proposed action is not likely to adversely affect the SRKW.

Moreover, based on the BiOp's own (albeit illegal) framework, existing hatchery programming should be part of the environmental baseline. Therefore, the benefits to the prey base from these existing hatchery programs are not an "effect of the action" on which the agencies can rely to conclude that the proposed action is not likely to adversely affect the SRKW. The Action Agencies inconsistently and selectively apply the revised regulatory definitions; their treatment of these benefits as an effect of the action is arbitrary and capricious.

Analyses in the ROD and 2020 BiOp do not consider relevant factors and ignore important aspects of the problems facing SRKW. For example, the BiOp discounts impacts of the proposed action on certain Chinook Salmon runs and consequently SRKW because, they argue, there is little spatial and temporal overlap among those prey items and the SRKW. This analysis does not consider the energetic importance of prey items irrespective of overlap. For example, Columbia River spring Chinook may have a lower degree of spatial and temporal overlap than some other prey items, yet these Salmon likely constitute an energetically important component of the SRKW diet during a particular life stage—for example, late winter and early spring during a critical period of gestation—and, if so, the impact of the proposed action on that prey item may be severe to SRKW.

The ROD and 2020 BiOp's analysis of the proposed action's impact on the SRKW is not based on the best scientific and commercial data available, does not draw a rational conclusion between the evidence presented and the conclusions drawn, and does not consider relevant factors.

#### **IV. THE FEDERAL ACTION AGENCIES' VIOLATIONS OF THE ESA.**

##### **A. The Action Agencies Have Failed to Ensure That Their Actions Are Not Likely to Jeopardize the Continued Existence of Listed Species or Destroy or Adversely Modify Their Critical Habitat.**

The ESA regulations define jeopardy as an action that "reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. For reasons including, but not limited to, those addressed by the Court in *NWF v. NMFS*, 184 F. Supp. 3d 861 (D. Or. 2016), and those described above, the 2020 BiOp incorrectly applies ESA § 7(a)(2) and its implementing regulations to determine that the proposed action will avoid jeopardy. The Action Agencies, however, have an independent duty to ensure that their actions avoid jeopardy. The current proposed action, when evaluated in light of the environmental baseline and cumulative effects, has both short-term and long-term adverse impacts on listed species that jeopardize their continued existence. Even before 2020 BiOp, the Action Agencies were already operating the CRS and taking other actions in reliance on the inadequate and illegal 2000, 2004, 2008, 2010, and 2014 BiOps. The agencies—through their continued actions, including adopting and acting pursuant to the ROD and 2020 BiOp—are knowingly continuing to violate § 7(a)(2). This is especially true here because the Action Agencies were intimately involved in the development and drafting of the analyses and data employed in the 2020 BiOp and can reasonably be expected to know that it is arbitrary and capricious and contrary to law. See, e.g., *Res. Ltd. v Robertson*, 35 F.3d 1300, 1304–05 (9th Cir. 1993); *Stop H-3 Ass'n.*, 740 F.2d 1460.

The Action Agencies also have not ensured that their actions are not likely to destroy or adversely modify the designated critical habitat of the listed species. *See* 50 C.F.R. § 402.02 (adverse modification defined as “direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species.”). The ESA defines critical habitat as those areas with the “physical or biological features essential to the conservation of the species[.]” 16 U.S.C. § 1532(5)(A)(i). The final rules designating critical habitat for listed salmon and steelhead describe many features of critical habitat essential for their recovery, including, among other things, adequate water quality and quantity, water temperature, water velocity, and safe passage conditions in migratory corridors. *See, e.g.*, 70 Fed. Reg. 52488, 52521-22 (Sept. 2, 2006). A lawful assessment of whether a proposed action destroys or adversely modifies critical habitat must focus on the ability of the essential features of critical habitat to contribute to recovery of listed species, including an assessment of whether the proposed action precludes or appreciably delays improvements to features essential to recovery—an analysis not present in the 2020 BiOp or Action Agencies’ ROD. Overall, the proposed agency action described in the Action Agencies’ ROD and 2020 BiOp—which is not materially distinguishable from the actions approved in the 2008, 2010, and 2014 BiOps and RODs—adversely impacts essential features of designated critical habitat and destroys and adversely modifies the ability of the critical habitat to contribute to the recovery of the species. *See Gifford Pinchot Task Force*, 378 F.3d 1059; *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d at 933–36. The conclusion that the proposed action will not further degrade already impaired critical habitat by a “meaningful amount” does not support a conclusion that the proposed action is not likely to destroy or adversely modify listed species’ critical habitat. By implementing the proposed action under these circumstances, the Action Agencies are violating § 7(a)(2) of the ESA.

**B. The Action Agencies Are Taking Actions That “May Affect” Listed Species and Their Designated Critical Habitat Without a Valid Biological Opinion.**

The substantive goal of consultation under ESA § 7(a)(2) is to ensure that federal actions do not jeopardize the continued existence of listed species or adversely modify critical habitat. Federal agencies may not take action that could harm a listed species until they have completed the ESA § 7(a)(2) consultation process and have received a valid biological opinion. The 2020 BiOp is not valid for reasons, including but not limited to those described above, and the Action Agencies may not rely on this document to conclude that their actions will avoid jeopardy or to satisfy their procedural duties under the ESA. Under these circumstances, the ESA requires that the Action Agencies avoid any action that causes harm to listed species or designated critical habitat pending compliance with the procedural requirements of § 7(a)(2).

Moreover, the Action Agencies have not initiated formal consultation on the proposed action considered in the 2020 BiOp for the SRKW DPS, although this proposed action will adversely affect this DPS and appreciably reduce its likelihood of survival and recovery. As described above, the Action Agencies’ NLAA determination for these whales (and NOAA’s concurrence in that determination) is not based on the best scientific and commercial data available and does not draw a rational connection between the evidence before the agencies and their conclusion.

**C. The Action Agencies Have Not Complied With § 7(a)(1).**

ESA § 7(a)(1) is an additional, mandatory obligation that agencies develop programs for the recovery of listed species, in consultation with NOAA. *See Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998). As the 2020 BiOp and its predecessors since 2000 acknowledge, the biological requirements of salmon and steelhead in the mainstem of the Columbia and Snake Rivers are not being met, and consequently, the species continue to slide towards extinction. Yet the Action Agencies have not identified or consulted with NOAA regarding those steps they will take to recover these species to the point where they can be removed from ESA protection. Indeed, the Action Agencies continue to arbitrarily reject measures such as increased spill, reservoir drawdown, and dam removal that would both increase fish survival and increase the likelihood of recovery.

**D. The Action Agencies Are Making Irretrievable and Irreversible Commitments of Resources in Violation of ESA § 7(d).**

ESA § 7(d) prevents federal agencies from making irretrievable and irreversible commitments of resources “which [have] the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.” 50 C.F.R. § 402.09. As this regulation makes clear, “[t]his prohibition . . . continues until the requirements of section 7(a)(2) are satisfied.” *Id.* The additional restrictions imposed by § 7(d) are in effect because the Action Agencies have initiated the consultation process but have not completed the process lawfully by obtaining a valid biological opinion. The prohibition against the irreversible and irretrievable commitment of resources in § 7(d) applies to the ongoing operation of the CRS pending completion of a valid consultation, and adoption and implementation of a biological opinion that avoids jeopardy.

The Action Agencies are violating this prohibition by taking actions that could foreclose implementation of measures required to avoid jeopardy, including, but not limited to, producing power with water otherwise necessary for fish, foregoing river flow levels necessary to avoid salmon and steelhead mortality, and transporting salmon and steelhead in trucks and barges. These and other actions that make irreversible or irretrievable commitments of resources are contrary to law. *See Pac. Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996) (preservation of “status quo” as required by *Conner* means enjoining the action under consultation); *Pac. Coast Fed’n of Fishermen’s Ass’ns, et al. v. Bureau of Reclamation*, 138 F. Supp. 2d at 1249 & n.19; *Pac. Rivers Council*, 30 F.3d at 1057.

**E. The Action Agencies Are “Taking” Listed Species Without a Valid ITS in Violation of ESA § 9.**

In their operation of the CRS facilities, the Action Agencies are “taking” or causing the take of endangered and threatened salmon and steelhead. This take occurs in a number of ways, including mortality and injury to adults and juveniles caused by: passing through turbines, spillways, and bypass and collection systems; delayed migration and increased predation associated with reservoir operations and altered hydrograph; loss of spawning and rearing habitat; and impaired water quality. The magnitude of this authorized “incidental” take is quite large. In the absence of a valid ITS or exemption under the Act, this take is prohibited. Because

the 2020 BiOp, including its ITS, is arbitrary and illegal, the ITS is also invalid and does not insulate the Action Agencies from liability for take of the listed species. Because the Action Agencies may not lawfully take listed species, they are in violation of § 9 of the ESA.

The ITS in the 2020 BiOp and the Action Agencies' reliance on it in their ROD is arbitrary, capricious, and contrary to law. The ITS must include a rational take trigger and this trigger cannot be an amount of take that causes jeopardy. The 2020 BiOp does not set a rational take trigger or explain how the level of take anticipated in the ITS will avoid jeopardy. The Action Agencies' reliance on this ITS in their ROD is therefore arbitrary and illegal.

## **V. CONCLUSION**

If the Action Agencies do not cure the violations of law described above immediately, upon expiration of the 60 days the State of Oregon intends to file suit pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). In the meantime, the State of Oregon remains available to discuss resolutions of these issues. Please feel free to contact my office in that regard.

We look forward to continuing our discussion of these issues with you.

Sincerely,

*s/ Nina R. Englander*  
Nina R. Englander  
Assistant Attorney General