



February 8, 2021

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Re: Sixty-day notice of intent to sue to remedy violations of the Endangered Species Act in connection with the Yazoo Backwater Pumps Project

Dear Acting Secretary of the Army John Whitley, Acting Secretary of the Interior Scott de la Vega, Acting Assistant Secretary of the Army (Civil Works) Vance F. Stewart III, and Acting Director of the U.S. Fish and Wildlife Service Matt Hogan:

American Rivers, National Audubon Society, Sierra Club, and Healthy Gulf (collectively the “Conservation Organizations”) hereby provide notice, pursuant to section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(2)(A)(i), that the United States Army Corps of Engineers (Corps) is in violation of the ESA, 16 U.S.C. §§ 1531 et seq., for failing to formally consult with the U.S. Fish and Wildlife Service (Service) and ensure that the Yazoo Backwater Pumps Project will not jeopardize the federally listed pondberry (*Lindera melissifolia*). Unless the Corps takes immediate action to remedy the significant violations of the ESA detailed below, we will file suit against the Corps and Service to enforce the provisions of section 7 of the ESA, 16 U.S.C. § 1536. We intend to file this action pursuant to section 11(g)(1)(A) of the ESA, 16 U.S.C. § 1540(g)(1)(A), and the Administrative Procedure Act, 5 U.S.C. § 706.

BACKGROUND

The Yazoo Backwater Area sustains a number of federally listed species, including the endangered pondberry. In early spring, this distinctive plant produces small clusters of yellow flowers, which are an important winter food source for pollinators, followed by green fruits that ripen to red by fall. See U.S. Fish and Wildlife Service, Pondberry Final Biological Opinion 9 (July 2, 2007) [hereinafter BiOp].



The pondberry is an obligate wetland species, meaning that it occurs almost exclusively in wetlands, and thus is a key indicator of wetland health. *Id.* The Service listed the pondberry as an endangered plant under the ESA in 1986 due to the “tremendous[.]” loss of the species caused by “land clearing and drainage activities in recent and historic times.”¹ The species is considered extirpated in Alabama, Florida, and Louisiana. BiOp at 13. The remaining, and largest populations, occur in bottomland hardwood forests of the Mississippi alluvial valley. *Id.* The Yazoo Backwater Area contained approximately 13 potential pondberry populations located within 177 pondberry sites in 2005. *Id.* at 32. The following figure depicts a pondberry colony.



¹ Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for *Lindera melissifolia*, 51 Fed. Reg. 27,495, 27,496 (July 31, 1986).

In 2007, the Corps proposed to construct and operate a 14,000 cubic feet per second (cfs) pumping plant in the Yazoo Backwater Area (known as the Yazoo Pumps Project) to drain water, primarily from low-lying agricultural lands, during certain types of flood events to facilitate increased agricultural production on those lands. The stated objective of the Yazoo Pumps Project was to limit the spatial extent, frequency, and length of time the Yazoo Backwater Area floods.

The Corps acknowledged that the construction and operation of the pumping plant may affect the pondberry, but claimed that there would likely be no adverse effects to the species. BiOp at 2. In support of that contention, the Corps asserted that pondberry sites located above the 2-year floodplain were sustained by local conditions (e.g., precipitation), not overbank flooding, and thus would not be adversely affected by the pumps' impacts on hydrology. *Id.* at 50. The Corps thus refused to initiate formal consultation with the Service to determine whether the pumping plant would jeopardize the species. *Id.* at 4.

The Service rejected the Corps' flawed analysis as "contrary to conclusions based on the available data." *Id.* at 50. As the Service carefully explained, "[s]tatistical relationships demonstrate pondberry is affected by flooding" and that "colony/site growth rates decline as flood frequency decreases." *Id.* The Service thus urged the Corps to initiate formal consultation to comply with the ESA and ensure against jeopardy of the species. *Id.* at 5. The Corps agreed and initiated formal consultation. Through that process, the Service prepared a comprehensive Biological Opinion, which concluded that the pumps project would likely adversely affect the species by altering hydrology, including overbank flooding. *Id.* at 74-92. The Service, however, concluded that the proposed pumps would not appreciably reduce the survival and recovery of the species, and thus reached a no-jeopardy conclusion. *Id.* at 117-18.

In 2008, the Environmental Protection Agency (EPA) exercised its authority under Section 404(c) of the Clean Water Act to veto the Yazoo Pumps Project, including all of the alternatives proposed by the Corps that involved the construction and operation of a 14,000 cfs pumping plant, due to the unacceptable adverse effects on fish and wildlife in the Yazoo Backwater Area. EPA's decision reflects the culmination of decades of review of the project by the EPA, Corps, and Service. The Veto was also a priority of the George W. Bush Administration's EPA and Department of the Interior, which believed there were less environmentally damaging ways to provide flood damage reduction, and urged the Corps to consider those alternative approaches. EPA has issued only 13 vetoes since the Clean Water Act was enacted in 1972, out of approximately 2 million activities approved by the Corps during that timeframe.

Nonetheless, in 2020, the Corps issued a notice of its intent to "complete the Yazoo Area Pump Project feature."² To that end, the Corps proposed the construction and operation of the same 14,000 cfs pumping plant at a nearby location with the exact same key features as the vetoed Yazoo Pumps Project (hereinafter the Yazoo Pumps Redo).

² Notice of Intent To Prepare Supplemental Environmental Impact Statement for the Yazoo Area Pump Project, 85 Fed. Reg. 21,218, 21,219 (April 16, 2020).

The Corps prepared a revised biological assessment for the Yazoo Pumps Redo, which documented “steep declines” in pondberry colonies in the Yazoo Backwater Area. Revised Biological Assessment 67 (Dec. 11, 2021) [hereinafter Revised BA]. Nonetheless, the Corps claimed that the construction and operation of the same 14,000 cfs pumping plant would not likely adversely affect the pondberry because “precipitation inputs” (e.g., rainfall) would sustain wetlands. *Id.* at 70. In support of this contention, the Corps cited a 2019 study by Berkowitz *et al.* titled “Forested wetland hydrology in a large Mississippi River tributary.” *Id.*

The Service repeatedly refused to concur with the Corps’ “not likely to adversely affect” determination.³ The Service concluded that: the Corps “inappropriately extrapolated the findings of Berkowitz (2019)” and “disregarded” the Service’s prior findings regarding the role of overbank flooding, which constitutes the best available science. Accordingly, the Corps’ reliance on the Berkowitz study to disclaim the adverse effects of the pumps was “premature and inappropriate.” Service’s 2021 Letter at 2; Service’s 2020 Letter at A-6. Instead, the Service concluded that the Yazoo Pumps Redo “is likely to adversely affect pondberry” and thus urged the Corps to initiate formal consultation to ensure against jeopardy. Service’s 2021 Letter at 2.

Yet, the Corps rejected the Service’s expert conclusions, refused to initiate formal consultation, and instead hastily signed the Record of Decision approving the project on January 15, 2021, just days before the end of the Trump Administration.

THE ENDANGERED SPECIES ACT

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its purpose is to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b). The “plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth.*, 437 U.S. at 184.

Section 7(a)(2) is “the heart of the Endangered Species Act” and requires the Corps to ensure that its actions are “not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2); *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F. Supp. 3d 7, 18 (D.D.C. 2014). Section 7(a)(2) of the ESA prohibits federal agencies from undertaking actions that are “likely to jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification of” critical habitat. *Id.* § 1536(a)(2). “Jeopardy” results when it is reasonable to expect, “directly or indirectly,” that the action would appreciably reduce “the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

³ See Letter from Stephen M. Ricks to Colonel Hilliard (Dec. 8, 2020) (hereinafter “Service’s 2020 Letter”); Letter from Stephen M. Ricks to Colonel Hilliard (Jan. 10, 2020) (hereinafter “Service’s 2021 Letter”).

To ensure compliance with section 7's substantive mandate, the ESA and its implementing regulations impose specific procedural duties on federal agencies, requiring an "action agency"—in this case, the Corps—to consult with the Service before undertaking any "action" that "may affect" a listed species or its designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The "may affect" threshold for triggering the consultation duty under section 7(a)(2) is low. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc). "Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926, 19,949-50 (June 3, 1986). The Service and action agency must use the best scientific and commercial data available throughout the consultation process. 16 U.S.C. § 1536(a)(2).

As a first step, the federal action agency prepares a biological assessment ("BA"). 50 C.F.R. §§ 402.02, 402.12. The BA must evaluate the potential "effects of the action" on listed and proposed species and designated and proposed critical habitat within the "action area" and determine whether any such species or habitat are "likely to be adversely affected by the action." *Id.* § 402.12(a), (c). If the action agency determines that a proposed action "may affect" an endangered or threatened species, the agency must engage in formal consultation with the Service. *See* 50 C.F.R. § 402.14 ("Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required . . ."). Formal consultation is only excused where (1) an agency determines, as a result of its biological assessment or as a result of informal consultation with the Service, that the proposed action is not likely to adversely affect any listed species or critical habitat, *and* (2) the regional director of the Service, or authorized representative, provides a written concurrence. *See Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998); *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. United States Dep't of Energy*, 232 F.3d 1300, 1306 (9th Cir. 2000); *see also* 50 C.F.R. § 402.14(b).

Through the formal consultation process, the Service issues a Biological Opinion assessing whether the proposed action, taken together with its cumulative effects, is "likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). The BiOp's finding must be based on the Service's independent analysis of the "effects of the action"—including the action's "indirect effects" and effects of "interrelated or interdependent" activities—and the "cumulative effects" on listed species or critical habitat. *Id.* §§ 402.02, 402.14(g). As part of this jeopardy analysis, the Service must consider a species' survival *and* recovery. 50 C.F.R. § 402.02; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th Cir. 2008) (noting survival and recovery are "intertwined needs that must both be considered in a jeopardy analysis").

While section 7(a)(2)'s consultation obligations promote agency decision-making that avoids jeopardizing listed species, mere compliance with the obligations does not relieve the Corps of its substantive duties to ensure that a proposed action will not jeopardize listed species or adversely modify critical habitat. *See Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (internal quotation marks omitted).

Any ESA violation is subject to judicial review under the ESA's citizen suit provision. 16 U.S.C. § 1540(g)(1)(A).

VIOLATIONS OF THE ESA

A. The Corps Violated the ESA by Refusing to Formally Consult with the Service Regarding the Effects of the Yazoo Pumps Redo.

Construction and operation of a 14,000 cfs pumping plant in the Yazoo Backwater Area—the Yazoo Pumps Redo—may affect the federally listed pondberry, triggering the Corps' obligation to formally consult with the Service to ensure that the proposed project is not likely to jeopardize the species. 50 C.F.R. §§ 402.03, 402.14(a). Instead, the Corps attempted to sidestep this process by hastily approving the Yazoo Pumps Redo. This approach clearly violates the ESA. Given that the Service not only “disagreed with the [Corps'] determination of no adverse effects,” but also affirmatively determined that the Yazoo Pumps Redo would likely adversely affect the pondberry, the Corps had “a clear legal obligation” to initiate formal consultation and obtain a biological opinion from the Service determining whether the project would jeopardize the species. *Nat. Res. Def. Council*, 146 F.3d at 1126.

The Corps cannot “meet its independent responsibilities under the ESA” absent formal consultation with the Service regarding the effects of the proposed action. *Id.* As the Ninth Circuit reasoned in *Thomas*, the procedural requirements of the ESA “are designed to ensure compliance with the substantive provisions.” 753 F.2d at 764. Accordingly, if a project is allowed to proceed without substantial compliance with those procedural requirements, “there can be no assurance that a violation of the ESA's substantive provisions will not result.” *Id.* Courts have thus held that the Corps cannot unilaterally satisfy its obligation to ensure that the project is not likely to jeopardize the pondberry; the Corps can only satisfy this obligation by obtaining concurrence from the Service or a formal biological opinion finding no-jeopardy, neither of which it obtained here. See *Washington Toxics Coal. v. U.S. Dep't of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1179 (W.D. Wash. 2006) (“A unilaterally-made [not-likely to adversely affect] determination cannot be converted into a section 7(a)(2) finding of ‘not likely to jeopardize’ without ‘consultation’ with the relevant Service.”).

The Corps' failure to initiate formal consultation was arbitrary, capricious, and contrary to the ESA for a multitude of additional reasons. As an initial matter, the Corps' purported excuse for foregoing formal consultation is wholly inadequate. Absent the Service's concurrence, the Corps can avoid formal consultation only if it determines that the Yazoo Pumps Redo will have “no effect” on the pondberry. *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 12 (D.D.C. 2014) (“All of this means that an agency avoids the consultation requirement for a proposed discretionary action only if it determines that its action will have ‘no effect’ on threatened or endangered species or critical habitat.”). Here, though, the Corps acknowledged the project may affect the pondberry and the Service concluded that the project would likely adversely affect the pondberry—findings that foreclose the Corps' unilateral attempt to evade formal consultation as made clear by the ESA, regulations, and caselaw.

Nor can the Corps sidestep the ESA by refusing to request a biological opinion from the Service—the tactic it employed here. Whether or not this was part of “a deliberate (and successful) effort to avoid formal consultation and a possible ‘jeopardy’ finding,” it still violates the ESA as the Corps has failed to ensure that its action is “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification.” *See Pac. Coast Fed’n of Fishermen’s Associations v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1246 (N.D. Cal. 2001). As a result, the Corps “clearly violated section 7(a)(2) of the ESA.” *Id.*

B. The Corps Failed to Ensure that the Yazoo Pumps Redo Is Not Likely To Jeopardize the Pondberry.

The Corps also violated the ESA by relying on a fundamentally flawed Revised BA that failed to consider the relevant factors and ignored contrary evidence, including the best available science. Due to these errors, the Corps has failed to satisfy its obligation to ensure the Yazoo Pumps Redo is not likely to jeopardize the pondberry. *See* 16 U.S.C. § 1536(a)(2).

The Service determined that the operation of a 14,000 cfs pumping plant will likely adversely affect the pondberry by reducing overbank flooding. Service’s 2021 Letter at 2. The Service based this determination on an extensive examination of the record, including the best available science, which demonstrates that “pondberry are affected by overbank flooding, local hydrology, and both factors combined.” *Id.*; BiOp at 74-92. The Service also noted the “continued decline of the species in the Delta National Forest,” which further exacerbates the adverse effects of the Yazoo Pumps Redo on the species’ recovery and survival. Service’s 2021 Letter at 2. Given these circumstances, the Service concluded that the project is likely to adversely affect pondberry—a reasoned determination entitled to great weight “given the expertise of the FWS in the area of wildlife conservation and management.” *Carlton v. Babbitt*, 900 F. Supp. 526, 530 (D.D.C. 1995). Indeed, courts have consistently recognized that where an action agency—the Corps, in this instance—attempts to proceed in the face of an adverse determination by the Service, the action agency will “almost certainly be found to have acted arbitrarily and capriciously and contrary to law.” *Lone Rock Timber Co. v. U.S. Dep’t of Interior*, 842 F. Supp. 433, 437 (D. Or. 1994) (citing *TVA*, 437 U.S. at 153).

Despite these clear statements, the Corps disregarded the Service’s expert determination and instead claimed the pumping plant is not likely to adversely affect the species. In an attempt to justify this assertion, the Corps generally cited the Berkowitz study for the sweeping proposition that “precipitation inputs sustain most wetlands in the Yazoo Basin, in addition to intermittent local flooding events.” Revised BA at 67. The Corps then leaped to the conclusion that few pondberry colonies would be affected by a reduction to overbank flooding due to the Yazoo Pumps Redo, and thus disavowed any adverse effects from the project. *Id.* at 70.

The Service repeatedly rejected this conclusory analysis as not just “premature and inappropriate,” but scientifically unsound and contrary to the “best available information.”

Service’s 2021 Letter at 2; Service’s 2020 Letter at A-18.⁴ As an initial matter, the Berkowitz study was not based on a randomized, statistically valid sample of wetland locations. As a result, the Corps cannot extrapolate the study to all wetlands in the Yazoo Backwater Area, let alone pondberry colonies. In fact, the Corps admitted that the sampling locations used in the study were “*not* determined randomly or based on a probabilistic distribution approach,” Revised BA at 64 (emphasis added), and were selected “*independent* of pondberry locations.” Service’s 2021 Letter at 1 (emphasis added).

Furthermore, the Berkowitz study improperly conflated the distinct roles of precipitation and overbank flooding in supporting wetland functions. This was a clear oversight, according to the Service, as “duration and inundation patterns (particularly associated with surface waters) differ strongly between wetlands driven by precipitation versus flooding. These differences in hydrology have potentially large impacts on habitat suitability for pondberry.” Service’s 2021 Letter at 1.⁵ Yet, the Corps provides no “method, analysis, or rationale” for extrapolating from the Berkowitz study to pondberry colonies. *Id.* Given these severe shortcomings, the Service concluded that that the Corps had “inappropriately extrapolated the findings of Berkowitz (2019)” — a fundamental error that infected the Corps’ determination and rendered its attempt to disclaim the project’s adverse affects arbitrary and capricious. *Id.*

Instead of addressing the Service’s concerns, the Corps admitted that its sweeping reliance on Berkowitz was largely unfounded and uncertain. It acknowledged that it still “needed” to undertake “more thorough investigations” to assess whether the Berkowitz study “applies to conditions elsewhere in the backwater area.” Revised BA at 64. It also acknowledged that it still needed to assess whether it could even “extrapolate” from the Berkowitz study “in a scientifically sound manner.” *Id.* These statements demonstrate that the Corps’ determination was not based on the best available science, but instead “speculation and surmise” in plain contravention of the ESA. *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

Compounding this error, the Corps disregarded the best available science demonstrating that the Yazoo Pumps Redo will likely adversely affect the species by altering overbank flooding, further violating the ESA. *Id.* at 1454 (holding that an agency “cannot ignore available, relevant biological information.”). For example, the Service criticized the Corps for blinding itself to the Biological Opinion’s extensive analysis of pondberry survey reports, which established a link between overbank flooding and colony health. Service’s 2020 Letter at A-12; BiOp at 74-92. As stated by the Service, “[t]hese concerns have not been addressed in the BA

⁴ The Service disputed the Corps’ assertion in 2007 that local hydrology (via rainfall) is the most important aspect of hydrologic regimes at pondberry colonies on the Delta National Forest. Service’s 2020 Letter at A-6. The Revised BA simply disregarded this extensive analysis. *Id.*

⁵ For example, the Berkowitz study asserts that precipitation could sustain wetlands by maintaining water tables within 30 cm of the surface (i.e., belowground). But underground saturation is no substitute for surface inundation, which plays a crucial role in supporting essential wetland functions such as pollutant filtering, export of organic carbon, and providing aquatic habitat.

and that is needed.” Service’s 2020 Letter at A-12. By failing to consider this available information, the Corps impermissibly “disregarded” the adverse effects of the Yazoo Pumps Redo on the pondberry, thereby overlooking a critical aspect of the problem. *See Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149 (W.D. Wash. 2000) (finding it unlawful for an agency to entirely ignore relevant factor and fail to analyze and develop projections regarding that factor based on information that was available).

The Corps committed a series of additional errors that underscore the flaws in its Revised BA. The Corps failed to provide an adequate discussion of the environmental baseline, including any “acknowledgment or assessment of potential deleterious impacts caused or exacerbated by previous water and flood control projects in the action area.” Service’s 2021 Letter at 5. This oversight is particularly problematic given the “steep declines” in pondberry colonies in the Yazoo Backwater Area. Revised BA at 67. Without assessing the impacts of prior flood control projects on the pondberry, and how those projects contributed to these declines, the Corps cannot adequately assess the total impacts of constructing and operating a 14,000 cfs pumping plant. *See Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127-28 (D.D.C. 2001) (“Simply reciting the activities and impacts that constitute the baseline and then separately addressing only the impacts of the particular agency action in isolation is not sufficient.”).

The Corps also failed to ensure that the Yazoo Pumps Redo will not “reduce appreciably the likelihood of both the survival and recovery” of the pondberry. 50 C.F.R. § 402.02. As a result, it failed to provide any analysis of whether the species had passed the “tipping point for recovery” given the steep declines in populations, many of which are extant at previously surveyed locations. *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 999 (D. Ariz. 2011); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010). By failing to determine whether the Yazoo Pumps Redo would appreciably reduce survival and recovery of the species, the Corps failed to ensure that its action will not jeopardize the continued existence of the pondberry in violation of the ESA.

C. The Corps Irreversibly and Irretrievably Committed Resources to the Yazoo Pumps Redo in Violation of the ESA.

Section 7(d) of the ESA prohibits a federal agency from making “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(d). This prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09. Section 7(d) is designed to ensure that an agency carefully evaluates a proposed project’s impact on listed species before moving ahead with the project. *Sierra Club v. Andrus*, 486 F. Supp. 332, 356 (D.D.C. 1980) (“Congress enacted § 7(d) to prevent Federal agencies from ‘steamrolling’ activity in order to secure completion of projects regardless of their impact on endangered species.”).

Here, the Corps acknowledged that the Yazoo Pumps Redo may affect the pondberry and initiated informal consultation, thereby triggering the section 7(d) prohibition. Accordingly, the Corps agreed not to sign a record of decision “until coordination is complete” with the Service

regarding the pondberry.⁶ But instead of following through with this regulatory obligation, the Corps hastily signed the Record of Decision on January 15, 2021, a mere five days after the Service *refused* to concur with the Corps' flawed analysis. By signing the Record of Decision, the Corps approved the construction and operation of the 14,000 cfs pumping plant and foreclosed reasonable and prudent alternatives to that action. This decision constitutes an "irreversible and irretrievable commitment of resources," which the Corps made before completing its section 7(a)(2) consultation duties to ensure that the Project will not jeopardize listed species. *Pac. Rivers Council*, 30 F.3d at 1057; 16 U.S.C. § 1536(a)(2). Therefore, the decision and any activities it authorizes are in direct violation of section 7(d). 16 U.S.C. § 1536(d). Moreover, the decision violates the intent of section 7(d), which is to prevent agencies from "steamrolling" their projects forward to secure completion regardless of impacts to listed species. *N. Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C. 1980).

D. The Corps and Service Must Reinitiate Formal Consultation.

Both the Corps and Service have an ongoing obligation to reinitiate consultation if new information reveals effects not previously considered or if the action is modified in a manner that causes unanalyzed effects to a species. 50 C.F.R. § 402.16. Consistent with the plain text of the regulation, the Ninth Circuit has stated that "[t]he duty to reinitiate consultation lies with both the action agency and the consulting agency." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

Here, though, both the Corps and Service abdicated their obligation to reinitiate formal consultation, despite identifying significant new information indicating effects not previously considered in the Biological Opinion. The Corps identified "steep declines" in pondberry colonies in the Yazoo Backwater Area, as well as significant changes in hydrology due to prior flood control projects. Revised BA at 67. Instead of reinitiating formal consultation, however, the Corps tried to short-circuit the process. Though the Service refused to concur, it failed to reinitiate formal consultation and prepare a biological opinion that assesses the total impacts of constructing and operating a 14,000 cfs pumping plant, given the changed circumstances.

Furthermore, the Yazoo Pumps Redo will cause even greater impacts to the aquatic ecosystem than the Yazoo Pumps Project, thereby exacerbating adverse effects to the pondberry in ways not previously considered. Among other things, the Yazoo Pumps Redo will destroy 86 acres of wetlands at the new pump location, which has not been surveyed and may contain pondberry colonies or sites. The Yazoo Pumps Redo also eliminates 8,257 acres of wetland mitigation and 52,900 acres of reforestation, thereby increasing the unacceptable adverse impacts of the project. The agencies' failure to reinitiate formal consultation to analyze these significant new impacts violates section 7(a)(2) of the ESA.

CONCLUSION

If the Corps and Service do not cure the significant ESA violations described above, upon the expiration of 60 days after the date of this Notice, the Conservation Organizations intend to

⁶ 2020 Final Supplemental Environmental Impact Statement at 52.

file suit under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), and the Administrative Procedure Act, 5 U.S.C. § 706. The Conservation Organizations can be reached using the contact information below.

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