

1 PATTI GOLDMAN (WSB #24426)
2 MICHAEL MAYER (WSB #32135)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
pgoldman@earthjustice.org
mmayer@earthjustice.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

PACIFIC COAST FEDERATION OF) Civ. No.
FISHERMEN'S ASSOCIATIONS,)
INSTITUTE FOR FISHERIES RESOURCES,)
OREGON NATURAL RESOURCES)
COUNCIL, PACIFIC RIVERS COUNCIL,) COMPLAINT FOR DECLARATORY AND
THE WILDERNESS SOCIETY, UMPQUA) INJUNCTIVE RELIEF
WATERSHEDS, KLAMATH FOREST)
ALLIANCE, KLAMATH-SISKIYOU)
WILDLANDS CENTER, SISKIYOU)
REGIONAL EDUCATION PROJECT, and)
NORTHWEST ECOSYSTEM ALLIANCE,)
Plaintiffs,)
v.)
NATIONAL MARINE FISHERIES)
SERVICE, U.S. FISH AND WILDLIFE)
SERVICE, U.S. DEPARTMENT OF)
AGRICULTURE, and U.S. DEPARTMENT)
OF THE INTERIOR,)
Defendants.)

1 INTRODUCTION

2 1. This action challenges an amendment that significantly weakens the Aquatic
3 Conservation Strategy (“ACS”), the component of the Northwest Forest Plan designed to protect
4 salmon, clean water, and aquatic ecosystems. The amendment eliminates the requirement that
5 defendant U.S. Department of Agriculture (through the Forest Service) and U.S. Department of
6 the Interior (through the Bureau of Land Management (“BLM”)) find that each action
7 proceeding under the Plan will meet, attain, not retard, or not prevent attainment of the Aquatic
8 Conservation Strategy objectives, which, in turn, require that these agencies manage the forest
9 lands to maintain and restore nine functions of healthy aquatic ecosystems. Actions, such as
10 timber sales, roads, mining, and other habitat-degrading activities, may now proceed if they
11 comply only with the specific standards and guidelines prescribed in the Plan. The standards and
12 guidelines do not, by themselves, ensure that the actions proceeding under the Plan will avoid
13 jeopardizing the continued existence of threatened and endangered salmon and steelhead.

14 2. The Final Supplemental Environmental Impact Statement (“Final SEIS”) prepared
15 by the Departments of Agriculture and Interior for the ACS amendment violates the National
16 Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, and its implementing regulations,
17 because it fails: (a) to disclose and assess the impacts, including the cumulative impacts, of the
18 habitat-degrading activities that will be allowed under the ACS amendment; (b) to disclose
19 scientific disagreement with eliminating the mandatory finding from the scientists who
20 developed the ACS; and (c) to consider an adequate range of alternatives and most particularly
21 an alternative in which the Forest Service and BLM would implement the ACS as written and as
22 interpreted by the courts. This action seeks a declaration that the Departments of Agriculture and
23 Interior violated NEPA and its implementing regulations in issuing an SEIS that fails to disclose
24 the ACS amendment’s full impacts and scientific disagreement and fails to analyze a full range

1 of alternatives, and acted arbitrarily, capriciously, and contrary to the law, in violation of the
2 Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in adopting the amendment and the Final
3 SEIS. This action asks the Court to issue an order, enjoining and setting aside the 2004 ACS
4 amendment because of these violations.

5 3. This action challenges the biological opinions issued under Section 7(a)(2) of the
6 Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), by the National Marine Fisheries
7 Service (“NMFS”) for listed salmon and steelhead and by the Fish and Wildlife Service (“FWS”)
8 for listed bull trout. First, the NMFS and FWS biological opinions arbitrarily and without
9 reasoned explanation reverse the positions taken by NMFS and FWS in their previous
10 programmatic biological opinions on the Northwest Forest Plan’s impacts on listed salmonids
11 and bull trout, namely that, because the standards and guidelines would not alone ensure against
12 jeopardy to listed salmonids, the mandatory ACS objectives finding is necessary to fulfill the
13 ESA’s no-jeopardy obligation. Second, the biological opinions fail to explain how the ACS will
14 ensure against jeopardy without any proscriptions on aquatic habitat degrading activities outside
15 designated riparian reserves. Third, instead of requiring adequate safeguards in the Plan, the
16 biological opinions improperly leave it to site-specific NEPA analysis and section 7 ESA
17 consultations to identify, curtail, or modify actions that alone, or in combination due to their
18 cumulative effects, will jeopardize listed salmonids and bull trout. For these reasons, this action
19 seeks a declaration that the NMFS and FWS biological opinions are arbitrary and capricious, and
20 contrary to the ESA’s requirement that consultations use the best scientific information, 16
21 U.S.C. § 1536(a)(2), in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
22 This action also seeks an order setting aside and enjoining the NMFS and FWS biological
23 opinions.

PARTIES

4. Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest organization of commercial fishermen on the west coast, with member organizations from San Diego to Alaska representing thousands of men and women in the Pacific fleet. Many of PCFFA's members are fishermen whose livelihoods depend upon fish as a natural resource and who, until recent fisheries closures, generated hundreds of millions of dollars in personal income to the region.

5. Institute for Fisheries Resources (“IFR”) is a non-profit corporation that constitutes the conservation arm of PCFFA and shares PCFFA’s offices in Sausalito, California, and Eugene, Oregon. IFR has approximately 850 supporting members, most of them commercial fishermen, whose livelihoods are directly or indirectly affected by salmonid habitat losses throughout the Pacific Coast region.

6. Oregon Natural Resources Council Action (“ONRC”) is a non-profit corporation with 6,000 members throughout the state of Oregon and the Pacific Northwest. ONRC and its members are dedicated to protecting and conserving Oregon’s wildlife, lands, waters, and natural resources, including salmon, steelhead, and bull trout. ONRC members use the Northwest Forest Plan area for fishing, hiking, recreation, and other pursuits.

7. Umpqua Watersheds, Inc., is a non-profit conservation organization that monitors forest management practices of public agencies and advocates for and engages in public education concerning sound management of natural resources. Umpqua Watershed's members and supporters include hundreds of individuals who use the natural assets present in the Umpqua River Basin and elsewhere in coastal Oregon for recreation, enjoyment, and vocational pursuits.

8. Pacific Rivers Council (“PRC”) is a non-profit conservation organization dedicated to the development of scientific tools, legislative policies, and economic strategies to

1 restore the ecological integrity and sustainable use of America's river systems and watersheds.
2 Headquartered in Eugene, Oregon, PRC's programs and membership are focused on the western
3 states but also extend nationwide. PRC has over 750 members, most of who reside in Oregon
4 and Washington.

5 9. Siskiyou Regional Education Project ("Siskiyou Project") is a public interest
6 organization with hundreds of members in Oregon and northern California. The Siskiyou Project
7 seeks to preserve, protect, and restore the wildlands, wild river, wild fish, and wildlife of the
8 Siskiyou Mountain Bioregion. The Siskiyou Project concentrates its efforts on the Klamath-
9 Siskiyou region, and as a consequence, salmon are a large part of the organization's work.

10 10. Klamath Forest Alliance ("KFA") is a non-profit public interest organization
11 formed in 1989 under the laws of the state of California. KFA's mission is to protect and
12 promote sustainable ecosystems and sustainable communities and economies throughout the
13 Klamath Basin of northern California and southern Oregon through the conservation and
14 sustainable use of forest, water, and fishery resources. KFA and its members work to realize this
15 mission through education, advocacy, and enforcement of environmental laws.

16 11. Klamath-Siskiyou Wildlands Center ("KS Wild") is a non-profit, public interest
17 organization with offices in Williams and Ashland, Oregon. KS Wild has approximately 500
18 members concentrated in southwestern Oregon and northern California. KS Wild fights for
19 permanent protection of the incomparable ecological riches of southwest Oregon and northwest
20 California.

21 12. The Wilderness Society ("TWS") is a non-profit national membership
22 organization that devotes its resources to preserving wilderness and wildlife on federal public
23 lands and fostering an American land ethic. Founded in 1935, TWS is headquartered in
24

1 Washington, D.C. with over 200,000 members nationwide. TWS has approximately 10,000
2 members in its Northwest Region.

3 13. Northwest Ecosystem Alliance (“NWEA”) is a nonprofit corporation organized
4 under the laws of Washington state, with its principal place of business in Bellingham,
5 Washington, and an office in Seattle. NWEA and its members are dedicated to protecting and
6 restoring wildlands in Washington and southern British Columbia. NWEA carries out research
7 and advocacy, and works with scientists, environmental activists, policymakers, and the general
8 public to encourage the conservation of biological diversity and ecological integrity on public
9 lands.

10 14. The interests of the members of the plaintiff organizations will be impaired if the
11 timber sales, roads, mining, and other habitat-degrading activities that are inconsistent with the
12 ACS objectives can proceed in the Northwest Forest Plan area.

13 15. The National Marine Fisheries Service is an agency of the U.S. Department of
14 Commerce responsible for administering the provisions of the Endangered Species Act with
15 regard to threatened and endangered marine species, including listed salmon and steelhead
16 throughout the range of the Northwest Forest Plan.

17 16. The Fish and Wildlife Service is an agency of the U.S. Department of the Interior
18 responsible for administering the provisions of the Endangered Species Act with regard to
19 threatened and endangered terrestrial and freshwater species, including listed bull trout
20 throughout the range of the Northwest Forest Plan.

21 17. Defendant U.S. Department of Agriculture is the federal agency charged with
22 management of national forests and with complying with NEPA and the ESA with respect to
23 those forests. The Department’s Undersecretary for Natural Resources and the Environment

signed the record of decision for the ACS amendment jointly with the Department of the Interior's Assistant Secretary for Lands and Mineral Management. The Department of Agriculture issued the Final SEIS for the ACS amendment jointly with the Department of the Interior. The Forest Service is an agency within the U.S. Department of Agriculture that is responsible for managing national forests within the Northwest Forest Plan area.

18. Defendant U.S. Department of the Interior is a federal agency charged with managing certain public lands and with complying with NEPA and the ESA with respect to those lands. The Department's Assistant Secretary for Lands and Mineral Management signed the record of decision for the ACS amendment jointly with the Department's Undersecretary for Natural Resources and the Environment. The Department issued the Final SEIS for the ACS amendment jointly with the Department of Agriculture. The BLM is an agency with the U.S. Department of Interior responsible for managing certain public lands within the Northwest Forest Plan area.

JURISDICTION

19. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

BACKGROUND

I. THE AQUATIC CONSERVATION STRATEGY OF THE NORTHWEST FOREST PLAN

20. Years of controversy over management of the old-growth forests in the Pacific Northwest led the Forest Service and BLM to develop regional forest management standards and guidelines for these forests. In 1991, upon uncovering “a remarkable series of violations of the environmental laws,” and “a deliberate and systematic refusal . . . to comply with the laws protecting wildlife,” this Court issued an injunction halting timber sales in old-growth forests.

1 Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1089-90 (W.D. Wash.), aff'd, 952 F.2d 297
2 (9th Cir. 1991). An Oregon district court enjoined BLM from proceeding with further timber
3 sales in old-growth forests pending compliance with NEPA. Portland Audubon Soc'y v. Lujan,
4 795 F. Supp. 1489 (D. Or. 1992), aff'd sub nom. Portland Audubon Soc'y v. Babbitt, 998 F.2d
5 705 (9th Cir. 1993).

6 21. To end the gridlock, President Clinton convened a forest conference and directed
7 the land management agencies to craft a comprehensive, long-term management strategy that is
8 “scientifically sound, ecologically credible, and legally responsible.” To meet this goal, the
9 agencies assembled the Forest Ecosystem Management Assessment Team (“FEMAT”) to assess
10 the consequences of various land management options considered in developing the Northwest
11 Forest Plan. FEMAT evaluated ten alternatives in depth.

12 22. In April 1994, the Secretaries of Agriculture and Interior signed the Northwest
13 Forest Plan, selecting what had come to be known as “Option 9.” Record of Decision for
14 Amendments to Forest Service and Bureau of Land Management Planning Documents Within
15 the Range of the Northern Spotted Owl (Apr. 13, 1994) (“ROD”). The Northwest Forest Plan
16 has been heralded as the first science-based ecosystem management strategy for federal lands.
17 The record of decision amended the existing forest plans for 19 national forests and was
18 incorporated into the newly developed plans for BLM districts within the range of the northern
19 spotted owl.

20 23. The Northwest Forest Plan includes the ACS to address the habitat needs of
21 salmonids, clean water, and other aquatic species on federal lands within the range of the
22 northern spotted owl. Salmonids have declined throughout the Pacific Northwest, in part, as a
23 result of aquatic habitat degradation. Hundreds of salmonid stocks are at risk because of low or
24

1 declining populations. At the time the Northwest Forest Plan was being developed, several fish
2 species within the Northwest Forest Plan area were proposed or candidates for listing under the
3 ESA.

4 24. The ACS is aimed at restoring and maintaining the ecological health of
5 watersheds and aquatic ecosystems on public lands. To accomplish this goal, the ACS stresses
6 the importance of maintaining the aquatic ecosystems and processes to which aquatic organisms
7 have adapted.

8 25. The basic components of the Aquatic Conservation Strategy are: (1) a system of
9 key watersheds or refugia comprising watersheds designated as either containing the best aquatic
10 habitat or having the greatest potential for recovery of at-risk fish stocks; (2) riparian reserves, or
11 sensitive portions of watersheds that directly affect streams, stream processes, and fish habitat;
12 (3) watershed analysis – an analysis of geomorphic and ecological processes in specific
13 watersheds, which will form the basis for watershed planning, monitoring, and restoration
14 programs; and (4) a comprehensive, long-term watershed restoration program. The ACS also
15 has binding standards and guidelines that restrict certain activities within the riparian reserves
16 and key watersheds.

17 26. As part of each component of the ACS, the strategy requires that federal lands
18 within the range of the northern spotted owl shall be managed to meet and attain nine specific
19 ACS objectives. Each ACS objective requires that certain aspects of aquatic habitat or aquatic
20 processes be maintained in and restored to properly functioning condition. ROD at B-11. The
21 nine ACS objectives require that the Northwest Forest Plan lands be managed to:

- 22 1. Maintain and restore the distribution, diversity, and complexity of
23 watershed and landscape-scale features to ensure protection of the aquatic
24 systems to which species, populations and communities are uniquely
adapted.

- 1
2. Maintain and restore spatial and temporal connectivity within and between
3 watersheds. Lateral, longitudinal, and drainage network connections
4 include floodplains, wetlands, upslope areas, headwater tributaries, and
intact refugia. These network connections must provide chemically and
physically unobstructed routes to areas critical for fulfilling life history
requirements of aquatic and riparian-dependent species.
- 5
3. Maintain and restore the physical integrity of the aquatic system, including
shorelines, banks, and bottom configurations.
- 6
4. Maintain and restore water quality necessary to support healthy riparian,
aquatic, and wetland ecosystems. Water quality must remain within the
range that maintains the biological, physical, and chemical integrity of the
system and benefits survival, growth, reproduction, and migration of
individuals composing aquatic and riparian communities.
- 7
5. Maintain and restore the sediment regime under which aquatic ecosystems
evolved. Elements of the sediment regime include the timing, volume,
rate, and character of sediment input, storage, and transport.
- 8
6. Maintain and restore in-stream flows sufficient to create and sustain
riparian, aquatic, and wetland habitats and to retain patterns of sediment,
nutrient, and wood routing. The timing, magnitude, duration, and spatial
distribution of peak, high, and low flows must be protected.
- 9
7. Maintain and restore the timing, variability, and duration of floodplain
inundation and water table elevation in meadows and wetlands.
- 10
8. Maintain and restore the species composition and structural diversity of
plant communities in riparian areas and wetlands to provide adequate
summer and winter thermal regulation, nutrient filtering, appropriate rates
of surface erosion, bank erosion, and channel migration and to supply
amounts and distributions of coarse woody debris sufficient to sustain
physical complexity and stability.
- 11
9. Maintain and restore habitat to support well-distributed populations of
native plant, invertebrate and vertebrate riparian-dependent species.

20 ROD at B-11.

21

22 27. The ACS acknowledges that: "Any species-specific strategy aimed at defining
23 explicit standards for habitat elements would be insufficient for protecting even the targeted
24 species." ROD at B-9. It then explains the role to be played by the ACS objectives in aquatic

1 ecosystem health:

2 The important phrases in these standards and guidelines are “meet Aquatic
3 Conservation Strategy objectives,” “does not retard or prevent attainment of
4 Aquatic Conservation Strategy objectives,” and “attain Aquatic Conservation
5 Strategy objectives.” These phrases, coupled with the phrase “maintain and
6 restore” within each of the Aquatic Conservation Strategy objectives, define the
7 context for agency review and implementation of management activities.

8 Complying with the Aquatic Conservation Strategy objectives means that an
9 agency must manage the riparian-dependent resources to maintain the existing
10 condition or implement actions to restore conditions. The baseline from which to
11 assess maintaining or restoring the condition is developed through watershed
12 analysis . . .

13 . . . The intent is to ensure that a decision maker must find that the proposed
14 management activity is consistent with the Aquatic Conservation Strategy
15 objectives. The decision maker will use the results of watershed analysis to
16 support the finding. In order to make the finding that a project or management
17 action “meets” or “does not prevent attainment” of the Aquatic Conservation
18 Strategy objectives, the analysis must include a description of the existing
19 condition, a description of the range of natural variability of the important
20 physical and biological components of a given watershed, and how the proposed
21 project or management action maintains the existing condition or moves it within
22 the range of natural variability. Management actions that do not maintain the
23 existing condition or lead to improved conditions in the long term would not
24 “meet” the intent of the Aquatic Conservation Strategy and thus, should not be
25 implemented.

26 ROD at B-9 and B-10.

27 28. Both the timber industry and several environmental organizations challenged the
28 Northwest Forest Plan. This Court upheld the Plan, and the Ninth Circuit affirmed. Seattle
29 Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1303-05 (W.D. Wash. 1994), aff'd sub nom.
30 Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996). The district court cautioned,
31 however, that “[i]f the plan as implemented is to remain lawful, the monitoring, watershed
32 analysis, and mitigating steps called for in the ROD will have to be faithfully carried out, and
33 adjustments made if necessary.” 871 F. Supp. at 1322.

1 I. ESA CONSULTATION ON THE AQUATIC CONSERVATION STRATEGY AND
2 TIMBER SALES PROCEEDING UNDER IT

3 A. Endangered Species Act Listings of Salmon and Steelhead Throughout the Range
of the Northwest Forest Plan

4 29. NMFS has listed 26 evolutionarily significant units (“ESUs”) of salmon and
5 steelhead as threatened or endangered. Portions of the range of several of these ESUs fall within
6 the Northwest Forest Plan area.

7 30. In 1998, FWS listed Columbia River Basin bull trout as threatened and Klamath
8 River Basin bull trout as endangered. 63 Fed. Reg. 31,647 (1998). In 1999, FWS listed Coastal-
9 Puget Sound bull trout as threatened. 64 Fed. Reg. 58,910 (1999). Portions of the range of these
10 distinct population segments of bull trout fall within the Northwest Forest Plan area.

11 31. In the listing decisions, NMFS and FWS concluded that logging had contributed
12 significantly to the decline of these populations and that the cumulative impacts of land
13 management practices continue to pose a serious threat to the species.

14 B. ESA Consultation Duties

15 32. Under the ESA, 16 U.S.C. § 1536(a)(2), “[e]ach federal agency shall, in
16 consultation with and with the assistance of the Secretary, insure that any action authorized,
17 funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency
18 action’) is not likely to jeopardize the continued existence of any endangered species or
19 threatened species . . .”

20 33. To carry out this obligation, the Forest Service and BLM must consult with the
21 expert fish and wildlife agencies concerning the effects of agency actions on listed species. For
22 salmon and steelhead, NMFS is the responsible expert agency. For bull trout, FWS is the
23 responsible expert agency. Initially, NMFS was the responsible expert agency for cutthroat
24 trout, but jurisdiction was transferred to FWS.

1 34. Forest management plans, and significant amendments to them, are agency
2 actions subject to this consultation obligation. When a new species is listed, the Forest Service
3 and BLM must consult on their forest management plans and ensure that continued
4 implementation of those plans will not jeopardize the newly listed species. 50 C.F.R. §
5 402.16(d).

6 35. The Forest Service and BLM typically initiate consultation by providing NMFS
7 or FWS a biological assessment describing the action, its effects, and relevant scientific
8 information. 50 C.F.R. § 402.14(c)-(d). A formal consultation culminates in NMFS or FWS
9 issuance of a biological opinion, which must review all relevant information, evaluate the
10 species' current status, provide a detailed evaluation of the action's effects, and determine
11 whether the action will jeopardize the survival and recovery of listed species or adversely modify
12 the species' critical habitat. 50 C.F.R. § 402.14(g)-(h).

13 C. NMFS Programmatic Consultation on the ACS

14 36. On March 18, 1997, NMFS issued a biological opinion concluding that the
15 continued implementation of the forest plans as amended by the ACS components of the
16 Northwest Forest Plan will not jeopardize survival and recovery of Umpqua cutthroat trout,
17 which was listed as endangered in 1996. <http://www.nwr.noaa.gov/1publcat/bo/1997/osb1997-0711>. The biological opinion pertains to all federal forests in western Oregon and all salmonids
18 that were then listed or proposed or candidates for listing under the ESA. At the time of its
19 issuance, it served as a biological opinion for the Umpqua cutthroat trout and as a conference
20 report for the not-yet-listed species. After NMFS listed other salmonids, it adopted the March
21 1997 programmatic biological opinion as the forest plan biological opinion for the newly listed
22 ESU.

24 37. At the outset, the biological opinion concluded that "the biological requirements

1 for freshwater life stages of [the various salmonids] are currently not being met under the
2 environmental baseline of the action area. Their status is such that there must be a significant
3 improvement in the environmental conditions of their habitat over those currently available
4 under the environmental baseline. Any further degradation of these conditions is expected to
5 have a significant impact due to the level of risk that listed, proposed, and candidate salmonids
6 presently face under the environmental baseline.” 1997 NMFS Programmatic Biological
7 Opinion (or “Biop”) at 15 (citation omitted).

8 38. The biological opinion did not assess the impact of the Northwest Forest Plan on
9 particular fish populations. Instead, it considered generally whether forest plan implementation
10 will maintain or restore properly functioning aquatic habitat so as to provide for salmonids’
11 biological requirements. The programmatic biological opinion establishes three criteria that
12 must be satisfied to meet this goal and avoid jeopardy:

13 (1) essential components of LRMPs [Land and Resource Management Plans] and
14 RMPs [Resource Management Plans], including ACS objectives, watershed
15 analysis, restoration, land allocations, and standards and guidelines, will be fully
16 applied at the four spatial scales of implementation (region, province, watershed,
and site or projects); (2) management actions will comply with all applicable land
allocations and standards and guidelines; and (3) management actions will
promote attainment of ACS objectives.

17 Id. at 38.

18 39. The biological opinion stressed that “[a] pivotal issue in applying these criteria is
19 determining whether proposed actions are properly designed and mitigated to ensure full
20 attainment of ACS objectives.” Id. The biological opinion then quoted the portion of the
21 Northwest Forest Plan record of decision that emphasized the importance of meeting and not
22 retarding attainment of the ACS objectives and that required agency decision makers to find that
23 each proposed activity is consistent with the ACS objectives. Id. at 38-39, quoting ROD at B-9

& B-10. NMFS concluded that narrow adherence to the ACS standards and guidelines without considering the broader ACS objectives may result in actions that jeopardize the survival of listed fish populations. Id. at 26 (“NMFS recognizes that agency decision makers retain enough discretion when implementing management direction in the LRMPs and RMPs that application of the standards and guidelines alone may not always guarantee that all management decisions will be fully consistent with the ACS objectives.”). According to NMFS, it is not enough that the proposed action be in compliance with the ACS standards and guidelines. NMFS concluded that site-specific actions “must be consistent with the ACS objectives. Compliance with these ACS objectives is not left to chance or to the discretion of individual land managers.” Id. at 24.

40. NMFS conditioned its no-jeopardy call on each site-specific action’s compliance with the ACS objectives:

Because all actions will be designed and mitigated in accordance with the ACS objectives, land allocations, and standards and guidelines, any associated effects (e.g., increased habitat sedimentation) are expected to be generally minor in magnitude and short-lived in duration. (Id. at 28.)

Implementation of actions consistent with the ACS objectives and components – including watershed analysis, watershed restoration, reserve and refugia land allocations (riparian reserves, key watersheds, late successional reserves, etc.) and associated standards and guidelines – will provide high levels of aquatic ecosystem understanding, protection, and restoration for aquatic-dependent species. (Id. at 44-45.)

The biological opinion also based its no-jeopardy determination on the consultation process and criteria through which NMFS would ensure that each individual project is consistent with the ACS objectives. Id. at 45.

41. Along with the biological opinion, NMFS issued an incidental take statement, which authorized the “take” of listed fish species during forest plan implementation, subject to voluntary reasonable and prudent measures and mandatory terms and conditions. One of the

1 reasonable and prudent measures deemed “necessary and appropriate” by NMFS to minimize
2 take specified that the Forest Service and BLM “shall apply the review criteria described on
3 pages B-9 and B-10 of the NFP ROD to ensure that proposed actions are fully consistent with
4 applicable standards and guidelines and ACS objectives.” Id. at 63. One of the mandatory terms
5 and conditions requires that “[t]o ensure that proposed actions designed in accordance with
6 relevant standards and guidelines are in fact consistent with the NFP ACS objectives, USFS and
7 BLM decision makers will apply the results of watershed analysis and other relevant information
8 to reach findings that actions either ‘meet’ or ‘do not prevent attainment’ of the ACS objectives.”
9 Id. at 66. The term and condition further draws from the ROD (at B-10) to reiterate the
10 requirements of such a finding:

11 (a) The finding must be supported by an analysis that includes a description of
12 the existing condition, a description of the range of natural variability of the
13 important physical and biological components of a given watershed, and how the
proposed project or management action maintains the existing condition or moves
it within the range of natural variability.

14 (b) Management actions that do not maintain the existing condition or lead to
improved conditions in the long term would not “meet” the intent of the Aquatic
15 Conservation Strategy and thus should not be implemented.

16 A. The First Site-Specific Consultations

17 42. In 1997, NMFS issued a series of site-specific biological opinions on timber sales
18 and other actions. These biological opinions tiered to the programmatic biological opinion. The
19 biological assessments prepared by the Forest Service and BLM for the timber sales revealed that
20 much of the existing habitat condition was either not properly functioning or at risk. The
21 biological assessments also showed that the proposed sales would further degrade some aquatic
22 habitat conditions or would merely maintain habitat that is currently either not properly
23 functioning or at risk.

24 43. During the consultation process, the Forest Service, BLM, and NMFS identified a

1 set of sales called “major problem,” “jeopardy,” or “the languishing” sales. Because the sales
2 contributed to adverse “cumulative watershed effects” already evident from extensive past
3 logging in the watersheds, Forest Service and BLM biologists recommended dropping the
4 clearcutting. Forest Service and BLM managers objected to the recommended mitigation
5 measures because they would require changes to timber sales beyond those required by the
6 Plan’s standards and guidelines. To facilitate a resolution of this dispute, regional officials with
7 the Forest Service and BLM convened FEMAT aquatic scientists who confirmed that cumulative
8 watershed effects from logging and roadbuilding, which increase peak flows, change runoff
9 timing, and impair other aspects of proper hydrological functions, must be mitigated to meet the
10 ACS objectives. The FEMAT scientists concluded that, to mitigate these effects, clearcutting
11 may need to be constrained, even in matrix lands designated in the Plan for timber production.

12 44. In the end, however, although the consultation process identified the extent of
13 clearcut areas in the impacted watersheds and cumulative watershed effects from the additional
14 clearcutting, the extensive clearcutting remained in the timber sales without any of the
15 recommended mitigation. The site-specific biological opinions failed to evaluate the pertinent
16 watershed analyses, even where the watershed analyses recommended against further
17 clearcutting or degradation in the sale areas, and failed to assess whether the cumulative
18 watershed effects of the logging in degraded watersheds would prevent attainment of the ACS
19 objectives. These biological opinions uniformly reached the conclusion that the projects were
20 not likely to jeopardize the survival of endangered Umpqua cutthroat trout.

21 B. PCFFA I

22 45. Some of the plaintiffs in this case challenged the programmatic and three site-
23 specific biological opinions in Pacific Coast Federation of Fishermen’s Associations v. NMFS,
24 No. C97-775R (W.D. Wash.) (“PCFFA I”). In an opinion issued on April 29, 1998 and reissued

1 as amended on May 29, 1998, this Court rejected the challenge to the programmatic biological
2 opinion, but found the site-specific biological opinions invalid.

3 46. With respect to the programmatic biological opinion, this Court held that NMFS
4 could assume that site-specific projects would be designed and mitigated in accordance with the
5 ACS objectives because the proposed action submitted for consultation was implementation of
6 the forest plans “in compliance with the ACS objectives, fully applying watershed analysis and
7 implementing monitoring programs” and NMFS must analyze the action as proposed by the
8 action agencies. May 29, 1998 Amended Order at 23; see also id. at 24 (NMFS’s “no jeopardy
9 determination is expressly based on USFS’s and BLM’s implementation of site-specific projects
10 in compliance with the ACS objectives By assuming agency compliance with the ACS,
11 NMFS was evaluating the action as proposed by the agencies requesting the consultation.”). The
12 Court accepted the agencies’ representations that “before a project can proceed, USFS and BLM
13 must find that the actions either meet, or do not prevent attainment of, the ACS objectives. The
14 finding must be supported by an analysis of how the proposed management action will maintain
15 the existing condition or restore it.” Id. at 29.

16 47. With respect to the biological opinions on particular timber sales, this Court held
17 that the federal agencies failed to deliver on their promise to ensure that the ACS objectives
18 would be met. According to the Court, “in light of evidence in the record of the presence of
19 adverse effects to the watershed combined with inadequate evidence of efforts to mitigate those
20 adverse effects, NMFS could not rationally conclude that the proposed timber sales would
21 comply with the ACS objectives.” Id. at 29; see also id. at 30 (“NMFS could not have rationally
22 concluded, based on the evidence of adverse effects and lack of evidence of significant
23 mitigation before it, that the proposed actions were consistent with the ACS’s mandate that

1 agencies maintain and restore aquatic systems within the range of the northern spotted owl.”).
2 Specifically, the Court found that the biological assessments and watershed analyses revealed
3 harmful aquatic impacts that NMFS never addressed and that NMFS failed to limit clearcutting
4 in already degraded watersheds despite its acknowledgement that such limits are necessary to
5 protect aquatic habitat. *Id.* at 27-29.

6 C. The Second Set of Timber Sale Biological Opinions

7 48. In an attempt to address the Court’s ruling, the agencies developed a new process
8 for assessing consistency with the ACS objectives. This process instructed agency staff to ignore
9 documented impacts from an individual timber sale if those impacts are not observable at the
10 watershed scale from the timber sale alone. The new process also allowed the agencies to assess
11 conditions 10-30 years after the logging – when sufficient trees will grow back across the
12 watershed – to discount the sales’ near-term aquatic habitat degradation. The new process
13 allowed short-term and localized impacts to escape review in the consultation process.

14 49. In late 1998, NMFS issued four biological opinions using the new process, which
15 concluded that 23 timber sales are not likely to jeopardize the survival of listed fish species.
16 Most of the timber sales involved clearcut logging in degraded watersheds. Approximately half
17 of these sales were subject to the biological opinions invalidated in PCFFA I, but BLM and the
18 Forest Service made no changes to the timber sales submitted for the second consultation.

19 50. In assessing the sales’ watershed effects, the biological opinions reviewed the
20 extent to which tree canopy closure is lacking throughout the federal lands in the watershed. The
21 best available scientific information demonstrates that hydrologic functions are impaired when
22 canopy closure is significantly reduced in the stream reach or subwatershed.

23 51. Some adverse aquatic impacts from the individual timber sales are not significant
24 enough in and of themselves to result in measurable effects at the watershed-scale or to change

1 the agencies' characterization of the overall aquatic habitat conditions. Localized impacts, such
2 as increased peak flows or sedimentation, may kill or impede survival of the salmon in that
3 affected stream reach.

4 52. The timber sale biological opinions relied on "passive restoration" through tree
5 regrowth over a period of ten or more years for their conclusion that the timber sales are not
6 likely to jeopardize species' survival. By focusing on ten or more years after the sale, NMFS
7 failed to assess the impacts of the sales' additional logging on the survival of the next few
8 generations of fish.

9 53. The biological opinions did not adhere to the mandatory watershed analysis term
10 and condition of the programmatic biological opinion's incidental take statement. The timber
11 sale biological opinions did not identify, let alone assess, whether the timber sales were
12 consistent with the desired future conditions and/or recommendations set forth in the watershed
13 analysis. For example, the November 23, 1998 biological opinion reached a no jeopardy
14 conclusion with respect to four Upper South Myrtle Creek clearcut sales without discussing the
15 pertinent watershed analysis recommendation that most of the drainages in which these sales are
16 located should be the target of restoration activities and not aquatic habitat degradation.

17 D. PCFFA II

18 54. Some of the plaintiffs in this case challenged the four site-specific biological
19 opinions in Pacific Coast Federation of Fishermen's Associations v. NMFS, 71 F. Supp.2d 1063
20 (W.D. Wash. 1999) ("PCFFA II"). The sales consisted primarily of large-scale clearcut logging
21 operations with no mitigation for the impacts of the logging, apart from riparian reserves along
22 the streams. In an order issued in September 1999, this Court held that NMFS acted arbitrarily
23 and capriciously in making its ACS compliance determination only at the watershed scale over
24 the long term because that approach ignored ongoing degradation and "virtually guaranteed that

1 no timber sale will ever be found to jeopardize the continued existence” of salmonids.” Id. at
2 1073.

3 55. The Court found that NMFS erroneously concluded that “only actions that would
4 adversely affect the environmental baseline over an entire watershed over a long period would be
5 inconsistent with ACS objectives.” 71 F. Supp. 2d at 1068. Based on the FEMAT report and the
6 programmatic biological opinion, both of which stressed that the ACS must be implemented at
7 four spatial scales ranging from the project to the region, the Court held that “not only must the
8 ACS objectives be met at the watershed scale (as NMFS argues), each *project* must also be
9 consistent with the ACS objectives.” Id. at 1069 (emphasis in original); see id. (NMFS’s focus
10 on the watershed scale “begs the question of what level it is supposed to measure or verify ACS
11 compliance to adequately protect the watershed.”). While evidence that “a project will result in
12 some degradation does not, standing alone, constitute ACS noncompliance,” NMFS “provide[d]
13 no basis for its shift to a broad watershed scale of analysis and away from the multi-scale
14 approach contained in the Programmatic Biological Opinion.” Id. at 1070.

15 56. The Court also held that NMFS erroneously “anayliz[ed] the sales’ effects based
16 on predicted conditions ten years after the sale. Because more trees are predicted to grow back
17 over ten years than are being cut in the sale, every sale under consultation could ultimately result
18 in a ‘no-jeopardy’ analysis.” Id. The Court held that NMFS must “assess the conditions
19 immediately after the sale instead of relying on tree regrowth as passive mitigation to
20 compensate for the logging.” Id.

21 57. The Court also held that NMFS “has not fully or sufficiently incorporated
22 watershed [analysis] recommendations into its ACS analysis” and that “[i]ts failure to do so was
23 arbitrary and capricious in light of the fact that the watershed analysis undoubtedly represents the
24

1 best available scientific information available.” Id. at 1072, 1073. Specifically, NMFS failed to
2 use the watershed analyses to determine whether the watersheds are within the natural range of
3 variability and to determine whether the actions will move the watershed toward the desired
4 future conditions identified in the watershed analyses. Id. at 1072.

5 58. In a May 2001 opinion, amended in September 2001, the Ninth Circuit affirmed,
6 holding that:

7 Its disregard of projects with a relatively small area of impact but that carried a
8 high risk of degradation when multiplied by many projects and continued over a
9 long time period is the major flaw in NMFS study. Without aggregation, the large
10 spatial scale appears to be calculated to ignore the effects of individual sites and
11 projects. Unless the effects of individual projects are aggregated to ensure that
12 their cumulative effects are perceived and measured in future ESA consultations,
13 it is difficult to have any confidence in a wide regional no-jeopardy opinion.
Failure to account adequately for the cumulative effects of the various projects
undermines the assumptions that the district court authorized NMFS to make in
PCFFA I. If the effects of individual projects are diluted to insignificance and not
aggregated, then Pacific Coast is correct in asserting that NMFS’s assessment of
ACS consistency at the watershed level is tantamount to assuming that no project
will ever lead to jeopardy of a listed species.

14 265 F.3d 1028, 1035-36 (9th Cir. 2001). The fact that the ACS is designed to maintain and
15 restore aquatic ecosystems at the watershed scale “does not prevent site degradation and does
16 nothing to restore habitat over broad landscapes if it ignores the cumulative effects of individual
17 projects on small tributaries within watersheds.” Id. at 1036. NMFS is not “free to ignore site
18 degradations because they are too small to affect the accomplishment of that goal at the
19 watershed scale.” Id. at 1035. Noting that the FEMAT report stressed the importance of
20 curtailing incremental habitat degradation, the Ninth Circuit further stated: “NMFS’s assuming
21 away site-specific degradations that could lead to a jeopardy finding contradicts the purpose of
22 the ESA and is arbitrary. Any effect on a particularly important spawning area should show up
23 as a degrade rating for the entire watershed.” Id. at 1037.

1 59. The Ninth Circuit also held that NMFS cannot limit its assessment to “only
2 degradations that persist more than a decade.... This generous time frame ignores the life cycle
3 and migration cycle of anadromous fish. In ten years, a badly degraded habitat will likely result
4 in the total extinction of the subspecies that formerly returned to a particular creek for
5 spawning.” Id. at 1037. The Ninth Circuit explained:

6 The NMFS predicts that more trees will grow within the watershed during the
7 ensuing decade than are cut in the proposed project and, therefore, concludes that
8 the “short-term” and “localized” effects of the logging will be naturally mitigated
9 by regrowth. This optimism may be justified for the purpose of counting trees,
10 but for the purpose of counting anadromous fish, it is wholly unrealistic.

11 Id.; see also id. at 1038 (finding “no scientific evidence in the record to support the conclusion
12 that natural vegetation regrowth will adequately mitigate the degradation caused by the logging
13 projects and ensure that fish that never hatched could return to the recovered spawning habitat”).

14 The Ninth Circuit further stated that “NMFS does not and cannot explain adequately its disregard
15 of short-term effects.... Given the importance of the near-term period on listed species survival it
is difficult to justify NMFS’s choice not to assess degradation over a time frame that takes into
account the actual behavior of the species in danger.” Id. at 1038.

16 A. PCFFA III

17 60. NMFS used the same template in conducting consultations on Northwest Forest
18 Plan timber sales throughout Washington, Oregon, and northern California. In addition to the
19 biological opinions at issue in PCFFA II, NMFS issued at least 19 other biological opinions
20 covering over 100 timber sales using this flawed consultation approach. These biological
21 opinions generally covered several timber sales for a particular district or forest over a specified
22 time frame. Some of the sales involved large-scale clearcut logging. Others involved less-
23 degrading commercial thinning. And some included restoration or road work as part of the sales.
24 The biological opinions also covered projects that involved no logging activities.

1 61. In the spring of 2000, the PCFFA plaintiffs formally asked NMFS to withdraw
2 these biological opinions because they suffered from the same defects as the biological opinions
3 invalidated by the district court in PCFFA II. NMFS refused and instead kept the biological
4 opinions in place. Logging proceeded on numerous sales, precipitating the third lawsuit known
5 as PCFFA III. PCFFA v. NMFS, C00-1757R (W.D. Wash.).

6 62. In an order dated December 7, 2000, the district court issued an injunction
7 invalidating the 20 NMFS biological opinions pending the outcome of the Ninth Circuit appeal
8 in PCFFA II. The Court stated, in pertinent part: “There is no dispute that, in the instant
9 opinions, NMFS has again (1) failed to measure impacts at the site specific scale, instead of
10 reviewing for compliance with ACS guidelines on a watershed level; [and] (2) ignored short term
11 effects that would not be measurable ten or more years after the action.... These actions were
12 held to violate the APA and ESA in PCFFA II. NMFS has made no showing that the court’s
13 prior ruling is in error, or that these opinions are somehow not governed by the ruling in PCFFA
14 II. The court therefore finds that PCFFA’s likelihood of success on the merits of the instant case
15 is exceedingly strong.” PCFFA III, C00-1757R, Order at 7 (W.D. Wash. Dec. 7, 2000). Upon
16 finding irreparable harm to salmon, the Court enjoined NMFS from taking any action on the
17 challenged opinions and provided that “[t]he injunction shall remain in place until such time as
18 NMFS is in compliance with the Ninth Circuit’s decision.” Id. at 10.

19 63. In response to the order, NMFS suspended the challenged biological opinions and
20 incidental take statements. However, NMFS incorrectly construed the Court’s order to stop
21 restoration projects in addition to logging. PCFFA immediately asked the Court to clarify that
22 only logging, and not beneficial restoration projects, were enjoined. In an order entered on
23 December 20, 2000, the court clarified that its order and NMFS’s suspension extended to the
24

1 biological opinions only as they pertain to timber sales and not to other non-timber sale projects
2 covered by the biological opinions.

3 64. After the Ninth Circuit issued its ruling in May 2001, the Forest Service and BLM
4 took no actions to modify the affected timber sales to eliminate or mitigate the degradation of
5 salmon habitat. Instead, the Forest Service and BLM, as well as the timber industry, blamed the
6 PCFFA litigation for causing gridlock. The plaintiffs then identified timber sales subject to the
7 PCFFA III injunction that could go forward with further analysis or modifications. Plaintiffs'
8 efforts led to a March 2002 stipulation removing from the injunction three sales that thin young
9 stands. The PCFFA plaintiffs subsequently filed a motion to convert the December 2000
10 preliminary injunction into a permanent injunction and to exempt certain timber sales or portions
11 of timber sales that would have minimal adverse aquatic impacts. In March 2003, the court
12 approved a settlement of the case in which NMFS rescinded the biological opinions as to timber
13 sales except as to 18 specific sales identified by the plaintiffs that could go forward as modified.

14 B. The FWS Programmatic Biological Opinion and Litigation Over FWS Site-
15 Specific Consultations

16 65. In May 2000, FWS issued a programmatic biological opinion concluding that the
17 continued implementation of the forest plans as amended by the ACS components of the
18 Northwest Forest Plan will not jeopardize survival and recovery of listed bull trout populations.
19 Like the NMFS programmatic biological opinion, FWS's opinion is based on the assumption that
20 “[a]ll action in watersheds containing bull trout should be consistent with the appropriate ACS
21 objectives of the NFP. The determination of ACS consistency is a responsibility of the land
22 management agency line officer and is to be supported by watershed analysis, where required, or
23 other pertinent information where watershed analysis is not required and does not exist.” 2000
24 FWS Programmatic Biop at 48; see also id. at 49 (“The USFS and BLM management activities

1 are directed to be consistent with the nine ACS objectives. Consequently, the USFS and BLM
2 must manage the riparian-dependent resources to maintain the existing condition or implement
3 actions to restore conditions.”); id. at 50 (“only those actions which do not retard or prevent
4 attainment of ACS objectives should be implemented (ROD, page B-10)”).

5 66. The FWS biological opinion differed from NMFS’s in specifying that
6 “Watersheds (fifth field hydrologic units approximately 20 to 200 square miles in size) provide
7 the appropriate geographic context for consistency determinations.” Id. at 50. The biological
8 opinion elaborated:

9 However, it is important to note that the ecosystem functions and processes
10 represented by the ACS objectives operate at multiple scales, including site,
11 reach, subwatershed, watershed, river basin, and population. Assessments of
12 project effects need to address the spatial scales that are relevant to the proposed
13 action and for the ACS objectives that would be affected. Because biological
14 resources are not always evenly distributed across watershed areas, project-level
15 impacts may be sufficient to significantly degrade a particular resource of concern
16 without appreciably diminishing the overall watershed conditions. The Service
17 believes such projects would not be consistent with the ACS objectives.

18 Id.; see also id. (“By definition, determinations of ACS consistency for objectives (e.g.
19 Objectives 1, 2, and 9 as they pertain to bull trout) that reference landscape or watershed scales
20 should be made at that scale.”).

21 67. While FWS found that the land allocations, standards and guidelines, and ACS
22 objectives will provide substantial riparian protection, it still predicted negative impacts to bull
23 trout from upland activities that alter stream hydrology, temperature, and sediment regimes. Id.
24 at 54-56. The biological opinion identified activities in the matrix lands, where most logging
25 will occur, to have a moderate risk of adverse effects even with application of all ACS
26 components. Because implementation of the ACS should “inhibit additional project impacts
through adherence to the ACS objectives,” as well as lead to improved habitat in reserves and

1 through restoration activities, FWS made a no-jeopardy call for Columbia River bull trout. Id. at
2 76. Because the Northwest Forest Plan lands within the range of the Klamath River bull trout are
3 in a key watershed, FWS assumed the habitat would be managed to maintain or achieve refugia
4 conditions further supporting a no-jeopardy call for this population. Id. at 77. FWS made
5 similar assumptions for the Coastal-Puget Sound population because much of its range is in late
6 successional reserves or key watersheds. Id. at 78.

7 68. Along with the biological opinion, FWS issued an incidental take statement,
8 which authorized the “take” of listed fish species during forest plan implementation, subject to
9 voluntary reasonable and prudent measures and mandatory terms and conditions. One of the
10 reasonable and prudent measures deemed “necessary and appropriate” by FWS to minimize take
11 specified that the Forest Service and BLM will “apply the process described on pages B-9 and B-
12 10 of the NFP ROD to ensure that proposed actions are fully consistent with applicable standards
13 and guidelines and ACS objectives.” Id. at 84. One of the mandatory terms and conditions
14 requires that “[t]o ensure that proposed actions designed in accordance with relevant standards
15 and guidelines are consistent with the NFP ACS objectives, USFS and BLM decision makers
16 will utilize the results of watershed analysis and other relevant information in the
17 decisionmaking process to conclude that actions either ‘meet’ or ‘do not prevent attainment’ of
18 the ACS objectives. The conclusion must be documented and supporting rationale provided.”
19 Id. at 86. Another term and condition provides that the Forest Service and BLM must: “Analyze,
20 design, and implement timber harvest activities to meet the requirements of amended LRMP
21 standards and guidelines and ACS objectives, and include additional measures as needed to
22 minimize adverse effects to bull trout, through incorporation of” additional mitigation developed
23 in accordance with bull trout science. Id. at 89.

1 69. In 2002, plaintiff Oregon Natural Resources Council and others challenged
2 FWS's biological opinions for particular timber sales in bull trout habitat on the Willamette
3 National Forest. In August 2002, the district court issued a preliminary injunction upon
4 concluding that the FWS had failed to ensure that the sales were consistent with the ACS
5 objectives as required by the terms and conditions of the incidental take statement, particularly in
6 light of acknowledged sedimentation of bull trout habitat from road construction and road
7 densities. Cascadia Wildlands Project v. FWS, No. CV-02-747-RE (D. Or. Aug. 7, 2002).

8 I. THE AMENDMENT TO THE ACS

9 A. The Supplemental Environmental Impact Statement ("SEIS")

10 70. In November 2002, the Departments of Agriculture and Interior published a
11 notice of intent to amend the ACS soliciting scoping comments. In March 2003, they released a
12 Draft SEIS, and in October 2003, they released a Final SEIS on amending the ACS.

13 *I. Purpose and need*

14 71. The purpose and need for the ACS amendment is described as clarifying a
15 "misinterpretation" of the ACS by the courts that has stopped or delayed logging and watershed
16 restoration needed to achieve the Northwest Forest Plan's goals. Draft SEIS at 6; Final SEIS at
17 6-7. The Final SEIS elaborates:

18 Projects needed to achieve Northwest Forest Plan goals have been delayed or
19 stopped due to misapplication of certain passages in the ACS. Specific language
20 has been interpreted to mean that every project must achieve all ACS objectives at
21 all spatial and temporal scales. This interpretation suggests that land managers
22 must demonstrate that a project will maintain existing conditions (or lead to
improved conditions) at every spatial and temporal scale. Any project that may
result in site-level disturbance to aquatic or riparian habitat, no matter how
localized or short-term, could be precluded under this interpretation. This
interpretation establishes an impossible expectation for demonstrating that a
project follow the ACS.

23 Final SEIS at 6.

1 72. The Final SEIS states that the particular purpose of the proposed amendment is to
2 clarify that: (1) projects must be designed to comply with the standards and guidelines in
3 Sections C and D of the ROD Attachment A; and (2) if a standard and guidelines refers to
4 achievement of the ACS objectives, the analysis is to be conducted at the watershed and broader
5 scales and no single project is required to achieve all ACS objectives by itself. The Final SEIS
6 states that the amendment is needed to clarify that the only standards and guidelines that must be
7 addressed in project planning are those set out in Sections C and D of the ROD Attachment A.
8 Since the mandate to find that each project is consistent with the ACS objectives is contained in
9 Section B, the amendment is designed to eliminate this mandate.

10 *I. The range of alternatives*

11 73. The Draft SEIS considered two alternatives: (1) a no action alternative in which a
12 finding of consistency with the ACS objectives would continue to be required for each project;
13 and (2) the proposed alternative, which would eliminate the requirement that the Forest Service
14 and BLM find that each project is consistent with the ACS objectives. Under this alternative,
15 “[n]o additional site-scale determinations regarding attainment of ACS objectives would be
16 required.” Draft SEIS at 13; Final SEIS at 18. While the Draft SEIS states that the change
17 would mean that “[n]o single project should be expected to achieve all ACS objectives” and that
18 decision makers would no longer need to “find that site-scale projects, in themselves, will fully
19 attain the ACS objectives,” the proposal would eliminate any requirement to make any finding of
20 compliance with the ACS objectives for site-specific actions. Draft SEIS at 3, 9. The standards
21 and guidelines would be the sole mandatory components of the ACS, and watershed analysis
22 would be relegated to providing “context” for the design and assessment of the project. Draft
23 SEIS at 3, 9, 13.

24 74. The Final SEIS added a third alternative A, identified as the preferred alternative,

1 which retains some language that was deleted under the proposed alternative. In particular, it
2 specifies that a project must maintain existing conditions or restore conditions at the watershed
3 scale over the long-term in order to be consistent with the ACS objectives. However, this
4 analysis will only apply where a standard and guideline pertaining to activities within riparian
5 reserves specifically incorporates the ACS objectives. Final SEIS at 18-19. The decision makers
6 will no longer need to find that each project is consistent with the ACS objectives, unless there is
7 a specific riparian reserve standard and guideline to that effect. Final SEIS 18-24.

8 75. Public comments on the Draft SEIS suggested other alternatives, which the Final
9 SEIS rejected because they would not meet the stated purpose and need. For example the Final
10 SEIS rejected alternatives that would add standards and guidelines to protect aquatic ecosystems
11 because it would not increase logging under the Northwest Forest Plan. Final SEIS at 26, 29.
12 The Final SEIS similarly rejected making watershed analysis decision documents that would be
13 binding. Final SEIS at 28. Public comments also suggested changing the nature of logging away
14 from old-growth to thinning of younger stands. The Final SEIS does not adequately address this
15 alternative.

16 2. *Environmental impacts of the alternatives*

17 76. The Draft SEIS describes the effects of the no action alternative as continued
18 gridlock “because the current language contains ambiguities that can be misinterpreted.” Draft
19 SEIS at 34. The Final SEIS concludes that the no action alternative would make implementation
20 of the range of projects envisioned in the Northwest Forest Plan less likely because it would be
21 more difficult for decision makers to demonstrate the projects follow the ACS than under the
22 proposed amendment. Final SEIS at 2.

23 77. The Final SEIS attributes a failure to offer the estimated amount of timber for the
24 Northwest Forest Plan, called the probable sale quantity (“PSQ”), to the court interpretations of

1 the ACS in the PCFFA litigation and the agencies' response. Final SEIS at 41-42, 49. The Final
2 SEIS describes BLM interim guidance that directs districts to pursue partial cuts rather than
3 clearcuts due to the PCFFA rulings. Id. at 42-43. While the Draft SEIS states that the proposed
4 alternative would increase the agencies' ability to proceed with timber sales and reach the PSQ,
5 Draft SEIS at 40, the Final SEIS indicates that land managers are likely to be able to pursue more
6 logging, but cannot predict the extent to which the PSQ might be attained. Final SEIS at 50-51.
7 The Final SEIS does assert, without support, that "expected levels of harvest" will not occur
8 without clearcut logging and logging of old-growth forests. Id. at 50.

9 78. In referring to the timber sales enjoined in the PCFFA litigation, the Final SEIS
10 asserts that "[t]he most common impact noted was a transitory increase in stream sedimentation
11 and/or short-term, localized sedimentation from road-related activities, especially activities that
12 would have been restorative in the long term but directly affect streams and riparian areas in the
13 short-term, such as culvert replacement, road decommissioning, skid trail obliteration and road
14 maintenance. The current wording of the ACS has been interpreted to preclude timber sales such
15 as these that may result in minimal impacts to aquatic and riparian habitat." Final SEIS at 8; see
16 also Draft SEIS at 8.

17 79. The sole discussion of impacts of logging that was blocked by the PCFFA
18 litigation and that would be facilitated by the amendment is: "timber harvest removes canopy and
19 exposes some land to accelerated erosion. Road work associated with the timber sale may result
20 in short-term sedimentation." Final SEIS at 50.

21 80. The Final SEIS contains a list of projects "most likely affected by the
22 misinterpretation of the ACS," which includes clearcut logging, mining, livestock, grazing, road
23 work, and restoration. Final SEIS at 7; see also Final SEIS at 53 (based on the public comments,

1 logging in old-growth forests is most likely to be delayed or stopped by current ACS
2 interpretations).

3 81. The Draft SEIS description of impacts from the types of activities resulting from
4 the proposed alternative refers generically and collectively to watershed restoration and logging
5 and identifies: “risk of adverse, short-term, site-level impacts would increase proportionately to
6 the amount of work implemented. . . . The potential adverse effects to aquatic and riparian
7 habitats include: risk of increased sedimentation from disturbance from road work and logging
8 operations, risk of effects to peak flows from canopy removal; and risk of loss or degradation of
9 wildlife habitat.” Draft SEIS at 42.

10 82. The Final SEIS states that the ACS amendment will minimize adverse effects
11 from projects and that adverse effects that will nevertheless result “are typically short-term in
12 nature and often associated with watershed restoration efforts.” Final SEIS at 57.

13 83. The Draft SEIS predicts that watershed restoration projects might be precluded
14 under the alleged misinterpretation of the ACS, even though it acknowledges that restoration
15 projects were not the subject of or blocked by the PCFFA litigation. Draft FEIS at 36. While the
16 Final SEIS still lists restoration projects among the types of activities impacted by the current
17 ACS interpretation, its analysis of impacts focuses on restoration activities that are integrated
18 into timber sales, rather than free-standing restoration projects. Compare Final SEIS 7 with id. at
19 8, 52. The Final SEIS asserts that restoration projects may be stymied by the reluctance of
20 agency staff to include restoration projects in timber sales due to their uncertainty about the ACS
21 and their view that it is the restoration projects that may be inconsistent with the ACS objectives
22 rather than the logging. Final SEIS at 54. The Final SEIS asserts that less active restoration
23 would proceed under the no action versus the proposed action and that reduced levels of

1 restoration would reduce the rate of watershed recovery. Final SEIS at 54.

2 84. The Draft and Final SEISs seek to minimize the nature of the changes by calling
3 the proposal a “clarification,” stating that it will make “limited changes to language about how to
4 implement the Aquatic Conservation Strategy,” and summarizing the changes as clarifying the
5 scale for evaluating projects and the documentation requirements, rather than clearly stating that
6 the amendment eliminates the mandatory finding that each project must be consistent with the
7 ACS objectives. E.g., Final SEIS at 1, 48. The response to comments goes even further and
8 states: “The ACS is not weakened or changed by the Proposed Action or Alternative A.” Final
9 SEIS at C-72; see also id. at C-58 (“The agencies do not intend to weaken the ACS.”). The Draft
10 and Final SEISs assert that all components of the ACS would remain in place and that the
11 amendment does not seek to change the original intent of the ACS. Draft SEIS at 11, 13, 20;
12 Final SEIS at 1, 48. The Draft SEIS asserts that the amendment “would not result in any
13 environmental impacts beyond those already disclosed in the Northwest Forest Plan Final
14 Supplemental Environmental Impact Statement.” Draft SEIS at 3.

15 3. *Failure to disclose FEMAT scientists’ disagreement with proposed*
16 *amendment*

17 85. In January 2003, the Forest Service sent a series of questions to scientists who had
18 been part of the FEMAT aquatic scientific team inquiring as to the intent of the ACS. Some of
19 the questions are general and subjective, asking, for example, whether the scientists agree with a
20 summary of the PCFFA rulings, with the proposed amendment, or that restoration projects that
21 have short-term sediment effects could proceed consistent with the ACS objectives. One of the
22 scientists indicated that he could not respond to questions framed in legal terms. Another
23 indicated that some of the questions were phrased in a leading manner. The scientists generally
24 provided narrative responses.

1 86. The narrative responses provided specific statements that disagree with the
2 elimination of the requirement that projects meet the ACS objectives and that undermine the
3 assertion that the proposed amendment is consistent with the original intent behind the ACS.
4 The following comments state that the ACS intended that each project must be consistent with
5 the ACS objectives:

6 We agree. "Projects must be analyzed at the site scale for ACS consistency." As
7 we interpret this, each project must be assessed for its consistency with the ACS
8 Objectives. This is based on the direction immediately preceding the ACS
Objectives (B-11).

9 [We] think that language proposed in the Draft SEIS is not consistent with our
10 original intent for the ACS so does not clarify its implementation. . . . Although
11 we agree "achievement of landscape-scale objectives cannot be meaningfully
evaluated on a site-by-site, project-by-project basis," we anticipated that each
proposed project would be evaluated based on its consistency with ACS
Objectives at the site, watershed, and landscape scales

12 We think that all relevant influences must be evaluated to assess the significance
13 of any project or site-scale effect on aquatic resources. Thus, the effect of a
14 project should be assessed based on its potential contribution to the cumulative
effect of multiple influences. That is, almost any project or action can and should
be evaluated in the context of other relevant effects and interactions at scales
appropriate to the objective and resources in question and evaluated at appropriate
scales through cumulative effects assessments informed by watershed analysis.

16 The overall goal was one of improving the long-term and watershed-scale
17 integrity of public lands, but to do this, examinations of both the site-specific and
watershed scales, as well as the short term and long term are necessary. . . . I
18 believe it was the intent of FEMAT scientists that both site-specific and
watershed-scales be considered in project evaluation

19 Analysis must occur at both project and watershed scales.

20 I do not agree that simply by complying with Standards and Guidelines at the
21 project or site scale, that ACS Objectives are automatically met. Some larger
scale consideration of landscape elements such as: (1) pattern of activities; (2)
intensity of activities; (3) timing of activities relative to other actions; and (4)
other natural or anthropogenic disturbances operating at larger or neighboring
scales, all have bearing on whether an individual site activity conforms to ACS
objectives. That's what a cumulative effect or watershed analysis is intended to
provide.

1 [S]pecific project actions could directly and negatively affect ACS objectives.
2 For example, basin-scale hydrologic or sediment delivery processes that conflict
3 with ACS objectives can be influenced by individual site impacts, such as canopy
removal or root strength loss.

4 A possible example of where ACSO's [ACS objectives] would be compromised
5 is a proposed activity (harvest/roads) in an unentered 6th or 7th level watershed
that lies within a 5th level watershed that a watershed analysis shows to be
degraded and directly affecting values @ risk (fish, water quality). Site
contributions to downstream degraded conditions are contrary to attainment of
ACSO's.

7 87. The following comments supported assessing compliance with the ACS
objectives at multiple scales:

9 Regardless of whether a project is located inside or outside of a Riparian Reserve,
10 we expected that it would be evaluated relative to its compliance with the ACS
11 Objectives at site, watershed, and landscape scales. However, it must be
12 recognized that although compliance of a project with some ACS Objectives can
be logically ascertained at all three scales, compliance of a project with other ACS
Objectives can be ascertained only relative to the watershed and landscape scales.

13 Analysis at multiple scales is essential for evaluating project consistency with
14 ACS Objectives.

15 Compliance of a project with the ACS Objectives should be evaluated at the
appropriate scales for each specific objective.

16 If the purpose of the changes is to strictly segregate the Standards and Guidelines
17 to project scales and the Objectives to broader scales, then, in my opinion, it is
likely to be inconsistent with our intent.

18 88. The following comments described the role that watershed analysis would play in
19 decisionmaking:

20 We agree, "Watershed analysis findings must be used, instead of being
21 discretionary." . . . we also expected watershed analysis findings would be used
when planning any project in a watershed for which a watershed analysis had
been completed.

22 We envisioned watershed analysis as the means by which landscape- (that is
23 watershed and project) level issues that could not be foreseen or prescribed at the

1 scale of the region (which is the scale we were working on in crafting FEMAT)
2 would be evaluated and management direction developed accordingly.

3 Without a watershed analysis (or some similar process) tied directly to
4 management actions, incremental or cumulative effects of individual actions on
watersheds or any other scale cannot be determined, as required by NEPA.

5 89. The following comments addressed consideration of short-term effects:

6 We agree, "Short term effects must be considered."

7 Our expectation is that short-term site-specific impacts would be evaluated
8 relative to the potential for all consequences to aquatic resources, both short- and
long-term, and a rational decision made considering overall benefit and sensitivity
9 of subject population. . . . [S]hort-term impacts on salmon habitat of clear cutting
10 in the matrix of a stronghold watershed can be difficult to justify even if long-
term ACS Objectives are met. However, such short-term impacts may be
justifiable in a watershed with less landscape significance if mitigation measures
are demonstrated to comply with ACS Objectives at the landscape and watershed
scales over the longer-term.

11 The concept of short-term and site-specific degradation is not necessarily
12 inconsistent with overall improvement of integrity, but the degradation must be
13 limited in time and space (certainly not chronic) and when weighed at broader
scales, demonstrate an overall improvement in attainment of ACS Objectives.

14 For consistency with the ACS, I believe that short-term degradation would have
15 to be restricted to a single season in duration or preferably an even shorter time
period.

16 90. The response to comments justified not disclosing the FEMAT scientists'
17 dissension in the Draft or Final SEIS as follows: "The scientist interviews were part of the
18 scoping effort but did not yield consistent results. Agency scientists consistently emphasize the
19 role of watershed analysis in providing context for project planning." Final SEIS at C-58. Yet
20 the response to comments continued to make broad statements about the FEMAT scientists'
21 intent that conflict with the scientist interviews:

22 The various parties who crafted the Northwest Forest Plan did not intent for the
23 ACS objectives to be interpreted as standards to be applied at all scales.

24 ACS objectives are not now, nor have they ever been, considered standards

1 This comment illustrates the very confusion created by the existing language.
2 The reference to “impact on ACS objectives at the project level” implies that
3 progress toward achievement of the ACS objectives is appropriately evaluated at
4 the project scale. This is not true.

5 Final SEIS at C-44, C-51.

6 91. The FSEIS and related documents on the 1994 Northwest Forest Plan assessed the
7 extent to which each option would assure viable populations of salmonids, trout, and other
8 aquatic species on federal lands over the long term. This assessment enabled the Department of
9 Agriculture to determine whether the selected Northwest Forest Plan would comply with the
10 National Forest Management Act (“NFMA”) obligations to “provide for diversity of plant and
11 animal communities . . . ,” 16 U.S.C. § 1604(g)(3)(B), and to “maintain viable populations of
12 existing native and desired nonnative vertebrate species in the planning area.” 36 C.F.R. §
13 219.19. This assessment enabled the Department of the Interior to determine whether the
14 selected Northwest Forest Plan would comply with the Federal Land Policy and Management
15 Act (“FLPMA”) obligation to manage land “in a manner that will protect the quality of scientific,
16 scenic, historical, ecological, environmental, air and atmospheric, water resource, and
17 archeological values.” 43 U.S.C. § 1701(a)(8). The scientists who conducted the aquatic species
18 viability assessments assumed that land management activities would comply with the ACS,
19 including the pivotal requirement that projects would promote and not retard attainment of the
20 ACS objectives. The 2004 ACS amendment departs from that assumption and calls into
21 question the continued viability ratings and the NEPA analysis on which the Departments of
22 Agriculture and the Interior and this Court based their conclusion that the Northwest Forest Plan
23 would comply with NFMA and FLPMA with regard to aquatic species.

24 A. The NMFS Biological Opinion

25 92. NMFS issued a biological opinion on March 19, 2004. The biological opinion

1 was based on the Final SEIS, but indicates that subsequent language changes in the record of
2 decision do not affect the opinion's analysis. NMFS Biop at 1.

3 93. In the biological opinion, NMFS continues to express salmonid biological
4 requirements in terms of the environmental factors that comprise properly functioning freshwater
5 aquatic habitat conditions. NMFS Biop at 29; *id.* ("Properly functioning watersheds, where all
6 of the individual factors operate together to provide healthy aquatic ecosystems, are also
7 necessary for the survival and recovery of these species.").

8 94. NMFS continues to identify logging and roadbuilding as "among the most
9 significant management actions that affect fish habitat on Federal land." NMFS Biop at 59.
10 More specifically, "[t]he principle [sic] ways in which previous land management policies have
11 contributed to the decline of salmon habitat include: (1) Overemphasis on production of non-
12 fishery commodities resulting in losses of riparian and fish habitat; (2) failure to take a
13 biologically conservative or risk-averse approach to planning land management actions when
14 inadequate information exists about the relationship between land management actions and fish
15 habitat; (3) planning land management activities on a site-specific basis rather than on a broader,
16 watershed scale; and (4) reductions in the number, size, and distribution of remaining high-
17 quality habitat areas (such as roadless and minimally developed areas) that serve as biological
18 refugia for anadromous fish subpopulations." NMFS Biop at 59-60.

19 95. In places, the biological opinion suggests that the system of key watersheds,
20 riparian reserves, and standards and guidelines will "protect the overall aquatic ecosystem."
21 NMFS Biop at 14. In other places, the biological opinion recognizes that various land
22 management activities, such as logging, roads, grazing, and mining, will have degrading habitat
23 effects ranging from "minor habitat changes, to reductions in growth rates, to death of

1 individuals,” NMFS Biop at 93, that protection of riparian habitat “cannot be achieved through
2 riparian zones alone,” NMFS Biop at 74, and that impacts “will occur at a spatial scale that is
3 much smaller than the scale associated with attainment of the ACS objectives.” NMFS Biop at
4 72, 93.

5 96. In initially describing the ACS, the biological opinion states that watershed
6 analysis “plays a key role in the ACS, ensuring that aquatic system protection is fitted to specific
7 landscapes” and “plan[ning] land use activities compatible with disturbance patterns . . .” Id. at
8 16, 17. The ACS amendment, however, provides that compliance with watershed analysis is
9 discretionary, that projects need not be consistent with the ACS objectives, and that maintaining
10 degraded conditions would be consistent with the ACS. NMFS Biop at 23-26, 80.

11 97. The biological opinion concludes generally that “[i]f the assumptions underlying
12 the NWFP hold true that plan implementation will result in improved habitat conditions for listed
13 salmonids, then high levels of compliance with the standards and guidelines should help achieve
14 these goals.” NMFS Biop at 93.

15 98. The biological opinion concludes that adverse effects of projects will be “short-
16 term and localized in nature because the ACS is designed to address and ameliorate negative
17 impacts at larger scales over long time periods.” NMFS Biop at 81. It bases this conclusion on
18 the riparian reserves and standards and guidelines. Id. In describing the types of aquatic impacts
19 that can occur under the standards and guidelines, the biological opinion discloses that: “listed
20 salmon utilize stream habitats in waters covered under the NWFP to spawn, and as juvenile
21 rearing and adult holding habitat. Each of these essential habitat components is often found in
22 discrete locations within specific segments of streams. Effects to these often geographically
23 small, but biologically important areas may not be observed at the fifth-field watershed scale

1 over the long term.” NMFS Biop at 86.

2 99. In lieu of requiring a finding that projects are consistent with the ACS objectives,
3 the biological opinion states that site-specific impacts will be addressed during project design
4 and site-specific NEPA analysis and section 7 consultations. See, e.g., NMFS Biop at 86. The
5 biological opinion describes a draft analytical process for conducting site-specific section 7
6 consultations that purportedly will “evaluate effects to listed species or critical habitat at a
7 variety of scales, from site to watershed, by habitat indicators. The determination of effects is
8 dependent upon specific site and watershed physical and biological baseline conditions for a
9 proposed action and the design and anticipated effects of the action itself.” NMFS Biop at 26.

10 100. The biological opinion contains no incidental take statement and, therefore, no
11 mandatory terms and conditions or reasonable and prudent measures. While it acknowledges
12 that the Northwest Forest Plan leaves agency decision makers enough discretion to undertake
13 actions that result in more than a negligible likelihood of incidental take of listed salmon, it
14 postpones any quantification and authorization of that take to project consultations. NMFS Biop
15 at 99. Although not explicit, the March 2004 biological opinion appears to supersede the March
16 1997 and related biological opinions that included incidental take statements and binding terms
17 and conditions and reasonable and prudent measures requiring findings that projects are fully
18 consistent with the ACS objectives applying the results of watershed analysis.

19 B. The FWS Biological Opinions

20 101. FWS initially issued a biological opinion on January 9, 2004, but then issued a
21 revised biological opinion on March 18, 2004. The revised opinion does not explain the reasons
22 for the revision.

23 102. The biological opinion states generally: “Implementation of the ACS to meet the
24 ACS Objectives should result in maintaining and restoring properly functioning aquatic

1 ecosystem conditions.” FWS Biop at 68. While the “overall intent of the ACS is beneficial to
2 the bull trout,” id. at 68, “the level of protection afforded to the bull trout and its proposed
3 critical habitat under the proposed action is expected to vary given the range of existing
4 conditions across the NWFP area and the variety of management activities that are
5 implemented.” Id.; see also id. (“the potential for adverse effects occurring still remains high in
6 some land allocations for certain management activities”).

7 103. The biological opinion’s summary of effects and conclusions are stated in
8 conditional terms, i.e., if the ACS is implemented in a certain fashion, **then** a certain result will
9 occur.

10 *I. Riparian reserves*

11 104. The biological opinion summarizes the effects of the riparian reserves as follows:
12 “To the degree that Riparian Reserves are managed to provide primary emphasis to riparian-
13 dependent species, and to the extent that past management actions have not compromised the
14 ability of the Riparian Reserves to provide for essential aquatic habitat features, Riparian
15 Reserves are expected to benefit the bull trout and its proposed critical habitat.” Id. at 68.

16 105. The biological opinion states: “Riparian Reserves assist in meeting some of the
17 ACS Objectives.” FWS Biop at 39. Many of the riparian reserve standards and guidelines
18 require meeting or not preventing attainment of the ACS objectives. Activities in riparian
19 reserves, such as logging, roads, and mining, may have adverse effects on bull trout at scales
20 smaller than the watershed. Id. at 57, 59, 61. “Reaches that support particular life stages of bull
21 trout, especially spawning and overwintering areas, are not randomly located throughout 5th field
22 watersheds, so specific local areas may be critical to bull trout subpopulation survival and
23 reproduction.” FWS Biop at 57; see also id. at 44 (“analyses at this broad scale may not detect
24 effects to local areas that are important to the conservation of bull trout.”); id. at 69 (same).

1 2. *Activities outside riparian reserves*

2 106. The biological opinion acknowledges that “riparian buffers alone are insufficient
3 to ensure healthy aquatic habitat. . . .” FWS Biop at 39. The biological opinion identifies
4 logging, roads, and mining outside of riparian reserves as having a high potential for adversely
5 affecting bull trout and its critical habitat in the Matrix lands where no standards and guidelines
6 are designed to afford aquatic protection. Id. at 53. It describes various adverse effects, such as
7 increases in fine sediment and peak flows, from these upland activities to bull trout. Id. at 54-55.

8 3. *Watershed analysis*

9 107. The biological opinion notes that the ACS amendment clarifies that watershed
10 analyses “are not decision-making documents” and “are discretionary.” FWS Biop at 42. The
11 biological opinion nonetheless states: “Provided that WAs identify the bull trout and its critical
12 habitat as a key issue, where appropriate, and information from the WA regarding the physical
13 and biological features that provide for the maintenance or creation, over time, of properly
14 functioning aquatic conditions for the bull trout and its proposed critical habitat is used in
15 subsequent decision making processes, WA should be generally beneficial to the bull trout and
16 its proposed critical habitat.” FWS Biop at 42; see also id. at 68 (“management direction . . .
17 should benefit the conservation of the bull trout if [watershed] analyses adequately address bull
18 trout habitat requirements at multiple scales and that information is used to design management
19 activities that are implemented”).

20 4. *Key watersheds*

21 108. The biological opinion notes that logging activities can occur in key watersheds
22 and that such activities may have adverse effects on bull trout and its proposed critical habitat.
23 Biop at 41. The biological opinion then states:

1 According to the BA (Page 68), management actions within Key Watersheds will
2 be consistent with maintaining present or restoring future refugial conditions,
3 which is beneficial to the bull trout and its proposed critical habitat. Therefore,
4 the Secretary concludes that although short-term adverse effects may occur from
5 implementing management actions, overall management within Key Watersheds
6 will result in long-term beneficial effects to the bull trout and its critical habitat.
7

8 Id. at 41. However, the biological opinion rates impacts from logging to be high in key
9 watersheds in the matrix due to the lack of standards and guidelines constraining those activities.
10

11 Id. at 53-54.

12 *I. No-Jeopardy conclusion*

13 109. The biological opinion reaches a no-jeopardy conclusion based principally on a
14 draft analytical process for identifying bull trout impacts that need to be addressed during project
15 design and site-specific NEPA analysis and ESA consultation. FWS Biop at 71-72; id. at 44, 65,
16 69. The biological opinion also states, relying on the assertion that key watersheds will be
17 managed as refugia, that it is anticipated that the proportion of the habitat for each distinct
18 population segment that falls within key watersheds will provide properly functioning aquatic
19 habitat. FWS Biop at 72-73.

20 110. FWS did not include an incidental take statement in the biological opinion
21 because it could not determine at the plan level the likelihood or quantity of take from
22 management actions. FWS, therefore, imposed no mandatory terms and conditions, nor did it
23 prescribe any reasonable and prudent measures. The biological opinion does make voluntary
24 conservation recommendations urging improvement of connectivity within and between bull
25 trout populations, decreased road densities, use of watershed analysis to guide project decisions,
26 and coordinated restoration strategies. FWS Biop at 73-74.

27 B. The Record of Decision

28 111. On March 22, 2004, the Departments of Agriculture and Interior signed the record
29

1 of decision amending the forest plans within the range of the northern spotted owl “to clarify
2 provisions relating to the Aquatic Conservation Strategy.” The decision “clarifies the proper
3 spatial and temporal scale for evaluating progress toward attainment of ACS objectives and
4 clarifies that no project-level finding of consistency with the ACS objectives is required.” ROD
5 at 1. Specifically, attainment of the ACS objectives will be assessed at “fifth-field watershed and
6 larger scales, and long-term time frames.” ROD at 2.

7 112. The decision adopts some language from the Proposed Action and Alternative A,
8 as well as some new language not presented in the alternatives assessed in the Final SEIS.
9 Language in the final decision that was not included in the alternatives includes:

10 achieving the Aquatic Conservation Strategy objectives at these large scales will
11 take decades or longer, and the effectiveness of the Strategy can only be assessed
over that amount of time.

12 Decision makers are not able or required to assess the contribution of a site-
13 specific project to achieving Aquatic Conservation Strategy objectives. The
14 Aquatic Conservation Strategy objectives are not to be interpreted as standards
and guidelines applicable to individual projects.

15 ROD at 7.

16 CAUSES OF ACTION

17 COUNT I: NEPA

18 113. The National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., and
the Council on Environmental Quality’s (“CEQ’s”) implementing regulations, 40 C.F.R. §§
19 1500-1517, require that each federal agency prepare an Environmental Impact Statement (“EIS”)
20 for every major federal action significantly affecting the environment. 42 U.S.C. § 4332(C).

21 114. The Departments of Agriculture and Interior are federal agencies subject to
22 NEPA, and the ACS amendment is a major federal action significantly affecting the human
23 environment requiring an EIS.

1 115. An EIS must assess the environmental impacts of the proposed action, including
2 direct effects, indirect effects, which are reasonably foreseeable but removed in time or space,
3 and cumulative impacts, i.e., those resulting “from the incremental impact of the action when
4 added to other past, present, and reasonably foreseeable future actions Cumulative impacts
5 can result from individually minor but collectively significant actions taking place over a period
6 of time.” 40 C.F.R. §§ 1502, 1508.7-1508.8.

7 116. The Final SEIS asserts that the impacts from logging, roads, mining, grazing, and
8 other habitat-degrading activities will be within the range assessed in the 1994 final EIS on the
9 Northwest Forest Plan. The Final SEIS made this assertion based on the conclusory statement
10 that the ACS amendment is consistent with the ACS’s original intent. FEMAT scientists who
11 participated in the development of the ACS disagreed with this conclusory statement and stated
12 that it was their original intent that the Forest Service and BLM must find that each project will
13 meet or not prevent attainment of the ACS objectives. The FSEIS on the Northwest Forest Plan
14 assessed compliance with NFMA, the NFMA viability regulation, and FLPMA based on the
15 ACS as written, including the requirement that each project be consistent with the ACS
16 objectives. The 1994 aquatic species viability assessments are likewise based on the assumption
17 that each project will be consistent with the ACS objectives. The Final SEIS on the 2004 ACS
18 amendment fails to assess the impact of eliminating the requirement that each project must be
19 consistent with the ACS objectives on the Northwest Forest Plan’s ability to protect aquatic
20 species’ viability and comply with NFMA, the NFMA viability regulation, and FLPMA. 16
21 U.S.C. § 1604(g)(3)(B); 43 U.S.C. § 1701(a)(8); 36 C.F.R. § 219.19.

22 117. The Final SEIS does not disclose or assess the impacts of the types of habitat-
23 degrading activities allowed under the 2004 ACS amendment that would not have been allowed
24

1 without that amendment. Comments on the Draft SEIS identified the types of logging activities
2 that were prevented by the PCFFA decisions that the ACS amendment seeks to overturn and
3 contended that an EIS on the ACS amendment had to assess the impacts of those types of
4 logging activities. The Final SEIS did not assess the impacts of those types of logging activities
5 or of other habitat-degrading activities that would be allowed under the ACS amendment.

6 118. The logging, road, mining, grazing, and other habitat-degrading activities
7 permitted under the ACS often consist of incremental habitat degradation that will not, by itself,
8 cause jeopardy or impede survival and recovery of listed salmonids. However, when such
9 incremental degradation occurs from numerous individual logging or other activities, the
10 consequences for listed salmonids are significant. Since the ACS applies throughout the range of
11 the northern spotted owl, it presents a broad picture of logging and other habitat-degrading
12 practices permitted throughout that region and their cumulative impacts. Nonetheless, the Final
13 SEIS did not assess the cumulative impacts of the types of logging activities that will be allowed
14 under the ACS amendment. Instead, it asserted that the impacts of those activities would be
15 assessed in NEPA analyses of the individual projects.

16 119. Under NEPA, the Departments of Agriculture and Interior have a duty to disclose
17 scientific disagreement with the proposed action. During the scoping process and the initial
18 development of the ACS amendment, the Departments interviewed scientists who developed the
19 ACS as part of the FEMAT aquatic scientific team. Those scientists expressed disagreement
20 with eliminating the requirement that each action must be consistent with the ACS objectives and
21 with making adherence to watershed analysis findings and recommendations purely
22 discretionary. Neither the Draft nor the Final SEIS disclose this scientific disagreement with the
23 ACS amendment.

1 120. Under NEPA, the Departments of Agriculture and Interior have a duty to assess a
2 reasonable range of alternatives. The SEIS assessed the current ACS and alternatives that would
3 eliminate the requirement that each project must be consistent with the ACS objectives, make
4 adherence to watershed analysis findings and recommendations discretionary, and limit any
5 assessments of attainment of ACS objectives to the watershed scale over the long term. The
6 SEIS did not analyze any alternatives that would have retained the requirement that each project
7 must be consistent with the ACS objectives, even if such a finding were tailored in whole or in
8 part to the watershed scale.

9 121. The Departments of Agriculture and Interior acted arbitrarily, capriciously, and
10 contrary to NEPA and its implementing regulations, in violation of the APA, 5 U.S.C. §§ 701-
11 706, by failing to: (a) assess the Northwest Forest Plan's ability to protect aquatic species'
12 viability and comply with NFMA, the NFMA viability regulation, and FLPMA without the
13 requirement that each project must be consistent with the ACS objectives; (b) analyze the
14 impacts of the types of logging, roads, mining, grazing, and other habitat-degrading activities
15 that would be allowed by the ACS amendment; (c) by failing to disclose scientific disagreement
16 with the ACS amendment and in particular with eliminating the requirement that each project
17 must be found to be consistent with the ACS objectives; and (d) to consider a reasonable range
18 of alternatives, including an alternative that would have retained the requirement that the
19 agencies must find each project consistent with the ACS objectives.

COUNT II: ESA SECTION 7 COMPLIANCE

21 122. Under Section 7(a)(2), 16 U.S.C. § 1536(a)(2), each federal agency shall, in
22 consultation and with the assistance of the expert fish and wildlife agency, “insure that any
23 action authorized, funded, or carried out by such agency (hereinafter in this section referred to as
24 an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species

1 or threatened species or result in the destruction or adverse modification of habitat of such
2 species" which has been designated as critical habitat. Such consultations must use the best
3 available scientific information. Id.

4 123. The ACS amendment is an action authorized and carried out by the Departments
5 of Agriculture and Interior. The Departments of Agriculture and Interior, as the action agencies,
6 must consult on the impacts of the ACS amendment with NMFS with respect to listed salmonids
7 and with FWS with respect to listed bull trout.

8 124. In a formal consultation, NMFS and FWS, as the expert fish and wildlife
9 agencies, must review all relevant information and issue a biological opinion evaluating the
10 action's effects on the listed species and making a jeopardy determination. 16 U.S.C. §
11 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

12 125. A biological opinion must assess the full effects of an action, which include:
13 the direct and indirect effects of an action on the species or critical habitat,
14 together with the effects of other activities that are interrelated or interdependent
15 with that action, that will be added to the environmental baseline. . . . Indirect
16 effects are those that are caused by the proposed action and are later in time, but
17 still are reasonably certain to occur. Interrelated actions are those that are part of
18 a larger action and depend on the larger action for their justification.
19 Interdependent actions are those that have no independent utility apart from the
20 action under consideration.

21 50 C.F.R. § 402.02.

22 A. NMFS's Biological Opinion

23 126. NMFS's 2004 biological opinion reverses the conclusions drawn by NMFS in its
24 previous biological opinions on implementation of the ACS, beginning with the March 1997
25 biological opinion. As in those previous biological opinions, the 2004 biological opinion
26 concludes that the standards and guidelines are not sufficient to prevent activities that will
degrade salmon habitat and take listed salmon. In the earlier biological opinions, NMFS reached

1 a no-jeopardy conclusion only because the Forest Service and BLM expressly promised that each
2 project proceeding under the Northwest Forest Plan would be fully consistent with the ACS
3 objectives, and NMFS wrote this requirement into the binding conditions of its programmatic
4 incidental take statement. The 2004 ACS amendment eliminates this required finding. Under
5 the amendment, projects need comply only with the specifically delineated standards and
6 guidelines. Because NMFS has found that compliance with the standards and guidelines alone is
7 insufficient to guard against jeopardy to listed salmonids from activities proceeding under the
8 Northwest Forest Plan, NMFS's no-jeopardy conclusion and elimination of the prior mandatory
9 conditions are arbitrary, capricious, contrary to the evidence in the record, and an unexplained
10 and unjustifiable departure from NMFS's prior determinations.

11 127. NMFS's no-jeopardy conclusion is based on the assumption that the ACS will
12 lead to attainment of the ACS objectives, even though the ACS amendment eliminates the
13 requirement that each project must be found to be consistent with the ACS objectives before it
14 may proceed. In the absence of effectiveness monitoring or other scientific evidence supporting
15 this assumption with respect to the ACS as amended, NMFS's no-jeopardy conclusion based on
16 this assumption is arbitrary, capricious, and contrary to the best available scientific information.

17 128. NMFS's 2004 biological opinion relies on site-specific NEPA analysis and
18 section 7 ESA consultations to disclose and possibly mitigate harm to listed salmonids from
19 habitat-degrading activities proceeding under the Northwest Forest Plan. Since NEPA is a
20 procedural statute requiring assessment and disclosure of environmental impacts but not
21 mitigation, it cannot be the mechanism for avoiding jeopardy to listed species or adverse
22 modification of their critical habitat. While site-specific section 7 consultations must assess a
23 project's impacts based on its design, location, and effects on particular salmon populations, a
24

1 site-specific consultation is no substitute for programmatic consultation on the ACS amendment
2 as a whole. A site-specific consultation will focus on a smaller action area than the entire plan
3 and will rarely capture the watershed, basin, province, and regional impacts and perspective.

4 129. NMFS's reliance on site-specific section 7 consultations is also arbitrary because
5 NMFS is relying on a draft analytical process that is being developed by the agencies and that is
6 not mandatory. Previously, NMFS relied on the mandatory terms of the Northwest Forest Plan,
7 which required that the agencies find that each project is consistent with the ACS objectives
8 before it may proceed. The objectives and the requirement for the finding were spelled out in the
9 ACS. With the elimination of that mandatory finding, NMFS is now relying on a draft analytical
10 process that may or may not occur in site-specific consultations to substitute for the mandatory
11 finding eliminated by the ACS amendment.

12 130. NMFS's 2004 biological opinion is arbitrary, capricious, contrary to the best
13 available scientific information, in violation of the APA, 5 U.S.C. § 706(2)(A), because it
14 reverses the position taken by NMFS in its previous biological opinions without an adequate
15 explanation, it deviates from the best available scientific information, it is based on assumptions
16 that are not borne out in the record, and it relies on subsequent site-specific NEPA analyses and
17 section 7 ESA consultation, which are an inadequate substitute for ensuring at the plan level that
18 plan implementation will avoid jeopardizing listed salmonids or adversely modifying their
19 critical habitat.

20 B. FWS's Biological Opinion

21 131. FWS's 2004 biological opinion reverses the conclusions drawn by FWS in its
22 2000 biological opinion on implementation of the ACS. As in the 2000 biological opinion, the
23 2004 biological opinion concludes that the standards and guidelines are not sufficient to prevent
24 activities that will degrade bull trout habitat and take listed bull trout. The 2004 biological

1 opinion finds that the ACS standards and guidelines do not constrain harmful activities outside
2 the riparian reserves and they may allow activities with localized, yet severe, impacts to critical
3 bull trout populations to occur within the riparian reserves. In the earlier biological opinion,
4 FWS reached a no-jeopardy conclusion only because the Forest Service and BLM expressly
5 promised that each project proceeding under the Northwest Forest Plan would be fully consistent
6 with the ACS objectives, and FWS wrote this requirement into the binding conditions of its
7 programmatic incidental take statement. The 2004 ACS amendment eliminates this required
8 finding. Under the amendment, projects need comply only with the specifically delineated
9 standards and guidelines. Because FWS has found that compliance with the standards and
10 guidelines alone is insufficient to guard against jeopardy to listed bull trout from activities
11 proceeding under the Northwest Forest Plan, FWS's no-jeopardy conclusion and elimination of
12 the prior mandatory conditions are arbitrary, capricious, contrary to the evidence in the record,
13 and an unexplained and unjustifiable departure from FWS's prior determination.

14 132. FWS's no-jeopardy conclusion is based on the assumption that the ACS
15 amendment will lead to attainment of the ACS objectives, even though the ACS amendment
16 eliminates the requirement that each project must be found to be consistent with the ACS
17 objectives before it may proceed. In the absence of effectiveness monitoring or other scientific
18 evidence supporting this assumption with respect to the ACS as amended, FWS's no-jeopardy
19 conclusion based on this assumption is arbitrary, capricious, and contrary to the best available
20 scientific information.

21 133. FWS's 2004 biological opinion relies on site-specific NEPA analysis and section
22 7 ESA consultations to disclose and possibly mitigate harm to listed bull trout from habitat-
23 degrading activities proceeding under the Northwest Forest Plan. Since NEPA is a procedural
24

1 statute requiring assessment and disclosure of environmental impacts, but not mitigation, it
2 cannot be the mechanism for avoiding jeopardy to listed species or adverse modification of their
3 critical habitat. While site-specific section 7 consultations must assess a project's impacts based
4 on its design, location, and effects on particular salmon populations, a site-specific consultation
5 is no substitute for programmatic consultation on the ACS amendment as a whole. A site-
6 specific consultation will focus on a smaller action area than the entire plan and will rarely
7 capture the watershed, basin, province, and regional impacts and perspective.

8 134. FWS's reliance on site-specific section 7 consultations is also arbitrary because
9 FWS is relying on a draft analytical process that is being developed by the agencies and that is
10 not mandatory. Previously, FWS relied on the mandatory terms of the Northwest Forest Plan,
11 which required that the agencies find that each project is consistent with the ACS objectives
12 before it may proceed. The objectives and the requirement for the finding were spelled out in the
13 ACS. With the elimination of that mandatory finding, FWS is now relying on a draft analytical
14 process that may or may not occur in site-specific consultations to substitute for the mandatory
15 finding eliminated by the ACS amendment.

16 135. FWS's 2004 biological opinion is arbitrary, capricious, contrary to the best
17 available scientific information, in violation of the APA, 5 U.S.C. § 706(2)(A), because it
18 reverses the position taken by FWS in its 2000 biological opinion without an adequate
19 explanation, it deviates from the best available scientific information, it is based on assumptions
20 that are not borne out in the record, and it relies on subsequent site-specific NEPA analyses and
21 section 7 ESA consultation, which are an inadequate substitute for ensuring at the plan level that
22 plan implementation will avoid jeopardizing listed bull trout or adversely modifying their critical
23 habitat.

1 RELIEF

2 WHEREFORE, plaintiffs pray that this Court:

3 A. Declare that the Departments of Agriculture and Interior acted arbitrarily,
4 capriciously, and contrary to NEPA, 42 U.S.C. § 4332(2)(C), in violation of the APA, 5 U.S.C. §
5 706(2), by failing to assess the ability to protect aquatic species' viability without the
6 requirement that each project must be consistent with the ACS objectives, by failing to assess
7 and disclose the impacts of the ACS amendment, as well as scientific disagreement with
8 eliminating the requirement that each project must be consistent with the ACS objectives and
9 other aspects of the ACS amendment, by failing to consider reasonable range of alternatives, and
10 by failing to assess the cumulative, inter-related, and indirect effects of the ACS amendment;

11 B. Declare NMFS's and FWS's biological opinions invalid under the APA, 5 U.S.C.
12 § 706(2)(A) because they are not based on the best available scientific information, they run
13 counter to prior determinations made by the agencies, they weaken the role of watershed analysis
14 and the ACS objectives and provide no other mechanism to ensure that implementation of the
15 ACS will achieve the ACS objectives, they authorize the projects to proceed that do not meet the
16 ACS objectives, and are thus arbitrary and capricious, and contrary to the ESA and its
17 implementing regulations, in violation of the ESA, § 7, and the APA, 5 U.S.C. § 706;

18 C. Enjoin and set aside the NMFS and FWS biological opinions and the ACS
19 amendment;

20 D. Award plaintiffs their costs and attorneys' fees in this action pursuant to the Equal
21 Access to Justice Act, 28 U.S.C. § 2412 and the ESA, 16 U.S.C. § 1540(g)(4); and

1 E. Grant such other and further relief as the Court may deem just and proper.

2 Respectfully submitted this 27th day of May, 2004.

3
4
5

6 PATTI GOLDMAN (WSB #24426)
7 MICHAEL MAYER (WSB #32135)
8 Earthjustice
9 705 Second Avenue, Suite 203
10 Seattle, WA 98104
11 (206) 343-7340
12 (206) 343-1526 [FAX]
13 pgoldman@earthjustice.org
14 mmayer@earthjustice.org

15
16
17
18
19
20
21
22
23
24
25 *Attorneys for Plaintiffs Pacific Coast
26 Federation of Fishermen's Associations,
 Institute for Fisheries Resources, Oregon
 Natural Resources Council, Pacific Rivers
 Council, The Wilderness Society, Umpqua
 Watersheds, Klamath Forest Alliance,
 Klamath-Siskiyou Regional Education Project,
 and Northwest Ecosystem Alliance*